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6–29–05 Wednesday
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4. An introduction to the finding aids of the FR/CFR system.

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

WHEN: Tuesday, July 19, 2005
9:00 a.m.–Noon

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

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 03–059–3]

Mexican Fruit Fly; Interstate Movement of Regulated Articles

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Mexican fruit fly regulations by removing a provision that allows regulated articles to be moved interstate from a regulated area without a certificate or limited permit if they are moved into States other than commercial citrus-producing States. Additionally, we are amending the regulations to remove references to quarantined States and to refer to regulated areas as quarantined areas. We are also making other changes to the regulations, including clarifying that an entity requiring the services of an inspector is responsible for the costs of services performed outside of normal business hours. These actions are necessary to prevent the interstate spread of Mexican fruit fly and make the Mexican fruit fly regulations more consistent with our other domestic fruit fly regulations.

DATES: Effective July 29, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Wayne Burnett, National Program Manager, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–4387.

SUPPLEMENTARY INFORMATION:

Background

The Mexican fruit fly regulations, contained in 7 CFR 301.64 through 301.64–10 (referred to below as the regulations) were established to prevent the spread of the Mexican fruit fly to noninfested areas of the United States. The regulations impose restrictions on the interstate movement of regulated articles from regulated areas.

On February 18, 2004, we published in the **Federal Register** (69 FR 7607–7611, Docket No. 03–059–1) a proposal to amend the regulations by removing a provision that allows regulated articles to be moved interstate from a regulated area without a certificate or limited permit if they are moved into States other than commercial citrus-producing States. Additionally, we proposed to amend the regulations to remove references to quarantined States and to refer to regulated areas as quarantined areas. We also proposed to make other changes to the regulations, including clarifying that an entity requiring the services of an inspector is responsible for the costs of services performed outside of normal business hours.

We solicited comments concerning our proposal for 60 days ending April 19, 2004. We subsequently extended the deadline for comments until May 17, 2004, in a document published in the **Federal Register** on April 15, 2004 (69 FR 19950, Docket No. 03–059–2). We received 10 comments by the close of the extended comment period. They were from State government officials, growers, industry associations, and an attorney. One commenter strongly supported the proposal, while the remaining nine commenters raised specific issues or objections. They are discussed below by topic.

Pest Pathways and Hosts

Three commenters stated that a pest risk assessment should first be prepared relative to the potential spread of Mexican fruit fly from Texas into States other than commercial citrus-producing States.

We do not believe a pest risk assessment is necessary in this case since Mexican fruit fly hosts are well known and known to be present in States other than commercial citrus-producing States. For these reasons, we did not find that a specific pest risk assessment was necessary to support our proposal.

In 2001, we prepared a document entitled "Identification of Susceptible Areas for the Establishment of *Anastrepha* spp. Fruit Flies in the United States and Analysis of Selected Pathways" (Sequeira, R., L. Millar, and D. Bartels 2001) in connection with another rule. In that document, we thoroughly catalogue and analyze the risks associated with the shipment of potential Mexican fruit fly hosts, including citrus, from infested areas. The document is available on the Internet at *http://www.aphis.usda.gov/ppq/avocados/ISA.pdf.*

One commenter said that northern States are not at risk for Mexican fruit fly infestation because of their cooler climates. The commenter further stated that the State of Texas is located at the northernmost extreme of the Mexican fruit fly's potential habitat.

While it is true that the Mexican fruit fly cannot exist year-round in northern States, there is potential for Mexican fruit fly survival in all States, particularly during the spring and summer months. Further, fruit found on the list of regulated articles at § 301.64–2 may be present in all States between April 15 and October 30. If infested regulated articles are shipped during this timeframe from a quarantined area into a State other than a commercial citrus-producing State where alternate Mexican fruit fly hosts are grown, those other host fruits could potentially become infested and subsequently be shipped to any State, including commercial citrus-producing States, without restriction, thereby increasing the risk of Mexican fruit fly being spread to an area with a climate more favorable to the year-round establishment of that pest.

The quarantined area in the State of Texas is located in the Rio Grande Valley, in the southern portion of the State. Conditions exist that could support damaging populations of Mexican fruit fly in the southern parts of Alabama, Arizona, California, Florida, Georgia, Louisiana, and Mississippi as well. With the exception of certain portions of Florida, all of these susceptible areas lie north of the quarantined area in Texas. Further, the States of Alabama, Georgia, and Mississippi, where conditions are such that Mexican fruit fly could become established, are not listed as commercial citrus-producing States at § 301.64(b).

One commenter stated that the Animal and Plant Health Inspection Service (APHIS) needs to fully develop scientifically based lists of Mexican fruit

fly hosts before proposing such a change to the regulations.

There is a comprehensive list of Mexican fruit fly hosts at § 301.64–2(a). This represents our most complete and scientific determination of the various Mexican fruit fly host fruits.

Treatments

Two commenters stated that the proposed change to the treatment and shipping requirements will cause sizable economic harm to producers and treatment facilities as a result of the inability of fumigation facilities to expand sufficiently to meet demand for their services.

We agree that this is a legitimate concern; however, methyl bromide fumigation is not the only treatment option available to producers of citrus and other regulated articles located in quarantined areas. The regulations at § 301.64–10 list several approved treatment options for citrus and other regulated articles from quarantined areas. They are as follows:

- Cold treatment in accordance with 7 CFR part 305;
- A field, grove, or area located within the quarantined area but outside the infested core area must receive regular treatments with either malathion or spinosad bait spray. These treatments must take place at 6- to 10-day intervals, starting a sufficient time before harvest (but not less than 30 days before harvest);
- High temperature forced air in accordance with 7 CFR part 305; or
- Irradiation, carried out in accordance with the provisions listed at § 301.64–10(g).

We are aware that facilities for cold treatment, forced air treatment, and irradiation are not currently available in the three Texas counties currently quarantined because of Mexican fruit fly (*i.e.*, Cameron, Hidalgo, and Willacy Counties), however the option of premises treatments with malathion or spinosad bait spray is available and serves to relieve the citrus industry of the economic burden of building additional fumigation chambers.

One commenter questioned why, in discussing the amount of citrus that may require treatment from year to year, APHIS assumes an average infestation rate instead of considering each infestation individually.

It is impossible to predict the amount of citrus that will require treatment from year to year due to the variability of Mexican fruit fly infestations. We acknowledge that this infestation rate may differ from year to year, but historical data shows that, on average, 5 to 10 percent of citrus will require treatment due to Mexican fruit fly infestation. Treatments based on the average infestation rate could cost the citrus industry $40,000 to $80,000, which is less than 0.5 percent of the value of the $20 million worth of citrus that will require treatment. The worst case scenario, or 100 percent infestation, would cost the citrus industry $806,000 in treatment costs. This amount represents less than 4 percent of the value of the $20 million worth of citrus that would require treatment.

The commenter also stated that there was a need to investigate the potential impacts of the rule on the organic citrus industry in Texas.

We have already considered these impacts to organic citrus producers. They are included in our estimation of the total impact to the Texas citrus industry ($40,000 to $80,000 annually). Since fumigation is not an available treatment option for organic producers and we assume the average infestation rate of 5 to 10 percent, treatment of organic citrus would cost approximately $12,000 to $25,000 annually for premises treatment using spinosad bait spray.

We consider "significant impact" to mean that the cost of a given action is equal to or greater than the small business's profit margin (5 to 10 percent of annual sales). By these standards, given the size and profitability of the citrus industry in Texas, this action does not represent a significant impact on a substantial number of small entities.

Two commenters added that, apart from the associated economic issues, Texas packinghouses will not be able to expand their operations adequately to fumigate citrus moving interstate, as prescribed in the regulations, because many of these entities are located near urban areas where air quality standards prohibit such expansion. One commenter additionally stated that fumigation degrades the quality of the fruit, thus affecting its marketability, and that some markets will not accept fruit that has undergone fumigation.

As previously stated, methyl bromide fumigation is not the only treatment option available to producers of citrus and other regulated articles located in quarantined areas. The alternative treatments available are listed above.

Regulatory Procedure

One commenter said that changes should not be made to the regulations solely in response to possible infestation of other hosts or transshipment. The commenter pointed out that no past infestations have occurred in commercial citrus-producing States as a result of regulated articles that originated in Texas.

The changes we are making to the regulations are precautionary in nature. As stated in the proposed rule, all of our other fruit fly regulations in 7 CFR part 301 (*e.g.*, Mediterranean fruit fly [§§ 301.78–301.78–10], Oriental fruit fly [§§ 301.93–301.93–10], etc.), have interstate shipment requirements identical to those listed in this document for Mexican fruit fly. In the past several years, infestations of Mexican fruit fly in California and Florida have emphasized the need for revision to the regulations.

One commenter stated that the current practice of marking containers as non-eligible for shipment to commercial citrus-producing States is sufficient to prevent transshipment.

We disagree with this assessment. According to the California Department of Food and Agriculture, fruit repacked in Nevada is routinely intercepted at border inspection stations in California. Mexican fruit fly larvae have also been discovered in grapefruit that had been purchased in Oregon and moved into California. We are also concerned with mailed containers of potentially infested fruits, particularly those used in gourmet and specialty fruit packages, since our regulations have not covered some fruits shipped by such retailers. The amended regulations are intended to eliminate those potential pest pathways.

One commenter pointed out that different regulatory processes are necessary given the differing circumstances in the growing areas within quarantined areas in Texas. The commenter argued that the regulatory system in Texas must necessarily differ from those in other States such as California, Florida, and Arizona where temporary infestations of Mexican fruit fly have historically occurred given that the quarantined areas in Texas are adjacent to areas in Mexico that are continually infested with many types of fruit fly, including Mexican fruit fly.

As previously stated in this document and in the proposed rule, the aim of this action is to make our Mexican fruit fly regulations equivalent to our other fruit fly regulations. The pest risk associated with the movement of regulated articles from those areas of Texas where Mexican fruit fly is established is equivalent to the pest risk associated with the movement of regulated articles from areas in California, Florida, or other States where Mexican fruit fly or other fruit flies may have been introduced. We have found that a uniform approach to quarantine and treatment is most effective in preventing

the spread of various types of injurious fruit flies to noninfested areas of the United States.

One commenter said that the APHIS-approved preventative release program using sterile insect technique that is being used within the quarantined areas in Texas is sufficient to prevent the spread of Mexican fruit fly to those States that are not commercial citrus-producing States.

The preventative release programs (PRP) described by the commenter are important tools in our efforts to protect noninfested areas from Mexican fruit fly infestation. The current PRP in Texas is part of a systems approach that is designed to mitigate the risk associated with the movement of host commodities. However, at the current sterile fly release levels, the PRP alone does not provide sufficient protection against the spread of the Mexican fruit fly. APHIS has submitted a request for increased funding for these sterile release programs as part of the Agency's 2006 budget in an effort to increase the sterile release rates in order to eradicate the Mexican fruit fly from Texas. The procedure outlined in this document provides necessary and immediate protection against the spread of Mexican fruit fly to noninfested areas of the United States.

Mexican Citrus

Two commenters stated that we should focus our efforts primarily on bringing Mexico's fruit fly programs into equivalency with U.S. programs. An additional commenter said that no importation of citrus from Mexico or any other country should be allowed unless the phytosanitary programs in the country of origin are equivalent to those used in quarantined areas of the United States.

We have developed a preventative release program with sterile insect technique in Mexico. The United States Department of Agriculture (USDA), in cooperation with the Mexican Government, has initiated a sterile fly release program along the Rio Grande River as well as in nearby urban areas. The program features consolidated U.S./Mexican recordkeeping, which will enable us to more effectively synchronize our Mexican fruit fly programs on both sides of the U.S./Mexico border.

In addition, we have drafted a series of foreign fruit fly systems approach guidelines that are based primarily on our domestic fruit fly programs. This document is a draft intended for broad ranging international consideration. It is available on the Internet at *http://www.aphis.usda.gov/ppq/manuals/pdf_files/FF%20Guidelines.pdf.*

Further, available treatment options make it possible for fruit to be exported to the United States from countries without equivalent eradication programs where fruit flies are present. Those importation standards and procedures are described in our regulations governing the importation of fruits and vegetables at 7 CFR 319.56–2(e) through (h) and 319.56–2(j) through (k).

One commenter objected to our proposal as a result of his understanding of consideration we may be giving to proposals from Argentina, Chile, and Mexico to ship untreated citrus to States other than citrus-producing States, as well as his understanding that we are poised to grant these requests.

When fruit flies are the only pest of concern, shipments of citrus from any citrus-producing country or area could be eligible for importation in two ways: Fruit from non-fruit-fly-free areas may be imported subject to approved treatments, as mentioned previously, and fruit from areas that we have determined to be free of a number of fruit flies, including Mexican fruit fly, may be imported without treatment. Under our import regulations at 7 CFR 319.56–2(e) through (g), fruits and vegetables, except those restricted to certain countries and districts by special quarantine, may be imported under a permit issued once the Administrator determines that certain conditions in the country of origin have been met. Among other things, the Administrator must determine that the fruit or vegetable is being imported from an area that is free of the pest or pests in accordance with the criteria for establishing freedom found in International Standard for Phytosanitary Measures Publication No. 4, "Requirements for the Establishment of Pest Free Areas," which is incorporated by reference into the regulations at 7 CFR 300.5. APHIS must approve the survey protocol used to determine freedom from the pests of concern.

We are considering no such proposals as described by the commenter from Argentina or Chile. However, we are considering a proposal that would allow untreated citrus from specified areas in Mexico to enter into areas of the United States that are quarantined because of Mexican fruit fly for processing. However, under the proposal we are considering, those areas in Mexico would be required to be operating under a systems approach for Mexican fruit fly that is the same as our domestic programs. Any action on this proposal would come only after we published a proposed rule for public comment in the **Federal Register**.

Miscellaneous

One commenter characterized the changes we proposed as "removing restrictions" and stated that there is a need instead for additional restrictions, including more quarantine stations.

We disagree with the commenter's characterization of the changes we are making in this final rule. These changes will provide more, not less, protection against the interstate spread of the Mexican fruit fly.

Although we are making no changes in this final rule in response to the comments discussed above, this final rule does not include two editorial changes that had been part of the proposed rule. Specifically, we had proposed to update an address that appeared in two places in § 301.64–10(g); because that address has been changed in another final rule, it is not necessary to follow through with the proposed change in this final rule.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule with the changes discussed in this document.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

We are amending the Mexican fruit fly regulations by removing a provision that allows regulated articles to be moved interstate from a regulated area without a certificate or limited permit if they are moved into States other than commercial citrus-producing States. Additionally, we are amending the regulations to remove references to quarantined States and to refer to regulated areas as quarantined areas. We are also making other changes to the regulations, including clarifying that an entity requiring the services of an inspector is responsible for the costs of services performed outside of normal business hours. These actions are necessary to prevent the interstate spread of Mexican fruit fly and make the Mexican fruit fly regulations more consistent with our other domestic fruit fly regulations.

The Regulatory Flexibility Act requires that agencies specifically consider the economic effects of their rules on small entities. We expect that the entities most likely to be affected by the changes will be citrus growers and

packinghouses located within quarantined areas. Currently, only Cameron, Hidalgo, and Willacy Counties in Texas are designated as quarantined areas in the regulations. In 2002, the latest census year, citrus fruit was produced on 1,053 farms in Texas. Approximately 98 percent of citrus farms had gross sales of less than $750,000 and thus are considered small entities according to the size standards set by the Small Business Administration (SBA).

Impact on Affected Industries in Texas

As noted previously, three counties in the Lower Rio Grande Valley of Texas—Cameron, Hidalgo, and Willacy—are designated as quarantined areas. The Mexican fruit fly protocol for Texas calls for a trapping program to monitor those areas; under the protocol, the detection of one wild Mexican fruit fly triggers the application of bait sprays or the aerial release of sterile flies around the fly capture. Fruit destined for shipment to commercial citrus-producing States must be certified as free of the Mexican fruit fly, either through inspection or following the application of an authorized post-harvest treatment.

Within the quarantined area of Texas there are approximately 540 citrus growers operating on 30,000 acres producing $31 million worth of citrus annually, and 5 packinghouses.[1] Seventy five percent of the citrus growers produce grapefruit while the remaining 25 percent produce oranges. Approximately 80 percent of all citrus growers use one of the five packinghouses, while the remaining 20 percent sell their citrus locally. The five packinghouses currently ship approximately 35 percent of the citrus to California and 65 percent to States that are not commercial citrus-producing States.[2] Currently only 5 to 10 percent of all citrus shipped annually to citrus-producing regions (mainly California) are treated for Mexican fruit flies using methyl bromide fumigation. The cost of treatment generally comprises less than 4 percent of the citrus wholesale value.[3]

This rule requires that all citrus and other host crops moved interstate to States that are not commercial citrus-producing States be accompanied by a limited permit or certificate issued by an APHIS inspector, just as is currently required for host crops moved to commercial citrus-producing States. The provisions of this rule will primarily affect the packinghouses in the quarantined area in that any overtime cost that is incurred by APHIS inspectors for supervising post-harvest treatments at the packinghouses will now have to be paid for by owners of the facilities. Currently, as a result of the small number of inspectors working overtime, this cost is borne by APHIS. It is estimated that one APHIS inspector will be required at each of the five Texas packinghouses for approximately 16 weeks during the citrus harvest period. APHIS has estimated that each of these inspectors will work approximately 53 hours in overtime supervision during this 16-week period. At $28.11 per hour, each citrus packinghouse will be responsible for, on average, $1,500 in overtime charges for the inspectors. Assuming these charges stay constant with more stringent interstate movement requirements, we estimate that the five Texas packinghouses will incur approximately $7,500 per year in total overtime charges for citrus fruits moving to commercial citrus-producing States.

Similarly, additional charges may also be incurred by producers or packinghouses for the services of an APHIS inspector in monitoring the post-harvest treatment of citrus for shipment to States other than commercial citrus-producing States if services are provided beyond the normal working hours. If, as estimated above, the overtime costs associated with the interstate movement of the 35 percent of fruit moving to commercial citrus-producing States would be $7,500, then a rough estimate of the overtime charges that may be incurred in connection with the interstate movement of the remaining 65 percent of fruit would be $14,000. The total overtime cost to the producers or packinghouses for APHIS supervision will be approximately $21,500 per year.

Producers of host crops may also incur additional costs for post-harvest treatment if they wish to send their fruit to States other than commercial citrus-producing States and their fruit is found to be infested. Under the rule, host crops moving interstate to such States, like fruit moved to commercial citrus-producing States, will be subject to treatment if found to be infested with Mexican fruit flies. The current fumigation facilities in place can treat approximately 5 to 20 percent of the citrus moving interstate. The amount of fruit that may require treatment as a condition of movement to States other than commercial citrus-producing States is not known and will vary with the infestation levels. However, assuming that (1) 65 percent of the $31 million worth of citrus is shipped to these States, (2) that the proportion of these fruits that would require treatment would be the same percentage as that of fruits currently shipped to commercial citrus-producing States (about 5–10 percent), and (3) that treatment costs comprise less than 4 percent of the wholesale value of citrus, the additional cost of treatment to producers is estimated to be $40,000 to $80,000. In sum, based on past infestation rates, the impact of this rule on the Texas citrus industry could range between $61,500 and $101,500 in additional yearly treatment costs and APHIS overtime costs for pre- and post-harvest monitoring (table 1).

TABLE 1.—POSSIBLE TEXAS OVERTIME AND TREATMENT COSTS

	Yearly costs
Current pre- and post-harvest APHIS monitoring (for movement to commercial citrus-producing States)	$7,500
Future pre- and post-harvest APHIS monitoring (for movement of citrus to non-commercial citrus-producing States)	14,000
Treatment (methyl bromide)[1]	40,000–80,000
Total cost	61,500–101,500

[1] For some producers, pre-harvest premises treatment with either malathion or spinosad bait spray is required under § 301.64–10(c); this pre-harvest treatment eliminates the need for post-harvest treatment with methyl bromide. The cost of malathion treatment is $5.50 per acre, with an average of 20 treatments required (a total per acre cost of $110). The cost of spinosad treatment is $18.50 per acre, with an average of 20 treatments required (a total per acre cost of $368).

[1] Texas Crop Production Summary with Values 2001–2002. NASS USDA report, Jerry Ramirez.

[2] John McClung, Texas Citrus Growers Association. Personal communication, June 28, 2003.

[3] It is estimated that it costs $0.25 to treat a 40-pound carton of citrus with a worth of approximately $7.50 to $9.00. Source: Robert Martin, Texas Citrus packing facility owner. Personal communication, June 28, 2003.

Summary

This rule could potentially have a negative economic impact on the Texas citrus industry, as producers who wish to move regulated articles, including citrus fruit, to any State—not just commercial citrus-producing States—will now have to obtain a certificate or limited permit before moving the articles interstate. Producers and/or packinghouses will have to incur the cost of treatment along with overtime costs incurred by APHIS in monitoring treatments. The extent of the impact will depend on the level of pest infestation.

It is expected that the percentage of citrus fruits requiring treatment for movement to States that are not commercial citrus-producing States would be the same as that of fruits currently shipped to commercial citrus-producing States (*i.e.*, 5–10 percent). The impact on the industry is expected to be small ($40,000 to $80,000 in annual treatment costs), as the treatment costs comprise less than 4 percent of the wholesale value of the citrus and only 5 to 10 percent of the citrus requires treatment.[4]

The Texas citrus industry will also have to incur the estimated $7,500 per year in overtime costs associated with PPQ treatment supervision at the five packinghouses for fruit moved to commercial citrus-producing States. These costs will either be absorbed by the industry or passed on to consumers of the fruit. Additionally, it is estimated that packinghouses for fruit moved to States other than commercial citrus-producing States could also incur overtime costs of $14,000. In sum, based on past infestation rates, the impact of this proposed rule on the Texas citrus industry could range between $61,500 and $101,500 in additional treatment costs and overtime charges for APHIS pre- and post-harvest monitoring.

The forgone costs or benefits of averting a Mexican fruit fly outbreak are substantial. The establishment of the Mexican fruit fly in the United States could cost producers and exporters about $900 million in losses annually.[5] This amount is comprised of (1) field control costs, (2) field losses after malathion use, (3) cost of quarantine compliance treatments, and (4) losses due to quarantine treatment damage. The costs associated with the additional restrictions on the interstate movement of regulated articles are surpassed by the benefits of averting a large scale Mexican fruit fly outbreak.

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

Executive Order 12372

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

Executive Order 12988

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

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0238.

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 7 CFR Part 301

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

PART 301—DOMESTIC QUARANTINE NOTICES

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

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

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

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

■ 2. Section 301.64 is revised to read as follows:

§ 301.64 Restrictions on interstate movement of regulated articles.

No person shall move any regulated article interstate from any quarantined area except in accordance with this subpart.[1,2]

■ 3. Section 301.64–1 is amended by removing the definition of *regulated area*

[4] It is estimated that 65 percent of the $31 million worth of Texas citrus produced is transported to States that are not commercial citrus producing States. Approximately 5 to 10 percent of the $20.15 million worth of fruit may require treatment based on past infestation levels. The total treatment cost is about 4 percent of the $1 to $2 million, or $40,000 to $81,000.

[5] Lottie Erikson (2000). "Economic Analysis of Options for Eradicating Mexican Fruit Fly (*Anastrepha ludens*) from the Lower Rio Grande Valley of Texas." Policy and Program Development, APHIS, USDA.

[1] Any properly identified inspector is authorized to stop and inspect persons and means of conveyance, and to seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of regulated articles as provided in sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754).

[2] Regulations concerning the movement of plant pests, including live Mexican fruit flies, in interstate commerce are contained in part 330 of this chapter.

and by adding, in alphabetical order, definitions for *departmental permit* and *quarantined area* to read as follows:

§ 301.64–1 Definitions.

* * * * *

Departmental permit. A document issued by the Administrator in which he or she affirms that the interstate movement of the regulated article identified on the document is for scientific or experimental purposes and that the regulated article is eligible for interstate movement in accordance with § 301.64–4(c).

* * * * *

Quarantined area. Any State, or any portion of a State, listed in § 301.64–3(c) or otherwise designated as a quarantined area in accordance with § 301.64–3(b).

* * * * *

§ 301.64–3 [Amended]

■ 4. Section 301.64–3 is amended as follows:

■ a. In the section heading, by removing the word "Regulated" and adding the word "Quarantined" in its place.

■ b. In paragraph (a), introductory text, by removing the word "quarantined" each time it appears, and by removing the word "regulated" each time it appears and adding the word "quarantined" in its place.

■ c. In paragraph (a)(2), by removing the word "regulated" and adding the word "quarantined" in its place.

■ d. In paragraph (b), by removing the word "quarantined", by removing the word "nonregulated" both times it appears and adding the word "nonquarantined" in its place, and by removing the words "regulated area" and adding the words "quarantined area" in their place.

■ e. In paragraph (c), introductory text, by removing the word "regulated" and adding the word "quarantined" in its place.

■ 5. In § 301.64–4, the section heading, the introductory text of the section, and paragraph (b) are revised and a new paragraph (c) and an OMB citation at the end of the section are added to read as follows:

§ 301.64–4 Conditions governing the interstate movement of regulated articles from quarantined areas.

Any regulated article may be moved interstate from a quarantined area only if moved under the following conditions:[3]

* * * * *

[3] Requirements under all other applicable Federal domestic plant quarantines and regulations must also be met.

(b) Without a certificate or limited permit, if:

(1) The regulated article originated outside the quarantined area and is either moved in an enclosed vehicle or is completely enclosed by a covering adequate to prevent access by Mexican fruit flies (such as canvas, plastic, or closely woven cloth) while moving through the quarantined area; and

(2) The point of origin of the regulated article is clearly indicated on the waybill, and the enclosed vehicle or the enclosure that contains the regulated article is not opened, unpacked, or unloaded in the quarantined area; and

(3) The regulated article is moved through the quarantined area without stopping except for refueling or for normal traffic conditions, such as traffic lights or stop signs; or

(c) Without a certificate or limited permit, if the regulated article is moved:

(1) By the United States Department of Agriculture for experimental or scientific purposes;

(2) Pursuant to a departmental permit issued by the Administrator for the regulated article;

(3) Under conditions specified on the departmental permit and found by the Administrator to be adequate to prevent the spread of Mexican fruit fly; and

(4) With a tag or label bearing the number of the departmental permit issued for the regulated article attached to the outside of the container of the regulated article or attached to the regulated article itself if not in the container.

(Approved by the Office of Management and Budget under control number 0579–0238).

■ 6. In § 301.64–6(a), footnote 6 is revised to read as follows:

§ 301.64–6 Compliance agreement and cancellation thereof.

(a) * * *[6]

[6] Compliance agreement forms are available without charge from local offices of the Animal and Plant Health Inspection Service, Plant Protection and Quarantine. Local offices are listed in telephone directories, or on the Internet at *http://www.aphis.usda.gov/ppq/*.

■ 7. In § 301.64–7(a), footnote 7 is revised to read as follows:

§ 301.64–7 Assembly and inspection of regulated articles.

(a) * * *[7]

[7] Inspectors are assigned to local offices of Plant Protection and Quarantine, which are listed in telephone directories. Information concerning such local offices may also be obtained on the Internet at *http://www.aphis.usda.gov/ppq/*.

■ 8. Section 301.64–9 is revised to read as follows:

§ 301.64–9 Costs and charges.

The services of an inspector during normal business hours (8 a.m. to 4:30 p.m., Monday through Friday, except holidays) will be furnished without cost. The user will be responsible for all costs and charges arising from inspection and other services provided outside normal business hours.

§ 301.64–10 [Amended]

■ 9. In § 301.64–10, paragraph (g)(9) is amended by removing the word "Mediterranean" and adding the word "Mexican" in its place.

Done in Washington, DC, this 23rd day of June 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–12814 Filed 6–28–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

7 CFR Part 868

United States Standards for Milled Rice; Correction

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final regulations 7 CFR part 868, which were published in the **Federal Register** of September 30, 2002. The regulations related to changes to the U.S. Standards for Milled Rice which established a new level of milling degree, "hard milled", to the existing milling requirements and eliminated reference to "lightly milled" from the milling requirements of U.S. Standards for Milled Rice.

DATES: Effective June 29, 2005.

FOR FURTHER INFORMATION CONTACT: Vicki Lacefield, at her e-mail address: *Vicki.A.Lacefield@usda.gov* or telephone her at (202) 720–0252.

SUPPLEMENTARY INFORMATION: On September 30, 2002, the Grain Inspection, Packers and Stockyards Administration (GIPSA) published in the **Federal Register** (67 FR 61249) a direct final rule that revised the United States Standards for Milled Rice to establish a new level of milling degree, "hard milled," to the existing milling requirements and to eliminate reference to "lightly milled" from the milling

requirements of U.S. Standards for Milled Rice.

Need for Correction

As published, the direct final rule contains errors which may prove to be confusing and needs to be clarified. In Section 868.310(f) U.S. Sample grade, the word "re" should read "or"; in § 868.311, the correct wording for that section should read "Grades and grade requirements for the class Second Head Milled Rice. (See also § 868.315)", instead of "Grades and grade requirements for the class Second Head Milled Rice. (See also § 868.305.)"; and in § 868.312, the correct wording for that section should read "Grades and grade requirements for the class Screenings Milled Rice. (See also § 868.315.)", instead of "Grades and grade requirements for the class Brewers Milled Rice. (See also § 868.315)."

List of Subjects in 7 CFR Part 868

Agricultural commodities, Rice.

PART 868—GENERAL REGULATIONS AND STANDARDS FOR CERTAIN AGRICULTURAL COMMODITIES

■ 1. The authority citation for part 868 continues to read as follows:

Authority: Secs. 202–208, 60 Stat. 1087, as amended (7 U.S.C. 1621 *et seq.*).

■ 2. Amend § 868.310 by revising note (f) of the table to read as follows:

§ 868.310 Grades and grade requirements for the classes Long Grain Milled Rice, Medium Grain Milled Rice, Short Grain Milled Rice, and Mixed Milled Rice. (See also § 868.315.)

* * * * *

(f) Contains two or more live or dead weevils or other insects, insect webbing, or insect refuse;

* * * * *

■ 3. Revise the heading of § 868.311 read as follows:

§ 868.311 Grades and grade requirements for the class Second Head Milled Rice. (See also § 868.315.)

■ 4. Revise the heading of § 868.312 to read as follows:

§ 868.312 Grade and grade requirements for the class Screenings Milled Rice. (See also § 868.315.)

David R. Shipman,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 05–12815 Filed 6–28–05; 8:45 am]

BILLING CODE 3410–EN–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. 2003F–0370]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Vitamin D_3

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of vitamin D_3 as a nutrient supplement in meal replacement bars, other-type bars, and soy-protein based meal replacement beverages represented for special dietary use in reducing or maintaining body weight. This action is in response to a petition filed by Unilever United States, Inc. (Unilever).

DATES: This rule is effective June 29, 2005. The Director of the Office of the Federal Register approves the incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 of certain publications in 21 CFR 172.380 as of June 29, 2005. Submit written or electronic objections and requests for a hearing by July 29, 2005. See section VI of this document for information on the filing of objections.

ADDRESSES: You may submit written objections and requests for a hearing, identified by Docket No. 2003F–0370, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.
- E-mail: *fdadockets@oc.fda.gov*. Include Docket No. 2003F–0370 in the subject line of your e-mail message.
- FAX: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All objections received will be posted without change to *http://www.fda.gov/ohrms/dockets/default.htm*, including any personal information provided. For detailed instructions on submitting objections, see the "Objections" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or objections received, go to *http://www.fda.gov/ohrms/dockets/default.htm* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Judith L. Kidwell, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1071.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a notice published in the **Federal Register** of August 21, 2003 (68 FR 50541), FDA announced that a food additive petition (FAP 3A4746) had been filed by Unilever United States, Inc., 390 Park Ave., New York, NY 10022–4698. The petition proposed that the food additive regulations be amended in § 172.380 *Vitamin D_3* (21 CFR 172.380) to provide for the safe use of vitamin D_3 as a nutrient supplement in certain foods for special dietary use, such as meal replacement products and snack replacement products. Foods specifically identified in the petition were meal replacement bars, other-type bars, and soy-protein based meal replacement beverages that are represented for special dietary use in reducing or maintaining body weight.

Vitamin D_3 currently is approved for use as a nutrient supplement in calcium-fortified fruit juice and fruit juice drinks under § 172.380. Vitamin D[1], including vitamin D_3, also is affirmed as generally recognized as safe (GRAS) for use in food under § 184.1950 (21 CFR 184.1950) with the following limitations:

Category of Food	Maximum Levels in Food (as served)
Breakfast cereals	350 International Units (IU)/100 grams (g)
Grain products and pasta	90 IU/100 g

[1] Vitamin D comprises a group of fat-soluble secosterols and comes in many forms. The two major physiologically relevant forms are vitamin D_2 and vitamin D_3. Vitamin D without a subscript represents either D_2 or D_3. Section 184.1950 includes crystalline vitamin D_2, crystalline vitamin D_3, vitamin D_2 resin, and vitamin D_3 resin. Section 172.380 includes only crystalline vitamin D_3.

Category of Food	Maximum Levels in Food (as served)
Milk	42 IU/100 g
Milk products	89 IU/100 g

Additionally, under § 184.1950(c)(2) and (c)(3) vitamin D is affirmed as GRAS for use in infant formula and margarine, respectively.

Vitamin D_3, also known as cholecalciferol, is the chemical 9,10-seco(5Z,7E)-5,7,10(19)-cholestatrien-3-ol. Humans synthesize vitamin D_3 in skin from its precursor, 7-dehydrocholesterol under exposure to ultraviolet B radiation in sunlight. Vitamin D_3 does not accumulate significantly in the body as a result of sun exposure because it is metabolized and removed during normal skin cell turnover. Other sources of naturally occurring vitamin D are foods such as butter, buttermilk, cheese, cream, eggs, fish, goat milk, meat fats and organ meats, and mushrooms.

Vitamin D is essential for human health. The major function of vitamin D is the maintenance of blood serum concentrations of calcium and phosphorus by enhancing the absorption of these minerals in the small intestine. Vitamin D deficiency can lead to abnormalities in calcium and bone metabolism such as rickets in children or osteomalacia in adults. At high levels, vitamin D may be toxic. Excessive intake of vitamin D elevates blood plasma calcium levels by increased intestinal absorption and/or mobilization from the bone.

To ensure that vitamin D is not added to the U.S. food supply at levels that could raise safety concerns, FDA affirmed vitamin D as GRAS with specific limitations, as listed in § 184.1950. Under 21 CFR 184.1(b)(2), an ingredient affirmed as GRAS with specific limitations may be used in food only within such limitations, including the category of food(s), functional use(s), and level(s) of use. Any addition of vitamin D to food beyond those limitations set out in § 184.1950 requires either a food additive regulation or an amendment of § 184.1950.

To support the safety of the proposed uses of vitamin D_3, Unilever submitted dietary intake estimates from current and proposed uses and naturally occurring sources of vitamin D and compared these exposure estimates to the tolerable upper intake level (UL) for vitamin D established by the Institute of Medicine (IOM) of the National Academies. The petitioner also submitted a number of publications pertaining to human clinical studies on vitamin D. Based on this information, which is discussed in section II of this document, the petitioner concluded that the proposed use of vitamin D_3 in meal replacement bars and other-type bars represented for special dietary use in reducing or maintaining body weight at levels not to exceed 100 IU per 40 g product is safe. The petitioner also concluded that the proposed use of vitamin D_3 in soy-protein based meal replacement beverages represented for special dietary use in reducing or maintaining body weight at levels not to exceed 140 IU per 240 milliliter product is safe.

II. Evaluation of Safety

To establish with reasonable certainty that a food additive is not harmful under its intended conditions of use, FDA considers the projected human dietary exposure to the additive, the additive's toxicological data, and other relevant information (such as published literature) available to the agency. FDA compares an individual's estimated daily intake (EDI) of the additive from all sources to an acceptable intake level established by toxicological data. The EDI is determined by projections based on the amount of the additive proposed for use in particular foods and on data regarding the consumption levels from all sources of the additive.

A. Acceptable Daily Intake for Vitamin D for Adults and Children

In 1997, the Standing Committee on the Scientific Evaluation of Dietary Reference Intakes of the Food and Nutrition Board at IOM conducted an extensive review of toxicology and metabolism studies on vitamin D published through 1996. The IOM published a detailed report that included a UL for vitamin D for infants, children, and adults. The IOM UL for vitamin D for children 1 to 18 years of age and adults is 2,000 IU per person per day (IU/p/d). The UL for infants is 1,000 IU/p/d.

The IOM considers the UL as the highest usual intake level of a nutrient that poses no risk of adverse effects when the nutrient is consumed over long periods of time. The UL is determined using a risk assessment model developed specifically for nutrients and considers intake from all sources: Food, water, nutrient supplements, and pharmacological agents. The dose-response assessment, which concludes with an estimate of the UL, is built upon three toxicological concepts commonly used in assessing the risk of exposures to chemical substances: No-observed-adverse-effect level, lowest-observed-effect level, and an uncertainty factor.

B. Estimated Daily Intake for Vitamin D

The petitioner provided average and 90th percentile vitamin D intake estimates for consumers of meal replacement bars, other-type bars, and soy-protein based meal replacement beverages represented for special dietary use from the following: (1) The proposed food uses, (2) current food uses (including naturally occurring sources of vitamin D), (3) current and proposed food uses, and (4) current and proposed food uses and dietary supplements. The proposed uses are for foods intended for use by adults as part of a weight control diet. Although these special dietary foods are not intended for use by children, the petitioner acknowledged that some sporadic use by children may occur, especially among older children. Therefore, intake estimates for adults and children over the age of 9 years were provided. The agency has determined that the methodology used to calculate these estimates is appropriate.

For the proposed food uses, dietary intake of vitamin D_3 for 90th percentile consumers of meal replacement bars, other-type bars, and soy-protein based meal replacement beverages was estimated to be 215 IU/p/d for consumers 9 years of age and older. The corresponding mean intake was estimated to be 127 IU/p/d.

For currently regulated uses in conventional foods (under § 184.1950 and § 172.380) and naturally occurring sources, mean dietary exposure to vitamin D for consumers of meal replacement bars, other-type bars, and soy-protein based meal replacement beverages was estimated to be 470 IU/p/d for consumers 9 years of age and older. Intake at the 90th percentile was estimated to be 957 IU/p/d. For consumers 9 years of age and older, mean and 90th percentile dietary intakes from current (including naturally occurring sources) and proposed food uses of vitamin D were estimated to be 565 IU/p/d and 995 IU/p/d, respectively.

The petitioner also considered the intake of vitamin D from dietary supplements. The National Health and Nutrition Examination Survey III (NHANES III) data indicate that approximately 40 percent of the U.S. population 2 months of age and older take dietary supplements. The NHANES III data also show that, when vitamin D is taken as a dietary supplement, the most frequent level is 400 IU/p/d. As a conservative estimate of intake of vitamin D from dietary supplements and

food uses, the petitioner assumed that all consumers of meal replacement bars, other-type bars, and soy-protein based meal replacement beverages represented for special dietary use would take dietary supplements containing 400 IU of vitamin D. They then added this value to the mean and 90th percentile intake estimates from current and proposed food uses. For consumers of meal replacement bars, other-type bars, and soy-protein based meal replacement beverages, mean and 90th percentile dietary intakes from current and proposed food uses and dietary supplements were estimated to be 965 IU/p/d and 1,395 IU/p/d for consumers 9 years of age and older, respectively. FDA concurs with these exposure estimates.

C. Safety Assessment

To support the safety of their proposed uses for vitamin D_3, Unilever submitted 16 scientific articles published subsequent to the IOM report and issuance of the 2003 final rule permitting the use of vitamin D_3 in calcium-fortified fruit juices and fruit juice drinks within the prescribed limitations (68 FR 9000, February 27, 2003). Unilever concluded that the recent publications continue to support the safe use of vitamin D supplementation in both animals and humans. FDA concurs with Unilever's conclusions.

FDA considered the UL established by IOM for children and adults relative to the intake estimates provided by the petitioner as the primary basis for assessing the safety of the proposed use of vitamin D_3 in meal replacement bars, other-type bars, and soy-protein based meal replacement beverages represented for special dietary use. For all children and adults 9 years of age and older, mean and 90th percentile intake estimates from current and proposed food uses of vitamin D are well below the IOM UL of 2,000 IU/p/d. Additionally, when dietary supplements are included in the calculations, intake estimates remain below the UL.

Because the EDI of vitamin D from all sources is less than the UL, the agency concludes that dietary exposure of vitamin D_3 from its use as a nutrient supplement in meal replacement bars, other-type bars, and soy-protein based meal replacement beverages represented for special dietary use in reducing or maintaining body weight will not pose a safety concern.

III. Conclusion

Based on all data relevant to vitamin D_3 reviewed by the agency, FDA concludes that there is a reasonable certainty that no harm will result from the use of vitamin D_3 as a nutrient supplement in meal replacement bars, other-type bars, and soy-protein based meal replacement beverages represented for special dietary use in reducing or maintaining body weight. Thus, vitamin D_3 is safe for its proposed use and the agency concludes that the food additive regulations should be amended as set forth in this document. To ensure that only food grade vitamin D_3 is used in food, the additive must meet the specifications set forth in this document.

Based on a request by the petitioner, FDA also is updating § 172.380 by citing the 5th edition of the *Food Chemicals Codex* rather than the 4th edition. Section 172.380(b) currently states that vitamin D_3 must meet the specifications of the *Food Chemicals Codex*, 4th ed., 1996. The agency compared specifications for vitamin D_3 in the 4th and 5th editions and found them to be identical. Therefore, the agency is making this requested editorial change. In addition, the agency is making an editorial update to § 172.380(b) to reflect the new address for the National Academy Press. The agency also is making editorial changes to § 172.380(c) for clarification.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person (see **FOR FURTHER INFORMATION CONTACT**). As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

IV. Environmental Effects

The agency has previously considered the environmental effects of this rule as announced in the notice of filing for FAP 3A4746 (68 FR 50541). No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that an environmental impact statement is not required.

V. Paperwork Reduction Act of 1995

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

VI. Objections

Any person who will be adversely affected by this regulation may file with the Division of Dockets Management (see **ADDRESSES**) written or electronic objections. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents are to be submitted and are to be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 172

Food additives, Incorporation by reference, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 172 is amended as follows:

PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION

■ 1. The authority citation for 21 CFR part 172 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 348, 371, 379e.

■ 2. Section 172.380 is amended by revising paragraphs (b) and (c) and removing paragraph (d) to read as follows:

§ 172.380 Vitamin D_3.

* * * * *

(b) Vitamin D_3 meets the specifications of the *Food Chemicals Codex*, 5th ed. (2004), pp. 498–499, which is incorporated by reference. The Director of the Office of the Federal Register approves this incorporation by

reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies from the National Academy Press, 500 Fifth St. NW., Washington, DC 20001 (Internet address *http://www.nap.edu*). Copies may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) The additive may be used as follows:

(1) At levels not to exceed 100 International Units (IU) per 240 milliliters (mL) in 100 percent fruit juices (as defined under § 170.3(n)(35) of this chapter) that are fortified with greater than or equal to 33 percent of the reference daily intake (RDI) of calcium per 240 mL, excluding fruit juices that are specially formulated or processed for infants.

(2) At levels not to exceed 100 IU per 240 mL in fruit juice drinks (as defined under § 170.3(n)(35) of this chapter) that are fortified with greater than or equal to 10 percent of the RDI of calcium per 240 mL, excluding fruit juice drinks that are specially formulated or processed for infants.

(3) At levels not to exceed 140 IU per 240 mL (prepared beverage) in soy-protein based meal replacement beverages (powder or liquid) that are represented for special dietary use in reducing or maintaining body weight in accordance with § 105.66 of this chapter.

(4) At levels not to exceed 100 IU per 40 grams in meal replacement bars or other-type bars that are represented for special dietary use in reducing or maintaining body weight in accordance with § 105.66 of this chapter.

Dated: June 20, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–12699 Filed 6– 28–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9207]

RIN 1545–AX93

Assumption of Partner Liabilities; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final regulations.

SUMMARY: This document corrects final regulation (TD 9207) that were published in the **Federal Register** on Thursday, May 26, 2005 (70 FR 30334). The final regulation relates to the definition of liabilities under section 752 of the Internal Revenue Code.

DATES: This correction is effective on May 26, 2005.

FOR FURTHER INFORMATION CONTACT: Laura Fields (202) 622–3050 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9207) that is the subject of this correction are under sections 358, 704, 705, 737 and 752 of the Internal Revenue Code.

Need for Correction

As published, TD 9207 contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

■ Accordingly, the publication of the final regulations (TD 9207), that was the subject of FR Doc. 05–10266, is corrected as follows:

■ On page 30337, column 3, that paragraph heading *"4. Section 752–7 Liability"*, the language *"4. Section 752–7 Liability"* is corrected to read *"4. Section 1.752–7 Liability"*.

Cynthia Grigsby,

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

[FR Doc. 05–12757 Filed 6–28–05; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 26 and 602

[TD 9208]

RIN 1545–BB54

Election Out of GST Deemed Allocations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations providing guidance for making the election under section 2632(c)(5)(A)(i) of the Internal Revenue Code to not have the deemed allocation of unused generation-skipping transfer (GST) tax exemption under section 2632(c)(1) apply with regard to certain transfers to a GST trust, as defined in section 2632(c)(3)(B). The final regulations also provide guidance for making the election under section 2632(c)(5)(A)(ii) to treat a trust as a GST trust. The regulations primarily affect individuals.

DATES: *Effective Date:* The regulations are effective June 29, 2005.

Applicability Date: For dates of applicability, see § 26.2632–1(e).

FOR FURTHER INFORMATION CONTACT: Mayer R. Samuels, (202) 622–3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1892.

The collection of information in these final regulations is in § 26.2632–1(b)(2)(iii) and (b)(3). This information is required by the IRS for taxpayers who elect to have the automatic allocation rules not apply to the current transfer and/or to future transfers to the trust or to terminate such election. This information is also required by the IRS for taxpayers who elect to treat trusts described in section 2632(c)(3)(B)(i) through (vi) as GST trusts or to terminate such election.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Books or records relating to this collection of information must be

retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to 26 CFR part 26 under section 2632–1 pertaining to the election under section 2632(c)(5)(A)(i) of the Internal Revenue Code to not have the deemed allocation of unused generation-skipping transfer (GST) tax exemption under section 2632(c)(1) apply with regard to certain transfers to a GST trust, as defined in section 2632(c)(3)(B) and the election under section 2632(c)(5)(A)(ii) to treat a trust as a GST trust.

On July 13, 2004, the IRS published (REG–153841–02) in the **Federal Register** a notice of proposed rulemaking (69 FR 42000). The IRS received written and oral comments responding to the notice of proposed rulemaking. No public hearing was requested or held. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision, and the corresponding proposed regulations are removed. The comments and revisions to the proposed regulations are discussed below.

Summary of Comments

The proposed regulations generally permitted transferors only two options for electing out of the automatic allocation rules. Transferors could elect out with respect to a current transfer only, or with respect to a current-year transfer and all future transfers to the same trust. Several commentators suggested that the final regulations provide transferors additional options. In response to these comments, the final regulations include the options provided in the proposed regulations and, in addition, give transferors the option of electing out with respect to (1) only certain designated future transfers to a trust, or (2) all future transfers made by the transferor to any trust (regardless of whether the trust exists at the time of the election out). Under the final regulations, the transferor may elect out with respect to future transfers even if the transferor has not made a current-year transfer and is not otherwise required to file a Federal gift tax return. Examples have been added illustrating language that may be used in the election out statement to satisfy the requirements for the various election out options.

One commentator suggested that the statements required by the regulations to elect out of the automatic GST allocation or to treat a trust as a GST trust should not require a citation to the specific regulation section that authorizes the election. The final regulations adopt this suggestion.

In response to comments, the final regulations have been clarified to specifically confirm that an election out of the automatic allocation rules for future years is limited to automatic allocations under section 2632(c) (automatic allocations to indirect skips made during the transferor's lifetime) and has no effect on the automatic allocation rules that apply after the transferor's death under section 2632(e).

One commentator recommended that the IRS clarify whether the effective date of an automatic allocation is changed if the transfer is reported on a late filed Federal gift tax return. For indirect skips made after December 31, 2000, to which section 2642(f) does not apply, the transferor's unused GST exemption is automatically allocated to the property transferred. Section 26.2632–1(b)(1)(ii) generally provides that in the case of direct skips, unless the transferor elects out of the automatic allocation rules, the automatic allocation becomes irrevocable on the due date for filing the Federal gift tax return, and the allocation is effective as of the date of the transfer. Thus, even if the Federal gift tax return reporting the transfer is filed late, or no Federal gift tax return is filed, the automatic allocation nevertheless is irrevocable on the due date of that return and takes effect as of the date of the transfer. The final regulations clarify that the same rules apply in the case of an automatic allocation to an indirect skip under section 2632(c). The automatic allocation is effective as of the date of the transfer, and becomes irrevocable on the due date for filing the Form 709 for the calendar year in which the transfer is made, whether or not a gift tax return is filed reporting the transfer.

Commentators suggested that, if a transferor makes an indirect skip and affirmatively allocates GST exemption in an amount that is less than the value of the property transferred, the transaction should be treated as an allocation of the amount that was affirmatively allocated and an election out of the automatic allocation rules for the value of the property not covered by the exemption amount affirmatively allocated. Treasury and the IRS agree with the commentators that this treatment would give effect to the transferor's most likely intent to limit the allocation of exemption to the amount that was affirmatively allocated. Accordingly, under the final regulations, an affirmative partial allocation of GST exemption is treated as an election out of the automatic allocation rules with regard to the balance of that specific transfer.

In response to comments, the rules regarding the automatic allocation to an indirect skip subject to an estate tax inclusion period (ETIP) have been revised in conformance with section 2632(c)(4) to provide that the automatic allocation to a direct skip or an indirect skip is deemed to be made at the close of the ETIP. Therefore, under the final regulations, a transferor may elect out of the automatic allocation rules for transfers subject to an ETIP that are either direct skips or indirect skips at any time prior to the due date of the Federal gift tax return for the calendar year during which the ETIP closes. Thus, transferors may elect out of the automatic allocation rules on the gift tax return reporting the transfer to the trust, or on a gift tax return filed for any calendar year subsequent to the year of the transfer up to and including the calendar year in which the ETIP closes. It should be noted that an election out of the automatic allocation for "all current transfers" or for "all transfers in the current year" includes an election out for a transfer subject to an ETIP that was made during that year, but an election out of the automatic allocation rules for "all future transfers" to a trust will not apply with respect to any previous transfer to a trust subject to an ETIP that is to close in the future. To apply the election out to prior-year transfers that are subject to an ETIP, the election out statement must specifically describe the prior-year transfers to be covered by the election out, state that those transfers are subject to an ETIP, and state that the transferor wishes to elect out of the automatic allocation to those prior-year transfers. Except in that limited circumstance, the final regulations provide that an election out does not apply to any prior-year transfer to a trust, including a transfer subject to an ETIP, even if the ETIP closes after the election has been made. It should be noted also that, once an affirmative allocation of GST exemption has been made (including to a transfer subject to an ETIP), the allocation may not be revoked.

One commentator recommended that transferors who made indirect skips after December 31, 2000, and before the proposed regulations become final, should be allowed to elect out of the automatic allocation rules on or before April 15th of the calendar year after the year in which the final regulations are

published. The Treasury Department and the IRS believe, however, that this extension of the time to elect out of the automatic allocation rules is unnecessary. Notice 2001–50 (2001–2 C.B. 189) (see § 601.601(d)(2)(ii)(b) of this chapter) alerted transferors that regulations would provide that an election under section 2632(c)(5) is to be made on a timely filed Federal gift tax return reporting the transfer. Further, the preamble to the proposed regulations provided that any election made on or before the date of publication of the proposed regulations will be recognized if the election was made on a timely filed Federal gift tax return in a manner that provided adequate notice to the Commissioner that the transferor made the election. Accordingly, this suggestion was not adopted.

Commentators suggested that the regulations include an example addressing the application of the automatic allocation rules for indirect skips in a situation in which a trust subject to an ETIP terminates upon the expiration of the ETIP, at which time the trust assets are distributed to other trusts that may be GST trusts. The Treasury Department and the IRS believe, however, that this issue is outside the scope of this regulation, and will consider whether to address the issue in separate guidance.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose on small entities, a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6), does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the Notice of Proposed Rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these final regulations is Mayer R. Samuels, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department also participated in their development.

List of Subjects

26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 26 and 602 are amended as follows:

PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

■ **Paragraph 1.** The authority citation for part 26 continues to read, in part, as follows:

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

■ **Par. 2.** In § 26.2600–1, the entries for § 26.2632–1 are amended by revising the entry for paragraph (b)(2) and adding entries for paragraphs (b)(3), (b)(4) and (e) to read as follows:

§ 26.2600–1 Table of contents.

* * * * *

§ 26.2632–1 Allocation of GST exemption.

* * * * *

(b) * * *

(2)Automatic allocation to indirect skips made after December 31, 2000.

(3) Election to treat trust as GST trust.

(4) Allocation to other transfers.

* * * * *

(e) Effective date.

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■ **Par. 3.** Section 26.2632–1 is amended as follows:

■ 1. Paragraph (b)(2) is redesignated as paragraph (b)(4).

■ 2. Paragraphs (b)(2) and (b)(3) are added.

■ 3. In newly designated paragraph (b)(4)(i), the third sentence is revised.

■ 4. In newly designated paragraph (b)(4)(ii)(A)(*1*), the fourth sentence is revised.

■ 5. In newly designated paragraph (b)(4)(ii)(B):

■ a. All references to paragraph "(b)(2)(ii)(A)(*1*)(*i*)" are removed and "(b)(4)(ii)(A)(*1*)(*i*)" is added in its place.

■ b. All references to paragraph "(b)(2)(ii)(A)(*1*)(*ii*)" are removed and "(b)(4)(ii)(A)(*1*)(*ii*)" is added in its place.

■ c. All references to paragraph "(b)(2)(ii)(A)(*1*)(*iii*)" are removed and "(b)(4)(ii)(A)(*1*)(*iii*)" is added in its place.

■ 6. *Examples 1* through *5* in newly designated paragraph (b)(4)(iii) are revised.

■ 7. *Example 6* in newly designated paragraph (b)(4)(iii) is added.

■ 8. Paragraph (b)(4)(iv) is added.

■ 9. Paragraph (c)(1) is redesignated as paragraph (c)(1)(i) and revised.

■ 10. Paragraphs (c)(1)(ii) and (c)(1)(iii) are added.

■ 11. *Example 5* in paragraph (c)(5) is added.

■ 12. In paragraph (d)(1), the fourth sentence is revised.

■ 13. Paragraph (e) is added.

The additions and revisions read as follows:

§ 26.2632–1 Allocation of GST exemption.

* * * * *

(b) * * *

(2) *Automatic allocation to indirect skips made after December 31, 2000*—(i) *In general.* An indirect skip is a transfer of property to a GST trust as defined in section 2632(c)(3)(B) provided that the transfer is subject to gift tax and does not qualify as a direct skip. In the case of an indirect skip made after December 31, 2000, to which section 2642(f) (relating to transfers subject to an estate tax inclusion period (ETIP)) does not apply, the transferor's unused GST exemption is automatically allocated to the property transferred (but not in excess of the fair market value of the property on the date of the transfer). The automatic allocation pursuant to this paragraph is effective whether or not a Form 709 is filed reporting the transfer, and is effective as of the date of the transfer to which it relates. An automatic allocation is irrevocable after the due date of the Form 709 for the calendar year in which the transfer is made. In the case of an indirect skip to which section 2642(f) does apply, the indirect skip is deemed to be made at the close of the ETIP and the GST exemption is deemed to be allocated at that time. In either case, except as otherwise provided in paragraph (b)(2)(ii) of this section, the automatic allocation of exemption applies even if an allocation of exemption is made to the indirect skip in accordance with section 2632(a).

(ii) *Prevention of automatic allocation.* Except as otherwise provided in forms or other guidance published by the Service, the transferor may prevent the automatic allocation of GST exemption with regard to an indirect skip (including indirect skips to which section 2642(f) may apply) by making an election, as provided in paragraph (b)(2)(iii) of this section. Notwithstanding paragraph (b)(2)(iii)(B) of this section, the transferor may also prevent the automatic allocation of GST exemption with regard to an indirect skip by making an affirmative allocation of GST exemption on a Form 709 filed at any time on or before the due date for

timely filing (within the meaning of paragraph (b)(1)(ii) of this section) of an amount that is less than (but not equal to) the value of the property transferred as reported on that return, in accordance with the provisions of paragraph (b)(4) of this section. See paragraph (b)(4)(iii) *Example 6* of this section. Any election out of the automatic allocation rules under this section has no effect on the application of the automatic allocation rules applicable after the transferor's death under section 2632(e) and paragraph (d) of this section.

(iii) *Election to have automatic allocation rules not apply*—(A) *In general.* A transferor may prevent the automatic allocation of GST exemption (elect out) with respect to any transfer or transfers constituting an indirect skip made to a trust or to one or more separate shares that are treated as separate trusts under § 26.2654–1(a)(1) (collectively referred to hereinafter as a trust). In the case of a transfer treated under section 2513 as made one-half by the transferor and one-half by the transferor's spouse, each spouse shall be treated as a separate transferor who must satisfy separately the requirements of paragraph (b)(2)(iii)(B) to elect out with respect to the transfer. A transferor may elect out with respect to—

(*1*) One or more prior-year transfers subject to section 2642(f) (regarding ETIPs) made by the transferor to a specified trust or trusts;

(*2*) One or more (or all) current-year transfers made by the transferor to a specified trust or trusts;

(*3*) One or more (or all) future transfers made by the transferor to a specified trust or trusts;

(*4*) All future transfers made by the transferor to all trusts (whether or not in existence at the time of the election out); or

(*5*) Any combination of paragraphs (b)(2)(iii)(A)(*1*) through (*4*) of this section.

(B) *Manner of making an election out.* Except as otherwise provided in forms or other guidance published by the IRS, an election out is made as described in this paragraph (b)(2)(iii)(B). To elect out, the transferor must attach a statement (election out statement) to a Form 709 filed within the time period provided in paragraph (b)(2)(iii)(C) of this section (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). See paragraph (b)(4)(iv) *Example 7* of this section. The election out statement must identify the trust (except for an election out under paragraph (b)(2)(iii)(A)(*4*) of this section), and specifically must provide that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers. Prior-year transfers that are subject to section 2642(f), and to which the election out is to apply, must be specifically described or otherwise identified in the election out statement. Further, unless the election out is made for all transfers made to the trust in the current year and/or in all future years, the current-year transfers and/or future transfers to which the election out is to apply must be specifically described or otherwise identified in the election out statement.

(C) *Time for making an election out.* To elect out, the Form 709 with the attached election out statement must be filed on or before the due date for timely filing (within the meaning of paragraph (b)(1)(ii) of this section) of the Form 709 for the calendar year in which—

(*1*) For a transfer subject to section 2642(f), the ETIP closes; or

(*2*) For all other elections out, the first transfer to be covered by the election out was made.

(D) *Effect of election out.* An election out does not affect the automatic allocation of GST exemption to any transfer not covered by the election out statement. Except for elections out for transfers described in paragraph (b)(2)(iii)(A)(*1*) of this section that are specifically described in an election out statement, an election out does not apply to any prior-year transfer to a trust, including any transfer subject to an ETIP (even if the ETIP closes after the election is made). An election out does not prevent the transferor from allocating the transferor's available GST exemption to any transfer covered by the election out, either on a timely filed Form 709 reporting the transfer or at a later date in accordance with the provisions of paragraph (b)(4) of this section. An election out with respect to future transfers remains in effect unless and until terminated. Once an election out with respect to future transfers is made, a transferor need not file a Form 709 in future years solely to prevent the automatic allocation of the GST exemption to any future transfer covered by the election out.

(E) *Termination of election out.* Except as otherwise provided in forms or other guidance published by the IRS, an election out may be terminated as described in this paragraph (b)(2)(iii)(E). Pursuant to this section, a transferor may terminate an election out made on a Form 709 for a prior year, to the extent that election out applied to future transfers or to a transfer subject to section 2642(f). To terminate an election out, the transferor must attach a statement (termination statement) to a Form 709 filed on or before the due date of the Form 709 for the calendar year in which is made the first transfer to which the election out is not to apply (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). The termination statement must identify the trust (if applicable), describe the prior election out that is being terminated, specifically provide that the prior election out is being terminated, and either describe the extent to which the prior election out is being terminated or describe any current-year transfers to which the election out is not to apply. Consequently, the automatic allocation rules contained in section 2632(c)(1) will apply to any current-year transfer described on the termination statement and, except as otherwise provided in this paragraph, to all future transfers that otherwise would have been covered by the election out. The termination of an election out does not affect any transfer, or any election out, that is not described in the termination statement. The termination of an election out will not revoke the election out for any prior-year transfer, except for a prior-year transfer subject to section 2642(f) for which the election out is revoked on a timely filed Form 709 for the calendar year in which the ETIP closes or for any prior calendar year. The termination of an election out does not preclude the transferor from making another election out in the same or any subsequent year.

(3) *Election to treat trust as a GST trust*—(i) *In general.* A transferor may elect to treat any trust as a GST trust (GST trust election), without regard to whether the trust is subject to section 2642(f), with respect to—

(A) Any current-year transfer (or any or all current-year transfers) by the electing transferor to the trust;

(B) Any selected future transfers by the electing transferor to the trust;

(C) All future transfers by the electing transferor to the trust; or

(D) Any combination of paragraphs (b)(3)(i)(A) through (C) of this section.

(ii) *Time and manner of making GST trust election.* Except as otherwise provided in forms or other guidance published by the Internal Revenue Service, a GST trust election is made as described in this paragraph (b)(3)(ii). To make a GST trust election, the transferor must attach a statement (GST trust election statement) to a Form 709 filed on or before the due date for timely filing (within the meaning of paragraph (b)(1)(ii) of this section) of the Form 709 for the calendar year in which the first

transfer to be covered by the GST trust election is made (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). The GST trust election statement must identify the trust, specifically describe or otherwise clearly identify the transfers to be covered by the election, and specifically provide that the transferor is electing to have the trust treated as a GST trust with respect to the covered transfers.

(iii) *Effect of GST trust election.* Except as otherwise provided in this paragraph, a GST trust election will cause all transfers made by the electing transferor to the trust that are subject to the election to be deemed to be made to a GST trust as defined in section 2632(c)(3)(B). Thus, the electing transferor's unused GST exemption may be allocated automatically to such transfers in accordance with paragraph (b)(2) of this section. A transferor may prevent the automatic allocation of GST exemption to future transfers to the trust either by terminating the GST trust election in accordance with paragraph (b)(3)(iv) of this section (in the case of trusts that would not otherwise be treated as GST trusts) or by electing out of the automatic allocation of GST exemption in accordance with paragraph (b)(2) of this section.

(iv) *Termination of GST trust election.* Except as otherwise provided in forms or other guidance published by the Service, a GST trust election may be terminated as described in this paragraph (b)(3)(iv). A transferor may terminate a GST trust election made on a Form 709 for a prior year, to the extent that election applied to future transfers or to a transfer subject to section 2642(f). To terminate a GST trust election, the transferor must attach a statement (termination statement) to a Form 709 filed on or before the due date for timely filing (within the meaning of paragraph (b)(1)(ii) of this section) a Form 709 for the calendar year: in which is made the electing transferor's first transfer to which the GST trust election is not to apply; or that is the first calendar year for which the GST trust election is not to apply, even if no transfer is made to the trust during that year. The termination statement must identify the trust, describe the current-year transfer (if any), and provide that the prior GST trust election is terminated. Accordingly, if the trust otherwise does not satisfy the definition of a GST trust, the automatic allocation rules contained in section 2632(c)(1) will not apply to the described current-year transfer or to any future transfers made by the transferor to the trust, unless and until another election under this paragraph (b)(3) is made.

(4) * * * (i) * * * See paragraph (b)(4)(ii) of this section. * * *

(ii) * * * (A) * * * (*1*) * * * For purposes of this paragraph (b)(4)(ii), the Form 709 is deemed filed on the date it is postmarked to the Internal Revenue Service address as directed in forms or other guidance published by the Service. * * *

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(iii) *Examples.* The following examples illustrate the provisions of this paragraph (b):

Example 1. Modification of allocation of GST exemption. On December 1, 2003, T transfers $100,000 to an irrevocable GST trust described in section 2632(c)(3)(B). The transfer to the trust is not a direct skip. The date prescribed for filing the gift tax return reporting the taxable gift is April 15, 2004. On February 10, 2004, T files a Form 709 on which T properly elects out of the automatic allocation rules contained in section 2632(c)(1) with respect to the transfer in accordance with paragraph (b)(2)(iii) of this section, and allocates $50,000 of GST exemption to the trust. On April 13th of the same year, T files an additional Form 709 on which T confirms the election out of the automatic allocation rules contained in section 2632(c)(1) and allocates $100,000 of GST exemption to the trust in a manner that clearly indicates the intention to modify and supersede the prior allocation with respect to the 2003 transfer. The allocation made on the April 13 return supersedes the prior allocation because it is made on a timely-filed Form 709 that clearly identifies the trust and the nature and extent of the modification of GST exemption allocation. The allocation of $100,000 of GST exemption to the trust is effective as of December 1, 2003. The result would be the same if the amended Form 709 decreased the amount of the GST exemption allocated to the trust.

Example 2. Modification of allocation of GST exemption. The facts are the same as in *Example 1* except, on July 8, 2004, T files a Form 709 attempting to reduce the earlier allocation. The return filed on July 8, 2004, is not a timely filed return. The $100,000 GST exemption allocated to the trust, as amended on April 13, 2004, remains in effect because an allocation, once made, is irrevocable and may not be modified after the last date on which a timely filed Form 709 may be filed.

Example 3. Effective date of late allocation of GST exemption. On November 15, 2003, T transfers $100,000 to an irrevocable GST trust described in section 2632(c)(3)(B). The transfer to the trust is not a direct skip. The date prescribed for filing the gift tax return reporting the taxable gift is April 15, 2004. On February 10, 2004, T files a Form 709 on which T properly elects out of the automatic allocation rules contained in section 2632(c)(1) in accordance with paragraph (b)(2)(iii) of this section with respect to that transfer. On December 1, 2004, T files a Form 709 and allocates $50,000 to the trust. The allocation is effective as of December 1, 2004.

Example 4. Effective date of late allocation of GST exemption. T transfers $100,000 to an irrevocable GST trust on December 1, 2003, in a transfer that is not a direct skip. On April 15, 2004, T files a Form 709 on which T properly elects out of the automatic allocation rules contained in section 2632(c)(1) with respect to the entire transfer in accordance with paragraph (b)(2)(iii) of this section and T does not make an allocation of any GST exemption on the Form 709. On September 1, 2004, the trustee makes a taxable distribution from the trust to T's grandchild in the amount of $30,000. Immediately prior to the distribution, the value of the trust assets was $150,000. On the same date, T allocates GST exemption to the trust in the amount of $50,000. The allocation of GST exemption on the date of the transfer is treated as preceding in point of time the taxable distribution. At the time of the GST, the trust has an inclusion ratio of .6667 (1—(50,000/150,000)).

Example 5. Automatic allocation to split-gift. On December 1, 2003, T transfers $50,000 to an irrevocable GST Trust described in section 2632(c)(3)(B). The transfer to the trust is not a direct skip. On April 30, 2004, T and T's spouse, S, each files an initial gift tax return for 2003, on which they consent, pursuant to section 2513, to have the gift treated as if one-half had been made by each. In spite of being made on a late-filed gift tax return for 2003, the election under section 2513 is valid because neither spouse had filed a timely gift tax return for that year. Previously, neither T nor S filed a timely gift tax return electing out of the automatic allocation rules contained in section 2632(c)(1). As a result of the election under section 2513, which is retroactive to the date of T's transfer, T and S are each treated as the transferor of one-half of the property transferred in the indirect skip. Thus, $25,000 of T's unused GST exemption and $25,000 of S's unused GST exemption is automatically allocated to the trust. Both allocations are effective on and after the date that T made the transfer. The result would be the same if T's transfer constituted a direct skip subject to the automatic allocation rules contained in section 2632(b).

Example 6. Partial allocation of GST exemption. On December 1, 2003, T transfers $100,000 to an irrevocable GST trust described in section 2632(c)(3)(B). The transfer to the trust is not a direct skip. The date prescribed for filing the gift tax return reporting the taxable gift is April 15, 2004. On February 10, 2004, T files a Form 709 on which T allocates $40,000 of GST exemption to the trust. By filing a timely Form 709 on which a partial allocation is made of $40,000, T effectively elected out of the automatic allocation rules for the remaining value of the transfer for which T did not allocate GST exemption.

(iv) *Example.* The following example illustrates language that may be used in the statement required under paragraph (b)(2)(iii) of this section to elect out of the automatic allocation rules under various scenarios:

Example 1. On March 1, 2006, T transfers $100,000 to Trust B, a GST trust described in section 2632(c)(3)(B). Subsequently, on

September 15, 2006, T transfers an additional $75,000 to Trust B. No other transfers are made to Trust B in 2006. T attaches an election out statement to a timely filed Form 709 for calendar year 2006. Except with regard to paragraph (v) of this *Example 1*, the election out statement identifies Trust B as required under paragraph (b)(2)(iii)(B) of this section, and contains the following alternative election statements:

(i) "T hereby elects that the automatic allocation rules will not apply to the $100,000 transferred to Trust B on March 1, 2006." The election out of the automatic allocation rules will be effective only for T's March 1, 2006, transfer and will not apply to T's $75,000 transfer made on September 15, 2006.

(ii) "Thereby elects that the automatic allocation rules will not apply to any transfers to Trust B in 2006." The election out of the automatic allocation rules will be effective for T's transfers to Trust B made on March 1, 2006, and September 15, 2006.

(iii) "Thereby elects that the automatic allocation rules will not apply to any transfers to Trust B made by T in 2006 or to any additional transfers T may make to Trust B in subsequent years." The election out of the automatic allocation rules will be effective for T's transfers to Trust B in 2006 and for all future transfers to be made by T to Trust B, unless and until T terminates the election out of the automatic allocation rules.

(iv) "Thereby elects that the automatic allocation rules will not apply to any transfers T has made or will make to Trust B in the years 2006 through 2008." The election out of the automatic allocation rules will be effective for T's transfers to Trust B in 2006 through 2008. T's transfers to Trust B after 2008 will be subject to the automatic allocation rules, unless T elects out of those rules for one or more years after 2008. T may terminate the election out of the automatic allocation rules for 2007, 2008, or both in accordance with the termination rules of paragraph (b)(2)(iii)(E) of this section. T may terminate the election out for one or more of the transfers made in 2006 only on a later but still timely filed Form 709 for calendar year 2006.

(v) "Thereby elects that the automatic allocation rules will not apply to any current or future transfer that T may make to any trust." The election out of the automatic allocation rules will be effective for all of T's transfers (current-year and future) to Trust B and to any and all other trusts (whether such trusts exist in 2006 or are created in a later year), unless and until T terminates the election out of the automatic allocation rules. T may terminate the election out with regard to one or more (or all) of the transfers covered by the election out in accordance with the termination rules of paragraph (b)(2)(iii)(E) of this section.

(c) *Special rules during an estate tax inclusion period*—(1) *In general*—(i) *Automatic allocations with respect to direct skips and indirect skips.* A direct skip or an indirect skip that is subject to an estate tax inclusion period (ETIP) is deemed to have been made only at the close of the ETIP. The transferor may prevent the automatic allocation of GST exemption to a direct skip or an indirect skip by electing out of the automatic allocation rules at any time prior to the due date of the Form 709 for the calendar year in which the close of the ETIP occurs (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year). See paragraph (b)(2)(i) of this section regarding the automatic allocation of GST exemption to an indirect skip subject to an ETIP.

(ii) *Other allocations.* An affirmative allocation of GST exemption cannot be revoked, but becomes effective as of (and no earlier than) the date of the close of the ETIP with respect to the trust. If an allocation has not been made prior to the close of the ETIP, an allocation of exemption is effective as of the close of the ETIP during the transferor's lifetime if made by the due date for filing the Form 709 for the calendar year in which the close of the ETIP occurs (timely ETIP return). An allocation of exemption is effective in the case of the close of the ETIP by reason of the death of the transferor as provided in paragraph (d) of this section.

(iii) *Portion of trust subject to ETIP.* If any part of a trust is subject to an ETIP, the entire trust is subject to the ETIP. See § 26.2642–1(b)(2) for rules determining the inclusion ratio applicable in the case of GSTs during an ETIP.

* * * * *

(5) * * *

Example 5. Election out of automatic allocation of GST exemption for trust subject to an ETIP. On December 1, 2003, T transfers $100,000 to Trust A, an irrevocable GST trust described in section 2632(c)(3) that is subject to an estate tax inclusion period (ETIP). T made no other gifts in 2003. The ETIP terminates on December 31, 2008. T timely files a gift tax return (Form 709) reporting the gift on April 15, 2004. On May 15, 2006, T files a Form 709 on which T properly elects out of the automatic allocation rules contained in section 2632(c)(1) with respect to the December 1, 2003, transfer to Trust A in accordance with paragraph (b)(2)(iii) of this section. Because the indirect skip is not deemed to occur until December 31, 2008, T's election out of automatic GST allocation filed on May 15, 2006, is timely, and will be effective as of December 31, 2008 (unless revoked on a Form 709 filed on or before the due date of a Form 709 for calendar year 2008).

(d) * * * (1) * * * A late allocation of GST exemption by an executor, other than an allocation that is deemed to be made under section 2632(b)(1) or (c)(1), with respect to a lifetime transfer of property is made on Form 706, Form 706NA, or Form 709 (filed on or before the due date of the transferor's estate tax return) and applies as of the date the allocation is filed. * * *

* * * * *

(e) *Effective dates.* This section is applicable as provided in § 26.2601–1(c), with the following exceptions:

(1) Paragraphs (b)(2) and (b)(3), the third sentence of paragraph (b)(4)(i), the fourth sentence of paragraph (b)(4)(ii)(A)(*1*), paragraphs (b)(4)(iii) and (b)(4)(iv), and the fourth sentence of paragraph (d)(1) of this section, which will apply to elections made on or after July 13, 2004; and

(2) Paragraph (c)(1), and *Example 5* of paragraph (c)(5), which will apply to elections made on or after June 29, 2005.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 4.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 5.** In § 602.101, paragraph (b) is amended by adding an entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
26.2632–1	1545–1892
* * * * *	

Mark E. Matthews.

Deputy Commissioner for Services and Enforcement.

Approved: June 21, 2005.

Eric Solomon,

Acting Deputy Assistant Secretary for Tax Policy.

[FR Doc. 05–12759 Filed 6–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 3

OMB Control Numbers Under the Paperwork Reduction Act

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Technical amendment.

SUMMARY: This technical amendment updates the listing of Office of Management and Budget (OMB) control numbers for MSHA's standards and regulations. We are prohibited from conducting a collection of information unless we display a currently valid OMB control number. This consolidated listing assists the public in searching for current MSHA standards and regulations that include information collection, recordkeeping, and reporting requirements approved by OMB under the Paperwork Reduction Act of 1995.

DATES: Effective June 29, 2005.

FOR FURTHER INFORMATION CONTACT: Rebecca Smith, Acting Director; Office of Standards, Regulations, and Variances, MSHA; phone: 202–693–9443; FAX: 202–693–9441; e-mail: *smith.rebecca@dol.gov*.

SUPPLEMENTARY INFORMATION: We (MSHA) first consolidated our listing of OMB control numbers in a final rule published on June 29, 1995 (60 FR 33719). This action codified the OMB control numbers for our standards and regulations in one location to assist the public in quickly determining whether a specific information collection requirement was approved by OMB. Table 1 in 30 CFR 3.1 displays the OMB control number for each section containing a requirement for the collection, reporting, recordkeeping, or dissemination of information.

We are prohibited from conducting a collection of information unless it displays a currently valid OMB control number, and we inform the potential responders that they are not required to respond unless the collection of information displays a currently valid OMB control number. By publishing this list, we are following the recommendation of OMB pursuant to 5 CFR 1320.3(f)(3) and 1320.5(b)(2)(ii)(C) that, even where we have already provided the above information "in a manner reasonably calculated to inform the public," that we also "publish such information along with a table or codified section of OMB control numbers to be included in the *Code of Federal Regulations*."

This revision updates our current list of OMB control numbers to include new control numbers approved by OMB for standards and regulations completed since the last update and any changes made through the renewal of previously issued OMB control numbers. There are no substantive changes or renewals made to information collection requirements by this technical amendment.

Information collection requirements go through the public review process, including notice and comment, as part of the rule to which they apply. Likewise, the renewal of an OMB control number also requires public review, including notice and comment. As a result, we find that it is unnecessary to have further public notice and comment and that, therefore, there is "good cause" under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA) to issue this technical amendment to Table 1 in 30 CFR part 3 without prior public notice and comment.

We also determined that it is unnecessary to delay the effective date. The technical amendment contains no new requirements for which the public would need time, beyond that provided for in the regulation itself, to plan compliance. We find, therefore, there is "good cause" to except this action from the 30-day delayed effective date requirement under 5 U.S.C. 553(d)(3) of the APA.

List of Subjects in 30 CFR Part 3

Mine safety and health, Reporting and recordkeeping requirements.

Dated: June 23, 2005.

David G. Dye,

Deputy Assistant Secretary of Labor for Mine Safety and Health.

■ Accordingly, under the authority of 30 U.S.C. 957, chapter I of title 30, Code of Federal Regulations is amended as set forth below.

PART 3—[AMENDED]

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

Authority: 30 U.S.C. 957; 44 U.S.C. 3501–3520.

■ 2. Amend § 3.1 by revising Table 1 to read as follows:

§ 3.1 OMB control numbers.

* * * * *

TABLE 1.—OMB CONTROL NUMBERS

30 CFR citation	OMB control No.
Subchapter B—Testing, Evaluation, and Approval of Mining Products	
6.10	1219–0066
7.3	1219–0066
7.4	1219–0066
7.6	1219–0066
7.7	1219–0066
7.23	1219–0066
7.27	1219–0066
7.28	1219–0066
7.29	1219–0066
7.30	1219–0066
7.43	1219–0066
7.46	1219–0066
7.47	1219–0066
7.48	1219–0066
7.49	1219–0066
7.51	1219–0066
7.63	1219–0066
7.69	1219–0066
7.71	1219–0066
7.83	1219–0119
7.90	1219–0119
7.97	1219–0119
7.105	1219–0119
7.303	1219–0066
7.306	1219–0066
7.309	1219–0066
7.311	1219–0066
7.403	1219–0066
7.407	1219–0066
7.408	1219–0066
7.409	1219–0066
15.4	1219–0066
15.8	1219–0066
18.6	1219–0066
18.15	1219–0066
18.53	1219–0116
18.53(h)	1219–0066
18.81	1219–0066
18.82	1219–0066
18.93	1219–0066
18.94	1219–0066
19.3	1219–0066
19.13	1219–0066
20.3	1219–0066
20.14	1219–0066
22.4	1219–0066
22.11	1219–0066
23.3	1219–0066
23.14	1219–0066
27.4	1219–0066
27.6	1219–0066
27.11	1219–0066
28.10	1219–0066
28.25	1219–0066
28.30	1219–0066
28.31	1219–0066
33.6	1219–0066
33.12	1219–0066
35.6	1219–0066
35.12	1219–0066
36.6	1219–0066
36.12	1219–0066
Subchapter G—Filing and Other Administrative Requirements	
40.3	1219–0042
40.4	1219–0042
40.5	1219–0042
41.10	1219–0042
41.11	1219–0042
41.12	1219–0042
41.20	1219–0042
43.4	1219–0014
43.7	1219–0014
44.9	1219–0065
44.10	1219–0065
44.11	1219–0065
45.3	1219–0040
45.4	1219–0040

TABLE 1.—OMB CONTROL NUMBERS—Continued

30 CFR citation	OMB control No.
Subchapter H—Education and Training	
46.3	1219–0131
46.5	1219–0131
46.6	1219–0131
46.7	1219–0131
46.8	1219–0131
46.9	1219–0131
46.11	1219–0131
47.31	1219–0133
47.41	1219–0133
47.51	1219–0133
47.71	1219–0133
47.73	1219–0133
48.3	1219–0009
48.9	1219–0009
48.23	1219–0009
48.29	1219–0009
49.2	1219–0078
49.3	1219–0078
49.4	1219–0078
49.6	1219–0078
49.7	1219–0078
49.8	1219–0078
49.9	1219–0078
Subchapter I—Accidents, Injuries, Illnesses, Employment, and Production in Mines	
50.10	1219–0007
50.11	1219–0007
50.20	1219–0007
50.30	1219–0007
Subchapter K—Metal and Nonmetal Mine Safety and Health	
56.1000	1219–0042
56.3203(a)	1219–0121
56.5005	1219–0048
56.13015	1219–0089
56.13030	1219–0089
56.14100	1219–0089
56.18002	1219–0089
56.19022	1219–0034
56.19023	1219–0034
56.19057	1219–0049
56.19121	1219–0034
57.1000	1219–0042
57.3203(a)	1219–0121
57.3461	1219–0097
57.5005	1219–0048
57.5037	1219–0003
57.5040	1219–0003
57.5047	1219–0039
57.5060	1219–0135
57.5065	1219–0135
57.5066	1219–0135
57.5067	1219–0135
57.5070	1219–0135
57.5071	1219–0135
57.5075	1219–0135
57.8520	1219–0016
57.8525	1219–0016
57.11053	1219–0046
57.13015	1219–0089
57.13030	1219–0089
57.14100	1219–0089
57.18002	1219–0089

TABLE 1.—OMB CONTROL NUMBERS—Continued

30 CFR citation	OMB control No.
57.19022	1219–0034
57.19023	1219–0034
57.19057	1219–0049
57.19121	1219–0034
57.22004(c)	1219–0103
57.22204	1219–0030
57.22229	1219–0103
57.22230	1219–0103
57.22231	1219–0103
57.22239	1219–0103
57.22401	1219–0096
57.22606	1219–0095
Subchapter M—Uniform Mine Health Regulations	
62.110	1219–0120
62.130	1219–0120
62.170	1219–0120
62.171	1219–0120
62.172	1219–0120
62.173	1219–0120
62.174	1219–0120
62.175	1219–0120
62.180	1219–0120
62.190	1219–0120
Subchapter O—Coal Mine Safety and Health	
70.201(c)	1219–0011
70.202	1219–0011
70.204	1219–0011
70.209	1219–0011
70.220	1219–0011
71.201(c)	1219–0011
71.202	1219–0011
71.204	1219–0011
71.209	1219–0011
71.220	1219–0011
71.300	1219–0011
71.301	1219–0011
71.403	1219–0024
71.404	1219–0024
72.500	1219–0124
72.503	1219–0124
72.510	1219–0124
72.520	1219–0124
75.100	1219–0127
75.153(a)(2)	1219–0001
75.155	1219–0127
75.159	1219–0127
75.160	1219–0127
75.161	1219–0127
75.204(a)	1219–0121
75.215	1219–0004
75.220	1219–0004
75.221	1219–0004
75.222	1219–0004
75.223	1219–0004
75.310	1219–0088
75.312	1219–0088
75.342	1219–0088
75.351	1219–0088, –0116
75.360	1219–0088, –0044
75.361	1219–0088
75.362	1219–0088

TABLE 1.—OMB CONTROL NUMBERS—Continued

30 CFR citation	OMB control No.
75.363	1219–0088, –0119
75.364	1219–0088
75.370	1219–0088
75.371	1219–0088, –0119
75.372	1219–0073
75.373	1219–0073
75.382	1219–0088
75.512	1219–0116
75.703–3(d)(11)	1219–0116
75.800–4	1219–0116
75.820(b),(e)	1210–0116
75.821	1219–0116
75.900–4	1219–0116
75.1001–1(c)	1219–0116
75.1100–3	1219–0054
75.1103–8	1219–0054
75.1103–11	1219–0054
75.1200	1219–0073
75.1200–1	1219–0073
75.1201	1219–0073
75.1202	1219–0073
75.1202–1	1219–0073
75.1203	1219–0073
75.1204	1219–0073
75.1204–1	1219–0073
75.1321	1219–0025
75.1327	1219–0025
75.1400–2	1219–0034
75.1400–4	1219–0034
75.1432	1219–0034
75.1433	1219–0034
75.1501	1219–0054
75.1502	1219–0054
75.1702	1219–0041
75.1712–4	1219–0024
75.1712–5	1219–0024
75.1713–1	1219–0078
75.1714–3(e)	1219–0044
75.1716	1219–0020
75.1716–1	1219–0020
75.1716–3	1219–0020
75.1721	1219–0073
75.1901	1219–0119
75.1904(b)(4)(i)	1219–0119
75.1911	1219–0119
75.1912	1219–0119
75.1914	1219–0119
75.1915	1219–0119, –0124
77.100	1219–0127
77.103(a)(2)	1219–0001
77.105	1219–0127
77.106	1219–0127
77.107	1219–0127
77.107–1	1219–0127
77.215	1219–0015
77.215–2	1219–0015
77.215–3	1219–0015
77.215–4	1219–0015
77.216–2	1219–0015
77.216–3	1219–0015
77.216–4	1219–0015
77.216–5	1219–0015
77.502	1219–0116
77.800–2	1219–0116
77.900–2	1219–0116
77.1000	1219–0026
77.1000–1	1219–0026

TABLE 1.—OMB CONTROL NUMBERS—Continued

30 CFR citation	OMB control No.
77.1101	1219–0051
77.1200	1219–0073
77.1201	1219–0073
77.1202	1219–0073
77.1404	1219–0034
77.1432	1219–0034
77.1433	1219–0034
77.1702	1219–0078
77.1713	1219–0083
77.1900	1219–0019
77.1901	1219–0082
77.1906	1219–0034
77.1909–1	1219–0025
90.201(c)	1219–0011
90.202	1219–0011
90.204	1219–0011
90.209	1219–0011
90.220	1219–0011
90.300	1219–0011
90.301	1219–0011

[FR Doc. 05–12816 Filed 6–28–05; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 75

RIN 1219–AA76

Underground Coal Mine Ventilation—Safety Standards for the Use of a Belt Entry as an Intake Air Course To Ventilate Working Sections and Areas Where Mechanized Mining Equipment Is Being Installed or Removed

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Final rule; conforming to the Court's opinion.

SUMMARY: On April 2, 2004, the Mine Safety and Health Administration published a final rule revising underground coal mine ventilation standards to allow the use of air traveling in the belt entry to ventilate working sections or areas where mechanized mining equipment is being installed or removed. The International Union, United Mine Workers of America and Jim Walter Resources, Inc. challenged the rule. On May 24, 2005, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion denying the Union's petition for review and granting the petition of Jim Walter Resources, Inc. Jim Walter Resources, Inc.'s petition challenged the Secretary of Labor's promulgation of 30 Code of Federal Regulations section 75.350(a)(2), which, under certain circumstances, set a velocity cap of 500 feet per minute in the belt entry of underground coal mines. This document provides notice of, and effectuates, the Court's opinion to vacate paragraph (a)(2) of section 75.350 and remand the matter to the Secretary of Labor.

DATES: Effective June 29, 2005.

FOR FURTHER INFORMATION CONTACT: Rebecca J. Smith, Acting Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939. Ms. Smith can be reached at *smith.rebecca@dol.gov* (Internet e-mail), (202) 693–9440 (voice), or (202) 693–9441 (facsimile). The document is also available on the Internet at *http://www.msha.gov/regsinfo.htm*. We maintain a listserve on our Web site that enables subscribers to receive e-mail notification when we publish rulemaking documents in the **Federal Register**. To subscribe to the listserve, visit our site at *http://www.msha.gov/subscriptions/subscribe.aspx*.

SUPPLEMENTARY INFORMATION: On April 2, 2004, the Mine Safety and Health Administration (MSHA) published a final rule (69 FR 17480) revising underground coal mine ventilation standards to allow the use of air traveling in the belt entry (belt air) to ventilate working sections or to areas where mechanized mining equipment is being installed or removed. In response to the belt air rule's publication, the International Union, United Mine Workers of America ("the Union") and Jim Walter Resources, Inc. ("JWR") filed petitions with the Court of Appeals for the DC Circuit challenging the rule on separate grounds. The court consolidated both petitions and issued a decision, *International Union, United Mine Workers of America* v. *Mine Safety and Health Administration*, 407 F.3d 1250 (DC Cir. 2005). The Court denied the Union's petition for review. In the petition of JWR, the coal mining company challenged the Secretary's promulgation of 30 Code of Federal Regulations (CFR) 75.350(a)(2), which states that "[t]he maximum air velocity in the belt entry must be no greater than 500 feet per minute unless otherwise approved in the mine ventilation plan." JWR contended that the 500 feet per minute velocity cap referenced in the section was invalid because the Secretary failed to comply with the notice-and-comment requirements of section 101(a) of the Federal Mine Safety and Health Act of 1977, 30 United States Code (U.S.C.) 811(a), and the Administrative Procedure Act, 5 U.S.C. 553(b).

The Court of Appeals granted JWR's petition; vacated paragraph (a)(2) of § 75.350(a)(2); and remanded the matter to the Secretary of Labor. In compliance with the Court's opinion the provision is removed from 30 CFR and the remaining provision is renumbered.

List of Subjects in 30 CFR Part 75

Mandatory safety standards, Mine safety and health, Underground coal mines, Ventilation.

Dated: June 23, 2005.

David G. Dye,

Deputy Assistant Secretary of Labor for Mine Safety and Health.

■ Chapter I of Title 30, part 75 of the Code of Federal Regulations is amended as follows:

PART 75—MANDATORY SAFETY STANDARDS—UNDERGROUND COAL MINES

■ 1. The authority citation for part 75 continues to read as follows:

Authority: 30 U.S.C 811.

■ 2. Amend § 75.350 by removing paragraph (a)(2) and redesignating paragraph (a)(3) as the new (a)(2).

[FR Doc. 05–12813 Filed 6–28–05; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

RIN 0596–AC29

Sale and Disposal of National Forest System Timber; Timber Sale Contracts; Indices To Determine Market-Related Contract Term Additions

AGENCY: Forest Service, USDA.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule amends the current regulation by requiring the use of three alternative Producer Price Indices (PPI) from the Bureau of Labor Statistics in lieu of the four PPI that the Forest Service has monitored for use in timber sale contract market-related contract term additions. After December 2003, the Bureau of Labor Statistics discontinued providing three of the four PPI that the Forest Service has monitored and changed the reference number for the fourth PPI. The Forest Service is issuing an interim final rule implementing the use of the three alternative PPI, prior to

publishing a final rule. By using the three alternative PPI, the Forest Service will be able to continue providing market-related contract term additions during drastic reductions in wood products market prices.

DATES: This interim final rule is effective June 29, 2005. Comments must be received in writing on or before August 29, 2005.

ADDRESSES: Send written comments by mail to USDA Forest Service, Director Forest Management, 1400 Independence Avenue, SW., Mail Stop 1103, Washington, DC 20250–0003; via e-mail to: *MRCTA@fs.fed.us;* or via facsimile to (202) 205–1045. Comments may also be submitted via the World Wide Web Internet Web site at: *http://www.regulations.gov.* All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. Information pertaining to the indices is available for public review on the Forest Service World Wide Web/Internet site at: *http://www.fs.fed.us/forestmanagement/infocenter/index.shtml.* Alternatively, these can be viewed in the office of the Director of Forest Management, Third Floor, Southwest Wing, Yates Building, 201 14th Street, SW., Washington, DC. Visitors are encouraged to call ahead to (202) 205–1496 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Don Benner, Forest Management Staff, at (202) 205–0855, or Richard Fitzgerald, Forest Management Staff, (202) 205–1753.

SUPPLEMENTARY INFORMATION:

Background

Experience indicates that substantial lumber market declines that would warrant a market-related contract term addition generally coincide with substantial economic distress in the wood products industry. Such economic distress broadly affects community stability, the ability of the wood products industry to supply construction lumber and other wood products from domestic sources, and threatens the existence of wood manufacturing plants needed to meet future demands for wood products.

The softwood lumber market decline in 1980–1982 resulted in large numbers of defaults on timber sale contracts. The market-related contract term addition policy was developed in order to establish procedures under the Federal Timber Contract Payment Modification Act or "Buyout Act" for extending contract termination dates in response to severely declining wood products markets. The Buyout Act was considered an extraordinary measure to respond to a crisis, but also recognized the need to prevent such a crisis from occurring in the future. Accordingly, on December 7, 1990, the Department published a final rule (55 FR 50643) to establish procedures at 36 CFR 223.52 for extending contract termination dates to avoid another crisis like the crisis which occurred in the early 1980s due to severe adverse conditions in the wood products markets. The rule provides that if the Chief finds that adverse wood products market conditions have resulted in a drastic reduction in wood product prices and the purchaser of a qualifying contract makes a written request, additional time may be added to the contract term.

A finding that a drastic reduction in wood product prices has occurred constitutes a finding that the substantial overriding public interest justifies extension of certain timber sale contracts, in accordance with the National Forest Management Act of 1976 (16 U.S.C. 72a(c)) and existing regulations at 36 CFR 223.115(b).

Since adoption of the rule, a drastic reduction in wood product prices has occurred in 1991, 1995, 1998, and 2000. As a result, the Forest Service notified purchasers and, upon the purchasers' written request, added an additional year to timber sale contract terms for qualifying contracts.

The rule required the use of various wood product Producer Price Indices (PPI), prepared by the Department of Labor, Bureau of Labor Statistics (BLS), to determine whether a drastic reduction in wood product prices has occurred.

Appearing before the House Appropriations Subcommittee on Interior and Related Agencies, on April 28, 1992 (Testimony Report number, T–RCED–92–58), the General Accountability Office (GAO) testified that in implementing the regulation in 1991, the Forest Service used a formula with inappropriate data to reach a determination that prices for wood products from the Pacific Northwest had drastically declined. Specifically, GAO testified that the Forest Service used a formula developed with price data that were not adjusted to account for seasonal fluctuations. GAO noted that if the Forest Service had used the BLS' seasonally adjusted price data, the formula would not have indicated a drastic price reduction and would not have triggered contract extensions on the west side of the Pacific Northwest.

GAO further testified that the BLS advises use of seasonally adjusted data are designed to eliminate the effects of normal market fluctuations that occur at about the same time, and in about the same magnitude, each year, such as price movements resulting from normal weather patterns and regular production and marketing cycles. GAO recommended that the Secretary of Agriculture direct the Chief of the Forest Service to stop using the BLS' unadjusted indices in reaching determinations that wood product prices have drastically declined.

The Secretary of Agriculture agreed to re-examine the use of the BLS' unadjusted PPI to determine whether wood product prices showed a drastic decline. Subsequently, the Forest Service concurred that seasonally adjusted PPI, adjusted to a constant dollar base, could be used to determine whether a drastic reduction in wood product prices has occurred and, therefore, whether a market-related contract term addition should be granted. However, after December 1994, the BLS stopped applying seasonal adjustments to the monitored PPI, since they found insufficient statistical evidence to demonstrate a need to continue adjusting these indices.

The initial PPI from the BLS used by the Forest Service were from the commodity series and included lumber indices for Douglas Fir, Dressed (081101); Southern Pine, Dressed (081102); Other Species, Dressed (081103); and Hardwood Lumber (0812). However, on May 1, 1998, the Department published a final rule (63 FR 24110) requiring the use of Industry Series PPI from the BLS, rather than the previously required indices in the commodity series. In addition to changing the index series, the final rule made a number of other technical changes. The Industry Series PPI used were Western Softwood (SIC 24214), Eastern Softwood (SIC 24213), and Hardwood Lumber (SIC 24211), which were considered more representative of the sawmill industry than the prior indices in the commodity series. The Forest Service also added the Industry Series Wood Chips (SIC 24215) PPI to measure market changes in the price of chips and to address the volatility of the wood chip market. In order to increase the utilization of small diameter material, many contracts include or consist primarily of chipable material.

However, after December 2003, the BLS discontinued publishing the following three lumber PPI: Western Softwood Lumber (SIC 24214), Eastern Softwood Lumber (SIC 24213), and Hardwood Lumber (SIC 24211), which were used by the Forest Service. The BLS also changed the Wood Chips PPI number from SIC 24215 to NAICS

3211135. In lieu of the three discontinued PPI, the Forest Service plans to use, effective retroactively to January, 2004, the following two lumber PPI: Softwood Lumber (0811) and Hardwood Lumber (0812). The Forest Service will continue to use the Wood Chips PPI (reference number NAICS 3211135).

A review of other readily available indices, such as Random Lengths indices and Western Wood Products Association indices, representing the same wood product markets shows that indices comparable to these PPI do not exist. Some regional indices are available; however, the timing, frequency, and procedure for collection of information for these indices varies. Some index services or associations use previous month invoice prices that are provided by their members, while other services use current month negotiated bid prices or sale prices. Wood product price indices, prepared nationally and consistently, are not available.

The BLS discontinued publishing seasonally adjusted versions of the Softwood Lumber (0811) and Hardwood Lumber (0812) PPI after December 2003. None of the three indices to be implemented in this interim final rule are seasonally adjusted. Each PPI is adjusted to a constant dollar base by dividing it by the PPI for All Commodities (00000000) to eliminate changes due to inflation and deflation.

A drastic reduction in wood product prices has occurred when, for 2 or more consecutive quarters after contract award, the applicable adjusted PPI is less than 85 percent of the average of such adjusted indices for the 4 highest of the 8 calendar quarters immediately prior to the qualifying quarter.

Forest supervisors determine which of the PPI that the Forest Service monitors is used for each contract. The selected PPI is representative of the predominant species and product, by volume, included in the contract.

Good Cause Statement

The Forest Service is issuing this interim final rule implementing the use of three alternative PPI to be able to continue providing contract term additions due to drastic reductions in wood products markets, prior to publishing a final rule. By using the three alternative PPI, the Forest Service will be able to continue providing market-related contract term additions during drastic reductions in wood products market prices.

Regulatory Certifications

Regulatory Impact

This interim final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. OMB has determined that this is not a significant rule. This rule will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. In short, little or no effect on the national economy will result from this rule change. This action consists of administrative changes to regulations affecting timber sale contract length. The PPI selected reflect the cyclic nature of wood products markets and help the agency determine whether a drastic decline has occurred in these particular markets.

Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this interim final rule is not subject to OMB review under Executive Order 12866.

Moreover, this interim final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 610 *et seq.*), and it is hereby certified that this action will not have a significant economic impact on a substantial number of small entities as defined by that act. Failure to adopt the PPI selected for measuring drastic reductions in wood product prices may result in both small purchasers and large purchasers not getting additional time to complete their contracts. Modifications to timber sale contract price indices have the intended effect of allowing purchasers additional time to complete contracts when severe adverse conditions have occurred in the wood products markets.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, which the President signed into law on March 22, 1995, the Department has assessed the effects of this rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Environmental Impact

This interim final rule deals with business practices related to timber sale contracts and, as such, has no direct effect on the amount, location, or manner of timber offered for purchase. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." The Department's preliminary assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

Controlling Paperwork Burdens on the Public

This interim final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR 1320 and, therefore, imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR part 1320 do not apply.

Comments Invited

The Forest Service invites comments on this interim final rule implementing the use of selected Commodity and Industry Series PPI from the BLS to apply market-related contract term additions to timber sale contracts. Comments received will be considered in the development of the final rule, which will be published in the **Federal Register**.

List of Subjects in 36 CFR Part 223

Administrative practice and procedure, Exports, Forests and forest products, Government contracts, National forests, Reporting and recordkeeping requirements.

■ Therefore, for the reasons set forth in the preamble, part 223 of title 36 of the Code of Federal Regulations is amended as follows:

PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213; 16 U.S.C. 618, 104 Stat. 714–726, 16 U.S.C. 620–620j, unless otherwise noted.

■ 2. Amend § 223.52 by revising paragraph (b)(1)(i) to read as follows:

§ 223.52 Market-related contract term additions.

* * * * *

(b)* * *

(1)* * *

(i) The Forest Service shall monitor and use only the following indices:

BLS producer price index	Index series	Index code
Hardwood Lumber.	Commodity	0812
Softwood Lumber	Commodity	0811
Wood Chips	Industry	3211135

* * * * *

Dated: June 17, 2005.

Mark Rey,

Under Secretary, Natural Resources and Environment.

[FR Doc. 05–12811 Filed 6–28–05; 8:45 am]

BILLING CODE 3410–11–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[Docket ID No. R10–OAR–2005–WA–0001; FRL–7929–7]

Approval and Promulgation of State Implementation Plans: Washington; Spokane Carbon Monoxide Nonattainment Area; Designation of Areas for Air Quality Planning Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: On November 29, 2004, the State of Washington submitted a carbon monoxide (CO) maintenance plan for the Spokane serious nonattainment area to EPA for approval. The State concurrently requested that EPA redesignate the Spokane CO serious nonattainment area to attainment for the National Ambient Air Quality Standard (NAAQS) for CO. In this action, EPA is approving the maintenance plan and redesignating the Spokane serious CO nonattainment area to attainment.

DATES: This direct final rule will be effective on August 29, 2005, without further notice, unless EPA receives comments by July 29, 2005. If comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: You may submit comments, identified by Docket ID No. R10–OAR–WA–2005–0001, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- Fax: (206)–553–0110.
- Mail: Office of Air, Waste, and Toxics (AWT–107), U.S. EPA Region 10, 1200 Sixth Ave., Seattle, Washington – 98101–1128.
- Hand Delivery/Courier: EPA Region 10, Service Center, 14th Floor, 1200 Sixth Ave., Seattle, Washington 98101; Attention: Connie Robinson, Office of Air, Waste and Toxics (AWT–107). Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. R10–OAR–2005–WA–0001. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to *I. General Information* of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Office of Air, Waste, and Toxics (AWT–107), U. S. EPA Region 10, 1200 Sixth Ave., Seattle, Washington 98101; open from 8 a.m.–4:30 p.m. Monday through Friday, excluding legal holidays. The telephone number is (206) 553–4273. Copies of the submittal, and other information relevant to this proposal are also available for public inspection during normal business hours at the Washington State Department of Ecology, 300 Desmond Drive SE, Lacey, Washington 98503.

FOR FURTHER INFORMATION CONTACT: Connie L. Robinson, Office of Air, Waste and Toxics (AWT–107), EPA Region 10, 1200 Sixth Avenue, Seattle WA 98101–1128, telephone number: (206) 553–1086; fax number: 206–553–0110; or e-mail address: *robinson.connie@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, wherever "we," "us," or "our" is used, we mean the EPA. Information is organized as follows:

I. General Information

What Should I Consider as I Prepare My Comments for EPA?

A. *Submitting Confidential Business Information (CBI).* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, 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 claimed as CBI. In addition to one complete version of the comment that includes 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. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identify the rulemaking by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action Is EPA Taking?

EPA is approving the Spokane CO maintenance plan and redesignating the Spokane Nonattainment Area from nonattainment to attainment for CO as requested by the State of Washington on November 29, 2004. The maintenance plan demonstrates that Spokane will be able to remain in attainment for the next 10 years. The Spokane, Washington CO nonattainment area is eligible for redesignation to attainment because air quality data shows that it has not recorded a violation of the primary or secondary CO air quality standards since 1996.

III. What Is the Background for This Action?

Areas meeting the requirements of section 107(d) of the Clean Air Act (the Act) were designated nonattainment for CO by operation of law. Under section 186(a) of the Act, each CO nonattainment area was also classified by operation of law as either moderate or serious depending on the severity of the area's air quality problems. Spokane was classified as a moderate CO nonattainment area. Moderate CO nonattainment areas were expected to attain the CO NAAQS as expeditiously as practicable but no later than December 31, 1995. If a moderate CO nonattainment area was unable to attain the CO NAAQS by December 31, 1995, the area was reclassified as a serious CO nonattainment area by operation of law. Spokane was unable to meet the CO NAAQS by December 31, 1995, and was reclassified as a serious nonattainment area effective April 13, 1998.

EPA made a determination based on air quality data that the Spokane CO nonattainment area in Washington attained the NAAQS for CO as of December 31, 2000, effective September 21, 2001 (66 FR 44060, August 22, 2001).

On September 20, 2001, and November 22, 2004, the Washington Department of Ecology (Ecology) submitted the Spokane CO attainment plan as a revision to the Washington SIP. We reviewed and subsequently approved the plan effective June 13, 2005. (See 70 FR 24991, May 12, 2005.)

IV. What Evaluation Criteria Was Used for the Maintenance Plan and Redesignation Request Review?

Section 107(d)(3)(E) of the Act states that EPA can redesignate an area to attainment if the following conditions are met:

1. The State must attain the applicable NAAQS.

2. The area must have a fully approved SIP under section 110(k) of the Act and the area must meet all the relevant requirements under section 110 and part D of the Act.

3. The air quality improvement must be permanent and enforceable.

4. The area must have a fully approved maintenance plan pursuant to section 175A of the Act.

V. EPA's Evaluation of the Spokane Maintenance Plan and Redesignation Request

EPA has reviewed the State's maintenance plan and redesignation request. EPA believes the Ecology submittal meets the requirements of section 107(d)(3)(E). The following is a summary of EPA's evaluation and a description of how each of the above requirements is met.

A. How Does the State Show That the Area Has Attained the CO NAAQS?

To attain the CO NAAQS, an area must have complete quality-assured data showing no more than one exceedance of the standard per year at any monitoring site in the nonattainment area for at least two consecutive years. The redesignation of Spokane is based on air quality data that shows that the CO standard was not violated from 1997 through 2004, or since. These data were collected by Ecology in accordance with 40 CFR 50.8, and entered in the EPA Air Quality System database following EPA guidance on quality assurance and quality control. Since the Spokane, Washington area has complete quality-assured monitoring data showing attainment with no violations after 1996, the area has met the statutory criterion for attainment of the CO NAAQS. EPA has already found the Spokane area attained the NAAQS.

B. Does the Area Have a Fully Approved SIP and Has the Area Met All the Relevant Requirements Under Section 110 and Part D of the Clean Air Act?

Yes. Spokane was classified as a moderate nonattainment area upon enactment of the Clean Air Act in 1990. Spokane was unable to meet the CO NAAQS by December 31, 1995, and was reclassified a serious nonattainment area effective April 13, 1998. Therefore, the requirements applicable to the Spokane nonattainment area for inclusion in the Washington SIP included an attainment demonstration, 1996 base year emission inventory with periodic updates, low enhanced motor vehicle inspection/maintenance (I/M) program, oxygenated gasoline program, contingency measures, conformity procedures, and a permit program for new or modified major stationary

sources. EPA has previously approved all of these required elements into the Washington SIP (70 FR 24991, May 12, 2005).

C. Are the Improvements in Air Quality Permanent and Enforceable?

Yes. Emissions reductions were achieved through a number of permanent and enforceable control measures including the Federal Motor Vehicle Control Program establishing emission standards for new motor vehicles; a low enhanced I/M program; an Oxygenated Gasoline Program; a Washington Wood Stove Curtailment Program; and Transportation Control Measures.

Ecology has demonstrated that permanent and enforceable emission reductions are responsible for the air quality improvement and that the CO emissions in the base year are not artificially low due to a local economic downturn or unusual or extreme weather patterns. We believe the combination of certain existing EPA-approved SIP and Federal measures result in permanent and enforceable reductions in ambient CO levels that have allowed the area to attain the NAAQS.

D. Has the State Submitted a Fully Approved Maintenance Plan Pursuant to Section 175A of the Clean Air Act?

Section 175A sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. The plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after the Administrator approves a redesignation to attainment. Probabilistic rollback modeling conducted by Spokane indicated that no additional emission reductions must be achieved to ensure attainment of the NAAQS for the maintenance period. Eight years after the redesignation, the State must submit a revised maintenance plan which demonstrates attainment for the ten years following the initial ten-year period. The maintenance plan must contain contingency measures to be implemented if future NAAQS violations occur. The Spokane CO maintenance plan meets the requirements of 175A.

E. Did the State Provide Adequate Base Year and Maintenance Year Emissions Inventories?

Yes. Ecology submitted comprehensive inventories of CO emissions from point, area and mobile sources using 2002 as the base year. Since air monitoring recorded attainment of CO in 2002, this is an acceptable year for the base year inventory. This data was then used in calculations to demonstrate that the CO standard will be maintained in future years. Ecology calculated inventories for 2010 and 2015. Future emission estimates are based on forecast assumptions of reductions due to control measures, growth of the regional economy, and vehicle miles traveled.

Mobile sources are the greatest source of CO. Although vehicle use is expected to increase in the future, more stringent Federal automobile standards and removal of older, less efficient cars over time will still result in an overall decline in CO emissions. The projections in the maintenance plan demonstrate that future emissions, assuming no oxygenated gasoline program, are not expected to exceed base year levels.

Total CO emissions were projected from the 2002 base year out to 2010 and 2015. These projected inventories were prepared according to EPA guidance. Because compliance with the 8-hour CO standard is linked to average daily emissions, emission estimates reflecting a typical winter season day (tons of CO per day) were used for the maintenance demonstration. The following table summarizes the 2002 base year actual emissions and the 2010 and 2015 projected emissions. The on-road mobile emissions were modeled for 2010 and 2015 using MOBILE6.2.

Table 1.—2002 Attainment/Base Year Actual Emissions, and 2010 and 2015 Projected Emissions

(TONS CO/WINTER DAY)

Year	Mobile	Area	Non-road	Point*	Total
2002 Base Year (Actuals)	217	38.16	65.25	0.68	321
2010 (Projected)	215	53.60	79.64	4.53	353
2015 (Projected)	182	57.18	85.2	4.53	328

*Kaiser carbon plant did not operate in 2002; allowable emissions for Kaiser carbon plant included in projected years only.

F. How Will the State Continue To Verify Attainment?

In accordance with 40 CFR part 58 and EPA's Redesignation Guidance, Ecology has committed to continue monitoring in this area in accordance with 40 CFR part 58. Ecology will also conduct a comprehensive review of plan implementation and air quality status eight years after redesignation. The State will then submit a SIP revision that includes a full emissions inventory update and provides for the continued maintenance of the standard ten years beyond the initial ten-year period.

G. What Contingency Measures Does the State Provide?

Section 175A(d) of the CAA requires that a maintenance plan include contingency provisions. Spokane County Air Pollution Control Agency (SCAPCA) will drop the winter oxygenated fuels requirement for Spokane after redesignation. One of the contingencies in the maintenance plan is that SCAPCA will re-adopt this requirement if the CO standard is violated. In addition, violation of the standard will initiate a local process by SCAPCA, Spokane Regional Transportation Council (SRTC), Ecology and EPA to identify and evaluated potential contingency measures other than or in addition to the oxygenated fuels requirement. SCAPCA will initiate a subcommittee process in coordination with SRTC, Ecology, and EPA to begin evaluating potential contingency measures no more than 60 days after being notified by Ecology that a violation has occurred. The maintenance plan requires that the necessary contingency measures will be implemented within one year of the date of the CO NAAQS violation.

H. How Will The State Provide for Subsequent Maintenance Plan Revisions?

In accordance with section 175A(b) of the Act, the State has agreed to submit a revised maintenance SIP eight years after the area is redesignated to attainment. That revised SIP must provide for maintenance of the standard for an additional ten years. It will include a full emissions inventory update and projected emissions

demonstrating continued attainment for ten additional years.

I. Is the Motor Vehicle Emission Budget Approvable as Required by Section 176(c)(2)(A) of the Clean Air Act and Outlined in the Conformity Rules, 40 CFR 93.118(e)(4)?

Yes. Section 176(c)(2)(A) of the Act requires regional transportation plans to be consistent with the motor vehicle emissions budget contained in the applicable air quality plan for the Spokane area. The 2002 motor vehicle emissions budget that is established for the Spokane first ten-year CO maintenance plan is 279 tons of CO.

The TSD summarizes how the CO motor vehicle emissions budget meets the criteria contained in the conformity rule.

VI. Final Action

EPA is approving the Spokane CO Maintenance Plan and redesignating the Spokane CO nonattainment area to attainment. This redesignation is based on validated monitoring data and projections made in the maintenance demonstration. EPA believes the area will continue to meet the NAAQS for CO for at least ten years beyond this redesignation, as required by the Act. Washington has demonstrated compliance with the requirements of section 107(d)(3)(E) based on information provided by Ecology and contained in the Washington SIP and Spokane, Washington CO maintenance plan. A Technical Support Document on file at the EPA Region 10 office contains a detailed analysis and rationale in support of the redesignation of Spokane's CO nonattainment area to attainment.

VII. 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 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the 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. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 29, 2005. 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

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: June 20, 2005.

Julie Hagensen,

Acting Regional Administrator, Region 10.

■ Parts 52 and 81, chapter I, title 40 of the Code of Federal Regulations are 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 WW—Washington

■ 2. In § 52.2475, paragraph (a)(2)(ii) is revised to read as follows:

§ 52.2475 Approval of plans.

(a) * * *

(2) * * *

(ii) EPA approves as a revision to the Washington State Implementation Plan, the Spokane Carbon Monoxide Maintenance Plan, adopted April 27, 2004 effective June 24, 2004, submitted by the Washington Department of Ecology on November 29, 2004.

PART 81—[AMENDED]

■ 1. The authority citation for part 81 continues to read as follows:

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

■ 2. In § 81.348, the table entitled "Washington—Carbon Monoxide" is amended by revising the entry for "Spokane Area Spokane County (part)" to read as follows:

§ 81.348 Washington.

* * * * *

WASHINGTON—CARBON MONOXIDE

Designated Area	Designation		Classification	
	Date[1]	Type	Date[1]	Type
* * *	*	*	*	*
Spokane Area:	8–29–2005	Attainment.		
Spokane County (part).				
Spokane urban area (as defined by The Washington Department of Transportation urban area maps).				
* * *	*	*	*	*

[1] This date is November 15, 1990 unless otherwise noted.

* * * * *

[FR Doc. 05–12713 Filed 6–28–05; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 9

[WC Docket No. 04–36; FCC 05–116]

E911 Requirements for IP-Enabled Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts rules requiring providers of interconnected voice over Internet Protocol (VoIP) service—meaning VoIP service that allows a user generally to receive calls originating from and to terminate calls to the public switched telephone network (PSTN)—to supply enhanced 911 (E911) capabilities to all of their customers as a standard feature of the service, rather than as an optional enhancement. The rules further require interconnected VoIP service providers to provide E911 from wherever the customer is using the service, whether at home or away from home. These changes will enhance public safety and ensure E911 access to emergency services for users of interconnected VoIP services.

DATES: *Effective Date:* This rule is effective July 29, 2005, except for § 9.5, which contains information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date.

Comment Date: Written comments by the public on the new and/or modified information collection requirements are due August 29, 2005.

Compliance Date: Subject to OMB approval, compliance with the customer notification requirements in § 9.5(e) is required by July 29, 2005. Subject to OMB approval, the compliance letter required by § 9.5(f) must be submitted to the Commission no later than November 28, 2005. Subject to OMB approval, compliance with the requirements in § 9.5(b) through (d) is not required until November 28, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Christi Shewman, Attorney-Advisor, Competition Policy Division, Wireline Competition Bureau, at (202) 418–1686.

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith B. Herman at (202) 418–0214, or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's First Report and Order (Order) in WC Docket No. 04–36, FCC 05–116, adopted May 19, 2005, and released June 3, 2005. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via e-mail at *www.bcpiweb.com.* It is also available on the Commission's website at *http://www.fcc.gov.*

In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov.*

Synopsis of the First Report and Order (Order)

1. *Background.* In the *Notice of Proposed Rulemaking* (NPRM) (69 FR 16193, March 29, 2004), we asked, among other things, about the potential applicability of "basic 911," "enhanced 911," and related critical infrastructure regulation to VoIP and other Internet Protocol (IP)-enabled services. Specifically, after noting that the Commission previously found in the *E911 Scope Order* (69 FR 6578, February 11, 2004) that it has statutory authority under sections 1, 4(i), and 251(e)(3) of the Communications Act of 1934, as amended (Act), to determine what entities should be subject to the Commission's 911 and E911 rules, the Commission sought comment on whether it should exercise its regulatory authority in the context of IP-enabled services. The Commission further sought comment on the appropriate criteria for determining whether and to what extent IP-enabled services should fall within the scope of its 911 and E911 regulatory framework, and whether IP-enabled services are technically and

operationally capable of meeting the Commission's basic and/or E911 rules or of providing analogous functionalities that would meet the intent of the 911 Act and the Commission's regulations.

2. *Discussion.* In this Order, we define "interconnected VoIP service" and require providers of this type of VoIP service to incorporate E911 service into all such offerings within the period of time specified below. We commit ourselves to swift and vigorous enforcement of the rules we adopt today. Because we have not decided whether interconnected VoIP services are telecommunications services or information services, we analyze the issues addressed in this Order primarily under our Title I ancillary jurisdiction to encompass both types of service. We decline to exempt providers of interconnected VoIP services from liability under state law related to their E911 services.

3. *Scope.* Our first task is to determine what IP-enabled services should be the focus of our concern. We begin by limiting our inquiry to VoIP services, for which some type of 911 capability is most relevant. The Commission previously has determined that customers today lack any expectation that 911 will function for non-voice services like data services. The record clearly indicates, however, that consumers expect that VoIP services that are interconnected with the PSTN will function in some ways like a "regular telephone" service. At least regarding the ability to provide access to emergency services by dialing 911, we find these expectations to be reasonable. If a VoIP service subscriber is able to receive calls from other VoIP service users and from telephones connected to the PSTN, and is able to place calls to other VoIP service users and to telephones connected to the PSTN, a customer reasonably could expect to be able to dial 911 using that service to access appropriate emergency services. Thus, we believe that a service that enables a customer to do everything (or nearly everything) the customer could do using an analog telephone, and more, can at least reasonably be expected and required to route 911 calls to the appropriate destination.

4. The E911 rules the Commission adopts today apply to those VoIP services that can be used to receive telephone calls that originate on the PSTN and can be used to terminate calls to the PSTN—"interconnected VoIP services." Although the Commission has not adopted a formal definition of "VoIP," we use the term generally to include any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony. Thus, an interconnected VoIP service is one we define for purposes of the present Order as bearing the following characteristics: (1) The service enables real-time, two-way voice communications; (2) the service requires a broadband connection from the user's location; (3) the service requires IP-compatible customer premise equipment (CPE); and (4) the service offering permits users generally to receive calls that originate on the PSTN and to terminate calls to the PSTN. We make no findings today regarding whether a VoIP service that is interconnected with the PSTN should be classified as a telecommunications service or an information service under the Act.

5. While the rules we adopt today apply to providers of all interconnected VoIP services, we recognize that certain VoIP services pose significant E911 implementation challenges. For example, the mobility enabled by a VoIP service that can be used from any broadband connection creates challenges similar to those presented in the wireless context. These "portable" VoIP service providers often have no reliable way to discern from where their customers are accessing the VoIP service. The Commission's past experience with setting national rules for 911/E911 service is informative, and we expect that our adoption today of E911 service obligations for providers of interconnected VoIP service will speed the further creation and adoption of such services, similar to the manner in which the Commission's adoption of E911 service obligations in the wireless context helped foster the widespread availability of E911 services for mobile wireless users, where it formerly was not possible for wireless carriers automatically to determine the precise geographic location of their customers. We recognize and applaud the progress that has already been made to ensure that VoIP customers have E911 services. We stress, however, that should the need arise, we stand ready to expand the scope or substance of the rules we adopt today if necessary to ensure that the public interest is fully protected.

6. *Authority.* We conclude that we have authority under Title I of the Act to impose E911 requirements on interconnected VoIP providers, and commenters largely agree. In addition, we conclude that we have authority to adopt these rules under our plenary numbering authority pursuant to section 251(e) of the Act. We find that regardless of the regulatory classification, the Commission has ancillary jurisdiction to promote public safety by adopting E911 rules for interconnected VoIP services. This Order, however, in no way prejudges how the Commission might ultimately classify these services. To the extent that the Commission later finds these services to be telecommunications services, the Commission would have additional authority under Title II to adopt these rules.

7. Ancillary jurisdiction may be employed, in the Commission's discretion, when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities." Both predicates for ancillary jurisdiction are satisfied here.

8. First, based on sections 1 and 2(a) of the Act, coupled with the definitions set forth in section 3(33) ("radio communication") and section 3(52) ("wire communication"), we find that interconnected VoIP is covered by the Commission's general jurisdictional grant. Specifically, section 1 states that the Commission is created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," and that the agency "shall execute and enforce the provisions of th[e] Act." Section 2(a), in turn, confers on the Commission regulatory authority over all interstate communication by wire or radio. In the NPRM, the Commission adopted no formal definition of "VoIP" but used the term generally to include "any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony." Recently, in the *Vonage Order*, the Commission found that Vonage's DigitalVoice service—an interconnected VoIP service—is subject to the Commission's interstate jurisdiction. Consistent with that conclusion, we find that interconnected VoIP services are covered by the statutory definitions of "wire communication" and/or "radio communication" because they involve "transmission of [voice] by aid of wire, cable, or other like connection * * *" and/or "transmission by radio * * *" of voice. Therefore, these services come within the scope of the Commission's subject matter jurisdiction granted in section 2(a) of the Act.

9. Second, our analysis requires us to evaluate whether imposing a E911 requirement is reasonably ancillary to the effective performance of the Commission's various responsibilities. Based on the record in this matter, we find that the requisite nexus exists. The Act charges the Commission with responsibility for making available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service * * * for the purpose of promoting safety of life and property through the use of wire and radio communication." In light of this statutory mandate, promoting an effective nationwide 911/E911 emergency access system has become one of the Commission's primary public safety responsibilities under the Act. As the Commission has recognized, "[i]t is difficult to identify a nationwide wire or radio communication service more immediately associated with promoting safety of life and property than 911." Indeed, the Commission has previously relied on Title I to satisfy both prongs of the standard for asserting ancillary jurisdiction: (1) Subject matter jurisdiction; and (2) the statutory goal furthered by the regulation. For example, in *Rural Telephone Coalition v. FCC*, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld the Commission's assertion of ancillary jurisdiction to establish a funding mechanism to support universal service in the absence of specific statutory authority as ancillary to its responsibilities under section 1 of the Act to "further the objective of making communications service available to all Americans at reasonable charges." Thus, we conclude that as more consumers begin to rely on interconnected VoIP services for their communications needs, the action we take here ensures that the Commission continues to "further the achievement of long-established regulatory goals" to "promot[e] safety of life and property."

10. Our actions today are consistent with, and a necessary extension of, our prior exercises of authority to ensure public safety. Since 1996, the Commission has acted to impose 911/E911 rules on providers of new technologies. Since that time, the Commission has affirmed and expanded on those efforts by exercising jurisdiction over other services to impose 911/E911 requirements, relying primarily on its Title I authority. That exercise of authority has been ratified, not rebuked, by Congress.

11. Further, we note that our actions here are consistent with other provisions of the Act. For example, we are guided by section 706, which directs the Commission (and state commissions with jurisdiction over telecommunications services) to encourage the deployment of advanced telecommunications capability to all Americans by using measures that "promote competition in the local telecommunications market" and removing "barriers to infrastructure investment." Internet-based services such as interconnected VoIP are commonly accessed via broadband facilities (*i.e.*, advanced telecommunications capabilities under the 1996 Act). The uniform availability of E911 services may spur consumer demand for interconnected VoIP services, in turn driving demand for broadband connections, and consequently encouraging more broadband investment and deployment consistent with the goals of section 706. Indeed, the Commission's most recent *Fourth Section 706 Report to Congress* recognizes the nexus between VoIP services and accomplishing the goals of section 706.

12. Moreover, as stated above, in recognition of the critical role 911/E911 services play in achieving the Act's goal of promoting safety of life and property, Congress passed the 911 Act, which among other things made 911 the universal emergency telephone number for both wireline and wireless telephone service for the nation. In the 911 Act, Congress made a number of findings regarding wireline and wireless 911 services, including that "improved public safety remains an important public health objective of Federal, State, and local governments and substantially facilitates interstate and foreign commerce," and that "emerging technologies can be a critical component of the end-to-end communications infrastructure connecting the public with emergency [services]." Thus, we believe that our action here to impose E911 obligations on interconnected VoIP providers is consistent with Congress' public safety policy objectives.

13. Finally, as an additional and separate source of authority for the requirements we impose on providers of interconnected VoIP service in this Order, we rely on the plenary numbering authority over U.S. North American Numbering Plan (NANP) numbers Congress granted this Commission in section 251(e) of the Act and, in particular, Congress' direction to use its plenary numbering authority to designate 911 as the universal emergency telephone number within the United States, which "shall apply to both wireline and wireless telephone service." We exercise our authority under section 251(e) of the Act because interconnected VoIP providers use NANP numbers to provide their services.

14. When the Commission initially implemented the 911 Act, it took actions similar to those we take today under its numbering authority. For instance, in the order implementing the 911 Act, the Commission exercised federal jurisdiction over the establishment of the deadlines by when all carriers had to provide 911 functionality, and adopted various deadlines depending on such things as whether a local community had established a public safety answering point (PSAP). The Commission also required carriers to implement certain switching and routing changes to their networks. Specifically, the Commission required all carriers to "implement a permissive dialing period, during which emergency calls will be routed to the appropriate emergency response point using either 911 or the seven-or ten-digit number." In order to achieve this, carriers had to "prepare and modify switches to 'translate' the three-digit 911 dialed emergency calls at the appropriate network points to the seven- or ten-digit emergency number in use by those PSAPs, and, subsequently, route the calls to them." The Commission also recognized that the transition to 911 in general required more network changes than required by translation.

15. The Commission's authority to require network changes to provide the E911 features that have long been central to the nation's 911 infrastructure is included within Congress' directive to the Commission to require the establishment of 911 as a "universal emergency telephone number * * * for reporting an emergency to appropriate authorities and requesting assistance."

16. *Requirements.* In this Order, we adopt an immediate E911 solution that applies to all interconnected VoIP services. We find that this requirement most appropriately discharges the Commission's statutory obligation to promote an effective nationwide 911/E911 emergency access system by recognizing the needs of the public safety community to get call back and location information and balancing those needs against existing technological limitations of interconnected VoIP providers. With regard to portable interconnected VoIP services, however, we intend to adopt in a future order an advanced E911 solution for interconnected VoIP that must include a method for determining a user's location without assistance from

the user as well as firm implementation deadlines for that solution.

17. *Enhanced 911 Service.* We require that, within 120 days of the effective date of this Order, an interconnected VoIP provider must transmit all 911 calls, as well as a call back number and the caller's "Registered Location" for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location and that has been designated for telecommunications carriers under section 64.3001 of the Commission's rules. These calls must be routed through the use of ANI and, if necessary, pseudo-ANI, via the dedicated Wireline E911 Network, and the Registered Location must be available from or through the ALI Database. As explained infra, however, an interconnected VoIP provider need only provide such call back and location information as a PSAP, designated statewide default answering point, or appropriate local emergency authority is capable of receiving and utilizing. While 120 days is an aggressively short amount of time in which to comply with these requirements, the threat to public safety if we delay further is too great and demands near immediate action.

18. Interconnected VoIP providers may satisfy this requirement by interconnecting indirectly through a third party such as a competitive local exchange carrier (LEC), interconnecting directly with the Wireline E911 Network, or through any other solution that allows a provider to offer E911 service as described above. As an example of the first type of arrangement, Level 3 offers a wholesale product that allows certain interconnected VoIP providers to provide E911 service to their customers. 8x8, Inc. recently announced that it is utilizing Level 3's service to provide E911 service to its Packet8 service subscribers in 2,024 rate centers covering 43 U.S. states. Likewise, Intrado has indicated that it is prepared to operate as a competitive LEC in a number of states to provide indirect interconnection to interconnected VoIP providers, and Pac-West Telecom is offering a similar service in "virtually 100%" of the state of California. We note that the Commission currently requires LECs to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section 271(c)(2)(B)(vii) of the Act. We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions that are consistent with the requirements of this Order, including NENA's I2 or wireless E911-like solutions.

19. At the same time, the record indicates that incumbent LECs are increasingly offering E911 solutions that allow VoIP providers to interconnect directly to the Wireline E911 Network through tariff, contract, or a combination thereof. For example, Qwest has tariffed E911 offerings that are currently available to VoIP providers and can be coupled with third party service offerings to enable the provision of E911 service to portable interconnected VoIP services, including those that allow their end users to use non-native NPA–NXX numbers. Verizon is developing an E911 solution for interconnected VoIP providers that is comparable to the solution it offers for wireless E911. Verizon has announced that it will offer this solution in New York City beginning in summer 2005 and will roll it out in other locations if the New York City model succeeds. BellSouth currently offers tariffed services similar to those that Qwest uses to provide its VoIP E911 solution and recently announced that it is offering interconnected VoIP providers access to 911 facilities equivalent to that which it offers commercial mobile radio service (CMRS) carriers. SBC has offered to negotiate commercial agreements with VoIP providers for direct connection to Selective Routers and ALI databases, comparable to the E911 access that SBC provides to competitive LECs. SBC further has established a new commercial offering that "will enable VoIP providers to offer customers who use their service at a fixed location, such as their home" full E911 service and has stated that it is "willing to develop a wireless-like VOIP 911 capability for VOIP providers" pending receipt of necessary technical information.

20. We are requiring that all interconnected VoIP 911 calls be routed through the dedicated Wireline E911 Network because of the importance of protecting consumers who have embraced this new technology. We recognize that compliance with this obligation is necessarily dependent on the ability of the interconnected VoIP providers to have access to trunks and selective routers via competitive LECs that have negotiated access with the incumbent LECs, through direct connections to the incumbent LECs, or through third-party providers. We expect and strongly encourage all parties involved to work together to develop and deploy VoIP E911 solutions and we point out that incumbent LECs, as common carriers, are subject to sections 201 and 202 of the Act. The Commission will closely monitor these efforts within the industry and will not hesitate to take further action should that be necessary.

21. By requiring that all 911 calls be routed via the dedicated Wireline E911 Network, we are requiring interconnected VoIP service providers to provide E911 service only in those areas where Selective Routers are utilized. We expect that few VoIP 911 calls will be placed in areas that are not interconnected with a dedicated Wireline E911 Network. We further note that nothing in this Order prevents interconnected VoIP providers from entering into mutually acceptable 911 call termination arrangements with PSAPs that are not interconnected with a dedicated Wireline E911 Network.

22. *Service Level Obligation.* For the purposes of these requirements, the phrase "all 911 calls" is defined as "any voice communication initiated by an interconnected VoIP user dialing 911." We recognize that not all PSAPs will immediately be capable of receiving and utilizing the call back number and Registered Location information associated with the E911 requirements outlined above. By way of example, NENA estimates that approximately 26.6 percent of all PSAPs are not currently capable of receiving and utilizing wireless E911 Phase I data. We therefore hold that the E911 requirements set forth above shall be applicable when an interconnected VoIP provider provides service to a Registered Location only to the extent that the PSAP, designated statewide default answering point, or appropriate local emergency authority designated to serve that Registered Location is capable of receiving and utilizing the data, such as Automatic Location Identification (ALI) or Automatic Numbering Information (ANI), associated with those requirements. Even in those areas where the PSAP is not capable of receiving or processing location or call back information, however, we conclude that interconnected VoIP providers must transmit all 911 calls to the appropriate PSAP via the Wireline E911 Network. To be clear, this means that interconnected VoIP providers are always required to transmit all 911 calls to the appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority utilizing the Selective Router, the trunk line(s) between the Selective Router and the PSAP, and such other elements of the Wireline E911 Network as are necessary in those areas where Selective Routers are utilized.

23. We further hold that the obligation to determine what type of information, such as ALI or ANI, each PSAP is capable of receiving and utilizing rests with the provider of interconnected VoIP services. There is no limit to the number of entities that may engage in the provision of interconnected VoIP services in a given geographic area. It would be unreasonable to require PSAPs to attempt to inform every provider of interconnected VoIP services when the PSAP is prepared to receive and utilize the information associated with E911 service.

24. We decline at this time to adopt performance standards regarding how much time may elapse after an end user updates the Registered Location before the provider has taken such actions as are necessary to provide that end user with the level of E911 service specified in this Order.

25. We also require interconnected VoIP providers to take certain additional steps to minimize the scope of the 911 issues associated with their service and to facilitate their compliance with our new VoIP E911 rules, as explained below. First, we require interconnected VoIP providers to obtain, and facilitate updating of, customer location information. Second, we preclude interconnected VoIP providers from requiring subscribers to "opt-in" or allowing subscribers to "opt-out" of 911 services and expect that VoIP providers will notify their customers of the limitations of their 911 service offerings.

26. *Registered Location Requirement.* We recognize that it currently is not always technologically feasible for providers of interconnected VoIP services to automatically determine the location of their end users without end users' active cooperation. We therefore require providers of interconnected VoIP services to obtain location information from their customers. Specifically, interconnected VoIP providers must obtain from each customer, prior to the initiation of service, the physical location at which the service will first be utilized. Furthermore, providers of interconnected VoIP services that can be utilized from more than one physical location must provide their end users one or more methods of updating information regarding the user's physical location. Although we decline to specify any particular method, we require that any method utilized allow an end user to update his or her Registered Location at will and in a timely manner, including at least one option that requires use only of the CPE necessary to access the interconnected VoIP service. We caution interconnected VoIP providers against charging customers to update their Registered Location, as this would discourage customers from doing so and therefore undermine this solution. The most recent location provided to an interconnected VoIP provider by a customer is the "Registered Location." Interconnected VoIP providers can comply with this requirement directly or by utilizing the services of a third party.

27. *Customer Requirements.* In light of the recent incidents involving problems with 911 access from interconnected VoIP services, it is clear that not all providers of interconnected VoIP are including E911 as a standard feature of their services. We find that allowing customers of interconnected VoIP providers to opt-in to or, for that matter, opt-out of E911 service is fundamentally inconsistent with our obligation to "encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs." Thus, interconnected VoIP providers must, as a condition of providing that service to a consumer, provide that consumer with E911 service as outlined in the requirements above.

28. Further, although many VoIP providers include explanations of the limitations of their 911-like service (or lack thereof) in the Frequently Asked Questions sections on their web sites or in their terms of service, recent incidents make clear that consumers in many cases may not understand that the reasonable expectations they have developed with respect to the availability of 911/E911 service via wireless and traditional wireline telephones may not be met when they utilize interconnected VoIP services. In order to ensure that consumers of interconnected VoIP services are aware of their interconnected VoIP service's actual E911 capabilities, by the effective date of this Order, we require that all providers of interconnected VoIP service specifically advise every subscriber, both new and existing, prominently and in plain language, the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service. VoIP providers shall obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood this advisory. In addition, in order to ensure to the extent possible that the advisory is available to all potential users of an interconnected VoIP service, interconnected VoIP service providers shall distribute to all subscribers, both new and existing, warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available and instructing the subscriber to place them on and/or near the CPE used in conjunction with the interconnected VoIP service.

29. Additional customer education efforts may well be necessary for users of portable interconnected VoIP, for whom E911 service requires that they notify their service provider affirmatively of their location. For example, customers of portable interconnected VoIP services likely will need to be instructed on how to register their locations with their providers, the need to update that information promptly when they relocate, and how to confirm that the registration is effective.

30. *Compliance Letter.* We require all interconnected VoIP providers to submit a letter to the Federal Communications Commission detailing their compliance with our rules no later than 120 days after the effective date of this Order. The letter and all other filings related to this Order should be filed with the Commission's Secretary in WC Docket No. 05–196 on a going-forward basis.

31. Because of the vital public safety interests at stake in this proceeding, we are committed to ensuring compliance with the rules we adopt in this Order. Failure to comply with these rules cannot and will not be tolerated, as noncompliance may have a direct effect on the lives of those customers who choose to obtain service from the interconnected VoIP providers covered by this Order. Interconnected VoIP providers who do not comply fully with the requirements set forth in this Order will be subject to swift enforcement action by the Commission, including substantial proposed forfeitures and, in appropriate cases, cease and desist orders and proceedings to revoke any Commission licenses held by the interconnected VoIP provider.

32. *911 Funding.* We believe that the requirements we establish today will significantly expand and improve interconnected VoIP 911 service while substantially reducing the threat to 911 funding that some VoIP services currently pose. First, we recognize that while some state laws today may already require 911 funding contributions from providers of interconnected VoIP, interconnected VoIP providers may not be covered by existing state 911 funding mechanisms in other states. But even in the latter circumstance, the record does not indicate that states are receiving no 911

funding contributions from interconnected VoIP providers. On the contrary, the record indicates that many interconnected VoIP providers currently are contributing to state 911 funding mechanisms. In addition, states have the option of collecting 911 charges from wholesale providers with whom interconnected VoIP providers contract to provide E911 service, rather than assessing those charges on the interconnected VoIP providers directly. For example, we have explained that interconnected VoIP providers often enlist a competitive LEC partner in order to obtain interconnection to the Wireline E911 Network, and we believe that as a result of this Order, many more will do so. In that situation, states may impose 911 funding obligations on the competitive LEC partners of interconnected VoIP providers, regardless of whether the VoIP providers themselves are under any obligation to contribute. Similarly, states may be able to impose funding obligations on systems service providers, such as incumbent LECs, that provide direct interconnection to interconnected VoIP providers. We believe that the ability to assess 911 funds on interconnected VoIP providers indirectly should narrow any gap in 911 funding attributable to consumers switching to interconnected VoIP service.

33. Second, the record indicates that the network components that have been developed to make wireless E911 possible can also be used for VoIP E911, which should make the implementation process simpler and far less expensive than the initial upgrades necessary for wireless E911. For that reason, we do not expect the rules we adopt today to impose substantial implementation costs on PSAPs. In short, we believe that the rules we adopt today will neither contribute to the diminishment of 911 funding nor require a substantial increase in 911 spending by state and local jurisdictions.

34. *Liability.* We decline to exempt providers of interconnected VoIP service from liability under state law related to their E911 services. Although the NPRM did not directly address the issue, Intrado, among others, requests that the Commission insulate these VoIP providers from liability to the same extent that Congress insulated wireless carriers from liability related to the provision of 911/E911 service in the wireless context. In the 911 Act, Congress gave wireless carriers providing 911 service liability protection equal to that available to wireline carriers for 911 calls. Congress has enacted no similar protection for providers of interconnected VoIP service. As the Commission has said in an analogous context, before we would consider taking any action to preempt liability under state law, the Commission would need to demonstrate that limiting liability is essential to achieving the goals of the Act.

35. No commenter has identified a source of authority for the Commission to limit liability in this way. Limiting liability related to the use or provision of E911 services is not necessary to the creation or use of E911 services, and we are not persuaded that absent the liability protection sought by Intrado and others, interconnected VoIP providers will be unwilling or unable to provide E911 services. Rather, the record shows that some interconnected VoIP providers have already begun deploying E911 services. In addition, to the extent individual interconnected VoIP providers believe they need this type of liability protection, they may seek to protect themselves from liability for negligence through their customer contracts and through their agreements with PSAPs, as some interconnected VoIP providers have done.

Final Paperwork Reduction Act Analysis

36. This document contains new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this Report and Order as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due August 29, 2005.

Final Regulatory Flexibility Analysis

37. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. We received comments specifically directed toward the IRFA from three commenters. These comments are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

1. Need for, and Objectives of, the Rules

38. The Order establishes rules requiring providers of interconnected VoIP—meaning VoIP service that allows a user generally to receive calls originating from and to terminate calls to the PSTN—to provide E911 capabilities to their customers as a standard feature of service. The Order requires providers of interconnected VoIP service to provide E911 service no matter where the customer is using the service, whether at home or away.

39. The Order is in many ways a necessary and logical follow-up to the *Vonage Order* issued late last year. In that order, the Commission determined that Vonage's DigitalVoice service—an interconnected VoIP service—cannot be separated into interstate and intrastate communications and that this Commission has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having similar capabilities. The *Vonage Order* also made clear that questions regarding what regulatory obligations apply to providers of such services would be addressed in the pending *IP-Enabled Services* proceeding. In accord with that statement, the Order takes critical steps to advance the goal of public safety by imposing E911 obligations on certain VoIP providers.

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

40. In this section, we respond to comments filed in response to the IRFA. A more detailed FRFA is contained in the Order. In addition, to the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the Order.

41. We disagree with SBA and Menard that the Commission should postpone acting in this proceeding—thereby postponing imposing E911 obligations on interconnected VoIP service providers—and instead should reevaluate the economic impact and the compliance burdens on small entities and issue a further notice of proposed rulemaking in conjunction with a supplemental IRFA identifying and analyzing the economic impacts on small entities and less burdensome alternatives. We believe the additional steps suggested by SBA and Menard are unnecessary because, as described below, small entities already have received sufficient notice of the issues addressed in the Order and because the Commission, as requested by the VON Coalition, has considered the economic impact on small entities and what ways are feasible to minimize the burdens imposed on those entities, and, to the extent feasible, has implemented those less burdensome alternatives.

42. The NPRM specifically sought comment on what 911/E911 obligations should apply in the context of IP-enabled services, and discussed the criteria the Commission previously has

used to determine the scope of its existing 911/E911 rules. While the NPRM did not specify particular rules the Commission might adopt—and the IRFA therefore did not catalogue the effects that such particular rules might have on small businesses—the Commission provided notice to parties regarding the range of policy outcomes that might result from the Order. A summary of the NPRM was published in the **Federal Register** (69 FR 16193, March 29, 2004) and we believe that such publication constitutes appropriate notice to small businesses subject to this Commission's regulation.

43. Moreover, we note that we have attempted to balance the economic interests of small businesses with the public's great interest in access to E911 services when using interconnected VoIP services. The Order discusses how E911 service is critical to our nation's ability to respond to a host of crises and that the public has come to rely on the life-saving benefits of such services in emergency situations. While the Commission sought comment on, and considered, ways that the public safety could be protected through access to E911 services that are less burdensome to small businesses than the imposition of E911 obligations, the Commission concluded that it was important for all interconnected VoIP service providers to participate in protecting the public safety. As SBA notes, many VoIP providers are likely to be small businesses. SBA claims that "[t]hese small providers are developing a nascent technology and are especially vulnerable to disproportionate regulatory costs." Nevertheless, as discussed in the Order, we believe it is reasonable to expect any business electing to interconnect with the PSTN to the extent required to provide interconnected VoIP service also to provide E911 service in order to protect the public interest. Small businesses may still offer VoIP service without being subject to the rules adopted in the Order by electing not to provide an interconnected VoIP service. We therefore have provided alternatives for small entities.

44. We disagree with Menard's contention that the Commission did not meet its obligations under the RFA because it failed to list as a significant alternative to the proposed rulemaking imposing economic regulation on the underlying facilities of cable carriers. The rules we adopted in the Order apply to cable operators that provide interconnected VoIP service. Moreover, we reject the above contention as insufficient to achieve our goal of ensuring that users of interconnected VoIP service have access to E911, as well as rejecting it for the reasons already provided generally. As discussed in the Order, there currently is no way for portable VoIP providers reliably and automatically to provide location information to PSAPs without the customer's active cooperation. Not only is the provider of an interconnected VoIP service the entity actively involved in routing the calls of users of interconnected VoIP service, but it is the entity that has the relationship with the customer who currently plays an essential role in providing accurate location information; hence, it is reasonable to impose E911 rules on that interconnected VoIP service provider. In addition, although the Commission determined that it was necessary to impose E911 obligations on all providers of interconnected VoIP service in order to ensure the ubiquitous availability of E911 service for users of interconnected VoIP service, the Commission minimized the burdens of this regulation by, for example, by requiring straightforward reporting requirements and by setting reasonable timetables for implementation of the rules adopted in the Order. The Commission minimized the burdens of this regulation by not mandating any particular technical solution; interconnected VoIP providers may connect directly to the Wireline E911 Network, connect indirectly through a third party, such as a competitive local exchange carrier, or through any other solution that allows a provider to offer E911 service.

45. We also disagree with Menard's contention that the Commission inappropriately failed to "weigh the impact on non-affiliated regional Internet Service Providers of the consequence for the removal of all forms of economic regulation for broadband services provided by incumbent carriers." The Order does not remove "all forms of economic regulation for broadband services provided by incumbent carriers," and would be an inappropriate forum for reconsideration of any such decision the Commission has made in other proceedings. The Commission reached its decision in the Order in full awareness and consideration of the Commission's other rules and to that extent satisfied Menard's request and SBA's request to consider how the requirements imposed in the Order overlap with other requirements imposed on small entities.

46. Finally, we reject claims that the present proceeding is not the appropriate docket in which to address what E911 obligations should be imposed on providers of interconnected VoIP service. The Commission provided proper notice that these issues would be addressed in this proceeding, and in the *Vonage Order* made clear that questions regarding what regulatory obligations apply to providers of a type of interconnected VoIP service would be addressed in this proceeding. Therefore, we do not accede to the preferences of some small businesses that the Commission resolve various other proceedings, including proceedings involving E911 requirements, prior to addressing issues in the *IP-Enabled Services* docket. We reject Menard's claim that the Commission is using the present rulemaking as a way of by-passing its statutory obligations under section 10 of the Telecommunications Act of 1996 (section 10) because that statutory section is not applicable to the present situation. Section 10 sets forth the Commission's obligation to forbear from existing regulation to a telecommunications carrier or a telecommunications service, or class of telecommunications carriers or telecommunications services, if certain criteria are satisfied. Prior to the Order, the Commission had not imposed E911 obligations on interconnected VoIP service providers. In addition, the Commission to date has not classified interconnected VoIP service as a telecommunications service.

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

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

48. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

49. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.

50. *Small Governmental Jurisdictions.* The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages,

school districts, or special districts, with a population of less than fifty thousand." As of 1997, there were approximately 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

a. Telecommunications Service Entities

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

52. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

53. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action.

54. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of local resellers are small entities that may be affected by our action.

55. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

56. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

57. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of IXCs are small entities that may be affected by our action.

58. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of OSPs are small entities that may be affected by our action.

59. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

60. *800 and 800-Like Service Subscribers.* Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service ("toll free") subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. We estimate that there are 7,692,955 or fewer small entity 800 subscribers; 7,706,393 or fewer small entity 888 subscribers; and 1,946,538 or fewer small entity 877 subscribers.

61. *International Service Providers.* The Commission has not developed a small business size standard specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad categories of Satellite Telecommunications and Other Telecommunications. Under both categories, such a business is small if it has $12.5 million or less in average annual receipts. The majority of Satellite Telecommunications firms can be considered small.

62. The second category—Other Telecommunications—includes "establishments primarily engaged in * * * providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems." Under this second size standard, the majority of firms can be considered small.

63. *Wireless Telecommunications Service Providers.* Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

64. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under both SBA categories, a wireless

business is small if it has 1,500 or fewer employees. Under both categories and associated small business size standards, the majority of firms can be considered small.

65. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. Under this category and size standard, the great majority of firms can be considered small. We have estimated that 245 of the entities engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services are small under the SBA small business size standard.

66. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. Under this category and associated small business size standard, the majority of firms can be considered small. In the *Paging Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small business size standards. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 346 carriers reported that they were engaged in the provision of paging and messaging services. Of those, we estimate that 341 are small, under the SBA-approved small business size standard.

67. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity.

68. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for "Cellular and Other Wireless Telecommunications" services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. We have estimated that 245 of the carriers who reported to us that they were engaged in the provision of wireless telephony are small under the SBA small business size standard.

69. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as "an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years." These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA. No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

70. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.* A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

71. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not

developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. Under this second category and size standard, the majority of firms can be considered small. Assuming this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard.

72. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business size standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.

73. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years, respectively. These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities.

74. *700 MHz Guard Band Licensees.* In the *700 MHz Guard Band Order*, we adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

75. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS). The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

76. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service. We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

77. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small"

business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars. There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

78. *Fixed Microwave Services.* Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

79. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico. There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.

80. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of $40 million or less in the three previous calendar years. An additional size standard for "very small business" is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards. The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices adopted herein.

81. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

82. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. We conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

83. *218–219 MHz Service.* The first auction of 218–219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. In the *218–219 MHz Report and Order and Memorandum Opinion and Order,* we established a small business size standard for a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years. We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum.

84. *24 GHz—Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This

category provides that such a company is small if it employs no more than 1,500 persons. Under this size standard, the great majority of firms can be considered small.

85. *24 GHz—Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million. "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these small business size standards. These size standards will apply to the future auction, if held.

b. Cable and OVS Operators

86. *Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually. The Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

87. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide. The Commission estimates that there currently are fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

88. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that there are 67,700,000 subscribers in the United States. Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

89. *Open Video Services.* Open Video Service (OVS) systems provide subscription services. The SBA has created a small business size standard for Cable and Other Program Distribution. This standard provides that a small entity is one with $12.5 million or less in annual receipts. The Commission concludes that up to 24 OVS operators might qualify as small businesses that may be affected by the rules and policies adopted herein.

c. Internet Service Providers

90. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs "provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity." Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less. According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year. We estimate that the majority of these firms are small entities that may be affected by our action.

d. Other Internet-Related Entities

91. *Web Search Portals.* Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The Commission has not adopted a size standard for entities that create or provide these types of services or applications. However, the census bureau has identified firms that "operate web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format. Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users." The SBA has developed a small business size standard for this category; that size standard is $6 million or less in average annual receipts. We estimate that the majority of these firms are small entities that may be affected by our action.

92. *Data Processing, Hosting, and Related Services.* Entities in this category "primarily "provid[e] infrastructure for hosting or data processing services." The SBA has developed a small business size standard for this category; that size standard is $21 million or less in average annual receipts. We estimate that the majority of these firms are small entities that may be affected by our action.

93. *All Other Information Services.* "This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives)." Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is $6 million or less in average annual receipts. We estimate that the majority of these firms are small entities that may be affected by our action.

94. *Internet Publishing and Broadcasting.* "This industry comprises establishments engaged in publishing and/or broadcasting content on the Internet exclusively. These establishments do not provide traditional (non-Internet) versions of the content that they publish or broadcast." The SBA has developed a small business size standard for this new (2002) census category; that size standard is 500 or fewer employees. To assess the prevalence of small entities in this category, we will use 1997 Census Bureau data for a relevant, now-superseded census category, "All Other Information Services." The SBA small business size standard for that prior category was $6 million or less in average annual receipts. We estimate that the majority of the firms in this current category are small entities that may be affected by our action.

95. *Software Publishers.* These companies may design, develop or publish software and may provide other support services to software purchasers, such as providing documentation or assisting in installation. The companies

may also design software to meet the needs of specific users. The SBA has developed a small business size standard of $21 million or less in average annual receipts for all of the following pertinent categories: Software Publishers, Custom Computer Programming Services, and Other Computer Related Services. We estimate that the majority of the firms in each of these three categories are small entities that may be affected by our action.

96. *Equipment Manufacturers.* The equipment manufacturers described in this section are merely indirectly affected by our current action, and therefore are not formally a part of this FRFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our decisions. These manufacturers may include: Wireless Communications Equipment Manufacturers; Telephone Apparatus Manufacturing; Electronic Computer Manufacturing; Computer Terminal Manufacturing; Other Computer Peripheral Equipment Manufacturing; Fiber Optic Cable Manufacturing; Other Communication and Energy Wire Manufacturing; Audio and Video Equipment Manufacturing; Electron Tube Manufacturing; Bare Printed Circuit Board Manufacturing; Semiconductor and Related Device Manufacturing; Electronic Capacitor Manufacturing; Electronic Resistor Manufacturing; Electronic Coil, Transformer, and Other Inductor Manufacturing; Electronic Connector Manufacturing; Printed Circuit Assembly (Electronic Assembly) Manufacturing; Other Electronic Component Manufacturing; and Computer Storage Device Manufacturing.

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

97. We are requiring interconnected VoIP service providers to collect certain information and take other actions to comply with our rules requiring interconnected VoIP service providers to supply E911 capabilities to their customers. The Order requires collection of information in four instances. First, interconnected VoIP providers must obtain from each customer, prior to the initiation of service, the physical location at which the service will first be utilized, and must provide customers a way to update this information (*i.e.*, the "Registered Location"). Second, interconnected VoIP providers must place the Registered Location information for their customers into, or make that information available through, ALI Databases maintained by local exchange carriers (and, in at least one case, a state government) across the country. Third, the Order requires all providers of interconnected VoIP service specifically to advise new and existing subscribers of the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service, and to obtain and keep a record of affirmative acknowledgement by every subscriber of having received and understood this advisory. Fourth, the Order requires all interconnected VoIP providers to submit a letter to the Commission detailing their compliance with the rules set forth in the Order no later than 120 days after the effective date of the Order.

98. We also impose other requirements on providers of interconnected VoIP service. Specifically, the Order requires that, within 120 days of the effective date of the Order, an interconnected VoIP provider must transmit all 911 calls, as well as a call back number and the caller's Registered Location for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location and that has been designated for telecommunications carriers under section 64.3001 of the Commission's rules. These calls must be routed through the use of ANI or pseudo-ANI via the dedicated Wireline E911 Network, and the Registered Location must be available from or through the ALI Database. As explained in the Order, however, an interconnected VoIP provider need only provide such call back and location information as a PSAP, designated statewide default answering point, or appropriate local emergency authority is capable of receiving and utilizing. The obligation to determine what type of information, such as ALI or ANI, each PSAP is capable of receiving and utilizing rests with the provider of interconnected VoIP services.

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

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

100. The NPRM invited comment on a number of alternatives to the imposition of 911/E911 obligations on providers of interconnected VoIP service. For instance, the NPRM specifically sought comment on the effectiveness of alternatives to direct regulation to achieve the Commission's public policy goals of ensuring the availability of 911 and E911 capability. The Commission also sought comment on whether voluntary agreements among public safety trade associations, commercial IP-stakeholders, consumers, and state and local E911 coordinators and administrators could lead to VoIP subscribers receiving enhanced 911 functionality, and what the Commission could do to facilitate such agreements. The Commission also asked whether "promulgation of best practices or technical guidelines [would] promote the provision of effective IP-based E911 services." The Commission also asked how it could provide for technological flexibility so that our rules allow for the development of new and innovative technologies in the event it concluded that mandatory requirements would be necessary.

101. In addition, the Commission sought comment on more general issues surrounding the possible imposition of a 911/E911 requirement for IP-enabled services, which could have prompted commenters to suggest other alternatives to the rules adopted in the Order. For instance, the Commission sought comment on what ways IP-enabled service providers currently seek to provide emergency services to their customers. The Commission also noted that the development and deployment of IP-enabled services is in its early stages, that these services are fast-changing and likely to evolve in ways that it cannot anticipate, and that imposition of regulatory mandates should be undertaken with caution. In this regard, the Commission sought comment on how to weigh the potential public benefits of requiring emergency calling and other public safety capabilities against the risk that regulation could slow technical and market development.

102. The Commission has considered each of the alternatives described above, and in the Order, imposes minimal regulation on small entities to the extent consistent with our goal of ensuring that users of interconnected VoIP service have access to appropriate emergency

services when they dial 911. As an initial matter, the Commission limited the scope of the Order to interconnected VoIP service providers. As a result, certain VoIP service providers are not subject to the E911 obligations imposed in the Order. Specifically, the Order does not apply to those entities not fully interconnected with the PSTN. Because interconnecting with the PSTN can impose substantial costs, we anticipate that many of the entities that elect not to interconnect with the PSTN, and which therefore are not subject to the rules adopted in the Order, are small entities. Small entities that provide VoIP services therefore also have some control over whether they will be subject to the E911 obligations adopted in the Order. Small businesses may still offer VoIP service without being subject to the rules adopted in the Order by electing not to provide an interconnected VoIP service.

103. However, as stated above, we must assess the interests of small businesses in light of the overriding public interest in access to E911 services when using interconnected VoIP services. The Order discusses that E911 service is critical to our nation's ability to respond to a host of crises and that the public has come to rely on the life-saving benefits of such services in emergency situations. Therefore, the Commission concluded that it was important for all interconnected VoIP service providers to participate in protecting the public safety, regardless of their size. The Commission therefore rejected solutions that would rely on the voluntary agreement of VoIP service providers. The record indicated that this alternative had not resulted in, and was not likely soon to result in, ubiquitous access to E911 among users of interconnected VoIP service, which is the Commission's goal.

104. While the rules adopted in the Order apply to all providers of interconnected VoIP service, the Commission attempted to minimize the impact of the new rules on all entities, including small entities. For instance, while it is essential that interconnected VoIP service providers interconnect with the Wireline E911 Network, the Commission employed performance rather than design standards to achieve this result. Thus, rather than mandating a particular technical solution, the Order allows interconnected VoIP providers to connect directly to the Wireline E911 Network, or connect indirectly through a third party, such as a competitive LEC, or through any other solution that allows a provider to offer E911 service, which thereby allows for technological and commercial flexibility, and leaves room under the new rules for the development of new and innovative technologies. The Commission also declined to specify any particular method by which interconnected VoIP service providers must enable their customers to provide and update their Registered Location. The Commission also declined to specify any particular method by which interconnected VoIP service providers must advise new and existing subscribers of the E911 service limitations of their interconnected VoIP service and declined to specify any particular method by which acknowledgments of such limitations must be gathered and stored. The Commission expects these decisions will help small entities comply with the rules adopted in the Order in the most practical means possible. In addition, the Commission in the Order imposes straightforward and limited reporting requirements, and sets reasonable timetables. For example, regarding reporting requirements, the Commission simply requires providers of interconnected VoIP service to file a letter detailing their compliance with our rules no later than 120 days after the effective date of the Order. In addition, while the Commission's review of the record in this proceeding convinces us that ensuring reliable E911 service for users of interconnected VoIP service is essential, and therefore that the location information of such users who dial 911 should automatically be sent to the relevant PSAP, the Commission did not impose the obligation in the Order automatically to locate the interconnected VoIP service user in light of record evidence of the current state of technological development and the costs, including on small entities, of such an obligation. The Commission fully expects this situation to change in the near future, helped in part by the present Order.

105. We also note that by adopting E911 rules for providers of interconnected VoIP service at the present time, the Commission likely has saved small entities providing these services resources in the long run. For instance, in light of the importance of E911 service to the public, providers of interconnected VoIP service likely eventually would have been required by the Commission or Congress to provide E911 service. This could have involved "costly and inefficient 'retrofitting' of embedded IP infrastructure" for any interconnected VoIP service provider that had already adopted a E911 solution.

106. *Report to Congress:* The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. (A copy of this present summarized Order and FRFA is also hereby published in the **Federal Register**.)

Ordering Clauses

107. Accordingly, *it is ordered* that pursuant to sections 1, 4(i), 4(j), 251(e) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 251(e), 303(r), the Report and Order in WC Docket No. 04–36 *IS adopted*, and that part 9 of the Commission's rules, 47 CFR part 9, is added as set forth in the rule changes. The Order shall become effective July 29, 2005 subject to OMB approval for new information collection requirements. Accordingly, subject to such OMB approval: (i) Compliance within the customer notification requirements set forth in 47 CFR 9.5(e) is required by July 29, 2005; (ii) the compliance letter required by 47 CFR 9.5(f) must be submitted to the Commission no later than November 28, 2005; and (iii) compliance with the requirements in 47 CFR 9.5(b) through (d) is required by November 28, 2005.

108. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this First Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 9

Interconnected voice over internet protocol services, Communications, Telephone, Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission is adding 47 CFR part 9 to read as follows:

PART 9—INTERCONNECTED VOICE OVER INTERNET PROTOCOL SERVICES

Sec.

Authority: 47 U.S.C. 151, 154(i)-(j), 251(e), and 303(r) unless otherwise noted.

§ 9.1 Purpose.

The purpose of this part is to set forth the E911 service requirements and conditions applicable to interconnected Voice over Internet Protocol service providers.

§ 9.3 Definitions.

ANI. Automatic Number Identification, as such term is defined in § 20.3 of this chapter.

Appropriate local emergency authority. An emergency answering point that has not been officially designated as a Public Safety Answering Point (PSAP), but has the capability of receiving 911 calls and either dispatching emergency services personnel or, if necessary, relaying the call to another emergency service provider. An appropriate local emergency authority may include, but is not limited to, an existing local law enforcement authority, such as the police, county sheriff, local emergency medical services provider, or fire department.

Interconnected VoIP service. An interconnected Voice over Internet protocol (VoIP) service is a service that:

(1) Enables real-time, two-way voice communications;

(2) Requires a broadband connection from the user's location;

(3) Requires Internet protocol-compatible customer premises equipment (CPE); and

(4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

PSAP. Public Safety Answering Point, as such term is defined in § 20.3 of this chapter.

Pseudo Automatic Number Identification (Pseudo-ANI). A number, consisting of the same number of digits as ANI, that is not a North American Numbering Plan telephone directory number and may be used in place of an ANI to convey special meaning. The special meaning assigned to the pseudo-ANI is determined by agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system.

Registered Location. The most recent information obtained by an interconnected VoIP service provider that identifies the physical location of an end user.

Statewide default answering point. An emergency answering point designated by the State to receive 911 calls for either the entire State or those portions of the State not otherwise served by a local PSAP.

Wireline E911 Network. A dedicated wireline network that:

(1) Is interconnected with but largely separate from the public switched telephone network;

(2) Includes a selective router; and

(3) Is utilized to route emergency calls and related information to PSAPs, designated statewide default answering points, appropriate local emergency authorities or other emergency answering points.

§ 9.5 E911 Service.

(a) *Scope of Section.* The following requirements are only applicable to providers of interconnected VoIP services. Further, the following requirements apply only to 911 calls placed by users whose Registered Location is in a geographic area served by a Wireline E911 Network (which, as defined in § 9.3, includes a selective router).

(b) *E911 Service.* As of November 28, 2005:

(1) Interconnected VoIP service providers must, as a condition of providing service to a consumer, provide that consumer with E911 service as described in this section;

(2) Interconnected VoIP service providers must transmit all 911 calls, as well as ANI and the caller's Registered Location for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location and that has been designated for telecommunications carriers pursuant to § 64.3001 of this chapter, provided that "all 911 calls" is defined as "any voice communication initiated by an interconnected VoIP user dialing 911;"

(3) All 911 calls must be routed through the use of ANI and, if necessary, pseudo-ANI, via the dedicated Wireline E911 Network; and

(4) The Registered Location must be available to the appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority from or through the appropriate automatic location information (ALI) database.

(c) *Service Level Obligation.* Notwithstanding the provisions in paragraph (b) of this section, if a PSAP, designated statewide default answering point, or appropriate local emergency authority is not capable of receiving and processing either ANI or location information, an interconnected VoIP service provider need not provide such ANI or location information; however, nothing in this paragraph affects the obligation under paragraph (b) of this section of an interconnected VoIP service provider to transmit via the Wireline E911 Network all 911 calls to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location and that has been designated for telecommunications carriers pursuant to § 64.3001 of this chapter.

(d) *Registered Location Requirement.* As of November 28, 2005, interconnected VoIP service providers must:

(1) Obtain from each customer, prior to the initiation of service, the physical location at which the service will first be utilized; and

(2) Provide their end users one or more methods of updating their Registered Location, including at least one option that requires use only of the CPE necessary to access the interconnected VoIP service. Any method utilized must allow an end user to update the Registered Location at will and in a timely manner.

(e) *Customer Notification.* Each interconnected VoIP service provider shall:

(1) Specifically advise every subscriber, both new and existing, prominently and in plain language, of the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service. Such circumstances include, but are not limited to, relocation of the end user's IP-compatible CPE, use by the end user of a non-native telephone number, broadband connection failure, loss of electrical power, and delays that may occur in making a Registered Location available in or through the ALI database;

(2) Obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood the advisory described in paragraph (e)(1) of this section; and

(3) Distribute to its existing subscribers warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available and instructing the subscriber to place them on or near the equipment used in conjunction with the interconnected VoIP service. Each interconnected VoIP provider shall distribute such warning stickers or other appropriate labels to each new subscriber prior to the initiation of that subscriber's service.

(f) *Compliance Letter.* All interconnected VoIP providers must

submit a letter to the Commission detailing their compliance with this section no later than November 28, 2005.

[FR Doc. 05–12828 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–1612; MB Docket No. 04–370, RM–11081; MB Docket No. 04–371, RM–11082; MB Docket No. 04–388, RM–11089; MB Docket No. 04–390, RM–11091; and MB Docket No. 04–391, RM–11092]

Radio Broadcasting Services; Blythe, CA; Celoron, NY; Crystal Falls, MI; Laona, WI; and Wells, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Results Broadcasting of Iron Mountain, Inc., allots Channel 280C2 at Crystal Falls, Michigan, as the community's third local FM service. Channel 280C2 can be allotted to Crystal Falls, Michigan, in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.3 km (15.1 miles) southwest of Crystal Falls. The coordinates for Channel 280C2 at Crystal Falls, Michigan, are 45–57–22 North Latitude and 88–33–46 West Longitude. Concurrence in the allotment is required because the proposed allotment is located within 320 kilometers (199 miles) of the U.S.-Canadian border. Although Canadian concurrence has been requested, notification has not been received. If a construction permit for Channel 280C2 at Crystal Fall, Michigan, is granted prior to receipt of formal concurrence by the Canadian government, the authorization will include the following condition: "Operation with the facilities specified herein for Crystal Falls, Michigan, is subject to the modification, suspension, or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Canada-United States FM Broadcast Agreement, or if specifically objected to by Industry Canada." *See* **SUPPLEMENTARY INFORMATION** *infra.*

DATES: Effective July 25, 2005.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket Nos. 04–370, 04–371, 04–388, 04–390, and 04–391, adopted June 8, 2005, and released June 10, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A).

The Audio Division further, at the request of Results Broadcasting of Iron Mountain, Inc., allots Channel 272C3 at Laona, Wisconsin, as the community's first local FM service. Channel 272C3 can be allotted to Laona, Wisconsin, in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.1 km (6.9 miles) north of Laona. The coordinates for Channel 272C3 at Laona, Wisconsin, are 45–39–30 North Latitude and 88–43–20 West Longitude. Concurrence in the allotment is required because the proposed allotment is located within 320 kilometers (199 miles) of the U.S.-Canadian border. Although Canadian concurrence has been requested, notification has not been received. If a construction permit for Channel 272C3 at Laona, Wisconsin, is granted prior to receipt of formal concurrence by the Canadian government, the authorization will include the following condition: "Operation with the facilities specified herein for Laona, Wisconsin, is subject to modification, suspension, or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Canada-United States FM Broadcast Agreement, or if specifically objected to by Industry Canada."

The Audio Division, at the request of Linda A. Davidson, allots Channel 239B at Blythe, California, as the community's second local FM service. Channel 239B can be allotted to Blythe, California, in compliance with the Commission's minimum distance separation requirements without site restriction at center city reference coordinates. The coordinates for Channel 239B at Blythe, California, are 33–37–02 North Latitude and 114–35–20 West Longitude. Concurrence in the allotment is required because the proposed allotment is located within 320 kilometers (199 miles) of the U.S.-Mexican border. Although Mexican concurrence has been requested, notification has not been received. If a construction permit for Channel 239B at Blythe, California, is granted prior to receipt of formal concurrence by the Mexican government, the authorization will include the following condition: "Operation with the facilities specified herein for Blythe, California, is subject to modification, suspension, or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Mexico-United States FM Broadcast Agreement, or if specifically objected to by the Government of Mexico."

The Audio Division, at the request of Dana J. Puopolo, Inc., allots Channel 237A at Celoron, New York, as the community's first local FM service. Channel 237A can be allotted to Celoron, New York, in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.4 km (0.2 miles) southeast of Celoron. The coordinates for Channel 237A at Celoron, New York, are 42–06–24 North Latitude and 79–16–53 West Longitude. Concurrence in the allotment is required because the proposed allotment is located within 320 kilometers (199 miles) of the U.S.-Canadian border. Although Canadian concurrence has been requested, notification has not been received. If a construction permit for Channel 237A at Celoron, New York, is granted prior to receipt of formal concurrence by the Canadian government, the authorization will include the following condition: "Operation with the facilities specified herein for Celoron, New York, is subject to the modification, suspension, or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Canada-United States FM Broadcast Agreement, or if specifically objected to by Industry Canada."

The Audio Division, at the request of Charles Crawford, allots Channel 254A at Wells, Texas, as the community's second local FM service. Channel 254A can be allotted to Wells, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.6 km (1.0 miles) west of Wells. The coordinates for Channel 254A at Wells, Texas, are 31–29–35 North Latitude and 94–57–20 West Longitude.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under California, is amended by adding Channel 239B at Blythe.
■ 3. Section 73.202(b), the Table of FM Allotments under Michigan, is amended by adding Channel 280C2 at Crystal Falls.
■ 4. Section 73.202(b), the Table of FM Allotments under New York, is amended by adding Celoron, Channel 237A.
■ 5. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 254A at Wells.
■ 6. Section 73.202(b), the Table of FM Allotments under Wisconsin, is amended by adding Laona, Channel 272C3.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–12471 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–1628; MB Docket No. 04–427, RM–11127; RM–11239]

Radio Broadcasting Services; Ammon and Dubois, ID

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 286A at Dubois Idaho at the request of Laramie Mountain Broadcasting, LLC, counterproponant filing in response to a *Notice of Proposed Rule Making* issued at the request of withdrawn petitioner Justin Robinson. 69 FR 75016 (December 15, 2004). Laramie originally requested the allotment of Channel 283A at Dubois, Idaho and amended to Channel 286A. Channel 286A is allotted at Dubois without a site restriction at coordinates 44–10–34 NL and 112–13–48 WL. A second counterproposal, dismissed as defective, was filed by Millcreek Broadcasting, LLC, licensee of Stations KNJQ(FM), Manti, Utah, KUUU(FM), South Jordan, Utah and KUDD(FM), Roy, Utah; Simmons SLC–LS, LLC, licensee of Stations KDWY(FM), Diamondville, Wyoming, KAOX(FM), Kemmerer, Wyoming and KRAR(FM), Brigham City, Utah; Rocky Mountain Radio Network, Inc., licensee of Station KRMF(FM) Evanston, Wyoming; 3 Point Media—Coalville, LLC, licensee of Station KCUA(FM), Naples, Utah; and College Creek Broadcasting, LLC successful bidder and applicant for four vacant auction allotments.

DATES: Effective July 25, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 04–427 adopted June 8, 2005, and released June 10, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ 47 CFR part 73 is amended as follows:

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Idaho is amended by adding Dubois, Channel 286A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–12470 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–1614; Docket No. 04–402; RM–11087]

Radio Broadcasting Services; Cheyenne and Encampment, WY

AGENCY: Federal Communications Commission.

ACTION: Final rule; dismissal.

SUMMARY: In response to a *Notice of Proposed Rule Making ("Notice")*, 69 FR 65120 (November 10, 2004), this *Report and Order* dismisses a rulemaking proceeding requesting the allotment of Channel 285C2 to Encampment, Wyoming, the substitution of Channel 229C2 for Channel 285C2 at Station KRRR (FM), Cheyenne, Wyoming, and the substitution of Channel 285C2 for vacant Channel 229A at Cheyenne, Wyoming. The proponent of this rulemaking requested that the proceeding be dismissed and provided a declaration that neither it nor any of its principals has received or will receive any consideration in connection with the withdrawal of its expression of interest in this proceeding.

DATES: July 25, 2005.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 04–402, adopted June 8, 2005, and released June 10, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. This document is not subject to the Congressional Review Act. (The Commission is, therefore, not required to submit a copy of this *Report and Order* to GAO pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the proposed rule is dismissed.)

Channel 260A should not be listed in 47 CFR 73.202(b), FM Table of Allotments under Cheyenne, Wyoming. The referenced channel was upgraded to Channel 260C2 on February 14, 1997 (File No. BPH–19961031IB).

Accordingly, 47 CFR 73.202, FM Table of Allotments under Cheyenne, Wyoming, should be amended to reflect the fact that Channel 260C2 has been added to Cheyenne and Channel 260A has been removed from Cheyenne.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Wyoming is amended by removing Channel 260A and by adding Channel 260C2 at Cheyenne.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–12469 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 70, No. 124
Wednesday, June 29, 2005

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21683; Directorate Identifier 2005–NM–021–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F27 Mark 200, 400, 500, and 600 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Fokker Model F27 Mark 200, 400, 500, and 600 airplanes. This proposed AD would require a general visual inspection of the rotary knobs for the fuel tank isolation valves to determine if the seal wire has been installed correctly and corrective actions if necessary. This proposed AD is prompted by investigation of a recent accident, which found that the rotary knobs controlling the fuel tank isolating valves had been in the shut position. We are proposing this AD to ensure that the rotary knobs are not inadvertently moved to the shut position, which could result in fuel starvation to both engines and consequent inability to maintain controlled flight and landing.

DATES: We must receive comments on this proposed AD by July 29, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- By fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Fokker Services B.V., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands.

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2005–21683; the directorate identifier for this docket is 2005-NM–021–AD.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES.** Include "Docket No. FAA–2005–21683; Directorate Identifier 2005–NM–021–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of our docket Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you can visit *http://dms.dot.gov*.

Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

The Civil Aviation Authority—The Netherlands (CAA-NL), which is the airworthiness authority for the Netherlands, notified us that an unsafe condition may exist on certain Fokker Model F27 Mark 200, 400, 500, and 600 airplanes. The CAA-NL advises that the rotary knobs controlling the fuel tank isolating valves were found in the shut position during investigation of a recent accident caused by fuel starvation to both engines shortly before takeoff. Although the airplane had been delivered with a seal wire between the two knobs, investigators found no seal wire or holes in the knobs for attaching the seal wire. Other airplanes were found to have the seal wire installed incorrectly. Inadvertently moving the rotary knobs to the shut position, if not prevented, could result in fuel starvation to both engines and consequent inability to maintain controlled flight and landing.

Relevant Service Information

Fokker Services B.V. has issued Fokker Service Bulletin F27/28–67, dated February 23, 2004. The service bulletin describes procedures for doing an inspection of the rotary knobs for the fuel tank isolation valves to determine if the seal wire has been installed correctly, and taking corrective actions if necessary. The corrective actions include the following actions:

- If the holes are positioned incorrectly or are not drilled, drilling two holes in each rotary knob and reidentifying the knobs as P/N Y00092–401.

- If the seal wire is installed incorrectly, installing the seal wire from the bottom hole in the left rotary knob to the top hole in the right rotary knob with the knobs in the open position.
- If the seal wire is installed correctly, installing a placard between the rotary knobs.

The service bulletin also specifies the following:

- Contacting the manufacturer after accomplishing the service bulletin.
- Incorporating the changes specified in Fokker Services Manual Change Notification MCNO F27–020, dated February 23, 2004, into the airplane maintenance manual.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The CAA–NL mandated the service information and issued Dutch airworthiness directive 2004–037 R1, dated April 14, 2005, to ensure the continued airworthiness of these airplanes in the Netherlands.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in the Netherlands and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA–NL has kept the FAA informed of the situation described above. We have examined the CAA–NL's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between the Proposed AD and the Dutch Airworthiness Directive."

Differences Between the Proposed AD and the Dutch Airworthiness Directive

The applicability of Dutch airworthiness directive 2004–037 R1 excludes airplanes on which Fokker Service Bulletin F27/28–58, dated May 12, 1986, has been accomplished. However, we have not excluded those airplanes in the applicability of this proposed AD; rather, this proposed AD includes credit for the actions specified in that service bulletin. Operators must continue to operate the airplane in the configuration required by this proposed AD unless an alternative method of compliance is approved. This difference has been coordinated with the CAA–NL.

Dutch airworthiness directive 2004–037 R1 requires incorporating the changes specified in Fokker Services Manual Change Notification MCNO F27–018, dated December 1, 2003, into the airplane flight manual, and the changes specified in Fokker Services Manual Change Notification MCNM F27–020, dated February 23, 2004, into the airplane maintenance manual. Fokker Services Manual Change Notification MCNO F27–018 adds items to the taxiing checklist to advise the pilot to verify if the seal wire is installed. Fokker Services Manual Change Notification MCNM F27–020 adds information to advise maintenance personnel to verify that the seal wire is installed. We have determined that incorporation of these changes to the airplane flight and maintenance manuals is not necessary for adequately addressing the unsafe condition of this AD. This difference also has been coordinated with the CAA–NL.

Although the Accomplishment Instructions of Fokker Service Bulletin F27/28–67 describe procedures for informing the manufacturer of accomplishment of the service bulletin, this proposed AD would not require those actions. We do not need this information from operators.

Clarification of Inspection Terminology

The "inspection" specified in the Fokker service bulletin is referred to as a "general visual inspection" in this proposed AD. We have included the definition for a general visual inspection in a note in the proposed AD.

Costs of Compliance

This proposed AD would affect about 1 airplane of U.S. registry. The proposed actions would take about 2 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the proposed AD for the one U.S. operator is $130.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Fokker Services B.V.: Docket No. FAA–2005–21683; Directorate Identifier 2005–NM–021–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by July 29, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Fokker Model F27 Mark 200, 400, 500, and 600 airplanes, certificated in any category; serial numbers 10505 through 10591 inclusive; not equipped with inboard wing fuel tanks.

Unsafe Condition

(d) This AD was prompted by investigation of a recent accident, which found that the rotary knobs controlling the fuel tank isolating valves had been in the shut position. We are issuing this AD to ensure that the rotary knobs are not inadvertently moved to the shut position, which could result in fuel starvation to both engines and consequent inability to maintain controlled flight and landing.

Compliance

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

Inspection and Corrective Action if Applicable

(f) Within 3 months after the effective date of this AD, do a general visual inspection of the rotary knobs for the fuel tank isolation valves to determine if the seal wire is installed correctly and do the corrective action(s) as applicable, in accordance with the Accomplishment Instructions of Fokker Service Bulletin F27/28–67, dated February 23, 2004. Do the applicable corrective actions before further flight.

Note 1: For the purposes of this AD, a general visual inspection is: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

Credit for Alternative Method of Compliance

(g) Actions done before the effective date of this AD in accordance with Fokker Service Bulletin F27/28–58, dated May 12, 1986, are acceptable for compliance with the requirements of paragraph (f) of this AD.

Parts Installation

(h) As of the effective date of this AD, no person may install a rotary knob having part number E16032–3, 10632–10003, or P80–004 on any airplane, unless the corrective actions specified in paragraph (f) of this AD have been accomplished.

No Reporting Requirement

(i) Although the service bulletin referenced in this AD specifies to submit certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(j) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Related Information

(k) Dutch airworthiness directive 2004–037 R1, dated April 14, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on June 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–12838 Filed 6–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21701; Directorate Identifier 2005–NM–086–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 and 767 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 747 and 767 airplanes. This proposed AD would require reworking the electrical bonding between the airplane structure and the pump housing of the outboard boost pumps in the main fuel tank of certain Boeing Model 747 airplanes, and between the airplane structure and the pump housing of the override/jettison pumps in the left and right wing center auxiliary fuel tanks of certain Boeing Model 767 airplanes. This proposed AD would also require related investigative actions and corrective actions if necessary. This proposed AD is prompted by the results of fuel system reviews conducted by the manufacturer. We are proposing this AD to prevent insufficient electrical bonding, which could result in a potential of ignition sources inside the fuel tanks, and which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by August 15, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- By fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2005–21701; the directorate identifier for this docket is 2005–NM–086–AD.

FOR FURTHER INFORMATION CONTACT: Diane Pagel, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6488; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES.** Include "Docket No. FAA–2005–21701; Directorate Identifier 2005–NM–086–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that Web

site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you can visit *http://dms.dot.gov*.

Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System (DMS) receives them.

Discussion

The FAA has examined the underlying safety issues involved in recent fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled "Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements" (67 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 ("SFAR 88," Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (*i.e.*, type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: Single failures, single failures in combination with another latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

We have received a report indicating that the outboard boost pumps in the main fuel tank of certain Boeing Model 747 airplanes, and the override/jettison pumps in the left and right wing center auxiliary fuel tanks of certain Boeing Model 767 airplanes, have insufficient electrical bonding between the pump housing and the airplane structure. This condition, if not corrected, could result in an ignition source inside the fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Relevant Service Information

We have reviewed Boeing Special Attention Service Bulletin 747–28–2259, dated November 4, 2004 (for Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes). This service bulletin describes procedures for reworking the electrical bonding between the airplane structure and the pump housing of the outboard boost pumps in the main fuel tank, and related investigative and corrective actions. The rework consists of replacing the four mounting fasteners on each of the pump housings with rivets, stenciling each new rivet with the statement: "CAUTION—BONDING RIVET," and, when the related investigative actions are completed, sealing the new rivets as specified in the airplane maintenance manual. The related investigative actions are measuring the electrical resistance of the new rivets, and doing an open-hole high-frequency eddy current (HFEC) inspection for cracks, corrosion, and damage. If the resistance is greater than the maximum allowable resistance specified in the service bulletin, the procedures include reworking the bonding as necessary according to the standard wiring practices manual, until the resistance is within allowable limits.

We have also reviewed Boeing Special Attention Service Bulletin 767–57–0092, dated November 4, 2004 (for Boeing Model 767–200, –300, and –300F series airplanes); and Boeing Special Attention Service Bulletin 767–57–0093, dated November 4, 2004 (for Boeing Model 767–400ER series airplanes). These service bulletins describe procedures for reworking the electrical bonding between the airplane structure and the pump housing of the override/jettison pumps in the left and right wing center auxiliary fuel tanks, and related investigative actions and corrective actions. The rework consists of cleaning the wing rib/ground bracket bonding surface, installing new fasteners for the ground brackets of the fuel override/jettison pump, using new bonding processes during the installation, and sealing the ground brackets. The related investigative actions are measuring the electrical resistance at specified points in the rework process. If the electrical resistance is greater than the maximum allowable resistance specified in the service bulletin, the corrective action specified in the procedures includes repeating the applicable corrective actions and the applicable related investigative actions until the resistance is within allowable limits.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed under "Difference Between the Proposed AD and Special Attention Service Bulletin 747–28–2259."

Difference Between the Proposed AD and Special Attention Service Bulletin 747–28–2259

Although Boeing Special Attention Service Bulletin 747–28–2259 does not specify an action to take if any crack, corrosion, or damage is found during the open-hole HFEC inspection, this proposed AD would require operators to repair those conditions in one of the following ways:

- Using a method that we approve; or

• Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization whom we have authorized to make those findings.

Costs of Compliance

There are about 3,401 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hour	Average labor rate pere hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Rework electrical bonding for Boeing Model 747 airplanes	10	$65	$650	1,115	$724,750
Rework electrical bonding for Boeing Model 767 airplanes	9	65	585	921	538,785

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify that the proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2005–21701; Directorate Identifier 2005–NM–086–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this AD action by August 15, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the Boeing airplane models identified in Table 1 of this AD, certificated in any category.

TABLE 1.—AIRPLANES AFFECTED BY THIS AD

Model—	As identified in Boeing special attention service bulletin—
747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes.	747–28–2259, dated November 4, 2004.
767–200, –300, and –300F series airplanes	767–57–0092, dated November 4, 2004.
767–400ER series airplanes	767–57–0093, dated November 4, 2004.

Unsafe Condition

(d) This AD was prompted by the results of fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent insufficient electrical bonding, which could result in a potential of ignition sources inside the fuel tanks, and which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Compliance

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

Rework Electrical Bonding

(f) Within 60 months after the effective date of this AD: Do the actions specified in paragraph (f)(1) or (f)(2) of this AD, as applicable, by accomplishing all the actions specified in the Accomplishment Instructions of the applicable service bulletin in Table 1 of this AD. Do any related investigative and corrective actions before further flight.

(1) For Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes: Rework the electrical bonding between the airplane structure and the pump housing of the outboard boost pumps in the main fuel tank, and do related investigative and

applicable corrective actions. If any crack, corrosion, or damage is found during the open-hole high-frequency eddy current inspection specified in Boeing Special Attention Service Bulletin 747–28–2259, dated November 4, 2004: Before further flight, repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or in accordance with data meeting the certification basis of the airplane approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the approval must specifically reference this AD.

(2) For Boeing Model 767–200, –300, –300F, and –400ER series airplanes: Rework the electrical bonding between the airplane structure and the pump housing of the override/jettison pumps in the left and right wing center auxiliary fuel tanks, and do the related investigative and applicable corrective actions.

Alternative Methods of Compliance (AMOCs)

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

Issued in Renton, Washington, on June 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–12840 Filed 6–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21702; Directorate Identifier 2005–NM–024–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330 and A340 Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Model A330 and A340 series airplanes. This proposed AD would require repetitive borescope inspections of the left and right fuel tanks of the trimmable horizontal stabilizers (trim tanks) for detached or damaged float valves; related investigative/corrective actions if necessary; and the eventual replacement of all float valves in the left and right trim tanks with new, improved float valves, which terminates the need for the repetitive inspections. This proposed AD would also require repetitive replacement of certain new, improved float valves. This proposed AD is prompted by reports of detached and damaged float valves in the trim tanks. We are proposing this AD to prevent, in the event of a lightning strike to the horizontal stabilizer, sparking of metal parts and debris from detached and damaged float valves, or a buildup of static electricity, which could result in ignition of fuel vapors and consequent fire or explosion.

DATES: We must receive comments on this proposed AD by July 29, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- By fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France.

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2005–21702; the directorate identifier for this docket is 2005–NM–024–AD.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES.** Include "Docket No. FAA–2005–21702; Directorate Identifier 2005–NM–024–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of our docket Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you can visit *http://dms.dot.gov*.

Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

We have examined the underlying safety issues involved in recent fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled "Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements" (67 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 ("SFAR 88," Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design approval

(i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design approval holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with another latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) has issued a regulation that is similar to SFAR 88. (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States who have agreed to co-operate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this proposed AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition may exist on certain Airbus Model A330 and A340 series airplanes. The DGAC advises that it has received reports of detached and damaged float valves in the left and right fuel tanks of the trimmable horizontal stabilizers (trim tanks). The left tank float valves, part number (P/N) L87–13–001, are manufactured by Intertechnique. The right tank float valves, P/N 61600, are manufactured by Argo-Tech. The float valves are part of the fuel vent system. The DGAC states that the affected float valves detached as a result of environmental fatigue that exceeded the valves' qualification standards. Certain float valves have metal parts which, when detached and positioned in certain locations/orientations in the trim tank, may create ignition sources in the trim tanks. If there is a lightning strike to the horizontal stabilizer, the metal parts and debris from detached and damaged float valves may cause sparking, or a buildup of static electricity, which could result in ignition of fuel vapors and consequent fire or explosion.

The DGAC also advises that a life limit of 24,500 flight cycles must be imposed on Intertechnique vent float valves, P/N L87–13–002, if installed in the left trim tank on Model A330 series airplanes.

Relevant Service Information

Airbus has issued the following service bulletins:

RELEVANT SERVICE INFORMATION

Airbus model	Airbus service bulletin
A330 series airplanes	A330–28–3086, dated July 24, 2003. A330–28–3087, Revision 01, dated August 16, 2004. A330–28–3088, dated April 27, 2004. A330–28–3089, Revision 02, dated April 1, 2005. A330–28–3094, dated April 7, 2005.
A340–200 and –300 series airplanes	A340–28–4100, Revision 01, dated August 16, 2004. A340–28–4101, Revision 01, dated August 16, 2004. A340–28–4102, dated April 27, 2004. A340–28–4103, Revision 02, dated April 1, 2005. A340–28–4111, dated April 6, 2005.
A340–541 and –642 airplanes	A340–28–5007, May 7, 2004. A340–28–5010, May 7, 2004. A340–28–5021, dated April 6, 2005.

Service Bulletins A330–28–3086 and A340–28–4100, Revision 01, include procedures for performing repetitive borescope inspections of the right trim tank for detached or damaged float valves, and related investigative/corrective actions if necessary. Service Bulletins A330–28–3087 and A340–28–4101, both Revision 01, include procedures for doing those same actions for the left trim tank. If a float valve is detached, or the arms are damaged, the related investigative/corrective actions include:

- Doing a detailed visual inspection for damage to the trim tank structure;
- Repairing structural damage in accordance with the applicable Airbus Structural Repair Manual (SRM) and contacting Airbus if the damage exceeds the limits specified in the SRM;
- Removing a detached float valve and associated debris from the trim tank;
- Replacing the float valve; and
- Reporting all findings to Airbus.

These service bulletins also provide the option of deactivating an affected trim tank until the float valve can be replaced in accordance with the operator's maintenance schedule. In addition, for airplanes on which some floats are intact, Service Bulletin A340–28–4100, Revision 01, provides the option of contacting Airbus for the possible issuance of an Airbus No Technical Objection (NTO) letter to allow continued operation, for a specified number of flight cycles, without deactivating the trim tank.

Service Bulletins A330–28–3088, A340–28–4102, and A340–28–5007 include procedures for installing a new, improved float valve, P/N 62015–1, manufactured by Argo-Tech, in the right trim tank. The installation procedures include:

- Removing the existing float valve and bonding leads;
- Removing a detached float valve and associated debris from the trim tank, if necessary;
- Repairing structural damage in accordance with the applicable Airbus Structural Repair Manual (SRM) and contacting Airbus if the damage exceeds the limits specified in the SRM;
- Preparing the airplane structure to accommodate the new electrical bonding;
- Installing P/N 62015–1; and
- Performing a bonding test of the float valve.

Service Bulletin A330–28–3088 also specifies a life limit of 20,000 flight cycles since first installation for the new Argo-Tech float valve, P/N 62015–1. Service Bulletins A330–28–3088 and A340–28–4102 state that any removed float valve having a certain part number should be sent to Argo-Tech. In addition, Service Bulletin A330–28–3088 identifies Airbus Service Bulletin A330–55–3022, dated November 4, 1997, as a concurrent service bulletin; and Service Bulletin A340–28–4102 identifies Airbus Service Bulletin A340–55–4023, dated November 4, 1997, as a concurrent service bulletin. The concurrent service bulletins include procedures for installing Teflon gore joints in the front spar panels.

Service Bulletin A330–28–3088 states that accomplishing the actions specified in that service bulletin cancels the inspections specified in Service Bulletin A330–28–3086. Service Bulletin A340–28–4102 states that accomplishing the actions specified in that service bulletin cancels the inspections specified in Service Bulletin A340–28–4100.

Procedures for installing a new, improved float valve, P/N L87–13–002, manufactured by Intertechnique, in the left trim tank, are included in the following service bulletins: A330–28–3089, Revision 02; A340–28–4103, Revision 02; and A340–28–5010. The installation procedures include:

- Removing the existing float valve;
- Removing a detached float valve and associated debris from the trim tank, if necessary;
- Repairing structural damage in accordance with the applicable Airbus Structural Repair Manual (SRM) and contacting Airbus for damage that exceeds the limits specified in the SRM;
- Installing P/N L87–13–002; and
- Performing a bonding test of the float valve.

Service Bulletin A330–28–3089, Revision 02, also specifies a life limit of 24,500 flight cycles since first installation for the new Intertechnique float valve, P/N L87–13–002. Service Bulletins A330–28–3089, Revision 02; A340–28–4103, Revision 02; and A340–28–5010 also state that removed float valves having a certain part number should be sent to Intertechnique. In addition, Service Bulletin A330–28–3089 identifies Airbus Service Bulletin A330–55–3022 as a concurrent service bulletin; and Service Bulletin A340–28–4103 identifies Airbus Service Bulletin A340–55–4023 as a concurrent service bulletin.

Service Bulletin A330–28–3089, Revision 02, states that accomplishing the actions in that service bulletin cancels the inspections specified in Service Bulletin A330–28–3087. Service Bulletin A340–28–4103, Revision 02, states that accomplishing the actions in that service bulletin cancels the inspections specified in Service Bulletin A340–28–4101.

Procedures for installing a new, improved float valve, P/N L87–13–003, manufactured by Intertechnique, in the left trim tank, are included in the following service bulletins: A330–28–3094, A340–28–4111, and A340–28–5021. The installation procedures include:

- Removing the existing float valve;
- Removing a detached float valve and associated debris from the trim tank, if necessary;
- Repairing structural damage in accordance with the applicable Airbus Structural Repair Manual (SRM) and contacting Airbus for damage that exceeds the limits specified in the SRM;
- Installing P/N L87–13–003; and
- Performing a bonding test of the float valve.

Service Bulletin A330–28–3094 states that, if P/N L87–13–002 has not been installed, accomplishing the actions specified in that service bulletin eliminates the need for accomplishing the actions specified in Service Bulletin A330–28–3089. Service Bulletin A340–28–4111 states that, if P/N L87–13–002 has not been installed, accomplishing the actions specified in that service bulletin eliminates the need for accomplishing the actions specified in Service Bulletin A340–28–4103. Service Bulletin A340–28–5021 states that, if P/N L87–13–002 has not been installed, accomplishing the actions specified in that service bulletin eliminates the need for accomplishing the actions specified in Service Bulletin A340–28–5010.

The DGAC mandated the service information and issued French airworthiness directives F–2005–003, dated January 5, 2005, and F–2005–004 R1 and F–2005–005 R1, both dated April 27, 2005, to ensure the continued airworthiness of these airplanes in France.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require repetitive borescope inspections of the left and right fuel tanks of the trimmable horizontal stabilizers (trim tanks) for detached or damaged float valves; related investigative/corrective actions if necessary; and the eventual replacement of all float valves in the left and right trim tanks with new, improved float valves, which terminates the need for the repetitive inspections. This proposed AD would also require repetitive replacement of certain new, improved float valves.

Differences Among the Proposed AD, French Airworthiness Directives, and Service Information

All of the service bulletins specify that if the structural damage caused by a detached float exceeds the limits in the applicable Airbus SRM, you may contact the manufacturer for instructions on how to repair the damage. This proposed AD would require you to contact us, or the DGAC (or its delegated agent), for instructions on how to repair damage that exceeds the limits in the SRM. Also, this proposed AD provides the option of either repairing any structural damage in accordance with the applicable service bulletin, or in accordance with a method approved by us, or the DGAC (or its delegated agent). In light of the type of repair that would be required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that, for this proposed AD, a repair we or the DGAC approve would be acceptable for compliance with this proposed AD.

Service Bulletin A340–28–4100, Revision 01, provides operators the option of contacting Airbus for the possible issuance of an Airbus NTO

letter to allow continued operation without deactivating the trim tank for a specified number of flight cycles. This proposed AD would not allow that action. We can better ensure long-term continued operational safety by having operators correct the source of the problem, the trim tank. Anyone may apply for an AMOC and make a request to temporarily operate an airplane without a deactivated trim tank.

Operators should note that, although the Accomplishment Instructions of certain referenced service bulletins describe procedures for submitting an inspection report sheet to Airbus, or returning removed float valves to the float valve manufacturer, this proposed AD would not require those actions.

Concurrent Service Information

Airbus Service Bulletins A330–28–3088 and A330–28–3089 identify Airbus Service Bulletin A330–55–3022 as a concurrent service bulletin, and Airbus Service Bulletins A340–28–4102 and A340–28–4103 identify Airbus Service Bulletin A340–55–4023 as a concurrent service bulletin. The concurrent service bulletins include procedures for installing Teflon gore joints on front spar access panel 343ER. That action reduces the number of work hours needed to remove and install the access panel when the new, improved float valves are installed. The French airworthiness directives do not mandate accomplishment of the concurrent service bulletins and this proposed AD would not require accomplishment of the concurrent service bulletins.

Clarification of Life Limit in Paragraph (h) of the Proposed AD

For Airbus Model A330 series airplanes, French airworthiness directive F–2005–003, dated January 5, 2005, mandates a life limit of 24,500 flight cycles "since new" for Intertechnique float valve, P/N L87–13–002. This P/N failed in a mode that potentially re-introduced the possible ignition source, so a life limit is necessary. The DGAC has informed us that it does not intend to issue a parallel French airworthiness directive for Airbus Model A340 series airplanes. The DGAC states that a float valve life limit of 24,500 flight cycles is above the A340 design service goal of 20,000 flight cycles. Intertechnique float valve, P/N L87–13–003, did not exhibit any failure during qualification tests and does not have a life limit for Airbus Model A330 or A340 series airplanes.

Clarification of Inspection Terminology

In this proposed AD, the "detailed visual inspection" specified in the Airbus service bulletins is referred to as a "detailed inspection." We have included the definition for a detailed inspection in Note 1 of this AD.

Costs of Compliance

The following table provides the estimated costs for U.S. operators of Model A330 series airplanes to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Borescope inspection, per inspection cycle.	2 (1 hour per float, 2 floats per airplane).	$65	None	$130	25	$3,250, per inspection cycle.
Installation of float valves.	4 (2 per valve, 2 valves per airplane).	65	No charge	260	25	$6,500, per installation.
Bonding test (new, improved float valves, left trim tank only).	1	65	None	65	25	$1,625.

Currently, there are no affected Model A340 series airplanes on the U.S. Register. However, should an affected airplane be imported and placed on the U.S. Register in the future, it would be subject to the proposed actions of this AD. The estimated costs would be the same as those listed above for the Model A330 series airplanes.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2005–21702; Directorate Identifier 2005–NM–024–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by July 29, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A330 and A340 series airplanes, certificated in any category, as identified in Table 1 of this AD.

TABLE 1.—APPLICABILITY

Airbus model	Except those modified in production by airbus modification
A330 series airplanes	51953 and either 52110 or 53081
A340–200 and –300 series airplanes	51953 and either 52110 or 53081
A340–541 and –642 airplanes	51951 and either 52109 or 53081

Unsafe Condition

(d) This AD was prompted by reports of detached and damaged float valves in the left and right fuel tanks of the trimmable horizontal stabilizers (trim tanks). We are issuing this AD to prevent, in the event of a lightning strike to the horizontal stabilizer, sparking of metal parts and debris from detached and damaged float valves, or a buildup of static electricity, which could result in ignition of fuel vapors and consequent fire or explosion.

Compliance

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

Borescope Inspection

(f) At the later of the times specified in paragraph (f)(1) and (f)(2) of this AD: Do a borescope inspection for detached or damaged float valves in the left and right trim tanks, by doing the applicable actions in the Accomplishment Instructions of Airbus Service Bulletins A330–28–3086, dated July 24, 2003; and A330–28–3087, Revision 01, dated August 16, 2004 (for Model A330 series airplanes); or A340–28–4100 and A340–28–4101, both Revision 01, both dated August 16, 2004 (for Model A340–200 and –300 series airplanes); as applicable.

(1) Prior to the accumulation of 2,500 total flight cycles or 15,000 total flight hours, whichever is first.

(2) Within 7,500 flight hours after the effective date of this AD.

Related Investigative and Corrective Actions

(g) Depending on the results of the inspection required by paragraph (f) of this AD: Do the applicable actions in accordance with the Accomplishment Instructions of the applicable service bulletin identified in Table 2 of this AD, at the times specified in Table 2.

TABLE 2.—INSPECTION RESULTS AND RELATED INVESTIGATIVE/CORRECTIVE ACTIONS

If inspection results reveal—	Then—	In accordance with Airbus Service Bulletin—
Detached or damaged float valve in the right trim tank.	Before further flight: (1) Remove the detached float and float debris from the trim tank and do a detailed inspection for structural damage to the affected trim tank tank. Repair any structural damage to the trim tank or deactivate the trim tank, before further flight, in accordance with the applicable service bulletin, or in accordance with a method approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent). Where the service bulletin specifies to contact the manufacturer, instead contact the Manager, International Branch, ANM–116, or the DGAC (or its delegated agent).	A330–28–3086, dated July 24, 2003. A340–28–4100, Revision 01, dated August 16, 2004.
	Before further flight, after doing the detailed inspection and repairing any structural damage: (2) Replace the affected float valve with a new unit having the same part number (P/N), or a new, improved float valve, P/N 62015–1. If a new unit of P/N 61600 is installed, thereafter, do the inspection required by paragraph (f) of this AD at intervals not to exceed 2,500 flight cycles or 15,000 flight hours, whichever is first, after the most recent inspection, until paragraph (h) of this AD is accomplished.	A330–28–3086, dated July 24, 2003. A330–28–3088, dated April 27, 2004. A340–28–4100, Revision 01, dated August 16, 2004. A340–28–4102, dated April 27, 2004.
Detached or damaged float valve in the left trim tank.	Before further flight: (1) Remove the detached float and float debris from the trim tank and do a detailed inspection for structural damage to the affected trim tank. Repair any structural damage to the trim tank or deactivate the trim tank, before further flight, in accordance with the applicable service bulletin, or in accordance with a method approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the DGAC (or its delegated agent). Where the service bulletin specifies to contact the manufacturer, instead contact the Manager, International Branch, ANM–116, or the DGAC (or its delegated agent).	A330–28–3087, Revision 01, dated August 16, 2004. A340–28–4101, Revision 01, dated August 16, 2004.

TABLE 2.—INSPECTION RESULTS AND RELATED INVESTIGATIVE/CORRECTIVE ACTIONS—Continued

If inspection results reveal—	Then—	In accordance with Airbus Service Bulletin—
	Before further flight, after doing the detailed inspection and repairing any structural damage: (2) Replace the affected float valve with either a new unit having that same P/N, or a new improved float valve, P/N L87–13–002 or P/N L87–13–003. If a new unit of P/N L87–13–001 is installed, thereafter, do the inspection required by paragraph (f) of this AD at intervals not to exceed 2,500 flight cycles or 15,000 flight hours, whichever is first, after the most recent inspection, until paragraph (h) of this AD is accomplished. For Airbus Model A330 series airplanes, if a float valve having P/N L87–13–002 is installed, thereafter, replace that float valve with a float valve having that same P/N at intervals not to exceed those specified in paragraph (h) of this AD. Installation of P/N L87–13–003 on Airbus Model A330 series airplanes terminates the repetitive float valve replacement required by paragraph (h) of this AD.	A330–28–3087, Revision 01, dated August 16, 2004. A330–28–3089, Revision 02, dated April 1, 2005. A330–28–3094, dated April 7, 2005. A340–28–4101, Revision 01, dated August 16, 2004. A340–28–4103, Revision 02, dated April 1, 2005. A340–28–4111, dated April 6, 2005.
No damaged or detached float valve in the right trim tank.	Within 10,000 flight hours or 1,500 flight cycles, whichever is first, from the initial float inspection done in accordance with paragraph (f) of this AD, replace the existing Argo-new Tech float valve, P/N 61600, with either a unit having that same P/N, or a new, improved float valve, P/N 62015–1. If a new unit of P/N 61600 is installed, thereafter, repeat the inspection required by paragraph (f) of this AD at intervals not to exceed 2,500 flight cycles or 15,000 flight hours, whichever is first, until paragraph (h) of this AD is accomplished.	A330–28–3086, dated July 24, 2003. A330–28–3088, dated April 27, 2004. A340–28–4100, Revision 01, dated August 16, 2004. A340–28–4102, dated April 27, 2004.
No damaged detached float valve in the left trim tank.	Within 10,000 flight hours or 1,500 flight cycles, whichever is first, from the initial inspection done in accordance with paragraph (f) of this AD, replace the existing trim tank Intertechnique float valve, P/N L87–13–001, with either a new unit having that same P/N, or a new improved float valve, P/N L87–13–002 or P/N L87–13–003. If a new unit of P/N L87–13–001 is installed, thereafter, do the inspection required by paragraph (f) of this AD at intervals not to exceed 2,500 flight cycles or 15,000 flight hours, whichever is first, after the most recent inspection, until paragraph (h) of this AD is accomplished. For Airbus Model A330 series airplanes, if a float valve having P/N L87–13–002 is installed, thereafter, replace that float valve with a float valve having that same P/N at intervals not to exceed those specified in paragraph (h) of this AD. Installation of P/N L87–13–003 on Airbus Model A330 series airplanes terminates the repetitive float valve replacement required by paragraph (h) of this AD.	A330–28–3087, Revision 01, August 16, 2004. A330–28–3089, Revision 02, dated April 1, 2005. A330–28–3094, dated April 7, 2005. A340–28–4101, Revision 01, dated August 16, 2004. A340–28–4103, Revision 02, dated April 1, 2005. A340–28–4111, dated April 6, 2005.

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

Installation of New, Improved Float Valves

(h) Within 50 months after the effective date of this AD: Replace any Argo-Tech float valve, P/N 61600, with a new, improved float valve, P/N 62015–1; replace any Intertechnique float valve, P/N L87–13–001, with a new, improved float valve, P/N L87–13–002 or P/N L87–13–003; and do any applicable corrective action; by accomplishing the actions specified in the Accomplishments Instructions of the applicable service bulletin in Table 3 of this AD. Do any applicable corrective action before further flight. For Airbus Model A330 series airplanes, if P/N L87–13–002 is installed, replace the float valve thereafter at intervals not to exceed 24,500 flight cycles. Installation of P/N L87–13–003 on Airbus Model A330 series airplanes terminates the repetitive float valve replacement required by this paragraph. Installation of either P/N L87–13–002 or P/N L87–13–003 terminates the borescope inspections required by paragraphs (f) and (g) of this AD. Where the service bulletin specifies to contact the manufacturer, instead contact the Manager, International Branch, ANM–116, or the DGAC (or its delegated agent).

TABLE 3.—SERVICE INFORMATION FOR NEW FLOAT VALVES

Airbus model	Float valve P/N	Airbus service bulletin
A330 series airplanes	62015–1	A330–28–3088, dated April 27, 2004.
	L87–13–002	A330–28–3089, Revision 02, dated April 1, 2005.
	L87–13–003	A330–28–3094, dated April 7, 2005.
340–200 and –300 series airplanes	62015–1	A340–28–4102, dated April 27, 2004.
	L87–13–002	A340–28–4103, Revision 02, dated April 1, 2005.
	L87–13–003	A340–28–4111, dated April 6, 2005.
A340–541 and –642 airplanes	62015–1	A340–28–5007, dated May 7, 2004.
	L87–13–002	A340–28–5010, dated May 7, 2004.
	L87–13–003	A340–28–5021, dated April 6, 2005.

Actions Accomplished Previously

(i) Inspections and related investigative and corrective actions accomplished before the effective date of this AD, in accordance with any applicable Airbus service bulletin identified in Table 4 of this AD, are acceptable for compliance with the corresponding actions specified in this AD.

TABLE 4.—SERVICE INFORMATION FOR ACTIONS ACCOMPLISHED PREVIOUSLY

Airbus model	Airbus service bulletin
A330 series airplanes.	A330–28–3087, dated July 24, 2003. A330–28–3089, Revision 01, dated May 12, 2004.
A340–200 and –300 series airplanes.	A340–28–4100, dated July 24, 2003. A340–28–5010, dated May 7, 2004. A340–28–5021, dated April 6, 2005.

No Submission of Information/Parts

(j) Where any Airbus service bulletin specifies to submit information to Airbus, or send removed float valves to either Argo-Tech or Intertechnique, those actions are not required by this AD.

Alternative Methods of Compliance (AMOCs)

(k) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Related Information

(l) French airworthiness directives F–2005–003, dated January 5, 2005, and F–2005–004 R1 and F–2005–005 R1, both dated April 27, 2005, also address the subject of this AD.

Issued in Renton, Washington, on June 22, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–12839 Filed 6–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF EDUCATION

34 CFR Part 300

RIN 1820–AB56

National Instructional Materials Accessibility Standard

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary of Education proposes to establish the National Instructional Materials Accessibility Standard (NIMAS or standard) as required under sections 612(a)(23)(A) and 674(e)(4) of the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004 (Act). The purpose of the NIMAS is to help increase the availability and timely delivery of print instructional materials in accessible formats to blind or other persons with print disabilities in elementary schools and secondary schools.

DATES: We must receive your comments on or before September 12, 2005.

ADDRESSES: Address all comments about this proposed standard to Troy Justesen, Office of Special Education and Rehabilitative Services, U.S. Department of Education, 400 Maryland Avenue, SW., room 5126, Potomac Center Plaza, Washington, DC 20202–2641. If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: *http://www.regulations.gov.*

Or you may send your Internet comments to us at the following address: *Osersnimascomments@ed.gov.*

You must include the term "NIMAS Comments" in the subject line of your electronic message.

Please submit your comments only one time in order to ensure that we do not receive duplicate copies.

FOR FURTHER INFORMATION CONTACT: Troy R. Justesen. Telephone: (202) 245–7468.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit comments regarding our proposal to adopt the NIMAS and to make your comments as specific as possible. Also, if appropriate, please identify the specific section or subsection of the NIMAS that each of your comments addresses and arrange your comments in the same order as the standard.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from this proposed regulatory action. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits in connection with this regulatory action.

Please include the following with your comments: A description of the area of your involvement in special education or regular education, as well as your role, if any, in that area (*e.g.*, parent, teacher, student, state or local administrator, or researcher) or other area (*e.g.*, technology specialist, publisher, or software developer).

During and after the comment period, you may inspect all public comments about the standard in room 5126, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Comments

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this standard. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Background

States use electronic files from publishers of educational materials to produce accessible versions (*e.g.*, Braille or digital audio) of these materials or contract to have accessible versions produced from these files. Because States have different requirements for these electronic files, however, publishers often experience increased costs for production, and States experience delays and inconsistencies in the materials produced.

To facilitate the provision of accessible, timely, and consistent versions of print textbooks in the United States, the Department of Education funded the National Center on Accessing the General Curriculum (NCAC) at the Center on Applied Special Technologies, Inc. (CAST) to establish technical specifications for a voluntary national instructional materials accessibility standard. Beginning in November 2002, NCAC convened a panel of 43 experts, composed of educators, publishers, technology specialists, and disability groups. The National Institute of Standards and Technology (NIST) also participated on the panel. The panel held three public meetings in January, March, and June 2003, and conducted extensive teleconference and online discussions.

The panel developed, with consensus, a common standard for digital source files that can be used to accurately and reliably produce instructional materials in a variety of alternate formats using the same source file. This standard, known as the National Instructional Materials Accessibility Standard (NIMAS, version 1.0), provides a single, uniform format that can be used for the electronic files associated with instructional materials. The Department announced the establishment of the NIMAS as a voluntary standard on July 27, 2004. Additional information on the standard and the expert panel's report is available at *http://nimas.cast.org/about/index.html*.

The purpose of the NIMAS is to help increase the availability and timely delivery of print instructional materials in accessible formats to blind or other persons with print disabilities in elementary schools and secondary schools. The term *print instructional materials* is defined in section 674(e)(3)(C) of the Act, and the term *blind or other persons with print disabilities* is defined in section 674(e)(3)(A) of the Act.

Under section 674(e)(4) of the Act, the NIMAS applies to print instructional materials published after the date on which the final rule establishing the NIMAS is published in the **Federal Register**. This notice proposes to establish the NIMAS and would amend 34 CFR part 300 for purposes of complying with section 674(e)(4) of the Act. A separate rulemaking proceeding will be conducted to require States to adopt the standard. In this separate notice, the Secretary will propose other amendments to 34 CFR part 300, which will contain information and seek public comment on the requirement for States to adopt the NIMAS in a timely manner after it has been established by the Department, as set forth in section 612(a)(23)(A) of the Act.

Significant Proposed Regulation

We propose to establish the NIMAS in our regulations by adding an appendix to 34 CFR part 300 that will set forth the technical elements and specifications for the standard. The proposed appendix is included at the end of this notice.

Executive Order 12866

Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed standard are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

We have also determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

The National Instructional Materials Accessibility Standard (NIMAS) applies to print instructional materials required by State or local educational agencies (LEAs) for classroom use. Publishers, State and local educational agencies, authorized conversion entities, and students potentially will be affected by NIMAS.

The adoption of the NIMAS is expected to provide long-term cost savings for publishers of educational materials. Currently, 26 States have laws requiring publishers to provide State or local educational agencies with electronic files suitable for converting print instructional materials into Braille versions. Depending on what requirements each State has enacted, publishers may be required to produce a conversion file in as many as 6 different file formats. This process wastes time and effort on the part of publishers and is unnecessarily costly. Adoption of the NIMAS means that publishers won't have to convert their materials to several different file formats.

The NIMAS will supersede the different standards for source files currently used by some State and local educational agencies to produce accessible versions of textbooks. However, unless States and LEAs currently use electronic source files to produce their own accessible versions of textbooks, this will not result in any additional cost to these agencies beyond that associated with publishing new State rules, as needed, to implement the NIMAS. In most cases, States and LEAs currently contract with third party providers to take the electronic source files and convert them into accessible formats such as Braille, digital text, and digital audio. These third party providers may encounter some cost in adapting to the use of the NIMAS files, but this will be more than offset by the savings realized from only having to work with one format instead of multiple formats. In addition, these entities will not need to spend exorbitant amounts of time manipulating different types of files in order to convert them into accessible formats. Working with only one format is also a benefit for publishers of textbooks and will result in cost savings for these entities. Any cost to States and LEAs in moving to NIMAS should be offset by the increased speed in which they receive files and improved consistency and quality of the files received.

The adoption of NIMAS is expected to be highly valuable to students who are blind or who have print disabilities because they will have access to accessible versions of textbooks in a timely manner. Current methods of converting print textbooks into Braille and other specialized formats are complex and time consuming, and the process can take months to complete. In many cases students who are blind or who have print disabilities now receive accessible textbooks and other instructional materials well after the beginning of the instructional period. The adoption of the NIMAS will improve both the speed of the process and the quality and consistency of books converted into specialized formats.

The Act does not require existing textbooks to be converted to NIMAS. There also are no associated costs to prepare special education instructors to use or train others to use this new standard because teachers and other educational staff receive the books in their final accessible format. The method used to produce the book is not visible to the teachers or students, except that use of the universal standard is expected to speed the delivery of the books to the students and improve the quality and consistency of the texts.

Regulatory Flexibility Act Certification

The Secretary certifies that this proposed standard would not have a significant economic impact on a substantial number of small entities. This proposed standard would largely affect States and State agencies or individuals. States and State agencies are not defined as "small entities" in the Regulatory Flexibility Act.

Paperwork Reduction Act of 1995

The proposed standard does not contain any information collection requirements.

Intergovernmental Review

This standard is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed standard may have federalism implications, as defined in Executive Order 13132. We encourage State and local elected officials to review and provide comments on this proposed standard.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number does not apply)

List of Subjects in 34 CFR Part 300

National Instructional Materials Accessibility Standard (NIMAS), Special education, Grant programs—accessible instructional materials, Technology.

Dated: June 24, 2005.

John H. Hager,

Assistant Secretary for Special Education and Rehabilitative Services.

For the reasons discussed in the preamble, the Secretary proposes to amend part 300 of title 34 of the Code of Federal Regulations as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

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

Authority: 20 U.S.C. 1411–1420, unless otherwise noted.

2. Appendix D is added to part 300 as follows:

Appendix D—National Instructional Materials Accessibility Standard

TECHNICAL SPECIFICATIONS—THE BASELINE ELEMENT SET

Element	Description
	a. Document-level tags (required to be valid XML)
dtbook	The root element in the Digital Talking Book DTD. <dtbook> contains metadata in <head> and the contents itself in <book>.
Head	Contains metainformation about the book but no actual content of the book itself, which is placed in <book>. This information is consonant with the <head> information in xhtml, see [XHTML11STRICT]. Other miscellaneous elements can occur before and after the required <title>. By convention <title> should occur first.
book	Surrounds the actual content of the document, which is divided into <frontmatter>, <bodymatter>, and <rearmatter>. <head>, which contains metadata, precedes <book>.
meta	Indicates metadata about the book. It is an empty element that may appear repeatedly only in <head>.
title	Contains the title of the book but is used only as metainformation in <head>. Use <doctitle> within <book> for the actual book title, which will usually be the same.
	Usage Guidelines: please refer to Document Level Tags and Required Tags in Appendix B, ©DAISY Consortium, 2002. http://nimas.cast.org/about/report /index.html#appendixb.
	b. Structure and Hierarchy
bodymatter	Consists of the text proper of a book, as contrasted with preliminary material <frontmatter> or supplementary information in <rearmatter>.
rearmatter	Contains supplementary material such as appendices, glossaries, bibliographies, and indices. It follows the <bodymatter> of the book.
level1	The highest-level container of major divisions of a book. Used in <frontmatter>, <bodymatter>, and <rearmatter> to mark the largest divisions of the book (usually parts or chapters), inside which level2 subdivisions (often sections) may nest. The class attribute identifies the actual name (*e.g.*, part, chapter) of the structure it marks. Contrast with <level>.
level2	Contains subdivisions that nest within <level1> divisions. The class attribute identifies the actual name (*e.g.*, subpart, chapter, subsection) of the structure it marks.
level3	Contains sub-subdivisions that nest within <level2> subdivisions (*e.g.*, sub-subsections within subsections). The class attribute identifies the actual name (*e.g.*, section, subpart, subsubsection) of the subordinate structure it marks.
level4	Contains further subdivisions that nest within <level3> subdivisions. The class attribute identifies the actual name of the subordinate structure it marks.
level5	Contains further subdivisions that nest within <level4> subdivisions. The class attribute identifies the actual name of the subordinate structure it marks.
level6	Contains further subdivisions that nest within <level5> subdivisions. The class attribute identifies the actual name of the subordinate structure it marks.
h1	Contains the text of the heading for a <level1> structure.
h2	Contains the text of the heading for a <level2> structure.
h3	Contains the text of the heading for a <level3> structure.
h4	Contains the text of the heading for a <level4> structure.
h5	Contains the text of the heading for a <level5> structure.
h6	Contains the text of the heading for a <level6> structure.
	Usage Guidelines: please refer to the Information Object references in the Structure and Hierarchy section in Appendix B, © DAISY Consortium, 2002.

TECHNICAL SPECIFICATIONS—THE BASELINE ELEMENT SET—Continued

Element	Description
	c. Block Elements
blockquote	Indicates a block of quoted content that is set off from the surrounding text by paragraph breaks. Compare with <q>, which marks short, inline quotations.
list	Contains some form of list, ordered or unordered. The list may have intermixed heading <hd> (generally only one, possibly with <prodnote>) and an intermixture of list items and <pagenum>. If bullets and outline enumerations are part of the print content, they are expected to prefix those list items in content, rather than be implicitly generated.
Li	Marks each list item in a <list>. content may be either inline or block and may include other nested lists. Alternatively it may contain a sequence of list item components, <lic>, that identify regularly occurring content, such as the heading and page number of each entry in a table of contents.
Hd	Marks the text of a heading in a <list> or <sidebar>.
note	Marks a footnote, endnote, etc. Any local reference to <note id="yyy"> is by <noteref idref="#yyy"> [Attribute id].
P	Contains a paragraph, which may contain subsidiary <list> or <dl>.
sidebar	Contains information supplementary to the main text and/or narrative flow and is often boxed and printed apart from the main text block on a page. It may have a heading <hd>.
cite	Marks a reference (or citation) to another document.
Dd	Marks a definition of the preceding term <dt> within a definition list <dl>. A definition without a preceding <dt> has no semantic interpretation, but is visually presented aligned with other <dd>.
Dl	Contains a definition list, usually consisting of pairs of terms <dt> and definitions <dd>. Any definition can contain another definition list.
Dt	Marks a term in a definition list <dl> for which a definition <dd> follows.
	Usage Guidelines: please refer to the Information Object references in the Block Elements section in Appendix B, ©DAISY Consortium, 2002.
	d. Inline Elements
q	Contains a short, inline quotation. Compare with <blockquote>, which marks a longer quotation set off from the surrounding text.
strong	Marks stronger emphasis than . Visually is usually rendered bold.
sub	Indicates a subscript character (printed below a character's normal baseline). Can be used recursively and/or intermixed with <sup>.
sup	Marks a superscript character (printed above a character's normal baseline). Can be used recursively and/or intermixed with <sub>.
br	Marks a forced line break.
line	Marks a single logical line of text. Often used in conjunction with <linenum> in documents with numbered lines. [Include in baseline element set. Use only when line breaks must be preserved to capture meaning (*e.g.*, poems, legal texts).]
linenum	Contains a line number, for example in legal text. [Include in baseline element set. Use only when <line> is used, and only for lines numbered in print book.]
pagenum	Contains one page number as it appears from the print document, usually inserted at the point within the file immediately preceding the first item of content on a new page. [NB: Only valid when includes id attribute].
noteref	Marks one or more characters that reference a footnote or endnote <note>. Contrast with <annoref>. <noteref> and <note> are independently skippable.
	Usage Guidelines: please refer to the Information Object references in the Inline Elements section in Appendix B, ©DAISYConsortium, 2002.
	e. Tables
table	Contains cells of tabular data arranged in rows and columns. A <table> may have a <caption>. It may have descriptions of the columns in <col>s or groupings of several <col> in <colgroup>. A simple <table> may be made up of just rows <tr>. A long table crossing several pages of the print book should have separate <pagenum> values for each of the pages containing that <table> indicated on the page where it starts. Note the logical order of optional <thead>, optional <tfoot>, then one or more of either <tbody> or just rows <tr>. This order accommodates simple or large, complex tables. The <thead> and <tfoot> information usually helps identify content of the <tbody> rows. For a multiple-page print <table> the <thead> and <tfoot> are repeated on each page, but not redundantly tagged.
td	Indicates a table cell containing data.
tr	Marks one row of a <table> containing <th> or <td> cells.
	Usage Guidelines: please refer to the Information Object references in the Tables section in Appendix B, ©DAISY Consortium, 2002.
	f. Images
imggroup	Provides a container for one or more <img> and associated <caption>(s) and <prodnote>(s). A <prodnote> may contain a description of the image. The content model allows: 1) multiple <img> if they share a caption, with the ids of each <img> in the <caption imgref="id1 id2 ...">, 2) multiple <caption> if several captions refer to a single <img id="xxx"> where each caption has the same <caption imgref="xxx">, 3) multiple <prodnote> if different versions are needed for different media (*e.g.*, large print, Braille, or print). If several <prodnote> refer to a single <img id="xxx">, each prodnote has the same <prodnote imgref="xxx">.
caption	Describes a <table> or <img>. If used with <table> it must follow immediately after the <table> start tag. If used with <img> or <imggroup> it is not so constrained.
	Usage Guidelines: please refer to the Information Object references in the Images section in Appendix B, ©DAISY Consortium, 2002.

1. The Optional Elements and Guidelines for Use

Publishers are encouraged to apply markup beyond the baseline (required) elements. The complete DTBook Element Set reflects the tags necessary to create the six types of Digital Talking Books referenced in Section II and Braille output. Because of the present necessity to subdivide the creation of alternate format materials into distinct phases, the Panel determined that baseline elements would be provided by publishers, and optional elements would be added to the NIMAS-compliant files by third party conversion entities. In both circumstances the protocols for tagging the digital files should conform to the ANSI/NISO Z39.86 specification. For this reason, the optional elements beyond the baseline set are included as an Appendix C, and content converters are directed to the DAISY Structure Guidelines (*http://www.daisy.org/publications/guidelines/sg-daisy3/structguide.htm*) for guidance on their use.

2. Package File

A package file describes a publication. It identifies all other files in the publication and provides descriptive and access information about them. A publication must include a package file conforming to the NIMAS. The package file is based on the Open eBook Publication Structure 1.2 package file specification (For most recent detail please see *http://www.openebook.org/oebps/oebps1.2/download/oeb12-xhtml.htm#sec2*). A NIMAS package file must be an XML-valid OeB PS 1.2 package file instance and must meet the following additional standards:

The NIMAS Package File must include the following Dublin Core (dc:) metadata:

- dc:Title.
- dc:Creator (if applicable).
- dc:Publisher.
- dc:Date (Date of NIMAS-compliant file creation—yyyy-mm-dd).
- dc:Format (="NIMAS 1.0").
- dc:Identifier (a unique identifier for the NIMAS-compliant digital publication, *e.g.*, print ISBN + "-NIMAS"—exact format to be determined).
- dc:Language (one instance, or multiple in the case of a foreign language textbook, etc.).
- dc:Rights (details to be determined).
- dc:Source (ISBN of print version of textbook).

And the following x-metadata items:

- nimas-SourceEdition (the edition of the print textbook).
- nimas-SourceDate (date of publication of the print textbook).

The following metadata were proposed also as a means of facilitating recordkeeping, storage and file retrieval:

- dc:Subject (Lang Arts, Soc Studies, etc.).
- nimas-grade (specific grade level of the print textbook, *e.g.*; Grade 6).
- nimas gradeRange (specific grade range of the print textbook, *e.g.*; Grades 4–5).

And additional suggestion references the use of:

- dc:audience:educationLevel (for the grade and gradeRange identifiers, noting that Dublin Core recommends using educationLevel with an appropriate controlled vocabulary for context, and recommends the U.S. Department of Education's Level of Education vocabulary online at *http://www.ed.gov/admin/reference/index.jsp*. Using educationLevel obviates the need for a separate field for gradeRange since dc elements can repeat more than once. A book used in more than one grade would therefore have two elements, one with value "Grade 4" and another with value "Grade 5."

A final determination as to which of these specific metadata elements to use needs to be clarified in practice. The package manifest must list all provided files (text, images, etc.). The package spine must reference all text content files in order. (Note: For purposes of continuity and to minimize errors in transformation and processing, the NIMAS-compliant digital text should be provided as a single document.)

[FR Doc. 05–12853 Filed 6–28–05; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[Docket ID No. R10–OAR–2005–WA–0001; FRL–7929–6]

Approval and Promulgation of State Implementation Plans: Washington; Spokane Carbon Monoxide Nonattainment Area; Designation of Areas for Air Quality Planning Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On November 29, 2004, the State of Washington submitted a carbon monoxide (CO) maintenance plan for the Spokane CO nonattainment area to EPA for approval. The State concurrently requested that EPA redesignate the Spokane CO nonattainment area to attainment for the National Ambient Air Quality Standard (NAAQS) for CO. In this action, EPA is proposing approval of the maintenance plan and redesignation of the Spokane CO nonattainment area to attainment.

DATES: Written comments must be received by July 29, 2005.

ADDRESSES: Submit comments, identified by Docket ID No. R10–OAR–2005–WA–0001, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- Mail: Connie Robinson, Office of Air, Waste, and Toxics, Environmental Protection Agency, Mail code: AWT–107, 1200 Sixth Ave., Seattle, Washington 98101.
- Hand Delivery: EPA, Region 10, Service Center, 14th Floor, 1200 Sixth Ave., Seattle, Washington 98101; Attention: Connie Robinson, Office of Air, Waste and Toxics, AWT–107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Final Rules and Regulations section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Connie L. Robinson, EPA, Region 10, Office of Air, Waste, and Toxics (AWT–107), Seattle, Washington, (206) 553–1086, or by e-mail at *robinson.connie@epa.gov*.

SUPPLEMENTARY INFORMATION: In the rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If EPA receives no adverse comments in response to this action, no further activity is contemplated.

If EPA receives adverse comments, the Agency will withdraw the direct final rule and will address all public comments we receive in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested

in commenting on this action should do so at this time. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the final rules and regulations section of this **Federal Register**.

Dated: June 20, 2005.

Julie Hagensen,

Acting Regional Administrator, Region 10.

[FR Doc. 05–12712 Filed 6–28–05; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 9

[WC Docket No. 05–196; FCC 05–116]

E911 Requirements for IP-Enabled Service Providers

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Communications Commission (Commission) proposes to amend its rules that require providers of interconnected VoIP (VoIP) services—meaning VoIP service that allows a user generally to receive calls originating from and to terminate calls to the public switched telephone network (PSTN)—to provide enhanced 911 (E911) capabilities to their customers as a standard feature of service. The Commission initiates this rulemaking to determine what additional steps it should take to ensure that providers of VoIP services that interconnect with the nation's PSTN provide ubiquitous and reliable E911 service. These changes will enhance public safety and ensure E911 access to emergency services for users of interconnected VoIP services.

DATES: Comments are due on or before August 15, 2005, and reply comments are due on or before September 12, 2005.

ADDRESSES: You may submit comments, identified by WC Docket No. 05–196, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Agency Web Site: http://www.fcc.gov.* Follow the instructions for submitting comments on *http://www.fcc.gov/cgb/ecfs/.*
- *E-mail: ecfs@fcc.gov,* and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- *Mail:* Federal Communications Commission, 445 12th Street, SW., Washington DC 20554 .
- *Hand Delivery/Courier:* 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.fcc.gov/cgb/ecfs/,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go *http://www.fcc.gov/cgb/ecfs/.*

FOR FURTHER INFORMATION CONTACT: Christi Shewman, Attorney-Advisor, Competition Policy Division, Wireline Competition Bureau, at (202) 418–1686.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM) in WC Docket No. 05–196, FCC 05–116, adopted May 19, 2005, and released June 3, 2005. The complete text of this NPRM is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via e-mail at *http://www.bcpiweb.com.* It is also available on the Commission's Web site at *http://www.fcc.gov.*

Public Participation

Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (May 1, 1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. Parties should also send a copy of their filings to Janice Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5–C140, 445 12th Street, SW., Washington, DC 20554, or by e-mail to *Janice.myles@fcc.gov.* Parties shall also serve one copy with

the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, or via e-mail to *fcc@bcpiweb.com*.

Synopsis of the Notice of Proposed Rulemaking (NPRM)

1. In this NPRM, we seek comment on what additional steps the Commission should take to ensure that providers of VoIP services that interconnect with the nation's PSTN provide ubiquitous and reliable E911 service. The Order that accompanies this NPRM is published elsewhere in this issue of the **Federal Register**. This Order is the Commission's first step to ensure that the life-saving benefits of E911 service that wireline telephone and wireless telephone users have come to rely on also are extended to citizens who choose to communicate using interconnected VoIP services. Due to the existing state of technology, today's Order relies in some cases on users to provide the location information that will be delivered to public safety answering points (PSAPs) in an emergency, and thus is an immediate step toward a more advanced solution in which the user automatically can be located without assistance from the user. We seek comment on what the Commission can do to further the development of this new technology, and on issues raised by today's Order, including whether the Commission should expand the scope and requirements of this Order. Commenters should take note of the Commission's view that while a provider of VoIP service enjoys the opportunity to introduce new and exciting public interest benefits to the communications marketplace, and to profit from those offerings, that opportunity brings with it the responsibility to ensure that public safety is protected.

2. As the Commission previously has discussed, one of the central customer benefits of portable interconnected VoIP services is the lack of geographic restrictions. However, because portable interconnected VoIP services may be offered independent of geography, currently there is no way for portable VoIP providers reliably and automatically to provide location information to PSAPs for these services without the customer's active cooperation. What can the Commission do to facilitate the development of techniques for automatically identifying the geographic location of users of this type of VoIP service? What role should the Commission play to further the evolution of E911 service and E911 systems that do not depend on a customer providing his or her location information? A number of possible methods have been proposed to automatically identify the location of a VoIP user, including gathering location information through the use of: an access jack inventory; a wireless access point inventory; access point mapping and triangulation; HDTV signal triangulation; and various GPS-based solutions. What role would be most productive for the Commission to play in facilitating the adoption of one or more of these possible solutions, or facilitating some other solution, to automatically identify a VoIP service customer's location? Are any of these solutions more promising than others? Are there any reasons why certain of these solutions are unworkable? What other solutions could be used to provide location information automatically in the VoIP service context? Should the Commission require all terminal adapters or other equipment used in the provision of interconnected VoIP service sold as of June 1, 2006 to be capable of providing location information automatically, whether embedded in other equipment or sold to customers as a separate device? Under what authority could the Commission take such actions?

3. We also seek comment on issues raised by our decision today to impose E911 service obligations on providers of interconnected VoIP services. The scope of today's Order is limited to providers of interconnected VoIP services. We seek comment on whether the Commission should extend these obligations, or similar obligations, to providers of other VoIP services that are not covered by the rules adopted today. For instance, what E911 obligations, if any, should apply to VoIP services that are not fully interconnected to the PSTN? Specifically, should E911 obligations apply to VoIP services that enable users to terminate calls to the PSTN but do not permit users to receive calls that originate on the PSTN? Should E911 obligations apply to the converse situation in which a VoIP service enables users to receive calls from the PSTN but does not permit the user to make calls terminating to the PSTN? We tentatively conclude that a provider of a VoIP service offering that permits users generally to receive calls that originate on the PSTN and separately makes available a different offering that permits users generally to terminate calls to the PSTN should be subject to the rules we adopt in today's Order if a user can combine those separate offerings or can use them simultaneously or in immediate succession. Are there any other services upon which the Commission should impose E911 obligations, including any IP-based voice services that do not require a broadband connection?

4. Does the Commission need to adopt regulations in addition to those imposed by today's Order to ensure that interconnected VoIP service customers obtain the required level of E911 services? It is our expectation that end-user updates of Registered Location information will take place immediately. If this is not feasible, what performance standards should the Commission adopt regarding the length of time between when an end user updates Registered Location information and when the service provider takes the actions necessary to enable E911 from that new location? How should such requirements be structured? How should providers of interconnected VoIP service satisfy the requirements we adopt today in cases in which a subscriber's Registered Location is not associated with a street address? What requirements, if any, should we impose on providers of interconnected VoIP service in geographic areas served by PSAPs that are not connected to a Selective Router? How should the use of wireless broadband connections such as Wi-Fi or WiMax impact the applicability of the obligations we adopt today? Would providers of wireless interconnected VoIP service be more appropriately subject to our existing 911/E911 rules for commercial mobile radio service? Should the Commission require VoIP service providers to create redundant systems for providing E911 services, such as requiring redundant trunks to each Selective Router and/or requiring that multiple Selective Routers be able to route calls to each PSAP? We also seek comment on whether the Commission should impose additional or more restrictive customer notification requirements relating to E911 on VoIP providers, and on the sufficiency of our customer acknowledgement requirements.

5. Should the Commission impose reporting obligations on VoIP service providers other than the compliance letter we impose in today's Order? Are there other ways for the Commission to monitor implementation of its E911 rules without imposing reporting requirements? We note that the Commission has imposed progress reporting requirements in the past for implementation and enforcement of 911/E911 transition deadlines for wireless and wireline providers. Should the Commission require interconnected VoIP providers to report what progress they are making in developing ways to

locate automatically a user who dials 911? Should the Commission require reporting of any other information by interconnected VoIP providers? If the Commission adopts additional reporting requirements, what are the appropriate deadlines for such progress reports? Under what authority could the Commission take such actions?

6. We seek comment on what role states can and should play to help implement the E911 rules we adopt today. We recognize the historic and important role of states and localities in public safety matters. State and local governments have filled an especially important role in creating and regulating 911/E911 operations—a role states have shouldered even in the context of wireless services. Should state and local governments play a role similar to the roles they play in implementing the Commission's wireless 911/E911 rules? Should the Commission take any action to facilitate the states' ability to collect 911 fees from interconnected VoIP providers, either directly or indirectly? How can the Commission and the states work together to ensure the public's safety?

7. Should the Commission adopt any customer privacy protections related to provision of E911 service by interconnected VoIP service providers? The E911 rules we adopt today when fully implemented will require interconnected VoIP service providers to transmit a customer's Registered Location to an appropriate PSAP, which necessarily requires providers of such services to maintain a list of their customers' Registered Location, and makes that information available to public safety professionals and others when the customer dials 911. Wireline and wireless telecommunications carriers are already subject to privacy requirements. Should the Commission adopt similar privacy protections in the context of interconnected VoIP service? Under what authority could we adopt such rules?

8. Finally, we seek comment on whether persons with disabilities can use interconnected VoIP service and other VoIP services to directly call a PSAP via a TTY in light of the requirement in Title II of the Americans with Disabilities Act (ADA) that PSAPs be directly accessible by TTYs. Furthermore, the Commission in 1999 released a Notice of Inquiry (64 FR 63277, November 19, 1999) raising specific questions regarding the application of the disability accessibility provisions found in sections 251(a)(2) and 255 of the Communications Act, as amended (Act), in the context of "IP telephony" and "computer-based equipment that replicates telecommunications functionality." That Notice of Inquiry sought comment on the extent to which Internet telephony was impairing access to communications services among people with disabilities, the efforts that manufacturers were taking to render new technologies accessible, and the degree to which these technologies should be subjected to the same disability access requirements as traditional telephony facilities. We ask commenters to refresh the record in that proceeding in light of today's Order by filing comments in this docket. Are there any steps that the Commission needs to take to ensure that people with disabilities who desire to use interconnected VoIP service obtain access to E911 services? What is the basis of the Commission's authority to impose any obligations that commenters feel are warranted?

Initial Paperwork Reduction Act of 1995 Analysis

9. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Initial Regulatory Flexibility Analysis

10. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities that might result from this Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided above. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

1. Need for, and Objectives of, the Proposed Rules

11. In the NPRM, we seek comment on what additional steps the Commission should take to ensure that providers of VoIP services that interconnect with the nation's existing public switched telephone network—"interconnected VoIP service"—provide ubiquitous and reliable E911 service. Due to the existing state of technology, the Order relies on users to provide the location information that will be delivered to PSAPs in an emergency, and thus is an immediate step toward a more advanced solution in which the user automatically can be located without assistance form the user. The NPRM seeks comment on: What the Commission can do to further the development of this new technology; whether the Commission should expand the scope and requirements of this Order; the role states can and should play in the implementation thereof; the need for consumer privacy protections; the need for stronger customer notification practices relating to 911 service; and whether persons with disabilities can use interconnected VoIP service and other VoIP services to directly call a PSAP via a TTY in light of the requirement in Title II of the Americans with Disabilities Act (ADA) that PSAPs be directly accessible by TTYs. The NPRM further asks commenters to refresh the record regarding the application of the disability accessibility provisions found in sections 251(a)(2) and 255 of the Act in the context of "IP telephony" and "computer-based equipment that replicates telecommunications functionality."

2. Legal Basis

12. The legal basis for any action that may be taken pursuant to this NPRM is contained in sections 1, 4(i), 4(j), 251(e), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 251(e), 303(r), and sections 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200–1.1216, of the Commission's rules, 47 CFR 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, 1.1200–1.1216.

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

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

14. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

15. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.

16. *Small Governmental Jurisdictions.* The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." As of 1997, there were approximately 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

a. Telecommunications Service Entities

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

18. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

19. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action.

20. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of local resellers are small entities that may be affected by our action.

21. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

22. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

23. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of IXCs are small entities that may be affected by our action.

24. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that the majority of OSPs are small entities that may be affected by our action.

25. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. The Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

26. *800 and 800-Like Service Subscribers.* Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service ("toll free") subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. We estimate that there are 7,692,955 or fewer small entity 800 subscribers; 7,706,393 or fewer small entity 888 subscribers; and 1,946,538 or fewer small entity 877 subscribers.

27. *International Service Providers.* The Commission has not developed a small business size standard specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad categories of Satellite Telecommunications and Other Telecommunications. Under both categories, such a business is small if it has $12.5 million or less in average annual receipts. The majority of Satellite Telecommunications firms can be considered small.

28. The second category—Other Telecommunications—includes "establishments primarily engaged in * * * providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems." Under this second size standard, the majority of firms can be considered small.

29. *Wireless Telecommunications Service Providers.* Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not

generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

30. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. Under both categories and associated small business size standards, the majority of firms can be considered small.

31. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. Under this category and size standard, the great majority of firms can be considered small. We have estimated that 245 of the entities engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services are small under the SBA small business size standard.

32. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. Under this category and associated small business size standard, the majority of firms can be considered small. In the *Paging Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small business size standards. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 346 carriers reported that they were engaged in the provision of paging and messaging services. Of those, we estimate that 341 are small, under the SBA-approved small business size standard.

33. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity.

34. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for "Cellular and Other Wireless Telecommunications" services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. We have estimated that 245 of the carriers who reported to us that they were engaged in the provision of wireless telephony are small under the SBA small business size standard.

35. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as "an entity that has average gross revenues of $40 million or less in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years." These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA. No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

36. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.* A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will

acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

37. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. Under this second category and size standard, the majority of firms can be considered small. Assuming this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard.

38. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business size standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.

39. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years, respectively. These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities.

40. *700 MHz Guard Band Licensees.* In the *700 MHz Guard Band Order*, we adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

41. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS). The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," i.e., an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

42. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service. We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

43. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and

December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars. There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

44. *Fixed Microwave Services.* Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

45. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico. There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.

46. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of $40 million or less in the three previous calendar years. An additional size standard for "very small business" is: An entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards. The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices adopted herein.

47. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

48. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. We conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small-entity LMDS providers.

49. *218–219 MHz Service.* The first auction of 218–219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. In the *218–219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years. We cannot estimate, however, the number of licenses that will be won by

entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum.

50. *24 GHz—Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons. Under this size standard, the great majority of firms can be considered small.

51. *24 GHz—Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million. "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these small business size standards. These size standards will apply to the future auction, if held.

b. Cable and OVS Operators

52. *Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually. The Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

53. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide. The Commission estimates that there currently are fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

54. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that there are 67,700,000 subscribers in the United States. Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

55. *Open Video Services.* Open Video Service (OVS) systems provide subscription services. The SBA has created a small business size standard for Cable and Other Program Distribution. This standard provides that a small entity is one with $12.5 million or less in annual receipts. The Commission concludes that up to 24 OVS operators might qualify as small businesses that may be affected by the rules and policies adopted herein.

c. Internet Service Providers

56. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs "provide clients access to the Internet and generally provide related services such as Web hosting, Web page designing, and hardware or software consulting related to Internet connectivity." Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less. According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year. We estimate that the majority of these firms are small entities that may be affected by our action.

d. Other Internet-Related Entities

57. *Web Search Portals.* Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, Web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The Commission has not adopted a size standard for entities that create or provide these types of services or applications. However, the census bureau has identified firms that "operate Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format. Web search portals often provide additional Internet services, such as e-mail, connections to other Web sites, auctions, news, and other limited content, and serve as a home base for Internet users." The SBA has developed a small business size standard for this category; that size standard is $6 million or less in average annual receipts. We estimate that the majority of these firms are small entities that may be affected by our action.

58. *Data Processing, Hosting, and Related Services.* Entities in this category "primarily * * * provid[e] infrastructure for hosting or data processing services." The SBA has developed a small business size standard for this category; that size standard is $21 million or less in average annual receipts. We estimate that the majority of these firms are small entities that may be affected by our action.

59. *All Other Information Services.* "This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives)." Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is $6 million or less in average annual receipts. We estimate that the majority of these firms are small entities that may be affected by our action.

60. *Internet Publishing and Broadcasting.* "This industry comprises establishments engaged in publishing and/or broadcasting content on the Internet exclusively. These establishments do not provide traditional (non-Internet) versions of the content that they publish or broadcast." The SBA has developed a small business size standard for this new (2002) census category; that size standard is 500 or fewer employees. To assess the prevalence of small entities in this category, we will use 1997 Census Bureau data for a relevant, now-superseded census category, "All Other Information Services." The SBA small

business size standard for that prior category was $6 million or less in average annual receipts. We estimate that the majority of the firms in this current category are small entities that may be affected by our action.

61. *Software Publishers.* These companies may design, develop or publish software and may provide other support services to software purchasers, such as providing documentation or assisting in installation. The companies may also design software to meet the needs of specific users. The SBA has developed a small business size standard of $21 million or less in average annual receipts for all of the following pertinent categories: Software Publishers, Custom Computer Programming Services, and Other Computer Related Services. We estimate that the majority of the firms in each of these three categories are small entities that may be affected by our action.

62. *Equipment Manufacturers.* The equipment manufacturers described in this section are merely indirectly affected by our current action, and therefore are not formally a part of this IRFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our decisions.

63. *Wireless Communications Equipment Manufacturers.* The SBA has established a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. Examples of products in this category include "transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment" and may include other devices that transmit and receive IP-enabled services, such as personal digital assistants (PDAs). Under the SBA size standard, firms are considered small if they have 750 or fewer employees. We estimate that the majority of wireless communications equipment manufacturers are small entities that may be affected by our action.

64. *Telephone Apparatus Manufacturing.* This category "comprises establishments primarily engaged primarily in manufacturing wire telephone and data communications equipment." Examples of pertinent products are "central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, and data communications equipment, such as bridges, routers, and gateways." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. We estimate that the majority of these establishments are small entities that may be affected by our action.

65. *Electronic Computer Manufacturing.* This category "comprises establishments primarily engaged in manufacturing and/or assembling electronic computers, such as mainframes, personal computers, workstations, laptops, and computer servers." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. We estimate that the majority of these establishments are small entities that may be affected by our action.

66. *Computer Terminal Manufacturing.* "Computer terminals are input/output devices that connect with a central computer for processing." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. We estimate that the majority or all of these establishments are small entities that may be affected by our action.

67. *Other Computer Peripheral Equipment Manufacturing.* Examples of peripheral equipment in this category include keyboards, mouse devices, monitors, and scanners. The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. We estimate that the majority of these establishments are small entities that may be affected by our action.

68. *Fiber Optic Cable Manufacturing.* These establishments manufacture "insulated fiber-optic cable from purchased fiber-optic strand." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. We estimate that the majority of these establishments are small entities that may be affected by our action.

69. *Other Communication and Energy Wire Manufacturing.* These establishments manufacture "insulated wire and cable of nonferrous metals from purchased wire." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. We estimate that the majority or all of these establishments are small entities that may be affected by our action.

70. *Audio and Video Equipment Manufacturing.* These establishments manufacture "electronic audio and video equipment for home entertainment, motor vehicle, public address and musical instrument amplifications." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 750 or fewer employees. We estimate that the majority of these establishments are small entities that may be affected by our action.

71. *Electron Tube Manufacturing.* These establishments are "primarily engaged in manufacturing electron tubes and parts (except glass blanks)." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 750 or fewer employees. We estimate that the majority of these establishments are small entities that may be affected by our action.

72. *Bare Printed Circuit Board Manufacturing.* These establishments are "primarily engaged in manufacturing bare (*i.e.*, rigid or flexible) printed circuit boards without mounted electronic components." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees. We estimate that the majority of these establishments are small entities that may be affected by our action.

73. *Semiconductor and Related Device Manufacturing.* These establishments manufacture "computer storage devices that allow the storage and retrieval of data from a phase change, magnetic, optical, or magnetic/optical media." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees. According to Census Bureau data for 1997, there were 987 establishments in this category that had employment of under 500.

74. *Electronic Capacitor Manufacturing.* These establishments manufacture "electronic fixed and variable capacitors and condensers." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees. According to Census Bureau data for 1997, there were 128 establishments in this category that operated for the entire year. Of these, 121 had employment of under 500, and four establishments had employment of 500 to 999.

75. *Electronic Resistor Manufacturing.* These establishments manufacture "electronic resistors, such as fixed and

variable resistors, resistor networks, thermistors, and varistors." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees. According to Census Bureau data for 1997, there were 118 establishments in this category that operated for the entire year. Of these, 113 had employment of under 500, and 5 establishments had employment of 500 to 999.

76. *Electronic Coil, Transformer, and Other Inductor Manufacturing.* These establishments manufacture "electronic inductors, such as coils and transformers." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees. According to Census Bureau data for 1997, there were 448 establishments in this category that operated for the entire year. Of these, 446 had employment of under 500, and two establishments had employment of 500 to 999.

77. *Electronic Connector Manufacturing.* These establishments manufacture "electronic connectors, such as coaxial, cylindrical, rack and panel, pin and sleeve, printed circuit and fiber optic." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees. According to Census Bureau data for 1997, there were 347 establishments in this category that operated for the entire year. Of these, 332 had employment of under 500, and 12 establishments had employment of 500 to 999.

78. *Printed Circuit Assembly (Electronic Assembly) Manufacturing.* These are establishments "primarily engaged in loading components onto printed circuit boards or who manufacture and ship loaded printed circuit boards." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees. According to Census Bureau data for 1997, there were 714 establishments in this category that operated for the entire year. Of these, 673 had employment of under 500, and 24 establishments had employment of 500 to 999.

79. *Other Electronic Component Manufacturing.* These are establishments "primarily engaged in loading components onto printed circuit boards or who manufacture and ship loaded printed circuit boards." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 500 or fewer employees. According to Census Bureau data for 1997, there were 1,835 establishments in this category that operated for the entire year. Of these, 1,814 had employment of under 500, and 18 establishments had employment of 500 to 999.

80. *Computer Storage Device Manufacturing.* These establishments manufacture "computer storage devices that allow the storage and retrieval of data from a phase change, magnetic, optical, or magnetic/optical media." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. According to Census Bureau data for 1997, there were 209 establishments in this category that operated for the entire year. Of these, 197 had employment of under 500, and eight establishments had employment of 500 to 999.

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

81. The NPRM describes a future requirement the Commission intends to adopt for an advanced E911 solution for interconnected VoIP that must include a method for determining a user's location without assistance from the user and that there will be firm implementation deadlines for that solution. The NPRM also seeks comment on what additional steps the Commission should take to ensure that providers of VoIP services provide ubiquitous and reliable E911 service in light of the technological barriers that apply to VoIP E911 services. For instance, the Commission seeks comment on how it can facilitate the development of techniques for automatically identifying the geographic location of users of VoIP services, and notes that a number of possible methods have been proposed to automatically identify the location of a VoIP user, including gathering location information through the use of: An access jack inventory; a wireless access point inventory; access point mapping and triangulation; HDTV signal triangulation; and various GPS-based solutions. The Commission specifically asks whether it should require all terminal adapters or other equipment used in the provision of interconnected VoIP service sold as of June 1, 2006 to be capable of providing location information automatically, whether embedded in other equipment or sold to customers as a separate device. The NPRM also seeks comment on whether the Commission should expand the scope of its rules, which are limited to providers of interconnected VoIP services. The Commission tentatively concludes that a provider of a VoIP service offering that permits users to receive calls that originate on the PSTN and separately makes available a different offering that permits users to terminate calls generally to the PSTN should be subject to the rules if a user can combine those separate offerings or can use them simultaneously or in immediate succession.

82. The Commission also seeks comment on whether it should adopt additional regulations to ensure that interconnected VoIP service customers obtain the required level of E911 services. Among other things, the Commission asks whether it should adopt E911 performance standards, require system redundancy, and require additional reporting requirements. The NPRM also seeks comment on whether the Commission should impose additional or more restrictive customer notification requirements relating to E911 on VoIP providers, and on the sufficiency of our customer acknowledgement requirements. It also asks whether the Commission should adopt any customer privacy protections related to provision of E911 service by interconnected VoIP service providers, perhaps similar to the privacy requirements that apply to wireline and wireless telecommunications carriers. In addition, the NPRM seeks comment on whether there are any steps the Commission should take to ensure that people with disabilities who desire to use VoIP services obtain access to E911 services, such as by imposing on VoIP technologies the same disability access requirements as traditional telephony facilities.

83. Finally, the Commission also asks what role states can and should play to help implement the E911 rules. For instance, the Commission asks whether state and local governments should play a role similar to the roles they play in implementing the Commission's wireless E911 rules. The NPRM also requests comment on whether the Commission should take any action to facilitate the states' ability to collect 911 fees from interconnected VoIP providers, either directly or indirectly.

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

84. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of

compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

85. The NPRM specifically seeks comment on whether the Commission should expand the scope and requirements of the rules, recognizing that such an expansion may not be appropriate with regard to all VoIP service providers. With one exception, the NPRM does not adopt any tentative conclusions regarding what specific regulations would apply to any entity, including small entities. We hereby specifically seek comment on the effect the various proposals described in the NPRM, and summarized above, will have on small entities, and on what effect alternative rules would have on those entities. How can the Commission achieve its goal of ensuring that all users of VoIP services ultimately covered by the Commission's E911 rules are able to access ubiquitous and reliable E911 service while also imposing the least necessary burdens on small entities? What specific steps could the Commission take in this regard?

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

86. None.

Ordering Clauses

87. *It is ordered* that pursuant to the authority contained in sections 1, 4(i), 4(j), 251(e), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 251(e), 303(r), the Notice of Proposed Rulemaking in WC Docket No. 05–196 is adopted.

88. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–12827 Filed 6–28–05; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; DA 05–1346]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; petition for declaratory ruling, comments requested.

SUMMARY: In this document, the Commission seeks comment on a petition for declaratory ruling filed by a coalition of 33 organizations, including trade associations, individual companies, and non-profit entities engaged in interstate telemarketing activities ("Joint Petitioners"), raising issues concerning the scope of the Commission's jurisdiction over interstate telemarketing calls under the Telephone Consumer Protection Act ("TCPA"). In particular, *Joint Petitioners* ask the Commission to issue a ruling declaring the Commission's exclusive regulatory jurisdiction over interstate telemarketing calls and barring state regulation of such calls.

DATES: Comments are due on or before July 29, 2005, and reply comments are due on or before August 18, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See **SUPPLEMENTARY INFORMATION** for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Kelli Farmer, Consumer Policy Division, Consumer & Governmental Affairs Bureau, (202) 418–2512 (voice), *Kelli.Farmer@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, DA 05–1346, released May 13, 2005. On July 3, 2003, the Commission released a *Report and Order (2003 TCPA Order)* revising its rules under the TCPA, published at 68 FR 44144, July 25, 2003. In the *2003 TCPA Order*, the Commission determined that it would consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, the Commission instructed any party that believes a state law is inconsistent with section 227 of the Communications Act or the Commission's rules to seek a declaratory ruling from the Commission. This petition argues that the Commission has exclusive jurisdiction over interstate telemarketing rules and need not deal with preemption petitions on a case-by-case basis. When filing comments on the joint petition, please reference CG Docket No. 02–278, DA 05–1346. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–B204, Washington, DC 20554.

This proceeding shall be treated as a "permit but disclose" proceeding in accordance with the Commission's *ex parte* rules, 47 CFR 1.1200. Persons making oral *ex parte* presentations are reminded that memoranda summarizing

the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, (202) 418–0270. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing (BCPI), Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site: *http://www.bcpiweb.com* or by calling 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format) send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). This document can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy*.

Synopsis

On April 29, 2005, a coalition of 33 organizations, including trade associations, individual companies, and non-profit entities engaged in interstate telemarketing activities ("*Joint Petitioners*"), filed with the Commission a joint petition for declaratory ruling. The joint petition raises issues concerning the scope of the Commission's jurisdiction over interstate telemarketing calls under the TCPA. In particular, *Joint Petitioners* ask the Commission to issue a ruling declaring the Commission's exclusive regulatory jurisdiction over interstate telemarketing calls and barring state regulation of such calls. The Commission seeks comment on the issues raised in the joint petition.

Joint Petitioners assert that, in the TCPA, Congress sought to "establish uniform national standards that balance the concerns of consumers with the legitimate interests of telemarketers." According to *Joint Petitioners*, states have adopted and proposed "divergent rules applicable to interstate telemarketing that undermine the desired uniform federal regulatory regime." Citing dozens of existing and proposed state laws that differ from the Commission's TCPA rules and that do not distinguish between intrastate and interstate telemarketing calls, *Joint Petitioners* contend that these state regulations place "undue and at times impossible compliance burdens on interstate telemarketers, and lead state courts in enforcement actions to * * * impose substantial fines on telemarketers for interstate calls expressly permitted by the federal rules."

To resolve this situation, Joint Petitioners ask the Commission to "revisit" determinations that it made in its *2003 TCPA Order* concerning "the interplay between federal and state authority" over interstate telemarketing activities and "clarify that the FCC has exclusive authority over interstate telemarketing." *Joint Petitioners* contend that the Commission's conflict preemption approach to resolving alleged conflicts between state and federal telemarketing laws is "unsound" because, in their view, states have no authority to regulate interstate telemarketing. *Joint Petitioners* state that the Commission's regulatory authority under the TCPA must be understood against the backdrop of pre-existing federal law governing the regulation of interstate communications. Specifically, they assert that Congress: (1) Provided the Commission with exclusive jurisdiction over interstate communications in section 2(a) of the Communications Act; (2) expanded the Commission's authority over intrastate telemarketing calls in the TCPA amendments to section 2(b) of the Act; and thus (3) made clear that it considered telemarketing to be "communication" covered by section 2 of the Act. *Joint Petitioners* also take issue with the Commission's statement in its *2003 TCPA Order* that section 227(e)(1) of the Act is "ambiguous" as to whether states may regulate interstate telemarketing calls, asserting that that section instead reflects Congress's desire to "(a) expand federal power over intrastate calls, (b) restrict, but * * * not eliminate, state authority over such calls, and (c) * * * not grant to the states any authority over interstate calls."

Based on the view that Congress intended the Commission to have exclusive jurisdiction over interstate telemarketing calls, *Joint Petitioners* contend that the Commission cannot lawfully delegate that jurisdiction to the states. *Joint Petitioners* assert that "acknowledging the Commission's exclusive jurisdiction over interstate telemarketing" would not deprive states of their ability to protect their residents from unwanted interstate telephone solicitations. *Joint Petitioners* note that the TCPA both allows state attorneys general to enforce federal telemarketing rules in federal court and "preserves the right of state attorneys general to proceed in state court against telemarketers "on the basis of an alleged violation of any general civil or criminal statute of such State'." Thus, *Joint Petitioners* contend, the TCPA does not interfere with state police powers or long-arm statutes, which are used to protect consumers generally against fraud.

If the Commission determines that the Communications Act, as amended by the TCPA, does not already bar states from regulating interstate telemarketing, *Joint Petitioners* argue, in the alternative, that the Commission should exercise its own authority to "categorically preempt" state regulation of interstate telemarketing calls. *Joint Petitioners* urge the Commission to categorically preempt all state regulation of interstate telemarketing on the basis that such regulation is "inconsistent with the sound, pro-competitive policy of prohibiting multiple, inconsistent regulation."

Federal Communications Commission.

Monica Desai,

Acting Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 05–12467 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; DA 05–1347]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; petition for declaratory ruling, comments requested.

SUMMARY: In this document, the Commission reopens the public comment period for six declaratory ruling petitions that seek Commission preemption under the Telephone Consumer Protection Act ("TCPA") of the application of particular state laws to interstate telemarketing calls.

DATES: Comments are due on or before July 29, 2005, and reply comments are due on or before August 18, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See **SUPPLEMENTARY INFORMATION** for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Kelli Farmer, Consumer Policy Division, Consumer & Governmental Affairs Bureau, (202) 418–2512 (voice), *Kelli.Farmer@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, DA 05–1347, released May 13, 2005. On July 3, 2003, the Commission released a *Report and Orders* revising its rules under the TCPA (*2003 TCPA Order*), published at 68 FR 44144, July 25, 2003. The Commission determined that it would consider any alleged conflicts between state and Federal requirements and the need for preemption on a case-by-case basis. The Commission instructed any party who believes that a state law is inconsistent with section 227 of the Communications Act or the Commission's rules to seek a declaratory ruling from the Commission. The six Petitions that are the subject of this document sought such a declaratory ruling. In order to assemble a more complete administrative record that encompasses and reflects relevant developments in this area, the Commission invites interested parties to file supplemental comments in the record of the following proceedings: (1) *American Teleservices Association Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code*, DA 04–3185, filed Aug. 24, 2004 (citing N.J. Statutes Ann. section 56:8–119, *et seq.* (West 2003) and N.J. Admin. Code title 13, section 45D (2004)); (2) *ccAdvertising (aka FreeEats.com, Inc.) Petition for Expedited Declaratory Ruling*, DA 04–3187, filed Sept. 13, 2004 (citing N.D. Cent. Code section 51–28–02); (3) *Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code*, DA 04–3835, filed Nov. 19, 2004 (citing Burns Ind. Code Ann. section 24–4.7–4 (2004) and Ind. Admin. Code section 11 IAC 1–1–4 and section 11 IAC 1–1–3.5 (2004)); (4) *Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code*, DA 04–3836, filed Nov. 19, 2004 (citing Wis. Statutes section 100.52 (2003) and Wis. Admin. Code, Agriculture, Trade and Consumer Protection, sections 127.02–127.20 and 127.80–127.84)); (5) *National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes*, DA 04–3837, filed Nov. 22, 2004 (citing Fla. Statutes section 501.059); and (6) *TSA Stores, Inc. (The Sports Authority) Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida Laws and Regulations*, DA 05–342, filed Feb. 1, 2005 (citing Fla. Statutes section 501.059)).

When filing comments, please reference CG Docket No. 02–278, DA 05–1347, and the DA number assigned to the petition to which the comments relate, including one or more of the following: DA 04–3185, DA 04–3187, DA 04–3835, DA 04–3836, DA 04–3837, or DA 05–342. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html*. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–B204, Washington, DC 20554.

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

The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, (202) 418–0270. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing (BCPI), Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site: *http://www.bcpiweb.com* or by calling 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format) send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). This document can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy*.

Synopsis

In late 2004 and early 2005, the Commission received six petitions for declaratory ruling seeking Commission preemption under the TCPA of particular state laws, as applied to interstate telemarketing calls. In response to public notices issued by the Commission's Consumer & Governmental Affairs Bureau, interested parties filed comments with the Commission on issues raised in the six

declaratory ruling petitions. Since the close of the comment cycles relating to these petitions, the Commission's staff has learned of a number of recent developments that, if made a part of the formal record, may help to inform the Commission's consideration of particular issues raised in the petitions. In particular, a recently filed petition for declaratory ruling describes an increasing number of divergent state laws applicable to interstate telemarketing and lists several telemarketing-related bills that have been introduced in state legislatures in recent months that, if enacted, would apply to interstate telemarketing calls. *See Alliance Contact Services,* et al. *Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing,* filed April 29, 2005. Similarly, we are aware of recent court proceedings involving adjudications of state enforcement actions in which the proper relationship between state and federal telemarketing laws has been at issue before the court. *See, e.g., North Dakota* v. *FreeEats.com, Inc.*, Opinion and Order, No. 04–C–1694 (N.D. Dist. Ct. Feb.2, 2005); *North Dakota* v. *FreeEats.com, Inc.*, Stipulation for Entry of Final Judgment, No. 04–C–1694 (N.D. Dist. Ct. March 9, 2005) (state court holding that interstate political polling calls using prerecorded message violate state's telemarketing law).

Finally, we note that the Consumer & Governmental Affairs Bureau released contemporaneously with this document two additional public notices seeking public comment on two separate petitions for declaratory ruling that raise issues relating to the Commission's jurisdiction and preemption authority under the TCPA. *See Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Telemarketing,* Public Notice, CG Docket No. 02–278, DA 05–1346 (rel. May 13, 2005) (seeking comment on joint petition filed by 33 organizations engaged in interstate telemarketing activities in which petitioners ask Commission to declare its exclusive regulatory jurisdiction over interstate telemarketing); *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling on Preemption of California Telemarketing Rules,* Public Notice, CG Docket No. 02–278, DA 05–1348 (rel. May 13, 2005) (seeking comment on petition for declaratory ruling in which petitioner asks Commission *not* to preempt particular provisions of California's telemarketing laws). In order to assemble a more complete administrative record that encompasses and reflects relevant developments in this area, the Commission reopens the public comment period for the six declaratory ruling petitions referenced above and invites interested parties to file supplemental comments in the record of those proceedings.

Federal Communications Commission.

Monica Desai,

Acting Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 05–12466 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 70, No. 124
Wednesday, June 29, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 23, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (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 assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Grain Inspection, Packers and Stockyard Administration

Title: Livestock and Meat Marketing Study (Part 1—Survey Data Collection).

OMB Control Number: 0580–NEW.

Summary of Collection: The Grain Inspection, Packers and Stockyards Administration (GIPSA) administers the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. 71–87) (USGSA), and the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 181–229) (P&S Act). The P&S Act prohibits unfair, deceptive and fraudulent practices by market agencies, dealers, stockyards, packers, swine contractors, and live poultry dealers in the livestock, meatpacking, and poultry industries. During the development of the 2002 Farm Bill, the Senate considered an amendment to the P&S Act that would make it unlawful for a packer to own, control, or feed livestock intended for slaughter. In fiscal year 2003, GIPSA received $4.5 million in appropriations for a packer concentration study (Public Law 108–7, 117 Stat. 22). Congress stated that the study should address issues related to packer ownership of livestock. The survey will be conducted for cattle, hog, and lamb and their meat products among producers, feeders, dealers, meaf packers, meat processors, food wholesalers, food retailers, food service operations, and meat exporters.

Need and Use of the Information: The purpose of the survey is to collect information on the use and terms of alternative marketing arrangements, volume of livestock and meat products transferred through spot and alternative marketing arrangements, and respondents' perceptions regarding the costs and benefits associated with using alternative marketing arrangements.

Description of Respondents: Business or other for-profit; farms.

Number of Respondents: 3,460.

Frequency of Responses: Reporting: on occasion.

Total Burden Hours: 3,589.

Grain Inspection, Packers and Stockyard Administration

Title: Livestock and Meat Marketing Study (Part 2—Transactions Data Collection).

OMB Control Number: 0580-NEW.

Summary of Collection: The Grain Inspection, Packers and Stockyards Administration (GIPSA) administers the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. 71–87) (USGSA), and the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 181–229) (P&S Act). The P&S Act prohibits unfair, deceptive and fraudulent practices by market agencies, dealers, stockyards, packers, swine contractors, and live poultry dealers in the livestock, meatpacking, and poultry industries. During the development of the 2002 Farm Bill, the Senate considered an amendment to the P&S Act that would make it unlawful for a packer to own, control, or feed livestock intended for slaughter. In fiscal year 2003, GIPSA received $4.5 million in appropriations for a packer concentration study (Public Law 108–7, 117 Stat. 22). Congress stated that the study should address issues related to packer ownership of livestock. To conduct the Livestock and Meat Marketing Study, data needs to be collected on procurement and sales transactions from the largest meat packers, meat processors, food wholesalers, food retailers, food service operators and meat exporters.

Need and Use of the Information: The study will examine the use and economic effects of various methods for transferring cattle, hogs, lambs, and meat between successive stages of the livestock and meat marketing system. It will examine marketing arrangements from the first producer (that is, cow-calf producers, lamb producers, and hog farrowing operations) to the procurement of meat and meat products by wholesalers, retailer, food service operators, and exporters.

Description of Respondents: Business or other for-profit; farms.

Number of Respondents: 268.

Frequency of Responses: Reporting: on occasion.

Total Burden Hours: 29,120.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–12776 Filed 6–28–05; 8:45 am]
BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 23, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (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 assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Conservation Effects Assessment Project.

OMB Control Number: 0535–0245.

Summary of Collection: The National Agricultural Statistics Service (NASS) primary function is to prepare and issue official State and national estimates of crop and livestock production, disposition and prices. The goal of this information collection is to obtain land management information that will assist the Natural Resources Conservation Service in assessing environmental benefits associated with implementation of various conservation programs and installation of associated conservation practices. The authority for these data collection activities is granted under U.S. Code title 7, section 2204.

Need and Use of the Information: The survey will utilize personal interviews to administer a questionnaire that is designed to obtain from farm operators field-specific data associated with selected National Resources Inventory sub-sample units in the contiguous 48 States. Data collected in this survey will be used in conjunction with previously collected data on soils, climate, and cropping history. The assessment will be used to report progress annually on Farm Bill implementation to Congress and the general public.

Description of Respondents: Farms.

Number of Respondents: 7,489.

Frequency of Responses: Reporting: annually.

Total Burden Hours: 7,114.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–12777 Filed 6–28–05; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 23, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (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 assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Poultry and Pork Products Transiting the United States.

OMB Control Number: 0579–0145.

Summary of Collection: The United States Department of Agriculture (USDA) and the Animal and Plant Health Inspection Service (APHIS) is responsible for controlling and eliminating domestic animal diseases such as brucellosis and scrapie, as well as preventing the introduction of exotic animal diseases such as hog cholera, exotic Newcastle disease (END) and other foreign diseases. Disease prevention is the most effective method for maintaining a healthy animal population and enhancing the United States' ability to compete in exporting animals and animal products. The regulations under which APHIS conducts disease prevention activities are contained in title 9, chapter D, parts 91 through 99 of the Code of Federal Regulations. APHIS has determined that fresh pork and pork products, as well as poultry carcasses, parts and products from Mexican States can transit the United States with minimal risk of introducing hog cholera or END. Allowing fresh pork and pork products as well as poultry carcasses, parts, and products from certain Mexican States to transit the United States necessitates the use of several information collection activities, which include the completion of an import permit application, the placement of serial numbered seals on product containers, and the forwarding of a written, pre-arrival notification to APHIS port personnel.

Need and Use of the Information: APHIS will collect information to ensure that fresh pork and pork products, as well as poultry carcasses, parts, and products transiting the United States from Mexico pose a negligible risk of introducing hog

cholera and END into the United States. APHIS will also collect the name, address of the exporter, the origin and destination points of entry, the date of transportation, the method and route of shipment, the time and date the items are expected to arrive at the port, how long the items are expected to be in the United States, the permit number of the shipment, and the serial numbers of the seals on the shipment containers. If the information is not collected, it would make disease incursion event much more likely, with potentially devastating affects on the U.S. swine and poultry industries.

Description of Respondents: Business or other for-profit; farm; individual or households; not-for-profit institutions; Federal government; State, local or tribal government.

Number of Respondents: 75.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 600.

Animal and Plant Health Inspection Service

Title: ISA Payment of Indemnity.

OMB Control Number: 0579–0192.

Summary of Collection: Federal regulation contained in 9 CFR Subchapter B governs cooperative programs to control and eradicate communicable diseases of livestock from the United States. Infectious Salmon Anemia (ISA) poses a substantial threat to the economic viability and sustainability of salmon aquaculture in the United States and abroad. ISA is the clinical disease resulting from infection with the ISA virus; signs include hemorrhaging, anemia, and lethargy. The Animal and Plant Health Inspection Service (APHIS) will collect information using VS Form 1–22 ISA Program Enrollment Form and VS Form 1–23 All Species Appraisal & Indemnity Claim Form.

Need and Use of the Information: Each program participant must sign an ISA Program Enrollment Form in which they agree to participate fully in USDA's and the State of Maine's ISA Program. APHIS will collect the owner's name and address, the number of fish for which the owner is seeking payment, and the appraised value of each fish. The owner must also certify as to whether the fish are subject to a mortgage. Without the information it would be impossible for APHIS to launch its program to contain and prevent ISA outbreaks in the United States.

Description of Respondents: Business or other for-profit; individuals or households.

Number of Respondents: 200.

Frequency of Responses: Reporting: on occasion.

Total Burden Hours: 5,600.

Animal and Plant Health Inspection Service

Title: Foot-and-Mouth Disease; Prohibition on Importation of Farm Equipment.

OMB Control Number: 0579–0195.

Summary of Collection: Regulations contained in 9 CFR parts 92 through 98 prohibits the importation of used farm equipment into the United States from regions in which foot-and-mouth disease or rinderpest exist, unless the equipment has been stream-cleaned prior to export to the United States so that it is free of exposed dirt and other particulate matter. Disease prevention is the most effective method for maintaining a healthy animal population and enhancing the Animal and Plant Health Inspection Service (APHIS) ability to compete in exporting animals and animal products.

Need and Use of the Information: APHIS will collect information through the use of a certification statement in which the exporter states that the cleaning of the equipment has been done. This is necessary to help prevent the introduction of food-and-mouth disease into the United States. If the information were not collected APHIS would be forced to discontinue the importation of any used farm equipment from FMD regions, a development that could have a damaging financial impact on exporters and importers of this equipment.

Description of Respondents: Business or other for-profit; State, local or tribal government.

Number of Respondents: 1,000.

Frequency of Responses: Reporting: on occasion.

Total Burden Hours: 2,000.

Ruth Brown

Departmental Information Collection Clearance Officer.

[FR Doc. 05–12778 Filed 6–28–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 22, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (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 assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Farm Service Agency

Title: Transfer of Farm Records Between Counties.

OMB Control Number: 0560–NEW.

Summary of Collection: Most Farm Service Agency (FSA) programs are administered on the basis of "farm". For program purposes, a farm is a collection of tracts of land that have the same owner and the same operator. Land with different owners may be considered to be a farm if all the land is operated by one person and additional criteria are met. A farm is typically administered in the FSA county office where the farm is physically located. A farm transfer can be initiated if the farm is being transferred back to the county where the farm is physically located, the principal dwelling on the farm operator has changed, a change has occurred in the operation of the land, or there has been a change that would cause the receiving administrative county to be more accessible. Form FSA–179, "Transfer of Farm Record Between Counties," is used as the request for a farm transfer

from one county to another initiated by the producer.

Need and Use of the Information: The information collected on the FSA–179 is collected only if a farm transfer is being requested and is collected in a face-to-face setting with county office personnel. The information is used by county office employees to document which farm is being transferred, what county it is being transferred to, and why it is being transferred. Without the information county offices will be unable to determine whether the producer desires to transfer a farm.

Description of Respondents: Farms.

Number of Respondents: 25,000.

Frequency of Responses: Reporting: on occasion.

Total Burden Hours: 29,175.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–12779 Filed 6–28–05; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Environmental Assessment for the North Light Creek Bridge Replacement, Hiawatha National Forest, Munising Ranger District, Alger County, MI

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: The Forest Service is seeking public comment on proposed replacement of the North Light Creek Bridge, located within the Grand Island Research Natural Area and Grand Island National Recreation Area, Munising Ranger District, Alger County, Michigan.

The Responsible Official for decisions on permanent structures within Research Natural Areas, such as the proposed replacement bridge, is Dale Bosworth, Chief of the Forest Service (36 CFR 251.23). Forest Service appeal regulations require that legal notice of opportunity to comment on proposed actions be published in the **Federal Register** and the newspaper of record (36 CFR 215.5).

DATES: Comments on the proposed action must be received at the Munising Ranger District on or before 30 days from the date of publication in the newspaper of record, the "Mining Journal," located in Marquette, Michigan. If the comment period ends on a Saturday, Sunday, or Federal holiday, comments will be accepted until the end of the next Federal working day.

ADDRESSES: The environmental assessment for the proposal is available on-line at *http://www.fs.fed.us/r9/hiawatha/planning.htm*, and in print from the Munising Ranger District, 400 East Munising Avenue, Munising, MI 49862, Attn: NLCB. Comments may be submitted orally, in writing, or via electronic mail. For oral comments, call Teresa Chase, District Ranger, at (906) 387–2512, extension 14. Written comments may be addressed to the Munising District Ranger at the above address or faxed to (906) 387–2070. Electronic mail comments must be sent to: *comments-eastern-hiawatha-munising@fs.fed.us*. Please include "North Light Creek Bridge Comments" in the subject line of the e-mail. Office hours for hand delivered or oral (in person or by telephone) comments are 8 a.m. to 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Teresa Chase, Munising District Ranger, at (906) 387–2512, extension 14. Individuals who use telecommunication devices for the deaf (TDD) may call 906–387–3371 between 8 a.m. and 4:30 p.m., Central Daylight Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The North Light Creek Bridge is located within the Grand Island National Recreation Area. The bridge is an integral part of an historic travel route around the rim of the island. The bridge is currently in severe disrepair and is closed to traffic. Visitors to Grand Island place themselves at risk by crossing North Light Creek. Repair or replacement is needed for visitor safety, maintenance of the historic travel route, and sustaining the long-term recreation objectives in the Grand Island Management Plan. The Forest Service is proposing to replace the bridge, and is considering three alternatives: No action/no replacement (Alternative 1), replacement with a glue-laminate arch bridge with a treated wood deck (Alternative 2), and replacement with a steel pony truss bridge with a treated wood deck (Alternative 3).

Opportunity for public comment was previously provided in the newspaper of record, the "Mining Journal," Marquette, Michigan, on October 7, 2004. However, notice was not published in the **Federal Register** as required by 36 CFR 215.5 when the Chief of the Forest Service is the Responsible Official. This opportunity to comment corrects the original omission. Substantive comments that were timely submitted in response to the October 7, 2004, notice in the newspaper of record need not be re-submitted and will be considered in arriving at a decision or in determining standing to appeal the decision.

Only those who submit timely and substantive comments will be accepted as appellants. Substantive comments that are within the scope of the proposed action, specific to the proposed action, or that have a direct relationship to the proposed action and include supporting reasons, are most helpful to the Forest Service in arriving at a decision (36 CFR 215.2). For appeal eligibility, each individual or representative from each organization submitting substantive comments must either sign the comments or verify identity upon request. Acceptable formats for electronic comments are text or HTML e-mail, Adobe Portable Document Format (PDF), and Microsoft Office formats.

Dated: June 23, 2005.

Timothy DeCoster,

Acting Deputy Chief, Programs, Legislation & Communications.

[FR Doc. 05–12786 Filed 6–28–05; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Ketchikan Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting

SUMMARY: The Ketchkian Resource Advisory Committee will meet in Ketchikan, Alaska, October 13, 2005. The purpose of this meeting is to discuss potential projects under the Secure Rural Schools and Community Self-Determination Act of 200.

DATES: The meeting will be held October 13, 2005.

ADDRESSES: The meeting will be held at the Southeast Alaska Discovery Center Learning Room (back entrance), 50 Main Street, Ketchikan, Alaska. Send written comments to Ketchikan Resource Advisory Committee, c/o District Ranger, USDA Forest Service, 3031 Tongass Ave., Ketchikan, AK 99901, or electronically to *1koland@fs.fed.us*.

FOR FURTHER INFORMATION CONTACT: Lynn Kolund, District Ranger, Ketchikan-Misty Fiords Ranger District, Tongass National Forest, (907) 228–4100.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, public input

opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: June 22, 2005.

Forrest Cole,

Forest Supervisor.

[FR Doc. 05–12807 Filed 6–28–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Atlantic Highly Migratory Species Observer Notification Requirements.

Form Number(s): None.

OMB Approval Number: 0648–0374.

Type of Request: Regular submission.

Burden Hours: 282.

Number of Respondents: 393.

Average Hours Per Response: 2 minutes.

Needs and Uses: Under current regulations, National Marine Fisheries Service (NMFS) may select for observer coverage any fishing trip by a vessel that has a permit for Atlantic Highly Migratory Species (HMS). NMFS will advise vessel owners in writing when their vessels have been selected. The owners of those vessels are then required to notify NMFS before commencing any fishing trip for Atlantic HMS. The notification allows NMFS to arrange for observer placements and assignments.

Affected Public: Business or other for-profit organizations; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: June 23, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–12781 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the emergency provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Evaluation of NOAA's Bay Watershed Education and Training (B–WET) Programs.

Form Number(s): None.

OMB Approval Number: None.

Type of Request: Emergency submission.

Burden Hours: 4,838.

Number of Respondents: 7,427.

Average Hours Per Response: 25 minutes.

Needs and Uses: NOAA seeks to ascertain whether B-WET-funded Meaningful Watershed Educational Experience (MWEE) programs are inproving students' stewardship and academic achievement as well as teachers' confidence in implementing MWEEs with their students. NOAA, with additional funding from the Chesapeake Bay Trust and the Keith Campbell Foundation, has contracted with an external team of evaluators to conduct an initial, exploratory evaluation to collect baseline data on the MWEE and professional development programs.

Affected Public: Not-for-profit institutions; State, Local or Tribal government.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent before July 15, 2005, to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: June 23, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–12783 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Deep Seabed Mining Regulations for Exploration Licenses.

Form Number(s): None.

OMB Approval Number: 0648–0327.

Type of Request: Regular submission.

Burden Hours: 8,490.

Number of Respondents: 45,520.

Average Hours Per Response: 7 minutes.

Needs and Uses: This information collection consists of a mandatory annual vessel permit program for commercial tuna fisheries, recreational highly migratory species (HMS) fisheries and charter/headboat HMS fisheries, and mandatory dealer permits for purchase HMS from vessels and international trade of several HMS. The catch monitoring and collection of catch and effort statistics in these fisheries are required under the Atlantic Tunas Convention Act and the Magnuson-Stevens Fishery Conservation and Management Act. Such information is collected through the permit programs, and is essential for the United States to meet its reporting obligations to the International Commission for the Conservation of Atlantic Tunas. Both the International Commission for the Conservation of Atlantic Tunas and the Inter-American Tropical Tuna Commission require trade tracking programs which are implemented in part by the dealer permit for international trade under this collection.

Affected Public: Individuals or households; business or other for-profit organizations.

Frequency: Annually and on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: June 23, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–12784 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Northeast Region Sea Scallop Framework 16 Adjustment.

Form Number(s): None.

OMB Approval Number: 0648–0509.

Type of Request: Regular submission.

Burden Hours: 863.

Number of Respondents: 274.

Average Hours Per Response: 40 seconds.

Needs and Uses: Sea scallop fishermen, fishing under the general category permit, wishing to fish in exemption areas are subject to certain vessel monitoring system (VMS) and communication reporting requirements. This submission requests clearance for an extension of a collection as it pertains to Framework 16 to the Sea Scallop Fishery Management Plan reporting requirements that all scallop vessels including general category vessels fishing in reopened closed areas have a functional VMS.

Affected Public: Business or other for-profit organizations; individuals or households; not-for-profit institutions.

Frequency: Monthly, hourly, weekly, and on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: June 23, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–12785 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–503, A–122–503, A–570–502, C–351–504]

Continuation of Antidumping Duty Orders on Certain Iron Construction Castings from Brazil, Canada, and the People's Republic of China, and the Countervailing Duty Order on Heavy Iron Construction Castings from Brazil

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce ("the Department") and the International Trade Commission ("ITC") that revocation of the antidumping duty orders on certain iron construction castings from Brazil, Canada, and the People's Republic of China ("China"), and the countervailing duty order on heavy iron construction castings from Brazil would likely lead to continuation or recurrence of dumping and countervailable subsidies, and material injury to an industry in the United States, the Department is publishing notice of continuation of these antidumping and countervailing duty orders.

EFFECTIVE DATE: June 29, 2005.

FOR FURTHER INFORMATION CONTACT: Martha V. Douthit or Dana Mermelstein, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5050 or (202) 482–1391, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2004, the Department initiated and the ITC instituted sunset reviews of the antidumping duty orders on certain iron construction castings from Brazil, Canada, and China, and the countervailing duty order on heavy iron construction castings from Brazil, pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act").[1]

As a result of its review, the Department found that revocation of the antidumping and countervailing duty orders would likely lead to continuation or recurrence of dumping and countervailable subsidies, and notified the ITC of the magnitude of the margins and the net countervailable subsidy likely to prevail were the orders to be revoked.[2] On June 14, 2005, the ITC determined pursuant to section 751(c) of the Act, that revocation of the antidumping duty orders on certain iron construction casting from Brazil, Canada, and China, and the countervailing duty order on heavy iron construction castings from Brazil would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[3]

Scope of the Orders

Brazil (A–351–503)

The merchandise subject to this antidumping duty order consists of certain iron construction castings, limited to manhole covers, rings, and frames; catch basin grates and frames; and cleanout covers and frames used for drainage or access purposes for public utility, water and sanitary systems, classifiable as heavy castings under Harmonized Tariff Schedule of the United States ("HTS") item number 7325.10.0010; and to valve, service, and meter boxes which are placed below ground to encase water, gas, or other valves, or water and gas meters,

[1] *See Initiation of Five-Year ("Sunset") Reviews*, 69 FR 58890 (October 1, 2004), and ITC *Investigation No. 731-TA-125 (Second Review)*, 69 FR 58955 (October 1, 2004).

[2] *See Certain Iron Construction Castings from Canada; Five Year ("Sunset") Review of Antidumping Duty Order: Final Results*, 70 FR 24512 (May 10, 2005), *Certain Iron Construction Castings from Brazil; Five Year ("Sunset") Review of Antidumping Duty Order: Final Results*, 70 FR 24513 (May 10, 2005), *Certain Iron Construction Castings from the People's Republic of China; Five Year ("Sunset") Review of Antidumping Duty Order: Final Results*, 70 FR 24611 (May 10, 2005), and *Certain Iron Construction Castings from Brazil; Five Year ("Sunset") Review of Countervailing Duty Order: Final Results*, 70 FR 24529 (May 10, 2005).

[3] *See Investigation Nos. 701-TA-249, 731-TA-262, 263, and 265 (Second Review)*, 70 FR 34505 (June 14, 2005).

classifiable as light castings under HTS item number 7325.10.0050.

Canada (A–122–503)

The merchandise subject to this antidumping duty order consists of certain iron construction castings, limited to manhole covers, rings, and frames; catch basin grates and frames; cleanout covers and frames used for drainage or access purposes for public utility, water and sanitary systems, classifiable as heavy castings under HTS item number 7325.10.0010.

China (A–570–502)

The merchandise subject to this antidumping duty order consists of certain iron construction castings, limited to manhole covers, rings and frames; catch basin grates and frames; and cleanout covers and frames used for drainage or access purposes for public utility, water and sanitary systems; and valve, service, and meter boxes which are placed below ground to encase water, gas, or other valves, or water and gas meters. These articles must be of cast iron, not alloyed, and not malleable. The merchandise is currently classifiable under item number 7325.10.0010 and 7325.10.0050.

Brazil (C–351–504)

The merchandise subject to this countervailing duty order consists of certain heavy iron construction castings from Brazil. The merchandise is defined as manhole covers, rings and frames; catch basin grates and frames; and cleanout covers and frames. This merchandise is currently classifiable under HTS item number 7325.10.00.

The HTS item numbers subject to these antidumping and countervailing duty orders are provided for convenience and customs purposes. The written product descriptions remain dispositive.

Determination

As a result of the determinations by the Department and the ITC that revocation of these antidumping and countervailing duty orders would likely lead to continuation or recurrence of dumping and countervailable subsidies, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty orders on certain iron construction castings from Brazil, Canada, and China, and countervailing duty order on heavy iron construction castings from Brazil.

U.S. Customs and Border Protection ("CBP") will continue to collect antidumping and countervailing duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of these orders will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to section 751(c)(2) and 751(c)(6)(A) of the Act, the Department intends to initiate the next five–year reviews of these orders not later than May 2010.

These five–year (sunset) reviews and this notice are in accordance with section 751(c) of the Act.

Dated: June 21, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–3393 Filed 6–28–05; 8:45 am]

Billing Code: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–848]

Notice of Extension of the Preliminary Results of New Shipper Antidumping Duty Reviews: Crawfish Tail Meat from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: June 29, 2005.

FOR FURTHER INFORMATION CONTACT: Scot Fullerton at (202) 482–1386 or Bobby Wong at (202) 482–0409; AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce (the Department) received timely requests from Dafeng Shunli Import & Export Co., Ltd. (Shunli) and Shanghai Blessing Trade Co., Ltd. (Shanghai Blessing) in accordance with 19 CFR 351.214(c), for new shipper reviews of the antidumping duty order on crawfish tail meat from the PRC. *See Freshwater Crawfish Tail Meat From the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews*, 69 FR 64028 (November 3, 2004). On October 28, 2004, the Department found that the requests for review with respect to Shunli and Shanghai Blessing met all the regulatory requirements set forth in 19 CFR 351.214(b) and initiated these new shipper antidumping duty reviews covering the period September 1, 2003, through August 31, 2004. *Id.* On March 23, 2005, the Department extended the time limit for the deadline for issuance of the preliminary results to June 30, 2005, in accordance with section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act), and § 351.214(i)(2) of the Department's regulations. *See Notice of Extension of the Preliminary Results of New Shipper Antidumping Duty Reviews: Crawfish Tail Meat from the People's Republic of China* 70 FR 14648.

Extension of Time Limits for Preliminary Results

The Act and 19 CFR 351.214(i)(1) require the Department to issue the preliminary results of a new shipper review within 180 days after the date on which the new shipper review was initiated and final results of a review within 90 days after the date on which the preliminary results were issued. The Department may, however, extend the deadline for completion of the preliminary results of a new shipper review to 300 days if it determines that the case is extraordinarily complicated (19 CFR 351.214 (i)(2)). The Department has deemed it necessary to provide additional time for parties to comment on the Department's bona fide sales analyses prior to the preliminary results. Accordingly, the Department is extending the time limit for the completion of the preliminary results until no later than August 23, 2005, in accordance with section 751(a)(2)(B)(iv) of the Act and 19 CFR 351.214(i)(2). The deadline for the final results of this administrative review continues to be 90 days after the publication of the preliminary results, unless extended.

Dated: June 23, 2005.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E5–3392 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–838]

Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: Western Forest Products Inc. (WFP) has requested a changed circumstances review of the antidumping duty order on certain

softwood lumber products from Canada pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216(b). The Department of Commerce (the Department) is initiating this changed circumstances review and issuing this notice of preliminary results pursuant to 19 CFR 351.221(c)(3)(ii). We have preliminarily determined that WFP and its subsidiaries, WFP Products Limited, WFP Western Lumber Ltd., and WFP Lumber Sales Limited (collectively, "the WFP Entities"), are the successor–in-interest to Doman Industries Limited, Doman Forest Products Limited, and Doman Western Lumber Ltd. (collectively, "the Doman Entities").

EFFECTIVE DATE: June 29, 2005.

FOR FURTHER INFORMATION CONTACT: Constance Handley or David Neubacher, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0631 or (202) 482–5823, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 24, 2005, the Department issued the amended final results of the antidumping duty administrative review on certain softwood lumber products from Canada. *See Notice of Amended Final Results Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 70 FR 3358 (January 24, 2005). On May 27, 2005, WFP requested that the Department initiate and conduct an expedited changed circumstances review, in accordance with section 351.216 of the Department's regulations, to confirm that WFP and its subsidiaries are the successor–in-interest to the Doman Entities. In its request, WFP stated that the Doman Entities reorganized and transferred all of their assets to a new operating group known as WFP on July 27, 2004, and provided supporting documentation.

Scope of the Order

The products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:

(1) coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger–jointed, of a thickness exceeding six millimeters;

(2) coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v–jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger–jointed;

(3) other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v–jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood moldings and wood dowel rods) whether or not planed, sanded or finger–jointed; and

(4) coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v–jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger–jointed.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive. Preliminary scope exclusions and clarifications were published in three separate **Federal Register** notices.

Softwood lumber products excluded from the scope:

- trusses and truss kits, properly classified under HTSUS 4418.90
- I–joist beams
- assembled box spring frames
- pallets and pallet kits, properly classified under HTSUS 4415.20
- garage doors
- edge–glued wood, properly classified under HTSUS 4421.90.97.40 (formerly HTSUS 4421.90.98.40)
- properly classified complete door frames
- properly classified complete window frames
- properly classified furniture

Softwood lumber products excluded from the scope only if they meet certain requirements:

- *Stringers* (pallet components used for runners): if they have at least two notches on the side, positioned at equal distance from the center, to properly accommodate forklift blades, properly classified under HTSUS 4421.90.97.40 (formerly HTSUS 4421.90.98.40).
- *Box–spring frame kits*: if they contain the following wooden pieces - two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails should be radius–cut at both ends. The kits should be individually packaged, they should contain the exact number of wooden components needed to make a particular box spring frame, with no further processing required. None of the components exceeds 1″ in actual thickness or 83″ in length.
- *Radius–cut box–spring-frame components*, not exceeding 1″ in actual thickness or 83″ in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantial cuts so as to completely round one corner.
- *Fence pickets* requiring no further processing and properly classified under HTSUS 4421.90.70, 1″ or less in actual thickness, up to 8″ wide, 6′ or less in length, and have finials or decorative cuttings that clearly identify them as fence pickets. In the case of dog–eared fence pickets, the corners of the boards should be cut off so as to remove pieces of wood in the shape of isosceles right angle triangles with sides measuring ¾ inch or more.
- *U.S. origin lumber* shipped to Canada for minor processing and imported into the United States, is excluded from the scope of this order if the following conditions are met: 1) the processing occurring in Canada is limited to kiln–drying, planing to create smooth–to-size board, and sanding, and 2) the importer establishes to U.S. Customs and Border Protection's (CBP) satisfaction that the lumber is of U.S. origin.[1]
- *Softwood lumber products contained in single family home packages or kits*,[2] regardless of tariff classification, are excluded from the scope of the orders if the following criteria are met:

1. The imported home package or kit constitutes a full package of the number of wooden pieces specified in the plan, design or blueprint necessary to produce a home of at

[1] For further clarification pertaining to this exclusion, *see* the additional language concluding the scope description below.

[2] To ensure administrability, we clarified the language of this exclusion to require an importer certification and to permit single or multiple entries on multiple days, as well as instructing importers to retain and make available for inspection specific documentation in support of each entry.

least 700 square feet produced to a specified plan, design or blueprint;
2. The package or kit must contain all necessary internal and external doors and windows, nails, screws, glue, subfloor, sheathing, beams, posts, connectors and, if included in purchase contract, decking, trim, drywall and roof shingles specified in the plan, design or blueprint;
3. Prior to importation, the package or kit must be sold to a retailer of complete home packages or kits pursuant to a valid purchase contract referencing the particular home design plan or blueprint, and signed by a customer not affiliated with the importer;
4. The whole package must be imported under a single consolidated entry when permitted by CBP, whether or not on a single or multiple trucks, rail cars or other vehicles, which shall be on the same day except when the home is over 2,000 square feet;
5. The following documentation must be included with the entry documents:
- a copy of the appropriate home design, plan, or blueprint matching the entry;
- a purchase contract from a retailer of home kits or packages signed by a customer not affiliated with the importer;
- a listing of inventory of all parts of the package or kit being entered that conforms to the home design package being entered;
- in the case of multiple shipments on the same contract, all items listed immediately above which are included in the present shipment shall be identified as well.

We have determined that the excluded products listed above are outside the scope of this order provided the specified conditions are met. Lumber products that CBP may classify as stringers, radius cut box–spring-frame components, and fence pickets, not conforming to the above requirements, as well as truss components, pallet components, and door and window frame parts, are covered under the scope of this order and may be classified under HTSUS subheadings 4418.90.40.90, 4421.90.70.40, and 4421.90.98.40. Due to changes in the 2002 HTSUS whereby subheading 4418.90.40.90 and 4421.90.98.40 were changed to 4418.90.45.90 and 4421.90.97.40, respectively, we are adding these subheadings as well.

In addition, this scope language has been further clarified to now specify that all softwood lumber products entered from Canada claiming non–subject status based on U.S. country of origin will be treated as non–subject U.S.-origin merchandise under the antidumping and countervailing duty orders, provided that these softwood lumber products meet the following condition: upon entry, the importer, exporter, Canadian processor and/or original U.S. producer establish to CBP's satisfaction that the softwood lumber entered and documented as U.S.-origin softwood lumber was first produced in the United States as a lumber product satisfying the physical parameters of the softwood lumber scope.[3] The presumption of non–subject status can, however, be rebutted by evidence demonstrating that the merchandise was substantially transformed in Canada.

Initiation and Preliminary Results

Pursuant to section 751(b)(1) of the Act, the Department will conduct a changed circumstances review upon receipt of information concerning, or a request from an interested party for a review of, an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. As indicated in the Background section, we have received information indicating that the Doman Entities transferred all of their assets to a new operating group of companies known as WFP. This constitutes changed circumstances warranting a review of the order. Therefore, in accordance with section 751(b)(1) of the Act, we are initiating a changed circumstances review based upon the information contained in WFP's submission.

Section 351.221(c)(3)(ii) of the regulations permits the Department to combine the notice of initiation of a changed circumstances review and the notice of preliminary results if the Department concludes that expedited action is warranted. In this instance, because we have on the record the information necessary to make a preliminary finding, we find that expedited action is warranted and have combined the notice of initiation and the notice of preliminary results.

In making successor–in-interest determinations, the Department examines several factors including, but not limited to, changes in: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base. *See, e.g., Polychloroprene Rubber from Japan: Final Results of Changed Circumstances Review*, 67 FR 58 (January 2, 2002) citing, *Brass Sheet and Strip from Canada: Notice of Final Results of Antidumping Duty Administrative Review*, 57 FR 20460 (May 13, 1992). While no single factor, or combination of factors, will necessarily prove dispositive, the Department will generally consider the new company to be the successor to its predecessor company if the resulting operations are essentially the same as the predecessor company. *Id.* citing, *Industrial Phosphoric Acid from Israel; Final Results of Antidumping Duty Changed Circumstances Review*, 59 FR 6944, 6945 (February 14, 1994). Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as its predecessor, the Department will assign the new company the cash–deposit rate of its predecessor.

In its May 27, 2005, submission, WFP states that the Doman Entities reorganized and transferred all of their assets to the WFP Entities, and that WFP and its subsidiaries are the identical companies to the Doman Entities. As such, WFP states that the companies' management, production facilities and customer/supplier relationships have not changed. To support its claims, WFP submitted numerous documents, including: (1) the Doman Entities' Plan of Compromise and Arrangement; (2) the Doman Entities' Asset Transfer Agreement; (3) copies of Certificate of Amendment documents amending the names of the Doman Entities to WFP Entities; (4) copies of share certificates showing Doman Entities shares transferred to WFP; (5) corporate structure chart of Doman before the pre–plan implementation and current structure chart of WFP; (6) WFP's overview presentation on its current business structure and operations given at the 2005 CIBC World Markets Conference and; (7) customer lists for the pre- and post–plan implementation period.

Based on the information submitted by WFP, we preliminarily find that WFP and its subsidiaries are the successor–in-interest to the Doman Entities. Based on the evidence reviewed, we find that WFP and its subsidiaries operate as the same business entities as the Doman Entities and that the companies' senior management, production facilities, supplier relationships, and customers have not changed. Thus, we preliminarily find that WFP and its subsidiaries should receive the same antidumping duty cash–deposit rate (*i.e.*, 3.78 percent) with respect to the subject merchandise as the Doman Entities, its predecessor companies.

[3] *See* the scope clarification message (3034202), dated February 3, 2003, to CBP, regarding treatment of U.S.-origin lumber on file in the Central Records Unit, Room B-099 of the main Commerce Building.

However, because cash deposits are only estimates of the amount of antidumping duties that will be due, changes in cash deposit rates are not made retroactive. If WFP believes that the deposits paid exceed the actual amount of dumping, it is entitled to request an administrative review during the anniversary month of the publication of the order of those entries to determine the proper assessment rate and receive a refund of any excess deposits. *See Certain Hot–Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom: Final Results of Changed–Circumstances Antidumping and Countervailing Duty Administrative Reviews*, 64 FR 66880 (November 30, 1999). As a result, if these preliminary results are adopted in our final results of this changed circumstances review, we will instruct CBP to suspend shipments of subject merchandise made by the WFP Entities at the Doman Entities' cash deposit rate (*i.e.*, 3.78 percent). Until that time, the cash deposit rate assigned to WFP's entries is the rate in effect at the time of entry (*i.e.*, the "all others" rate).

Public Comment

Any interested party may request a hearing within 30 days of publication of this notice. *See* 19 CFR 351.310(c). A hearing, if requested, will be held 44 days after the date of publication of this notice, or the first working day thereafter. Interested parties may submit case briefs and/or written comments not later than 30 days after the date of publication of this notice. Rebuttal briefs and rebuttals to written comments, which must be limited to issues raised in such briefs or comments, may be filed not later than 37 days after the date of publication of this notice. Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.

Consistent with section 351.216(e) of the Department's regulations, we will issue the final results of this changed circumstances review no later than 270 days after the date on which this review was initiated, or within 45 days if all parties agree to our preliminary finding. We are issuing and publishing this finding and notice in accordance with sections 751(b)(1) and 777(i)(1) of the Act and section 351.216 of the Department's regulations.

Dated: June 23, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–3394 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–839]

Notice of Extension of Time Limit for Final Results of Countervailing Duty New Shipper Review: Certain Softwood Lumber Products from Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: June 29, 2005.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–4793.

SUPPLEMENTARY INFORMATION:

Statutory Time Limits

Section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act), requires the Department of Commerce (the Department) to issue the final results of a new shipper review within 90 days after the date the preliminary results are issued. However, if the Department determines that the case is extraordinarily complicated, section 751(a)(2)(B)(iv) of the Act allows the Department to extend the 90-day deadline for the final results to 150 days.

Background

On July 8, 2004, the Department initiated a new shipper review relating to the countervailing duty order on certain softwood lumber products from Canada, covering the period January 1, 2003, through December 31, 2003. *See Certain Softwood Lumber Products From Canada: Notice of Initiation of Antidumping Duty New Shipper Review for the Period May 1, 2003, through April 30, 2004, and Notice of Initiation of Countervailing Duty New Shipper Review for the Period January 1, 2003, through December 31, 2003*, 69 FR 41229 (July 8, 2004).[1] The respondent in this review is Seed Timber Co. Ltd. (Seed Timber). The Department completed the preliminary results of this new shipper review on April 26, 2005. *See Certain Softwood Lumber Products From Canada: Preliminary Results of Countervailing Duty New Shipper Review*, 70 FR 22848 (May 3, 2005). The current deadline for the final results is July 25, 2005.

Extension of Time Limits for Final Results

Pursuant to section 751(a)(2)(B)(iv) of the Act, the Department may extend the deadline for completion of the final results of a new shipper review if the case is extraordinarily complicated. The Department determines that this review is extraordinarily complicated and cannot be completed within the statutory time limit of 90 days because of the complexity of issues that interested parties raised in case briefs concerning the Department's applied benefit methodology.[2] Therefore, in accordance with section 751(a)(2)(B)(iv) of the Act and section 351.214(i)(2) of the Department's regulations, the Department is extending the time limit for completion of the final results to 150 days. The final results are now due no later than September 23, 2005.

This notice is published pursuant to sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: June 17, 2005.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E5–3395 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Proposed Information Collection; Comment Request; National Voluntary Conformity Assessment System Evaluation (NVCASE) Program

ACTION: Notice.

SUMMARY: The Department of Commerce (DOC), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the continuing and proposed information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

[1] Seed Timber's antidumping new shipper review was subsequently rescinded as a result of the company's withdrawal of its request for a review (69 FR 54766, September 10, 2004).

[2] Case briefs were submitted to the Department on June 2, 2005.

DATES: Written comments must be submitted on or before August 29, 2005.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of Jogindar S. Dhillon, National Institute of Standards and Technology (NIST), 100 Bureau Drive, Stop 2150, Gaithersburg, MD 20899–2150, telephone: (301) 975–5521 or via e-mail to *jogindar.dhillon@nist.gov*.

SUPPLEMENTARY INFORMATION

I. Abstract

The National Voluntary Conformity Assessment System Evaluation (NVCASE) Program is a voluntary program to evaluate organizations that carry out activities related to laboratory testing, product certification, and quality system registration. Any interested organizations provide information to the National Institute of Standards and Technology (NIST) to support their conformance with established criteria for any of these activities. The information provided is used to conduct a NVCASE evaluation. Based on NVCASE evaluations, NIST provides recognition to qualified U.S. organizations. The ultimate goal is to help U.S. manufacturers satisfy applicable product requirements mandated by other countries through conformity assessment procedures conducted in this country prior to export. NVCASE recognition (1) provides other governments with a basis for having confidence that qualifying U.S. conformity assessment bodies (CABs) are competent, and (2) facilitates the acceptance of U.S. products in foreign-regulated markets based on U.S. conformity assessment results.

The NVCASE recognition program facilitates U.S. trade with Europe, Asia and the Americas under government-to-government agreements, and facilitates the flow of U.S. products to countries in those regions.

II. Method of Collection

Applicants submit written information to NIST.

III. Data

OMB Number: 0693–0019.
Form Number(s): None.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 10.
Estimated Time Per Response: 3 hours.
Estimated Total Annual Respondent Burden Hours: 30.
Estimated Total Annual Respondent Cost Burden: $1,050.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.*, the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 23, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–12782 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Flower Garden Banks National Marine Sanctuary Advisory Council

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The Flower Garden Banks National Marine Sanctuary (FGBNMS or Sanctuary) is seeking applicants for the following vacant seats on its Sanctuary Advisory Council (Council): Recreational Diving, Diving Operations, Oil and Gas Industry, Recreational Fishing, Commercial Fishing, Research, Education, and Conservation. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve 3-year terms, pursuant to the Council's Charter.

DATES: Applications are due by August 15, 2005.

ADDRESSES: Application kits may be obtained from Shelley Du Puy at Flower Garden Banks National Marine Sanctuary, 1200 Briarcrest, Suite 4000, Bryan, Texas 77802. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Shelley Du Puy, 1200 Briarcrest, Suite 4000, Bryan, Texas 77802, 979–846–5942, *Flowergarden@noaa.gov*.

SUPPLEMENTARY INFORMATION: Located in the northwestern Gulf of Mexico, the Flower Garden Banks National Marine Sanctuary includes three separate areas, known as East Flower Garden, West Flower Garden, and Stetson Banks. The Sanctuary was designated on January 17, 1992. Stetson Bank was added to the Sanctuary in 1996. The Sanctuary Advisory Council will consist of no more than 11 members; 8 non-governmental voting members and 3 governmental non-voting members. The Council may serve as a forum for consultation and deliberation among its members and as a source of advice to the Sanctuary manager regarding the management of the Flower Garden Banks National Marine Sanctuary.

Authority: 16 U.S.C. 1431 *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program.)

Dated: June 23, 2005.

Daniel J. Basta,

Director, National Marine Sanctuary Program, National Ocean Services, National Oceanic and Atmospheric Administration.

[FR Doc. 05–12773 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

U.S. Coral Reef Task Force Public Meeting and Public Comment

AGENCY: National Ocean Service, NOAA, Department of Commerce.

ACTION: Notice of public meeting, notice of public comment.

SUMMARY: Notice is hereby given of a public meeting of the U.S. Coral Reef

Task Force. The meeting will be held in Koror, Palau. This meeting, the 14th bi-annual meeting of the U.S. Coral Reef Task Force, provides a forum for coordinated planning and action among federal agencies, state and territorial governments, and nongovernmental partners. Held in Koror, Palau, this is the first Coral Reef Task Force meeting to be held outside the United States states, territories, or commonwealths and provides an opportunity to learn about coral reef science and management strategies in the Freely Associated States. This meeting has time allotted for public comment and provides exhibit space. All public comment must be submitted in written format at the meeting if able to attend or prior to the meeting if unable to attend. If you plan to attend, please register in advance by visiting the Web site listed below. Registration for public comment and exhibit space is also available at this site.

Those who wish to attend but cannot due to travel and other considerations can find background materials at the Web site listed below and may submit written statements to the e-mail, fax, or mailing address listed below. A written summary of the meeting will be posted on the Web site within two months of its occurrence.

DATES: The meeting will be held on Saturday, November 5, 2005, 8:30–5:30 and Monday, November 7, 2005, 8:30–5:30. Advance public comments can be submitted from Monday, October 3, 2005–Friday, October 22, 2005.

Location: The meeting will be held at the Ngarachamayong Cultural Center, located at Medalaii, Koror 96940, Koror, Palau.

FOR FURTHER INFORMATION CONTACT: Beth Dieveney, U.S. Coral Reef Task Force Coordinator, Coral Reef Conservation Program, 1305 East-West Highway, Silver Spring, Maryland, 20910 (phone: 301–713–2989 ext. 200, Fax: 301–713–4389, e-mail: *Beth.Dieveney@noaa.gov*, or visit the U.S. Coral Reef Task Force Web site at *http://www.coralreef.gov*).

SUPPLEMENTARY INFORMATION: Established by Presidential Executive Order 13089 in 1998, the U.S. Coral Reef Task Force mission is to lead, coordinate, and strengthen U.S. government actions to better preserve and protect coral reef ecosystems. Co-chaired by the Departments of Commerce and Interior, Task Force members include leaders of 12 Federal agencies, seven U.S. States and territories, and three freely associated states. For more information about the meeting, traveling to Palau, registering, and submitting public comment go to *http://www.coralreef.gov*.

Dated: June 22, 2005.

David Kennedy,

Manager, Coral Reef Conservation Program.

[FR Doc. 05–12774 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 062405C]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States and Coral and Coral Reefs Fishery in the South Atlantic; Exempted Fishing Permit

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

ACTION: Notice of receipt of an application for an exempted fishing permit; request for comments.

SUMMARY: NMFS announces the receipt of an application for an exempted fishing permit (EFP) from David R. Griffin on behalf of The North Carolina Aquariums. If granted, the EFP would authorize the applicant, with certain conditions, to collect up to 50 red porgy and up to 500 lb (227 kg) of live rock. Specimens would be collected from Federal waters off the coast of North Carolina during 2005 and 2006, and displayed at three North Carolina Aquarium facilities located on Roanoke Island, near Morehead City, and south of Wilmington, North Carolina.

DATES: Comments must be received no later than 5 p.m., eastern time, on July 14, 2005.

ADDRESSES: Comments on the application may be sent via fax to 727–824–5308 or mailed to: Julie Weeder, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701. Comments may be submitted by e-mail. The mailbox address for providing e-mail comments is *nc.aquarium@noaa.gov*. Include in the subject line of the e-mail document the following text: Comment on North Carolina Aquariums EFP Application. The application and related documents are available for review upon written request to the address above or the e-mail address below.

FOR FURTHER INFORMATION CONTACT: Julie Weeder, 727–551–5753; fax 727–824–5308; e-mail *julie.weeder@noaa.gov*.

SUPPLEMENTARY INFORMATION: The EFP is requested under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

According to the applicant, The North Carolina Aquariums are operated by the North Carolina Department of Environment and Natural Resources. Their mission is to inspire appreciation and conservation of North Carolina's aquatic environments through display of live animals found in the state.

The proposed collection for public display involves activities otherwise prohibited by regulations implementing the Fishery Management Plans (FMP) for the Snapper-Grouper Fisheries of the South Atlantic Region and the Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region.

The applicant requires authorization to harvest and possess up to 50 red porgy and up to 500 lb (227 kg) of live rock. Collections would occur in Federal waters off the coast of North Carolina during 2005 and 2006. Red porgy would be captured using hook-and-line, and SCUBA divers would collect live rock by hand at depths ranging from 40 ft (12 m) to 130 ft (40 m).

NMFS finds that this application warrants further consideration. Based on a preliminary review, NMFS intends to issue an EFP. Possible conditions the agency may impose on this permit, if it is indeed granted, include but are not limited to: Reduction in the number of fish and/or live rock to be collected; prohibition of harvest of live rock; restrictions on the size of fish to be collected; prohibition of the harvest of any fish with visible external tags; and specification of locations, dates, and/or seasons allowed for collection of red porgy and/or live rock. A final decision on issuance of the EFP will depend on a NMFS review of public comments received on the application, conclusions of environmental analyses conducted pursuant to the National Environmental Policy Act, and consultations with the affected states, the South Atlantic Fishery Management Council, and the U.S. Coast Guard. The applicant requests a 12-month effective period for the EFP.

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

Dated: June 24, 2005.

Alan D. Risenhoover

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E5–3396 Filed 6–28–05; 8:45 am]

BILLING CODE 3510–22–S

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Notice of the Defense Base Closure and Realignment Commission (Washington, DC)

AGENCY: Defense Base Closure and Realignment Commission.

ACTION: Notice: Defense Base Closure and Realignment Commission—Open Meeting (Washington, DC).

SUMMARY: Notice is hereby given that a delegation of the Commissioners of the Defense Base Closure and Realignment Commission will hold an open meeting on July 7, 2005 from 8:30 a.m. to 3:15 p.m. in the Ronald Reagan Building, 1300 Pennsylvania Avenue, NW., Washington, DC 20004. The delay of this notice resulted from the short time-frame established by statute for the operations of the Defense Base Closure and Realignment Commission and the need to coordinate the schedules of the various Federal, state and local officials whose participation was judged essential to a meaningful public discussion. The Commission requests that the public consult the Defense Base Closure and Realignment Commission Web site, *http://www.brac.gov*, for updates. The delegation will meet to receive comment from Federal, state and local government representatives and the general public on base realignment and closure actions in the District of Columbia, Pennsylvania, and Virginia that have been recommended by the Department of Defense (DoD). The purpose of this regional hearing is to allow communities experiencing a base closure or major realignment action (defined as loss of 300 civilian positions or 400 military and civilian positions) an opportunity to voice their concerns, counter-arguments, and opinions in live public forum. This meeting will be open to the public, subject to the availability of space. The delegation will not render decisions regarding the DoD recommendations at this meeting, but will gather information for later deliberations by the Commission as a whole.

DATES: July 7, 2005 from 8:30 a.m. to 3:15 p.m.

ADDRESSES: Ronald Reagan Building, 1300 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Please see the Defense Base Closure and Realignment Commission Web site, *http://www.brac.gov*. The Commission invites the public to provide direct comment by sending an electronic message through the portal provided on the Commission's website or by mailing comments and supporting documents to the Defense Base Closure and Realignment Commission, 2521 South Clark Street, Suite 600, Arlington, Virginia 22202–3920. The Commission requests that public comments be directed toward matters bearing on the decision criteria described in the Defense Base Closure and Realignment Act, as amended, available on the Commission Web site. Sections 2912 through 2914 of that Act describe the criteria and many of the essential elements of the Base Closure and Realignment process. For questions regarding this announcement, contact Mr. Dan Cowhig, Deputy General Counsel and Designated Federal Official, at the Commission's mailing address or telephone at 703–699–2950 or 2708.

Dated: June 23, 2005.

Jeannette Owings-Ballard,

Administrative Support Officer.

[FR Doc. 05–12772 Filed 6–28–05; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Waiver of 10 U.S.C. 2534 for Certain Defense Items Produced in the United Kingdom

AGENCY: Department of Defense (DoD).

ACTION: Notice of waiver of 10 U.S.C. 2534 for certain defense items produced in the United Kingdom.

SUMMARY: The Under Secretary of Defense (Acquisition, Technology, and Logistics) is waiving the limitation of 10 U.S.C. 2534 for certain defense items produced in the United Kingdom (UK). 10 U.S.C. 2534 limits DoD procurement of certain items to sources in the national technology and industrial base. The waiver will permit procurement of items enumerated from sources in the UK, unless otherwise restricted by statute.

DATES: This waiver is effective for one year, beginning July 14, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Glotfelty, OUSD (AT&L), Director of Defense Procurement and Acquisition Policy, Program Acquisition and International Contracting, Room 5E581, 3060 Defense Pentagon, Washington, DC 20301–3060, telephone (703) 697–9351.

SUPPLEMENTARY INFORMATION: Subsection (a) of 10 U.S.C. 2534 provides that the Secretary of Defense may procure the items listed in that subsection only if the manufacturer of the item is part of the national technology and industrial base. Subsection (i) of 10 U.S.C. 2534 authorizes the Secretary of Defense to exercise the waiver authority in subsection (d), on the basis of the applicability of paragraph (2) or (3) of that subsection, only if the waiver is made for a particular item listed in subsection (a) and for a particular foreign country. Subsection (d) authorizes a waiver if the Secretary determines that application of the limitation "would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items" and if he determines that "that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country." The Secretary of Defense has delegated the waiver authority of 10 U.S.C. 2534(d) to the Under Secretary of Defense (Acquisition, Technology, and Logistics).

DoD has had a Reciprocal Defense Procurement Memorandum of Understanding (MOU) with the UK since 1975, most recently renewed on December 16, 2004.

The Under Secretary of Defense (Acquisition, Technology, and Logistics) finds that the UK does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in the UK, and also finds that application of the limitation in 10 U.S.C. 2534 against defense items produced in the UK would impede the reciprocal procurement of defense items under the MOU.

Under the authority of 10 U.S.C. 2534, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has determined that application of the limitation of 10 U.S.C. 2534(a) to the procurement of any defense item produced in the UK that is listed below would impede the reciprocal procurement of defense items under the MOU with the UK.

On the basis of the foregoing, the Under Secretary of Defense (Acquisition, Technology, and Logistics) is waiving the limitation in 10 U.S.C. 2534(a) for procurements of any defense item listed below that is produced in the UK. This waiver applies only to the limitations in 10 U.S.C. 2534(a). It does not apply to any other limitation, including sections 8016 and 8059 of the DoD Appropriations Act for Fiscal Year 2005 (Pub. L. 108–287). This waiver applies to procurements under solicitations issued during the period

from July 14, 2005, to July 13, 2006. Similar waivers have been granted since 1998 (63 FR 38815, July 20, 1998; 64 FR 38896, July 20, 1999; 65 FR 47968, August 4, 2000; 66 FR 40680, August 3, 2001; and 67 FR 50423, August 2, 2002). For contracts resulting from solicitations issued prior to August 4, 1998, this waiver applies to procurements of the defense items listed below under—

(1) Subcontracts entered into during the period from July 14, 2005, to July 13, 2006, provided the prime contract is modified to provide the Government adequate consideration such as lower cost or improved performance; and

(2) Options that are exercised during the period from July 14, 2005, to July 13, 2006, if the option prices are adjusted for any reason other than the application of the waiver, and if the contract is modified to provide the Government adequate consideration such as lower cost or improved performance.

List of Items To Which This Waiver Applies

1. Air circuit breakers.
2. Welded shipboard anchor and mooring chain with a diameter of four inches or less.
3. Gyrocompasses.
4. Electronic navigation chart systems.
5. Steering controls.
6. Pumps.
7. Propulsion and machinery control systems.
8. Totally enclosed lifeboats.
9. Ball and roller bearings.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

[FR Doc. 05–12747 Filed 6–28–05; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notice of the Defense Acquisition Performance Assessment Project—Open Meeting; Correction

AGENCY: Department of Defense.

ACTION: Notice; correction.

SUMMARY: The Defense Acquisition Performance Assessment Project published a notice of Open Meeting in the **Federal Register** of June 23, 2005. The document cited a General Information section that should be removed and incorrect contact telephone numbers.

FOR FURTHER INFORMATION CONTACT: Lt Col Rene Bergeron, (703) 697–1361, *rene.Bergeron@pentagon.af.mil.*

Correction

In the **Federal Register** of June 23, 2005, in FR Doc 05–12424, on page 36377, in the middle column, on the bottom of the page, correct the **FOR FURTHER INFORMATION CONTACT** caption to read:

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this meeting or wishing to submit comments must contact: Lt Col Rene Bergeron, Assistant Director of Staff, Defense Acquisition Performance Assessment Project, 1670 Air Force Pentagon, Rm 4E886, Washington, DC 20330–1670, Telephone: (703) 697–1361, DSN 225–1361, Fax: (703) 693–4303, *rene.bergeron@pentagon.af.mil.* Interested persons may submit a written statement for consideration by the Panel, preferably via fax. Written statements to the Panel must be directed to the point of contact listed above, received no later than 5 p.m., July 13, 2005.

Dated: June 23, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–12812 Filed 6–28–05; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: DoD, Per Diem, Travel and Transportation Allowance Committee.

ACTION: Notice of Revised Non-Foreign Overseas Per Diem Rates—Civilian Personnel Per Diem Bulletin Number 241.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is publishing Civilian Personnel Per Diem Bulletin Number 241. This bulletin lists revisions in the per diem rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 241 is being published in the **Federal Register** to assure that travelers are paid per diem at the most current rates.

DATES: Effective July 1, 2005.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 240. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions in per diem rates to agencies and establishments outside the Department of Defense. For more information or questions about per diem rates, please contact your local travel office. The text of the Bulletin follows:

BILLING CODE: 5001–06–M

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A) +	M&IE RATE (B) =	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
THE ONLY CHANGES IN CIVILIAN BULLETIN 241 ARE UPDATES TO THE RATES FOR MIDWAY ISLANDS AND WAKE ISLAND.				
ALASKA				
ADAK	120	79	199	07/01/2003
ANCHORAGE [INCL NAV RES]				
05/01 - 09/15	170	89	259	06/01/2004
09/16 - 04/30	95	81	176	06/01/2004
BARROW	159	95	254	05/01/2002
BETHEL	119	77	196	06/01/2004
BETTLES	135	62	197	10/01/2004
CLEAR AB	80	55	135	09/01/2001
COLD BAY	90	73	163	05/01/2002
COLDFOOT	135	71	206	10/01/1999
COPPER CENTER				
05/16 - 09/15	109	63	172	07/01/2003
09/16 - 05/15	99	63	162	07/01/2003
CORDOVA				
05/01 - 09/30	110	74	184	04/01/2005
10/01 - 04/30	85	72	157	04/01/2005
CRAIG				
04/15 - 09/14	125	64	189	04/01/2005
09/15 - 04/14	95	61	156	04/01/2005
DEADHORSE	95	67	162	05/01/2002
DELTA JUNCTION	89	75	164	06/01/2004
DENALI NATIONAL PARK				
06/01 - 08/31	114	60	174	04/01/2005
09/01 - 05/31	80	57	137	04/01/2005
DILLINGHAM	114	69	183	06/01/2004
DUTCH HARBOR-UNALASKA	121	73	194	04/01/2005
EARECKSON AIR STATION	80	55	135	09/01/2001
EIELSON AFB				
05/01 - 09/15	159	88	247	06/01/2004
09/16 - 04/30	75	79	154	06/01/2004
ELMENDORF AFB				
05/01 - 09/15	170	89	259	06/01/2004
09/16 - 04/30	95	81	176	06/01/2004
FAIRBANKS				
05/01 - 09/15	159	88	247	06/01/2004
09/16 - 04/30	75	79	154	06/01/2004
FOOTLOOSE	175	18	193	06/01/2002
FT. GREELY	89	75	164	06/01/2004
FT. RICHARDSON				
05/01 - 09/15	170	89	259	06/01/2004
09/16 - 04/30	95	81	176	06/01/2004
FT. WAINWRIGHT				
05/01 - 09/15	159	88	247	06/01/2004
09/16 - 04/30	75	79	154	06/01/2004
GLENNALLEN				
05/01 - 09/30	125	73	198	04/01/2005

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A) +	M&IE RATE (B) =	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
10/01 - 04/30	89	69	158	04/01/2005
HEALY				
06/01 - 08/31	114	60	174	04/01/2005
09/01 - 05/31	80	57	137	04/01/2005
HOMER				
05/15 - 09/15	125	73	198	04/01/2005
09/16 - 05/14	76	68	144	04/01/2005
JUNEAU				
05/01 - 09/30	120	80	200	06/01/2005
10/01 - 04/30	79	77	156	04/01/2005
KAKTOVIK	165	86	251	05/01/2002
KAVIK CAMP	150	69	219	05/01/2002
KENAI-SOLDOTNA				
05/01 - 08/31	129	82	211	04/01/2005
09/01 - 04/30	79	77	156	04/01/2005
KENNICOTT	189	85	274	04/01/2005
KETCHIKAN				
05/01 - 09/30	135	82	217	04/01/2005
10/01 - 04/30	98	78	176	04/01/2005
KING SALMON				
05/01 - 10/01	225	91	316	05/01/2002
10/02 - 04/30	125	81	206	05/01/2002
KLAWOCK				
04/15 - 09/14	125	64	189	04/01/2005
09/15 - 04/14	95	61	156	04/01/2005
KODIAK	112	80	192	04/01/2005
KOTZEBUE				
05/15 - 09/30	141	86	227	02/01/2005
10/01 - 05/14	135	85	220	02/01/2005
KULIS AGS				
05/01 - 09/15	170	89	259	06/01/2004
09/16 - 04/30	95	81	176	06/01/2004
MCCARTHY	189	85	274	04/01/2005
METLAKATLA				
05/30 - 10/01	98	48	146	05/01/2002
10/02 - 05/29	78	47	125	05/01/2002
MURPHY DOME				
05/01 - 09/15	159	88	247	06/01/2004
09/16 - 04/30	75	79	154	06/01/2004
NOME	120	84	204	04/01/2005
NUIQSUT	180	53	233	05/01/2002
PETERSBURG	80	62	142	06/01/2005
POINT HOPE	130	70	200	03/01/1999
POINT LAY	105	67	172	03/01/1999
PORT ALSWORTH	135	88	223	05/01/2002
PRUDHOE BAY	95	67	162	05/01/2002
SEWARD				
05/01 - 09/30	145	79	224	04/01/2005
10/01 - 04/30	62	71	133	04/01/2005
SITKA-MT. EDGECUMBE				

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A) +	M&IE RATE (B) =	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
05/01 - 09/30	119	66	185	04/01/2005
10/01 - 04/30	99	64	163	04/01/2005
SKAGWAY				
05/01 - 09/30	135	82	217	04/01/2005
10/01 - 04/30	98	78	176	04/01/2005
SLANA				
05/01 - 09/30	139	55	194	02/01/2005
10/01 - 04/30	99	55	154	02/01/2005
SPRUCE CAPE	112	80	192	04/01/2005
ST. GEORGE	129	55	184	06/01/2004
TALKEETNA	100	89	189	07/01/2002
TANANA	120	84	204	04/01/2005
TOGIAK	100	39	139	07/01/2002
UMIAT	180	107	287	04/01/2005
UNALAKLEET	79	80	159	04/01/2003
VALDEZ				
05/01 - 10/01	129	74	203	04/01/2005
10/02 - 04/30	79	69	148	04/01/2005
WASILLA				
05/01 - 09/30	134	78	212	04/01/2005
10/01 - 04/30	80	73	153	04/01/2005
WRANGELL				
05/01 - 09/30	135	82	217	04/01/2005
10/01 - 04/30	98	78	176	04/01/2005
YAKUTAT	110	68	178	03/01/1999
[OTHER]	80	55	135	09/01/2001
AMERICAN SAMOA				
AMERICAN SAMOA	135	67	202	06/01/2004
GUAM				
GUAM (INCL ALL MIL INSTAL)	135	90	225	06/01/2005
HAWAII				
CAMP H M SMITH	129	96	225	05/01/2005
EASTPAC NAVAL COMP TELE AREA	129	96	225	05/01/2005
FT. DERUSSEY	129	96	225	05/01/2005
FT. SHAFTER	129	96	225	05/01/2005
HICKAM AFB	129	96	225	05/01/2005
HONOLULU (INCL NAV & MC RES CTR)	129	96	225	05/01/2005
ISLE OF HAWAII: HILO	105	80	185	05/01/2005
ISLE OF HAWAII: OTHER	150	92	242	05/01/2005
ISLE OF KAUAI	158	98	256	05/01/2005
ISLE OF MAUI	159	95	254	06/01/2004
ISLE OF OAHU	129	96	225	05/01/2005
KEKAHA PACIFIC MISSILE RANGE FAC	158	98	256	05/01/2005
KILAUEA MILITARY CAMP	105	80	185	05/01/2005
LANAI	400	153	553	05/01/2005
LUALUALEI NAVAL MAGAZINE	129	96	225	05/01/2005
MCB HAWAII	129	96	225	05/01/2005
MOLOKAI	119	95	214	05/01/2005
NAS BARBERS POINT	129	96	225	05/01/2005
PEARL HARBOR [INCL ALL MILITARY]	129	96	225	05/01/2005

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A) +	M&IE RATE (B) =	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
SCHOFIELD BARRACKS	129	96	225	05/01/2005
WHEELER ARMY AIRFIELD	129	96	225	05/01/2005
[OTHER]	72	61	133	01/01/2000
MIDWAY ISLANDS				
MIDWAY ISLANDS [INCL ALL MILITAR	100	65	165	07/01/2005
NORTHERN MARIANA ISLANDS				
ROTA	129	88	217	06/01/2005
SAIPAN	121	91	212	06/01/2005
TINIAN	85	80	165	06/01/2005
[OTHER]	55	72	127	04/01/2000
PUERTO RICO				
BAYAMON				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
CAROLINA				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
FAJARDO [INCL CEIBA & LUQUILLO]	82	54	136	01/01/2000
FT. BUCHANAN [INCL GSA SVC CTR,				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
HUMACAO	82	54	136	01/01/2000
LUIS MUNOZ MARIN IAP AGS				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
MAYAGUEZ	85	59	144	01/01/2000
PONCE	96	69	165	01/01/2000
ROOSEVELT RDS & NAV STA	82	54	136	01/01/2000
SABANA SECA [INCL ALL MILITARY]				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
SAN JUAN & NAV RES STA				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
[OTHER]	62	57	119	01/01/2000
VIRGIN ISLANDS (U.S.)				
ST. CROIX				
04/15 - 12/14	98	83	181	08/01/2003
12/15 - 04/14	135	87	222	08/01/2003
ST. JOHN				
04/15 - 12/14	110	91	201	08/01/2003
12/15 - 04/14	185	98	283	08/01/2003
ST. THOMAS				
04/15 - 12/14	163	95	258	08/01/2003
12/15 - 04/14	220	99	319	08/01/2003
WAKE ISLAND				
WAKE ISLAND	100	65	165	07/01/2005

Dated: June 23, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–12771 Filed 6–28–05; 8:45 am]

BILLING CODE 5001–06–C

DEPARTMENT OF EDUCATION

[CFDA No. 84.357]

Reading First

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice announcing application deadline.

SUMMARY: Under the Reading First program, we award Targeted Assistance Grants to State educational agencies (SEAs) that demonstrate an increase in student achievement in schools and districts participating in the Reading First program.

As discussed elsewhere in this notice, the data that States must submit to demonstrate an increase in student achievement are the same data that States must submit in their annual performance reports for their Reading First State grants. We are therefore permitting States to apply for Targeted Assistance Grants by submitting their annual Reading First performance report. No separate application is required. This notice establishes July 30, 2005, as the deadline date for submitting the annual performance report to apply for a Targeted Assistance Grant.

DATES: *Application Deadline:* July 30, 2005.

SUPPLEMENTARY INFORMATION:

Which SEAs Are Eligible for a Targeted Assistance Grant?

An SEA is eligible for a Targeted Assistance Grant if it can show an increase in student achievement over two consecutive years. Therefore, an SEA's eligibility for this grant begins when the State has three years of student achievement data. This may include either—

(a) Student data representing three years of school-level implementation of the Reading First program; or

(b) Student data representing two years of school-level implementation of the Reading First program, along with baseline data from the year preceding implementation.

Specifically, the SEA's application must demonstrate that an increasing percentage of third-grade students in the schools served by the LEAs that receive Reading First funds are reaching the proficient level in reading for each of two consecutive years in the following categories—

(a) Economically disadvantaged students;

(b) Students from each major racial and ethnic group;

(c) Students with disabilities; and

(d) Students with limited English proficiency.

The SEA must also demonstrate in its application that for each of those two consecutive years, the schools receiving Reading First funds are improving the reading skills of students in grades 1, 2, and 3 based on instructional reading assessments, and that increasing percentages of students in the State are reading at grade level or above.

Who Will Review State Applications for Targeted Assistance Grants?

The expert review panel convened to evaluate State applications for Reading First State Grants will also review applications for Targeted Assistance Grants to determine whether the data the SEA submits demonstrate an increase in student achievement in schools and districts participating in the Reading First program.

How Is the Targeted Assistance Grant Application Submitted?

The data that States must submit to demonstrate an increase in student achievement are the same data States must submit in their annual performance reports. Accordingly, the annual performance report will serve as the Targeted Assistance Grant application and States may apply for a Targeted Assistance Grant by submitting their annual performance report. The annual performance report is available and submitted electronically at: *https://www.readingfirstapr.org.* States should indicate that they want their data reviewed in consideration for a Targeted Assistance Grant by checking the appropriate box on the annual performance report and providing the assurances and information requested. In order to be considered for a Targeted Assistance Grant, the annual performance report must be submitted by July 30, 2005. Only those States that want to be considered for a Targeted Assistance Grant this year must submit their annual performance report by this date. All other States must submit their reports no later than November 30, 2005.

How Will Targeted Assistance Grants Be Awarded to Eligible States?

The Department will award the grants to eligible SEAs based on the information provided in the annual performance report and a statutory formula for determining award amounts. The statutory formula is calculated based on the proportion of children aged 5 to 17 who reside within the State and are from families with incomes below the poverty line, compared to the number of children aged 5 to 17 from families with incomes below the poverty line who reside in all States with approved Targeted Assistance Grant applications for that year. Poverty data are drawn from the most recent fiscal year for which satisfactory data are available.

FOR FURTHER INFORMATION CONTACT: Sandi Jacobs, telephone: (202) 401–4877 or by e-mail: *sandi.jacobs@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this notice in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.** *Electronic Access To This Document:* You may view this document, as well as other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll-free, at 1–888–293–6498; or in the Washington DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official version of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Program Authority: 20 U.S.C. 6364.

Dated: June 23, 2005.

Raymond Simon,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 05–12855 Filed 6–28–05; 8:45 am]

BILLING CODE 4001–01–P

ELECTION ASSISTANCE COMMISSION

Publication of State Plans Pursuant to the Help America Vote Act

AGENCY: U.S. Election Assistance Commission (EAC).

ACTION: Notice.

SUMMARY: Pursuant to sections 254(a)(11)(A) and 255(b) of the Help America Vote Act (HAVA), Public Law 107–252, the U.S. Election Assistance Commission (EAC) hereby causes to be published in the **Federal Register** material changes to the HAVA State plans previously submitted by Iowa, Mississippi, and North Carolina.

DATES: This notice is effective upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bryan Whitener, telephone 202–566–3100 or 1–866–747–1471 (toll-free).

Submit Comments: Any comments regarding the plans published herewith should be made in writing to the chief election official of the individual States at the address listed below.

SUPPLEMENTARY INFORMATION: On March 24, 2004, the U.S. Election Assistance Commission published in the **Federal Register** the original HAVA State plans filed by the 50 States, the District of Columbia and the Territories of American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. 69 FR 14002. HAVA anticipated that States, Territories and the District of Columbia would change or update their plans from time to time pursuant to HAVA section 254 (a)(11) through (13). HAVA sections 254(a)(11)(A) and 255 require EAC to publish such updates.

The submissions from Iowa, Mississippi, and North Carolina address material changes to their original State plans. Iowa provides additional detail regarding various aspects of HAVA implementation. Mississippi addresses a change in the State's approach to procuring new voting equipment and provides an updated timeline for the implementation of the required statewide voter registration database. North Carolina provides a revised budget for the use of HAVA funds received. In accordance with HAVA section 254(a)(12), the documents also provide information on how the States succeeded in carrying out their previous State plan. Upon the expiration of 30 days from June 29, 2005, Mississippi and North Carolina will be eligible to implement any material changes addressed in the State plan published herein, in accordance with HAVA section 254(a)(11)(C).

EAC notes that the plans published herein have already met the notice and comment requirements of HAVA section 256, as required by HAVA section 254(a)(11)(B). EAC wishes to acknowledge the effort that went into the revising the State plan and encourages further public comment, in writing, to the chief election officials of Mississippi and North Carolina.

Thank you for your interest in improving the voting process in America.

Chief State Election Officials

Iowa

The Honorable Chester J. Culver, Secretary of State, First Floor, Lucas Building, 321 E. 12th St., Des Moines, IA 50319, phone: 515–281–0145, Fax: 515–281–7142, e-mail: *sos@sos.state.ia.us.*

Mississippi

The Honorable Eric Clark, Secretary of State, P.O. Box 136, Jackson, MS 39205–0136, phone: 601–359–1350, Fax: 601–359–1499, e-mail: *administrator@sos.state.ms.us.*

North Carolina

Mr. Gary O. Bartlett, State Board of Elections, 6400 Mail Service Center, Raleigh, NC 27699–6400, phone: 919–733–7173, Fax: 919–715–0135, e-mail: *elections.sboe@ncmail.net.*

Dated: June 22, 2005.

Gracia M. Hillman,

Chair, U.S. Election Assistance Commission.

BILLING CODE 6820–KF–P

CHESTER J. CULVER
IOWA SECRETARY OF STATE
STATEHOUSE
DES MOINES, IA 50319

TEL (515) 281-8993
FAX (515) 242-5952

www.sos.state.ia.us
sos@sos.state.ia.us

June 9, 2005

U.S. Election Assistance Commission
%Peggy Sims, Research Specialist
1225 New York Avenue N.W., Suite 1100
Washington, D.C. 20005

Dear Ms. Sims,

I am pleased to file for publication in the *Federal Register* with the Election Assistance Commission (EAC), the up-dated Section 12 of the State of Iowa Help America Vote Act (HAVA) Advisory Committee State Plan in accordance with Section 255 of the Help America Vote Act of 2002. This updated section combined with the State of Iowa HAVA Advisory Committee State Plan submitted in 2003, is our complete plan for the 2004/2005 fiscal year.

As required by section 245 (a) (12), the amendment describes material changes Iowa has made since the State Plan was filed in 2003. Specifically, Section 12 contains descriptions of the amended versions of Sections 1,2,3,4,5,6,7,8,9,10,11, and 13 and lists the progress that Iowa has made toward full implementation of HAVA. The full State of Iowa HAVA Advisory Committee State Plan can be accessed at http://www.sos.state.ia.us/elections/hava/PlanReports/index.html.

The 2004/2005 amendments to the State of Iowa HAVA Advisory Committee State Plan were developed in accordance with HAVA Section 255 and the requirements for public notice and comment prescribed by HAVA Section 256.

I thank the commission for its assistance and look forward to our collaboration in improving the administration of elections in Iowa.

Sincerely,

Chet Culver

Chet Culver
Secretary of State

CC/jb
Enclosure

State of IOWA
Help America Vote Act Advisory Committee Preliminary State Plan

As required by Public Law 107-25, Help America Vote Act 2002, section 253 (b).

As recommended on May 16, 2003.

Chester J. Culver
Iowa Secretary of State
and Chief State Election Official
Statehouse
Des Moines, IA 50319

SECTION 12: CHANGES TO STATE PLAN FROM PREVIOUS FISCAL YEAR

ELEMENT 12. In the case of a state plan in effect under this subtitle during the previous fiscal year, a description of how the plan reflects changes from the state plan for the previous fiscal year and of how the state succeeded in carrying out the state plan for such previous year. HAVA section 254 (a)(12)

The FY 2003 state plan is the preliminary state plan required under the Help America Vote Act of 2002. This section will be updated in the next fiscal year, reflecting changes to the state plan, as well as a summary of the 2003 successes.

The following represents activity covering the period from October 2003 through April 2005, Federal Fiscal Year (FFY) 04 and the first half of FFY 05.

Section 1: State Plan Required Elements

301. Voting System Standards

As of April 2005, Iowa has four types of voting systems in place in its 99 counties. While some upgrades were made since the preliminary state plan was filed, most of the activity to place compliant equipment in counties will occur during calendar year 2005.

Iowa's Current Voting Systems – November 2004

Lever	1	21
Paper Ballot	0	0
Central Count Optical Scan	53	804
Precinct Count Optical Scan	31	906
DRE	14	249
Total	99	1,980

Evaluate Voting Systems

The State Election Office conducted a survey of all voting systems in place. The six lever counties will be replacing all equipment before January 1, 2006, as will the single paper ballot county. Central count optical scan machines will need to be replaced to allow voters to correct an incorrectly-marked ballot. It is unlikely that many, if any, existing precinct count optical scan or DRE systems will be compliant with HAVA requirements and with Iowa's certification requirements.

Replace Lever County Machines with HAVA Title I Funds

Precinct count optical scan election systems were provided to participating lever/paper ballot counties under a state-negotiated lease-purchase agreement. HAVA funds were used to pay the costs for the 2004 lease agreement, a total of $173,081.41. The one remaining lever county will upgrade equipment as part of the 2005 statewide purchase.

Meeting Accessibility Requirements
Funds for voting systems meeting HAVA accessibility requirements were included in the funding allocation amounts. However, no accessible equipment has passed the testing process; consequently, none has been submitted for Iowa's certification process. Additionally, the previous guidance on the type of equipment that will be considered accessible is undergoing review at the national level. DREs and ballot marking devices might ultimately be determined accessible, in which case both would be considered eligible for reimbursement under Iowa's criteria.

Voting Equipment Technical Support Services
No change to this section.

302. Provisional Voting and Voting Information Requirements
Iowa law largely met the provisional ballot requirements. During the 2004 session of the Iowa General Assembly, state law was modified to meet the requirements. Administrative Rules have also been modified accordingly. Training on provisional ballots was held on several levels including: county election officials and poll workers prior to the 2004 General Election.

303. Computerized Statewide Voter Regiatration Liat Requirements and Requirements for Voters Who Register by Mail
The State Election Office has completed the plan for studying Iowa's current voter registration system and for administering and implementing the plan. A contract was awarded in early December 2004 to Saber Consulting for total replacement of the voter registration systems in all counties with a single, uniform, official centralized, interactive computerized statewide voter registration system as required by HAVA. The bid and additional expected purchases of hardware remain within the budgeted amount. The contractor began working on-site in January 2005 and has remained on schedule for implementation.

The contractor has worked with a representative group of county auditors to develóp the standards for the statewide application. Demonstrations of the system have occurred in each region. Twelve pilot counties are on schedule to be converted to the new system by July 2005.

The timeline for implementation of the voter registration system follows:

- **December 2004**-Issued intent to award to Saber Consulting, Salem, Oregon
- **January & February 2005**-Saber Project Manager/Application Manager/Technical Manager established project control center at the State Elections Office in Des Moines
- **February 2005**-Six regional application demonstrations to county auditors and county election staff
- **March & April 2005**
  - Production/dual site Data Center hardware
  - Pilot County Data migration from current county systems
  - Gaps/enhancements to "off the shelf" VR application (making it Iowa specific)
- **June 2005**- Pilot Counties will test the voter registration application with Iowa enhancements
- **July 2005**- Pilot Counties will switch to the voter registration application.
- **July-December 2005**- All other counties will be migrated to the voter registration application in three phases

304. Minimum Requirements
No change to this section.

305. Methods of Implementation Left to Discretion of State
No change to this section.

312. Adoption of Voluntary Guidance by Commission
No change to this section.

251(b)(2). Other Activities
No change to this section.

Section 2: Distribution of Requirements Payments

A maximum allocation of funds for each of Iowa's 99 counties has been predetermined and approved by the HAVA Advisory Committee and the Chief State Election Official. (See the Secretary of State website to review the funding allocations by county.) The amount indicated is the maximum amount reimbursable to the county for voting systems. The formula sets a minimum amount for county size ranges, takes into account the number of registered voters, and limits the allocation to a maximum of $12,000 per precinct. A county seeking to further reduce compliance costs may wish to consider consolidating precincts, as the formula amount is fixed.

Purchasing voting systems is the responsibility of county supervisors, per Iowa Code section 52.2. For the purposes of this program, the Chief State Election Official, in conjunction with the Department of Administrative Services, will obtain pricing under a state Master Contract for several types of voting systems and allow counties to purchase off the state Master Contract. Counties may also choose to purchase directly from vendors. In any case, the price under the state Master Contract will be the maximum price eligible for use of HAVA funds.

The process for applying and receiving allocation funds includes the following steps:

1. Complete and submit to the Chief State Election Official a county voting system compliance plan by April 30, 2005.
2. Complete and file with the Chief State Election Office a Voting System Allocation Application. The State Election Office will review and, upon approval, provide an award letter and Allocation Agreement to the county.
3. After a county has negotiated a contract, the county shall file a copy of the contract with a request to draw down funds in an amount not to exceed the total county allocation. The contract must include an itemized list of items to be purchased and the total cost.
4. Once the county receives the equipment, the county shall submit a copy of the detailed invoice and a final report of HAVA voting system compliance. The report shall be filed with the State Election Office no later than December 30, 2005.

Section 3: Voter Education, Election Official Education and Training, and Poll Worker Training

Voter Education

Voter education requirements of HAVA were met through a variety of activities to reach all voters. The following table lists the 2003 Iowa HAVA State Plan activities and materials, the implementation of the plan in the past 18 months, and the planned activities in FFY 2005 – 2006.

2003 HAVA State Plan: Outreach Program Components/Objectives	2003 HAVA State Plan: Implementation	2003 HAVA State Plan: Future Implementation/Goals
As federally mandated and adopted on July 17, 2003	2004	2005-2006
Non-visual presentations using Braille and audio tapes and other media	▪ Voter information posting in Braille sent to every precinct ▪ Voter guide available on audio tape	▪ Continue to update audio tape of voter guide ▪ Presentation/instructions on how to use new accessible voting equipment
Telecommunications devices for the deaf in state and county election offices	▪ Deaf Action Open House – update on HAVA for the deaf community ▪ TDD number for voter hotline to convert audio into visual script for the deaf	▪ TDD number for voter hotline to convert audio into visual script for the deaf
Voter Bill of Rights	▪ *Bill of Rights/Top 10 Reasons To Get Involved* distributed to various groups. ▪ Example: Newly naturalized citizens and state employees paycheck stuffer	▪ Continued distribution of Voter Bill of Rights ▪ Inclusion as part of New Iowa Citizens curriculum (see also Voter's pamphlets)
Voter registration cards and instructions	▪ Available on Web site and in Iowa Voter Guide (in multiple languages)	▪ Continued availability of forms and expansion of languages
Absentee forms and voting instructions	▪ Available on Web site and in Iowa Voter Guide (in multiple languages)	▪ Continued availability of forms and expansion of languages
Languages other than English	▪ Voter registration and absentee ballot request forms translated to Spanish, Laotian, and Vietnamese ▪ Translation of voter information postings to Spanish and Russian	▪ Voter registration and absentee ballot request forms translated to languages where requested ▪ Encourage county posting of translation of voter information postings in multiple languages

2003 HAVA State Plan: Outreach Program Components/Objectives	2003 HAVA State Plan: Implementation	2003 HAVA State Plan: Future Implementation/Goals
As federally mandated and adopted on July 17, 2003	2004	2005-2006
Voter's pamphlets – Voter Guide, Candidate Guide	▪ Direct mailing of voter guides to every Iowa household ▪ Reminder postcard mailed to voters who were required to show ID at the polls ▪ Voting equipment instruction postcard mailed to six counties with new voting equipment	▪ 2006 direct mailing of voter guide ▪ Reminder postcard mailed to voters who will be required to show ID at the polls ▪ New voting equipment instructional pamphlets
Training focused on first-time voters	▪ ISPAC activities including: Capitol Project, Mock Caucus and Mock Election *(51,598 participants statewide)* ▪ Iowa Collegiate Empowerment Coalition – group of young minority leaders whose goal is to engage other young adults in the political process	▪ ISPAC activities including: Capitol Project, Mock Caucus and Mock Election ▪ Iowa Collegiate Empowerment Coalition – group of young minority leaders whose goal is to engage other young adults in the political process ▪ New Citizens Curriculum: instructions on how voting works in Iowa and the importance of voting
Iowa Voter Registration Day	▪ Voter Registration Week *(25 colleges participated and nearly 2,900 citizens registered to vote)*	▪ Voter Registration Week
Instructions for provisional voting Posters at polling place to advise voters on new voting equipment and procedural changes	▪ Iowa Voter Information poster placed in every precinct	▪ Iowa Voter Information poster placed in every precinct ▪ Instructions for new voting equipment
Voter education display at county courthouses	▪ Voting equipment demonstrations and voter education programs in courthouses and other locations in six counties with new voting equipment ▪ ISU voter registration drive	▪ Voting equipment demonstrations and voter education programs in courthouses and other locations in counties with new voting equipment
State and County fair booths to distribute information	▪ Iowa State Fair booth with new voting equipment demonstration	▪ Iowa State Fair booth with new voting equipment demonstration

2003 HAVA State Plan: Outreach Program Components/Objectives	2003 HAVA State Plan: Implementation	2003 HAVA State Plan: Future Implementation/Goals
As federally mandated and adopted on July 17, 2003	2004	2005-2006
Internet Web site maintained by the Chief State Election Official	▪ www.iowavotes.us site for election information including online voter guide, Voter Registration Form (multiple languages) and Absentee Ballot Request Form (multiple languages)	▪ www.iowavotes.us site for election information including online voter guide, Voter Registration Form (multiple languages) and Absentee Ballot Request Form (multiple languages)
Celebration of Voting Rights		▪ Engage participation and representation of Iowa's diverse cultural groups a celebration centering on the 40th Anniversary of the Voting Rights Act, the 85th Anniversary of the 19th Amendment, and the 15th Anniversary of the ADA. The celebration will includes events across Iowa, a curriculum on voting rights for use in schools, and extensive education on voting.
PSAs	▪ Radio PSAs during Iowa Hawkeye football games to remind voters to register/update registrauon and where to find voting information	▪ PSAs informing voters of new equipment and deadlines for voter registration

Election Official Education and Training

Election officials were able to take advantage of opportunities for training and education throughout the year. In addition to the SEAT training effort, intense work to develop uniform poll worker training materials and conduct a train-the-trainer session for election officials dominated the months preceding the November 2004 elections. The following table lists the election official training outlined in the original plan, implementation acuvities for 2004, and anucipated efforts in 2005-2006.

2003 HAVA State Plan: Outreach Program Components/Objectives	2003 HAVA State Plan: Implementation	2003 HAVA State Plan: Future Implementation/Goals
As federally mandated and adopted on July 17, 2003	2004	2005-2006
Election Official Training ▪ New requirements by federal/state law, or administrative rule changes ▪ Interpretation of the laws ▪ New voter registration software: forms, fields, requirements ▪ Motor voter registration ▪ SEAT curriculum content made universal ▪ Absentee balloting ▪ Early voting, satellite voting, voting by mail ▪ New accessibility requirements ▪ Cultural and alternative language accessibility ▪ Disability and other populations; diverse cultures; etiquette in relation to voting ▪ First-time voters ▪ Benefits of new system ▪ Selection of poll workers	▪ State Election Administrator Training (SEAT)-certification program for election administrators ▪ Successful cooperative effort with Iowa State Association of County Auditors (ISACA); Iowa Secretary of State; Iowa Ethics and Finance Disclosure Board; facilitated by Iowa State University State (ISU) and Local Government Programs ▪ Purpose: to enhance public confidence in the election process ▪ Iowa is a leader in this election education process ▪ Each graduate has taken 50 hours of classes: specific election laws and professional administration courses ▪ HAVA paid registration fees for those attending SEAT *Statistics:* *167 participated (including):* *> 73 Auditors* *> 89 Counties* *> 3 State Elections Office staff.* *127 certified (including):* *> 59 Auditors*	▪ SEAT will provide continuing education requirements to maintain certification. The first continuing education will be devoted to HAVA ▪ HAVA funds will pay for continuing education registration ▪ HAVA funds will pay for SEAT certification registration ▪ Provide additional accessibility and cultural education ▪ Provide standard curriculum for SEAT trainers ▪ Provide "Train the Trainer" workshops ▪ Establish an ongoing training entity jointly between Iowa Association of County Auditors (ISACA) and the Chief State Election Official to focus on training of county election officials and poll workers. The delivery methods will include web-based training programs

2003 HAVA State Plan: Outreach Program Components/Objectives	2003 HAVA State Plan: Implementation	2003 HAVA State Plan: Future Implementation/Goals
As federally mandated and adopted on July 17, 2003	2004	2005-2006
County Supervisor Training	• Updated supervisors as HAVA legislation progressed • Included supervisors from six counties with new voting systems • Two supervisors traveled to Washington, DC with the Chief State Election Official to discuss federal funding for HAVA with Iowa Senators and Iowa Representatives • Involved supervisors to encourage Iowa legislators to provide HAVA matching funds at the state level	• Continue to involve supervisors as they are the local policy and financial decision makers • Supervisors as members on the HAVA State Advisory Board • In March and April 2005, the Chief State Election Official will hold 12 regional meetings with County Supervisors and County Auditors to continue educating local election officials about HAVA and to gain feedback on HAVA implementation

Poll Worker Training
For the first time in Iowa, poll workers received consistent and uniform training from county election officials using materials developed by the State Election Office in cooperation with county election officials and persons with disabilities. This effort could not have been undertaken or disseminated to every county without the resources available through HAVA.

2003 HAVA State Plan: Outreach Program Components/Objectives	2003 HAVA State Plan: Implementation	2003 HAVA State Plan: Future Implementation/Goals
As federally mandated and adopted on July 17, 2003	2004	2005-2006

Poll Worker Training Material
• Video
• PowerPoint presentation
• Role playing
• Handouts
• Internet and /or computer-based
• ICN-Iowa Communication Network
• Job-specific
• Training manual in print, large type, Braille, and audiotape
	• Training manual: Statewide uniform curriculum for county auditors/commissioner of elections to use as a poll worker training tool provided for each county
	• "Train the Trainer": Instruction was presented at training held for auditors and election staff. The focus was on education methods for adult learners (poll workers) Each county received:
	  • Teaching manual
	  • CD with all documents
	  • PowerPoint presentation
	  • Interactive activities
	  • Poll worker handouts
	  • Poll Worker Guidebook (1/precinct - 1980 precincts)
	  • VHS/DVD of polling place scenarios that include correct voting procedures, provisional ballots, and voters in need of assistance
		• The Auditor Training Manual will be updated to comply with any legislative changes
		• Additional training materials will be provided for specific elections (School, City, Specials)
		• Provide additional role-playing scenarios
		• Continue to develop interactive training material for poll workers to use on a computer
		• Poll worker certification program
		  • One certified poll worker per precinct
		  • Four to six hours of training
		  • Beginning in spring 2006

Section 4: Voting System Guidelines and Processes

Uniform Definition of What Constitutes a Vote – Iowa Code Section 52.5 has been revised to provide that the State Commissioner of Elections shall adopt rules as to what constitutes a vote for all voting systems in use in Iowa. The Commissioner has adopted rules defining what constitutes a vote in 721 Iowa Administrative Code Chapter 26.

Voting System Defined – Iowa Code Section 52.5 provides the authority for the State Commissioner of Elections to adopt rules relating to the certification of electronic voting systems. The section also adopts the 2002 Voting System Standards.

Effective Date – Iowa Code Section 52.5 provides the authority for the State Commissioner of Elections to adopt rules for the decertification of election equipment that does meet state standards. Prior to December 31, 2005, the Commissioner intends to adopt rules for the decertification of election equipment that does not meet HAVA requirements and/or the 2002 Voting System Standards.

Section 5: HAVA Fund Management

The HAVA Advisory Committee periodically reviews and approves a detailed budget. The Financial Oversight Subcommittee of the Advisory Committee reviews expenditures quarterly. In addition, the Chief State Election Official has reported to the Legislative Oversight Committee in July 2004 and February 2005. The Chief State Election Official will continue regular reports to the Legislative Oversight Committee regarding HAVA spending.

Section 6: Budget

The HAVA budget has been developed and reviewed by the Financial Oversight Committee and the State Plan Advisory Committee at the quarterly meetings of each body. Adjustments to the budget based on actual funds received by the state as well as updated information on the costs for each element have been reflected in the following budget, effective January 2005.

HAVA Revenue (Current and Estimated)

Received From	Funds	Clarification
HAVA Title I	$5,000,000	Minimum amount of planning funds for every state
State Funds – 2003	$423,000	Intergovernmental transfer for FY 2003 5% match
State Funds – 2004	$765,000	State appropriation for FY 2004 5% state match
HAVA Title II – 2003 & 2004	$23,739,383	Federal funds for two years
EAID Grants - 2005 & 2006	$222,161	
GDDC – 2005	$10,000	
Interest – 2003-2006	$572,504	Projected
Revenue Total	$31,307,665	

HAVA Projected Expenditures

Expenditure Category	Funds	Clarification
Voter Registration System – Title III Requirement	$6,575,000	An RFP was issued for the provision of a statewide voter registration system using specifications compiled from county registration system surveys. Eleven letters of intent were received, yielding four bids. Using a detailed scoring process, a bid from Saber Consulting was accepted and a contract was signed in January 2005. The budgeted amount includes additional funds for the purchase of data center hardware and county equipment upgrades (computers and scanners) to ensure compatibility.
Voting Systems – Title III Requirement	$17,500,000	Only equipment qualified by national standards and certified by the state of Iowa will be eligible to receive HAVA reimbursement. To ensure an equitable distribution and encourage efficiency, funds for equipment purchases will be allocated to counties based on a formula combining number of registered voters and number of precincts. This amount includes the cost of the lever/paper counties' leased equipment.
Provisional Voting – Title III Requirement	$5,000	To keep current with provisional voting practices across the country and ensure HAVA-compliance, State Elections Office staff has attended national meetings on this subject.
ADA Accessible Polling Places – Other Election Reform Activities	$241,224	The State Elections Office coordinated funding from a variety of sources to make Polling Place Accessibility grants to reimburse counties for the costs of making improvements to increase accessibility. Currently, 37 precincts in 16 counties have received the grants. The program will continue through 2005.
Training and Education – Other Election Reform Activities	$3,325,000	Iowa provided one of the first consistent statewide poll worker training curricula for the November 2004 election. Additional funding was spent to support SEAT training, to produce a public voter guide and to target voters needing to show ID, those using new equipment, and those from traditionally low turnout groups.
Administration – Other Election Reform Activities	$855,000	Administrative funds will be used to ensure all HAVA requirements and other specific activities to improve Iowa's election system are thoroughly and adequately completed.
Contingency	$2,806,441	Dollars in the contingency fund will be used to pay for unforeseen expenses and to supplement the other categories, excluding administration.
Total	$31,307,665	

Section 7: Maintenance of Effort

Iowa has maintained its expenditures at the level funded in the fiscal year ending prior to November 2000.

Section 8: Performance Goals and Measures

Performance Goal 1: Elimination of lever voting machines

Six Iowa counties used lever voting machines in 2002. In May of 2004, the state issued a bid request for equipment to replace lever machines. Five of the lever counties participated in the program and have upgraded to precinct count optical scan systems. In addition, Iowa's single paper ballot county upgraded to a precinct optical scan system. The last lever county intends to upgrade during 2005.

Performance Goal 2: HAVA Required DRE in Each Polling Place

While the plan used the term DRE, the Advisory Committee has interpreted to be more generic and mean accessible equipment. The state has issued a draft voting system program, dated March 16, 2005. The program requires counties to submit a compliance plan, to submit a grant application for funds related to the purchase of the equipment, and establishes a maximum allocation amount per county. The final version of the 2005 HAVA Voting System Equipment Plan will be adopted during April 2005.

Performance Goal 3: Accessibility for All Voters

In August 2004, the Chief State Election Official in conjunction with Iowa Developmental Disabilities Council and Iowa Protection and Advocacy established a grant program to assist counties in making polling places accessible. For the 2004 Primary Election, 250 polling places sought accessibility waivers. Through the grant program 37 precincts improved accessibility. A second polling place accessibility grant program was introduced in March 2005.

Performance Goal 4: Centralized Statewide Voter Registration System

In December 2004 Iowa awarded a contract to Saber Consulting, Inc. to develop a statewide voter registration system. The development of the system is well underway with the system to be tested in pilot counties in April 2005. Counties have provided leadership in the development of the voter registration system. Counties have participated in the following ways: identifying requirements for the system, evaluating and recommending proposals, and setting standards for the system. The voter registration system contract is on schedule for full implementation by December 31, 2005.

Performance Goal 5: Administrative Complaint Procedure

On December 17, 2003, the Chief State Election Official adopted an administrative complaint procedure as required by HAVA. In addition, Iowa Code Section 47.1(5) was amended to expressly require the Chief State Election Official to adopt an administrative complaint procedure.

Performance Goal 6: Provisional Ballots

Iowa law largely met the provisional ballot requirements. During the 2004 session of the Iowa General Assembly, state law was modified to meet the requirements. Administrative Rules have also been modified accordingly. Training on provisional ballots was held on several levels including: county election officials and poll workers prior to the 2004 General Election.

Performance Goal 7: Voter Education

Iowa voters were provided with active and passive voter education activities. Recognizing the critical role of local election officials and the reliance of voters on their county auditors, the Chief State Election Official used a strategy of providing current and consistent information to local officials via the *HAVA Weekly News*, distributed by email beginning early in 2004. In the late summer and early fall 2004, state office staff assisted local election officials in the unveiling of the new election systems in the six lever/paper counties and in providing opportunities for those voters to try out the systems. Iowans were able to learn about HAVA and try different voting machines at the Iowa State Fair. Prior to the 2004 elections, a voter guide that included changes in procedures was mailed to each household in Iowa. Voter information was posted on the Chief State Election Official's website. On election day, staff provided telephone support for more than 900 voters.

Performance Goal 8: Poll Worker Training

A uniform system of poll worker training was developed and completed in September 2004. In an effort to improve consistency of poll worker performance across the state, a train-the-trainer session was held on October 8, 2004. Each county auditor was provided a full set of curricula: trainer manual, poll worker guidebook, VHS/DVD with nine polling place scenarios and how to handle common situations, and a comprehensive power point presentation covering the content needed for qualified poll workers. In January 2005, the Training and Education Committee as well as the HAVA Advisory Committee recommended the State Election Office proceed with additional poll worker training opportunities.

Performance Goal 9: Election Official Training

HAVA funds were used for costs for county election officials to attend the SEAT training. In addition, State Election Office staff provided briefings and trainings at various meetings of local election officials that included regional meetings and ISACA conferences. An October 8, 2004 Train-the-Trainer session reached more than 110 election officials from 86 counties.

Performance Goal 10: County Board of Supervisor Training

With a role of budgeting for elections and election systems, County Boards of Supervisors are critical to supporting the local elections process. Information was provided on a regular basis regarding the progress of the legislation to secure the 5% match funds. The Chief State Election Official provided current information to Supervisors via the *HAVA Weekly News*, presentations and discussions at ISAC meetings, inclusion of Supervisors on the various HAVA committees, and by providing ongoing information regarding federal guidelines and options for HAVA funds to partially cover costs of upgraded election systems and the full coverage of the voter registration system.

Section 9: State-Based Administrative Complaint Procedure

Iowa Code Section 49.1(5) was revised during the 2004 Session of the Iowa General Assembly to require the Chief State Election Official to adopt an administrative complaint procedure.

The Chief State Election Official adopted the required administrative complaint procedure in 721 Iowa Administrative Code Chapter 25.

Section 10: Effect of Title I Payment

Title I payments have been used as described in the plan and remaining funds will be used consistent with the plan.

Section 11: HAVA State Plan Management

The HAVA State Plan Advisory Committee meets a minimum of quarterly to review implementation progress and plans. The Committee has provided advice as to implementation and has reviewed and approved detailed project plans. Furthermore, the Committee has adopted the information contained herein.

Section 13: State Plan Development and Committee

The HAVA State Plan Advisory Committee has consistently met at least quarterly since its development in February 2003. Particular emphasis was given in 2004 to expand representation on the Advisory Committee to include geographical, gender, political, and cultural/ethnic/disability balance. As of January 2005, the following individuals serve on the Committee:

Chief Election Officials from the Two Most Populous Jurisdictions

Linda Langenberg - Linn County Auditor
Michael Mauro - Polk County Auditor

Representatives of Groups of Individuals with Disabilities

Jill Avery – Iowa Department of Human Rights, Division of Persons with Disabilities
Peggy Elliott – City Council Member, Grinnell; National Federation of the Blind of Iowa
Mike Hoenig – IDEAS Program, Center for Disabilities & Development, University of Iowa
Joey Lewis – Student, Iowa School for the Deaf
Jennifer Martindale – Iowa Central Deaf Association; Pastor
Sylvia Piper – Iowa Protection & Advocacy
Rik Shannon – Governor's Developmental Disabilities Council

Other Elected Officials

Chet Culver – Iowa Secretary of State
Michael L. Fitzgerald – Treasurer, State of Iowa
Mary Gaskill – State Representative, Wapello County
Patrick Gill – Auditor, Woodbury County; Past President ISACA
Michael Gronstal – State Senator, Pottawattamie County; Democratic Floor Leader
Judy Howrey – Auditor, Calhoun County; President, ISACA
Libby Jacobs – State Representative, Polk County; Majority Whip
Mike King – Supervisor, Union County; Past President, Iowa State Association of County Supervisors
Lannie Miller – Supervisor, Palo Alto County
Pat Murphy – State Representative, Dubuque County; Minority Leader
Marjorie Pitts – Auditor, Clay County
Mark Zieman – State Senator, Allamakee County, Republican Assistant Leader

Representatives of State-wide Non-Partisan Organizations

Adam Kaduce – State of Iowa Youth Action Committee (SIYAC)
Bruce Koeppel – Iowa Director, AARP
Jan McNelly – Past President, League of Women Voters of Iowa

Other Citizens

Kimberly Baxter – Iowa Department of Human Rights, Division on the Status of African-Americans
Elaine Baxter – former Iowa Secretary of State
Francis Boggus – Council Bluffs attorney
John-Paul Chaisson-Cardenas – Iowa Department of Human Rights, Division of Latino Affairs
Cyndi Chen – Statistical Researcher, Division of Vocational Rehabilitation
Bob Cink – former Supervisor, Kossuth County
Vernon Johnson – PACE
Skywalker Payne – ICLU Community Programs Coordinator

Technical Advisors

Dave Beary – Iowa Department of Transportation
Dennis Cowen – Iowa Department of Administrative Services, Information Technology Enterprise
Holmes Foster – former Banking Superintendent, State of Iowa
Shathi Goel – Iowa Department of Management
Ken Paulsen – Senior Purchasing Agent, Iowa Department of Administrative Services, General Services Enterprise
Sursee Rodari – Bankers Trust
Dawn Williams – Elections Director, Marshall County Auditor's Office

State Public Policy Group (SPPG) facilitated the open and public meetings in compliance with Iowa's open meetings laws. Meetings were held on November 14, 2003; February 25, 2004; May 20, 2004; September 16, 2004; December 8, 2004; January 26, 2005; and April 28, 2005. During this 18-month period SPPG also facilitated the following work groups as they focused on essential elements of HAVA implementation: Financial Oversight, Voter Education & Awareness, Election Official & Poll Worker Training, Voting Equipment, Voter Registration Users, Voter Registration State Agencies, and Voter Registration List Purchasers.

STATE OF MISSISSIPPI
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May 16, 2005

Ms. Gracia Hillman, Chair
U.S. Election Assistance Commission
1225 New York Ave, NW-Ste 1100
Washington, DC 20005

RE: Revised State Plan for Mississippi

Dear Ms. Hillman:

The State of Mississippi has revised its state plan for the implementation of the Help America Vote Act of 2002. In accordance with Section 254, Mississippi published the revised state plan for public comment from stakeholders and the general public, as follows:

A draft of the revised plan was released on March 3, 2005. Notice was provided to the Circuit Clerks (82), Elections Commissioners (410), County Supervisors (410), Members of the Mississippi Legislature (174), citizens, and interested parties who sought HAVA updates from our office. A press release was issued to all media in the state, directing reporters to a copy of the plan available on the Secretary of State's web site.

Comments were received in the Secretary of State's Office until 5:00 pm on April 8, 2005. All comments were received and considered in the finalization of Mississippi's Plan for HAVA Compliance. The state plan has four major changes:

1. Changing the purchasing of voting machines from a statewide direct recording electronic device system to the option of a statewide combination of a dual voting technology system with precinct optical mark scanners and disability accessible devices.

2. Reducing the Elections Division staffing level by two full-time equivalent staff members as a result of state budgetary conditions.

3. Appendix A has been updated to reflect the procurement of voting technologies during the calendar year 2005 with adequate time for delivery and training of new voting systems.

4. Appendix B has been updated to reflect implementation timelines for the development of the Statewide Elections System (SEMS) that incorporates the statewide voter registry system and other elements as identified under Section 1.C and 1.H of this plan.

Attached please find a copy of the 2005 Mississippi HAVA Plan for your review and publication in the Federal Register. If you have any questions, please contact Jay Eads, Assistant Secretary of State for Elections, at (601) 359-9372.

Sincerely,

ERIC CLARK
Secretary of State

Enclosures (2)
JE:ce

Summary of Changes made to State of Mississippi's HAVA Compliance Plan

1. Changing the purchasing of voting machines from a statewide direct recording electronic device system to the option of a dual voting technology system of precinct optical mark scanners and disability accessible devices.

2. Reducing Elections Division staffing level by one full-time equivalent staff members as a result of state budgetary conditions.

3. Appendix A has been updated to reflect the procurement of voting technologies during calendar year 2005 with adequate time for delivery and training of new voting systems.

4. Appendix B has been updated to reflect implementation timelines for the development of the Statewide Elections Management System (SEMS) that incorporates the statewide voter registry system and other elements as identified under Section 1.C and 1.H of this plan.

5. On March 15, 2004 and July 12, 2004, the Secretary of State implemented administrative rules to conform Mississippi's affidavit balloting process to the HAVA provisional balloting process as specified under HAVA §402(a)(2). On April 14, 2004 and August 10, 2004, the Secretary adopted the final administrative rules after the thirty-day public comment period, respectively.

6. On July 12, 2004, the U.S. Department of Justice pre-cleared Mississippi Senate Bill 2857 (2004), Mississippi's Help America Vote Act Compliance Law. This state law provides authority to the Secretary of State (acting as the Chief Elections Official) to comply with the mandates of the Help America Vote Act of 2002 (P.L. 107-252).

7. On July 12, 2004, the Secretary of State adopted an emergency administrative rule to require all unverified voters as defined under HAVA §303(b) to present a valid form of identification prior to casting a regular election day ballot. On August 10, 2004, the Secretary of State adopted the final administrative rule after the thirty-day public comment period.

8. On October 10, 2004, the Secretary of State adopted an emergency administrative rule to require all absentee ballots cast by unverified voters as provisional ballots under HAVA §303(b) . On November 10, 2004, the Secretary of State adopted the final administrative rule after the thirty-day public comment period.

STATE OF MISSISSIPPI
PLAN FOR COMPLIANCE WITH THE HELP AMERICA VOTE ACT OF 2002

ERIC CLARK
SECRETARY OF STATE

ERIC CLARK

REVISED FEBRUARY 2005

Mississippi State Plan for HAVA Compliance

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PUBLIC COMMENT ON DRAFT STATE PLAN

A draft of the Mississippi State Plan for HAVA Compliance was released on June 25, 2003. A hard copy of the document was distributed to the following:

- Members of the Mississippi HAVA Advisory Committee
- Members of the Mississippi Statewide Voter Registry Advisory Committee
- Mississippi Circuit Clerks (82)
- Mississippi Election Commissioners (410)
- Mississippi County Supervisors (410)
- Members of the Mississippi Legislature (174)
- Citizens and interested parties who had signed up for HAVA updates

A press release was issued to all media in the state, directing reporters to a copy of the Plan available on the web site of the Secretary of State's Office. That site was included in media reports to the public about the posting.

Comments were received in the Secretary of State's Office until 5:00 p.m., Monday, July 28. Comments came by mail and e-mail. All comments were reviewed and considered in the finalization of Mississippi's Plan for HAVA Compliance.

A meeting of the Mississippi HAVA Advisory Committee took place on Friday, July 11. Members of the Committee discussed the various points of the Plan and ultimately supported the broad goals expressed therein.

The Secretary of State wishes to express his gratitude to the members of the Mississippi HAVA Advisory committee (listed on page 26 of this Plan) for their contributions to the construction of these ideas and their commitment to the continuing improvement of elections. He also wishes to thank those Mississippian who took the time to review and comment on the Plan.

STATE PLAN APPROACH

The Mississippi Secretary of State is the state's chief elections official. In that capacity, he is responsible for National Voter Registration Act coordination among state registrar agencies and distribution of NVRA registration forms. Under state law, the Secretary of State's Office certifies the annual training and qualifications of local election officials and party executive committee chairs to conduct primary and general elections. In addition, the Secretary of State is the candidate qualifying office for certain judicial offices and all independent candidates for state, state district and legislative district offices. The Secretary of State is a member of a three (3) person State Board of Election Commissioners which meets to certify certain candidates' eligibility for placement on general election ballots and to adopt an official sample ballot. Finally, the Secretary of State compiles certified local election returns and certifies election results for statewide, state district and legislative district offices.

Within the Secretary of State's Office, there is a permanent elections staff of thirteen (13) including an Assistant Secretary of State for Elections who can legally act for the Secretary.

Under state law, elections in Mississippi are very decentralized. In each county and municipality, local election commissioners conduct special and general elections and local party executive committees conduct primaries. Local governments are responsible financially for the full cost of these elections. Collaboration between the Secretary of State's Office and local election officials is essential to the conduct of successful elections. The State's elections community works cooperatively to serve local governments and Mississippi's approximately one million, eight hundred and two thousand (1,802,000) registered voters.

Since 2001, Mississippi has taken significant steps toward election reform through new programs that encourage voter participation, education, a centralized voter registration system, better reporting of election results such as residual vote counts and other legislative changes. Implementing these state legislative reforms and the Help America Vote Act of 2002 (HAVA) will require considerable effort and resources from both the Secretary of State's Office and the local election officials.

In developing the State Plan, the Secretary of State's Office formed a State Plan Committee, pursuant to HAVA §255. In bringing this group together, the Secretary of State relied on the cooperative effort of a variety of election officials and stakeholders to guide the themes and intent of the Plan. Particular attention was paid to accessibility issues, specifically for individuals with disabilities and alternative language groups. More general themes of authority, accountability, uniformity, and centralization emerged with additional discussion and feedback.

This State Plan is organized as specified in HAVA §254. Each section of this document corresponds to a subsection of §254 and addresses a State Plan requirement specified in HAVA. The Plan outlines program milestones to address large-scale system or procedural changes.

STATE PLAN REQUIRED ELEMENTS (HAVA §254)

1. Title III Requirements and Other Activities
How the State will use the requirements payment to meet the requirements of Title III, and, if applicable under section 251(b)(2), to carry out other activities to improve the administration of elections. -- HAVA §254 (a)(1)

1.A §301(a), Voting Systems Standards Requirements
Deadline for Compliance: January 1, 2006; no waiver permitted.

The State currently uses seven different polling place voting systems in its eighty-two (82) jurisdictions, including eight (8) lever systems, ten (10) punch card systems, one Opscan (combination OMR and punch card) system, eight (8) precinct optical mark reader systems, fifty-one (51) central optical mark reader systems, two (2) direct recording electronic (DRE) device systems and two (2) Shouptronic systems. Absentee balloting is done either by paper ballot or by the system in place for election day voting in the jurisdiction in question.

Assuming full federal funding of HAVA, Mississippi plans to use some fifteen ($15) million of its federally authorized thirty-four ($34) million to create a uniform voting device system throughout the state. This system will include the usage of direct recording election (DRE) voting devices for disabled voters and precinct optical mark readers (OMR) systems.

The advantages of a uniform statewide voting system are numerous and include the following:

- Training for and by election officials and voters will be easier and simpler due to devotion of resources to uniform technologies.
- The minimizing of voter confusion when moving from one local jurisdiction within the state to another as little or no change in voting technology will be encountered. Affidavit/Provisional and absentee balloting procedures, complicated by the use of different technologies across the state, will be simplified and consistent.
- Procurement at a state level of uniform technologies will allow the state to maximize the federal dollars it receives by ensuring bulk purchase discounts.
- Precinct optical mark readers systems will meet the HAVA requirements of second-chance voting and minimize confusion among all voters by minimizing the leap in technologies.

The State will adopt a funding formula to determine an equitable distribution of voting devices to each county. The formula will take into consideration factors including, but not limited to, the following:

- county population
- county voting age population (VAP)
- number of registered voters per county
- number of precincts per county
- geographic size of the county, in square miles
- voter turnout per county in the previous two (2) statewide (Gubernatorial) elections and the previous two (2) federal (Presidential) elections

The formula will result in the state's providing a sufficient number of voting devices to adequately serve each county's voters, regardless of the number of precincts in the county. The county will be charged with deciding how best to distribute the devices among its present or reduced number of precincts, as appropriate. If a county wishes to retain a number of precincts higher than suggested by the formula, the county may purchase additional voting devices at its own expense.

The state procurement of voting devices will be preceded by a Memorandum of Understanding (MOU) between the local governing authority and the Secretary of State. This MOU will specify that acceptance of the devices will constitute a commitment by the local governing authority to utilize the voting devices in all elections in the county; that changes in the technology (hardware or software) will require advance approval by the Secretary of State and any violation of these terms will result in repayment by the local government to the Secretary of State the cost of the devices. In this way, Mississippi will receive the best possible assurance that local governments will participate in creation of a uniform statewide voting system.

The state will embark on its procurement of a uniform statewide system of voting devices after a very thorough process of specification development, including extensive local government and stakeholder input, and a Request for Proposals (RFP) process. Specifications will include the following key components:

- All voting devices to be purchased will meet HAVA's §301(a)'s requirements.
- Voter verification of ballot changes will be required for the state's procurement.
- The voting system will be required to produce a record of each vote cast.
- Voting records will be available for any court ordered election recount under state law.
- The voting system to be purchased will be technologically sophisticated to provide maximum disability access, including the same opportunities for privacy and independence in voting provided to non-disabled voters.
- The voting system will be required to allow for multiple language ballots as presently required for nine Mississippi local jurisdictions under §203 of the Voting Rights Act of 1965.
- The ability to integrate future election reforms such as non-geographic voting that may come in the future.

- The DRE equipment to be purchased will be "fully loaded" and include all required disability accessibility technology, multi-language capabilities, installation, training and computation software and hardware required to give Mississippi counties a "turnkey" operation.

A scoring committee will review all voting device proposals and recommend a top choice to the Secretary of State and he will award a contract. Following the contract award, the state will begin implementation in 2005 (a municipal and not a state or federal election year) for roll out to the voters in the 2006 federal primary election. (A project procurement plan for the statewide uniform voting device system is attached hereto as Exhibit "A".)

Mississippi law does not now provide a standard for defining what constitutes a vote and what will be counted as a vote for DRE technology. At present, Mississippi has only two jurisdictions using DRE voting devices. In the 2005 session of the Mississippi Legislature the Secretary of State will seek successful passage of a law setting forth this required standard for DRE devices.

1.B §302, Provisional (or Affidavit) Voting and Voting Information Requirements
Deadline for Compliance: January 1, 2004; no waiver permitted.

HAVA addresses the process of provisional or affidavit voting to ensure that no individual who goes to the polls intending to cast a ballot is turned away without having the opportunity to do so. Long before passage of HAVA, Mississippi had enacted a system of affidavit balloting that complies with most of HAVA's requirements. In developing the State Plan, the State of Mississippi assessed its present affidavit ballot statute to determine those elements needing modification in order to fully comply with HAVA.

Currently, the State's affidavit voting laws allow a voter whose name does not appear on the precinct pollbook to cast an affidavit ballot, provided the voter completes a certification in which he or she affirms that he or she is entitled to vote or has been legally denied registration. In any election conducted under Mississippi state law, election officials must provide such voters with affidavit ballots.

The intent of the State's existing affidavit voting law - to reduce the number of individuals unable to participate on election day - is similar to the intent of HAVA §302. However, the new HAVA requirements differ in some respects from the State's procedure, so the Secretary of State has adopted rules conforming Mississippi's affidavit voting law to be consistent with HAVA's provisional voting and voting information requirements. At the same time, the State implemented the new federal affidavit ballot requirements for its 2004 federal election.[1] Through these modifications, the State provided a private "free

[1] Changes to the affidavit/provisional balloting procedure were adopted by administrative rule on March 15, 2004 (Affidavit/Provisional Ballot Envelope) and July 12, 2004 (Instructions for Affidavit/Provisional Voters). The U.S. Department of Justice pre-cleared the passage of the state HAVA compliance law (Senate Bill No. 2857 passed during the 2004 Legislative Session. The compliance law grants administrative rule making authority for the Secretary of State to promulgate rules and regulations necessary to effectuate the provisions of the Help America Vote Act of 2002 in this state.

access" system for affidavit voters to learn about the status of their affidavit/provisional ballot and an informational sheet to affidavit voters about how to vote by affidavit and how to contact the free access system. Finally, the State complied for all state elections, with HAVA's §302 (b) requirements for the posting of information at each polling place on election day.[2]

HAVA §302 further requires that voters who vote under a court or other order during extended hours, after the normal close of a polling place, cast affidavit ballots. These ballots must be kept separate from other affidavit ballots. The State complied with this federal requirement in its 2004 federal election.

1.C §303, Computerized Statewide Voter Registration System Requirements and Requirements for Voters Who Register by Mail
Deadline for Compliance: January 1,2004; State can submit a certification stating "good cause" that will move the deadline for §303(a) compliance to January 1, 2006.

Currently, official State voter registration records are created and maintained at the local jurisdiction level. Local election officials update and separately maintain voter registration records for their jurisdiction, with all eighty-two (82) jurisdictions using customized systems.

As explained above, the State does not have a "single, uniform, official, centralized, interactive, computerized statewide voter registration list" required by HAVA. Moreover, information gathered and maintained on State voters does not uniformly include driver's license numbers or partial social security numbers, as required by HAVA.

However, in 2002, Mississippi anticipated the federal mandate in this regard and passed legislation authorizing creation of a HAVA-compliant statewide voter registry system. The implementation of the system has awaited receipt of federal funds. This legislation creates an advisory committee of interested stakeholders that has been appointed and is working with the Secretary of State on implementation (the project plan for procurement of the statewide voter registration system is attached hereto as Exhibit B).

As outlined in the project plan, the State has already begun the steps to procure a centralized voter registration system through an RFP process. The development of specifications is proceeding with the input of both local government officials and other stakeholders. A scoring committee will review all responses to the RFP and will identify the top scoring vendors based on their technical responses and costs. These vendors will be required to participate in a presentation/interview process that will also be scored and

[2] On July 12, 2004, the Secretary of State adopted by administrative rule the "Mississippi Voter Information Poster." This poster includes all of the HAVA required information as listed under Section 302(b).

added to their proposal score. A recommendation will then be made to the Secretary of State as to the highest scorer and he will award a contract. Following the contract award, the state will begin implementation in 2005. Mississippi is on track in meeting project plan deadlines and if HAVA is fully funded, will be in a position to procure and implement the system on time.

Mississippi's current state mail-in voter registration process differs from HAVA requirements. The mail-in voter registration form requires redesign to accommodate information required by HAVA. These revisions to the NVRA and state mail-in voter registration applications have been made, along with the minor changes needed on the state's non-mail in application to capture driver's license or social security numbers.[3] Also, the voter registration and polling place voter qualification processes will be modified to allow for the verification of identification provided by first-time voters who register by mail.

At present, local voter registrars have begun to identify post January 1, 2003, mail-in, first-time voters and are providing the information to the Secretary of State. Prior to the federal primary election in March, 2004, the Secretary of State's Office has will have in place an electronic link to the state Department of Public Safety (Mississippi's driver's license bureau) for record matching purposes. Those first-time voting, mail-in registrants whose identifying information does not match the state DPS record will be required to provide one of the HAVA-specified forms of identification when they vote in the 2004 federal election.

1.D §304, Minimum Requirements

The State understands that the requirements laid out in HAVA Title III are minimum requirements, and that the State may establish election technology and administration requirements that are more stringent. Any more stringent requirements that the State imposes will comply with all Title III requirements, as well as the laws described in HAVA §906.

[3] The Secretary of State has adopted by administrative rule on July 12, 2004, voter registration forms that meet HAVA requirements. Currently, the state is awaiting approval from the Department of Justice as required under Section 5 of the Voting Rights Act of 1965.

1.E §305, Methods of Implementation Left to Discretion of State

The State chose various means to comply with the requirements of HAVA Title III. Specific details on the implementation methodology chosen can be found in Sections 1.A through 1.C of this State Plan.

1.F §311, Adoption of Voluntary Guidance by Commission

Once the federal Election Assistance Commission (EAC) has issued its voluntary recommendations with respect to Title III, the State will consider that guidance in updating the State Plan. The State will incorporate those recommendations deemed appropriate into subsequent amended versions of the State Plan.

1.G §312, Process for Adoption

The State will stay aware of the progress of the EAC on developing the Title III recommendations. If appropriate, the State will provide feedback during the public comment period after the recommendations are published in the Federal Register and participate in public hearings regarding the recommendations.

1.H §251(b) (2), Other Activities

The State currently does not have the personnel and technical capacity required to fully achieve HAVA compliance. Ongoing operations and maintenance of the new capabilities required by HAVA cannot be supported with the current state and local elections technical infrastructure and resources. The State proposes to establish a solid foundation to build and sustain the people, processes, and technology necessary to maintain the new capabilities. The following activities are thus proposed to improve the election system:

- Conduct an assessment of the current technical infrastructure and establish a strategy to standardize technical infrastructure;
- Conduct process redesign;
- Research the possibility of integration of key election management systems;
- Continue expanding polling place accessibility; and
- Document job descriptions and staff positions with resources qualified to conduct election reform activities.

2. Mississippi's Distribution of Requirements Payment

How the State will distribute and monitor the distribution of the requirements payment to units of local government or other entities in the State for carrying out the activities described in paragraph (1), including a description of --

(A) the criteria to be used to determine the eligibility of such units or entities for receiving the payment; and

(B) the methods to be used by the State to monitor the performance of the units or entities to whom the payment is distributed, consistent with the performance goals and measures adopted under paragraph (8). -- HAVA §254 (a)(2)

2.A, Eligibility of local units to receive the payment

The State of Mississippi, through its state chief elections official, the Secretary of State, will centrally manage initiatives funded by requirements payments. The funding formula to be developed for voting device distribution is described in section 1.A above. Distribution of State (centrally) purchased statewide voter registration hardware and software will be nearly identical in each registrar office in all eighty-two counties. Difference in current technology in those offices may necessitate some difference in installation, but the end product will be identical in each office.

The Secretary of State will be responsible to account for all expenditures, funding levels, program controls, and outcomes.

2.B, Performance measures for local units

Funds will be centrally managed as described in Section 2.A, and the Secretary of State will monitor the initiatives for which those funds are authorized.

The Secretary of State will monitor the performance of each initiative that is funded by requirements payments in three areas: financial controls, compliance with standards and program results.

Financial Controls: The Secretary of State will develop and use standard financial reporting for all initiatives funded by requirements payments.

Compliance with Standards: The Secretary of State will develop and use standard program management reporting for all initiatives that are funded by requirements payments.

Program Results: The Secretary of State will develop key performance indicators (KPI) for each initiative funded by requirements payments. See Section 8 of this document for specific performance goals and measures.

3. Voter Education, Election Official Education and Training, and Poll Worker Training

How the State will provide for programs for voter education, election official education and training, and poll worker training which will assist the State in meeting the requirements of Title III. -- HAVA §254 (a)(3)

3.1, Voter Education

State-level voter education in Mississippi is limited and not standardized. Information is made available by request, or voters may get information on elections from the Secretary of State's Office's web site (www.sos.state.ms.us). Most voter education is developed and takes place on the local level, through county and municipal clerks and election commissioners, political parties, and local media outlets.

The Secretary of State's Office, with the assistance of local election officials and representatives of advocacy and interest groups, will develop a comprehensive, statewide voter outreach program. The primary goal of the program will be to increase voter turnout. Voter turnout in Mississippi has stayed below fifty percent (50%) of registered voters for several elections. The Secretary of State's Office will measure turnout as a long-term indicator of the success of voter education programs it develops and implements.

The issues that should be covered in the comprehensive voter education program include the following:

- Rights of voters (including an emphasis on voters with disabilities)
- Second-chance voting
- Federal voter identification requirements
- Military and Overseas voters programs
- Dates of elections and applicable qualification deadlines
- Voter registration deadlines
- Change of address/name requirements for voters
- Use of voting technology
- Absentee voting procedures
- Affidavit balloting procedures
- Uses and availability of sample ballots
- Primary elections vs. general elections
- How to locate your polling place

The voter outreach program will reach the largest number of potential voters through the use of multiple channels, including mass media. Dissemination of voter information will take place by the following methods:

- Print media
  i. wider distribution of the "Voter Information Guide."

ii. development of standard voter information posters for polling places.
iii. development of voter education materials in alternative languages, including Braille.
iv. development of standard advertisements for local print outlets.
v. cooperation with local print media to highlight voter education prior to election day.

- TV and Radio
  i. development of PSA's to be run on local channels.
  ii. development of a statewide "speaker's bureau" for appearances on local shows.
- Internet
  i. ongoing development of resources on the Secretary of State's Office's web site.
  ii. development of voter information content and specifications to be used as guides for county and municipal level web sites.
  iii. use of the Internet to disseminate voter information through list serves.
- Personal Contact
  i. development of a statewide speaker's bureau on election issues.
  ii. coordination with state civic organizations, to include voter education in annual conferences.
- Telephone
  i. use of the Secretary of State's Office's "Elections Hotline" (1-800 number) as an ongoing source of election information.
  ii. installation and use of toll-free numbers on the county-level as a new source of election information, including affidavit balloting results.

While the intent of the voter outreach program will be to educate all Mississippians, certain demographic groups will be targeted because of special needs and/or traditionally low turnout. Those groups would include:

- Persons with disabilities
- Alternative language populations
- 18-30 year olds
- Persons new to Mississippi

All agencies charged with any election duties, including NVRA registration agencies, will be required to participate in voter outreach programs.

3.1 Election Official Education and Training

The Secretary of State's Office will enhance the current election officials training program to include all HAVA-related activities. Moreover, the current training requirement will be expanded to make certification a more formal process.

The training materials and programs will include (but not be limited to) the following topics:

- Federal and state law and rule changes
- Reporting requirements
- Overseas and military voting
- Recruiting and training of poll workers
- Working with voting technology
- Working with voter registration technology
- Election day procedures
- Absentee balloting; affidavit/provisional balloting
- Working with persons with disabilities (including accessibility requirements)
- Working with alternative language populations
- Identification requirements for first-time, mail-in registrants
- Other items as deemed useful by the Secretary of State's Office and assisting local officials.

First-time, newly-elected county Election Commissioners will be required to attend ten (10) hours of training in the calendar year immediately following their election. Training will be developed by the Secretary of State's Office, in conjunction with local election officials. An official will be certified only after attending the ten (10) hours of training and successfully completing a skills assessment inventory. After meeting the first year's requirements, Election Commissioners will be required to attend five (5) hours of training per calendar year and successfully complete a skills assessment inventory to maintain their certification.

First-time, newly-elected county Circuit Clerks will be encouraged to attend a ten (10) hour training session following their election. All clerks will be encouraged to attend Election Commissioner training to stay abreast of federal and state election law changes.

Executives with each of the state party organizations will be invited to attend the same training as county Election Commissioners and Circuit Clerks. The Secretary of State's Office will work with the parties to ensure that training materials are available for their use in training their executive committee members.

Municipal Clerks and Municipal Election Commissioners will be required to attend a special five (5) hour training session offered within six (6) months prior to the municipal political primaries.

The Secretary of State's Office will produce a quarterly "Eye on Elections" newsletter for all of the officials mentioned above, to keep them aware of changes in federal and state election law and rules.

3.2 Poll Worker Training

Currently, poll worker training is handled on the local level, primarily using locally developed training materials. The Secretary of State's Office will work with local election officials to develop a single, comprehensive poll worker training program. Training materials and methods of instruction will be made available to municipal and county clerks and party executive committees. All poll workers will be required to attend training and successfully complete a skills assessment inventory prior to their being certified to work the election for which they have been hired. Certification results from each jurisdiction will be submitted to the Secretary of State's Office.

The training materials and programs will include (but not be limited to) the following topics:

- Working with voting technology
- Questions/issues of tabulation
- Second-chance voting
- Voter identification requirements for first-time, mail-in registrants
- Handling affidavit ballots
- Poll watching
- Working with persons with disabilities
- Working with alternative language populations
- Other items as deemed useful by the Secretary of State's Office and assisting local officials.

The Secretary of State's Office will supervise poll worker training and monitor its conduct to be certain that consistent poll worker training occurs statewide.

A "Mississippi Poll Manager Guide" will be developed to serve as an on-site resource for poll workers on election day. Additionally, the State developed a poll manager worker training video and other training presentations for use by local election officials.

Through functionality included in the statewide voter registration system, the Secretary of State's Office will maintain a list of poll workers, through the input of local election officials and party executive committees. The poll workers will also receive the "Eye on Elections" newsletter mentioned above, to stay informed of changes in federal and state election law.

The Secretary of State's Office will work with municipal and county election officials, civic groups, secondary schools, colleges and universities, and media outlets to recruit poll workers.

4. Voting System Guidelines and Processes
How the State will adopt voting system guidelines and processes that are consistent with the requirements of section 301. -- HAVA §254 (a)(4)

As outlined in our response to section 301(a), the State is moving ahead with plans to procure a uniform voting system by January 1, 2006. The Request For Proposals that will be written and released to procure this system will be consistent with HAVA's §301 requirements and the Secretary of State will seek passage of a law to set forth required voting system standards for DRE devices.

Ongoing with the implementation of a uniform voting system, the State will publicize the rights and responsibilities of voters regarding their votes (i.e., casting multiple votes for a single-vote election). The State will also continue to work with local election officials to document their accounting of all ballots and votes, and their treatment of affidavit/provisional ballots and ballots with possible errors (resolution board ballots).

Persons with disabilities and alternative language populations will be educated (informed) of their rights, and to keep state and local election officials mindful of those groups in planning elections.

The Secretary of State's Office will continue to collect data from local election officials regarding residual votes to determine error rates per county and for the entire State. This data will be collected for every federal and state election, in anticipation of the minimum acceptable error rate to be established by the FEC.

5. Mississippi's HAVA Fund Management
How the State will establish a fund described in subsection (b) for purposes of administering the State's activities under this part, including information on fund management. -- HAVA §254 (a)(5)

Working with the State Department of Finance and Administration, the Secretary of State has established a HAVA Election Fund, #3115, which is separate and distinct from all other programs and funds within the agency. This fund will contain both federal and matching state general funds. The federal fund portion will be used to maintain federal fund receipts and to expend federal funds. The general fund portion will be used to budget and expend general funds representing the five percent (5%) match required under HAVA. The Secretary of State has requested and received approval for state matching funds from the State legislature for state fiscal year 2004 and 2005 that will meet the five percent (5%) match requirement. The Secretary of State has requested and anticipates approval for state matching funds from the state legislature for state fiscal year 2006, assuming the full funding of HAVA by Congress.

The Secretary of State and Department of Finance and Administration will work with the State Department of Audit and the State Treasurer to follow and enforce all mandated fiscal controls and policies.

6. Mississippi's HAVA Budget

The State's proposed budget for activities under this part, based on the State's best estimates of the costs of such activities and the amount of funds to be made available.

A) the costs of the activities required to be carried out to meet the requirements of title III;

B) the portion of the requirements payment which will be used to carry out activities to meet such requirements; and

C) the portion of the requirements payment which will be used to carry out other activities.

-- HAVA §254 (a)(6)

At the time of the writing of this Plan, HAVA appropriations were significantly less than amounts authorized. The state's budget assumes full funding of HAVA by Congress according to amounts authorized for appropriation. If full funding is not forthcoming, Mississippi will amend its plan in subsequent years as necessary to accommodate these changes.

Based on these funding levels, the State HAVA budget is representative of the activities required to implement and conduct operations and maintenance through calendar year 2005 for the HAVA Title III requirements and other activities. The budget will be revised over time based on the most current information available regarding federal funding.

Federal Funding Assumptions for Mississippi

Description	Federal Authorized Payment	State Match Payment (actual and anticipated	Total Authorized Amounts (all sources)
Early Payments	$5.460 Million		$5.460 Million
Title III Payment 2003	$13.283 Million	$750,000	$14.033 Million
Title III Payment 2004	$9.488 Million	$500,000	$9.988 Million
Title III Payment 2005	$5.693 Million	$300,000	$5.993 Million
TOTALS	**$33.924 Million**	**$1.550 Million**	**$35.474 Million**

Based on Mississippi percent of national VAP of .009488%

The State of Mississippi estimates it will spend:

- approximately ten ($10) million on the SWVR system/election management system.
- approximately fifteen ($15) million on the procurement of a statewide uniform DRE voting system
- approximately nine point two ($9.2) million on other federal compliance efforts, including, but not limited to, voter, poll worker and local elections official training and state administrative costs of HAVA implementation.

The duration for the State's budget is based on HAVA deadlines and funding. The State is concerned, however, that beyond the three years of federal funding, the ongoing costs of operating and maintaining the new voting systems and statewide voter registration system will be considerably higher than the State's maintenance of effort level (see Section 7 of the State Plan). The operation and maintenance of the new systems will be the financial burden of the State when HAVA funding is no longer available.

7. Maintenance of Effort

How the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000. -- HAVA §254 (a)(7)

The largest single appropriation for elections in Mississippi is the funding of the Secretary of State's Office. That appropriation for fiscal year 2000 (ending June 30, 2000) was $8,093,200. Of that amount, $789,952 was directed to elections activities. The Mississippi Legislature is aware of the expenditure maintenance requirement of HAVA, and the Secretary of State's Office anticipates full funding on a yearly basis.

The larger portion of the funds appropriated on a yearly basis in Mississippi are on the county level. Mississippi's eighty-two (82) local election office budgets typically support year-round staff and operating expenses for continuous functions such as voter registration, information services, and information technology support. In addition, local governments bear the largest cost increases associated with each specific election – poll workers, temporary office staff, mass mailings, election material production and procurement, polling place rental, and election day support (including personnel, equipment, and supplies). While county funds may be allocated within the budget specifically for elections, many costs may be "in-kind" assistance from other county agencies.

All local governments that receive the benefit of HAVA funding, through equipment, services, or grants, as a part of the Memorandum of Understanding will agree to maintain local funding at the level determined. Exceptions will be made for expenditures that are replaced by materials provided by the State (ex. – a county should not be expected to appropriate money for a voter registration system lease, when a new system will be provided by the State).

8. HAVA Performance Goals and Measures

How the State will adopt performance goals and measures that will be used by the State to determine its success and the success of units of local government in the State in carrying out the plan, including timetables for meeting each of the elements of the plan, descriptions of the criteria the State will use to measure performance and the process used to develop such criteria, and a description of which official is to be held responsible for ensuring that each performance goal is met. -- HAVA §254 (a)(8)

The basic elements of HAVA that require performance monitoring are listed below, along with the official(s) responsible and the timeline.

GOAL	OFFICIAL RESPONSIBLE	TIMETABLE
Voting System Standards, §301	Chief Election Official and staff County Supervisors Local Election Officials	To be implemented by January 1, 2006 (with waiver)
Provisional (or Affidavit) Voting, §302	Chief Election Official and staff Local Election Officials	Implemented by administrative rules (March 15, 2004 and July 12, 2004)
Voter Registration System, §303(a)	Chief Election Official and staff SWVR Advisory Committee County Supervisors Local Election Officials Dept. of Public Safety Dept. of Health Admin. Office of Courts	To be implemented by January 1, 2006 (with waiver)
Voter Registration System, §303 (b)	Chief Election Official and staff Local Election Officials Dept. of Public Safety	To be implemented by January 1, 2004
Education and Training, §254 (a)(3)	Chief Election Official and staff Local Election Officials	Ongoing
Budget and Fiscal Controls, §254 (a)(2, 6, 7, 10)	Chief Election Official and staff Department of Audit Treasurer's Office County Supervisors	Ongoing
Complaint Procedure, §254 (a)(9), and 402	Chief Election Official and staff	Ongoing
Expansion of polling place accessibility, §261	Chief Election Official and staff County Supervisors Disability Advocacy Groups	Ongoing
Military and Overseas Voting, Title 7	Chief Election Official and staff Voting Assistance Officers Local Election Officials	Ongoing
Maintenance of Effort, §253 (a)(7)	Chief Election Official and staff Legislative Budget Office County Supervisors	Ongoing
Alternative Language Accessibility, §301 (a)(4)	Chief Election Official and staff Designated Alternative Language Groups Local Election Officials	Ongoing

Criteria to determine the success of implementation will focus on timeliness of completion and ease of installation of the product or program. More specific criteria will be developed for each particular project. The Secretary of State will work with the official(s) responsible for implementation and other stakeholders will develop criteria for success.

Each entity or official involved in the implementation of HAVA elements will have individual performance goals to meet. The ability of participants to successfully meet those goals will be reported annually to the state chief election official, the Mississippi Legislature, county supervisors, local election officials, the public, and the media.

9. State-Based Administrative Complaint Procedures

A description of the uniform, nondiscriminatory State-based administrative complaint procedures in effect under section 402. -- HAVA §254 (a)(9) Deadline for Compliance: Prior to certification of State Plan, but no later than January 1, 2004; no waiver permitted.

The Secretary of State has developed and proposed an administrative rule creating an administrative complaint procedure that meets HAVA requirements. Before the adoption of the procedures, State election laws contained no provision for the processing of election complaints at the administrative level. Informal complaint handling by state and local authorities by telephone or e-mail has existed for many years, with state law providing for judicial remedies where parties were dissatisfied with results. Formal complaints will now follow the procedures to be adopted by the Secretary of State and codified as Mississippi administrative rules and regulations.

Mississippi's administrative complaints procedure will be uniform and nondiscriminatory.[4] It will allow any person who believes there is a HAVA Title III violation (including a violation which has occurred, is occurring or is about to occur) to file a written complaint with the Secretary of State's Office. The complaint must be

[4] The Secretary of State adopted a HAVA-compliant administrative compliant procedure on May 14, 2004.

notarized, signed and sworn to by the complainant. The Secretary of State may consolidate complaints filed under the state's administrative complaint procedure.

At the complainant's request, there will be a hearing on the record regarding the complaint. The Secretary of State will provide an appropriate remedy if he finds any Title III violation exists. If the Secretary of State finds no such violation exists, the complaint will be dismissed and notification will be sent to the complainant accordingly.

The Secretary of State will make a final determination regarding each complainant prior to ninety (90) days after receipt of the complaint unless the complainant agrees to an extension of the ninety-day period. If the Secretary fails to meet the ninety-day deadline, the complaint will be referred for alternative dispute resolution to an arbitrator. Any record compiled by the Secretary of State during his review of the complaint will be provided to the arbitrator.

10. Effect of Title I Payments

If the State received any payment under Title I, a description of how such payment will affect the activities proposed to be carried out under the plan, including the amount of funds available for such activities. -- HAVA §254 (a)(10)

The State of Mississippi received $5.4 Million dollars in Title I payments. These funds will be spent pursuant to Sections 101 and 102, as a part of the State's centralized procurement of a statewide voting system. As a part of this procurement, the State will replace all of its punch card and lever voting machines and replace them with HAVA-compliant voting devices. This process will be completed by January 1, 2006, with the HAVA waiver of the January 1, 2004, deadline.

11. Mississippi's HAVA State Plan Management

How the State will conduct ongoing management of the plan, except that the State may not make any material change in the administration of the plan unless the change.

(A) is developed and published in the Federal Register in accordance with section 255 in the same manner as the State Plan;

(B) *is subject to public notice and comment in accordance with section 256 in the same manner as the State Plan; and*

(C) *takes effect only after the expiration of the 30-day period which begins on the date the change is published in the Federal Register in accordance with subparagraph (A).*

-- HAVA §254 (a)(11)

The State intends to use the State Plan as the foundation for its future strategic direction. Consequently, sound and responsible management of the State Plan will be an essential component of the State election community's future success.

Due to the complexity of HAVA and the potential variety of projects it encompasses, the Secretary of State's Office reorganized duties among existing staff and engaged in extensive training. The Elections Division will conduct ongoing management of the State Plan, including project planning (for all HAVA-related and other election reform projects) and establishing and implementing program management standards (i.e. performance measures, review and approval processes, issue/risk management, etc.). The Elections Division will also be responsible for other election functions, including: budget and fiscal, personnel, and office support functions. These include Americans with Disabilities Act, National Voter Registration Act, and Voting Rights Act oversight as they relate to the state's compliance responsibilities.

The State understands and agrees to comply with HAVA requirements related to ongoing management of the State Plan. More specifically, the State agrees that it may not make any material change in the administration of the State Plan unless the change:

(A) is developed and published in the Federal Register in accordance with HAVA §255 in the same manner as the State Plan;

(B) is subject to public notice and comment in accordance with HAVA §256 in the same manner as the State Plan; and

(C) takes effect only after the expiration of the thirty (30) day period which begins on the date the change is published in the Federal Register in accordance with subparagraph (A).

12. Changes to State Plan from Previous Fiscal Year

In the case of a State with a State Plan in effect under this subtitle during the previous fiscal year, a description of how the plan reflects changes from the State Plan for the previous fiscal year and of how the State succeeded in carrying out the State Plan for such previous fiscal year. -- HAVA §254 (a) (12)

This FY 2003 Plan is the State's inaugural Plan under HAVA. This section will be updated in the FY 2004 Plan, reflecting changes to the Plan, as well as a summary of 2003 successes.

No changes were made to the state's plan in FY 2004 in anticipation of Congressional appropriations for the full funding of second year authorization; however, a number of significant changes were made in FY 2005, including:

1. Changing the purchasing of voting machines from a statewide direct recording electronic (DRE) devices system to a dual voting technology system.

2. Reducing Elections Division staffing level by one full-time equivalent staff members as a result of state budgetary conditions.

3. Appendix A has been updated to reflect the procurement of voting technologies during calendar year 2005 with adequate time for delivery and training of new voting systems.

4. Appendix B has been updated to reflect implementation timelines for the development of the Statewide Elections Management System (SEMS) with incorporates the statewide voter registry system and other elements as identified under Section 1.C and 1.H of this plan.

13. State Plan Development and Committee

A description of the committee which participated in the development of the State Plan in accordance with section 255 and the procedures followed by the committee under such section 255 and section 256.

-- HAVA §254 (a)(13)

The State's committee consists of individuals representing a cross-section of election stakeholders. The State Plan Committee was selected by the state chief election official, Eric Clark, Secretary of State.

Members of the State Plan Committee, and the primary qualification of each for being a committee member, are as follows:

Eric Clark, Secretary of State, Mississippi's chief election official;
Dora Blakeney, Smith County Election Commissioner;
Michael Boyd, Policy and Planning Director, Office of the Governor;
Senator Hob Bryan, State Senator;
Eugene Bryant, President, Mississippi NAACP;
Bill Chandler, Mississippi Immigrants Rights Alliance;
Gary Dearman, Greene County Supervisor;
Barbara Dunn, Circuit Clerk, Hinds County (chief election official of largest local jurisdiction);
James Dunn, Tunica County Supervisor;
Johnny Dupree, Mayor, City of Hattiesburg;
Rebecca Floyd, Mississippi Protection and Advocacy Systems;
Senator Hillman Frazier, State Senator;
Jim Fraiser, Legal Counsel, Mississippi Band of Choctaw Indians;
Earline Hart, President, Mississippi Circuit Clerks Association;
Representative Roger Ishee, State House of Representatives;
Fran Leber, League of Women Voters;
Dora McKenzie, Clarke County Election Commissioner;
Arlelia Moreland, Washington County Election Commissioner;
Larry Otis, Mayor, City of Tupelo;
Gayle Parker, Circuit Clerk, Harrison County (chief election official of second largest local jurisdiction);
Marsha Peters, City of Lucedale, Municipal Election Commissioner;
Representative Tommy Reynolds, State House of Representatives;
Jimmy Smith, Lauderdale County Supervisor;
Larry Swales, Rankin County Supervisor;
Dale Thompson, Circuit Clerk, Desoto County;
Mary Troupe, Council on Citizens with Disability; and
Tommy Walman, Mayor, City of McComb.

In creating the State Plan, the State Plan Committee worked with the Stennis Institute of Government at Mississippi State University, which assisted the Secretary of State in conducting four public meetings concerning plan development. Documents from those meetings may be found in Appendix C.

Mississippi State Plan for HAVA Compliance

APPENDIX A

EXHIBIT A
Mississippi Secretary of State's Office
Voting Systems Procurement Project

Over the past two years, SOS has been in contact with multiple voting machine vendors, held voting machine vendor fairs for local elections officials and created a voting machine vendor database. Of course, a lot has changed in the past year with the release of reports that questioned the security of electronic voting machine and modifications that have been made by vendors to address the shortcomings that were uncovered in those reports.

Over the past several months, SOS staff has been compiling and reviewing RFPs from other states, reviewing current voting machine standards and researching groups like the Voting System Performance Rating, in an effort to develop a RFP document to meet the voting machine requirements for Mississippi. The RFP will include the voting systems, installation, training, support and interfacing with the Statewide Elections Management System (SEMS).

The following timeline was established in order to provide additional information on the procurement process and installation of voting machine in Mississippi.

Date	Description	Participants
On-going	Research information on voting machines	SOS Staff
1/21 - 2/15	Develop draft RFP	SOS Staff
2/1	Submit CP-28 to ITS	SOS Staff
2/15 - 2/25	Review and edit draft	SOS Staff
3/1	Release draft to ITS and VM Focus Group	SOS Staff
3/1-3/25	Work on final RFP	ITS/SOS Staff
3/7 - 3/11	Vendor demos	SOS Staff
3/28	Release RFP to vendors	ITS Staff
4/29	Proposals due from vendors	Vendors
5/2 - 5/13	Review and scoring of proposals	SOS/ITS Staff
5/16 - 5/20	Oral Presentations from finalists	Vendors SOS/ITS Staff VM Focus Group
5/31	Announcement of winning vendor	SOS/ITS Staff
6/1 - 6/30	Contract negotiations and signing	SOS/ITS Staff and winning vendor
7/1	Order equipment	Project Team
7/6	Project Kick-Off	Project Team

Mississippi State Plan for HAVA Compliance

APPENDIX B

EXHIBIT B
Mississippi Secretary of State's Office
Statewide Voter Registry System Procurement Project

Project Milestone	Due Dates
Phase 1 – Stage 1: Planning, Prototyping, and Design Establish detailed project management plan and work plan, including a detailed Microsoft Project 2000 schedule for all phases of the project. A copy of the project plan must be made available for MSOS's Office to monitor. Prepare detailed business and technical requirements Prepare data conversion and migration plan Prepare system prototypes Prepare internal test plan Prepare network design documentation Prepare detailed software design documentation Prepare detailed GAP analysis for voter registration and election management systems Document proposed MSOS Help Desk procedures and processes Prepare complete State and County hardware configuration with pricing Design data matching with DPS and other agencies Design integration with NVRA agencies	Dec 04 - Feb 05
PHASE 2: Stage 2: Software Modification, Development, and Pilot Selection Install Data Center Hardware, Software Install pilot County Hardware, Software Modify software to meet Mississippi's detailed business and technical requirements as documented and approved in Phase 1. Carry out internal testing and deliver test documentation results Configuration and testing of Network with the State Data conversion and migration Plans Complete trial data exchanges with DPS, Mississippi Department of Health, and Administrative Office of the Courts Completed testing of interfaces with NVRA agencies. Select and provide orientation for 10 – 15 pilot counties for "standalone" operation Develop a user acceptance test plan	Mar - May 05
Stage 3: User Acceptance Testing Install remaining County Hardware, Software Administer User Acceptance Testing	May - July 05

Develop and Deliver User Training Plan Implement Help Desk software for utilization during UAT and train SOS staff	
Stage 4: Conversions and Implementations in Pilot Counties Install hardware and establish data network connectivity among pilot counties and MSOS Implement systems in 10 – 15 pilot counties; provide training and full support Carry out database conversions and migration in pilot counties Provide Initial System Documentation for the Pilot Counties Record results; modify software; prepare final version for acceptance testing Provide support for local elections Perform Final User Acceptance Testing	July - Sep 05
Stage 5: Final Rollout and Implementation Establish data network connectivity among remaining counties and MSOS Provide user Training (for the rest of the State) Deliver System Documentation Configure MSOS Help Desk and train Users Implement systems in remaining counties; provide training and full support Carry out database conversions and migration in remaining counties Establish full network connections and identity verification with DPS Establish comparison checking with MSDH and AOC	Sep 05 - Mar 06
Stage 6: Final Documentation and Transition to Maintenance and Support Deliver final, revised sets of System and Technical Documentation Deliver final, revised sets of User Manuals and Documentation, including updated context-sensitive help menus and screens resident on Mississippi's servers and client workstations. Assist in final configuration of MSOS Help Desk Environment Provide support to local election officials for June and November 2006 elections.	Dec 05 - Mar 06

Mississippi State Plan for HAVA Compliance

APPENDIX C

Appendix C

Public Meetings on the "Help America Vote Act"

Purpose

In generating Mississippi's response to the recently enacted federal Ney-Dodd-Hoyer-McConnell "Help America Vote Act of 2002" (HAVA), the Secretary of State, as the state's chief election official, is actively seeking public input on election-related issues. Sponsored by the HAVA State Plan Advisory Committee and moderated by the John C. Stennis Institute of Government, these meetings are designed to educate the public on the specific requirements of HAVA and to receive input on how these requirements may be implemented best at the state and local levels.

Agenda

Overview of HAVA Legislation
Overview of Required State Plan Elements
Moderated Discussion of Local Issues Relating to HAVA Implementation

Meeting Dates and Locations*

Tuesday, April 15, 2003 ..... **Congressional District 1**
4 p.m. – 6 p.m.
Yerby Center Auditorium
University of Mississippi, Oxford

Thursday, April 17, 2003 ..... **Congressional District 2**
4 p.m. – 6 p.m.
Fine Arts Building
Holmes Community College – Goodman Campus, Goodman

Tuesday, April 22, 2003 ..... **Congressional District 4**
4 p.m. – 6 p.m.
Polymer Science Building Auditorium
University of Southern Mississippi, Hattiesburg

Thursday, April 24, 2003 ..... **Congressional District 3**
4 p.m. – 6 p.m.
George Wynne Building, Lecture Hall
Hinds Community College – Rankin County Campus, Pearl

Accommodations will be provided for the sight- and hearing-impaired.

Information on meeting dates, locations, and times will be made available through a wide range of formats to the public, county and municipal election personnel, and local leaders. To be added to a public, moderated e-mail list for HAVA-related announcements, please send a short e-mail to hava@sig.msstate.edu with your name and e-mail address.

C-1

SUMMARY OF "THE HELP AMERICA VOTE ACT" OF 2002

In response to the controversial 2000 Presidential Election, Congress passed "The Help America Vote Act of 2002," known as HAVA. This significant piece of national election reform affects nearly every facet of elections in the United States. Congress also recommended appropriating more than $3.6 billion dollars to fund the reforms mandated in HAVA.

This document contains a section-by-section summary of HAVA, with notes in some areas about the status of those items in Mississippi. The second section contains additional information about some of the more significant elements of HAVA.

Section-By-Section Summary

TITLE I – Payments to States Election Administration Improvement and Replacement of Punch Card and Lever Voting Machines.

- $325 million dollars is authorized nationally to buy-out punch card and lever machines. States that apply for this program must complete the device replacement by the 2004 General Election, or apply for a waiver. The waiver gives states until January 1, 2006 to complete the replacement. The State may receive approximately $4000 per qualifying precinct under this program (the amount of the appropriation, and the number of states electing to participate in the program, may change this amount)

  Mississippi has approximately 550 precincts that used punch card or lever machines during the 2000 Presidential Election, which would qualify for this program.
- $325 million dollars is authorized nationally for states to improve the administration of elections.

  Mississippi may use its share of these funds to improve elections in the state, so long as those activities are not inconsistent with HAVA or other relevant Federal laws.

TITLE II – Election Assistance Commission

- A new Federal Commission is established, consisting of 2 Republican and 2 Democratic appointees.
- The Commission has no rulemaking authority, but will issue voluntary guidelines for voting systems and other HAVA requirements.
- The Commission will provide for the certification and testing of voting systems, will study election issues, and will administer grant programs in the following areas: Requirements Payments, Disability Access grants, Voting Technology Research grants, Pilot Program grants, Protection and Advocacy Systems Payments, and the National Student/Parent Mock Election.
- Each state must be represented by a state election official and a local election official, of different political parties, on the Election Assistance Commission Standards Board, which will be involved with review of voting systems and the establishment of voluntary guidelines.

  Mississippi's representatives on the EAC Standards Board are Secretary of State Eric Clark (D) and Hinds County Election Commissioner Marilyn Avery (R).
- Apart from the funds authorized under Title I, the following funds have been authorized for distribution to the states by the EAC
  - Fiscal Year 2003 – $1.4 billion
  - Fiscal Year 2004 -- $1 billion
  - Fiscal Year 2005 -- $600 million

The amount authorized and the amount appropriated may not be the same. For FY 2003, the amount authorized was $1.4 billion, but Congress only appropriated $800 million. It is unclear if the difference will be made up in supplemental appropriations.

- States may be eligible for the Requirements Payment only after submitting a State Plan, which must include the following:
  1. How the requirements payment will be used.
  2. How the state will distribute the benefits of the funding to other entities within the state.
  3. How the state will provide for voter education and election official/poll worker training.
  4. How the state will adopt voting system guidelines that are consistent with federal requirements.
  5. How the state will establish a fund to accept Federal dollars.
  6. What the state's budget for required HAVA activities is.
  7. How the state will maintain its expenditure level so that it is not less than the expenditure level for the fiscal year ending prior to November, 2000.
  8. How the state will measure performance to determine success for the state and for local government in carrying out elements of HAVA and the Plan.
  9. A description of the uniform, non-discriminatory state-based administrative complaint procedure.
  10. If the state accepted any Title I money, how it was used and the impact on the Plan.
  11. How the state will conduct ongoing management of the Plan.
  12. If applicable, changes from the previous FY State Plan and a report on the previous FY State Plan success (for State Plans submitted in later fiscal years)
  13. A description of the committee that advised in the development of the State Plan.

TITLE III – Requirements

Each state must:

- Provide voters an opportunity to check for and correct ballot errors in a private and independent manner.

  This is also called "second chance voting." If a voter mistakenly over votes, or forgets to cast a vote in an election, the device will notify him/her in a private manner and allow for ballot correction.
- Have a voting system with manual audit capacity.
- Provide at least 1 voting device per precinct that is accessible to the disabled.

  All voters, including individuals with disabilities, must be able to cast their votes unassisted and in private. Curb-side voting and voter assistance will not meet the requirements set in this section of HAVA.
- Provide alternative language accessibility pursuant to the Voting Rights Act.

  Mississippi currently has 9 counties that have been identified by the U.S. Justice Department as requiring this type of action.
- Have a voting system whose error rate does not exceed the existing rate established by the FEC Office of Election Administration.

  No such rate has been established. The EAC must issue guidance by January 1, 2004.

NOTE *All states must meet Voting System Requirements by January 1, 2006. Any equipment purchased with funds received or appropriated under HAVA, and purchased after January 1, 2007, must meet ALL Voting System Standards requirements.*

- Define what constitutes a legal vote for each type of voting machine used in the state.

  With the exception of the new touch-screen DRE voting devices, this has been done in Mississippi.
- Provide provisional ballots to ensure no individual is turned away at the polls. Counties must also provide a "free access system" by which voters who cast provisional ballots may find ou

if their vote counted.

Provisional balloting is done in Mississippi, and is known as "affidavit balloting." There is no uniform method of free-access to affidavit balloting information currently prescribed in Mississippi.

- Implement a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the state. This database will be used to ensure accurate voter registration lists for use at all elections. This list must be in place by January 1, 2004, unless the state applies for and receives a waiver to January 1, 2006.

Mississippi passed enabling legislation in 2002 to begin work on such a system. The specifications for such a system prescribed by Mississippi's Select Task Force on Election Procedures and Technology predated HAVA, but were nearly identical.

Ensuring system integrity:

- When registering to vote, individuals must provide a driver's license number or, if the voter does not have a driver's license, the last 4 digits of the Social Security number. If an individual does not have either number, he or she will be assigned a unique identifier. This must be in place by January 1, 2004.
- First-time voters who register to vote by mail are required to provide identification when they cast their ballots. Jurisdictions must comply with this by January 1, 2004.

This requirement is for Federal elections only.

- States are obligated to maintain clean and accurate voter registration lists.

HAVA requires that the state office that maintains the state list must enter into agreements with other state agencies that provide information relevant to keeping voter information accurate. Data-sharing must take place among these agencies. In addition, the Mississippi Department of Public Safety will have to enter into an agreement with the Social Security Administration to share data that is relevant to the maintenance of accurate voter records.

TITLE IV – Enforcement

- The U.S. Department of Justice may seek injunctive or declaratory relief for violations of HAVA.
- Each state receiving funds under HAVA must establish a state-based Administrative Grievance Procedure for hearing complaints. Citizens who feel that there has been a violation of the standards set under Title III of HAVA may file a complaint. The State will have to conduct hearings and, where appropriate, provide remedy.

TITLE V – Help America Vote College Program

$5 million dollars authorized to encourage college students to participate in the political process by volunteering as poll workers.

TITLE VI – Help America Vote Foundation

$5 million dollars authorized to encourage high school students to participate in the political process by volunteering as poll workers.

Mississippi law was changed in 2002 to allow jurisdictions to create a Poll Worker Intern program, where 16-, 17-, and 18-year-old students may be selected to serve as assistants at the polls on election day. No jurisdiction is required to participate in this program, and each jurisdiction may set up the program according to its own priorities.

TITLE VII – Military

Provisions to improve ballot access for military and overseas voters.

TITLE VIII – Transition Provisions

Transfer of responsibilities and oversight of particular activities to new entities.

TITLE IX – Miscellaneous

- The Commission is authorized to conduct audits, including special audits, of all entities receiving funds.
- Criminal penalties are established for conspiracy to deprive voters of a fair election, and for providing false information in registering and voting.

Significant Elements

Enhancing Voting for Persons with Disabilities

By building on provisions found in the Americans with Disabilities Act (ADA) and the Voting Accessibility for the Elderly and Handicapped Act (VAEHA), HAVA makes it easier for persons with disabilities to vote independently and privately. This legislation ensures that persons with disabilities have the same access to voting as other citizens. The "Help America Vote Act":

- Requires that every precinct across the nation have at least one voting machine or system that is accessible to individuals with disabilities by January 1, 2006.
- Authorizes $100 million in grants to improve polling place access for disabled voters.
- Authorizes an additional $40 million to improve State Protection and Advocacy systems. Beginning in 2003, the Secretary of Health and Human Services will award this money in four allotments of $10 million per year. The grants will be presented to entities in each state that represent persons with disabilities, and will be used to provide services that enable these individuals to participate fully in the electoral process.

Voter Rights

- Second-Chance Voting – Each voter will be given an opportunity to check for and correct ballot errors in a private and independent manner.
- Provisional Ballots – An individual whose name does not appear on the official voter registration list will be given the opportunity to cast a provisional ballot, thereby ensuring that no individual is turned away at the polls.
- Access for Individuals with Disabilities – Each precinct will be required to provide at least 1 voting machine that allows individuals with disabilities to vote in a private and independent manner.

Voting System Standards

- Audit Capacity – Each voting system must produce a permanent paper record with a manual audit capacity.
- Error Rates – Each voting system must comply with the existing error rate established by the FEC Office of Election Administration.
- Uniform Standard of What Constitutes a Vote – Each state must define what constitutes a legal vote for each type of voting machine used in the state.
- Multilingual Accessibility – Each voting system must provide alternative language accessibility pursuant to the Voting Rights Act.

Computerized Statewide Voter Registration List

Each state must implement a single, uniform, official, centralized, interactive computerized statewide voter registration list to ensure accurate lists.

Voting Information Requirements

By January 1, 2004, election officials must publicly post the following information at each polling place on election day:

- A sample ballot.
- The hours during which the polling place will be open.
- Instructions on how to cast a ballot or provisional ballot.
- Instructions for mail-in registrants who are first-time voters.
- General information on voting rights under federal and state laws.
- General information on prohibitions on fraud and misrepresentation.

Assistance for Military and Overseas Voters

"The Help America Vote Act" contains provisions to improve ballot access for military and overseas voters. Both the Department of Defense (DOD) and states have requirements under these provisions.

Requirements for the DOD

- Military Voting Assistance Officers must be guaranteed the time and resources they need to help military personnel vote.
- The DOD must make certain that all military ballots have postmarks (or other official proof of mailing date) to ensure that no ballots are disqualified for this reason.
- The DOD must provide military personnel with applicable deadlines and other timely information on registration and voting.
- New military enlistees must be given a voter registration form.

Requirements for States

- States must establish a single state office mandated to provide information on registration and absentee voting, to make it easier for military personnel to access such information.
- States must report the number of military and overseas applications and ballot received to the Federal government.
- States must provide overseas absentee ballots for two Federal general elections to voters who request them. The current Mississippi absentee ballot application is good for only 1 year.
- States must accept a standard oath for verifying election materials.
- States may not refuse ballots for being submitted too early. Many military personnel are isolated for long periods of time (ex., submariners). This must be in place by January 1, 2004.
- States must notify overseas and military voters whose applications have been rejected. This requirement applies to both voter registration and absentee ballot applications.
- All items above are effective immediately, unless another effective date is listed.

FREQUENTLY ASKED QUESTIONS REGARDING
"The Help America Vote Act of 2002"

What is the "Help America Vote Act"?

The Help America Vote Act is the common title for a federal act signed into law by the President on October 29, 2002. Officially, it is Public Law 107-252, or codified as U.S.C. 15301-15545. Sometimes, it is also referred to as "The Help America Vote Act" for its principle authors, or as H. R. 3295, which was its designation as Congress finally enacted it.

What is the purpose of the Act?

After the problems seen in some other states during the 2000 Presidential Election, Congress recognized a need to standardize some elements of federal elections, and appropriated federal funds to help states make those reforms. The Act is the result of the negotiation between the House and Senate on exactly how those reforms should occur.

The Act refers specifically to federal elections, but because state and federal elections are usually conducted simultaneously, it will impact almost all Mississippi elections. The Act applies to all states and territories, and all of these areas must submit a plan that explains how the Act will be implemented locally.

The Act does not shift the control of elections to the federal level. Instead, it shifts responsibility for complying with federal election reform laws from the local to the state level, and sets a number of ground rules that states should follow to provide some uniformity in elections. For instance, one of the provisions of the Act specifies that each state must determine exactly what constitutes a legal vote on a ballot.

Will the Act dramatically change the way local elections are conducted?

The Act contains a number of provisions that are designed to make elections easier to understand, easier to access for people with disabilities, and easier to audit after the votes have been counted. One recent report noted that no single state in the nation met all the provisions of the Act, but some states will have more difficulty than others in complying, depending on their individual election systems.

Mississippi, for instance, already has state level enabling legislation for a statewide, centralized voter registry, which is one of the key components of the Act. Because the Legislature passed that in the 2002 session, Mississippi is ahead of many other states in planning how that provision of the Act can be implemented.

What exactly does the Act do?

Essentially, the Act sets up a system where every state and territory generates a roadmap – the statewide plan – that will be used to bring the state in conformity with the provisions of the Act. The provisions of the Act are generally designed to ensure that voters are capable of voting easily, privately, and independently, and sets up mechanisms where they can be sure their votes are counted, if there is any doubt.

First, the Act sets standard requirements for actual voting devices that are designed to make them easier to use: (a) voters must be able to review their ballot before it is cast to ensure they correctly voted for the right candidate, (b) voters must be able to change their selections on a race before the ballot is cast, and (c) the voting machine must provide some mechanism to notify voters when they accidentally vote for more than one candidate in a single race (and allow them to correct the error).

Additionally, voting systems must be able to produce a manual audit trail of those ballots that are processed, and this audit trail must be able to help local election officials determine error rates in processing ballots. The total error rate for a system should not exceed the Election Assistance Commission's specifications for the machine.

Secondly, the Act mandates statewide, centralized voter registration systems, that can be used at the local level to make sure that voter rolls are accurate and valid. As local election personnel enter registration information, that information automatically is double-checked against other registration entries (to determine if the applicant is registered in another jurisdiction), and is checked against other state databases (to ensure that the voter has not been convicted of a disenfranchising crime, and that the driver's license or social security number provided matches records for him). Further, the system will have the capability to interface with records at the Department of Health and other systems to determine if a particular entry is for a deceased person (and should be removed).

Third, the Act ensures that all people who believe they are eligible to vote in a jurisdiction but whose names do not appear on the poll books, can vote there by way of an affidavit ballot. The eligibility of the voter will be determined before the votes are finally totaled. Finally, the Act mandates that each person who votes an affidavit ballot be provided a free access system for determining if his or her vote was counted (and if not, why).

These elements constitute the major mandates of the bill. Details about how these requirements are to be implemented are largely left to the discretion of the state's chief election official, who must submit a statewide plan of action to the federal government.

Will my county have to replace its voting equipment?

In general, if a county has voting equipment that does not meet the requirements of the Act, those voting devices must be replaced or upgraded to meet the requirements of the Act by January 1, 2006. Specific funds are authorized in the Act to assist with the replacement of punch card and lever-based systems. States that receive those specific funds must replace their punch card and lever devices by the 2004 General Election, or by the 2006 General Election, if the state receives a waiver of the first deadline. Other funds may, at the discretion of the state's Chief Election Official, help defray costs of voting device purchases by local governments.

If my county has already replaced its systems with compliant voting machines, will we be reimbursed by funds from the Act?

The Act provides funds earmarked for defraying costs associated with replacing punch card and lever machines with compliant voting equipment. That program includes jurisdictions that used punch card and lever machines during the November 2000, election

and replaced those devices after that date. Until the entire plan is finalized and the state determines how much new equipment Mississippi needs to comply with HAVA, it is impossible to say if, or how much, each county may be reimbursed for equipment.

How will I know if the machines my county purchases are compliant with the Act?

One of the things the Act does is establish the Elections Assistance Commission, which will issue non-binding guidelines about how different machines conform to the requirements of the Act. Unfortunately, the Commission is not yet fully constituted, so there is no definitive source of information in the meantime, except for the Act itself. However, the Secretary of State's Office, national organizations, and many other resources are available to help a county make an educated decision about what types of voting equipment to purchase.

Will all the counties purchase equipment separately, or will the state do it in bulk?

It is not known at present exactly how much money is required to bring Mississippi counties into full compliance with HAVA Voting System Standards and the Statewide Voter Registry mandate. Until the state plan process is complete, no decision on how to allocate funds among the federal mandates will be made.

Because the current fiscal year appropriation from the federal government is less that the money authorized under HAVA, and because there is no guarantee that future authorized appropriations will be met, great care should be taken with the funds the state does receive. As a part of the plan process, all opportunities to "stretch" these dollars will be considered, including centralized purchasing.

Will the statewide voter database mean that election rolls are maintained centrally from Jackson?

The HAVA Act and the accompanying state legislation mandate that there will be a centralized voter registry, but that it will be designed so that local election officials have access to it to make additions, changes and deletions, as allowed by law. The purpose of the centralized registry is to better inform local election commissioners and circuit clerks about potential problems, duplicate entries, or other issues that should be acted on at the local level. The decision about whether a particular person should or should not be added to a jurisdiction's election roll is up to local election officials; the database will just be an added tool that will help ensure the rolls are accurate and up to date.

Will the centralized system replace my current local voter registry?

The centralized system has yet to be fully developed, but as a centralized system, data that is currently in your local system will be converted over to the new system, and the new system will then become the primary tool for managing election rolls at the local level.

How much money is being made available through the Act?

Although Congress passed and the President signed the Act, money must be separately appropriated to fund its provisions. Some $1.5 billion dollars was appropriated in the FY03 budget, much of it designated for specific programs. Since this bill was a high priority for

Congress, it is possible that additional monies will be made available in subsequent funding cycles, as states face compliance with the Act's expensive mandates. It is important to realize, though, that this is essentially one-time money – after the timetables specified by the Act expire, there are no additional funds that will be available under the Act. Moreover, the actual appropriation of funds has no bearing on a state's obligation to meet the requirements of the Act – little or no money does not mean that Mississippi can pick and choose which elements of HAVA it wishes to implement.

Most initial estimates predict that Mississippi will receive a total amount of approximately $34 million dollars, over a three-year period, and assuming that Congress fully funds HAVA. This provides a significant window of opportunity for state and local officials to work together to make improvements in elections-related infrastructure, while federal funding is available.

Are there provisions in the Act that will require a voter to show a picture ID at the polling place?

The issue of voter ID has been one that has captured a great deal of press within Mississippi, as the Mississippi Legislature debated the issue as one element of an overall, comprehensive HAVA compliance bill. HAVA is very specific in its ID requirements: voters who register by mail (and do not include copies of one of several different kinds of identification with their registration), and who are voting for the first time in a jurisdiction (or state, once the state implements a centralized registry), must show one of a number of different types of ID when they go to the polling place. That ID could include a photo ID driver's license, a paycheck, a utility bill, or other government document that includes a name and address. There is an exception for voters whose driver's license or social security number match a state record containing this verifying information.

Is HAVA only going to be used in years that there are candidates for federal office?

HAVA requirements only apply to elections for federal offices, but most states, including Mississippi, will likely pass state statutes or promulgate administrative rules, or both, that make HAVA requirements applicable to all elections. Without a single set of rules for federal, state, and local elections, Mississippi would have different rules in non-federal election years only. This type of dual system is confusing to voters and election officials alike.

What is the timetable for submitting the statewide plan?

Public hearings are being held during the month of April to receive input from people at the local level. In addition, the entire plan is being developed with the input from the HAVA Advisory Committee, which has many representatives from the local level.

After a draft version of the plan is produced with the aid of the advisory group, it will be advertised and made available for public comment for thirty days. At the end of that time, it may be revised to accommodate the public comments that were received, and must eventually be published in the *Federal Register*.

The preliminary plan will be published in Mississippi for comment on or around July 1, 2003, and the final plan will be submitted to the federal government in early August.

How can I continue to be a part of the plan formulation process?

A number of methods are available:

- Stay in touch with your representatives on the HAVA Advisory Committee.
- Communicate with the staff at the Elections Division of the Office of the Secretary of State by email to elections@sos.state.ns.us or by toll-free phone at (800) 829-6786).

STATE BOARD OF ELECTIONS
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GARY O. BARTLETT
Executive Director

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RALEIGH, NC 27611-7255

June 2, 2005

U.S. Election Assistance Commission
1225 New York Ave. NW-Suite 1100
Washington, D.C. 20005

Re: Change in North Carolina State HAVA Plan

Dear Members of the Commission:

In accordance with section 255 of the Help America Vote Act of 2002 (HAVA), the North Carolina State Board of Elections offers to the Election Assistance Commission (EAC), for publication in the *Federal Register*, this letter and the following amendments that supplants outdated information with new pages that will comprise new Sections 6, 7, and 12 of the State HAVA Plan of North Carolina for 2005 and future years unless further amended. These new sections were required because the fiscal data in Sections 6 and 7 were estimated when written in 2003. The financial data in the new Sections 6 and 7 are based upon the actual HAVA funds received by our state.

As required by section 254(a)(12) of HAVA, Section 12 of the plan, as amended, describes the material changes that North Carolina has made to the State Plan since it first filed in 2003. Specifically, Section 12 contains descriptions of the amended versions of Sections 6 and 7 and lists the progress that North Carolina has made with regard to the State Plan that was submitted to the Federal Election Commission on June 24, 2003.

We have available to the EAC and members of the public the North Carolina State Board of Election's website (www.sboe.state.nc.us) to view and copy the complete amended North Carolina State HAVA Plan. This 2005 Amendment to the North Carolina State HAVA Plan was developed in accordance with section 255 of HAVA and the requirements for public notice and comment prescribed by section 256 of HAVA.

On behalf of North Carolina, I thank the Commission for its assistance. I look forward to our continued collaboration to improve the administration of elections in North Carolina.

Very truly yours,

Gary O. Bartlett

Gary O. Bartlett, Executive Director

LOCATION: 506 NORTH HARRINGTON STREET • RALEIGH, NORTH CAROLINA 27603 • (919) 733-7173

6. § 254(a)(6) North Carolina's HAVA Budget

The State's proposed budget for activities under this part, based on the State's best estimates of the costs of such activities and the amount of funds to be made available, including specific information on—

(A) the costs of the activities required to be carried out to meet the requirements of title III;

(B) the portion of the requirements payment which will be used to carry out activities to meet such requirements; and

(C) the portion of the requirements payment, which will be used to carry out other activities. -- HAVA §254 (a)(6)

The following table is based on actual receipts for FY03 and FY04 and assumptions for FY05 regarding federal funding that the State has used in creating its budget for HAVA activities. This is a revised Section 6 from the original State HAVA Plan that used estimates as to HAVA budget matters, not the actual receipts.

ACTUAL HAVA RECEIPTS

	Federal Funds*				State Matching Funds**	State Maintenance of Effort Funds
	HAVA 101	HAVA 102	HAVA 252	TOTAL FEDERAL FUNDS		
2003 Based on Appropriated Federal Funds	$7,877,740	$893,822	$23,431,708	$32,203,270	$1,232,508	$1,791,936
2004 Appropriated			$42,046,100	$42,046,100	$2,211,625	$1,791,936
2005 Estimated			$0	$0	$0	$1,791,936
Total	$7,877,740	$893,822	$65,477,808	$74,249,370	$3,444,133	$5,375,808
***Difference	-$22,260	+$17,324	+$14,989,808	+$14,984,872	+$919,733	+$3

* Funding has no fiscal year limit. ** The North Carolina General Assembly has appropriated the required Title II five percent matching funds

*** The difference in the estimated funds to be received shown on the original State HAVA Plan and actual receipts are noted above at the bottom of the chart.

Interest. All interest earned from HAVA and state HAVA related funds shall be allocated in the discretion of the State Board between the funding of voting systems set forth in Section 301 and the statewide voter registration database (SEIMS) as set forth in Section 303 of the above chart.

Assumptions. Funding from Title I early payments to the states is divided into Section 101 and Section 102 payments. Section 101 funds will be distributed as grants without the need for matching funds, have no fiscal year limitations on expenditures, and will be used to improve election administration. North Carolina received $7,877,740 in Section 101, Title I funds.

Section 102 funds must be used for the replacement of punch card and lever voting systems. The State Board found that 241 precincts used punch card systems and 46 precincts used lever-voting systems in November 2000 in North Carolina. North Carolina received $893,822 in Section 102, Title I funds.

Title II of HAVA allows for requirements payments to be made to the States for those election activities set out in Title III of HAVA. These funds require a matching 5.26% State expenditure and maintenance of effort upon the part of the State that requires at least the level of 2000 State spending for any items that receive Title II grants in the current State budget. There is no fiscal year limitation on the expenditure of these funds.

North Carolina received $23,431,708 in Title II HAVA funds for federal FY03. North Carolina received $42,046,100 in Title II HAVA funds for federal FY04. It does not appear that Congress will appropriate any HAVA funds to distribute to the states in federal FY05 and there is no provision in HAVA for Title II HAVA appropriations beyond federal FY05.

North Carolina must match funds granted under Title II of HAVA at a rate of 5.26%. Based on the Title II HAVA funding received, North Carolina appropriated matching State funds of $1,232,508 in the 2003-04 state budget and $ 2,211,625 in the 2004-05 state budget. In addition, HAVA mandates that the State must maintain expenditures equal to its budget that expired prior to the November 2000 election (the N.C. State Budget of 1999-2000) as to election administration items. This maintenance of effort requirement in the amount of $1,791,936 for each year Title II funds are used was provided for in the 2003-04 and 2004-05 state budget, and is included in the proposed 2005-06 state budget.

HAVA increases the responsibilities and workload of the State Board. As part of the budgeting and planning process the State Board is anticipating an additional staffing requirement to implement and manage these new responsibilities and workload. The necessary staffing is estimated to be:

- 3 Programmers

NORTH CAROLINA HAVA BUDGET AS REVISED APRIL 2005

HAVA Requirements Budget Based on Funding Source	Allocation	Funding Source											
		HAVA 101	HAVA 102	HAVA 252			State Match			Maint. Of Effort		
				2003	2004	Interest from 252 fund**	2003	2004	Interest from Matching Fund**	2003	2004	2005*
Title III Requirements												
Appropriated Funding		$7,877,740	$893,822	$23,431,708	$42,046,100		$1,232,508	$2,211,625		$1,791,936	$1,791,936	$1,791,936
Sect 301 Voting System***												
Accessible Equipment	$11,000,000			$11,000,000								
Voting Equipment	$26,231,222		$893,822		$24,463,404	See Footnote **		$873,996	See Footnote **			
Sub Total	$37,231,222		$893,822	$11,000,000	$24,463,404			$873,996				
Sect 302 Provisional Voting & Voting Information Requirements												
Informational Signs	$300,000			$300,000								
1-800 Help Desk	$100,000			$25,000	$75,000							
Videos/TV/Teleconference/Public TV Access Channels	$150,000			$150,000								
WEB Site	$100,000			$100,000								
PSAs & Voter Outreach	$1,000,000			$1,000,000								
Sub Total	$1,650,000			$1,575,000	$75,000							
Sec 303 Statewide Computer system & requirements for voters registering by mail ***												
SEIMS	$5,000,000	$4,977,740										
Verification Confirmation and List maintenance mailings	$2,000,000				$2,000,000							
Subtotal	$7,000,000	$4,977,740			$2,000,000	See Footnote **			See Footnote **			
Subtotal	$45,863,898	$4,977,740		$12,575,000	$12,594,404							

- 1 Business Analyst
- 2 Help Desk
- 1 Certification Program/Outreach Coordinator
- 1 Certification Program/Outreach Coordinator Assistant
- 2 Election Technicians
- 2 Office Support

Funding will also be required for support of HAVA-related activities including travel, subsistence, office equipment and supplies.

The North Carolina State Board of Election amended the original State HAVA Plan by unanimous vote on April 7, 2005. Prior to their decision, the State HAVA Advisory Committee met on March 8, 2005 and recommended the changes that were adopted by the State Board. The amendment designated unappropriated funds and interest to fund budget items listed in Sections 301 and 303 of the HAVA budget set forth in Sections 6 and 7 of the original State HAVA Plan.

7. § 254(a)(7) Maintenance of Effort

How the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000. – HAVA §254 (a)(7)

In using any requirements payment, North Carolina will maintain expenditures of the State for activities funded by the payment at a level equal to or greater than the level of such expenditures in the State FY 1999 -2000 budget. This requires an additional yearly appropriation of $1,791,936 in the area of election administration. North Carolina appropriated these funds in the amount of $1,791,936 for each of the state 2003-04 and 2004-05 budget years.

The North Carolina General Assembly is currently in the 2005-06 budget approval process and legislation is moving forward to appropriate the maintenance of effort funds for that budget year in the amount of $1,791,936.

HAVA Requirements Budget Based on Funding Source	Allocation	Funding Source											
		HAVA 101	HAVA 102	HAVA 252			State Match			Maint. Of Effort		
				2003	2004	Interest from 252 fund**	2003	2004	Interest from Matching Fund**	2003	2004	2005*
Other Election Reform Activities												
Funding to make polls accessible	$1,000,000	$1,000,000										
Focus group studies	$50,000	$25,000		$25,000								
Polling place registry/Sample Ballot/Request for Service	$75,000	$75,000										
Additional one stop absentee voting sites	$1,000,000				$1,000,000							
Certification programs for election officials, support materials & media and non-partisan voter education programs	$1,500,000	$1,500,000										
Public computer terminals	$300,000	$300,000										
Electronic Records Access at Polling Place	$10,000,000			$10,000,000								
County Technology Improvements	$2,000,000				$349,596		$1,130,000	$520,404				
State Board of elections personnel for HAVA Activities	$5,375,805									$1,791,935	$1,791,935	$1,791,935
Subtotal	$21,300,805	$2,900,000		$10,025,000	$1,349,596		$1,130,000	$520,404		$1,791,935	$1,791,935	$1,791,935
Total of Allocated Budgeted Items	$67,164,703	$7,877,740	$893,822	$22,600,000	$27,963,000	**	$1,130,000	$1,394,400	**	$1,791,935	$1,791,935	$1,791,935
			$831,708***		$14,083,100***			$102,508***	$817,225***			

Footnotes

* Expected funding by 2005 North Carolina General Assembly

** All interest generated by HAVA related federal or state funds will be allocated by the N.C. State Board of Elections in the future to fund budget items either in § 301 and /or § 303 .

*** There is available an additional $15,834,541 in federal HAVA funds and state matching funds that are subject to being allocated by the State Board of Elections in the future to fund budget items either in § 301 and /or § 303.

12. § 254(a)(12) Changes to State Plan from Previous Fiscal Year

In the case of a State with a State plan in effect under this subtitle during the previous fiscal year, a description of how the plan reflects changes from the State plan for the previous fiscal year and of how the State succeeded in carrying out the State plan for such previous fiscal year. – HAVA §254 (a) (12)

The North Carolina State Board of Election amended the original State HAVA Plan by unanimous vote on April 7, 2005. Prior to their decision, the State HAVA Advisory Committee met on March 8, 2005 and recommended the changes that were adopted by the State Board. The amendment designated unappropriated funds and interest to fund budget items listed in Sections 301 and 303 of the HAVA budget set forth in Sections 6 and 7 of the original State HAVA Plan.

There were additional $15,834,541 in federal HAVA funds and state matching funds received beyond the 2003 State HAVA Plan estimates that were set out in the original Section 6. Also, there was a difference in the maintenance of effort funds that were estimated in Section 7 of the 2003 State HAVA Plan. These funds were received and placed in the State HAVA Fund and had to be allocated. As set out above, these additional funds and associated interest are being allocated to fund budget items listed in Section 301 and Section 303 of the HAVA budget set forth in the State HAVA Plan.

North Carolina has enjoyed success in carrying out parts of the State HAVA Plan prior to this recent amendment as follows:

TITLE ONE SECTION 102 FUNDS...To buy out punch-card and lever voting machines. All of the $894,000 Section 102 funds were distributed to 13 counties on June 30, 2003.

TITLE ONE SECTION 101 FUNDS...To improve election administration. The following funds were spent:

$1,528,000 for accessible polling places
$2,625,000 for SEIMS (the N.C. statewide voter registration database) compliance
$722,000 for One-Stop Absentee (early) voting additional sites
$68,500 for Student Election Assistants
$149,000 for Voter registration information as part of 4 million voter guides sent out.

TITLE TWO SECTION 252 FUNDS...Provides the states with funds to implement Title III HAVA requirements. The following funds were spent:

$1,269,000 for employment costs for persons improving SEIMS
$366,415 for electronic poll book pilot project in Guilford County
$1,384,000 for technology grants to counties
$218,701 (as of 2/28/05) for costs of HAVA time-limited positions at the State Board of Elections to implement HAVA
$40,000 for Voter Information Posters used in the 2004 election.

The successes in North Carolina implementing HAVA up to June of 2005 can be summarized as follows:

- Voter registration forms updated to be HAVA compliant
- Grants to 13 counties to buy out punch-card and lever voting machines
- Posting of voting information at all 2800 polling places for the 2004 elections using posters designed and provided by the State Board
- Upgrade server hardware and software in 96 counties
- SEIMS automatic drivers license validation with the N.C. Division of Motor Vehicles
- SEIMS ID requirement support
- Provisional voting support for the 2004 elections
- 12 time limited positions for the support of HAVA implementation
- 1-800 help desk number
- Funding to make polls accessible for the 2004 elections
- Polling place registry/sample ballot/request for service available on website
- Additional one-stop absentee voting sites funding for the 2004 elections
- County board of elections technology improvements
- Provided extensive training to election officials regarding the implementation of HAVA requirements
- Public computer terminals at county election offices
- Pilot program electronic records access at polling place in Guilford County
- Converted Mecklenburg, Forsyth and Guilford County to SEIMS on a real-time basis

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ELECTION ASSISTANCE COMMISSION

Proposed Guidance on Voluntary Voting System Guidelines

AGENCY: United States Election Assistance Commission (EAC).

ACTION: Notice of proposed voluntary Voting System Guidelines and request for comments.

SUMMARY: EAC is proposing Voluntary Voting System Guidelines pursuant to sections 221 and 222 of the Help America Vote Act of 2002 (HAVA) which was passed by Congress to modernize the administration of Federal elections. This marks the first time in our nation's history that the Federal Government has funded an election reform effort. HAVA provides Federal funding to help the States meet the law's uniform and non-discretionary administrative requirements, which include the following new programs and procedures: (1) Provisional voting, (2) voting information, (3) statewide voter registration lists and identification requirements for first-time registrants, (4) administrative complaint procedures, and (5) updated and upgraded voting equipment.

HAVA also established the U.S. Election Assistance Commission (EAC) to administer the Federal funding and to provide guidance to the States in their efforts to comply with the HAVA administrative requirements. Section 202 directs the EAC to adopt voluntary voting system guidelines, and to provide for the testing, certification, decertification, and recertification of voting system hardware and software. The purpose of the guidelines is to provide a set of specifications and requirements against which voting systems can be tested to determine if they provide all the basic functionality, accessibility, and security capabilities required of voting systems.

This document, the Voluntary Voting System Guidelines, is the third iteration of national level voting system standards. The Federal Election Commission published the Performance and Test Standards for Punchcard, Marksense and Direct Recording Electronic Voting Systems in 1990. This was followed by the Voting Systems Standards in 2002.

As required by HAVA, EAC formed the Technical Guidelines Development Committee (TGDC) to develop an initial set of recommendations for the Guidelines. This committee of 15 experts began their work in July 2004 and submitted their recommendations to the EAC in the 9-month timeline prescribed by HAVA. The TGDC was provided with technical support by the National Institute for Standards and Technology (NIST), who was given nearly $3 million dollars by the EAC to complete this work. This funding represents the first time the Federal Government has spent a significant amount of money on setting guidelines for voting systems. These latest Guidelines update and augment the 2002 Voting Systems Standards to address increasingly complex voting system technology. Specifically, the 2005 Guidelines address the critical topics of accessibility, usability, and security. These Guidelines are voluntary. States may adopt them in whole, in part, or not at all. States may also choose to enact stricter performance requirements for certifying their voting systems.

The Guidelines consist of two volumes. Volume I, entitled "Voting System Performance Guidelines," includes new requirements for accessibility, voting system software distribution, system setup validation, and the use of wireless communications. This volume also includes a set of optional requirements for a Voter Verified Paper Audit Trail component for Direct Recording Electronic voting systems for use by those States that have decided to require this feature for their voting systems. In addition, it contains an updated glossary and a conformance clause. Volume II, entitled "Voting System National Certification Guidelines," has been revised to reflect the new EAC process for national certification of voting systems. This process will go into effect in 2005 and will replace the voting system qualification process that has been conducted by the National Association of State Election Directors since 1994. Volume II also includes an updated appendix on procedures for testing system error rates. Terminology in both volumes has been revised to reflect new terminology introduced by HAVA. The following provides a summary of the contents of each volume.

Volume I Summary: Volume I, the Voting System Performance Guidelines, describes the requirements for the electronic components of voting systems. It is intended for use by the broadest audience, including voting system developers, manufacturers and suppliers; voting system testing labs; state organizations that certify systems prior to procurement; state and local election officials who procure and deploy voting systems; and public interest organizations that have an interest in voting systems and voting system standards. It contains the following sections:

- Section 1 presents the objectives and usage of the Guidelines, definitions of types of voting systems, and a discussion of how the guidelines and testing specifications are applied. It also contains a conformance clause.
- Section 2 describes the functional capabilities required of voting systems.
- Sections 3 through 5 describe specific performance standards for election system hardware, software and telecommunications.
- Section 6 is a significantly expanded section on security requirements for voting systems. It includes new material for the secure distribution of voting system software and for verifying that voting systems are operating with the correct software. There are also new requirements for the use of wireless communications. Since some States have decided to require a voter verified paper audit trail component for their direct recording electronic (DRE) voting systems, requirements are included to support appropriate testing of these components. These requirements are optional because there are other currently available technologies besides paper audit trails that can be employed to provide a second method, in addition to the DRE summary screen, for voters to verify their ballot choices. There was insufficient time to develop requirements for these other technologies for the present Guidelines, but these technologies, including audio, video, and cryptographic means, will be addressed in the near future.
- Sections 7 and 8 describe requirements for vendor quality assurance and configuration management practices and the documentation required about these practices for the certification process.
- Appendix A contains a glossary of terms.
- Appendix B provides a list of documents incorporated into the Guidelines by reference, as well as documents used in preparation of the Guidelines.
- Appendix C contains best practices for election officials regarding accessibility, paper audit trails, and wireless.
- Appendix D presents an informational discussion of independent dual verification which is a concept being examined for potential future application to voting systems. In essence, this is a methodology to produce multiple independent records

of ballot choices for verification purposes. Voter verified paper audit trails do not provide independent verification because the printer prints from the same data source that produces the DRE summary screen display.

• Appendix E contains the NASED Voting System Standards Board Technical Guide #1 on color and contrast adjustment for individuals with low vision or color blindness.

Volume II Summary: Volume II, the Voting System National Certification Testing Guidelines, is a complementary document to Volume I. Volume II provides an overview and specific detail of the national certification testing process, which is performed by independent voting system test labs accredited by the EAC. It is intended principally for use by vendors, test labs, and election officials who certify, procure, and accept voting systems. This volume contains the following sections:

• Section 1 presents an overview of the testing guidelines and the national certification testing process.

• Section 2 provides a description of the Technical Data Package that vendors are required to submit with their system for certification testing.

• Section 3 describes the basic functionality testing requirements.

• Sections 4 through 6 define the requirements for hardware, software and system integration testing.

• Section 7 describes the required examination of vendor quality assurance and configuration management practices.

• Appendix A provides the requirements for the National Certification Test Plan that is prepared by the voting system test lab and provided to the EAC for review.

• Appendix B describes the scope and content of the National Certification Test Report which is prepared by the test lab and delivered to the EAC along with a recommendation for certification.

• Appendix C describes the guiding principles used to design the voting system certification testing process. It also contains a revised section on testing system error rates.

The format of the Guidelines is intended to facilitate ease of identifying new information and comparison with the 2002 Voting Systems Standards. New material is indicated by a gray-shaded header with the words "NEW MATERIAL," and includes line numbers. Material essentially carried forward in its entirety from the 2002 Voting Systems Standards remains in its original format and does not include line numbers. Selected portions of this material have been revised to reflect the EAC process for voting system certification, specifically Volume I, Section 1.6.1, and Volume II Section 1. Updates have been made throughout to include new terminology introduced by HAVA.

Comments: The Voluntary Voting System Guidelines is provided for comment by the public for the next 90 days. All comments must be received by EAC on or before 5 p.m. EDT on September 30, 2005. All comments will posted on the EAC Web site. The EAC is provided several alternative methods for submitting comments.

• On-line electronic comment form at *http://www.eac.gov.*

• By e-mail to *votingsystemguidelines@eac.gov.*

• By mail to Voting System Guidelines Comments, U.S. Election Assistance Commission, 1225 New York Ave, NW., Suite 1100, Washington, DC 20005.

• By fax to Voting System Guidelines Comments at (202) 566–3127.

EAC requests that comments be provided according to the following specifications:

(1) Comments regarding a particular section should be designed by the page, line (if included) and section number to which the comment refers.

(2) Comments regarding a term that is included or that should be added to the glossary should reference the term and page number to which the comment refers.

(3) General comments regarding the entire document or comments that refer to more than one section should be made as specifically as possible so that EAC can clearly understand to which portion(s) of the documents the comment refers.

(4) To the extent that a comment suggests a change in the wording of a requirement or section of the Guidelines, please provide proposed language for the suggested change.

To obtain a copy of the voluntary voting system guidelines: Due to the fact that the Voluntary Voting System Guidelines is more than 250 pages in length, the entire documents has not been attached to this notice. A complete copy of the Voluntary Voting System Guidelines is available from EAC in electronic or hard copy format. An electronic copy can be downloaded in PDF format or read in HTML version on EAC's Web site, *http://www.eac.gov.* In addition, interested persons may obtain a hard copy or CD–ROM electronic copy from EAC by contacting Voting System Guidelines, via fax at 202–566–3128, via e-mail at *VotingSystemGuidelines@eac.gov*, or via mail at Voting System Guidelines, U.S. Election Assistance Commission, 1225 New York Avenue, NW., Suite 1100, Washington, DC 20005. You may also request by phone at (866) 747–1471. Please specify whether a hard copy or electronic copy is desired.

FOR FURTHER INFORMATION CONTACT: Carol A. Paquette, Phone (202) 566–3125, fax (202) 566–3128, e-mail *cpaquette@eac.gov.*

Thomas R. Wilkey,

Executive Director, U.S. Election Assistance Commission.

[FR Doc. 05–12859 Filed 6–28–05; 8:45 am]

BILLING CODE 6820–KF–M

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Federal Energy Management Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Federal Energy Management Advisory Committee (FEMAC). The Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) requires that these meetings be announced in the **Federal Register** to allow for public participation. This notice announces the tenth FEMAC public meeting, an advisory committee established under Executive Order 13123—"Greening the Government through Efficient Energy Management."

DATES: Monday, August 15, 2005; 6 to 7 p.m.

ADDRESSES: Long Beach Convention Center, 300 East Ocean Boulevard, Room 101, Long Beach, CA 90802.

FOR FURTHER INFORMATION CONTACT: Rick Klimkos, Designated Federal Officer, Office of Federal Energy Management Programs, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–8287.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: To seek input and feedback from interested parties on working group recommendations to meet mandated Federal energy management goals.

Tentative Agenda: Agenda will include discussions on the following topics:

○ Update on FEMAC Working Groups.

○ Discussion on FEMAC priorities.

○ Open discussion with public.

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the

Federal Energy Management Advisory Committee. If you would like to file a written statement with the committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact Rick Klimkos at (202) 586–8287 or *rick.klimkos@ee.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The chair of the committee will make every effort to hear the views of all interested parties. The chair will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; Room 1E–190; Forrestal Building; 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC on June 23, 2005.

Rachel M. Samuel,

Deputy Committee Management Officer.

[FR Doc. 05–12819 Filed 6–28–05; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency information collection activities; submission for OMB review; comment request.

SUMMARY: The EIA has submitted the EIA–882T, "Generic Clearance for Questionnaire Testing and Research" to the Office of Management and Budget (OMB) for review and a three-year extension under section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (44 U.S.C. 3501 *et seq*).

DATES: Comments must be filed by July 29, 2005. If you anticipate that you will be submitting comments but find it difficult to do so within that period, you should contact the OMB Desk Officer for DOE listed below as soon as possible.

ADDRESSES: Send comments to John Asalone, OMB Desk Officer for DOE, Office of Information and Regulatory Affairs, Office of Management and Budget. To ensure receipt of the comments by the due date, submission by FAX (202–395–7285) or e-mail (*John_A._Asalone@omb.eop.gov*) is recommended. The mailing address is 726 Jackson Place NW., Washington, DC 20503. The OMB DOE Desk Officer may be telephoned at (202) 395–4650. (A copy of your comments should also be provided to EIA's Statistics and Methods Group at the address below.)

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Kara Norman. To ensure receipt of the comments by the due date, submission by FAX (202–287–1705) or e-mail (*kara.norman@eia.doe.gov*) is recommended. The mailing address is Statistics and Methods Group (EI–70), Forrestal Building, U.S. Department of Energy, Washington, DC. 20585–0670. Kara Norman may be contacted by telephone at (202) 287–1902.

SUPPLEMENTARY INFORMATION: This section contains the following information about the energy information collection submitted to OMB for review: (1) The collection numbers and title; (2) the sponsor (*i.e.*, the Department of Energy component); (3) the current OMB docket number (if applicable); (4) the type of request (*i.e.*, new, revision, extension, or reinstatement); (5) response obligation (*i.e.*, mandatory, voluntary, or required to obtain or retain benefits); (6) a description of the need for and proposed use of the information; (7) a categorical description of the likely respondents; and (8) an estimate of the total annual reporting burden (*i.e.*, the estimated number of likely respondents times the proposed frequency of response per year times the average hours per response).

1. EIA–882T, "Generic Clearance for Questionnaire Testing and Research."
2. Energy Information Administration.
3. OMB Number 1905–0186.
4. Three-year approval requested.
5. Voluntary.
6. The EIA–882T is used to conduct pretest/pilot surveys (face-to-face interviews, telephone interviews, mail questionnaires, and electronic questionnaires), focus groups, and cognitive interviews. Data are used to modify questionnaires to improve the quality of data. Samples of potential respondents to proposed surveys are selected to participate.
7. Individuals or households; business or other for-profit; not-for profit institutions; farms; Federal Government; and state, local or tribal government.
8. 1000 hours.

Statutory Authority: Section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (44 U.S.C. 3501 *et seq.*).

Issued in Washington, DC, June 21, 2005.

Jay H. Casselberry,

Agency Clearance Officer, Energy Information Administration.

[FR Doc. 05–12818 Filed 6–28–05; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. QF05–99–000]

Apex Power, LLC; Notice of Amendment of Filing

June 20, 2005.

Take notice that on June 17, 2005, Apex Power, LLC (Apex Power), filed an amendment to its petition for certification as a qualifying cogeneration facility filed on April 29, 2005, in the above-referenced proceeding.

Any person desiring to intervene or to protest in the above proceeding must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and.385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies

of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filing in the above proceeding is accessible in the Commission's eLibrary system. It is also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time on June 27, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3373 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[ER99–2948–005; ER00–2918–004; ER00–2917–004; ER97–2261–001; ER01–556–003; ER01–557–003; ER01–558–003; ER01–559–003; ER01–560–003; ER01–1654–006; ER01–2641–004; ER00–3240–004; ER02–2567–004; ER02–699–001; ER01–1949–004; ER04–485–001]

Baltimore Gas and Electric Company; Constellation Power Source Generation, Inc.; Calvert Cliffs Nuclear Power Plant, Inc.; Constellation Energy Commodities Group, Inc. (f/k/a Constellation Power Source, Inc.); Handsome Lake Energy, LLC; University Park Energy, LLC; Holland Energy, LLC; Wolf Hills Energy, LLC; Big Sandy Peaker Plant, LLC; Nine Mile Point Nuclear Station, LLC; High Desert Power Project, LLC; Oleander Power Project, Limited Partnership; Constellation NewEnergy, Inc.; Constellation Energy Commodities Group Maine, LLC; (f/k/a Constellation Power Source Maine, LLC); Power Provider LLC; R.E. Ginna Nuclear Power Plant, LLC; Notice of Filing

May 26, 2005.

Take notice that on May 23, 2005, Constellation Energy Group, Inc., (Constellation) submitted for filing a supplement to its May 2, 2005, Notice of Change in Status filing. Constellation states that the purpose of this filing is to supplement the May 2, 2005, filing with the addition of the revised tariff sheets of Baltimore Gas and Electric Company to comply with the Commission's Order No. 652 (*Reporting Requirement for Change in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 FR 8253, FERC Stats & Regs ¶ 31,175 (Feb. 18, 2005). In addition, Constellation states that it is adding Oleander Power Project, Limited Partnership to the case caption that was omitted from the May 2, 2005, filing.

Constellation states that copies of this notification were served upon all persons on the service lists in the above-captioned dockets.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filing in the above proceeding is accessible in the Commission's eLibrary system. It is also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. on June 13, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3391 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 22, 2005.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER00–980–012.

Applicants: Bangor Hydro-Electric Company.

Description: Bangor Hydro-Electric Company, pursuant to the settlement agreement filed on 11/1/00 and the Commission's order issued 2/26/01, submits an informational filing showing the implementation of their formula rate for the charges that became effective 6/1/05.

Filed Date: 06/15/2005.

Accession Number: 20050621–0226.

Comment Date: 5 p.m. eastern time on Wednesday, July 6, 2005.

Docket Numbers: ER00–1053–015.

Applicants: Maine Public Service Company.

Description: Maine Public Service Company, pursuant to the settlement agreement filed on 2/11/04 and the Commission's order issued 4/1/04, submits its informational filing setting forth the changed open access transmission tariff charges with an effective date of 6/1/05 together with back-up materials.

Filed Date: 06/15/2005.

Accession Number: 20050621–0225.

Comment Date: 5 p.m. eastern time on Wednesday, July 6, 2005.

Docket Numbers: ER00–3614–004.

Applicants: BP Energy Company.

Description: BP Energy Company submits an updated market analysis .

Filed Date: 06/17/2005.

Accession Number: 20050621–0001.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–1121–000.

Applicants: Aquila Inc.

Description: Aquila, Inc. submits an Incremental Energy Agreement between Aquila Networds-WPK and the City of Beloit, Kansas, dated 6/7/05 and designated as FERC Electric Rate Schedule 131.

Filed Date: 06/17/2005.

Accession Number: 20050621–0011.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–1122–000.

Applicants: FirstEnergy Generation Corp.

Description: FirstEnergy Nuclear Generation Corp. submits its FERC Electric Tariff, Original Volume 1, for the sale of power to wholesale purchasers at market-based rates.

Filed Date: 06/17/2005.

Accession Number: 20050621–0012.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–1125–000.

Applicants: Equitec Power, LLC.

Description: Equitec Power, LLC submits a Notice of Cancellation of its Market Base Rate Authority to be effective June 13, 2005.

Filed Date: 06/16/2005.

Accession Number: 20050620–0132.

Comment Date: 5 p.m. eastern time on Thursday, July 7, 2005.

Docket Numbers: ER05–1126–000.

Applicants: Virginia Electric and Power Company.

Description: Virginia Electric & Power Company d/b/a Dominion Virginia Power submit twenty-one interconnection agreements with its customers under PJM Interconnection, LLC's FERC Electric Tariff, Sixth Revised Volume No. 1

Filed Date: 06/15/2005.

Accession Number: 20050622–0025.

Comment Date: 5 p.m. eastern time on Wednesday, July 6, 2005.

Docket Numbers: ER05–569–002.

Applicants: Indianapolis Power & Light Company.

Description: Midwest Independent Transmission System Operator, Inc., submits an amendment to its 5/20/05 filing in Docket No. ER05–569–001 of an Interconnection Agreement with DTE Georgetown, LP.

Filed Date: 06/17/2005.

Accession Number: 20050621–0005.*Comment Date:* 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–635–001.

Applicants: American Electric Power Service Corporation.

Description: American Electric Power Service Corporation, on behalf of the AEP Operating Companies in its East Zone, submits for re-filing an Interconnection & Local Delivery Service Agreement with Blue Ridge Power Agency in compliance with the Commission's order issued 4/18/2005 in Docket No. ER05–635–000.

Filed Date: 06/17/2005.

Accession Number: 20050621–0004.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–709–002.

Applicants: Virginia Electric and Power Company.

Description: Virginia Electric and Power Company d/b/a Dominion Virginia Power amends an agreement with Virginia Municipal Electric Association #1 originally filed on 3/16/05 and amended on 4/22/05 in Docket Nos. ER05–709–000 and 001, respecitively.

Filed Date: 06/17/2005.

Accession Number: 20050621–0009.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–722–002.

Applicants: Carolina Power & Light Company.

Description: Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc., submits a revision to the Power Supply Agreement with North Carolina Electric Membership Corporation in compliance with the Commission's 5/20/05 letter order in Docket No. ER05–722–000.

Filed Date: 06/17/2005.

Accession Number: 20050621–0016.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–856–001.

Applicants: Virginia Electric and Power Company.

Description: Virginia Electric & Power Company submits an amendment to its 4/22/05 filing in Docket No. ER05–856–000 of an agreement for the Purchase of Electricity for Resale between Dominion and the Town of Windsor.

Filed Date: 06/17/2005.

Accession Number: 20050621–0008.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–980–001.

Applicants: American Transmission Systems, Incorporated.

Description: American Transmission System, Incorporated submits an amendment to its 5/19/05 filing in Docket No. ER05–980–000—a revised page to the Construction Agreement with Holmes-Wayne Electric Cooperative, Inc. & Buckeye Power, Inc.

Filed Date: 06/17/2005.

Accession Number: 20050621–0007.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER95–1278–015; ER02–580–003; ER05–698–003.

Applicants: NAP Trading & Marketing, Inc.; Pawtucket Power Associates Limited Partnership; San Joaquin Cogen, L.L.C.

Description: NAP Trading and Marketing, Inc., Pawtucket Power Associates Limited Partnership and San Joaquin Cogen, L.L.C. submit notices of change in status for NAP Trading and Pawtucket; a consolidated triennial filing; a request for a future consolidated triennial filing date; and amendments to market-based rate tariffs of NAP Trading and Pawtucket.

Filed Date: 06/16/2005.

Accession Number: 20050621–0006.

Comment Date: 5 p.m. eastern time on Thursday, July 7, 2005.

Docket Numbers: ER98–2329–006.

Applicants: Central Vermont Public Service Corp.

Description: Central Vermont Public Service Corporation submits revised tariff sheets modifying its market-based rate tariff in compliance with the Commission's 5/26/05 Order in Docket No. ER98–2329–003, 004 and 005.

Filed Date: 06/17/2005.

Accession Number: 20050621–0010.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other and the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They

are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3375 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TS05–11–000; Docket No. TS05–15–000; Docket No. TS05–14–000; Docket No. TS05–4–000; Docket No. TS04–248–001; Docket No. TS05–13–000; Docket No. TS04–234–001; Docket No. TS05–3–000; Docket No. TS04–260–001]

Cinergy Services, Inc.; Discovery Gas Transmission LLC; Gulf South Pipeline Company, LP; Islander East Pipeline Company, L.L.C.; National Fuel Gas Supply Corporation ; NGO Transmission, Inc.; SCG Pipeline, Inc.; Texas Eastern Transmission, LP; Williston Basin Interstate Pipeline Company; Notice of Filings

June 16, 2005.

Between October 2004 and May 2005, each of the above captioned Transmission Providers submitted individual pleadings or compliance filings with respect to the Standards of Conduct under Order No. 2004.

Any person desiring to intervene or to protest any of these filings must file separately in each proceeding accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 proceedings. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate, in each individual proceeding. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time on June 30, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3374 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–96–000]

Tenaska Power Fund, L.P.; TPF Pennsylvania, LLC; Alabama Electric Marketing, LLC Owners; Calpine Construction Finance Company, L.P.; CES Marketing VI, LLC; Calpine Energy Services, L.P.; Notice of Filing

June 20, 2005.

Take notice that on June 13, 2005, Tenaska Power Fund, L.P. (Power Fund), TPF Pennsylvania, LLC (TPF PA), Alabama Electric Marketing, LLC Owners (AEM Owners), Calpine Construction Finance Company, L.P. (CCFC), CES Marketing VI, LLC, (CESM), and Calpine Energy Services, L.P. (CES) (collectively, Applicants) tendered for filing with the Commission pursuant to section 203 of the Federal Power Act and part 33 of the Commission's regulations, an application authorizing Power Fund to acquire Ontelaunee Energy Center (the Ontelaunee Facility) from CCFC and the Ontelaunee Facility's reactive power tariff from CES. Applicants state that the Ontelaunee Facility is an approximately 584 MW electric generating facility located in Ontelaunee, Pennsylvania. Applicants request confidential treatment of certain parts of the Application.

Applicants state that a copy of the filing was served on the Pennsylvania Public Utility Commission.

Any person desiring to intervene or to protest of the above proceeding must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other and the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filing in the above proceeding is accessible in the Commission's eLibrary system. It is also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: July 5, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3371 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–51–002]

Wisconsin Public Service Corporation v. Midwest Independent Transmission System Operator, Inc.; Notice of Compliance Filing

June 16, 2005.

Take notice that on June 3, 2005, Midwest Independent Transmission System Operator, Inc., (Midwest ISO) submitted a compliance filing pursuant to the Commission's Order issued April 29, 2005, in *Wisconsin Public Service Corporation* v. *Midwest Independent Transmission System, Operator, Inc.*, 111 FERC ¶ 61,131 (2005).

Any person desiring to intervene or to protest in the above proceeding must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other and the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filing in the above proceeding is accessible in the Commission's eLibrary system. It is also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment date: 5 p.m. eastern time on July 5, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3372 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Filings

Thursday, May 26, 2005.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER00–1857–006.

Applicants: Split Rock Energy LLC.

Description: Split Rock Energy LLC submits First Revised Sheet 1 to FERC Electric Tariff, Original Volume 1, effective 5/25/05 under ER00–1857.

Filed Date: 05/24/2005.

Accession Number: 20050526–0022.

Comment Date: 5 p.m. eastern time on Tuesday, June 14, 2005.

Docket Numbers: ER01–2071–002.

Applicants: Desert Power, L.P.

Description: Desert Power, L.P. submits its updated triennial market power analysis pursuant to Section 205 of the Federal Power Act, etc. under ER01–2071.

Filed Date: 05/24/2005.

Accession Number: 20050526–0023.

Comment Date: 5 p.m. eastern time on Tuesday, June 14, 2005.

Docket Numbers: ER05–1012–000.

Applicants: Union Electric Company d/b/a AmerenUE.

Description: Union Electric Co dba AmerenUE submits its notice of cancellation of the Amended Interchange Agreement between Associated Electric Cooperative Inc., Kansas Gas & Electric Company, Public Service Company of Oklahoma and Union Electric Company for the Missouri-Kansas Oklahoma 345 kV Interconnection under ER05–1012.

Filed Date: 05/24/2005.

Accession Number: 20050526–0025.

Comment Date: 5 p.m. eastern time on Tuesday, June 14, 2005.

Docket Numbers: ER05–1013–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits the SWPL Operation Agreement with San Diego Gas and Electric Company under ER05–1013.

Filed Date: 05/24/2005.

Accession Number: 20050526–0024.

Comment Date: 5 p.m. eastern time on Tuesday, June 14, 2005.

Docket Numbers: ER05–1014–000, ER98–3184–008 and ER00–494–001.

Applicants: TransAlta Energy Marketing (U.S.) Inc. and TransAlta Centralia Generation LLC.

Description: Submission of triennial update of market power analysis for TransAlta Energy Marketing (US) Inc. and TransAlta Centralia Generation LLC and Application of TransAlta Energy Marketing (US) Inc for amendment of market based rate authority and order approving revised rate schedule under ER05–1014 *et al.*

Filed Date: 05/24/2005.

Accession Number: 20050526–0021.

Comment Date: 5 p.m. eastern time on Tuesday, June 14, 2005.

Docket Numbers: ER05–1016–000; ER05–1017–000.

Applicants: TransAlta Energy Marketing Corp. and TransAlta Energy Marketing (California) Inc.

Description: Notice of Surrender of Market Based Rate Authority re TransAlta Energy Marketing Corp and TransAlta Energy Marketing (California) Inc under ER05–1016 *et al.*

Filed Date: 05/24/2005.

Accession Number: 20050526–0020.

Comment Date: 5 p.m. eastern time on Tuesday, June 14, 2005.

Docket Numbers: ER05–1011–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits revisions to its ISO Market Administration and Control Area Services Tariff regarding energy limited resources and capacity limited resources under ER05–1011.

Filed Date: 05/23/2005.

Accession Number: 20050525–0087.

Comment Date: 5 p.m. eastern time on Monday, June 13, 2005.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlinSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3390 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 21, 2005.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER05–1117–000.

Applicants: Northeast Utilities Company.

Description: Northeast Utilities Service Company, on behalf of the Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Power and Electric Company, Holyoke Water Power Company and Public Service Company of New Hampshire submits revised tariff sheets to Schedule 21–NU of the ISO New England tariff for Transmission, Markets and Services.

Filed Date: 06/15/2005.

Accession Number: 20050617–0001.

Comment Date: 5 p.m. eastern time on Wednesday, July 6, 2005.

Docket Numbers: ER05–1120–000.

Applicants: Virginia Electric and Power Company.

Description: Virginia Electric and Power Company, dba Dominion Virginia Power, submits a notice of cancellation and a revised cover sheet to cancel an executed Generator Interconnection and Operating Agreement with CPV Cunningham Creek, LLC.

Filed Date: 06/16/2005.

Accession Number: 20050620–0152.

Comment Date: 5 p.m. eastern time on Thursday, July 7, 2005.

Docket Numbers: ER05–1123–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits proposed tariff revisions to remedy real-time market price volatility attributable to forecasting uncertainties, rather than to actual market conditions.

Filed Date: 06/17/2005.

Accession Number: 20050621–0013.

Comment Date: 5 p.m. eastern time on Friday, June 28, 2005.

Docket Numbers: ER05–724–001.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection L.L.C. submits an amended network integration transmission service agreement with Allegheny Power designated Service Agreement No. 1302, in compliance with the Commission's 5/17/05 order, to be effective 1/1/05.

Filed Date: 06/16/2005.

Accession Number: 20050620–0151.

Comment Date: 5 p.m. eastern time on Thursday, July 7, 2005.

Docket Numbers: ER05–929–001.

Applicants: Premcor Generating LLC.

Description: Premcor Generating LLC submits an amendment to its 5/2/2005 filing in ER05–929–000 to change the effective date of cancellation of Rate Schedule FERC No. 1, Original Sheets Nos. 1–3, from 4/6/05 to 5/3/05.

Filed Date: 06/16/2005.

Accession Number: 20050620–0153.

Comment Date: 5 p.m. eastern time on Thursday, July 7, 2005.

Docket Numbers: ER96–404–018.

Applicants: Questar Energy Trading Company.

Description: Questar Energy Trading Company, in compliance with the Commission's order issued 5/31/2005 in Docket No. ER98–3809–000, reports that there has been no change in the facts relied upon by FERC in its initial grant of market-based rate authority.

Filed Date: 06/16/2005.

Accession Number: 20050621–0003.

Comment Date: 5 p.m. eastern time on Thursday, July 7, 2005.

Docket Numbers: ER98–1643–008.

Applicants: Portland General Electric Company

Description: Portland General Electric Company, in compliance with the Commission's order issued 5/5/2005 in ER98–1643–006 and 007, submits a revision to its market-based rate tariff to include the change in status reporting requirement adopted by the Commission in Order 652.

Filed Date: 06/15/2005.

Accession Number: 20050620–0155.

Comment Date: 5 p.m. eastern time on Wednesday, July 6, 2005.

Docket Numbers: ER99–3168–003; ER00–1463–004.

Applicants: Astoria Generating Company, L.P.; Orion Power Midwest, LP.

Description: Astoria Generating Company LP and Orion Power Midwest, LP submit an updated market study in compliance with the FERC orders granting then authorization to sell energy and capacity at market-based rates.

Filed Date: 06/16/2005.

Accession Number: 20050620–0116.

Comment Date: 5 p.m. eastern time on Thursday, July 7, 2005.

Docket Numbers: ER04–1098–002.

Applicants: Rolling Hills Generating, L.L.C.

Description: Rolling Hills Generating, L.L.C. submits its refund report in compliance with the Commission's order issued 3/7/2005 in ER04–1098–000 and 001.

Filed Date: 06/06/2005.

Accession Number: 20050606–5038.

Comment Date: 5 p.m. eastern time on Monday, June 27, 2005.

Docket Numbers: ER97–851–016.

Applicants: H.Q. Energy Services (U.S.), Inc.

Description: H.Q. Energy Services (U.S.), Inc., in compliance with the Commission's order issued 5/26/2005 in Docket No. ER97–851–012, et al., submits its revised market-based rate tariff to include the change in status reporting requirement adopted in Order No. 652.

Filed Date: 06/15/2005.

Accession Number: 20050620–0154.

Comment Date: 5 p.m. eastern time on Wednesday, July 06, 2005.

Any person desiring to intervene or to protest in any of the above proceedings

must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other and the Applicant.

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Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3370 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

June 22, 2005.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER01–2537–002; ER01–2543–002; ER01–2544–002; ER01–2545–002, ER01–2546–002; ER01–2547–002.

Applicants: CalPeak Power-Midway LLC; CalPeak Power-Panoche LLC; CalPeak Power-Vaca Dixon LLC; CalPeak Power-El Cajon LLC; CalPeak Power-Enterprise LLC; CalPeak Power-Border LLC.

Description: Calpeak Power-Midway LLC submits revised tariffs to comply with the Commission's May 26 Order. 111 ¶61,258 (2005).

Filed Date: 06/17/2005.

Accession Number: 20050621–0230.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER95–892–059.

Applicants: CL Power Sales One, L.L.C.

Description: CL Power Sales One, LLC submits revised sheets to its market-based rate tariff, FERC Electric Tariff, Original Volume 1 in compliance with the Commission's order issued 5/26/2005, 111 ¶61,251 (2005).

Filed Date: 06/17/2005.

Accession Number: 20050621–0228.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER96–2652–054.

Applicants: CP Power Sales Seven, L.L.C.

Description: CL Power Sales Seven, LLC submits revised sheets to its market-based rate tariff, FERC Electric Tariff, Original Volume No. 1 in compliance with the Commisison's order issued 5/26/2005, 111 ¶61,251 (2005).

Filed Date: 06/17/2005.

Accession Number: 20050621–0227.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER98–1821–005.

Applicants: Bollinger Energy Corp.

Description: Bollinger Energy Corp. submits updated information as required to be in compliance with the conditions of having market-based rate authority.

Filed Date: 06/17/2005.

Accession Number: 20050621–0229.

Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other and the Applicant.

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Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3376 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 23, 2005.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER01–1305–010.
Applicants: Westar Generating, Inc.
Description: Westar Generating, Inc. submits a compliance filing, pursuant to the settlement filed on 5/24/02 and approved by Commission order issued 9/5/02 (100 FERC ¶61,255), informing the Commission of its third periodic rate adjustment in accordance with the formula rate of the settlement agreement which requires that any difference between actual & allowed costs & estimated billings be paid by or refunded to Westar Energy as appropriate.
Filed Date: 06/17/2005.
Accession Number: 20050622–0274.
Comment Date: 5 p.m. eastern time on Friday, July 8, 2005.

Docket Numbers: ER05–1051–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy Inc submits a Notice of Withdrawal of the unexecuted Service Agreement for Ancillary Services and Distribution Facilities between Kansas Power Pool and Southwest Power Pool, Inc.
Filed Date: 06/20/2005.
Accession Number: 20050621–0237.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–1128–000.
Applicants: New York State Electric & Gas Corporation.
Description: New York State Electric & Gas Corporation submits a supplement to FERC Rate Schedule 200—Facilities Agreement with the New York Power Authority.
Filed Date: 06/20/2005.
Accession Number: 20050622–0268.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–1129–000.
Applicants: Rockingham Power, L.L.C.
Description: Rockingham Power L.L.C. submits Rate Schedule FERC 4, Original Sheet 1, under which it specifies its revenue requirement for providing cost-based reactive support and voltage control from generation sources service.
Filed Date: 06/20/2005.
Accession Number: 20050622–0267.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–1130–000.
Applicants: Murphy Oil USA, Inc.
Description: Murphy Oil USA Inc. submits a notice of cancellation of its market-based rate tariff currently on file as Rate Schedule FERC No. 1.
Filed Date: 06/20/2005.
Accession Number: 20050622–0266.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–1131–000.
Applicants: Southwestern Electric Power Company.
Description: Southwestern Electric Power Company submits its actuarial reports with respect to post-employment benefits other than pensions & post-employment benefits for calendar year 2004 under ER05–1131.
Filed Date: 06/20/2005.
Accession Number: 20050622–0273.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–1132–000.
Applicants: Shell Energy Services Company, L.L.C.
Description: Shell Energy Services Co., LLC submits a notice of cancellation of its market-based rate schedule, FERC Rate Schedule No. 1.
Filed Date: 06/20/2005.
Accession Number: 20050622–0272.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–1133–000.
Applicants: Milford Power Limited Partnership.
Description: Milford Power Limited Partnership submits notice of its market-based rate schedule FERC Rate Schedule No. 1.
Filed Date: 06/20/2005.
Accession Number: 20050623–0030.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–215–004.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits the large generator interconnection agreement with Ameren Services Company as agent for Illinois Power Company and Prairie State Generating Company LLC in compliance with the Commission's May 20, 2005 Order, 111 FERC ¶61,237 (2005).
Filed Date: 06/20/2005.
Accession Number: 20050623–0032.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–689–001.
Applicants: Public Service Company of New Mexico and Texas-New Mexico Power Company.
Description: Public Service Company of New Mexico and Texas-New Mexico Power Company submit Joint Open Access Transmission Tariff, Original Volume 1 of the PNM Resources, Inc to reflect the correct effective date as approved by FERC's 5/6/05 Order in ER05–689–000.
Filed Date: 06/20/2005.
Accession Number: 20050622–0006.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–731–001.
Applicants: Central Maine Power Company.
Description: Central Maine Power Company submits its report regarding refunds for sales of energy and capacity into the ISO New England spot market pursuant to the Commission's order issued 5/25/05 in ER05–731–000.
Filed Date: 06/20/2005.
Accession Number: 20050623–0033.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–732–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits certain additional supplemental information as an amendment to the 3/28/05 filing in Docket No. ER05–732–000 of an Interconnection & Operating Agreement with Tholen Transmission, Inc. and Northern States Power Company dba Xcel Energy.
Filed Date: 06/20/2005.
Accession Number: 20050623–0034.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–736–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits certain additional supplemental information as an amendment to its 3/28/05 filing in Docket No. ER05–736–001 regarding the interconnection agreement among Tholen Transmission, Inc. the Midwest ISO and Northern States Power Company d/b/a Xcel Energy under ER05–736.
Filed Date: 06/20/2005.
Accession Number: 20050623–0031.
Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

Docket Numbers: ER05–947–001.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits revised rate sheets for the Bear Valley Project Distribution System Facilities Agreement with Southern California Water Company filed on 5/9/05 in Docket No. ER05–947–000.
Filed Date: 06/20/2005.
Accession Number: 20050621–0240.

Comment Date: 5 p.m. eastern time on Monday, July 11, 2005.

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Linda Mitry,

Deputy Secretary.

[FR Doc. E5–3377 Filed 6–28–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0172; FRL–7721–6]

FIFRA Scientific Advisory Panel; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 4–day meeting of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review the n-methyl carbamate preliminary cumulative risk assessment.

DATES: The meeting will be held on August 23 - 26, 2005, from 8:30 a.m. to approximately 5 p.m., eastern time.

Comments: For the deadlines for the submission of requests to present oral comments and submission of written comments, see Unit I E. of the **SUPPLEMENTARY INFORMATION**.

Nominations: Nominations of scientific experts to serve as *ad hoc* members of the FIFRA SAP for this meeting should be provided on or before July 11, 2005.

Special accommodations: For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at the Holiday Inn Rosslyn at Key Bridge, 1900 North Fort Myer Drive, Arlington, VA 22209. The telephone number for the Holiday Inn Rosslyn at Key Bridge is (703) 807–2000.

Comments: Written comments may be submitted electronically (preferred), through hand delivery/courier, or by mail. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

Nominations, requests to present oral comments, and special accommodations: To submit nominations for ad hoc members of the FIFRA SAP for this meeting, requests for special accommodation arrangements, or requests to present oral comments, notify the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT**. To ensure proper receipt by EPA, your request must identify docket ID number OPP–2005–0172 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: Myrta R. Christian, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: (202) 564–8498; fax number: (202) 564–8382; e-mail addresses:*christian.myrta@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), FIFRA, and the Food Quality Protection Act of 1996 (FQPA). 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 any questions regarding the applicability of this action to a particular entity, consult the DFO 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 ID number OPP–2005–0172. 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, 1801 S. Bell St., 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 under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

EPA's position paper, charge/questions to the FIFRA SAP, FIFRA SAP composition (i.e., members and consultants for this meeting), and the meeting agenda will be available by August 2005. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be

available electronically, from the FIFRA SAP Home Page at *http://www.epa.gov/scipoly/sap.*

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 in hard copy 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 (preferred), through hand delivery/courier, or by mail. 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. 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–2005–0172. 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–2005–0172. 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 deliver as described in Unit I.C.2 or mail to the address provided in Unit I.C.3. 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 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, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2005–0172. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

3. *By mail.* Due to potential delays in EPA's receipt and processing of mail, respondents are strongly encouraged to submit comments either electronically or by hand delivery or courier. We cannot guarantee that comments sent via mail will be received prior to the close of the comment period. If mailed, please 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–2005–0172.

D. What Should I Consider as I Prepare My Comments for EPA?

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

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. Provide specific examples to illustrate your concerns.

5. Make sure to submit your comments by the deadline in this document.

6. 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.

E. How May I Participate in this Meeting?

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number OPP–2005–0172 in the subject line on the first page of your request.

1. *Oral comments.* Oral comments presented at the meetings should not be repetitive of previously submitted oral or written comments. Although requests to present oral comments are accepted until the date of the meeting (unless otherwise stated), to the extent that time permits, interested persons may be permitted by the Chair of the FIFRA SAP to present oral comments at the meeting. Each individual or group wishing to make brief oral comments to the FIFRA SAP is strongly advised to submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than noon, eastern time, August 16, 2005, in order to be included on the meeting agenda. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (e.g., overhead projector, 35 mm projector, chalkboard). Oral comments before the FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of his or her comments and presentation slides for distribution to the FIFRA SAP at the meeting.

2. *Written comments.* Although, written comments will be accepted until the date of the meeting (unless otherwise stated), the Agency encourages that written comments be submitted, using the instructions in Unit I.C., no later than noon, eastern time, August 9, 2005, to provide the FIFRA SAP the time necessary to consider and review the written comments. It is requested that persons submitting comments directly to the docket also notify the DFO listed under **FOR FURTHER INFORMATION CONTACT**. There is no limit on the extent of written comments for consideration by the FIFRA SAP.

3. *Seating at the meeting.* Seating at the meeting will be on a first-come basis. Individuals requiring special accommodations at this meeting, including wheelchair access and assistance for the hearing impaired, should contact the DFO at least 10 business days prior to the meeting using the information under **FOR FURTHER INFORMATION CONTACT** so that appropriate arrangements can be made.

4. *Request for nominations of prospective candidates for service as ad hoc members of the FIFRA SAP for this meeting.* As part of a broader process for developing a pool of candidates for each meeting, the FIFRA SAP staff routinely solicit the stakeholder community for nominations of prospective candidates for service as ad hoc members of the FIFRA SAP. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates for a specific meeting. Individuals nominated for this meeting should have expertise in one or more of the following areas: toxicology, exposure modeling (dietary and residential) including Lifeline, CARES, and DEEM/Calendex; drinking water modeling and exposure, pharmacokinetics, statistics, probabilistic risk assessment. Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this meeting. Nominees should be identified by name, occupation, position, address, and telephone number. Nominations should be provided to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before 12 days from the date of publication in the **Federal Register**. The Agency will consider all nominations of prospective candidates for this meeting that are received on or before this date. However, final selection of ad hoc members for this meeting is a discretionary function of the Agency.

The selection of scientists to serve on the FIFRA SAP is based on the function of the panel and the expertise needed to address the Agency's charge to the panel. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency (except the EPA). Other factors considered during the selection process include availability of the potential panel member to fully participate in the panel's reviews, absence of any conflicts of interest or appearance of lack of impartiality, independence with respect to the matters under review, and lack of bias. Though financial conflicts of interest, the appearance of lack of impartiality, lack of independence, and bias may result in disqualification, the absence of such concerns does not assure that a candidate will be selected to serve on the FIFRA SAP. Numerous qualified candidates are identified for each panel. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives on the panel. In order to have the collective breadth of experience needed to address the Agency's charge for this meeting, the Agency anticipates selecting approximately 12 ad hoc scientists.

If a prospective candidate for service on the FIFRA SAP is considered for participation in a particular session, the candidate is subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. As such, the FIFRA SAP candidate is required to submit a Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency (EPA Form 3110–48 [5–02]), which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. The EPA will evaluate the candidate's financial disclosure form to assess that there are no financial conflicts of interest, no appearance of lack of impartiality and no prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on the FIFRA SAP.

Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes. The list of FIFRA SAP members participating at this meeting will be posted on the FIFRA SAP web site or may be obtained by contacting the PIRIB at the address or telephone number listed in Unit I.

II. Background

A. Purpose of the FIFRA SAP

Amendments to FIFRA enacted November 28, 1975 (7 U.S.C. 136w(d)), include a requirement under section 25(d) of FIFRA that notices of intent to cancel or reclassify pesticide registrations pursuant to section 6(b)(2)

of FIFRA, as well as proposed and final forms of regulations pursuant to section 25(a) of FIFRA, be submitted to a SAP prior to being made public or issued to a registrant. In accordance with section 25(d) of FIFRA, the FIFRA SAP is to have an opportunity to comment on the health and environmental impact of such actions. The FIFRA SAP also shall make comments, evaluations, and recommendations for operating guidelines to improve the effectiveness and quality of analyses made by Agency scientists. Members are scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments as to the impact on health and the environment of regulatory actions under sections 6(b) and 25(a) of FIFRA. The Deputy Administrator appoints seven individuals to serve on the FIFRA SAP for staggered terms of 4 years, based on recommendations from the National Institutes of Health and the National Science Foundation.

Section 104 of FQPA (Public Law 104–170) established the FQPA Science Review Board (SRB). These scientists shall be available to the FIFRA SAP on an ad hoc basis to assist in reviews conducted by the FIFRA SAP.

B. Public Meeting

The FIFRA SAP will meet to consider and review the N-methyl carbamate preliminary cumulative risk assessment. The Food Quality Protection Act of 1996 amended both FIFRA and FFDCA. One of the major changes is the requirement that EPA consider risk posed by pesticides acting by common mechanism of toxicity. For such groups of pesticides, EPA's Office of Pesticide Programs (OPP) has treated cumulative risk, under FQPA, as the risk of a common toxic effect associated with concurrent exposure by all relevant pathways and routes. The N-methyl carbamate pesticides were assigned priority for tolerance reassessment early during the process of FQPA implementation. OPP established the N-methyl carbamate pesticides as a common mechanism group in February 2004 based on their shared ability to inhibit acetycholinesterase via carbamylation. Those pesticides included in the cumulative risk assessment were announced in a February **Federal Register** Notice. OPP has proceeded with the development of the cumulative risk assessment in a step by step process including review of a case study for the N-methyl carbamate risk assessment in February 2005 by the FIFRA SAP. Based on the comments from the SAP, the Agency made appropriate revisions. The Agency plans to release the preliminary cumulative risk assessment for the N-methyl carbamate pesticides in late July 2005. This preliminary assessment will be reviewed by the SAP in August 2005. The hazard assessment for these chemicals involves empirical dose-response modeling of the available red blood cell and brain cholinesterase inhibition and recovery data. The exposure assessment of the N-methyl carbamate pesticides incorporates probabilistic approaches in all pathways considered: food, drinking water, and residential/non-occupational for various population subgroups and regions.

C. FIFRA SAP Meeting Minutes

The FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency in approximately 90 days after the meeting. The meeting minutes will be posted on the FIFRA SAP web site or may be obtained by contacting the PIRIB at the address or telephone number listed in Unit I.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: June 17, 2005.

Clifford J. Gabriel

Director, Office of Science Coordination and Policy.

[FR Doc. 05–12575 Filed 6–28–05; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0168; FRL–7722–8]

Soil Fumigant Assessments; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA will hold a public meeting to present to interested stakeholders the Agency's risk assessments for four soil fumigant pesticides: dazomet, metam sodium, methyl bromide, and 1,3-D or Telone. This public meeting, known as a "Technical Briefing," will provide an opportunity for stakeholders to learn more about the data, information, and methodologies that the Agency used in developing its risk assessments for these pesticides. EPA is concurrently assessing six soil fumigants, including these four pesticides, to ensure that its risk assessment approaches are consistent, and to ensure that risk tradeoffs and economic outcomes can be adequately predicted in reaching risk management decisions. Risk assessments for two other soil fumigants, chloropicrin and a new active ingredient, iodomethane, will follow about a month later due to recently submitted data which are currently under review.

DATES: The meeting will be held on July 13, 2005, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at Sheraton Suites Alexandria, 801 North Saint Asaph St., Alexandria, VA 22314; telephone number: (703) 836–4700.

FOR FURTHER INFORMATION CONTACT: John Leahy, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6703; fax number: (703) 308–8005; e-mail address: *leahy.john@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 interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this 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 OPP–2005–0168. The official public docket consists of this **Federal Register** Notice, and other information related to the Technical Briefing. 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, 1801 S. Bell St., 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, to 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

This document announces EPA's intent to hold a public meeting or Technical Briefing to present to interested stakeholders the Agency's risk assessments for the soil fumigant pesticides dazomet, metam sodium, methyl bromide, and 1,3-D or Telone. EPA is assessing risks and will develop risk management decisions for five soil fumigants, including dazomet, metam sodium, and methyl bromide, plus chloropicrin and a new active ingredient, iodomethane. 1,3-D risks will be discussed for comparative purposes; however, the Agency's risk management decision for 1,3-D was completed in September 1998. Risk assessments for chloropicrin and iodomethane will follow about a month later due to recently submitted data which are currently under review. The Technical Briefing is part of EPA's process to involve the public in developing pesticide registration and reregistration eligibility decisions. Through these programs, the Agency is ensuring that all pesticides meet current health and safety standards.

At the Technical Briefing, EPA will describe the risk assessments and the data, information and methodologies used in developing them. Stakeholders will have an opportunity to ask clarifying questions. On the day of the Technical Briefing, the soil fumigant risk assessments and related documents will be available in their respective pesticide Dockets and EDOCKET on the Agency's web site. These docket ID numbers will be as follows: Methyl bromide (OPP–2005–0123), 1,3-D (OPP–2005–0124), metam sodium (OPP–2005–0125), and dazomet (OPP–2005–0128). EPA will solicit public comment on the risk assessments and related documents through **Federal Register** notices of availability, which are scheduled to be published on the day of the Technical Briefing.

After considering public comments received, EPA will revise the risk assessments for dazomet, metam sodium, methyl bromide, and 1,3-D (and later for chloropicrin and iodomethane) and develop any needed risk mitigation. Stakeholders and the public will have opportunities, including stakeholder meetings during public comment periods, to review the revised risk assessments and provide ideas and recommendations on risk mitigation options.

EPA is evaluating the soil fumigants to ensure that its risk assessment approaches are consistent, and to ensure that risk tradeoffs and economic outcomes can be adequately predicted in reaching risk management decisions. Using this approach, the Agency expects to address risks of concern while maintaining key use benefits.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: June 23, 2005.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 05–12917 Filed 6–28–05; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0161; FRL–7718–5]

Imazethapyr; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2005–0161, must be received on or before July 29, 2005.

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: Jim Tompkins, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5697; e-mail address: *tompkins.jim@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

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 ID number OPP–2005–0161. 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, 1801 S. Bell St., 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. 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. 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–2005–0161. 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–2005–0161. 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–2005–0161.

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, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2005–0161. 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. Make sure to submit your comments by the deadline in this notice.

7. 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. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding theelements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests. Reporting and recordkeeping requirements.

Dated: June 10, 2005.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

BASF Corporation

PP 5F 6947

EPA has received a pesticide petition (5F 6947) from BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, North Carolina 27709–3528 proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of imazethapyr,2–[4,5–dihydro–4–methyl–4–(1–methylethyl)–5–oxo–1H-imidazol–2–yl]–5–ethyl–3–pyridine-carboxylic acid) as its free acid or its ammonium salt (calculated as the acid), and its metabolite 2–[4, 5–dihydro–4–methyl–4–(1–methylethyl–5–oxo-1H-imidazol–2–yl]–5–(1–hydroxyethyl)–3–pyridinecarboxylic acid both free and conjugated] in or on the raw agricultural commodity rice grain at 0.3 parts per million (ppm) and rice straw at 0.4 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism.* The qualitative nature of the residues of imazethapyr in rice is adequately understood. Based on studies conducted on soybean, edible and forage legumes and corn, parent imazethapyr and common metabolites CL 288511 and CL 182704 are the only residues of concern for tolerance setting purposes.

2. *Analytical method.* The analytical method for rice commodities, grain and straw is based on Capillary Electrophoresis with limits of quantitation (LOQ) of 0.05 ppm. Measurement of imazethapyr residues in polished rice, hull and bran are accomplished by Liquid Chromatography/Atmospheric Pressure Ionization-Electrospray (API/ES) Mass Spectrometry (LC/MS). The validated LOQ of the method is 0.025 ppm. A CZE-methodology is available for the determination of imazethapyr in crayfish with limits of quantitation of 50 ppb. These independently validated methods are appropriate for the enforcement purposes of this petition.

3. *Magnitude of residues.* A total of nineteen field trials were conducted with imazethapyr and its metabolites on rice in 1997 and 1998 at several different use rates and timing intervals to represent the use patterns which would result in the highest residue. In these trials, residues of parent compound AC 263499 in grain and straw were less than the limit of quantitation (0.05 ppm). The hydroxy metabolite, CL 288511 was detected in grain samples at a maximum value of 0.085 ppm. All straw samples analyzed for CL 288511 residues were less than the limit of quantitation (0.05 ppm). The glucose conjugate, CL 182704 was detected at a maximum value of 0.11 ppm in grain. All straw samples analyzed for CL 182704 residues were less than the limit of quantitation (0.05 ppm). The raw agricultural commodity (RAC) samples were also processed into polished rice, hull and bran. Results from these studies support the proposed tolerances of 0.3 ppm for rice grain and 0.4 ppm for rice straw.

B. Toxicological Profile

1. *Acute toxicity.* Imazethapyr technical is considered to be nontoxic (Toxicity Category IV) to the rat by the oral route of exposure. In an acute oral toxicity study in rats, the LD_{50} value of imazethapyr technical was greater than 5,000 mg/kg body weight for males and females. The results from an acute dermal toxicity study in rabbits indicate that imazethapyr is slightly toxic (Toxicity Category III) to rabbits by the dermal route of exposure. The dermal LD_{50} value of imazethapyr technical was greater than 2,000 mg/kg bw for both male and female rabbits. Imazethapyr technical is considered to be non-toxic (Toxicity Category IV) to the rat by the respiratory route of exposure. The 4–hour LC_{50} value was greater than 3.27 mg/l (analytical) and greater than 4.21 mg/l (gravimetric) for both males and females. Imazethapyr technical was shown to be non-irritating to rabbit skin (Toxicity Category IV) and mildly irritating to the rabbit eye (Toxicity Category III). Based on the results of a dermal sensitization study (Buehler),

imazethapyr technical is not considered a sensitizer in guinea pigs.

2. *Genotoxicity.* Imazethapyr technical was tested in a battery of four *in vitro* and one *in vivo* genotoxicity assays measuring several different endpoints of potential genotoxicity. Collective results from these studies indicate that imazethapyr does not pose a mutagenic or genotoxic risk.

3. *Reproductive and developmental toxicity.* The developmental toxicity study in Sprague Dawley rats conducted with imazethapyr technical showed no evidence of developmental toxicity or teratogenic effects in fetuses. Thus, imazethapyr is neither a developmental toxicant nor a teratogen in the rat. The No-Observable-Effect-Level (NOEL) for maternal toxicity was 375 mg/kg bw/day, based on clinical signs of toxicity in the dams (e.g. excessive salivation) at 1,125 mg/kg bw/day. Imazethapyr technical did not exhibit developmental toxicity or teratogenic effects at maternal dosages up to and including 1,125 mg/kg bw/day, the highest dose tested (HDT).

Results from a developmental toxicity study in New Zealand White rabbits with imazethapyr technical also indicated no evidence of developmental toxicity or teratogenicity. Thus, imazethapyr technical is neither a developmental toxicant nor a teratogen in the rabbit. The NOEL for maternal toxicity was 300 mg/kg bw/day, based on decreased food consumption and body weight gain, abortion, gastric ulceration and death at 1,000 mg/kg bw/day, the next HDT. The NOEL for developmental toxicity and teratogenic effects was determined to be <1,000 mg/kg bw/day based on no developmental toxicity or fetal malformations associated with the administration of all doses.

The results from the two-generation reproduction toxicity study in rats with imazethapyr technical support a NOEL for reproductive toxicity of 10,000 ppm (equivalent to 800 mg/kg bw/day). The NOEL for non-reproductive parameters (i.e. decreased weanling body weights) is 5,000 ppm.

4. *Subchronic toxicity.* A short-term (21–day) dermal toxicity study in rabbits was conducted with imazethapyr technical. No dermal irritation or abnormal clinical signs were observed at dose levels up to and including 1,000 mg/kg bw/day (HDT), supporting a NOEL for dermal irritation and systemic toxicity of 1,000 mg/kg bw/day.

In a subchronic (13–week) dietary toxicity study in rats with imazethapyr technical, no signs of systemic toxicity were noted, supporting a NOEL of 10,000 ppm the highest concentration tested (equivalent to 820 mg/kg bw/day).

In a subchronic (13–week) dietary toxicity study in dogs with imazethapyr technical, no signs of systemic toxicity were noted, supporting a NOEL of 10,000 ppm (equivalent to 250 mg/kg b.w./day), the highest concentration tested.

5. *Chronic toxicity.* A one-year dietary toxicity study was conducted with imazethapyr technical in Beagle dogs at dietary concentrations of 0, 1,000, 5,000 and 10,000 ppm. In this study, the NOEL for systemic toxicity was 1,000 ppm (equivalent to 25 mg/kg bw/day), based on slight anemia, i.e., decreased red cell parameters observed at 5,000 and 10,000 ppm concentrations. No treatment-related histopathological lesions were observed at any dietary concentration, including the highest concentration tested (10,000 ppm).

In a two-year chronic dietary oncogenicity and toxicity study in rats conducted with imazethapyr technical, the NOEL for oncogenicity and chronic systemic toxicity was 10,000 ppm (equivalent to 500 mg/kg bw/day), the highest concentration tested. An 18–month chronic dietary oncogenicity and toxicity study in mice with imazethapyr technical supports a NOEL for oncogenicity of 10,000 ppm, the highest concentration tested (equivalent to 1,500 mg/kg bw/day), and a NOEL for chronic systemic toxicity of 5,000 ppm (equivalent to 750 mg/kg bw/day), based on decreased body weight gain in both sexes).

The EPA has classified imazethapyr as negative for carcinogenicity (evidence of non-carcinogenicity for humans) based on the absence of treatment-related tumors in acceptable carcinogenicity studies in both rats and mice.

6. *Animal metabolism.* The rat, goat and hen metabolism studies indicate that the qualitative nature of the residues of imazethapyr in animals is adequately understood.

In three rat metabolism studies conducted with radiolabeled imazethapyr technical the major route of elimination of the herbicide was through rapid excretion in urine and to a much lesser extent in feces. In the first study, almost 100% of the administered material was recovered in excreta within 96 hours (89–95% in urine, 6–11% in feces). The major residue in urine and feces was parent compound. Approximately 2% of the dose was metabolized and excreted as the α-hydroxyethyl derivative of imazethapyr. In the second study, the test material was rapidly and completely eliminated unchanged in the urine within 72 hours of dosing. After 24 hours, 92.1% of radioactivity was excreted in the urine with 4.67% in the feces. There was no significant bioaccumulation of radioactivity in the tissues from this rat metabolism study (<0.01 ppm after 24 hours). In the third study, four groups treated with radiolabeled imazethapyr readily excreted <95% of the test material in the urine and feces within 48 hours. A high percentage (97–99%) of the test material was excreted in the urine as unchanged parent, the remainder as the α-hydroxyethyl derivative of imazethapyr. For all three studies, the major route of elimination of the herbicide in rats was through rapid excretion of unchanged parent compound in urine. It is clear that imazathapyr and its related residues do not accumulate in tissues and organs.

In the goat metabolism study, parent ^{14}C-imazethapyr was dosed to lactating goats at 0.25 ppm and 1.25 ppm. Results showed ^{14}C-residues of <0.01 ppm in milk and <0.05 ppm in leg muscle, loin muscle, blood, fat, liver and kidney. Laying hens dosed at 0.5 ppm and 2.5 ppm with ^{14}C-imazethapyr showed ^{14}C-residues of <0.05 ppm in eggs and all tissues (blood, muscle, skin/fat, liver and kidney).

Additional animal metabolism studies have been conducted with GL 288511 (main metabolite in treated crops fed to livestock) in both laying hens and lactating goats. These studies have been repeated to support subsequent use extensions on crops used as livestock feed items which would theoretically result in a higher dosing of imazethapyr-derived residues to livestock (i.e., corn, alfalfa). In these studies, lactating goats dosed at 42 ppm of ^{14}C-CL 288511 showed ^{14}C-residues of <0.01 ppm in milk, leg muscle, loin muscle and omental fat. ^{14}C-Residues in blood were mostly <0.01 ppm but reached 0.01 ppm on two of the treatment days. ^{14}C-Residue levels in the liver and kidney were 0.02 and 0.09 ppm, respectively. Laying hens dosed at 10.2 ppm of ^{14}C-imazethapyr showed ^{14}C-residues of <0.01 ppm in eggs and all tissues (blood, muscle, skin/fat, liver and kidney). ^{14}C-imazethapyr or ^{14}C-CL 288511 ingested by either laying hens or lactating goats was excreted within 48 hours of dosing. These studies indicate that parent imazethapyr and CL 288511-related residues do not accumulate in milk or edible tissues of the ruminant.

7. *Metabolite toxicology.* Metabolism studies in soybean, peanut, corn and alfalfa indicate that the only significant metabolites are the α-hydroxyethyl derivative of imazethapyr, CL 288511 and its glucose conjugate CL 182704. The α-hydroxyethyl metabolite has also

been identified in minor quantities in the previously submitted rat metabolism studies and in goat and hen metabolism studies. No additional toxicologically significant metabolites were detected in any of the plant or animal metabolism studies.

8. *Endocrine disruption.* Collective organ weight data and histopathological findings from the two-generation rat reproductive study, as well as from the subchronic and chronic toxicity studies in three different animal species demonstrate no apparent estrogenic effects or treatment-related effects of imazethapyr on the endocrine system.

C. Aggregate Exposure

1. *Dietary exposure*—i. *Food.* BASF has determined that there are no toxic effects attributable to a single dose of imazethapyr. Therefore, a quantitative acute dietary exposure and risk assessment was not required.

Assessments were conducted to evaluate the potential risk due to chronic dietary exposure of the U.S. population to residues of imazethapyr. This herbicide and its metabolites (CL 288511, CL 182704) were expressed as the parent compound (imazethapyr). A dietary exposure analysis was conducted for all current crops, including the increased tolerance for rice grain and straw, and secondary residues in meat, meat byproducts, and fat. The commodities include canola, field corn, crop group 6, soybeans, alfalfa, nongrass animal feed group, peanuts, endive, crayfish, head lettuce, and leaf lettuce.

The tier 1 chronic dietary exposure estimates were based on the tolerance values, 100 percent crop treated values, default concentration/processing factors and consumption data from the USDA Continuing Survey of Food Intake by Individuals (CSFII 1994 – 1996, 1998) and the EPA Food Commodity Ingredient Database (FCID) using Exponent's Dietary Exposure Evaluation Module (DEEM-FCID) software. Resulting exposure estimates were compared against the imazethapyr chronic Population Adjusted Dose (cPAD) of 2.5 mg/kg bw/day.

Exposure estimates for the imazethapyr chronic dietary assessments were well below U.S. EPA's level of concern (See Table 1). The estimated chronic dietary exposure was <0.1% of the cPAD for all subpopulations. Additional refinements such as the use of anticipated residues and predicted percent crop treated would further reduce the estimated chronic dietary exposure.

TABLE 1.—SUMMARY OF CHRONIC DIETARY EXPOSURE AND RISK FOR IMAZETHAPYR CONSIDERING ALL CURRENT CROPS AND SECONDARY ANIMAL RESIDUES

Population Subgroups	Exposure Estimate (mg/kg bw/day)	%cPAD (cPAD = 2.5 mg/kg bw/day)
U.S. Population	0.000476	0.019
All Infants (<1 year old)	0.000693	0.028
Children (1-2 years old)	0.000945	0.038
Children (3-5 years old)	0.000959	0.038
Children (6-12 years old)	0.000701	0.028
Youth (13-19 years old)	0.000514	0.021
Females (13-49 years old)	0.000379	0.015
Adults (20-49 years old)	0.000424	0.017
Adults (50+ years old)	0.000304	0.012

ii. *Drinking water.* Because the Agency does not have monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of imazethapyr. EPA determined that the residue of concern in drinking water is only imazethapyr. Surface water (rice paddy model; peak and average 126 µg/l) estimated drinking water concentrations (EDWCs) for imazethapyr were calculated. The surface water EDWCs were generated assuming two applications of imazethapyr at 0.188 lbs ae/acre (highest registered/proposed multiple application rate). Based on several prospective ground water studies the upper bound ground water exposure would not be expected to exceed 1 µg/L. The estimated drinking water concentrations (EDWC) for both surface water and ground water are well below the allowable level. Drinking water level of comparison (DWLOC) calculations and comparisons to surface water estimations are given as follows in Table 2.

TABLE 2. — ESTIMATED CHRONIC DRINKING WATER VALUES FOR IMAZETHAPYR

$DWLOC_{chronic}$	U.S. Population[1]	All Infants <1 year)	Children (1-6 years)	Females (13-49 years)	Adults (20-49 years)
DWLOC chronic (µg/L)	87483	24993	24991	74989	87485
		EDWC's			
PRZM/EXAMS (BASF) Surface water (µg/L)*	126	126	126	126	126

*acute value for surface water

iii. *Aggregate exposure (diet + water).* The estimated chronic aggregate exposure of imazethapyr from potential residues in food and water are summarized in Table 3 as follows. Imazethapyr is not registered for residential use and therefore residential exposure was not considered.

TABLE 3. — ESTIMATED CHRONIC AGGREGATE EXPOSURE FROM THE USE OF IMAZETHAPYR

Population Subgroup	Chronic Food Exposure (mg/kg/day)	Chronic Drinking Water Exposure[1] (mg/kg/day)	Aggregate Exposure[2] (mg/kg/day)	Aggregate %cPAD
U.S. Population	0.000476	0.003600	0.004076	0.16
Infants (< 1 year old)	0.000693	0.012600	0.013293	0.53
Children (1-6 years old)	0.000937	0.012600	0.013537	0.54
Females (13-49 years old)	0.000379	0.004000	0.004379	0.18
Adults (20-49 years old)	0.000424	0.003600	0.004024	0.16

[1] Aggregate Exposure = Food Exposure + Drinking Water Exposure
[2] Drinking Water Exposure (mg/kg/day) = [Drinking Water Concentration (µg/L) * Water Consumed (L/day)/ Body weight (kg)]/1,000

The assessment results indicate the aggregate exposure of imazethapyr from potential residues in food and drinking water will not exceed the U.S. EPA's level of concern (100% of PAD). The percent chronic PAD was <1% for all subpopulations. Additional refinements such as the use of anticipated residues and predicted percent crop treated would further reduce the estimated chronic dietary exposure and %cPAD. Overall, considering a "worst-case" scenario, we can conclude with reasonable certainty that no harm will occur from chronic aggregate exposure of imazethapyr residues from the current crops, including the higher proposed tolerance values.

2. *Non-dietary exposure* . Imazethapyr products are not currently registered for requested to be registered for residential use; therefore the estimate of residential exposure is not relevant to this tolerance petition.

D. Cumulative Effects

Imazethapyr is a member of the imidazolinone class of herbicides. Other compounds of this class are registered for use in the United States However, the herbicidal activity of the imidazolinones is due to the inhibition of acetohydroxyacid synthase (AHAS), an enzyme only found in plants. AHAS is part of the biosynthetic pathway leading to the formation of branched chain amino acids. Animals lack AHAS and this biosynthetic pathway. This lack of AHAS contributes to the low toxicity of the imidazolinone compounds in animals. We are aware of no information to indicate or suggest that imazethapyr has any toxic effects on mammals that would be cumulative with those of any other chemical. Therefore, for the purposes of this tolerance petition no assumption has been made with regard to cumulative exposure with other compounds having a common mode of action.

E. Safety Determination

1. *U.S. population.* Using the conservative exposure assumptions described above and based on the completeness and the reliability of the toxicity data, BASF has estimated the aggregate exposure to imazethapyr will utilize less than 1% of the cPAD for the U.S. population and all subpopulations, respectively.

2. *Infants and children.* All subpopulations based on age were considered. Infants and children remained below 1% of the aggregate cPAD for food and water. BASF, considering a worst-case situation, concludes with reasonable certainty that no harm will result to infants or children from aggregate exposure to imazethapyr residues.

No additional FQPA safety factor(s) are considered to be appropriate for imazethapyr. There is a complete toxicity database for imazethapyr and the exposure data are complete or are estimated based on data that reasonably accounts for potential exposures. Based on the toxicology data and conclusions, a FQPA safety factor of 1X appears to be appropriate for imazethapyr.

F. International Tolerances

There are no Codex maximum residue levels established or proposed for residues of imazethapyr on rice.

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BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0033; FRL–7718–8]

Paraquat Dichloride; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Potection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2005–0033, must be received on or before July 29, 2005.

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: Jim Tompkins, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number:(703) 305–5697; e-mail address: *tompkins.jim@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)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

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 ID number OPP–2005–0033. 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, 1801 S. Bell St., 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. 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. EPA intends to work toward 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–2005–0033. 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–2005–0033. 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–2005–0033.

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, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2005–0033. 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 a potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. 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. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: June 10, 2005.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Syngenta Crop Protection, Inc.

PP 2F6433 , 3E 6763, 1E 6332, 1E 6319, 1E 6223

EPA has received pesticide petitions (2F6433, 3E6763, 1E6332, 1E6319, and 1E6223) from Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300 and Interregional Research Project#4 (IR4), 681 US Highway #1 South, New Brunswick, NJ 08902–3390 proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of paraquat dichloride in or on the raw agricultural commodities: cotton, seed at 5.0 parts per million (ppm); cotton gin byproducts at 82.0 ppm; soybean, seed at 0.70 ppm; soybean, forage at 0.40 ppm; soybean, hay at 6.0 ppm; soybean, aspirated grain fractions at 60.0 ppm; wheat, grain at 1.5 ppm; wheat, forage at 0.40 ppm; wheat, hay at 3.0 ppm; wheat, straw at 40.0 ppm; wheat, aspirated grain fractions at 65.0 ppm; barley, hay at 3.0 ppm; vegetable, brassica leafy, group at 0.05 ppm; fruit, pome, group at 0.05 ppm; fruit, stone, group at 0.05 ppm; berry group at 0.05 ppm; animal feed, nongrass, group at 5.0 ppm; vegetable, legume, edible-podded, subgroup at 0.05 ppm; pea and bean, succulent, shelled, subgroup at 0.05 ppm; pea and bean, dried, shelled, except soybean, subgroup at 0.3 ppm; grape at 0.05 ppm; cranberry at 0.05 ppm; barley, straw at 1.0 ppm; beet, sugar, tops at 0.05 ppm; sorghum, forage at 0.1 ppm; hops, cone, dry at 0.5 ppm; cattle, kidney at 0.3 ppm; goat, kidney at 0.3 ppm; hog, kidney at 0.3 ppm; horse, kidney at 0.3 ppm; sheep, kidney at 0.3 ppm; vegetable, fruiting, group at 0.05 ppm; vegetable, cucurbit, group at 0.05 ppm; nut, tree, group at 0.05 ppm; ginger at 0.1 ppm, okra at 0.05 ppm, tanier at 0.05 ppm, and onion (dry bulb) at 0.1 ppm.. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism.* The qualitative nature of the residue in plants is adequately understood based on studies depicting the metabolism of paraquat

dichloride in carrots and lettuce following preemergence treatments and in potatoes and soybeans following desiccant treatment. The residue of concern in plants is the parent, paraquat dichloride; the current tolerance expression for plant commodities, as defined in 40 CFR 180.205(a) and (b).

2. *Analytical method.* An adequate analytical method (spectrometric method) has been accepted and published in The Pesticide Analytical Manual (PAM Vol. II) for the enforcement of tolerances in plant commodities.

3. *Magnitude of residues*—i. *Cotton.* As required under reregistration, residue studies (MRID No. 44432402) were conducted to determine the levels of paraquat cation on ginned cotton seed and cotton byproducts. Twelve residue field trials were conducted during 1995 in the United States. This data reflects a use pattern of a total of 3 lbs ai/A per season as preemergence; followed by two post-directed applications with shielded/hooded sprayers; followed by three broadcast defoliation/desiccation applications. Paraquat dichloride residues in cotton seed ranged from <0.05 to 4.6 mg/kg. These data support a cotton seed tolerance of 5.0 ppm and a gin byproducts tolerance of 82.0 ppm with a 3 day PHI.

ii. *Wheat.* As required under reregistration, residue studies (MRID No. 44965703) were conducted to determine levels of paraquat cation in or on wheat grain, forage, hay, straw, and aspirated grain fractions. Twenty-two residue trials were conducted on wheat (nine on spring wheat and thirteen on winter wheat) during 1997 and 1998. This data reflects a use pattern (preemergence/broadcast, prior to heading/spot spray and three days before grain and straw harvest/broadcast for a total of 1.75 lbs. ai/A. The range of paraquat dichloride residues was: wheat grain (0.06 to 1.1 ppm), wheat forage (<0.050 to 0.29 ppm), wheat hay (<0.050 to 2.8 ppm), wheat straw (4.0 to 40 ppm), and aspirated grain fractions (40 to 61 ppm). These data support a revised tolerance for grain of 1.5 ppm, forage of 0.4 ppm, hay of 3.0 ppm, straw of 40 ppm, and aspirated grain fractions of 65 ppm.

iii. *Soybean.* As required under reregistration, residue studies (MRID No. 44965702) were conducted to determine levels of paraquat cation on soybean seed, forage, hay, and aspirated grain fractions (MRID No. 44965701). Twenty-two field residue studies were conducted on soybeans during 1997 and 1998. The aspirated grain fractions study was conducted during 1995 at 12X the label rate two days prior to harvest. The 1997–1998 data reflects a use pattern (preemergence, directed spray, spot spray, and three days before harvest for a total seasonal rate of 2.9 lbs. ai/A. The range of paraquat dichloride residues was: soybean seed (<0.05 to 0.69 ppm), soybean hay (<0.05 to 5.65 ppm), soybean forage (<0.05to 0.38 ppm), and aspirated grain fractions (57 ppm based on calculations presented in MRID No. 44965701). These data support a revised tolerance for soybean seed at 0.7 ppm, hay at 6.0 ppm, forage at 0.4 ppm and aspirated grain fractions at 60 ppm.

iv. *Ginger.* As required under reregistration, residue studies, residue studies were conducted to determine levels of paraquat cation on ginger. Data was collected from three field studies in Hawaii. All samples from these studies showed residues less than 0.1 ppm.

v. *Okra.* As required under reregistration, residue studies were conducted to determine levels of paraquat cation on okra. Trials were conducted in South Carolina, Tennessee and Texas. No quatifiable residues were found in any of the samples.

vi. *Onion (dry bulb).* There is an established tolerance for pre-plant and preemergence applications of paraquat dichloride. Several states appealed to IR4 to request a tolerance for post-directed applications in onion (dry bulb). Field trials were conducted in New York, Texas, Ohio, Washington, California and Colorado. No quatifiable residues were observed in any of the samples.

vii. *Tanier.* As required under reregistration, residue studies were conducted to determine levels of paraquat cation on tanier. There is an existing tolerance for tanier for Puerto Rico only. Data was collected from one field trial in Florida. No quantifiable residues were observed in any of the samples.

The 1997 Paraquat Dichloride Reregistration Eligibility Decision (RED) indicates that crop group tolerances will be established and indicates the tolerance levels (0.05 ppm) for vegetable, brassica leafy, group; fruit, pome group; fruit, stone, group; and berry group. These are based on existing tolerances. New grape (0.05 ppm) and cranberry (0.05 ppm) tolerances are proposed as they were part of the small fruit group which is being changed to berry group. The request for animal feed, nongrass, group tolerance is also based on statements in the RED to group alfalfa, clover, and birdsfoot trefoil existing tolerances (these are based on broadcast preemergence uses). The RED indicates that tolerances should be raised for forage (75 ppm) and hay (210 ppm). These tolerances are not being proposed as they appear to be based on harvest aid uses in clover and birdsfoot trefoil which are not relevant as only the broadcast preemergence uses are desired in these crops. The field residue data for preemergence broadcast uses in alfalfa, clover and birdsfoot trefoil supports the existing tolerance of 5 ppm. The only harvest aid use for crops in this group is for use on alfalfa grown for seed which has a grazing and feeding prohibition.

Proposed tolerance for barley, straw (1.0 ppm) is a new tolerance indicated in the RED assessment. Proposed individual (miscellaneous) tolerance changes based on the RED assessment include beet, sugar, tops (0.05 ppm); sorghum, forage (0.1ppm); and hops, cone, dry (0.5 ppm). The proposed increased tolerances for kidney are to harmonize U. S. tolerances with Codex Maximum Residue Levels (MRL's) as discussed in the RED. Proposed tolerances for vegetable, fruiting, group; vegetable, cucurbit, group, and nut, tree, group update the crop group nomenclature only. They are based on existing crop group tolerances. The proposed tolerances for Crop Subgroups 6A, 6B, and 6C (Peas and Beans) are not discussed in the RED and result from a new tolerance (peas, dry) granted in Sept. 1991. The use pattern for Group 6C is for a harvest aid application while 6A and 6B are for preplant/preemergence application.

Tolerances discussed in the RED which are not being requested include: grape, juice (the processing factor is 1.0 so the tolerance is the same as grape), raisin (processing factor is 1.0), pineapple, process residue (the processing factor is 0.6), sugarcane molasses (processing factor is 0.1 for refined molasses) and corn, field, flour (processing factor is 1.0, discussed in the Sept. 1991 FR Notice).

Animal feed, grass, group will not be requested. Syngenta Crop Protection, Inc. is voluntarily removing animal feed, grass (pasture and range) uses from the label except for grasses grown for seed and "juniper leaf moisture reduction or desiccation prior to prescribed burning of pastures" which have a feeding/grazing prohibition.

B. Toxicological Profile

1. *Acute toxicity.* Acute toxicity studies conducted with the 45.6% paraquat dichloride technical concentrate give the following results: oral LD_{50} in the rat of 344 mg/kg (males) and 283 mg/kg (females) (Category II); dermal LD_{50} in the rat of >2,000 mg/kg for males and females (Category III); the primary eye irritation study showed

corneal involvement with clearing in 17 days (Category II) ; and dermal irritation of slight erythema and edema at 72 hours (Category IV). Paraquat dichloride is not a dermal sensitizer. Acute inhalation studies conducted to EPA guideline with aerosolized sprays result in LC_{50} of 0.6 to 1.4 µg paraquat cation/L (Category I). However, since paraquat dichloride has no measurable vapor pressure, and hydraulic spray droplets are too large to be respired, inhalation exposure is not a concern in practice.

2. *Genotoxicity.* Paraquat dichloride was not mutagenic in the Ames test using *Salmonella typhimurium* strains TA1535, TA1538, TA98, and.TA100; the chromosomal aberrations in the bone marrow test system; or in the dominant lethal mutagenicity study with CD–1 mice. Additionally, paraquat dichloride was negative for unscheduled DNA synthesis in rat hepatocyctes *in vitro* and *in vivo*. Paraquat dichloride was weakly positive in the mouse lymphoma cell assay only in the presence of metabolic activation. Paraquat dichloride was weakly positive in mammalian cells (lymphocytes) and positive in the sister chromatid exchange (SCE) assay in Chinese hamster lung fibroblasts. Paraquat dichloride is nonmutagenic.

3.*Reproductive and developmental toxicity.* A three-generation reproduction study in rats fed diets containing 0, 25, 75, and 150 ppm (0, 1.25, 3.75, or 7.5 mg of paraquat cation/kg/day, respectively) showed no effect on body weight gain, food consumption and utilization, fertility and length of gestation of the F0, F1, and F2 parents at any dose. The no observed effect level (NOEL) and lowest observed effect level (LOEL) for systemic toxicity are 25 ppm (1.25 mg/kg/day) and 75 ppm (3.75 mg/kg/day), respectively, expressed as paraquat cation, based on high mortality due to lung damage (alveolar histiocytes). The NOEL for reproductive toxicity is less than or equal to 150 ppm [7.5 mg/kg/day; highest dose tested (HDT)] expressed as paraquat cation, as there were no reproductive effects.

Two developmental toxicity studies were conducted in rats given gavage doses of 0, 1, 5, and 10 mg/kg/day and 0, 1, 3, and 8 mg/kg/day, respectively, expressed as paraquat cation. In the first study, the NOEL for maternal toxicity was 1 mg/kg/day based on clinical signs of toxicity and decreased body weight gain at 5 mg/kg/day (the LOEL). The NOEL for developmental toxicity was set at 5 mg/kg/day based on delayed ossification of the forelimb and hindlimb digits. In the second study, the maternal and developmental NOEL is 8 mg/kg/day (HDT) as there were no effects observed at any dose level even though the animals were examined more carefully in the manus and pes assessment. Based on both studies the overall NOEL for maternal and developmental toxicity is at least 3 mg/kg/day.

The developmental toxicity studies were conducted in mice given gavage doses of 0, 1, 5, and 10 mg/kg/day and 0, 7.5, 15, or 25 mg/kg/day paraquat ion, respectively. In the first study the NOEL and LOEL for maternal toxicity are 5 mg/kg/day and 10 mg/kg/day, respectively, based on reductions in body weight gain and death (range-finding study). The NOEL and LOEL for developmental toxicity are 5 mg/kg/day and 10 ma/kg/day, respectively, based on an increased number of litters and fetuses with partial ossification of the 4thsternebrae at 10 mg/kg/day (HDT). Both the maternal and developmental NOELs are at 15 mg/kg/day in the second study. The maternal LOEL of 25 mg paraquat cation/kg/day is based on death, decreases in body weight and body weight gain, and mean fetal weights, retarded ossification and other skeletal effects. The developmental/maternal NOEL should be based on the second study and is 15 mg/kg/day. Paraquat dichloride is not a developmental toxin.

4. *Subchronic toxicity.*A 90 day feeding study in dogs fed doses of 0, 7, 20, 60, or 120 ppm with a NOEL of 20 ppm (equivalent to 0.56 mg paraquat cation/kg/d for males and 0.71 mg paraquat cation/kg/d for females) based on lung effects such as alveolitis and alveolar collaps seen at the LOEL of 60 ppm.

A 21 day dermal toxicity study in which rabbits were exposed dermally to doses of 0, 1.5, 3.4, 7.8, or 17.9 mg/kg/day resulted in a NOEL of 1.15 mg paraquat cation/kg.day and a LOEL of 2.6 mg paraquat cation/kg/day based on dermal irritation.

A 21 day inhalation toxicity study in rats that were exposed to respirable aerosols of paraquat at doses of 0, 0.01, 0.1, 0.5, and 1.0 q/L with a NOEL of 0.01 ug paraquat cation/L and a LOEL of 0.10 µg paraqut cation/L based on histopathological changes to the epithelium of the larynx and nasal discharge.

5.*Chronic toxicity.* In a 12–month feeding study, dogs were fed dose levels of 0, 15, 30, or 50 ppm, expressed as paraquat cation. These levels corresponded to 0, 0.45, 0.93, or 1.51 mg of paraquat cation/kg/day, respectively, in male dogs or 0, 0.48, 1.00, or 1.58 mg of paraquat cation/kg/day, respectively for female dogs. There was a dose-related increase in the severity and extent of chronic pneumonitis in the mid-dose and high-dose male and female dogs. This effect was also noted in the low-dose male group, but was minimal when compared with the male controls. The systemic NOEL is 15 ppm (0.45 mg/kg/day for males and 0.48 mg/kg/day for females, expressed as paraquat cation). The systemic LOEL is 30 ppm (0.93 mg/kg/day for males and 1.00 mg/kg/day for females, expressed as paraquat cation).

In a 2–year chronic feeding/carcinogenicity study, rats were fed doses of paraquat dichloride at 0, 25, 75, or 150 ppm which corresponds to 0, 1.25, 3.75, or 7.5 mg of paraquat cation/kg/day. Paraquat dichloride enhanced the development of ocular lesions in all of the treated groups. The predominant lesions detected opthamoscopically were lenticular opacities and cataracts. At test week 103, dose-related statistically significant ($P<0.001$) increases in the incidence of ocular lesions were observed only in the mid-dose and high-dose male and female groups. Based on these findings, the NOEL (approximate) and the LOEL for systemic toxicity, for both sexes, are 25 ppm (1.25 mg/kg/day) and 75 ppm (3.75 mg/kg/day), respectively. In this study, there was uncertain evidence of carcinogenicity (squamous cell carcinomas in the head region; ears, nasal cavity, oral cavity, and skin) in males at 7.5 mg/kg/day (HDT) with a systemic NOEL of 1.25 mg/kg/day. Upon submission of additional data to EPA, the incidence of pulmonary adenomas and carcinomas was well within historical ranges and it was determined that paraquat dichloride was not carcinogenic in the lungs and head region of the rat.

In another 2–year chronic feeding/carcinogenicity study, rats were dosed at 0, 6, 30, 100 or 300 ppm, expressed as paraquat dichloride (nominal concentrations), equivalent to 0, 0.25, 1.26, 4.15, or 12.25 mg/kg/day, respectively (males) and 0, 0.30, 1.5, 5.12, or 15.29 mg/kg/day respectively (females), expressed as paraquat dichloride. The incidence of ocular changes was low and not caused by paraquat dichloride in this study. The systemic NOEL is 100 ppm of paraquat dichloride (4.15 and 5.12 mg/kg/day, for males and females, respectively); or 3.0 mg/kg/day (males) and 3.7 mg/kg/day (females), expressed as paraquat cation. The systemic LOEL is 300 ppm of paraquat dichloride (12.25 and 15.29 mg/kg/day, for males and females, respectively); or 9.0 mg/kg/day (males) and 11.2 mg/kg/day (females), expressed as paraquat cation. There were no

evidence of carcinogenicity in this study even at the highest dose tested.

In a two year chronic feeding/oncogenicity study, SPF Swiss derived mice were fed paraquat dichloride at dose levels of 0, 12.5, 37.5, or 100/125 ppm, expressed as cation. Because no toxic signs appeared after 35 weeks of dosing, the 100 ppm level was increased to 125 ppm at week 36. There were no carcinogenic effects observed in this study. The systemic NOEL for both sexes is 12.5 ppm (1.87 mg/kg/day) and the systemic LOEL is 37.5 ppm (5.6 mg/kg/day), each expressed as paraquat cation based on renal tubular degeneration in males and weight loss and decreased food intake in females. Paraquat dichloride is classified Category E of carcinogenicity (no evidence of carcinogenicity in animal studies).

6. *Animal metabolism.* The qualitative nature of the residue in animals is adequately understood based on the combined studies conducted with ruminants (goats and cows), swine, and poultry. The residue of concern in eggs, milk, and poultry and livestock tissue is the parent, paraquat dichloride.

7. *Metabolite toxicology.* The nature of the residues in plants and animals is adequately understood. The residue of concern in eggs, milk, poultry, livestock, and in crops is the parent, paraquat dichloride.

8. *Endocrine disruption.* There is no evidence of endocrine effects in the database supporting registration of paraquat dichloride.

C. Aggregate Exposure

1. *Dietary exposure.* Syngenta Crop Protection, Inc. has estimated aggregate exposure based on all proposed and established tolerances.

2. *Food.* For the purposes of assessing the potential dietary exposure under the proposed tolerances, Syngenta Crop Protection has estimated aggregate exposure from all crops for which tolerances are established or proposed (i.e., pesticide petition PP#2F6433).

i. *Acute exposure.* The paraquat dichloride acute dietary exposure assessment utilized the Dietary Exposure Evaluation Model (DEEM™. version 7.76) and the USDA's Continuing Survey of Food Intake by Individuals (CSFII) with the 1994–96 consumption database and the Supplemental CSFII Children's Survey (1998) consumption database. The acute reference dose (aRfD) for paraquat dichloride is 0.0042 mg/kg-bw/day for females 13–50 years of age and 0.0125 mg/kg-bw/day for children and the U.S. population. The aRfD is based on a reproduction study in rats with a no observable adverse effect level (NOAEL) of 1.25 mg/kg-bw/day and an uncertainty factor of 100X. An additional FQPA safety factor of 3X was applied for females between the ages of 13 and 50 years due to a data gap for a prenatal developmental study conducted in a non-rodent species. The paraquat dichloride Tier II acute dietary exposure assessment was based upon established and proposed tolerances for paraquat dichloride. The maximum percent crop treated (%CT) values that were described in the most recent EPA exposure assessment for paraquat dichloride (published in the **Federal Register**) of September 21, 2001 (66 FR 48593)(FRL-6799-2) were used for all currently registered crops. One-hundred percent crop treated was assumed for all proposed crops. It should be noted that the most recent EPA acute exposure assessment for paraquat dichloride was based on a probabilistic Monte Carlo analysis using tolerance residue values. The current Syngenta acute assessment was performed deterministically using tolerance residue values. For the purpose of aggregate risk assessment, the exposure values were expressed in terms of margin of exposure (MOE) which was calculated by dividing the no observable adverse effect level (NOAEL) by the exposure for each population subgroup. In addition, exposure was expressed as a percent of the acute reference dose (%aRfD). Acute exposure to the U.S. population resulted in a MOE of 377 (26.47% of the aRfD of 0.0125 mg/kg-bw/day). The most exposed sub-population was females (13–19 years, not pregnant or nursing) with a MOE of 712 (41.78% of the aRfD of 0.0042 mg/kg-bw/day). Since the benchmark MOE for females (13–50 years of age) was 300 and since EPA generally has no concern for exposures below 100% of the RfD, Syngenta believes that there is a reasonable certainty that no harm will result from dietary (food) exposure to residues arising from the current and proposed uses of paraquat dichloride.

ii. *Chronic exposure.* The paraquat dichloride chronic dietary exposure assessment utilized the Dietary Exposure Evaluation Model (DEEM™. version 7.76) and the USDA's Continuing Survey of Food Intake by Individuals (CSFII) with the 1994–96 consumption database and the Supplemental CSFII Children's Survey (1998) consumption database. The chronic reference dose (cRfD) for paraquat dichloride is 0.0045 mg/kg-bw/day and is based on a one-year feeding study in dogs with a NOAEL of 0.45 mg/kg-bw/day and an uncertainly factor of 100X. No additional FQPA safety factor was applied. The paraquat dichloride Tier II chronic dietary exposure assessment was based upon established and proposed tolerances for paraquat dichloride. The average percent crop treated (%CT) values that were described in the most recent EPA exposure assessment for paraquat dichloride published in the **Federal Register** of September 21, 2001, were used for all currently registered crops. For the proposed crops, it was assumed that 100 percent of these crops were treated. For the purpose of aggregate risk assessment, the exposure values were expressed in terms of MOE and as a percent of the reference dose (%RfD). Chronic exposure to the U.S. population resulted in a MOE of 1,475 (6.8% of the cRfD of 0.0045 mg/kg-bw/day). The most exposed sub-population was children (1–6 years old) with a MOE of 507 (19.7% of the cRfD). Since the benchmark MOE for this assessment was 100 and since EPA generally has no concern for exposures below 100% of the RfD, Syngenta believes that there is a reasonable certainty that no harm will result from dietary (food) exposure to residues arising from the current and proposed uses of paraquat dichloride.

1. *Drinking water.* To estimate total aggregate exposure to a pesticide from food, drinking water and residential uses, the Agency calculates the drinking water level of comparison (DWLOCs) which are used as a point of comparison against the model estimates of a pesticide's concentration in water (EECs). When EECs for surface water and ground water are less than the calculated DWLOCs, EPA concludes with reasonable certainty that exposures to the pesticide in drinking water would not result in unacceptable levels of aggregate human health risk. The calculated DWLOC for acute exposure to paraquat dichloride in surface and ground water was 74 ppb for the most exposed sub-population (females 13–19 years, not pregnant or nursing). The calculated DWLOC for chronic exposure to paraquat dichloride in surface and ground water was 36 ppb for the most exposed sub-population (children 1–6 years). Based on the comparison to the EECs for surface and ground water, the estimated environmental concentrations of paraquat dichloride in surface and ground water are below the DWLOC based upon food exposures; therefore, the EPA should not have a drinking water concern for paraquat dichloride.

2. *Non-dietary exposure.* Paraquat dichloride is not registered for use on any sites that would result in residential exposure.

D. Cumulative Effects

Cumulative exposure to substances with a common mechanism of toxicity. Section 408(b)(2)(D)(v) 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." The EPA does not have, at this time, available data to determine whether paraquat dichloride has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. For the purposes of this tolerance action, the EPA has not assumed that paraquat dichloride has a common mechanism of toxicity with other substances.

E. Safety Determination

1. *U.S. population*—i. *Acute risk.* The acute dietary exposure analysis (food only) showed that exposure from all established and proposed paraquat dichloride tolerances would be 26.5% of the aRfD for the general U.S. population.

ii. *Chronic risk.* The chronic dietary exposure analysis (food only) showed that exposure from all established and proposed paraquat dichloride tolerances would be 6.8% of the cRfD for the general U.S. population.

2. *Females 13–50 years of age— Acute risk.* The acute dietary exposure analysis (food only) showed that exposure from all established and proposed paraquat dichloride tolerances would be 41.8% of the aRfD for the most exposed sub-population (females 13–19, not pregnant or nursing).

3. *Infants and children*—i. *Acute risk.* The acute dietary exposure analysis (food only) showed that exposure from all established and proposed paraquat dichloride tolerances would be 38.3% of the aRfD for the next most exposed sub-population (children 1–6 years).

ii. *Chronic risk.* The chronic dietary exposure analysis (food only) showed that exposure from established and proposed paraquat dichloride tolerances would be 19.7% of the cRfD for the most exposed sub-population (children 1–6 years). The next most exposed sub-population was non-nursing infants with an exposure of 12.7% of the cRfD. There is no indication of quantitative or qualitative increased susceptibility of rats or mice to *in utero* and/or prenatal/postnatal exposure to paraquat dichloride. The EPA has determined that a developmental neurotoxicity study is not required. Infants and children are not expected to show any particular sensitivity to paraquat dichloride.

Syngenta has considered the potential aggregate exposure from food and water and concluded that aggregate exposure is not expected to exceed 100% of the acute or chronic reference dose and that there is a reasonable certainty that no harm will result to infants and children from the aggregate exposure to paraquat dichloride.

F. International Tolerances

Compatibility between U.S. tolerances and Codex Maximum Residue Levels (MRLs) exist for eggs, milk, ruminant tissues, passion fruit, sunflower seed and vegetables including beans (succulent), brassica (cole) leafy vegetables group, carrots, cassava, corn (sweet), cucurbits, fruiting vegetables, lettuce, onions (dry bulb and green), peas (succulent), pigeon peas, turnips (roots and tops), and yams. Incompatibilities of U.S. tolerances and Codex MRLs on the following raw plant commodities remain because of differences in agricultural practices: Cottonseed, dry hops, dry peas/beans, maize, olives, potatoes, rice, sorghum, soybeans and wheat. No questions of compatibility exists with respect to commodities where no Codex MRLs have been established but United States tolerances exist or where Codex MRLs have been established but U.S. tolerances do not exist.

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FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

June 16, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before July 29, 2005. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Leslie F. Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., DC 20554 or via the Internet to *Leslie.Smith@fcc.gov*, and/or to Kristy L. LaLonde, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3087 or via the Internet at *Kristy_L._LaLonde@omb.eop.gov*. If you would like to obtain or view a copy of this new information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Leslie F. Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Commission has requested approval of these information collections under the emergency processing provisions of the PRA by July 1, 2005.

OMB Control Number: 3060–XXXX.

Title: Federal Communications Commission Proposes Collection of Location Information, Provision of Notice and Reporting on Interconnected voice over Internet Protocol (VoIP) E911 Compliance.

Type of Review: Emergency.

Form Number: N/A.

Respondents: Business or other for-profit entities; Not-for-profit institutions; State, Local or Tribal Governments; and Individuals or households.

Number of Respondents: 100.

Estimated Time per Response: 0.09 hours–16 hours.

Frequency of Response: Recordkeeping; on occasion, annual,

and one-time reporting requirements; third party disclosure.

Total Annual Burden: 435,894 hours.

Total Annual Cost: $43,162,335.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On June 3, 2005, the Commission released a *First Report and Order* in WC Docket. No. 04–36 and a *Notice of Proposed Rulemaking* in WC Docket No. 05–196, FCC 05–116 (*Order*) in which the Commission established rules requiring providers of interconnected VoIP—meaning VoIP service that allows a user generally to receive calls originating from and to terminate calls to the public switched telephone network (PSTN)—to provide enhanced 911 (E911) capabilities to their customers as a standard feature of service. *See IP-Enabled Services*, WC Docket No. 04–36, *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05–196, FCC 05–116 (rel. June 3, 2005). The *Order* requires collection of information in six instances:

A. *Location Registration.* The *Order* requires providers of interconnected VoIP services to obtain location information from their customers for use in the routing of 911 calls and the provision of location information to emergency answering points.

B. *Provision of Automatic Location Information (ALI).* In order to meet the obligations set forth in the *Order*, interconnected VoIP service providers will place the location information for their customers into, or make that information available through, specialized databases maintained by local exchange carriers (and, in at least one case, a state government) across the country.

C. *Customer Notification.* In order to ensure that consumers of interconnected VoIP services are aware of their interconnected VoIP service's actual E911 capabilities, the *Order* requires that all providers of interconnected VoIP service specifically advise every subscriber, both new and existing, prominently and in plain language, the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service.

D. *Record of Customer Notification.* The *Order* requires VoIP providers to obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood this advisory.

E. *User Notification.* In addition, in order to ensure to the extent possible that the advisory is available to all potential users of an interconnected VoIP service, interconnected VoIP service providers must distribute to all subscribers, both new and existing, warning stickers or other appropriate labels warning subscribers if E911 service may be limited or not available and instructing the subscriber to place them on and/or near the customer premises equipment used in conjunction with the interconnected VoIP service.

F. *Compliance Letter.* The *Order* requires all interconnected VoIP providers to submit a letter to the Commission detailing their compliance with the rules set forth in the Order no later than 120 days after the effective date of the *Order.* This letter will enable the Commission to ensure that interconnected VoIP providers have achieved E911 compliance by the established deadline.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–12556 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved By Office of Management and Budget

June 15, 2005.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995, Pub. L. 104–13. 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.

FOR FURTHER INFORMATION CONTACT: Paul J. Laurenzano, Federal Communications Commission, 445 12th Street, SW., Washington DC, 20554, (202) 418–1359 or via the Internet at *plaurenz@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0816.

OMB Approval date: 5/26/2005.

Expiration Date: 5/31/2008.

Title: Local Telephone Competition and Broadband Reporting, WC Docket No. 04–141, FCC 04–266 (Report and Order).

Form No.: FCC form 477.

Estimated Annual Burden: 2,800 responses; 61,320 total annual burden hours; approximately 21.9 hours average per respondent.

Needs and Uses: FCC Form 477 seeks to gather information on the development of local competition and deployment of broadband service also known as advanced telecommunications services. The data are necessary to evaluate the status of developing competition in local exchange telecommunications markets and to evaluate the status of broadband deployment. The information is used by Commission staff to advise the Commission about the efficacy of Commission rules and policies adopted to implement the Telecommunications Act of 1996.

OMB Control No.: 3060–1046.

OMB Approval date: 5/25/2005.

Expiration Date: 05/31/2008.

Title: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunication Act of 1996, CC Docket No. 96–128, Order on Reconsideration.

Form No.: N/A.

Estimated Annual Burden: 4,854 responses; 485,400 total annual burden hours; 100 hours average response time per respondent.

Needs and Uses: On October 3, 2003, the Commission issued a Report and Order that required "Completing Carriers" to compensate payphone service providers (PSPs) for each and every completed call using a coinless access number (CC Docket 96–128/FCC 03–235). This Order on Reconsideration, released on October 22, 2004, does not change this compensation framework, but rather refines and builds upon its approach. It provides guidance on the types of contracts that the Commission would deem to be reasonable methods of compensating PSPs, extends the time period that carriers must retain certain payphone records, and clarifies the rules' reporting, certification, and audit requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–12737 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority.

June 17, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other

Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 29, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918 or via the Internet at Cathy.Williams@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0075.

Title: Application for Consent to Assign Construction Permit or License for TV or FM Translator Station or Low Power Television Station or to Transfer Control of Entity Holding TV or FM Translator or Low Power Television Station.

Form Number: FCC Form 345.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 320.

Estimated Time per Response: 1 hour.

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 960 hours.

Total Annual Cost: $516,140.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Filing of the FCC Form 345 is required when applying for authority for assignment of license or permit, or for consent to transfer of control of corporate licensee or permittee for an FM or TV translator station, or low power TV station. This collection also includes the third party disclosure requirement of 47 CFR 73.3580. This section requires local public notice in a newspaper of general circulation of the filing of all applications for assignment of license/permit. This notice must be completed within 30 days of the tendering of the application. A copy of this notice must be placed in the public inspection file along with the application. The form has been revised to include inadvertently omitted information. The data is used by FCC staff to determine if the applicant meets basic statutory requirements to operate the station.

OMB Control Number: 3060–0394.

Title: Section 1.420, Additional Procedures In Proceedings for Amendment of FM, TV, or Air-Ground Table of Allotments.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 30.

Estimated Time per Response: 1–2 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 710 hours.

Total Annual Cost: $9,000.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 1.420 requires a petitioner seeking to withdraw or dismiss its expression of interest in allotment proceedings to file a request for approval. This request would include a copy of any related written agreement and an affidavit certifying that neither the party withdrawing its interest nor its principals has received any consideration in excess of legitimate and prudent expenses in exchange for dismissing/withdrawing its petition, an itemization of the expenses for which it is seeking reimbursement, and the terms of any oral agreement. Each remaining party to any written or oral agreement must submit an affidavit within 5 days of petitioner's request for approval stating that it has paid no consideration to the petitioner in excess of the petitioner's legitimate and prudent expenses. The data is used by FCC staff to ensure that an expression of interest in applying for, constructing, and operating a station was filed under appropriate circumstances and not to extract payment in excess of legitimate and prudent expenses.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–12749 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 05–1703]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On June 24, 2005, the Commission released a public notice announcing the July 19, 2005 meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and agenda.

DATES: Tuesday, July 19, 2005, 9:30 a.m.

ADDRESSES: Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, Portals II, 445 Twelfth Street, SW., Suite 5–A420, Washington, DC 20554. Requests to make an oral statement or provide written comments to the NANC should be sent to Deborah Blue.

FOR FURTHER INFORMATION CONTACT: Deborah Blue, Special Assistant to the Designated Federal Officer (DFO) at (202) 418–1466 or *Deborah.Blue@fcc.gov.* The fax number is: (202) 418–2345. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: Released: June 24, 2005.

The North American Numbering Council (NANC) has scheduled a meeting to be held Tuesday, July 19, 2005, from 9:30 a.m. until 5 p.m. The meeting will be held at the Federal Communications Commission, Portals II, 445 Twelfth Street, SW., Room TW–C305, Washington, DC. This meeting is open to members of the general public. The FCC will attempt to accommodate as many participants as possible. The public may submit written statements to the NANC, which must be received two

business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting.

Proposed Agenda—Tuesday, July 19, 2005, 9:30 a.m.:*

1. Announcements and Recent News
2. Approval of Minutes

—Meeting of March 15, 2005
—Meeting of May 17, 2005
—Conference Call Meeting of June 28, 2005

3. Report of the North American Numbering Plan Administrator (NANPA)
4. Report of the National Thousands Block Pooling Administrator (PA)
5. Report of the North American Portability Management (NAPM) LLC
6. Status of the Industry Numbering Committee (INC) activities
7. Report of the North American Numbering Plan Billing and Collection (NANP B&C) Agent
8. Report of the Billing & Collection Working Group (B&C WG)
9. Reports from the Issues Management Groups (IMGs)

—Safety Valve IMG
—SMS/800 Number Administration Committee (SNAC) Guidelines IMG
—NANC Primer IMG

10. Report of the Local Number Portability Administration (LNPA) Working Group
11. Report of the Numbering Oversight Working Group (NOWG)
12. Report of the Future of Numbering Working Group (FoN WG)
13. Special Presentations
14. Update List of the NANC Accomplishments
15. Summary of Action Items
16. Public Comments and Participation (5 minutes per speaker)
17. Other Business

Adjourn no later than 5 p.m.

Next Meeting: Tuesday, September 20, 2005.

*The Agenda may be modified at the discretion of the NANC Chairman with the approval of the DFO.

Federal Communications Commission.

Regina M. Brown,

Attorney, Telecommunications Access Policy Division, Wireline Competition Bureau.

[FR Doc. 05–12829 Filed 6–28–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may obtain copies of agreements by contacting the Commission's Office of Agreements at 202–523–5793 or via e-mail at *tradeanalysis@fmc.gov*. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 011741–007.

Title: U.S. Pacific Coast-Oceania Agreement.

Parties: A.P. Moller-Maersk A/S; Australia-New Zealand Direct Line; Lykes Lines Limited LLC; FESCO Ocean Management Limited; Hamburg-Süd; P&O Nedlloyd Limited; and P&O Nedlloyd B.V.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW., Washington, DC 20036.

Synopsis: The amendment changes the name of Lykes Lines Limited to CP Ships USA, LLC.

Agreement No.: 011777–001.

Title: CP Ships/CCNI Slot Charter Agreement.

Parties: Lykes Lines Limited LLP and Compania Chilena de Navegacion Interoceanica S.A.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW., Washington, DC 20036.

Synopsis: The amendment changes Lykes Lines' name to CP Ships USA, LLC, updates CCNI's name and address, deletes obsolete material, and restates the agreement.

Agreement No.: 011839–002

Title: Med-Gulf Space Charter Agreement

Parties: Lykes Lines Limited LLC, Compania Chilena de Navegacion Interoceanica, and Compania Sud Americana de Vapores S.A.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW., Washington, DC 20036.

Synopsis: The amendment deletes Compania Chilena de Navegacion Interoceanica as a party, changes the name of Lykes Lines Limited to CP Ships USA, LLC, and restates the agreement.

Agreement No.: 011872–001.

Title: USATLAN Cross Space Charter, Sailing and Cooperative Working Agreement.

Parties: Compania Sud Americana de Vapores S.A., Companhia Libra de Navegacao, and Montemar Maritima S.A.

Filing Party: Walter H. Lion, Esq; McLaughlin & Stern, LLP; 260 Madison Avenue; New York, New York 10016.

Synopsis: The amendment deletes CMA CGM, S.A. as a party to the agreement, makes corresponding changes to reflect CMA's resignation, and renames the agreement.

Agreement No.: 011915.

Title: CSAV/NYK Venezuela Space Charter Agreement.

Parties: Compania Sud Americana de Vapores and Nippon Yusen Kaisha.

Filing Party: Walter H. Lion, Esq.; McLaughlin & Stern, LLP; 260 Madison Avenue; New York, NY 10016.

Synopsis: The agreement authorizes CSAV to charter space to NYK for the carriage of motor vehicles in the trade between the Port of Baltimore and ports in Venezuela.

Agreement No.: 011916.

Title: APL/MOL 2005 Peak Season Space Charter Agreement.

Parties: American President Lines, Ltd.; APL Co. PTE, Ltd.; and Mitsui O.S.K. Lines, Ltd.

Filing Party: Eric C. Jeffrey, Esq.; Goodwin Proctor LLP; 901 New York Avenue, NW., Washington, DC 20001.

Synopsis: The agreement authorizes the parties to share vessel space in the trade between the U.S. West Coast, on the one hand, and China and Taiwan, on the other.

Dated: June 24, 2005.

By Order of the Federal Maritime Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 05–12851 Filed 6–28–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Performance Review Board

AGENCY: Federal Maritime Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given of the names of the members of the Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Harriette H. Charbonneau, Director of Human Resources, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573.

SUPPLEMENTARY INFORMATION:

Section 4314(c)(1) through (5) of title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more performance review boards. The board shall review and evaluate the initial appraisal of a senior executive's

performance by the supervisor, along with any recommendations to the appointing authority relative to the performance of the senior executive.

Steven R. Blust,

Chairman.

The Members of the Performance Review Board are:

1. A. Paul Anderson, Commissioner.
2. Joseph E. Brennan, Commissioner.
3. Harold J. Creel, Jr., Commissioner.
4. Rebecca F. Dye, Commissioner.
5. Kenneth A. Krantz, Administrative Law Judge.
6. Irwin L. Schroeder, Chief Administrative Law Judge.
7 Bryant L. VanBrakle, Secretary.
8. Bruce A. Dombrowski, Director of Administration.
9. Florence A. Carr, Director, Bureau of Trade Analysis.
10. Vern W. Hill, Director, Bureau of Enforcement.
11. Sandra L. Kusumoto, Director, Bureau of Certification and Licensing.
12. Austin L. Schmitt, Director of Operations.
13. Amy W. Larson, General Counsel.

[FR Doc. 05–12852 Filed 6–28–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 70-119) published on pages 36175-36176 of the issue for June 22, 2005.

Under the Federal Reserve Bank of Chicago heading, the entry for Lamplighter Financial, MHC, Wauwatosa, Wisconsin, is revised to read as follows:

Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Lamplighter Financial, MHC, Wauwatosa, Wisconsin and Wauwatosa Holdings, Inc.; Wauwatosa, Wisconsin; to become bank holding companies by acquiring 100 percent of the voting shares of Wauwatosa Savings Bank, Wauwatosa, Wisconsin.

Comments on this application must be received by July 15, 2005.

Board of Governors of the Federal Reserve System, June 23, 2005.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 05–12810 Filed 6–28–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires person contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

Trans #	Acquiring	Acquired	Entities
20051000	Merrill Lynch & Co., Inc	AMVESCAP PLC	AMVESCAP Retirement, Inc.
Transactions Granted Early Termination—06/07/2005			
20050942	Philip F. Anschutz	Carter David Meiselman	Eastern Federal Corporation.
20051028	Fenway Partners Capital Fund II, L.P	Craig T. and Ellen Amato	Panther II Transportation, Inc.
20051031	American Capital Strategies, Ltd	E&B Giftware LLC	E&B Giftware LLC.
20051032	Apollo Investment Fund IV, L.P	Wyndham International, Inc	Wyndham International, Inc.
20051033	Apollo Real Estate Investment Fund IV, L.P.	Wyndham International, Inc	Wyndham International, Inc.
20051034	AIF/THL PAH LLC	Wyndham International, Inc	Wyndham International, Inc.
20051035	Thomas H. Lee Equity Fund IV, L.P	Wyndham International, Inc	Wyndham International, Inc.
20051046	Seaboard Flour LLC	Daily Foods, Inc	Daily Foods, Inc.
20051053	Gannett Co., Inc	Jules Gardner	Andrew Ellenthal, Christopher Saridakis, Jules Gardner 2005 Grantor Retained Annuity, Keith Gelles, Point Roll, Inc.
Transactions Granted Early Termination—06/08/2005			
20050998	Cephalon, Inc.	Salmedix, Inc.	Salmedix, Inc.
Transactions Granted Early Termination—06/09/2005			
20041212	Harrah's Entertainment, Inc	Caesars Entertainment, Inc	Caesars Entertainment, Inc.
20050436	William J. Yung III	Caesars Entertainment, Inc	Caesars Entertainment, Inc.
Transactions Granted Early Termination—06/10/2005			
20050857	Avid Technology, Inc.	Pinnacle Systems, Inc.	Pinnacle Systems, Inc.
20050873	ChevronTexaco Corporation	Unocal Corporation	Unocal Corporation.
20050995	Allied Capital Corporation	Spear Pharmaceuticals, Inc	Spear Pharmaceuticals, Inc.
20051024	Mr. John W. Stanton & Mrs. Theresa E. Gillespie.	ALLTEL Corporation	ALLTEL Corporation.
20051025	Cardiac Science, Inc.	Quinton Cardiology Systems, Inc	Quinton Cardiology Systems, Inc.
20051026	Quinton Cardiology Systems, Inc	Cardiac Science, Inc.	Cardiac Science, Inc.
20051030	Baron Frere	Alleghany Corporation	Mineral Holdings Inc.

Trans #	Acquiring	Acquired	Entities
20051036	Tire Rack Holdings, Inc.	The Tire Rack, Inc.	The Tire Rack, Inc.
20051043	Paul G. Desmarais	Alleghany Corporation	Mineral Holdings Inc.
20051048	Saturn Pharmaceuticals, Inc	PLIVA d.d.	Odyssey Pharmaceuticals.
20051049	Computer Horizons Corp	Analysts International Corporation	Analysts International Corporation.
20051056	Johnson Controls, Inc.	Edwin J. McLaughlin	USI Companies Inc.
20051057	U.S. Bancorp	Certegy Inc.	Certegy Card Services, Inc.
20051059	Ralph Lauren	Reebok International Ltd	Ralph Lauren Footwear Co,, Inc.
20051070	Reliance Steel & Aluminum Co	James R. Sutow	Chapel Steel Corp.
20051084	American Capital Strategies Ltd	Linsalata Capital Partners Fund IV, L.P.	PHI Holding Company, Inc.
20051088	Affiliated Computer Services, Inc	LiveBridge, Inc.	LiveBridge, Inc.
20051089	Nippon Suisan Kaisha, Ltd	King & Prince Seafood Corporation	King & Prince Seafood Corporation.
20051095	United Parcel Service, Inc	Overnite Corporation	Overnite Corporation.
20051104	Nautic Partners V, L.P.	Hunt Capital Partners, L.P	International Radiology Group, LLC.
20051111	Cargill Incorporated	Better Beef Limited	Better Beef Limited, deJonge Farms Inc.
Transactions Granted Early Termination—06/13/2005			
20051041	Odyssey Investment Partners Fund III, LP.	NSP Holdings L.L.C.	Norcross Safety Products L.L.C. NSP Holdings Capital Corp.
20051066	Home Depot U.S.A., Inc	Utility Supply of America, Inc. d/b/a USABlueBook.	Utility Supply of America, Inc. d/b/a USABlueBook.
Transactions Granted Early Termination—06/14/2005			
20050996	Genzyme Corporation	Bone Care International, Inc	Bone Care International, Inc.
Transactions Granted Early Termination—06/15/2005			
20050990	A.T. Williams Oil Company	Trade Oil Company	Trade Oil Company.
20050991	Amerada Hess Corporation	Trade Oil Company	Trade Oil Company.
Transactions Granted Early Termination—06/16/2005			
20051100	T&F Informa PLC	Lord Laidlaw of Rothiemay	I.I.R. Holdings Limited.
20051113	Ralcorp Holdings, Inc.	J. Mark Grosvenor	Medallion Foods, Inc.
Transactions Granted Early Termination—06/17/2005			
20051045	Walter Wang	New Mighty U.S. Trust	J-M Manufacturing Company, Inc.
20051086	Berkshire Hathaway Inc.	General Electric Company	Medical Protective Corporation.
20051091	Gerald J. Ford	Affordable Residential Communities, Inc.	Affordable Residential Communities, Inc.
20051102	Apollo Investment Fund V, L.P	Metals USA, Inc.	Metals USA, Inc.
20051108	Pacific Equity Partners Fund II L.P	Worldwide Restaurant Concepts, Inc	Worldwide Restaurant Concepts, Inc.
20051114	Richard B. Cohen	Lone Star Fund V (U.S.), L.P	BI–LO, LLC.
20051119	AG Holding, L.P	Fletcher Jones, Jr. Life Trust U/D/T 2/16/94.	Fletcher Jones Luxury Vehicles, Inc.
20051120	Rodney D. Windley	Michael S. Brown	Capital Health Management Group, Inc.
20051122	President and Fellows of Harvard College Suez.		Trenton Energy Corporation. Trigen Building Services Corporation. Trigen-Kansas City Energy Corporation. Trigen-Maryland Steam Corporation. Trigen-Missouri Energy Corporation. Trigen-Oklahoma Energy Corporation. Trigen-Schuylkill Cogeneration, Inc. United Thermal Corporation.
20051123	PCT Equity 2 Limited	Global Promo Group Holdings, LLC	Global Promo Group, Inc.
20051130	Trident III, L.P	Zurich Financial Services	ZC Sterling Corporation.
20051135	Longyear Global Holdings, Inc	Anglo American plc	Boart Longyear International BV.
20051137	The Edward W. Scripps Trust	Shopzilla, Inc	Shopzilla, Inc.
20051148	Dofasco Inc.	Quebec Cartier Mining Company	Quebec Cartier Mining Company.

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Contact Representative or Renee Hallman, Case Management Assistant, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission,

Donald S. Clark,

Secretary.

[FR Doc. 05–12830 Filed 6–28–05; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[ATSDR–210]

Public Health Assessments Completed

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice announces those sites for which ATSDR has completed public health assessments during the period from January through March 2005. This list includes sites that are on or proposed for inclusion on the National Priorities List (NPL) and includes sites for which assessments were prepared in response to requests from the public.

FOR FURTHER INFORMATION CONTACT: William Cibulas, Jr., Ph.D., Director, Division of Health Assessment and Consultation, Agency for Toxic Substances and Disease Registry, 1600 Clifton Road, NE., Mailstop E–32, Atlanta, Georgia 30333, telephone (404) 498–0007.

SUPPLEMENTARY INFORMATION: The most recent list of completed public health assessments was published in the **Federal Register** on April 12, 2005 (70 FR 19081). This announcement is the responsibility of ATSDR under the regulation "Public Health Assessments and Health Effects Studies of Hazardous Substances Releases and Facilities" (42 CFR part 90). This rule sets forth ATSDR's procedures for the conduct of public health assessments under section 104(i) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA) (42 U.S.C. 9604(i)).

Availability

The completed public health assessments are available for public inspection at the Division of Health Assessment and Consultation, Agency for Toxic Substances and Disease Registry, 1825 Century Boulevard, Atlanta, Georgia (not a mailing address), between 8 a.m. and 4:30 p.m., Monday through Friday except legal holidays. The completed public health assessments are also available by mail through the U.S. Department of Commerce, National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, or by telephone at (800) 553–6847. NTIS charges for copies of public health assessments. The NTIS order numbers are listed in parentheses following the site names.

Public Health Assessments Completed or Issued

Between January 1, 2005, and March 31, 2005, public health assessments were issued for the sites listed below:

NPL and Proposed NPL Sites

California

Lawrence Livermore National Laboratory Site 300 (USDOE)—(PB2005–106289)

Florida

Stauffer Chemical Company—(PB2005–104925)

Idaho

Eastern Michaud Flats Contamination—(PB2005–104896)

Louisiana

Delatte Metals—(PB2005–106278)

New Mexico

Griggs & Walnut Ground Water Plume (a/k/a Griggs & Walnut Groundwater Site)—(PB2005–103476)

Molycorp, Incorporated—(PB2005–103470)

New York

Jackson Steel Products, Incorporated—(PB2005–104022)

Liberty Industrial Finishing Corporation—(PB2005–104880)

Mohonk Road Industrial Plant—(PB2005–104023)

North Carolina

Ward Transformer—(PB2005–104024)

West Virginia

Big John Salvage—Hoult Road Site—(PB2005–104021)

Non-NPL Petitioned Sites

Arkansas

Koppers Industries—(PB2005–102488)

California

Laytonville Landfill—(PB2005–104879)

Georgia

Arivec Chemicals, Incorporated—(PB2005–104020)

Minnesota

Faribault Municipal Well Field—(PB2005–104878)

Dated: June 23, 2005.

Kevin A. Ryan,

Acting Director, Office of Policy, Planning, and Evaluation, National Center for Environmental Health/ Agency for Toxic Substances and Disease Registry.

[FR Doc. 05–12805 Filed 6–28–05; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Iowa Army Ammunition Plant (IAAP), in Burlington, Iowa as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On May 20, 2005, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

Employees of the Department of Energy (DOE) or DOE contractors or subcontractors employed by the Iowa Army Ammunition Plant, Line 1, during the period from March 1949 through 1974 and who were employed for a number of work days aggregating at least 250 work days either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC.

This designation became effective on June 19, 2005, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on June 19, 2005, members of this class

of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV*.

John Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 05–12831 Filed 6–28–05; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Decision To Evaluate a Petition To Designate a Class of Employees at the Rocky Flats Plant, Golden, CO, To Be Included in the Special Exposure Cohort

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees at the Rocky Flats Plant, in Golden, Colorado, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Rocky Flats Plant.

Location: Golden, Colorado.

Job Titles and/or Job Duties: All represented members, past, present, and current, of USWA Local 8031 and its predecessors.

Period of Employment: April 1952 to February 15, 2005.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV*.

John Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 05–12832 Filed 6–28–05; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control; Special Emphasis Panels (SEP): Health Effects Associated With Environmental Exposures and Hazardous Waste, Academic Partners for Excellence in Environmental Public Health Tracking, Program Announcement (PA) #EH05–074, and Applied Research for Populations Around Hazardous Waste Sites, Program Announcement #TS05–110

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 meeting:

Name: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Health Effects Associated with Environmental Exposures and Hazardous Waste, Academic Partners for Excellence in Environmental Public Health Tracking, Program Announcement (PA) #EH05–074, and Applied Research for Populations Around Hazardous Waste Sites, Program Announcement #TS05–110.

Times and Dates: 8 a.m.–6 p.m., August 11, 2005(Closed).

Place: Renaissance Concourse Hotel, One Hartsfield Centre Parkway, Atlanta, GA 30354, Telephone Number 404.209.9999.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Pub. L. 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to: Health Effects Associated with Environmental Exposures and Hazardous Waste, Academic Partners for Excellence in Environmental Public Health Tracking, Program Announcement (PA) #EH05–074, and Applied Research for Populations Around Hazardous Waste Sites, Program Announcement #TS05–110.

For Further Information Contact: Bernadine B. Kuchinski, Ph.D., Occupational Health Consultant, National Institute for Occupational Safety and Health, CDC, 4676 Columbia Parkway, Mailstop C7, Cincinnati, OH 45226, Telephone 513.533.8511.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: June 23, 2005.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 05–12809 Filed 6–28–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[ATSDR–211]

Vessel Sanitation Program; Notice of Revision and Implementation of the Vessel Sanitation Program Operations Manual

AGENCY: Centers for Disease Control and Prevention, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This notice announces the revision and implementation of the Vessel Sanitation Program Operations Manual. The manual will become effective on August 1, 2005.

FOR FURTHER INFORMATION CONTACT: David Forney, Chief, Vessel Sanitation Program, Division of Emergency and Environmental Health Services (EEHS), National Center for Environmental Health (NCEH), telephone (770) 488–7333 or e-mail *DForney@cdc.gov*.

SUPPLEMENTARY INFORMATION:

Purpose and Background

The Vessel Sanitation Program (VSP) is a cooperative activity between the cruise ship industry and the Centers for Disease Control and Prevention (CDC), Public Health Service, U.S. Department of Health and Human Services. The purpose and goals of VSP are to achieve and maintain a level of sanitation that will lower the risk for gastrointestinal diseases and will assist the cruise ship industry in its efforts to provide a healthful environment for passengers and crew.

Comments

In 2003, CDC announced plans to revise the *Vessel Sanitation Operations Manual, November 2000*. Input and comments requested and received from the cruise ship industry, private sanitation consultants, other Federal

agencies, and other interested parties were discussed in detail at a public meeting held in Fort Lauderdale, Florida, on April 27, 2004. On the basis of comments received, VSP staff drafted a third revised manual that was discussed at a public meeting held in Fort Lauderdale on August 23–26, 2004. Input from the cruise ship industry was critical of this document. VSP revised the document and incorporated the comments received from the cruise ship industry, private sanitation consultants, and other interested parties who attended the public meetings or submitted comments in writing. A final draft of the *VSP Operations Manual, 2005* was put on the VSP Web site (*http://www.cdc.gov/nceh/vsp*) and was presented to attendees at the VSP annual public meeting held in Fort Lauderdale on April 26, 2005.

VSP acknowledges the helpful participation and the input of the cruise ship industry, private sanitation consultants, and other interested parties throughout the revision process. Major input for this document was provided by the International Council of Cruise Lines (ICCL), which represents the 16 largest passenger cruise lines that call on major ports in the U.S. and abroad.

Implementation and Transition for the VSP Operations Manual, 2005

The *VSP Operations Manual, 2005* will become effective on August 1, 2005. At that time, the VSP Environmental Health Officers will begin using the new manual and inspection report when they conduct their routine operational inspections.

For one year or for two routine inspections, whichever comes first, VSP staff will document deficiencies that indicate noncompliance with the 2005 operations manual. However, no points will be deducted for failure to meet the revised provisions in the 2005 manual. During the phase-in period, these deficiencies will be cited with a star on the inspection report, and no points will be deducted so that corrective actions can be taken.

One example of the new requirements in the 2005 manual is that hand wash sinks with the electronic sensors that cannot be user-adjusted have a maximum water temperature of 52 °C (125 °F). The *VSP Operations Manual, 2000* required only a minimum water temperature for the sinks with the sensors. For the first year or for two routine inspections, whichever comes first, inspectors will document water temperatures above the maximum at the handwash sinks with the sensors, but the item will be cited with a star on the inspection report, and no points will be deducted.

Applicability

The *VSP Operations Manual* is applicable to all passenger cruise vessels that have international itineraries and that call on U.S. Ports.

Availability

Final copies of the *VSP Operations Manual, 2005* can be found on the VSP Web site at *http://www.cdc.gov/nceh/vsp*; by contacting Stephanie Lawrence, Program Management Assistant for the Vessel Sanitation Program, Centers for Disease Control and Prevention (CDC), Mail stop F23, 4770 Buford Highway NE., Atlanta, GA 30341–3274; or by e-mail at *SLawrence1@cdc.gov*. Requests may also be sent to *vsp@cdc.gov*.

Dated: June 24, 2005.

Kevin A. Ryan,

Acting Director, Office of Policy, Planning, and Evaluation, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

[FR Doc. 05–12806 Filed 6–28–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Evaluation of the Improving Child Welfare Outcome Through Systems of Care Grant Program.

OMB No.: New Collection.

Description: The 1994 Amendments to the Social Security Act (SSA) authorize the U.S. Department of Health and Human Services to review State child and family service programs to ensure conformance with the requirements in titles IV–B and IV–E of the SSA. Under the Final Rule, which took effective March 25, 2000, States are assessed for substantial conformity with certain Federal requirements for child-welfare services. The Child and Family Service Reviews (CFSR), administered by the Children's Bureau, are designed to ensure conformity with Federal child-welfare requirements and, ultimately, to help States improve child-welfare services and outcomes, specifically safety, permanency, and well-being outcomes for child-welfare involved children and their families. States determined not to have achieved substantial conformity in any of the areas assessed are required to develop and implement program improvement plans (PIP) addressing the areas of nonconformity.

The Systems of Care grant cluster, from which these data are proposed to be collected, is designed to encourage public child-welfare agencies to address the issues identified in their state's CFSR. Although Systems of Care has shown promise in working with various at-risk and family populations, it has not been applied to a child-welfare target population. The data collected from these demonstration sites will allow the Children's Bureau to test whether this approach can help States reach the goals stated in their program improvement plans and explore how child welfare can benefit from being part of a system of care. Data will be collected via interviews, forms completed by project staff, surveys, focus groups and case file reviews. Data also will be collected to determine the extent to which the Technical Assistance (TA) provided, brokered or contracted by the TA and Evaluation Center is meeting the needs of the grantees, and how.

Respondents

- Systems of Care Project Directors;
- Members of the Systems of Care collaborative (may include representatives from mental health, juvenile justice, education, health, among others);
- Child-welfare agency supervisors and caseworkers;
- Partner agency caseworkers; and
- Families who have been involved with the child-welfare system.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response (minutues)	Total burden hours (hours)
Stakeholder Survey	240	51 items	.29	59
Child-Welfare Agency Survey	1440	72 items	.29	501

ANNUAL BURDEN ESTIMATES—Continued

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response (minutes)	Total burden hours (hours)
Supervisor Interviews	140	5 questions ...	5	58
Interview with family members	140	5 questions ...	5	58
Stakeholder Interviews	140	5 questions ...	5	58
Project Director Interviews	30	21 questions [1]	4	42
Child-Welfare agency and Partner agency focus groups	700	6 questions ...	6	420
Community Description Form	20	14 items	2	9
Organizational Structure Form	20	7 items	4	9
Collaborative Membership Form	20	7 items	2	5
Major Activities Form	20	7 items	6	14
Policy Changes Form	20	7	6	14
Other Training and Technical Assistance Form	20	4 items	5	7
Training and Technical Assistance Participant Feedback Forms	1080	37 items	.56	373
Technical Assistance Follow-up Survey	518	15	.29	38
Total Estimated Total Annual Burden Hours:	.....	.....	.....	1,665

[1] (1 hour for entire interview).

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *grjohnson@acf.hhs.gov*.

OMB Comments: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, e-mail address: *Katherine_T._Astrich@omb.eop.gov*

Dated: June 23, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–12821 Filed 6–28–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Child Care and Development Fund Tribal Plan (Form ACF–118–A).

OMB No.: 0970–0198.

Description: The Child Care and Development Fund (CCDF) Tribal Plan serves as the agreement between the applicant (Indian Tribes, Tribal consortia and Tribal organizations) and the Federal government, and describes how Tribal applicants will operate CCDF Block Grant programs. The Tribal Plan provides assurances that the CCDF funds will be administered in conformance with legislative requirements, federal regulations at 45 CFR parts 98 and 99 and other applicable instructions or guidelines issued by the Administration for Children and Families (ACF). Tribes must submit a new CCDF Tribal plan every two years in accordance with 45 CFR 98.17.

Respondents: Tribal CCDF Programs (265 in total).

Annual Burden Estimates

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
CCDF Tribal Plan	265	1	17.5	4,637.5
CCDF Tribal Plan Amendments	265	1	1.5	397.5

Estimated Total Annual Burden Hours: 5035.

Note: CCDF Tribal Plans are submitted biannually. This collection burden has been calculated to reflect an annual burden.

Additional Information

Copies of the proposed collection may be obtained by writing to The Administration for Children and Families, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *grjohnson@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, E-mail address: *katherine_T._Astrich@omb.eop.gov.*

Dated: June 23, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–12822 Filed 6–28–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed projects: Title: Developmental Disabilities Protection and Advocacy Program Performance Report.

OMB No.: 0980–0160.

Description: This information collection is required by federal statute. Each State Protection and Advocacy System must prepare and submit a Program Performance Report for the preceding fiscal year of activities and accomplishments and of conditions in the State. The information in the Annual Report will be aggregated into a national profile of Protection and Advocacy Systems. It will also provide ADD with an overview of program trends and achievements and will enable ADD to respond to administration and congressional requests for specific information on program activities. This information will also be used to submit a Biennial Report to Congress as well as to comply with requirements in the Government Performance and Results Act of 1993.

Respondents: Protection & Advocacy Agencies.

Annual Burden Estimates

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Developmental disabilities Protection and Advocacy Program Performance Report	57	1	44	2,508

Estimated Total Annual Burden Hours: 2,508.

In compliance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *grjohnson@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: June 23, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–12823 Filed 6–28–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung and Blood Institute, Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552(b)(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Molecular & Cellular Mechanisms in Transfusion Medicine.

Date: July 1, 2005.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7214, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Valerie L. Prenger, PhD, Scientific Review Administrator, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7214, Bethesda, MD 20892–7924, (301) 435–0270, *prengerv@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: June 21, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12787 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Resource-Related Research Project Applications (R24s).

Date: July 12, 2005.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Heart, Lung, and Blood Institute, Rockledge. 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Ying Ying Li-Smerin, Ph.D., M.D., Scientific Review Administrator, Division of Extramural Affairs, Review Branch, National Heart, Lung, and Blood Institute, NIH, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20814, (301) 435–0275, *lismerin@nhlbi.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Review of Research Scientist Development (K02s) and Clinical Investigator (K08s) Applications.

Date: August 11–12, 2005.

Time: 1:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Zoe Huang, M.D., Health Scientist Administrator, Review Branch, Room 7190, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7190, Bethesda, MD 20892–7924, (301) 435–0314, *huangz@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93,837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: June 22, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12800 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Persistent Symptoms After ASI, Effect of Subsequent Deliveries and Biofeedback.

Date: July 19, 2005.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: NICHD, 6100 Executive Blvd., 5B01, Rockville, MD 20892, (telephone conference call).

Contact Person: Jon M. Ranhand, PhD, Scientist Review Administrator, Division of Scientific Review, National Institute of Child Health, and Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892, (301) 435–6884, *ranhandj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: June 21, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12789 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Genomic Fingerprint of PGF2alpha and LH Actions on the Luteal Transcriptome in Primates.

Date: July 21, 2005.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (telephone conference call).

Contact Person: Jon M. Ranhand, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892, (301) 435–6884, *ranhandj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: June 21, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12790 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Clinical Investigator Application Review.

Date: July 22, 2005.

Time: 3 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Lakshmanan Sankaran, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 777, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *ls38oz@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS).

Dated: June 10, 2005

LaVerne Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12791 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke, Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel Udall Center Review.

Date: July 89, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Willard InterContinental 1401 Pennsylvania Avenue, NW., Washington, DC 20004.

Contact Person: Joann McConnell, PhD, Scientific Review Administrator, Scientific Review Branch, NIH/NINNDS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, Msc 9529, Bethesda, MD 20892–5324, *mcconnie@ninds.nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel Muscular Dystrophy Meeting.

Date: July 12–13, 2005.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Raul A. Saaverdra, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, NSC; 6001 Executive Blvd., Ste. 3208, Bethesda, MD 20892–9529, 301–496–9223, *saavedrr@ninds.nih.gov.*

*Name of Committee:*National Institute of Neurological Disorders and Stroke Special Emphasis Panel Fellowship Review.

Date: July 12, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Willard InterContinental Hotel, 1401 Pennsylvania Ave., NW., Washington, DC 20004.

Contact Person: Joann McConnell, PhD, Scientific Review Administrator, Scientific Review Branch, NIH/NINDS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, Msc 9529, Bethesda, MD 20892–2529, (301) 496–5324, *mcconnej@ninds.nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel Centers for Excellence in Translational Human Stem Cell Research.

Date: July 14–15, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: W. Ernest Lyons, Phd, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–4056.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel Spotrias.

Date: July 22, 2005.

Time: 7:30 a.m. to 4 p.m.

Place: Marriot Conference Center, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Katherine Woodbury, PhD, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, (301) 496–5980, *kw470@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institues of Health, HHS)

Dated: June 21, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12792 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Arthritis and Musculoskeletal and Skin Diseases Special Grants Review Committee.

Date: July 11–12, 2005.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Yan Z Wang, PHD, MD, Scientific Review Administrator, National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Blvd., Suite 820, Bethesda, MD 20892, (301) 594–4957, *wangy1@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS).

Dated: June 21, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12793 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Intestinal Electrolyte Transport.

Date: July 14, 2005.

Time: 8:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Maria E. Davila-Bloom, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 758, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Small Grants in Digestive Diseases and Nutrition.

Date: July 21, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Maria E. Davila-Bloom, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 758, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov*.

Name of Committee: National Institute on Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Polycystic Kidney Disease Centers.

Date: July 21–22, 2005.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 2899 Jefferson Davis Hwy., Arlington, VA 22202.

Contact Person: Michael W. Edwards, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 750, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8886, *edwardsm@extra.niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Kidney Disease Research and Translational Core Centers.

Date: July 24–25, 2005.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 2899 Jefferson Davis Hwy., Arlington, VA 22202.

Contact Person: Michael W. Edwards, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 750, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8886, *edwardsm@extra.niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel Mid Hypotherma for Acute Liver Failure Due to Acetaminophen.

Date: July 25, 2005.

Time: 3 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Paul A. Rushing, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 747, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8895, *rushingp@extra.niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel Digestive Diseases and Nutrition Training Grants.

Date: July 26, 2005.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Robert Wellner, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 706, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4721, *rw175w@nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel Ancillary Studies to Major Ongoing NIDDK Clinical Research Studies.

Date: July 28, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Xiaodu Guo, MD, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 705, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 496–4724, *quox@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institues of Health, HHS).

Dated: June 21, 2005.

LaVerne Y. Stringfield.

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12794 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Trauma and Burn.

Date: July 19, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Clarion Hotel Bethesda Park, 8400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Brian R Pike, PhD, Scientific Review Administrator, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, 301–594–3907, *pikbr@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS.)

Dated: June 22, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee.

[FR Doc. 05–12796 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel Maximizing Independence for Persons with Disabilities.

Date: July 18, 2005.
Time: 11 a.m. to 11:30 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852, (telephone conference call).
Contact Person: Anne Krey, Scientific Review Administrator, Division of Scientific Review, National Institutes of Child Health and Human Development, National Institutes of Health, Bethesda, MD 20892, (301) 435–6908.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS).

Dated: June 22, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12797 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussion could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Bioengineering Applications.
Date: July 12, 2005.
Time: 3 p.m. to 4:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852, (telephone conference call).
Contact Person: Anne Krey, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, National Institutes of Health, Bethesda, MD 20892, 301–435–6908.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: June 22, 2005.

LaVerne Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12798 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel Tri-Service Aids Clinical Consortium Data Analysis and Coordinating Center (TACC-DACC).
Date: July 13–14, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate contract proposals.
Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.
Contact Person: Lucy A. Ward, DVM, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, Bethesda, MD 20892–7616, 301–496–2550, *lward@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS.)

Dated: June 22, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12799 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel Course Development in the Neurobiology of Disease.
Date: July 18, 2005.
Time: 9 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.
Contact Person: A. Roger Little, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6110 Executive Blvd., Room 6157, MSC 9609, Rockville, MD 20852–9609, (301) 402–5844, *alittle@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clincians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS.)

Dated: June 22, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12801 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development, Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel Academic-Community Partnership Conference Series.

Date: July 21–22, 2005.

Time: 7 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Kishena C. Wadhwani, Ph.D., MPH, Scientific Review Administrator, Division of Scientific Review, 9000 Rockville Pike, MSC 7510, 6100 Bulding, Room 5B01, Bethesda, MD 20892–7510, (301) 496–1485, *wadhwank@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 92.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS.)

Dated: June 22, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12802 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Dental & Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant application,the disclosed of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institutes of Dental and Craniofacial Research Special Emphasis Panel 05–91, Review R21.

Date: July 14, 2005

Time: 10 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Bulding, 45 Center Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Rebecca Roper, MS, MPH, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr., room 4AN32E, Bethesda, MD 20892, 301–451–5096.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: June 22, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12803 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 ONC–T 02M: Radiation Therapy.

Date: July 1, 2005.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Eva Petrakova, PhD, MPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7804, Bethesda, MD 20892. 301–435–1716. *petrakoe@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Hyperaccelerated Award/Mechanisms in Immunomodulation Trials.

Date: July 5, 2005.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Samuel C. Edwards, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4200, MSC 7812, Bethesda, MD 20892. (301) 435–1152. *edwardss@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Innate Immunity Special Emphasis Panel Review.

Date: July 7, 2005.

Time: 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.

Contact Person: Paek-Gyu Lee, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4095D, MSC 7812, Bethesda, MD 20892. (301) 402–7391. *leepg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Social and Psychological Aspects of Addictions.

Date: July 12–13, 2005.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue, NW., Washington, DC 20036.

Contact Person: Gayle M. Boyd, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3028–D MSC 7759, Bethesda, MD 20892. 301–451–9956. *gboyd@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Co-Stimulation.

Date: July 12, 2005.
Time: 1 p.m. to 2 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).
Contact Person: Calbert A. Laing, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4210, MSC 7812, Bethesda, MD 20892. 301–435–1221. *laingc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Plasmodium Biology.
Date: July 12, 2005.
Time: 1:30 p.m. to 3:30 p.m.
Agenda: To review and evaluate grant applications and/or proposals.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).
Contact Person: Marian Wachtel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892. 301–435–1148. *wachtelm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Review of HIV/AIDS Fellowship Applications.
Date: July 13, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.
Contact Person: Jose H. Guerrier, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892. (301) 435–1137. *guerrej@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Addiction and Problem Behaviors—Risk and Risk Reduction.
Date: July 13, 2005.
Time: 1 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Renaissance Mayflower Hotel, 1127 Connecticut Avenue, NW., Washington, DC 20036.
Contact Person: Gayle M. Boyd, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3028–D, MSC 7759, Bethesda, MD 20892. (301) 451–9956. *gboyd@mail.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group, Gene and Drug Delivery Systems Study Section.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Steven J. Zullo, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7849, Bethesda, MD 20892. (301) 435–2810. *zullost@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Bacterial Diseases, Food Safety and General Microbiology.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue, NW., Washington, DC 20036.
Contact Person: Marian Wachtel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3028, MSC 7858, Bethesda, MD 20892. (301) 435–1148. *wachtelm@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group, Behavioral and Social Consequences of HIV/AIDS Study Section.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications and/or proposals.
Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.
Contact Person: Mark P. Rubert, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892. (301) 435–1175. *rubertm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Cardiovascular Sciences Small Business Activities.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Georgetown, 2101 Wisconsin Ave, NW., Washington, DC 20007
Contact Person: Lawrence E. Boerboom, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5156, MSC 7814, Bethesda, MD 20892. (301) 435–8367. *boerboom@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, FO3B Biophysical and Physiological Neuroscience.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Wyndham Washington, DC, 1400 M Street, NW., Washington, DC 20005.
Contact Person: Carole L. Jelsema, PhD, Scientific Review Administrator and Chief, MDCN Scientific Review Group, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4146, MSC 7850, Bethesda, MD 20892. (301) 435–1248. *jelsemac@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Molecular Aspects of Obesity and Diabetes.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Ann A. Jerkins, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6154, MSC 7892, Bethesda, MD 20892. 301–435–4515. *jerkinsa@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business Applications: Health of the Population.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.
Contact Person: Valerie Durrant, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892. (301) 435–3554. *durrantv@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, HIV/AIDS Vaccines.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Mary Clare Walker, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7852, Bethesda, MD 20892. (301) 435–1165. *walkermc@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group, NeuroAIDS and other End-Organ Diseases Study Section.
Date: July 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.
Contact Person: Abraham P. Bautista, PhD, Scientist Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5102, MSC 7852, Bethesda, MD 20892. (301) 435–1506. *bautista@crs.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, SBIR/STTR Genes, Genomes, and Genetics.
Date: July 14–15, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.
Contact Person: Michael A. Marino, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Rm. 2216 MSC 7890, Bethesda, MD 20892. (301) 435–0601. *marinomi@csr.nih.gov.*

Name of Committee: Biology of Development and Aging Integrated Review

Group, International and Cooperative Projects 1 Study Section.

Date: July 14–15, 2005.

Time: 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Sandy Warren, DMD, MPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5134, MSC 7843, Bethesda, MD 20892. (301) 435–1019. *warrens@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Synthetic and Biological Chemistry Review Panel.

Date: July 14, 2005.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Kathryn M. Koeller, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4095D, MSC 7806, Bethesda, MD 20892. 301–435–2681. *koellerk@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Renal and Urological Sciences Bioengineering Research Partnership (BRP) Special Emphasis Panel.

Date: July 14, 2005.

Time: 11:45 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Jean Dow Sipe, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4106, MSC 7814, Bethesda, MD 20892. 301/435–1743. *sipej@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, RIBT and LIRR Member Conflicts.

Date: July 14, 2005.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: George M. Barnas, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892. 301–435–0696. *barnasg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 ONC-J (02)M: COX-2 Inhibition of T-Cells in Human Lung Cancer.

Date: July 14, 2005.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Martin L. Padarathsingh, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6212, MSC 7804, Bethesda, MD 20892. (301) 435–1717. *padaratm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Visual System Special.

Date: July 14, 2005.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Jerome Wujek, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892. (301) 435–2507. *wujekjer@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Visual Stimulation.

Date: July 14, 2005.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Christine L. Melchior, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892. 301–435–1713. *melchioc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Biodata Management.

Date: July 14, 2005.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.

Contact Person: Malgorzata Klosek, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4188, MSC 7849, Bethesda, MD 20892. (301) 435–2211. *klosekm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Biology and Pathology of Modulator of FGF.

Date: July 14, 2005.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Syed M. Quadri, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6210, MSC 7804, Bethesda, MD 20892. (301) 435–1211. *quadris@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Infant Psychobiology and Sensory Development.

Date: July 14, 2005.

Time: 12:30 to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Anita Miller Sostek, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4100, MSC 7184, Bethesda, MD 20892. 301–435–1260. *sosteka@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Hematology Small Business.

Date: July 15, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Delia Tang, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4216, MSC 7802, Bethesda, MD 20892. 301–435–2506. *tangd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, SBIR/STTR: Early Childhood and Teen Risk Behavior.

Date: July 15, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Morrison House, 116 South Alfred Street, Alexandria, VA 22314.

Contact Person: Claire E. Gutkin, PhD, MPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3138, MSC 7759, Bethesda, MD 20892. 301–594–3139. *gutkincl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Orthopedics and Skeletal Biomechanics Special Emphasis Panel.

Date: July 15, 2005.

Time: 10 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Tamizchelvi Thyagarajan, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4016K, MSC 7814, Bethesda, MD 20892. 301–451–1327. *tthyagar@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Auditory Integration.

Date: July 15, 2005.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).

Contact Person: Christine L. Melchoir, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, 301–435–1713. *melchioc@csr.nih.gov.*

Names of Committee: Center for Scientific Review Special Emphasis Panel, BSPH Member Conflict Applications.

Date: July 15, 2005.
Time: 1:30 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.
Contact Person: Mark P. Rubert, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892. 301–435–1775. *rubertm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Hemostatic Agent.
Date: July 15, 2005.
Time: 2 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).
Contact Person: Robert T. Su, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4134, MSC 7802, Bethesda, MD 20892. (301) 435–1195. *sur@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Instrument Sharing Grant Review.
Date: July 15, 2005.
Time: 12:30 p.m. to 1 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (telephone conference call).
Contact Person: Angela Y. Ng, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804 (For courier delivery, use MD 20817), Bethesda, MD 20892. 301–435–1715. *nga@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 21, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12788 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Oral Cancer Metastasis.
Date: July 7, 2005.
Time: 2:30 p.m. to 3:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Joanna M. Watson, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6046–G, MSC 7804, Bethesda, MD 20892, 301–435–1048, *wastsonjo@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts: Stress and Cardiovascular Disease.
Date: July 8, 2005.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Mariela Shirley, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, 301–435–0913, *shirleym@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Teleconference to Review AOIC Member Conflict Applications.
Date: July 13, 2005
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Ranga V. Srinivas, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5222, MSC 7852, Bethesda, MD 20892, (301) 435–1167, *srinivar@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Teleconference for AOIC—Virology Member Conflict Applications.
Date: July 14, 2005.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Ranga V. Srinivas, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5222, MSC 7852, Bethesda, MD 20892, (301) 435–1167 *srinivar@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Bridges to the Future.
Date: July 15, 2005.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select, 480 King Street, Alexandria, VA 22314.
Contact Person: Cathleen L. Cooper, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4208, MSC 7812, Bethesda, MD 20892, 301–435–3566, *cooperc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business Occupational Health Meeting.
Date: July 15, 2005.
Time: 9 a.m. to 2 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Charles N. Rafferty, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7816, Bethesda, MD 20892, 301–435–3562, *raffertc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Affect in Chronic Diseases.
Date: July 15, 2005.
Time: 10 a.m. to 11 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Elisabeth Koss, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3028C, MSC 7759, Bethesda, MD 20892, (301) 435–1235, *kosse@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Innate Immunity CpG.
Date: July 15, 2005.
Time: 11 a.m. to 1 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Betty Hayden, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4206, MSC 7812, Bethesda, MD 20892, 301–435–1223, *haydenb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel,

Psychosocial Intervention in Chronic Diseases.

Date: July 15, 2005.

Time: 11 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Elisabeth Koss, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3028C, MSC 7759, Bethesda, MD 20892, (301) 435–1235, *kosse@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 ONC–J (04) M: Photo Dynamic Therapy and PET Imaging in Cancer.

Date: July 15, 2005.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Martin L. Padarathsingh, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6212, MSC 7804, Bethesda, MD 20892, (301) 435–1717, *padaratm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR–03–106: Innovations in Biomedical Computational Science and Technology.

Date: July 18, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Hotel, 4300 Military Road, Washington, DC 20015.

Contact Person: Guo Feng Xu, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217, MSC 7854, Bethesda, MD 20892, (301) 435–1032, *xuguofen@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, S10 Mass Spectrometer Systems.

Date: July 18–19, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: David R. Jollie, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4156, MSC 7806, Bethesda, MD 20892, (301) 435–1722, *jollieda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowships—Minority/Disability ZRG1 F10 (29L).

Date: July 18, 2005.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Wyndham City Center Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

Contact Person: Abdelouahab Aitouche, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2183, MSC 7318, Bethesda, MD 20892, (301) 435–2365, *abdelouahaba@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Minority/Disability Predoctral Fellowship Study Section.

Date: July 18–19, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Jurys Washington Hotel, 1500 New Hampshire Avenue, NW., Washington, DC 20036.

Contact Person: Seetha Bhagavan, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3022D, MSC 7846, Bethesda, MD 20892, (301) 435–1211, *bhagavas@csr.nih.gov*

Name of Committee: AIDS and Related Research Integrated Review Group, AIDS Immunology and Pathogenesis Study Section.

Date: July 18–19, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Embassy Row, 2015 Massachusetts Avenue, NW., Washington, DC 20036.

Contact Person: Abraham P. Bautista, MSC, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5102, MSC 7852, Bethesda, MD 20892, (301) 435–1506, *bautista@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Psychopathology and Adult Disorders.

Date: July 18–19, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2003 M Street, NW., Washington, DC 20036.

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, S10 Shared Instrumentation Application Review.

Date: July 18, 2005.

Time: 9 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Gopa Rakhit, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4154, MSC 7806, Bethesda, MD 20892, (301) 435–1721, *rakhitg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 HEME F 02M: Member Conflict: Thrombosis.

Date: July 18, 2005.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Jerrold Fried, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2114, MSC 7840, Bethesda, MD 20892, 301–435–2633, *friedje@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, HSOD Member Conflict.

Date: July 18, 2005.

Time: 10:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Karin F. Helmers, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7770, Bethesda, MD 20892, (301) 435–1017, *helmersk@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, G-cyclase in Pulmonary Vascular Function.

Date: July 18, 2005.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Rajiv Kumar, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7802, Bethesda, MD 20892, 301–435–1212, *kumarra@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Antiviral Therapeutics.

Date: July 18, 2005.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Marian Wachtel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892, 301–435–1148, *wachtelm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Prostaglandins in Transplant Tolerance.

Date: July 18, 2005.

Time: 1:30 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Cathleen L. Cooper, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4208, MSC 7812, Bethesda, MD 20892, 301–435–3566, *cooperc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, In-School Intervention.

Date: July 18, 2005.
Time: 2 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Victoria S. Levin, MSW, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7848, Bethesda, MD 20892, 301–435–0912, *levin@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Cognitive Neurophysiology.
Date: July 18. 2005.
Time: 3 p.m. to 4:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Bernard F. Driscoll, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, (301) 435–1242, *driscolb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts CADO.
Date: July 19, 2005.
Time: 1 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Reed A. Graves, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6166, MSC 7892, Bethesda, MD 20892, (301) 402–6297, *gravesr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Comparative Serial Learning.
Date: July 19, 2005.
Time: 1 p.m. to 2 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).
Contact Person: Luci Roberts, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3188, MSC 7848, Bethesda, MD 20892, (301) 435–0692, *roberlu@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, EPIC Member Conflict.
Date: July 19, 2005.
Time: 2 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive. Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Christopher Sempos, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3146, MSC 7770, Bethesda, MD 20892, (301) 451–1329, *semposch@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Neurotransmitters and Drugs of Abuse ZRG1 1FCNC (03).
Date: July 19, 2005.
Time: 2 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health. 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Michael Selmanoff, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3134, MSC 7844, Bethesda, MD 20892, (301) 435–1119, *mselmanoff@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, P53 Signaling and Cellular Response After Stress.
Date: July 19, 2005.
Time: 2 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Syed M. Quadri, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6210, MSC 7804, Bethesda, MD 20892, (301) 435–1211, *quadris@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Platelet Function.
Date: July 19, 2005.
Time: 3 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Delia Tang, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7802, Bethesda, MD 20892, 301–435–2506, *tangd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Breast and Ovarian Cancer Genetics.
Date: July 19, 2005.
Time: 3 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Joanna M. Watson, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6046–G, MSC 7804, Bethesda, MD 20892, 301–435–10486, *watsonjo@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group, Ethical, Legal, and Social Implications of Human Genetics-1.
Date: July 19–20, 2005.
Time: 5:30 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Cheryl M. Corsaro, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, 301–435–1045, *corsaroc@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 22, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–12795 Filed 6–28–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4992–N–09]

Privacy Act of 1974; Notice of a Computer Matching Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of a computer matching program between the Department of Housing and Urban Development and the Department of Education.

SUMMARY: In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), and the Office of Management and Budget (OMB) Guidelines on the Conduct of Matching Programs (54 FR 25818 (June 19, 1989); and OMB Bulletin 89–22, "Instructions on Reporting Computer Matching Programs to the Office of Management and Budget (OMB), Congress and the Public," HUD is issuing a public notice of its intent to conduct a recurring computer matching program with the Department of Education to utilize a computer information system of HUD, the Credit Alert Interactive Voice Response System (CAIVRS), with the Department of Education's debtor files. This match will allow prescreening of applicants for loans issued by or guaranteed by the federal government to ascertain if the applicant is delinquent in paying a debt owed to or insured by the federal government for HUD or the Department of Education for direct or guaranteed loans.

Before granting a loan, the lending agency and/or the authorized lending institution will be able to interrogate the CAIVRS debtor file which contains

delinquent debt information from the Departments of Agriculture, Education, Veteran Affairs, the Small Business Administration and judgment lien data from the Department of Justice, and verify that the applicant is not in default on a Federal judgment or delinquent on direct or guaranteed loans of participating Federal agencies. This match will allow prescreening of applicants for loans issued by or guaranteed by the federal government to ascertain if the applicant is delinquent in paying a debt owed to or insured by the federal government.

Authorized users do a prescreening of CAIVRS to determine a loan applicant's credit status with the federal government. As a result of the information produced by this match, the authorized users may not deny, terminate, or make a final decision on any loan assistance to an applicant or take other adverse action against such applicant, until an officer or employee of such agency has independently verified such information.

DATES: *Effective Date:* Computer matching is expected to begin July 29, 2005, unless comments are received which will result in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later.

Comments Due Date: July 29, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410.

Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: *From Recipient Agency* Jeanette Smith, Departmental Privacy Act Officer, Department of Housing and Urban Development, 451 7th St., SW., Room P8001, Washington, DC 20410, telephone number (202) 708–2374. (This is not a toll-free number.) A telecommunication device for hearing and speech-impaired individuals (TTY) is available at 1–800–877–8339 (Federal Information Relay Service). (This is a toll-free number.)

From Source Agency: Kathryn Griffin, Management Analyst, Collections, Federal Student Aid, Department of Education, Union Center Plaza, 830 First Street, NE., Room 41D2, Washington, DC 20202–5320, telephone number (202) 377–3252. (This is not a toll-free number.)

Reporting: In accordance with Pub. L. 100–503, the Computer Matching and Privacy Protection Act of 1988, as amended, and OMB Bulletin 89–22, "Instructions on Reporting Computer Matching Programs to the Office of Management and Budget (OMB), Congress and the Public," copies of this notice and report are being provided to the Committee on Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and OMB.

Authority: HUD has authority to collect and review mortgage data pursuant to the National Housing Act, as amended, 12 U.S.C. 1701 *et seq.*, and related laws. The Department of Education oversees and manages federal student aid programs pursuant to the Higher Education Act of 1965, as amended, 20 U.S.C. 1001 *et seq.* This computer matching will be conducted pursuant to Pub. L. 100–503, "The Computer Matching and Privacy Protection Act of 1988," as amended, and Office of Management and Budget (OMB) Circulars A–129 (Managing Federal Credit Programs) and A–70 (Policies and Guidelines for Federal Credit Programs). One of the purposes of all Executive departments and agencies is to implement efficient management practices for Federal Credit Programs. OMB Circulars A–129 and A–70 were issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Act of 1950, as amended; the Debt Collection Act of 1982 (Pub. L. 97–365), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001); and the Deficit Reduction Act of 1984, as amended.

Objectives To Be Met By the Matching Program: The matching program will allow the Department of Education access to a system that permits prescreening of applicants for loans issued by or guaranteed by the federal government to ascertain if the applicant is delinquent in paying a debt owed to or insured by the government. In addition, HUD will be provided access to the Department of Education's debtor data for prescreening purposes.

Records To Be Matched: HUD will utilize its system of records entitled HUD/DEPT–2, *Accounting Records.* The debtor files for HUD programs involved are included in this system of records. HUD's debtor files contain information on borrowers and co-borrowers who are currently in default (at least 90 days delinquent on their loans); or who have any outstanding claims paid during the last three years on insured or guaranteed home mortgage loans under Title II of the National Housing Act; or individuals who have had a claim paid in the last three years on a loan under Title I of the National Housing Act. For the CAIVRS match, HUD/DEPT–2, System of Records, receives its program inputs from HUD/DEPT–28, Property Improvement and Manufactured (Mobile) Home Loans—Default; HUD/DEPT–32, Delinquent/Default/Assigned Temporary Mortgage Assistance Payments (TMAP) Program; and HUD/CPD–1, Rehabilitation Loans—Delinquent/Default.

The Department of Education will provide HUD with debtor files contained in its system of records (Higher Education Act, Title IV Program File, 18–40–0024). HUD is maintaining the Department of Education's records only as a ministerial action on behalf of the Department of Education, not as part of HUD's HUD/DEPT–2 system of records. The Department of Education's data contain information on individuals who have defaulted on their guaranteed loans. The Department of Education will retain ownership and responsibility for their system of records that they place with HUD. HUD serves only as a record location and routine use recipient for the Department of Education's data.

Notice Procedures: HUD and the Department of Education have separate notification procedures. When the federal credit being sought is a HUD/FHA mortgage, HUD will notify individuals at the time of application (ensuring that routine use appears on the application form). The Department of Education will notify individuals at the time of application for federal student loan programs that their records will be matched to determine whether they are delinquent or in default on a federal debt. HUD and the Department of Education will also publish notices concerning routine use disclosures in the **Federal Register** to inform individuals that a computer match may be performed to determine a loan applicant's credit status with the Federal government.

Categories of Records/Individuals Involved: The debtor records include these data elements: SSN, claim number, the Department of Education's Regional Office Code, Collection Agency Code, program code, and indication of indebtedness. Categories of records include: records of claims and defaults, repayment agreements, credit reports, financial statements, and records of foreclosures. Categories of individuals include former mortgagors and purchasers of HUD-owned properties, manufactured (mobile) home and home improvement loan debtors who are delinquent or in default on their loans, and rehabilitation loan debtors who are delinquent or in default on their loans.

Period of the Match: Matching will begin at least 40 days from the date copies of the signed (by both Data Integrity Boards) computer matching agreement are sent to both Houses of Congress or at least 30 days from the date this notice is published in the **Federal Register**, whichever is later, providing no comments are received which would result in a contrary determination.

Dated: June 20, 2005.

Lisa Schlosser,

Chief Information Officer.

[FR Doc. 05–12770 Filed 6–28–05; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF THE INTERIOR

Indian Arts and Crafts Board

Renewal of Information Collection for Source Directory Publication

AGENCY: Indian Arts and Crafts Board.

ACTION: Notice and request for comments.

SUMMARY: The Indian Arts and Crafts Board (IACB) collects information to identify and revise listings for the Source Directory of American Indian and Alaska native owned and operated arts and crafts businesses. In compliance with the Paperwork Reduction Act of 1995, the IACB has submitted a request for renewal of approval of this information collection to the Office of Management and Budget (OMB), and requests public comments on this submission.

DATES: OMB has up to 60 days to approve or disapprove the information collection request, but may respond after 30 days; therefore, public comments should be submitted to OMB by July 29, 2005, in order to be assured of consideration.

ADDRESSES: Send your comments by facsimile (202) 395–6566 or e-mail (*OIRA_DOCKET@omb.eop.gov*) to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Department of the Interior Desk Officer (1085–0001). Also, please send a copy of your comments to Meridith Z. Stanton, Indian Arts and Crafts Board, U.S. Department of the Interior, MS 2058–MIB, 1849 C Street, NW., Washington, DC 20240 or by e-mail (*iacb@ios.doi.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the Source Directory application or renewal forms, *i.e.*, the information collection instruments, should be directed to Meridith Z. Stanton, Director, Indian Arts and Crafts Board, MS 2058-MIB, 1849 C Street, NW., Washington, DC 20240. You may also request additional information by telephone (202) 208–3773 (not a toll free call), or by e-mail (*iacb@ios.doi.gov*) or by facsimile (202) 208–5196.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Source Directory of American Indian and Alaska Native owned and operated arts and crafts enterprises is a program of the Indian Arts and Crafts Board that promotes American Indian and Alaska Native arts and crafts. The Source Directory is a forty-one page full-color illustrated publication featuring fine examples of contemporary American Indian and Alaska Native art from the major cultural areas in the United States. The Source Directory also comes with a listing of American Indian and Alaska native owned and operated arts and crafts businesses. This listing is included as an insert in the back cover of the Source Directory.

The service of being listed in this publication is provided free-of-charge to members of federally recognized tribes. Businesses listed in the Source Directory include American Indian and Alaska Native artists and craftspeople, cooperatives, tribal arts and crafts enterprises, businesses privately-owned-and-operated by American Indian and Alaska native artists, designers, and craftspeople, and businesses privately owned-and-operated by American Indian and Alaska Native merchants who retail and/or wholesale authentic Indian and Alaska native arts and crafts. Business listings in the Source Directory are arranged alphabetically by State. The Source Directory may be ordered either from the Oklahoma Arts and Crafts Cooperative, P.O. Box 966, Anadarko, Oklahoma 73005 or the Sioux Indian Museum, 222 New York Street, Rapid City, South Dakota 57701, for a cost of $11.50 which includes shipping and handling. The business listings are also available on the Board's Web site (*http://www.iacb.doi.gov*).

The Director of the Board uses this information to determine whether an individual or business applying to be listed in the Source Directory meets the requirements for listing. The approved application will be printed in the Source Directory. The Source Directory is updated annually to include new businesses and to update existing information.

II. Method of Collection

To be listed in the Source Directory, interested individuals and businesses must submit: (1) a letter requesting an entry in the Source Directory, (2) a draft of their business information in a format like the other Source Directory listings, (3) a copy of the individual's or business owner's tribal enrollment card; and for businesses, proof that the business is organized under tribal, State, or Federal law; and (4) a certification that the business is an American Indian or Alaska Native owned and operated cooperative, tribal enterprise, or nonprofit organization or that the owner of the enterprise is an enrolled member of a federally recognized American Indian tribe or Alaska Native group.

The following information is collected in a single-page form that is distributed by the Indian Arts and Crafts Board. Although listing in the Source Directory is voluntary, submission of this information is required for inclusion in the Directory.

Information collected	Reason for collection
Name of business, mailing address, city, zip code (highway location, Indian reservation, etc.), telephone number and e-mail address.	To identify the business to be listed in the Source Directory, and method of contact.
Type of organization	To identify the nature of the business entity.
Hours/season of operation	To identify those days and times when customers may contact the business.
Internet Web site address	To identify whether the business advertises and/or sells inventory online.
Main categories of products	To identify the products that the business produces.
Retail or wholesale products	To identify whether the business is a retail or wholesale business.
Mail order and/or catalog	To identify whether the business has a mail order and/or catalog.
Price list information, if applicable	To identify the cost of the listed products.

Information collected	Reason for collection
For a cooperative or tribal enterprise, a copy of documents showing that the organization is formally organized under tribal, State, or Federal law.	To determine whether the business meets the eligibility requirement for listing in the Source Directory.
Signed certification that the business is an American Indian or Alaska Native owned and operated cooperative, tribal enterprise, or nonprofit organization.	To obtain verification that the business is an American Indian or Alaska Native owned and operated business.
Copy of the business owner's tribal enrollment card	To determine whether the business owner is an enrolled member of a federally recognized tribe.
Signed certification that the owner of the business is a member of a federally recognized tribe.	To obtain verification that the business owner is an enrolled member of a federally recognized tribe.

The proposed use of the information: The information collected will be used by the Indian Arts and Crafts Board:

(a) to determine whether an individual or business meets the eligibility requirements for inclusion in the Source Directory, *i.e.*, whether they are either an American Indian or Alaska Native owned and operated cooperative, tribal enterprise, or nonprofit organization, or an enrolled member of a federally recognized American Indian tribe or Alaska Native group; and

(b) to identify the applicant's business information to be printed in the Source Directory.

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 Office of Management and Budget control number. The IACB has submitted a request to OMB to renew its approval of this information collection for an additional three years. There are four types of application forms: (1) new businesses—group; (2) new businesses—individual; (3) businesses already listed—group; and (4) businesses already listed—individual. Each respondent will only be asked to complete one applicable form.

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments on the collection of information was published on March 29, 2005 (70 FR 15869). No comments were received. This notice provides the public with an additional 30 days in which to comment on the following information collection activity.

III. Data

(1) *Title:* Source Directory of American Indian and Alaska Native owned and operated arts and crafts businesses application and renewal forms.

OMB Control Number: 1085–0001.

Type of Review: Renewal of an existing collection.

Affected Entities: Business or other for-profit; tribes.

Estimated Annual Number of Respondents: 100.

Frequency of Collection: Annual.

(2) Annual reporting and recordkeeping burden.

Total Annual Reporting per Respondent: 15 minutes.

Total Annual Burden Hours: 25 hours.

(3) *Description of the need and use of the information:* Submission of this information is required to receive the benefit of being listed in the Indian Arts and Crafts Board Source Directory. The information is collected to determine the applicant's eligibility for the service and to obtain the applicant's name and business address to be printed in the publication.

IV. Request for Comments

The Department of the Interior invites comments 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 the burden of the collection and the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other collection techniques or other forms of information technology.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Dated: June 23, 2005.

Meridith Z. Stanton,

Director, Indian Arts and Crafts Board.

[FR Doc. 05–12780 Filed 6–28–05; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Information Collection To Be Sent to the Office of Management and Budget (OMB) for Approval Under the Paperwork Reduction Act; Trade of Threatened Beluga Sturgeon (Huso huso)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service or Service) plan to send the collection of information described below to OMB for approval under the provisions of the Paperwork Reduction Act of 1995. The information collected is needed to effectively implement the provisions of the special rule to control the trade of threatened beluga sturgeon (*Huso huso*) (70 FR 10493, March 4, 2005). That rule requires that range countries for beluga sturgeon provide us with information and reports on a variety of issues related to beluga sturgeon conservation and trade. This information is necessary for us to gauge the effectiveness of international management efforts in the Caspian Sea and Black Sea regions, and to determine if the permit exemptions granted under the special rule are bringing about appropriate actions by national fisheries authorities and multilateral agreements.

DATES: You must submit comments on or before August 29, 2005.

ADDRESSES: Send your comments on this information collection to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS–222–ARLSQ, 4401 North Fairfax Drive,

Arlington, VA 22203; *hope_grey@fws.gov* (e-mail); or (703) 358–2269 (fax).

FOR FURTHER INFORMATION CONTACT: To request a copy of the information collection requirements, explanatory information, or related materials, contact Hope Grey at the above addresses or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), 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)). We plan to send a request to OMB for approval of the collection of information required by the special rule to control the trade of threatened beluga sturgeon (70 FR 10493, March 4, 2005). Federal agencies may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. However, there is no OMB control number for this information collection because fewer than 10 entities currently commercially trade in beluga caviar and, therefore, this requirement under the Paperwork Reduction Act does not apply. While an OMB control number is not necessary for collections that have such a low number of affected parties, it is reasonable to assume that there may be additional applicants or affected parties in the coming years. Therefore, we will request a 3-year term of approval for this information collection.

The special rule requires that range countries for beluga sturgeon develop multilateral fishery management plans, implement appropriate sturgeon fisheries laws and regulations, and provide biennial reports to us on a variety of issues related to beluga sturgeon conservation and trade. Range countries must do this if they wish to have an exemption to the standard threatened species permits issued under 50 CFR part 17, normally required under the Endangered Species Act to import, export, re-export, or conduct interstate commerce in listed species.

The special rule also requires certain information from U.S. and foreign aquaculture facilities wishing to trade in beluga sturgeon products without threatened species permits. If such facilities wish to import, re-export, or conduct U.S. interstate commerce in their beluga sturgeon products without threatened species permits, they must submit proof that they have agreements with one or more range countries to research, protect, or recover wild beluga sturgeon. These facilities must use captive-bred broodstock in all of their beluga sturgeon production. Also, upon application for a permit exemption under the special rule, these facilities must submit proof that the relevant government authority certifies they are following aquaculture best-management practices to prevent the escape of live specimens or pathogens into surrounding habitats. Finally, these facilities must also submit biennial reports to the Service documenting their collaboration with beluga sturgeon range countries to study and conserve wild beluga sturgeon. We will use the information collected from the relevant aquaculture facilities to determine if the special rule's exemptions are having the intended effect of capacity building and technology transfer from viable businesses to the range countries.

Beluga sturgeon are currently known to occur only in the Caspian and Black Seas and certain rivers connected to these basins. Of the 14 countries where the species still occurs, only 11 have significant beluga sturgeon habitat in the Caspian Sea, Black Sea, or Danube River, and, consequently, these countries (Azerbaijan, Bulgaria, Georgia, Islamic Republic of Iran, Kazakhstan, Romania, Russian Federation, Serbia and Montenegro, Turkey, Turkmenistan, and Ukraine; hereafter referred to as the "littoral states") take responsibility for cooperative management of the species. Only eight of these countries (Azerbaijan, Bulgaria, Islamic Republic of Iran, Kazakhstan, Romania, Russian Federation, Serbia and Montenegro, and Turkmenistan) currently permit commercial harvest and export of beluga sturgeon.

Overharvest, severe habitat degradation, and other factors led to the listing of beluga sturgeon as threatened throughout its range under the Endangered Species Act (Act) and in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). On March 4, 2005, we issued a special rule under Section 4(d) of the Act to control the trade in beluga sturgeon, monitor the effects of commercial aquaculture on recovery of wild beluga sturgeon populations, and effect robust conservation programs in the littoral states. The 4(d) rule prohibits all trade (import, export, re-export, and foreign and interstate commerce) in beluga sturgeon and beluga sturgeon products, except as provided in the special rule or with permits under the provisions of Section 10 of the Act. This special rule initially allows littoral states 6 months from the rule's effective date to submit a suite of reports, including information on management measures, to us for review. During this initial 6-month period, imports, re-exports, and exports of, and interstate and foreign commerce in, certain beluga sturgeon caviar and meat may continue without a requirement for threatened species permits. This is intended to provide the littoral states time to submit the required documents. Similarly, we will consider making programmatic permit exemptions for commercial aquaculture facilities outside the littoral states if they meet certain criteria for: (1) Enhancing the survival of populations of wild beluga sturgeon and (2) not threatening native aquatic fauna in the country in which the facility is located. CITES documentation will still be required for any international movement of beluga sturgeon and beluga sturgeon products, except as they may qualify for an exemption as personal or household effects.

By September 6, 2005, each littoral state wishing to export beluga caviar or beluga meat to the United States without the need for a threatened species permit issued under 50 CFR 17.32 must submit to the Service's Division of Scientific Authority a copy of a cooperative management plan for that state's respective basin. This plan must be agreed to by each littoral state in the relevant basin (not just exporting nations). These comprise Bulgaria, Georgia, Romania, Serbia and Montenegro, Turkey, and Ukraine in the Black Sea and Danube River, and, in the Caspian Sea, Azerbaijan, the Islamic Republic of Iran, Kazakhstan, the Russian Federation, and Turkmenistan. This basinwide management plan must contain the following elements:

1. A clear statement of the recovery and management objectives for the plan, including a specification of the stock(s) concerned, a definition of what constitutes overfishing for that stock, and a rebuilding objective and schedule for that stock;

2. A statement of standard fishery management measures and habitat improvement strategies the nations involved will use (*e.g.*, size limits, target harvest rates, quotas, seasons, fishing gear, effort caps, fish passage improvement, water quality controls);

3. A complete statement of the specific regulatory, monitoring, and research requirements that each cooperating nation must implement to comply with the management plan;

4. A complete description of how stock survey data and fisheries data are used to establish annual catch and export quotas, including a full

explanation of any models used and the assumptions underlying those models;

5. Procedures under which the nations may implement and enforce alternative management measures that achieve the same conservation benefits for beluga sturgeon as the standards mentioned in paragraph 2; and

6. A complete schedule showing when nations must take particular actions to comply with the plan.

Within 90 days of receipt, the Service's Division of Scientific Authority will review these basinwide management plans for completeness and clarity. If any elements of the management plans are missing or unclear, we will give the appropriate littoral states 60 days to provide additional information. If the littoral states fail to respond or fail to submit basinwide management plans by the specified deadlines, or if we are unable to confirm that all littoral states are signatories to those plans, we will immediately suspend trade with all littoral states in the given basin (Caspian Sea or Black Sea) until we are satisfied that such management plans exist and have been agreed to by the relevant countries.

Also by September 6, 2005, the effective date of this special rule, all littoral states wishing to export beluga caviar and meat to the United States under an exemption from threatened species permits must submit copies of national legislation and national fishery regulations pertaining to the harvest, trade, aquaculture, restocking, and processing of beluga sturgeon. These laws and regulations must exhibit clear means to implement the cooperative management plans mentioned in paragraph 1 above. The Service's Division of Scientific Authority will review these laws and regulations for completeness and clarity within 90 days of receipt. If any elements of the national legislation or national fishery regulations are missing or unclear, we will ask the appropriate littoral state(s) to provide additional information within 60 days of the date we contact them. If the littoral states fail to respond or fail to submit copies of national laws and regulations by the specified deadlines, we will immediately suspend trade with the given littoral states until we are satisfied that such laws and regulations are in effect.

No later than December 1, 2005, and every 2 years on that anniversary, all littoral states wishing to export beluga sturgeon products to the United States must submit a report to the Service. This report must contain, at a minimum:

1. A description of the specific fishery regulations that affect the harvest of *Huso huso* in the respective littoral state, with any changes from the previous report highlighted;

2. A description of any revisions to the cooperative management program mentioned above, including any new models, assumptions, or equations used to set harvest and export quotas;

3. Updated time-series of information on beluga sturgeon obtained from monitoring programs, including estimates of relative or absolute stock size, fishing mortality, natural mortality, spawning activity, habitat use, hatchery and restocking programs, and other relevant subjects;

4. A summary of law enforcement activities undertaken in the last 2 years, and a description of any changes in programs to prevent poaching and smuggling, including indicators of their effectiveness;

5. A summary of the revenues the commercial exploitation of beluga sturgeon generates in the respective littoral state, and a summary of any documented conservation benefits resulting from the commercial harvest program in that country (*e.g.*, revenues allocated to hatchery and restocking programs or research programs); and

6. Export data for the previous 2 calendar years.

Starting in December 2005, we will review information in the littoral state reports and any other pertinent information on wild beluga sturgeon conservation. Thereafter, we will conduct reviews biennially within 90 days of receiving the reports. If any elements of the biennial reports are missing or unclear, we will give the appropriate littoral states 60 days to provide additional information. If the littoral states fail to respond or fail to submit biennial reports by the specified deadline, we will immediately suspend trade with the given littoral states. We will use these reviews to determine if littoral state management programs are leading to recovery of wild beluga sturgeon stocks.

Based on the review of biennial reports, we propose to administratively suspend or restrict imports, re-exports, exports, and interstate commerce involving beluga sturgeon products from the littoral states if we determine that wild beluga sturgeon stock status worsens or threats to the species increase. Any such restriction would also apply to foreign commerce in beluga sturgeon products involving persons under U.S. jurisdiction.

Except in certain circumstances, the special rule does not exempt beluga sturgeon or any beluga sturgeon products derived from aquaculture or grow-out operations outside the littoral states from the provisions of the Act, which could (1) undermine the incentives for conserving wild *Huso huso* in the littoral states; (2) utilize *Huso huso* broodstock from the littoral states without any direct benefit to wild populations; and (3) result in the release of beluga sturgeon or disease pathogens into habitats outside their native range. Therefore, import, export, re-export, or interstate or foreign commerce involving any beluga sturgeon products that originate from aquaculture operations outside the littoral states will normally require a threatened species permit in addition to any applicable CITES documents (except as provided for captive-bred wildlife in 50 CFR 17.21(g)). However, we will consider programmatic exemptions to this prohibition for beluga caviar and meat from aquaculture facilities that provide information to our offices that demonstrate (1) the relevant regulatory agency has certified that the facility uses best-management practices to prevent escapes and disease introduction into surrounding habitats, and the Service has approved the specific practices; (2) the facility has entered into a formal agreement with one or more littoral states to study, conserve, or otherwise enhance the survival of wild populations of beluga sturgeon; and (3) the facility uses only captive-bred beluga sturgeon (*i.e.*, captive F1 generation and beyond) in its production systems. We will require the facilities to file biennial reports so we can document the results and efficacy of any arrangements with littoral states.

Title: Trade of Threatened Beluga Sturgeon (*Huso huso*).

Form number: None.

Frequency: For littoral states, an initial reporting requirement for basinwide management plans and national regulations is due by September 6, 2005. Biennial reports are due from littoral state governments on December 1, 2005, and every 2 years thereafter. For aquaculture facilities outside the littoral states, we require an initial application with relevant documents followed by biennial reports on the anniversary of the exemption.

Description of respondents: Foreign government officials and sturgeon aquaculture businesses.

Total annual burden hours: For littoral state governments in 2005: 5,120 hours; for biennial reporting years: 1,280 hours. For aquaculture facilities: 80 hours in year of application, 80 hours in biennial reporting years.

Total annual responses: Nine (eight littoral state governments, one commercial aquaculture facility).

We invite your comments on: (1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the information collection; (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.

Dated: June 20, 2005.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 05–12854 Filed 6–28–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Marriage and Dissolution in Courts of Indian Offenses

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of submission of information collection to the Office of Management and Budget.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, we are submitting this collection of information to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs for approval and renewal.

DATES: Written comments must be submitted by July 29, 2005.

ADDRESSES: Written comments are to be sent directly to the Desk Officer for the Department of the Interior, by e-mail to *OIRA_DOCKET@omb.eop.gov*, or by telefacsimile to (202) 395–6566. Please send a copy of your comments to Ralph Gonzales, Office of Tribal Services, Bureau of Indian Affairs, 1951 Constitution Avenue, NW., Mail Stop 320–SIB, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Ralph Gonzales, (202) 513–7629.

SUPPLEMENTARY INFORMATION:

On November 3, 2004, a notice of proposed renewal was published in the **Federal Register** (69 FR 64094) which requested comments. No comments were received.

I. Abstract

The Bureau of Indian Affairs, Department of the Interior, must collect personal information to carry out the requirements of title 25, section 11.600(c)—Marriage, and title 25, section 11.606(c)—Dissolution of Marriage, in order for a Courts of Indian Offenses (CFR court) to issue a marriage license or dissolve a marriage. The information is collected at the initiation of an applicant and only basic information necessary for the CFR court to properly dispose of the matter.

II. Method of Collection

Basic information is requested of applicants for the issuance of a marriage license or for the dissolution of a marriage by a CFR court under 25 CFR part 11. Information is collected by the Clerk of the CFR court so that the functions under 25 CFR 11.600(c), and 11.606(c) may be carried out.

III. Information Collected

CFR courts have been established on certain Indian reservations under the authority vested in the Secretary of the Interior by 5 U.S.C. 301 and 25 U.S.C. 2 and 9; and 25 U.S.C. 13, which authorizes appropriations for "Indian judges." See *Tillett* v. *Hodel*, 730 F. Supp., 381 (W.D. Okla. 1990), *aff'd* 931 F.2d 636 (10th Cir. 1991), *United States* v. *Clapox*, 13 Sawy. 349, 35 F. 575 (D. Ore. 1888). The CFR Courts provide adequate machinery for the administration of justice for Indian tribes in those areas where tribes retain jurisdiction over Indians and is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction. Accordingly, CFR courts exercise jurisdiction under title 25 part 11 of the Code of Federal Regulations. Domestic Relations are governed by 25 CFR 11.600 which authorizes the CFR court to conduct marriages and dissolve marriages. In order to be married in a CFR court a marriage license must be obtained (25 CFR 11.601). To comply with this requirement an applicant must respond to the following six questions found at 25 CFR 11.600(c):

(c) A marriage license application shall include the following information:

(1) Name, sex, occupation, address, social security number, and date and place of birth of each party to the proposed marriage;

(2) If either party was previously married, his or her name, and the date, place, and court in which the marriage was dissolved or declared invalid or the date and place of death of the former spouse;

(3) Name and address of the parents or guardian of each party;

(4) Whether the parties are related to each other and, if so, their relationship;

(5) The name and date of birth of any child of which both parties are parents, born before the making of the application, unless their parental rights and the parent and child relationship with respect to the child have been terminated; and

(6) A certificate of the results of any medical examination required by either applicable tribal ordinances, or the laws of the State in which the Indian country under the jurisdiction of the CFR court is located.

For the purposes of § 11.600, the social security number information is requested to confirm identity. Previous marriage information is requested to avoid multiple simultaneous marriages, and to ensure that any pre-existing legal relationships are dissolved. Information on consanguinity is requested to avoid conflict with state or tribal laws against marriages between parties who are related by blood as defined in such laws. Medical examination information may be requested if required under the laws of the state in which the CFR court is located.

To comply with the requirement for dissolution of marriage an applicant must respond to the following six questions found at 25 CFR 11.606(c):

(1) The age, occupation, and length of residence within the Indian country under the jurisdiction of the court of each party;

(2) The date of the marriage and the place at which it was registered;

(3) That jurisdictional requirements are met and that the marriage is irretrievably broken in that either (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the proceeding or (ii) there is a serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage, and there is no reasonable prospect of reconciliation;

(4) The names, age, and addresses of all living children of the marriage and whether the wife is pregnant;

(5) Any arrangement as to support, custody, and visitation of the children and maintenance of a spouse; and

(6) The relief sought.

For the purposes of § 11.606, Dissolution proceedings, information on occupation and residency is necessary to establish CFR court jurisdiction. Information on the status of the parties, whether they have lived apart 180 days or if there is serious marital discord warranting dissolution, is necessary for the court to determine if dissolution is appropriate. Information on the children of the marriage, their ages and whether the wife is pregnant is necessary for the CFR court to determine the appropriate level of support that may be required from the non-custodial parent.

Title: Law and Order on Indian Reservations, 25 CFR 11, Subpart F.

OMB approval number: 1076–0094.

Type of request: Extension of a currently-approved collection.

Description of the need for the information and proposed use of the information: The information is submitted in order to obtain or retain a benefit, namely, the issuance of a marriage license or a decree of dissolution of marriage from the CFR court.

Affected entities: Indian applicants that are under the jurisdiction of one of the 24 established CFR courts are entitled to receive the benefit of this action by the CFR Court.

Estimated number of respondents: Approximately 260 applications for a marriage license or petition for dissolution of marriage will be filed in the 24 Courts of Indian Offenses annually.

Proposed frequency of responses: On occasion as needed.

Total annual burden: The average burden of submitting a marriage license or petition for dissolution of marriage is 15 minutes per application. The total annual burden is estimated as 65 hours.

Estimated cost: There are no costs to consider, except estimated costs of $100 per court annually, for the material supplies and staff time required by the CFR court.

IV. Request for Comments

The Department of the Interior invites comments to be sent to the Office of Management and Budget concerning:

(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 the burden (including the hours and cost) of the proposed collection of information, 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 collection techniques or other forms of information technology.

The Office of Management and Budget has up to 60 days to approve or disapprove the information collection but may respond after 30 days; therefore, comments submitted in response to this notice should be submitted to OMB within 30 days in order to assure their maximum consideration. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. If you wish us to withhold any information, you must state this prominently at the beginning of your comment. We will honor your request to the extent allowable by law.

Please note that 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 Office of Management and Budget control number.

Dated: June 7, 2005.

Michael D. Olsen,

Acting Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 05–12808 Filed 6–28–05; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK964–1410–HY–P; F–14938–A, BSA–5]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, DOI.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to St. Michael Native Corporation. The lands are located in T. 23 S., Rs. 17 & 18 W., Kateel River Meridian, in the vicinity of St. Michael Alaska, and contain 8.467 acres. Notice of the decision will also be published four times in the Nome Nugget.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until July 29, 2005, to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599.

FOR FURTHER INFORMATION, CONTACT: Renee Fencl, by phone at (907) 271–5067, or by e-mail at *Renee_Fencl@ak.blm.gov*. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact Ms. Fencl.

Renee Fencl,

Land Law Examiner, Branch of Adjudication II.

[FR Doc. 05–12856 Filed 6–28–05; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–930–1320–EL]

Notice of Competitive Coal Lease Sale, Kentucky

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Competitive Coal Lease Sale (KYES–51002).

SUMMARY: Notice is hereby given that certain coal resources described below in the Gray Mountain Federal Mineral Tract (KYES–51002) in Leslie County, Kentucky, will be offered for competitive lease by sealed bid in accordance with the provisions for competitive lease sales in 43 CFR 3422, the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*), and the Mineral Leasing Act for Acquired Lands of 1947.

DATES: The lease sale will be held at 10 a.m. on Wednesday, July 27, 2005. The outside of the sealed envelope containing the bid must clearly state that the envelope contains a bid for Coal Lease Sale KYES–51002, and is not to be opened before the date and hour of the sale. The bid must be sent by certified mail, return receipt requested, or be hand delivered to the address indicated below, and must be received on or before 4:30 p.m., Tuesday, July 26, 2005. Any bid received after the time specified will not be considered, and will be returned.

ADDRESSES: The sale will be held at the Bureau of Land Management (BLM)—Eastern States, 7450 Boston Boulevard, Springfield, Virginia 22153. Sealed bids must be submitted to the Cashier, BLM–Eastern States, at that address.

FOR FURTHER INFORMATION: Contact Timothy Best, BLM–Eastern States, at (703) 440–1527.

SUPPLEMENTARY INFORMATION: This coal lease sale is being held in response to a lease by application (LBA) filed by

Bledsoe Coal Leasing Company of London, Kentucky. The Gray Mountain Federal Mineral Tract (KYES–51002) consists of underground-minable coal in the Hazard #4 and Hazard #4A seams, found in the Daniel Boone National Forest tracts 3094Bb, 3094Be, and 3094Az, containing 1,210.40 acres more or less, in Leslie County, Kentucky. Both the surface and mineral interests are owned by the Federal Government.

The Gray Mountain Federal Mineral Tract contains approximately 2,900,000 tons of recoverable coal which will be mined by underground methods and is limited to the Hazard #4 and

Hazard #4A seams. The rank of the coal is High Volatile A Bituminous. The proximate analysis of the coal seams is as follows:

Hazard #4 and Hazard #4A seams estimated recoverable Federal coal: 2,900,000 tons

Proximate Analysis (%):

Moisture—6.2800

Ash—8.200

Volatile—33.7700

Fixed—Carbon 50.5800

Sulfur—1.800

Btu/lb.—13,833

The Gray Mountain Federal Mineral Tract will be leased to the qualified bidder of the highest cash amount provided that the high bid meets or exceeds the BLM's estimate of the fair market value for the tract. The Department of the Interior has established a minimum bid of $100.00 per acre or fraction thereof for the tract. The minimum bid is not intended to represent fair market value. The Authorized Officer will determine the fair market value after the sale. The lease issued as a result of this offering will provide for payment of an annual rental of $3.00 per acre or fraction thereof, and a royalty of 8 percent of the value of coal produced by underground mining methods. The value of the coal will be determined in accordance with 30 CFR 206.250.

The required Detailed Statement, including bidding instructions for the tract offered and the terms and conditions of the proposed coal lease, is available from the BLM–Eastern States at the address above. Case file documents for KYES–51002 are available for inspection at the BLM–Eastern States Office.

Michael D. Nedd,

State Director, Eastern States.

[FR Doc. 05–12924 Filed 6–27–05; 1:46 pm]

BILLING CODE 4310–AG–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–512]

In the Matter of Certain Light-Emitting Diodes and Products Containing Same; Notice of Commission Determination to Review a Final Determination on Violation of Section 337; Schedule for Filing Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review a portion of the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on May 10, 2005, regarding whether there is a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3090, or Michelle Walters, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http//www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this patent-based section 337 investigation based on a complaint filed by Osram GmbH and Osram Opto Semiconductors GmbH, both of Germany (collectively, "Osram"). 69 FR 32609 (June 10, 2004). In the complaint, as supplemented and amended, Osram alleged violations of section 337 of the Tariff Act of 1930 in the importation of certain light-emitting diodes and products containing the same by reason of infringement of United States Patent Nos. 6,066,861, 6,277,301, 6,613,247, 6,245,259, 6,592,780 (collectively, the "Particle Size Patents"), 6,576,930 (the "930 patent"), 6,376,902, 6,469,321, 6,573,580 (collectively, the "Lead Frame Patents"), and 6,716,673 (the "673 patent"). The complaint, as subsequently amended, named three respondents: Dominant Semiconductors Sdn. Bhd. ("Dominant"), American Opto Plus, Inc. ("AOP"), and American Microsemiconductor, Inc. ("AMS"). The Commission has terminated the investigation as to AOP and AMS based on settlement agreements.

On May 10, 2005, the ALJ issued his final ID finding a violation of section 337 with regard to the '673 patent and containing his recommended determination on remedy and bonding. He found no violation of section 337 with respect to the nine other patents asserted by Osram. Specifically, he found that the asserted claims of the Particle Size Patents are invalid for indefiniteness, that the asserted claims of the '930 patent and the Lead Frame Patents are not infringed, and that the domestic industry requirement was not met for the '930 patent. Osram and the Commission investigative attorney ("IA" filed petitions for review of the ALJ's final ID. Dominant filed a response in opposition to the petitions from Osram and the IA. The IA filed a response to Osram's petition. Osram filed a motion for leave to file a reply to Dominant's response to its petition for review.

Having examined the record of this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, the Commission has determined (1) not to grant Osram's motion for leave to file a reply; (2) not to review the ALJ's determination of violation with respect to the '673 patent; and (3) to review the ALJ's findings and conclusions regarding the Particle Size Patents, the '930 patent, and the Lead Frame Patents.

In connection with its review, the Commission is particularly interested in responses to the following questions:

1. With respect to the Particle Size Patents, state your position with regard to whether the disputed limitation, "mean grain diameter d_{50}," can be construed and, if so, what the appropriate construction is. Identify the intrinsic evidence (and, if appropriate, extrinsic evidence) upon which you rely. Your response should separately discuss the meaning of the words "mean" and "d_{50}."

2. With respect to the '930 patent, provide your claim construction of the phrase "path length," including an analysis of any intrinsic evidence upon which you rely.

3. With respect to the Lead Frame Patents, provide your claim construction of the phrase "starting from," including an analysis of any intrinsic and/or extrinsic evidence upon which you rely.

4. With respect to the Lead Frame Patents, given that the ALJ construed the term "lead frame" to exclude glue dots, can the glue dot at issue in the accused device be considered part of the alleged equivalent in assessing infringement under the doctrine of equivalents?

5. Assuming the answer to the previous question is "yes," are the three ground leads plus the glue dot at issue in the accused device equivalent to the claimed external connections, especially with respect to the limitation "starting from said chip carrier part run toward the outside in a stellate form?" (You should discuss the "function, way, result" test in your analysis.)

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see* In the Matter of Certain Devices for Connecting Computers via Telephone Lines, Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. The written submissions should be concise and should thoroughly reference the record. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the May 10, 2005, recommended determination by the ALJ on remedy and bonding. Complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the dates that the patents expire and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on July 8, 2005. Reply submissions must be filed no later than the close of business on July 15, 2005. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42–46 of the Commission's Rules of Practice and Procedure (19 CFR 210.42–46).

By order of the Commission.

Issued: June 24, 2005.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–12846 Filed 6–28–05; 8:45 am]

BILLING CODE 7020–02–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–535]

In the Matter of Certain Network Communications Systems for Optical Networks and Components Thereof; Notice of a Commission Determination Not To Review an Initial Determination Granting a Motion To Withdraw the Complaint and Terminate the Investigation; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ's") initial determination ("ID") granting a motion to withdraw the complaint and terminate the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3152. Copies of the ID and all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: The Commission instituted this patent-based

section 337 investigation on March 30, 2005, based on a complaint filed by Ciena Corporation, of Linthicum, Maryland ("Ciena "). 70 FR 16304. The respondents named in the notice of investigation are Nortel Networks Corporation and Nortel Networks Limited, of Brampton, Ontario, Canada; Nortel Networks, Inc., of Richardson, Texas; and Flextronics International Ltd., and Flextronic Telecom Systems Ltd., of Port Louis, Mauritius. The complaint alleged that respondents violated section 337 by importing into the United States, selling for importation, and/or selling within the United States after importation certain network communications systems for optical networks and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 5,978,115 and 6,618,176.

On June 7, 2005, the presiding ALJ issued the subject ID, Order No. 6, granting a motion filed by Ciena pursuant to rule Commission rule 210.21(a) to terminate the investigation on the basis of withdrawal of the complaint. No party filed a petition for review of the subject ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: June 23, 2005.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–12847 Filed 6–28–05; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 340–E and H (Second Review)]

Solid Urea From Russia and Ukraine

AGENCY: United States International Trade Commission.

ACTION: Revised schedule for the subject reviews.

DATES: Effective July 23, 2005.

FOR FURTHER INFORMATION CONTACT: Olympia DeRosa Hand (202–205–3182), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: On April 7, 2005, the Commission established a schedule for the conduct of the second reviews of the subject investigations (70 FR 19502, April 13, 2005). The Commission has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B). The Commission, therefore, is revising its schedule to conform with its extension.

The Commission's new schedule for the reviews is as follows: requests to appear at the hearing must be filed with the Secretary to the Commission not later than September 12, 2005; the prehearing conference will be held at the U.S. International Trade Commission Building at 9:30 a.m. on September 14, 2005; the prehearing staff report will be placed in the nonpublic record on September 1, 2005; the deadline for filing prehearing briefs is September 13, 2005; the hearing will be held at the U.S. International Trade Commission Building at 9:30 a.m. on September 22, 2005; the deadline for filing posthearing briefs is October 3, 2005; the Commission will make its final release of information on November 7, 2005; and final party comments are due on November 9, 2005.

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: June 24, 2005.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–12848 Filed 6–28–05; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–05–025]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: July 12, 2005, at 11 a.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. No. 731–TA–282 (Second Review) (Petroleum Wax Candles From China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before July 28, 2005.)
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: June 24, 2005.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–12896 Filed 6–27–05; 10:36 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Parole Commission

[6P04091]

Public Announcement; Sunshine Act

Pursuant to the Government in the Sunshine Act, (Public Law 94–409) (5 U.S.C. Section 552b).

AGENCY HOLDING MEETING: Department of Justice, United States Parole Commission.

TIME AND DATE: 2 p.m., Tuesday, July 5, 2005.

PLACE: 5550 Friendship Blvd., Fourth Floor, Chevy Chase, MD 20815.

STATUS: Open.

MATTER TO BE CONSIDERED: The following matter has been placed on the agenda for the open Parole Commission meeting:

Consideration of rule and procedures to be followed for reviewing a decision pursuant to 28 CFR 2.27, upon request of the Attorney General as provided in 18 U.S.C. 4215(c).

AGENCY CONTACT: Thomas W. Hutchison, Chief of Staff, United States Parole Commission, (301) 492–5990.

Dated: June 24, 2005.

Pamela A. Posch,

Assistant General Counsel, U.S. Parole Commission.

[FR Doc. 05–12890 Filed 6–27–05; 10:36 am]

BILLING CODE 4410–31–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11175, et al.]

Proposed Exemptions; Milan Uremovich, D.D.S., P.C. Profit Sharing Plan and Trust (the Plan)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice. Comments and requests for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. ____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *"moffitt.betty@dol.gov"*, or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Milan Uremovich, D.D.S., P.C. Profit Sharing Plan and Trust (the Plan), Located in Arvada, CO.

[Application No. D–11175]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).[1] If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the leasing (the New Lease) by the individual account in the Plan of Dr. Milan Uremovich (the Account), of certain office space (the Office Space) to Milan Uremovich, D.D.S., P.C., (the Employer), a party in interest with respect to the Plan, provided that the following conditions are met:

(a) The terms and conditions of the New Lease are at least as favorable to the Account as those the Account could obtain in a comparable arm's length transaction with unrelated parties.

(b) The fair market rental value of the Office Space leased to the Employer is determined by a qualified, independent appraiser.

(c) The rent charged by the Account under the New Lease and for each renewal term is, at all times, not less than the fair market rental value of the Office Space, as determined by a qualified, independent appraiser. The rental payments under the New Lease are adjusted once every five years after the initial term and after each renewal term by the qualified, independent appraiser to ensure that the New Lease payments are not greater than or less than the fair market rental value of the leased space. In no event may the rent be adjusted below the rental amount paid for the preceding term of such lease.

(d) The fair market value of the Office Space represents, at all times, no more than 25 percent of the total assets of the Account.

(e) The Account does not pay any real estate fees, commissions, or other expenses with respect to the New Lease.

(f) The New Lease is a triple net lease under which the Employer, as lessee, pays, in addition to the base rent, all normal operating expenses associated with the Office Space, including real estate taxes, insurance, maintenance, repairs and utilities.

(g) Dr. Uremovich is the only participant in the Plan whose Account is affected by the New Lease.

(h) Within 90 days of the publication, in the **Federal Register**, of the notice granting this exemption, the Employer files a Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes under section 4975(a) of the Code that are attributed to the past purchase of the Building by Dr. Uremovoich's individual account in the Milan Uremovich, D.D.S., P.C. Profit Sharing Plan (the Profit Sharing Plan), a

[1] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

predecessor to the current Plan, and the leasing of Office Space in the Building by the Profit Sharing Plan Account and the Account to Dr. Uremovich.

Summary of Facts and Representations

1. The Employer (or the Applicant) is a Colorado corporation engaged in the business of providing dental services. Dr. Uremovich is the corporation's sole shareholder. Since 1974, the Employer has operated a dental practice in a single story building (the Building) containing 7,219 square feet of space. The Building is located at 11890 W. 64th Avenue. (This address is also known as "11890 Ralston, Arvada, Colorado.") Until October 1, 2001, the Employer sponsored two retirement plans, the Profit Sharing Plan and the Milan Uremovich, D.D.S., P.C. Money Purchase Plan and Trust (the Money Purchase Plan), which were then merged into the current "Milan Uremovich, D.D.S., P.C. Profit Sharing Plan and Trust" (otherwise referenced herein as "the Plan").

The Plan provides for individually directed accounts wherein each Plan participant exercises investment discretion over the assets of their respective accounts. Dr. Uremovich and Carol Uremovich, his wife, serve as the directed trustees of the Plan. As of September 30, 2004, the Plan had total aggregate assets of $2,706,515 and 7 participants, including Dr. Uremovich. Also as of that same date, the Account had total assets of $2,312,063. Among the assets of the Plan that are currently allocated to Dr. Uremovich's Account is the Building in which the Employer conducts its dental practice.

2. Prior to the October 1, 2001 merger of the Profit Sharing Plan and the Money Purchase Plan, Dr. Uremovich directed his Profit Sharing Plan Account to purchase the Building. The Applicant represents that the acquisition of the Building presented an opportunity for the Profit Sharing Plan Account to diversify its portfolio holdings among equity, bonds, and property assets. Furthermore, at the time of the purchase, equity and fixed income prices were falling while commercial real estate prices were rising thereby making the Building a good investment.

The Profit Sharing Plan Account acquired the Building for the total cash consideration of $386,000. The seller was a former joint venture group (the Joint Venture Group) comprised of Donald G. Richards, Edward J. Seibert, Jr., and Dr. Uremovich. Each joint venturer held a ⅓ ownership interest in the Building, as tenants in common. The Profit Sharing Plan Account paid no real estate fees or commissions in connection with the acquisition of the Building. At that time, the purchase price represented 58% of the Profit Sharing Plan Account's assets and 50% of the Profit Sharing Plan's total assets. The Applicant states the Building was and continues to be clear of any mortgages or encumbrances.

3. On August 20, 2000, Dr. Uremovich had the Building appraised by Mr. Richard DeFord, S.R.A., a qualified, independent appraiser, who was the President of DeFord and Associates, an independent appraisal firm located in Lakewood, Colorado. Dr. Uremovich was contemplating dissolving the Joint Venture Group and therefore requested that Mr. DeFord establish the Building's fair market value. In a limited scope appraisal, Mr. DeFord placed the fair market value of the Building at $353,000 as of August 20, 2000. Mr. DeFord stated that the Building, based on its overall condition and 100% occupancy, would sell at the appraised value within 12 months. Therefore, he recommended the value of the Building be discounted for the period of time required to sell such property.

The Joint Venture Group also retained the services of Messrs. Basil S. Katsarous, MAI, SRA and Daniel K. Sorrells, Associate Appraiser/Certified General Appraiser, who were affiliated with West Terra (West Terra), a real estate appraisal and consulting firm located in Denver, Colorado, to determine the fair market value of the Building. In an appraisal report dated November 10, 2000, the appraisers placed the fair market value of the Building at $375,000 and the fair market rental value of the rentable space in the Building at $15 per square foot as of August 23, 2000.

It is represented by the Applicant that the Building's $386,000 purchase price was ultimately determined by averaging both the DeFord and West Terra appraisals. In addition, the Profit Sharing Plan Account paid 6.5% above the averaged price for a total purchase amount of $386,000. At the time of the January 31, 2001 purchase transaction, none of the underlying appraisals were updated to reflect the then current fair market value of the Building.

4. As part of the terms of the purchase transaction, the Profit Sharing Account assumed the existing leases in force. Among the lessees was the Employer, which was already leasing 1,366 square feet of Office Space in the Building from the Joint Venture Group under the provisions of a written lease (the First Lease). The First Lease had an expiration date of November 4, 2001 and required a monthly rental of $1,708. The First Lease also provided for annual adjustments to the Colorado Consumer Price Index.

The other lessees in the Building were, and continue to be, unrelated parties. They are James Gallagher, D.M.D. and Calm Spirit Acupuncture, Inc.

On June 1, 2001, the Profit Sharing Plan Account negotiated with the Employer to increase the amount of square footage under the First Lease from 1,366 square feet to 2,400 square feet pursuant to an amendment to the First Lease. The amendment was not executed in writing nor was there a corresponding increase in the rental amount.

On November 5, 2001, the Applicant explains that a new written lease (the Second Lease) was entered into between the Employer and the newly-merged Plan for an additional five year period ending on December 1, 2006. The Second Lease was allocated exclusively to Dr. Uremovich's Account in the Plan as was the First Lease.[2] The Second Lease provides for a monthly rent of $4,000, which represented a rental increase to $20 per square foot from the former rental amount of $15 per square foot. The Second Lease also provides that the rent be adjusted each year in accordance with the Colorado Consumer Price Index. Although the Second Lease was initially silent about which party would be responsible for paying for utilities, real estate taxes and insurance with respect to the leased premises, it did provide that the Account would not be required to pay for any leasehold improvements.

In May 2003, the Second Lease was amended in order to clarify certain of its provisions. In this regard, the Plan and the Employer agreed that (a) the Employer would be responsible for paying its pro rata share of real estate taxes, insurance and leasehold improvements associated with the Office Space it occupied; (b) the annual rental payment under such lease would be adjusted each November 1 during the term of the Second Lease to reflect increases in the Colorado Consumer Price Index made during the preceding year, but not decreases; (c) at the time of expiration of the Second Lease on December 1, 2006, the Employer would be eligible to renew the lease for two additional two year terms; (d) the lease rate at the beginning of a renewal term would be determined by a qualified, independent appraiser; and (e) during the second year of each renewal term

[2] Because the Building and the New Lease have been allocated to Dr. Uremovich's Account in the Plan, the "Account" rather than "the Plan" is hereinafter deemed to be the lessor for the purposes of this exemption.

under the Second Lease, the rent would be adjusted upward to reflect increases in the Colorado Consumer Price Index, but would never be adjusted downward.

It is represented that all times under the Second Lease, the Employer has paid rent in a timely manner and there have been no defaults or delinquencies in rental payments.

5. The Applicant represents that legal counsel failed to inform Dr. Uremovich that the Building purchase and Lease transactions would constitute prohibited transactions in violation of the Act. In this regard, approximately 20 months after the transactions (*i.e.*, September 2002), Dr. Uremovich had a conversation with different legal counsel regarding updates to the Plan documents. In the course of the conversation, Dr. Uremovich was made aware of the prohibited transactions entered into by the Employer and the Profit Sharing Plan Account. Subsequent to the conversation, Dr. Uremovich filed an exemption application with the Department.

6. In conjunction with the preparation of the exemption application, Dr. Uremovich consulted an independent real estate broker, Mr. Charles S. Ochsner, President of REMAX Alliance of Arvada, Colorado, a commercial and residential real estate brokerage firm, to determine the fair market rental value of the Office Space occupied by the Employer. In a "look back" appraisal report dated January 21, 2003, Mr. Ochsner concluded that the fair market rental value of such Office Space was between $18–$21 per square foot for the period of November 2001 through January 2003. Mr. Ochsner noted that the Building was in good condition, situated in a very convenient location, and had ample parking. He also noted that the Employer occupied the prime lease space in the Building in terms of view and location. Therefore, Mr. Ochsner concluded that the lease rate paid by the Employer was within an acceptable range of fair market value rent.

7. Lease rates in the Building were also analyzed by Mr. Richard DeFord. Taking into account other comparable rentals and the condition, location, and features of the Building, Mr. DeFord concluded in a "look back" appraisal report dated May 14, 2003, that the fair market rental value of the Office Space occupied by the Employer was $20 per square foot for the period January 30, 2001 through February 1, 2003. Mr. DeFord noted that this rate was in line with rental rates for good quality dental space in 2001. In arriving at this figure, Mr. DeFord explained that he took into account the fact that lease rates were high for dentists and doctors because of the extra costs associated with this type of lessee. According to Mr. DeFord, dentist and doctor facilities require more water and air hookups, as well as many small "check-up" rooms.

8. Because the Building purchase and the Lease transactions appear to reflect less than arm's length dealings between the Employer and the Plan Accounts and were prohibited transactions in violation of the Act, the Department is not prepared to provide exemptive relief for such transactions. In this regard, the Profit Sharing Plan Account paid a 6.5 percent premium over the average of the two independent appraisals in order to acquire the Building. In addition, Dr. Uremovich did not obtain contemporaneous independent appraisals of the Building at the time of the acquisition, at the inception of the First and Second Leases, or when the Employer sought an increase in rental space. Further, the Department notes that the Building represented a large percentage of the Profit Sharing Plan Account's total assets at the time of acquisition.

Therefore, the Applicant represents that within 90 days of the publication, in the **Federal Register**, of the notice granting the exemption, the Employer will File a Form 5330 with the Service and pay all applicable excise taxes that are due. However, in order that the Employer may continue leasing the Office Space from the Account under the provisions of a new, written lease, the Applicant requests a prospective administrative exemption from the Department.

9. Thus, the New Lease will be effective on the date the grant notice is published in the **Federal Register**. It will have an initial term of five years and will require a minimum rent of $4,130 per month or $49,560 per year. Such rental amount will be based upon the fair market rental value of the Office Space as determined by Michael J. Martin, CFA, MAI,[3] a qualified, independent appraiser, on the date the New Lease is entered into by the parties. On April 16, 2005, Mr. Martin determined that the fair market rental value of the Office Space was $20.65 per square foot. Following the conclusion of the initial term, the New Lease may be renewed for two additional terms, each of 5 year's duration.

10. Rent for any of the two renewal periods under the New Lease will be determined at the outset of such renewal period in an amount no less than the Office Space's fair market value as established by a qualified, independent appraiser, but it will be for no less than the preceding lease term's rental value.

Under the New Lease, the Employer will pay all damages, costs and expenses which the Account may suffer or incur by reason of any default of the Employer or failure to comply with New Lease covenants, and all Office Space costs associated with real estate taxes, fire insurance premiums, water rent, sewer rent, electricity, gas, cost of maintenance, repairs, utilities and agrees to indemnify and hold the Account harmless against all claims, which might arise from the Applicant's use of the Office Space. The New Lease will also require the Employer to maintain personal and property liability insurance on the leased premises. The Account will pay no fees or commissions in connection with the administration of the New Lease.

11. The Applicant represents that the New Lease is in the best interest of the Account because it will help maintain the value of the Account's investment in commercial real estate by ensuring that the property has a strong, long-term anchor tenant. Further, the New Lease will help the Account maintain a suitable stream of income from its investment.

12. In summary, it is represented that the proposed transaction will satisfy the statutory criteria for an administrative exemption under section 408(a) of the Act because:

(a) The terms and conditions of the New Lease will be at least as favorable to the Account as those the Account could obtain in a comparable arm's length transaction with unrelated parties.

(b) The fair market rental value of the Office Space leased to the Employer at the inception of the New Lease and for each renewal term will be determined by a qualified, independent appraiser.

(c) The rent charged by the Account under the initial term of the New Lease and for each renewal term will, at all times, be no less than the fair market rental value of the Office Space, as determined by a qualified, independent appraiser. The rental payments under the New Lease will be adjusted once every five years after the initial term and after each renewal term by the qualified, independent appraiser to ensure that the New Lease payments are not greater

[3] Michael J. Martin, CFA, MAI, is the founder of Meta Advisory Services, Inc. of Centennial, Colorado. He has over twenty years of experience in real estate, business and finance valuations. In May 2005, upon Mr. DeFord's unavailability, the Applicant retained the services of Mr. Martin to update the DeFord November 24, 2003 appraisal report. In addition, Mr. Martin will also update the April 16, 2005 fair market rental update on the date of the New Lease's execution.

than or less than the fair market rental value of the leased space. In no event may the rent be adjusted below the rental amount paid for the preceding term of such lease.

(d) The fair market value of the Office Space will represent, at all times, no more than 25 percent of the total assets of the Account.

(e) The Account will not pay any real estate fees, commissions, or other expenses with respect to the New Lease.

(f) The New Lease is a triple net lease under which the Employer, as lessee, will pay, in addition to the base rent, all normal operating expenses associated with the Office Space, including real estate taxes, insurance, maintenance, repairs and utilities.

(g) Dr. Uremovich is the only participant in the Plan, whose Account will be affected by the New Lease.

(h) Within 90 days of the publication, in the **Federal Register**, of a notice granting this proposed exemption, the Employer will file a Form 5330 with the Service and pay all excise taxes applicable under section 4975(a) of the Code that are attributed to the former Profit Sharing Plan Account's purchase of the Building and leasing of the Office Space therein to Dr. Uremovich by the Profit Sharing Plan Account and the Account.

Notice to Interested Persons

Because Dr. Uremovich is the only participant in the Plan whose Account has been affected by the transactions, the Department has determined that there is no need to distribute the notice of proposed exemption to interested persons. Therefore, the comments and requests for a hearing are due 30 days after the date of publication of the notice of pendency in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Silvia M. Quezada of the Department, telephone (202) 693–8553. (This is not a toll-free number).

Edward D. Jones & Co., L.P. (the Applicant), Located in St. Louis, Missouri

[Application No. D–11216]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the extension of credit to the Applicant, by certain IRAs whose assets are held in custodian accounts by the Applicant, a party in interest and a disqualified person with respect to the IRAs, in connection with the Applicant's use of uninvested IRA cash balances (Free Credit Balance(s)) in such accounts, provided that the following conditions are met:

(a) Neither the Applicant nor any affiliate has any discretionary authority or control with respect to the investment of the cash balances of the IRA that are held in the Free Credit Balance or provides investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

(b) Edward Jones credits the IRA with monthly interest on its Free Credit Balance at an annual rate no less than the bank national index rate for interest checking, as reported in the Bank Rate Monitor. This rate will be subject to a minimum rate level of 10 basis points (0.10%);

(c) The interest rate will be no less than the rate paid by Edward Jones on non-IRA Free Credit Balances;

(d) The IRA independent fiduciary has the ability to withdraw the Free Credit Balance at any time without restriction;

(e) The Applicant provides in writing, to the IRA independent fiduciary, prior to any transfer of the IRA's available cash into a Free Credit Balance account, an explanation (i) that funds invested in a Free Credit Balance are not segregated and may be used in the operation of the business of the Applicant; (ii) of the method to be used for crediting interest to the Free Credit Balance; and (iii) that the funds are payable to the IRA on demand at any time;

(f) The IRA independent fiduciary approves the transfer of the IRA's available cash into a Free Credit Balance account no less frequently than once every three months, or once every month if there is account activity for the particular month other than the crediting of interest, together with or as a part of the customer's statement of account; and

(g) The Applicant periodically provides a written statement subsequent to the proposed transaction informing the independent IRA fiduciary of the IRA that (i) such funds are not segregated and may be used in the operation of the business of such broker or dealer, and (ii) such funds are payable on the demand at the customer.

Summary of Facts and Representations

1. The Applicant is a brokerage firm with its principal office in St. Louis, Missouri. It is a member of the National Association of Securities Dealers, the New York Stock Exchange and the Chicago Stock Exchange. The firm serves as custodian of self-directed IRAs, to which it provides brokerage services. As of March 26, 2005, the Applicant had 2,005,000 IRA accounts, with total assets of $99.7 billion. The IRAs fall into three categories:

Category	Number of Accounts	Assets (billion)
Traditional IRAs	1,348,000	$90.3
Roth IRAs	571,000	4.4
SEP-IRAs	86,000	5.0

The IRA accountholder is responsible to direct the Applicant with respect to the investments to be made, retaining sole responsibility for those investment decisions.[4] Investments are limited to those that are legally permissible for an IRA account and that are securities that are obtainable through the Applicant in the regular course of its business, such as mutual funds, stocks, bonds, certificates of deposit and unit trusts. The Applicant charges each IRA account an administrative fee of $30 per IRA account (which is sometimes waived), as well as fees for brokerage services and reimbursement for its reasonable expenses and any taxes paid with respect to the account.

2. Under the terms of the Applicant's retirement account agreements, the Applicant is pre-authorized to conduct daily sweeps of cash for its IRA accounts into a money market fund, to assure that all IRA account assets are fully invested. The money market fund used is the Edward Jones Money Market Fund (the Cash Fund), which currently holds total assets of $10.8 billion. The cash may be a dividend or interest payment that is too small to invest, an annual contribution awaiting investment, or proceeds from investments, sales or maturities.

The sweep is conducted automatically, without any discretion exercised on the part of the Applicant. All available cash is swept.[5] The IRA accountholder determines when to withdraw the swept cash, so that the

[4] The Applicant will not have any authority, control or responsibility concerning the IRAs and, as a result, the Applicant has no discretion over uninvested IRA cash balances.

[5] The term available cash excludes, for example, the proceeds of checks that have not yet cleared, so that Edward Jones is not obligated to advance funds against amounts that ultimately may not be collected.

Applicant has no discretion over how long the cash remains in the Cash Fund.

The Cash Fund is a registered mutual fund that invests primarily in U.S. Treasury and government agency securities maturing in 397 days or less, with a dollar-weighted average maturity of 90 days or less. As a money market fund, it has the goal of maintaining a constant $1.00 net asset value per share. It has two classes of shares, Investment Shares and Retirement Shares. IRAs for which the Applicant is custodian typically invest in the Retirement Shares.

The investment adviser to the Cash Fund is Passport Research Ltd., which is owned 50.5% by a subsidiary of Federated Investors, Inc. and 49.5% by the Applicant. It receives an annual investment advisory fee on a sliding scale of 0.500% of net assets on the first $500 million down to 0.400% of net assets over $2 billion—for the most recent reported period, its advisory fee was 0.41%. The Cash Fund also pays administrative and shareholder services fees to Federated Services Company and the Applicant. The Applicant serves as the transfer and dividend-disbursing agent for the Cash Fund, and receives a fee that is a fixed dollar amount multiplied by the number of shareholder accounts.[6]

While the Investment Share accounts are subject to a minimum average monthly account balance requirement of $2,500, and are charged a $3/month minimum balance fee in months when that requirement is not met, the Retirement Share accounts are not currently subject to such a requirement. As a result, as of September 30, 2003, there were 1,421,997 Retirement Share accounts holding $2,500 or less—91.0% of the Retirement Share accounts, accounting for only 2.1% of total Cash Fund assets—and over two-thirds of those (1,088,870 accounts) held $100 or less—accounting for under 0.1% of total Cash Fund assets. The consequence of having such a large number of small accounts with such small balances is to increase the fixed costs attributable to the Retirement Shares, particularly the transfer and dividend disbursing agent fees that are based in large part on the number of accounts and transactions. Thus, while the Investment Shares represent over four times as much assets as the Retirement Shares, the transfer and dividend disbursing agent fees deducted from the Retirement Shares exceed the amount of such fees deducted from the Investment Shares ($4.8 million versus $4.6 million, for the year ended August 31, 2003). The result is that the Retirement Shares currently bear an expense ratio of 118 basis points, versus 86 basis points for the Investment Shares. Because of the current low interest rates, the cost of transfer agency services can result in minimal returns for the Retirement Shares—currently down to 0.05%. To alleviate this problem, the Applicant is planning to impose on the Retirement Shares the $2,500 minimum balance requirement, thereby subjecting accounts below that balance to the $3/month minimum balance fee. At current market returns, the minimum balance fee would more than offset any investment income.

3. The Applicant seeks exemptive relief to maintain the IRA cash balances in the Applicant's broker-dealer account. The type of account the Applicant is proposing to use is a customer cash account that holds cash on deposit temporarily awaiting investment, drawn principally from dividends and interest paid on securities held in the customer's securities account. Unlike a subordinated loan, the cash can be withdrawn on demand and used for trading and investment activity.

The Applicant represents that according to the SEC, the Securities Investor Protection Corporation would presume that cash balances are left in the securities account for the purpose of purchasing securities, and would therefore be covered, absent substantial evidence to the contrary. The Applicant also represents the following: The cash accounts that would be used by the Applicant would not constitute loans of the type not covered by SIPC insurance. Even though interest would be paid, the accounts would be established pursuant to customer relationships for the holding of cash accumulated through dividends, interest and sales of securities, with the cash available on demand for use in investment transactions. As such, the Applicant represents that these would be free credit balances of the type that the SEC has acknowledged are covered by SIPC insurance[7]. SIPC covers cash claims up to $100,000 and the Applicant represents that a customer's free credit balance, of the type Edward Jones contemplates using, would be the type of cash that, assuming a "customer" relationship, is covered as described in SEC Release No. 34–18262 (Nov. 17, 1981), "Notice to Broker-Dealers Concerning Interest-Bearing free Credit Balances[8]."

4. The funds will be held by the Applicant as Free Credit Balances, and will be treated as debt obligations of the broker-dealer to its customers. The Applicant will pay the IRAs interest on

[6] On December 12, 2004, the Securities and Exchange Commission (SEC) instituted cease-and-desist proceedings pursuant to Section 8a of the Securities Act of 1993 (Securities Act) and Sections 15(b) and 21(c) of the Securities Exchange Act of 1934 against the Applicant. The allegations included: (1) That the Applicant violated Section 17(a)(2) of the Securities Act, Rule 10b–10 under the Securities Exchange Act, Section 17a–4 of the Securities Exchange Act, Section 15B of the Securities Exchange Act, and MSRB Rule G–15; (2) that the Applicant effected sales in mutual fund shares and 529 Plans without disclosing its financial incentives to sell the fund shares of preferred mutual fund families which compensated the Applicant on the basis of revenue sharing; (3) that the Applicant effected sales in mutual fund shares and 529 Plans without adequately disclosing the amounts and source of remuneration received in connection with the transactions either by written document or on its public Web site; (4) that the Applicant failed to ensure that adequate disclosure was contained in prospectuses and Statements of Additional Information (SAIS) concerning revenue sharing, directed brokerage payments or other incentives offered to the Applicant; (5) that the firm failed to supervise, establish, maintain and enforce adequate written supervisory procedures and systems related to sales of preferred family mutual funds and 529 Plans, including the failure to properly review prospectuses and SAIS of preferred fund families to make sure that they contained adequate disclosures of potential conflicts of interest; and (6) that the Applicant improperly encouraged its investment representatives to favor the sale of mutual funds and 529 Plans on the basis of the amount of revenue the Applicant received in connection with those sales. To resolve these allegations, without admitting or denying any misconduct, the Applicant has agreed to pay $75 million in disgorgement and civil penalties. Going forward, the Applicant has agreed, among other things, to place and maintain on its Web site specific disclosures showing the information regarding these disclosures to its customers. The Applicant is also required to establish procedures documenting its basis for adding or removing mutual fund families from its preferred list.

The Applicant represents that no revenue sharing is paid to the Applicant in connection with the investment in the money market fund since the investment adviser to the fund is partly owned (49.5%) by the Applicant. The Applicant further represents that the SEC investigation does not affect the proposed exemption because the investigation and settlement did not target any conduct relating to the money market fund, and the requirements of the settlement do not affect the current sweep arrangement.

[7] The Department expresses no opinion as to whether the Free Credit balances are covered by SIPC insurance.

[8] The Applicant represents that in an effort to ensure that those persons who have contributed capital to the debtor do not receive the special protection (priority) afforded customers under the Bankruptcy Code and The Securities Investor Protection Act (SIPA), Congress has seen fit to include language in both statutes to deny this statutory priority to subordinated lenders. In *SEC* v. *F.O. Baroff Company*, [1973–74] Fed. Sec. L. Rep. ¶ 94,576 (S.D.N.Y. 1974) the court dealt with securities that were transferred to a broker as, in effect, a loan, to help the broker out of a cash bind. Relying in part on the statutory provision described above, the court found that because there was no reasonable expectation that the securities would be used for trading or investment activity, they were not covered by SIPC insurance—the person making the claim simply was not in a "customer" relationship with the broker.

the amounts at no less than the bank national index rate for interest checking, as reported in the Bank Rate Monitor.

This rate will remain be subject to a minimum rate level of 10 basis points (0.10%), so as not to disadvantage the IRAs transferring assets from the Retirement Shares of the Cash Fund (which currently are earning 5 basis points (0.05%)). The Applicant will commit to use, for purposes of determining the monthly Free Credit Balance interest rate, the targeted Bank Rate Monitor rate in effect on the first day of the month during which the interest is to be paid.

A Free Credit Balance can be called on demand, and cannot be treated as part of the broker-dealer's capital for minimum net capital purposes—it is not an investment in the broker-dealer, but rather customer funds. In addition, customer Free Credit Balances of the type that would be used here are subject to reserve requirements, which are designed to assure that these funds are used solely for the broker-dealer's customer-related business and are protected against misuse and insolvency.

5. Free Credit Balances are defined by federal securities law regulations as "liabilities of a broker or dealer to customers that are subject to immediate cash payment to customers on demand, whether resulting from sales of securities, dividends, interest, deposits or otherwise (17 CFR 240.15c3–3(a)(8))." Until a Free Credit Balance amount is repaid, it can be used in connection with the operation of the broker-dealer's business. Rule 15c3–2 under the Securities Exchange Act of 1934 (Rule 15c3–2) requires a broker-dealer to establish adequate procedures governing the use of its Free Credit Balances, providing as follows: (1) Each customer for whom a credit balance is carried will be given or sent, together with or as a part of the customer's statement of account, whenever sent but not less frequently than once every three months, a written statement informing such customer of the amount due to the customer by such broker or dealer on the date of such statement; and (2) The statement must contain a written notice that (a) such funds are not segregated and may be used in the operation of the business of such broker or dealer, and (b) such funds are payable on the demand of the customer. In compliance with these requirements, the Applicant will provide a statement on customer account statement in accordance with Rule 15c3–2.

Customers with Free Credit Balances are further protected by a special reserve requirement. If the Applicant's total amounts owed or payable to its customers that are attributable to, among other things, Free Credit Balances exceed (subject to certain adjustments) the total amounts receivable by the Applicant from certain sources related to its customer accounts, the Applicant is required to maintain a minimum level of deposits in a segregated special reserve account at a bank (17 CFR 240.15c3–3(e). Because Free Credit Balances are treated as part of the assets and liabilities of the broker-dealer, they can be used in the Applicant's business and thereby reduce its borrowing needs. The Applicant will receive this benefit from the change; it also will lose transfer agency and other fees it will otherwise receive from the money market fund.

6. Compliance with the terms of the exemption will be monitored by IRA fiduciaries independent of the Applicant, the IRA accountholders, who will initially approve the cash sweep into the Free Credit Balance accounts and monitor the balances in those accounts through receipt of quarterly or monthly statements. For this reason, the Applicant represents that the exemption will be administratively feasible because the Department will not have to monitor the exemption's implementation or enforcement.

7. Because the Applicant plans to impose a minimum balance requirement (subject to a minimum balance fee) of $2,500 on the Retirement Shares of the Cash Fund, uninvested cash below that level will, under current market conditions, earn income that is less than the fee imposed if swept into the Cash Fund. Absent exemptive relief, the IRAs could suffer an economic loss on this cash in the form of lost principal and/or investment income. If the requested exemption is granted, making the Free Credit Balance option available, the small amounts of cash deposited in the Free Credit Balance account will be able to earn income pending investment.

8. Under the terms of the requested exemption, those IRA accounts withdrawing from the Cash Fund will earn interest on their Free Credit Balances that will not decrease below 0.10%, a rate that exceeds the 0.05% rate they were earning in the money market fund at the time of withdrawal. The interest rate also will be no less than the same rate paid by the Applicant on non-IRA Free Credit Balances. The independent fiduciaries of those IRAs will be able to withdraw the Free Credit Balances and reinvest them in other assets upon demand at any time. The arrangement under which available cash will be invested in Free Credit Balance accounts at the Applicant will be subject to the approval of an IRA independent fiduciary with respect to each IRA following full disclosure. The IRA independent fiduciary will be able to monitor the accumulation in the Free Credit Balance account through quarterly or monthly reports, and would be on notice of the interest rate to be earned and that the amounts are payable to the IRA on demand at any time.

9. In summary, the Applicant represents that the proposed transaction satisfies the statutory criteria for an administrative exemption under section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) Neither the Applicant nor any affiliate has any discretionary authority or control with respect to the investment of the cash balances of the IRA that are held in the Free Credit Balance or provides investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets; (b) the Applicant credits the IRA with monthly interest on its Free Credit Balance at an annual rate no less than the bank national index rate for interest checking, as reported in the Bank Rate Monitor. This rate will be subject to a minimum rate level of 10 basis points (0.10%); (c) The interest rate will be no less than the rate paid by the Applicant on non-IRA Free Credit Balances; (d) The IRA has the ability to withdraw the Free Credit Balance at any time without restriction; (e) The Applicant provides in writing to the IRA independent fiduciary, prior to any deposit of the IRA's available cash into a Free Credit Balance account, an explanation (i) that funds invested in a Free Credit Balance are not segregated and may be used in the operation of the business of the Applicant; (ii) of the method to be used for crediting interest to the Free Credit Balance; and (iii) that the funds are payable to the IRA on demand at any time; (f) The IRA independent fiduciary approves the deposit of the IRA's available cash into a Free Credit Balance account no less frequently than once every three months, or once every month if there is account activity for the particular month other than the crediting of interest, together with or as a part of the customer's statement of account; and (g) The Applicant provides a written statement subsequent to the proposed transaction informing the IRA independent fiduciary that (i) such funds are not segregated and may be used in the operation of the business of such broker or dealer, and (ii) such funds are payable to IRA on demand.

Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed in Washington, DC, this 23rd day of June, 2005.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 05–12834 Filed 6–28–05; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Exemption Application Nos. D–10993 & L–10994, *et al.*]

Prohibited Transaction Exemption; 2005–07; Grant of Individual Exemptions; PAMCAH–UA Local 675 Pension Plan (Pension Plan); PAMCAH–UA Local 675 Training Fund (Training Fund) (Collectively the Plans)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

PAMCAH–UA Local 675 Pension Plan (Pension Plan); PAMCAH–UA Local 675 Training Fund (Training Fund) (Collectively the Plans); Located in Honolulu, Hawaii

[Prohibited Transaction Exemption No. 2005–07; Application Nos. D–10993 and L–10994]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) The Training Fund's purchase (the Purchase) of an improved parcel of real property (the Property) located at 731 Kamehameha Highway, Pearl City, Hawaii from the Pension Plan; and (2) a loan (the Loan) from the Pension Plan to the Training Fund to finance the Purchase. This exemption is subject to the following conditions:

(a) The fair market value of the Property is established by an independent, qualified, real estate appraiser that is unrelated to the Plans or any party in interest;

(b) The Training Fund pays no more, and the Pension Plan receives no less than the fair market value of the Property as determined at the time of the transaction;

(c) The Pension Plan will, on irreversible default of the Training Fund, reassume the ownership of the Property automatically without requirement of a foreclosure and cancel the promissory note;

(d) Under the terms of the Loan, the Pension Plan in the event of default by the Training Fund has recourse only against the Property and not the against the general assets of the Training Fund;

(e) The terms and conditions of the Loan are not less favorable to the Plans than those obtained in arm's-length transactions with unrelated parties;

(f) The Plans will not pay any commissions or other expenses with respect to the transaction;

(g) The Bank of Hawaii (BOH), acting as an independent, qualified fiduciary for the Training Fund, has determined that the transactions are in the best interest of the Training Fund and its participants and beneficiaries;

(h) The First Hawaiian Bank (FHB), acting as an independent, qualified fiduciary for the Pension Plan, has determined that the transactions are in the best interest of the Pension Plan and its participants and beneficiaries: and

(i) FHB will monitor the terms and conditions of the Loan throughout the duration of the Loan and take whatever actions are necessary to protect the rights of the Pension Plan.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published on March 23, 2005 at 70 FR 14716.

Mutual Service Life Insurance Company (MSL); Located in Arden Hills, MN

[Prohibited Transaction Exemption 2005–08; Exemption Application No. D–11267]

Exemption

Section I. Covered Transaction

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code,[1] shall not apply, effective January 1, 2005, to the receipt of cash (Cash) or policy credits (Policy Credits) by any eligible member (Eligible Member), including an Eligible Member which is an employee benefit plan (within the meaning of section 3(3) of Act), an individual retirement annuity (within meaning of section 408(b) or 408A of the Code), or a tax sheltered annuity (within the meaning of section 403(b) of the Code)(each a Plan), including Plans sponsored by MSL for its employees (the MSL Plans), in exchange for the termination of such Eligible Member's membership interest in MSL, in accordance with the terms of a plan of conversion (the Plan of Conversion) adopted by MSL and implemented pursuant to Minnesota Statutes Section 60A.075 2003).

Section II. General Conditions

This exemption is subject to the following conditions:

(a) The Plan of Conversion was subject to approval, review and supervision by the Minnesota Commissioner of Commerce (the Commissioner) and was implemented in accordance with procedural and substantive safeguards that are imposed under the laws of the State of Minnesota.

(b) The Commissioner reviewed the terms of the Plan of Conversion and approved the Plan of Conversion following a determination that such Plan of Conversion was fair and equitable to all Eligible Members.

(c) Each Eligible Member had an opportunity to vote at a special meeting to approve the Plan of Conversion after full written disclosure was given to the Eligible Member by MSL.

(d) Pursuant to the Plan of Conversion, Eligible Members received Cash, except that Eligible Members received Policy Credits, and not Cash, to the extent consideration was allocable to the Eligible Member based on ownership of a policy of the following types:

(1) A policy that was an individual retirement annuity contract within the meaning of sections 408(b) or 408A of the Code or a tax sheltered annuity contract within the meaning of section 403(b) of the Code;

(2) A policy that was an individual annuity contract issued directly to the Plan participant pursuant to a Plan qualified under sections 401(a) or 403(a) of the Code; or

(3) A policy that was an individual life insurance policy issued directly to the Plan participant pursuant to a Plan qualified under sections 401(a) or 403(a) of the Code. Neither MSL nor any of its affiliates exercised any discretion or provided investment advice, within the meaning of 29 CFR 2510.3–21(c), with respect to such decisions.

(e) After each Eligible Member was allocated a fixed amount of consideration (Fixed Consideration) of $400, such Eligible Member also received a variable amount of consideration for each policy owned by the Eligible Member on September 30, 2003 (the Record Date) to reflect the Eligible Member's estimated past and future contributions to surplus as determined by an actuarial formula (approved by the Commissioner) based on specific features of the policies owned by the Eligible Member on September 30, 2003.

(f) In the case of a MSL Plan, the independent Plan fiduciary (the Independent Fiduciary):

(1) Voted on whether to approve or not to approve the demutualization;

(2) Reviewed and approved MSL's allocation of Cash received for the benefit of the participants and beneficiaries of the MSL Plans;

(3) Provided the Department with a complete and detailed final report as it related to the MSL Plans prior to the granting of the exemption; and

(4) Would take all actions that were necessary and appropriate to safeguard the interests of the MSL Plans and their participants and beneficiaries.

(g) All Eligible Members that were Plans participated in the transaction on the same basis as all Eligible Members that were not Plans.

(h) No Eligible Member paid any brokerage commissions or fees in connection with the receipt of Policy Credits.

(i) All of MSL's policyholder obligations remained in force and were not affected by the Plan of Conversion.

(j) The terms of the transactions were at least as favorable to the Plans as an arm's length transaction with an unrelated party.

DATES: This exemption is effective as of January 1, 2005.

Section III. *Definitions*

For the purposes of this exemption,

(a) The term "MSL" means Mutual Service Life Insurance Company and any affiliate of MSL, as defined below in Section III(b).

(b) An "affiliate" of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with MSL; and

(2) Any officer, director, or partner in any such person.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term "Independent Fiduciary" means a fiduciary who is: (1) Independent of and unrelated to MSL and its affiliates, and (2) appointed to act on behalf of the MSL Plans with respect to the demutualization of MSL. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to MSL if: (1) Such fiduciary directly or indirectly controls, is controlled by or is under common control with MSL; (2) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption,

[1] For purposes of this exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

except that an Independent Fiduciary may receive compensation for acting as an Independent Fiduciary from MSL in connection with the transactions contemplated herein if the amount of payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decision; and (3) the annual gross revenue received by such fiduciary from MSL and its affiliates during any year of its engagement, does not exceed 5 percent (5%) of the Independent Fiduciary's annual gross revenue from all sources for its prior tax year.

(e) An "Eligible Member" means a person (an individual, corporation, joint venture, limited liability company, association, trust, trustee, unincorporated entity, organization or government or any department or agency thereof) who is an owner of a policy that is in force on the Record Date, *i.e.*, September 30, 2003.

(f) "Policy Credit" means consideration to be paid in the form of an increase in cash value, account value, dividend accumulations, face amount, extended term period or benefit payment, as appropriate, depending on the policy.

(g) "Effective Date" means the date of the demutualization, which occurred on January 1, 2005.

(h) "The Plan of Conversion" means the process by which MSL will convert from a mutual life insurance company to a stock life insurance company, and following consummation of the Stock Purchase Agreement, will thereafter continue its corporate existence without interruption as a wholly owned subsidiary of Country Life Insurance Company. MSL's conversion to a stock insurance company occurred on the Effective Date (*i.e.*, January 1, 2005) and was subject to the conditions contained in the Plan of Conversion.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on March 23, 2005 at 70 FR 14719.

Written Comments

The Department received one written comment with respect to the proposed exemption. The comment was submitted by MSL and it requests certain clarifications to the operative language of the proposal and the Summary of Facts and Representations (the Summary). These modifications are described below.

1. *Form of Demutualization Consideration.* MSL notes that in Sections II(b) and (d) of the proposal and in other portions, there are references to an election by Eligible Members as to the form of consideration received (*i.e.*, Cash or Policy Credits). MSL explains that Eligible Members were not given the choice as to the form of consideration they were to receive. Rather, MSL asserts, Eligible Members received Policy Credits, and not Cash, to the extent consideration was allocable to the Eligible Member based on ownership of a policy of the following types:

(a) A policy that was an individual retirement annuity contract within the meaning of sections 408(b) or 408A of the Code or a tax sheltered annuity contract within the meaning of section 403(b) of the Code;

(b) A policy that was an individual annuity contract issued directly to the Plan participant pursuant to a Plan qualified under sections 401(a) or 403(a) of the Code; or

(c) A policy that was an individual life insurance policy issued directly to the Plan participant pursuant to a Plan qualified under sections 401(a) or 403(a) of the Code.

Therefore, MSL suggests that Section II(b) of the proposal be revised to read as follows:

(b) The Commissioner reviewed the terms of the Plan of Conversion and approved the Plan of Conversion following a determination that such Plan of Conversion was fair and equitable to all Eligible Members.

MSL further suggests that Section II(d) of the proposal be revised to read as follows:

(d) Pursuant to the Plan of Conversion, Eligible Members received Cash, except that Eligible Members received Policy Credits, and not Cash, to the extent consideration was allocable to the Eligible Member based on ownership of a policy of the following types:

(1) A policy that was an individual retirement annuity contract within the meaning of sections 408(b) or 408A of the Code or a tax sheltered annuity contract within the meaning of section 403(b) of the Code;

(2) A policy that was an individual annuity contract issued directly to the Plan participant pursuant to a Plan qualified under sections 401(a) or 403(a) of the Code; or

(3) A policy that was an individual life insurance policy issued directly to the Plan participant pursuant to a Plan qualified under sections 401(a) or 403(a) of the Code.

Neither MSL nor any of its affiliates exercised any discretion or provided investment advice, within the meaning of 29 CFR 2510.3–21(c), with respect to such decisions.

In response to these comments, the Department has made the changes requested by MSL to Sections II(b) and (d) of the proposal and it notes MSL's following revision to Representation 25(d) of the Summary: "Neither MSL nor any of its affiliates exercised any discretion or provided investment advice, within the meaning of 29 CFR 2510.3–21(c), with respect to any decision of an Eligible Member."

With respect to Section II(d) of the proposal, the Department wishes to point out that it never intended this provision to imply that an Eligible Member would be given the choice of receiving either Cash or Policy Credits. Rather, the Department notes that this provision actually meant that an Eligible Member would be given the opportunity to receive or to reject the form of demutualization consideration allocated to such Eligible Member by MSL.

2. *Amount of Fixed Consideration.* Section II(e) of the proposed exemption states that after each Eligible Member was allocated Fixed Consideration equivalent to approximately $400, such Eligible Member also received a variable amount of consideration. For purposes of clarity, MSL suggests that this provision be revised to read, in part, as follows: "After each Eligible Member was allocated a fixed amount of consideration (Fixed Consideration) of $400, such Eligible Member may also have received a variable amount of consideration * * *"

In response, the Department concurs with this clarification and it has made MSL's requested change to the final exemption. The Department also notes MSL's corresponding revision to Representation 25(e) of the Summary.

3. *Role of the Independent Fiduciary.* Section II(f)(2) of the proposed exemption states that one of the duties of the Independent Fiduciary for the MSL Plans was to elect between consideration in the form of Cash or Policy Credits on behalf of these Plans. Section II(f)(3) of the proposal states that the Independent Fiduciary reviewed and approved MSL's allocation of Cash or Policy Credits for the participants and beneficiaries of the MSL Plans. In keeping with the clarifications described above in item 1 of this grant notice, MSL suggests that Section II(f)(2) be deleted and the subsequent subparagraph be renumbered, accordingly. MSL also suggests that the phrase "Cash or Policy Credits" in Section II(f)(3) be revised to read "Cash."

In response to these comments, the Department has made the revisions suggested by MSL. In addition, the Department notes MSL's corresponding revisions to Representation 25 of the Summary, in paragraphs (f)(2) and (f)(3).

4. *Other Revisions to the Summary.* In addition to suggesting the foregoing changes to portions of the operative language of the proposal and identical representations in the Summary, MSL

has requested additional clarifications to the Summary. For example,

(a) In Representation 5, MSL requests that the parenthetical "(MSI Preferred)" be revised to include an alternate reference to "MSI," and thereby be amended to read "(MSI Preferred or MSI)."

(b) To correct a typographical error in Representation 8, MSL suggests that the word "of" be added to the phrase "the number of New MSL Members." In addition, MSL requests that the defined term "MSL" be added to the phrase "interest in purchasing MSL."

(c) In Representation 11, MSL suggests that the phrase "Although a wholly owned subsidiary of MSL, PSI, formerly provided * * *" be revised, in part, to read "While a wholly owned subsidiary of MSL, PSI provided * * *"

(d) In Representation 12, MSL requests that the table showing the MSL Plans be corrected.[2] In this regard, MSL states that in the name of the first two MSL Plans, the word "Employees" should be "Employees'" and in the name of the fourth MSL Plan, the word "Agent's" should be "Agents." For "Participant totals," MSL states that the first three dates should be changed to "9/30/03" and the fourth date should be changed to "12/1/03." For "Asset totals," MSL requests that both dates be changed to "7/7/04."

(e) In Representation 13, MSL suggests that the reference to "PSI" be changed to "MSI Preferred" and the word "entitled," in the final sentence, be changed to the word "required."

(f) In Representation 22, MSL recommends that the first sentence be revised to read as follows: "Decisions on voting whether to approve the plan of Conversion or as to any matter in connection with such Plan was made by one or more Plan fiduciaries which were independent of MSL." Also, MSL states that the word "Employees" in the name of the MSL Employees" Life Insurance Plan should be changed to "Employees'."

In response to these comments, the Department notes MSL's foregoing revisions the Summary.

Accordingly, after giving full consideration to the entire record, including MSL's comment letter, the Department has determined to grant the exemption as modified herein. For further information regarding the comment, additional information provided by the Independent Fiduciary, and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D–11267) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 693–8556. (This is not a toll-free number.)

Liberty Media International, Inc. (LMI); Located in Englewood, CO

[Prohibited Transaction Exemption 2005–09; Exemption Application No. D–11277]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act shall not apply,[3] effective July 26, 2004, to (1) the acquisition by the Liberty Cablevision of Puerto Rico 401(k) Savings Plan (the Plan) of certain stock rights (the Rights) pursuant to a stock rights offering (the Offering) by LMI, the Plan sponsor and a party in interest with respect to the Plan; (2) the holding of the Rights by the Plan during the subscription period of the Offering; and (3) the disposition or exercise of the Rights by the Plan.

This exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following general conditions:

(a) The Rights were acquired by the Plan pursuant to Plan provisions for individually-directed investment of participant accounts;

(b) The Plan's receipt of the Rights occurred in connection with the Rights Offering made available to all shareholders of LMI common stock;

(c) All decisions regarding the holding and disposition of the Rights by the Plan were made in accordance with Plan provisions for individually-directed investment of participant accounts by the individual participants whose accounts in the Plan received Rights in the Offering, and if no instructions were received, the Rights were sold;

(d) The Plan's acquisition of the Rights resulted from an independent act of LMI as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to the acquisition; and

(e) The Plan received the same proportionate number of the Rights as other owners of LMI Series A common stock.

DATES: This exemption is effective as of July 26, 2004.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on March 23, 2005 at 70 FR 14726.

FOR FURTHER INFORMATION CONTACT: Ms. Silvia M. Quezada of the Department, telephone number (202) 693–8553. (This is not a toll-free number.)

The North Texas Electrical Joint Apprenticeship and Training Trust Fund (the Plan); Located in Grand Prairie, Texas

[Prohibited Transaction Exemption No. 2005–10; Application No. L–11245]

Exemption

The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act shall not apply to the sale (the Sale(s)) of (1) 1.112 acres of land (Parcel 1) to the North Texas Chapter, National Electrical Contractors Association (NECA), a party in interest to the Plan; and (2) 5.383 acres of land (Parcel 2) to Local Union #20, International Brotherhood of Electrical Workers (IBEW), a party in interest to the Plan, provided that the following conditions are met:

(a) The Sales are one-time transactions for cash;

(b) The Plan does not pay any commissions, costs or other expenses in connection with the Sale of Parcel 1 and Parcel 2 (collectively the Parcels); and

(c) The Plan will receive an amount equal to the greater of: (i) $145,000 or the current fair market value of Parcel 1 as established by an independent, qualified, appraiser and updated at the time of the Sale; and (ii) $655,000; or the current fair market value of Parcel 2 as established by an independent, qualified, appraiser and updated at the time of the Sale; and

(d) The terms of the Sales will be no less favorable to the Plan than terms it would have received under similar circumstances in an arm's length negotiations with an unrelated party.

For a more complete statement of the facts and representations supporting the Department's decision to grant this

[2] MSL notes that effective December 31, 2004, the MSI Employees' Capital Accumulation Plan and Trust, the MSI Employees' Defined Contribution Retirement Plan and the MSI Employees' Life Insurance Plan were terminated.

[3] It is represented that because the fiduciaries for the Plan have not made an election under section 1022(i)(2) of the Act, whereby the Plan would be treated as a trust created and organized in the United States for purposes of tax qualification under section 401(a) of the Code, jurisdiction under Title II of the Act does not apply. Therefore, LMI is not requesting, nor is the Department providing, exemptive relief under the provisions of Title II of the Act. The Department is, however, providing exemptive relief under Title I of the Act.

exemption, refer to the Notice of Proposed Exemption published on February 3, 2005 at 70 FR 5705.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 693–8540 (this is not a toll-free number).

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed in Washington, DC, this 23rd day of June, 2005.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 05–12833 Filed 6–28–05; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Investment Act (WIA) Financial Reporting Requirements for the National Emergency Grants (NEG) Program, Under Title I of the Act

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. ETA is soliciting comments concerning the proposed extension to the financial reporting requirements for the WIA National Emergency Grants Program.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before August 29, 2005.

ADDRESSES: Isabel Danley, Office of Grants and Contract Management, Employment and Training Administration, United States Department of Labor, 200 Constitution Avenue, NW., Room N–4720, Washington, DC, 20210, (202) 693–3047 (this is not a toll-free number), *danley.isabel@dol.gov*, and/or fax (202) 693–3362.

FOR FURTHER INFORMATION CONTACT: Isabel Danley, Office of Grants and Contract Management, Employment and Training Administration, United States Department of Labor, 200 Constitution Avenue, NW., Washington, DC, 20210, (202) 693–3047 (this is not a toll-free number), *danley.isabel@dol.gov*, and/or fax (202) 693–3362. Copies of the Paperwork Reduction Act Submission Package may be found at the Web site *http://www.doleta.gov/Performance/guidance/OMBControlNumber.cfm:*

SUPPLEMENTARY INFORMATION:

I. Background

This proposed information collection notice is requesting an extension to the financial reporting collection format for the WIA National Emergency Grants Program as approved in OMB Notice of Action Number 1205–0434 (ETA Form Number 9099). The basic financial reporting requirements for this program are set forth in Public Law 105–220, dated August 7, 1998, and 20 CFR part 652 *et al.*, Workforce Investment Act (WIA) Final Rules, dated August 11, 2000.

II. Desired Focus of Comments

Currently, the Department is soliciting comments concerning the proposed extension of a currently approved collection of the WIA financial reporting requirements for the National Emergency Grants Program to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed information clearance request (ICR) can be obtained directly through the Web site: *http://www.doleta.gov/Performance/guidance/OMBControlNumber.cfm* or by contacting the office listed above in the addressee section of this notice.

III. Current Actions

Type of Review: Extension of a currently approved collection.

Agency: Employment and Training Administration.

Title: Workforce Investment Act (WIA) Financial Reporting Requirements for National Emergency Grants Program, under Title I of the Act.

OMB Number: 1205–0434.

Agency Numbers: Revision to ETA 9099.

Affected Public: State agencies, local governments, and/or other for profit and non-profit organizations; and consortia of any and/or all of the above.

Total Respondents: 40.

Frequency: Quarterly.

DOL-ETA REPORTING BURDEN FOR WIA FINANCIAL STATUS REPORT FOR NATIONAL EMERGENCY GRANTS

	PY 2004			PY 2005		
	PY 2004	FY 2005	Total	PY 2005	FY 2006	Total
Average number of reports per entity per quarter	1	1	2	1	1	2
Average number of reports per entity per year	4	4	8	4	4	8
Average number of hours required for reporting per quarter per report	1/2	1/2	1/2	1/2	1/2	1/2
Average number of hours required for reporting per entity per year	2	2	4	2	2	4
Number of entities reporting	40	40	40	40	40	40
Average number of hours required for reporting burden per year	80	80	160	80	80	160
Total burden cost @ $30.22 per hour			$4835			$4835

Note: Reviewer should note that the National Emergency Grants are awarded to States under Master Grant Agreements to fund approved projects within the State, on an on-going, as eligible basis. As reflected on table, PY 2004 grants/projects are funded with PY 2004 and FY 2005 funds. Likewise, PY 2005 grants/projects are funded with PY 2005 and FY 2006 funds. Financial reports are required to be submitted by project for each source of funds received.

It should also be noted that the number of projects per State varies, thus creating the need to average the number of reports per entity per quarter and per year.

The total burden cost was based upon a GS–12, Step 1 salary as calculated from Salary Table 2005–DCB, effective January 2005.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the ICR; they will become a matter of public record.

Dated: June 23, 2005.

Anna Goddard,

Administrator, Office of Financial and Administrative Management, Employment and Training Administration, Department of Labor.

[FR Doc. 05–12825 Filed 6–28–05; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Application for Federal Certificate of Age (WH–14). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before August 29, 2005.

ADDRESSES: Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0418, fax (202) 693–1451, *e-mail bell.hazel@dol.gov*. Please use only one method of transmission for comments (mail, fax, or e-mail).

SUPPLEMENTARY INFORMATION:

I. *Background:* Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, section 3(l) provides, in part, that an employer may protect against unwitting employment of "oppressive child labor," as defined in section 3(l), by having on file a certificate issued pursuant to Department of Labor (DOL) regulations certifying that the named person meets the FLSA minimum age requirements for employment. FLSA section 11(c) requires that all employers covered by the Act make, keep, and preserve records of wages, hours, and other conditions and practices of employment with respect to their employees. The employer is to maintain the records for such period of time and make such reports as prescribed by regulations issued by the Secretary of Labor. Form WH–14 is the application employers submit to obtain Federal Certificates of Age to protect themselves against unwitting child labor violations of the Fair Labor Standards Act. This information collection is currently approved for use through January 31, 2006.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks an extension of approval of the information collection to protect employers from unwitting violation of the minimum age standards of the Fair Labor Standards Act.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Application for Federal Certificate of Age.

OMB Number: 1215–0083.

Agency Number: WH–14.

Affected Public: Business or other for-profit; not-for-profit institutions; farms; State, local, or tribal government.

Total Respondents: 10.

Total Annual Responses: 10.

Estimated Time per Response: 10 minutes.

Estimated Total Burden Hours: 2.

Frequency: Annually.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $4.00.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: June 23, 2005.

Bruce Bohanon,

Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.

[FR Doc. 05–12824 Filed 6–28–05; 8:45 am]

BILLING CODE 4510–27–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 05–09]

Notice of Quarterly Report

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: In accordance with Section 612(b) of the Millennium Challenge Act of 2003 (Pub. L. 108–199, Division D), the Millennium Challenge Corporation is making its January 1, 2005 through March 31, 2005 Quarterly Report available to the public.

MILLENNIUM CHALLENGE CORPORATION

[Quarterly Report for the Period January 1, 2005 through March 31, 2005]

	Obligations
Assistance under Section 605	$0
Funds allocated or transferred under Section 619(b)	0
Total	0

Memo: The Millennium Challenge Corporation has no activity to report for the referenced quarter with respect to either assistance provided under Section 605 of the Millennium Challenge Act of 2003 (Pub. L. 108–199, Division D), or transfers of funds to other federal agencies pursuant to Section 619 of that act.

FOR FURTHER INFORMATION CONTACT: Jake Stefanik, Legislative Assistant, Office of Domestic Affairs, at *info@mcc.gov* or (202) 521–3600.

Dated: June 24, 2005.

Frances C. McNaught,

Vice President, Domestic Relations, Millennium Challenge Corporation.

[FR Doc. 05–12858 Filed 6–28–05; 8:45 am]

BILLING CODE 9210–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Meeting; Sunshine Act

June 21, 2005.

TIME AND DATE: 11 a.m., Wednesday, June 29, 2005.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Calmat Company of Arizona*, Docket No. WEST 2004–86–M. (Issues include whether the Secretary had jurisdiction to cite the operator for alleged violations occurring on a private road appurtenant to a mine, and, is so, whether the operator had notice of the Secretary's jurisdiction.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs, subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen, (202)434–9950/(202)708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 05–12904 Filed 6–27–05; 11:18 am]

BILLING CODE 6735–01–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before August 15, 2005. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means (**Note** the new address for requesting schedules using e-mail):

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.
E-mail: requestschedule@nara.gov.
FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Paul M. Wester, Jr., Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: (301) 837–3120. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending (**Note** the new address for requesting schedules using e-mail):

1. Department of Agriculture, Agricultural Research Service (N1–310–05–1, 47 items, 43 temporary items). Records accumulated by the National Arboretum, including such records as correspondence files, reports, publications, routine exhibit and events files, budget, personnel, procurement, and travel files, donation and bequest records, fee-for-service files, press releases, photographs, education program files, and records of the plant and bonsai artifacts collections. The electronic version of the Arboretum website and electronic copies of records created using electronic mail and word processing are also included. Proposed for permanent retention are recordkeeping copies of significant files accumulated by the director and the master files and documentation for a database describing the Arboretum's plant holdings.

2. Department of Education, Office of Intergovernmental and Interagency Affairs (N1–441–05–3, 5 items, 4 temporary items). Records accumulated by committees whose activities do not relate to the agency's basic mission and are not subject to the Federal Advisory Committee Act. Also included are files accumulated by individual members of agency committees and electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are recordkeeping copies of correspondence, minutes of meetings, reports, and other records accumulated by mission-related agency committees.

3. Department of Energy, Office of Hearings and Appeals (N1–434–04–1, 3 items, 3 temporary items). Records relating to reimbursements from overcharges on purchases of refined petroleum products. Also included are electronic copies of records created using electronic mail and word processing.

4. Department of Health and Human Services, Food and Drug Administration (N1–88–04–3, 22 items, 20 temporary items). Administrative records, including administrative delegations of authority, unapproved directives and manuals, Inspector General records, grants, and electronic administrative support systems, including all master data files, input records, system documentation, and outputs. Also included are electronic copies of records created using electronic mail and word processing. Recordkeeping copies of approved organization directives and program delegations of authority are proposed for permanent retention. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

5. Department of Justice, Bureau of Prisons (N1–129–05–5, 5 items, 5 temporary items). Inputs, outputs, master files, and system documentation associated with an electronic system which tracks and manages agency alternative program items purchases. Also included are electronic copies of records created using electronic mail and word processing.

6. Department of Justice, Bureau of Prisons (N1–129–05–9, 2 items, 2 temporary items). Inmate drug treatment certification files, including electronic copies of records created using electronic mail and word processing.

7. Department of Justice, Bureau of Prisons (N1–129–05–10, 2 items, 2 temporary items). Court-ordered evaluations of prisoners used primarily to establish fitness to stand trial. Also included are electronic copies of records created using electronic mail and word processing.

8. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (N1–436–05–5, 5 items, 5 temporary items). Outputs, master files, and documentation for an electronic system which maintains copies of firearm records from gun dealers who no longer are in business. Also included are electronic copies of documents created using electronic mail and word processing.

9. Department of the Treasury, Financial Management Service (N1–425–05–4, 14 items, 14 temporary items). Records of the Office of Legislative and Public Affairs, including such files as congressional and public inquiries, legislative proposals, monthly and weekly status reports, and website management records. Also included are electronic copies of records created using electronic mail and word processing.

10. United States Information Agency, Information Center Service (N1–306–98–3, 58 items, 12 temporary items). Book orders and shipping documents, grantee orientations, distribution sheets, requisitions, project files, correspondence with publishers, and other records lacking historical

significance. Proposed for permanent retention are subject, country, and specialized files of the Information Center Service, a long-defunct office. Records were accumulated primarily between the 1940s and the late 1960s.

Dated: June 22, 2005.

Michael J. Kurtz,

Assistant Archivist for Records Services—Washington, DC.

[FR Doc. 05–12826 Filed 6–28–05; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards; Meeting of the Subcommittee on Reactor Fuels; Notice of Meeting

The ACRS Subcommittee on Reactor Fuels will hold a meeting on July 27–28, 2005, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The agenda for the subject meeting shall be as follows:

Wednesday, July 27, 2005—8:30 a.m. until the conclusion of business.

Thursday, July 28, 2005—8:30 a.m. until the conclusion of business.

The purpose of this meeting is to hear staff presentations about the results of NRC research into reactor fuel behavior during reactivity initiated accidents, and staff development of the revised LOCA criteria for reactor fuel. The staff will also present the results of studies of embrittlement correlations for high burnup fuel. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff and other interested persons regarding these matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Ralph Caruso (telephone 301–415–8065) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4:30 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: June 23, 2005.

Michael R. Snodderly,

Acting Branch Chief, ACRS/ACNW.

[FR Doc. E5–3387 Filed 6–28–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–6659]

Establishment of the U.S. Department of Energy as the Long-Term Custodian of the Shirley Basin South Uranium Mill Tailings Site in Shirley Basin, Wyoming and Termination of the Petrotomics Company Source Materials License for the Shirley Basin South Site

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of establishment of the U.S. Department of Energy as the long-term custodian of the Shirley Basin South uranium mill tailings site in Shirley Basin, Wyoming under the general license provisions of 10 CFR part 40.28, and termination of the Petrotomics Company specific Source Materials License SUA–551 for the Shirley Basin South site.

FOR FURTHER INFORMATION CONTACT: Rick Weller, Project Manager, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: (301) 415–7287; fax number: (301) 415–5955; e-mail: *rmw2@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 25, 2005, the Petrotomics Company (Petrotomics) transferred ownership of the Shirley Basin South uranium mill tailings site in Shirley Basin, Wyoming to the U.S. Department of Energy (DOE), as required by 10 CFR part 40, appendix A, criterion 11, prior to termination of Petrotomics' specific license. Subsequently, by letter dated May 12, 2005, the DOE submitted the final Long-Term Surveillance Plan (LTSP) for the Shirley Basin South site for review by the U.S. Nuclear Regulatory Commission (NRC). A correction to one page of the LTSP was provided to the NRC in a DOE letter dated June 1, 2005. Based on the review of the LTSP, the NRC has determined that the LTSP satisfies the requirements in 10 CFR part 40, appendix A, criterion 12, and § 40.28 for the long-term surveillance of a tailings disposal site. Accordingly, notice is hereby given that the NRC has accepted the LTSP for the Shirley Basin South site. This acceptance establishes the DOE as the long-term custodian and caretaker of the Shirley Basin South site under the general license specified in 10 CFR 40.28. In a concurrent action, the NRC has terminated Petrotomics' specific Source Materials License SUA–551 for the Shirley Basin South site. These actions complete all requirements for closure of the Shirley Basin South site under the Uranium Mill Tailings Radiation Control Act of 1978, as amended. These actions do not require an environmental assessment as they are categorically excluded under 10 CFR 51.22(c)(11).

II. Further Information

The NRC has prepared correspondence which documents the actions that establish the DOE as the long-term custodian of the Shirley Basin South site under the general license specified in 10 CFR 40.28 and terminate Petrotomics' specific Source Materials License SUA–551 for the Shirley Basin South site. In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," copies of this correspondence, as well as the Shirley Basin South LTSP submitted by DOE letters dated May 12 and June 1, 2005, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are listed below. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Documents Related to this Notice:

1. Letter dated May 12, 2005, from T. Pauling, DOE, to G. Janosko, NRC, submitting the final LTSP for the Shirley Basin South site. ML051370527.

2. Letter dated June 1, 2005, from T. Pauling, DOE, to G. Janosko, NRC, submitting a correction to one page of the final LTSP for the Shirley Basin South site. ML051610322.

3. Letter dated June 8, 2005, from G. Janosko, NRC, to T. Pauling, DOE, accepting the final LTSP for the Shirley Basin South site. ML051660316.

4. Letter dated June 8, 2005, from G. Janosko, NRC, to S. Pfaff, Petrotomics Company, terminating Petrotomics' specific Source Materials License SUA–

551 for the Shirley Basin South site. ML051660331.

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated in Rockville, Maryland, this 17th day of June 2005.

For the Nuclear Regulatory Commission.

Richard Weller,

Senior Project Manager, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 05–12849 Filed 6–28–05; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application of Brooke Corporation To Withdraw Its Common Stock, $.01 Par Value, From Listing and Registration on the American Stock Exchange LLC File No. 1–13698

June 22, 2005.

On June 13, 2005, Brooke Corporation, a Kansas corporation ("Issuer"), filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, $.01 par value ("Security"), from listing and registration on the American Stock Exchange LLC ("Amex").

On April 14, 2005, the Board of Directors ("Board") of the Issuer approved a resolution to withdraw the Security from listing and registration on Amex and to list the Security on the Nasdaq National Market ("Nasdaq"). The Board believes that it is in the best interest of the Issuer and its shareholders to withdraw the Security from listing and registration on Amex and to list the Security on Nasdaq, because the Issuer believes that it will benefit from increased visibility to investors and an efficient electronic trading platform. The Issuer stated that it has been informed that its application to list the Security on Nasdaq has been approved.

The Issuer stated that it has met the requirements of Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration by complying with all the applicable laws in effect in Kansas, in which it is incorporated.

The Issuer's application relates solely to the withdrawal of the Security from listing on Amex and from registration under section 12(b) of the Act,[3] and shall not affect its obligation to be registered under section 12(g) of the Act.[4]

Any interested person may, on or before July 18, 2005, comment on the facts bearing upon whether the application has been made in accordance with the rules of Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/delist.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–13698 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number 1–13698. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3368 Filed 6–28–05; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(g).

[5] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application of TurboChef Technologies Inc. To Withdraw Its Common Stock, $.01 Par Value, From Listing and Registration on the American Stock Exchange LLC File No. 1–32334

June 22, 2005.

On June 13, 2005, TurboChef Technologies Inc., a Delaware corporation ("Issuer"), filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, $.01 par value ("Security"), from listing and registration on the American Stock Exchange LLC ("Amex").

On March 7, 2005, the Board of Directors ("Board") of the Issuer unanimously approved a proposal to withdraw the Security from listing on Amex and to list the Security on the Nasdaq National Market ("Nasdaq"). The Issuer stated that the reason for such action is that the Issuer believes that with respect to its own securities and stockholders, the trading system and involvement of market makers on Nasdaq is preferable to the Amex system of specialists, and a Nasdaq listing may be more attractive and provide the Issuer more exposure to potential investors.

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in effect in the state of Delaware, in which it is incorporated, and provided written notice of withdrawal to Amex.

The Issuer's application relates solely to withdrawal of the Security from listing on Amex and from registration under section 12(b) of the Act,[3] and shall not affect its obligation to be registered under section 12(g) of the Act.[4]

Any interested person may, on or before July 18, 2005, comment on the facts bearing upon whether the application has been made in accordance with the rules of Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(g).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/delist.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–32334 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number 1–32334. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3369 Filed 6–28–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51908; File No. SR–FICC–2004–15]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to Trade Submission Requirements and Pre-Netting

June 22, 2005.

I. Introduction

On July 30, 2004, the Fixed Income Clearing Corporation ("FICC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR–FICC–2004–15 pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the **Federal Register** on November 4, 2004.[2] Eleven comment letters were received.[3] FICC amended the proposed rule change on March 4, 2005. Notice of the amended proposed rule change was published in the **Federal Register** on March 18, 2005.[4] No comments were received on the amendment. On June 22, 2005, FICC further amended the proposed rule change to clarify the rule language regarding de minimus trades. Republication of the notice was not necessary because the June 22 amendment made only a technical change to the proposed rule change.

For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

Through a recent survey of FICC's Government Securities Division ("GSD") members and through other means, FICC has learned that there is a great deal of Government securities activity that is currently being executed or cleared and guaranteed as to settlement by affiliates of FICC's netting members, some of which are active market participants, and is not being submitted to FICC. This currently does not represent a violation of the GSD's rules, which require that netting members submit their own eligible trading activity but do not address trading activity of members' affiliates.

FICC has also determined that its trade submission requirements have been ineffective in preventing the "pre-netting" of otherwise netting-eligible activity by netting members as well as their affiliates. In fact, FICC believes that certain members may be purposefully funneling eligible transactions through their non-member affiliates in order to avoid having to submit these transactions to the clearing corporation. Such pre-netting practices, which may take the form of "internalization," "summarization," or "compression," prevent the submission to FICC of transactions on a trade-by-trade basis.[5] The GSD's rules currently prohibit certain pre-netting practices by requiring that all eligible trades executed by its netting members be submitted on a trade-by-trade basis. The proposed rule change expands this requirement to extend it to affiliate trades.

The submission to FICC of eligible activity of each GSD netting member and that of its affiliates that are active market participants is necessary to preserve the integrity of the netting process and the safety and soundness of the overall Government Securities clearance and settlement process. The consequence of a gap in FICC's trade submission requirements raises significant risk issues for FICC and the Government securities marketplace as a whole.

The GSD employs several methods to reduce risk including collateral and mark-to-market requirements and various monitoring procedures. These methods have been highly successful in protecting the GSD and its members from loss. The most powerful risk management tool employed by the GSD is its multilateral netting by novation process, which eliminates netting members' need to settle the large majority of receive and deliver obligations created by in trading activities. (For example, each business day during the first half of 2004, the netting process safely eliminated the settlement risk posed by an average of about 73,000 Government securities transactions worth approximately $1.82 trillion.) The integrity of this netting

[5] 17 CFR 200.30–3(a)(1).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 50607 (October 29, 2004), 69 FR 64343.

[3] Scott Gordon, Chief Executive Officer, Rosenthal Collins Group, LLC (November 26, 2004); Stephen Merkel, Executive Managing Director and General Counsel, Cantor Fitzgerald Securities (November 26, 2004); Scott Gordon, Chief Executive Officer, Rosenthal Collins Group, LLC (November 29, 2004); John P. Murphy, Managing Director of Operations, Hilliard Farber & Co., Inc. (December 15, 2004); Ronald A. Purpora, Chief Executive Officer, ICAP North American Securities, Garban LLC (December 17, 2004); Robert F. Gartland, Managing Director, Morgan Stanley & Co. Incorporated (December 23, 2004); Frank Tripodi, Managing Director & CFO, TD Securities (USA) LLC (December 17, 2004); David Cassan, Countrywide Securities Corp. (January 4, 2004); Jeffrey F. Ingber, General Manager, Fixed Income Clearing Corporation (January 14, 2005); Emil Assentato, President, Tradition Asiel Securities, Inc. (February 17, 2005); Eric L. Foster, Vice President and Associate General Counsel, The Bond Market Association (February 28, 2005).

[4] Securities Exchange Act Release No. 51365 (March 14, 2005), 70 FR 13222.

[5] In this regard, it should be noted that on February 28, 2003, the National Securities Clearing Corporation ("NSCC"), an FICC affiliate, issued a paper titled "Managing Risk in Today's Equity Market: A White Paper on New Trade Submission Safeguards." (*http://www.dtcc.com/ThoughtLeadership/whitepapers/managingrisk.pdf*). In the paper, which defined recent trade submission practices that are creating risks in the equities market, NSCC defined three trade submission practices that are some form of pre-netting: (i) Compression, which is a technique to combine submissions of data for multiple trades to the point where the identity of the party actually responsible for the trades is masked, (ii) internalization, which is a technique in which trade data on separate correspondents' trades completely "crossed" on a clearing member's books are not reported at all to the clearing corporation, and (iii) summarization, which is a technique in which the clearing broker nets all trades in a single CUSIP by the same correspondent broker into fewer submitted trades.

process depends upon the submission to the GSD of all eligible activity on a trade-by-trade basis.

For this reason, FICC, seeks to prohibit pre-netting activity on the part of members. Indeed, it is the avoidance of "broker pre-netting" that was a fundamental reason for the formation in the 1980s of the Government Securities Clearing Corporation, the predecessor of the GSD. The absence from the GSD's netting and settlement processes of all eligible trades of an active market participant that is a GSD netting member or an affiliate of a GSD netting member presents systemic risk to the marketplace for a number of reasons, including the following:

1. Counterparty Credit Risk

Management of the risk of trades that are not submitted to FICC becomes the responsibility of each direct counterparty, including ones that may have insufficient capital or financial strength and/or inadequate internal processes to mitigate such risk. Counterparty credit risk is therefore not managed in a centralized, transparent manner, and the myriad of risk protections built into the FICC process that have been supported by the industry and have been approved by the Commission are not employed.

2. Operational Risk

Eligible trades that are not submitted to FICC introduce operational risk, including "9–11" type risk, because such trades are not submitted to FICC for comparison and guaranteed settlement within minutes of execution through FICC's Real-Time Trade Matching ("RTTM") System. Should a catastrophic event occur after trade execution, submission of netted trade data could be significantly delayed or even lost. Trade guaranty would also not be obtained.

It is noteworthy that the GSD now receives approximately ninety-eight percent of its trade data on a real-time basis. That development alone has significantly improved the GSD's ability to timely manage the risk arising from the over two trillion dollars of daily activity in the Government securities marketplace.

3. Legal Risk

Members' failure to submit eligible activity to FICC increases systemic risk to the clearance and settlement system for Government securities by reducing the number of trades without providing clearly enforceable netting rights in the event of member insolvency. In an insolvency proceeding of a netting member of the GSD under U.S. law, the clearing organization netting provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA") afford clear netting rights to the GSD as a registered securities clearing agency. The United States Bankruptcy Code ("Bankruptcy Code") and the Federal Deposit Insurance Act ("FDIA"), to the extent applicable, also provide a number of protections to registered securities clearing agencies such as FICC. Although FDICIA, the Bankruptcy Code, and the FDIA also provide similar safe harbors protecting netting rights with respect to certain securities contracts when not submitted to and novated through the GSD and other registered clearing agencies, their applicability is highly dependent upon the types of entities involved and the nature and adequacy of the bilateral documentation. Thus, pre-netting activity has the potential to increase risk absent each trading entity's capacity for comprehensive monitoring to ensure that the proper documentation is in fact used throughout the Government securities marketplace.

Furthermore, as a practical matter, to the extent that there are any ambiguities in the application of relevant netting or close-out rights, FICC would expect that in general a bankruptcy court or other insolvency tribunal would be more deferential to close-out and netting by a registered clearing agency such as FICC than it would be to close-out and netting by nother market participants.

4. Resolution of Fails Problems

The failure of netting members to submit eligible trades to FICC decreases the ability of FICC to assist in the resolution of fail problems. The significant fail problem incurred by the industry with regard to the May 2013 10-Year Note likely could have been mitigated by submission of eligible data on behalf of non-member affiliates of GSD members. With submission, FICC could have identified and resolved fail situations involving these affiliates.

The failure of FICC to receive all eligible trading activity of an active market participant denigrates FICC's vital multilateral netting process and causes FICC to not be in as good a position to prevent future market crises. Given the enormous and growing amount of activity in the government securities marketplace and the resultant huge settlement risks, the proposed trade submission requirements and pre-netting prohibitions are the logical next steps for enhancing FICC's netting and risk management processes and for ensuring that FICC can continue to perform its vital risk management role for the Government securities marketplace.

As a result, FICC is broadening its trade submission standards by requiring the submission of data on trades executed or cleared and guaranteed as to their settlement by certain affiliates of members.[6] The proposed rule change also makes explicit that these affiliate trades must be submitted on a trade-by-trade basis as executed. This should advance the goal of having every active Government securities market participant which is a GSD netting member or is an active affiliate of a GSD netting member submit or have submitted on its behalf its eligible activity to the GSD on a trade-for-trade basis for netting, risk management, and guaranteed settlement. It would also put the Government securities marketplace on a more equal footing with other markets where the presence of regulatory confirmation or price transparency requirements effectively mandates that all eligible trades be submitted to the clearing corporation.

Specifically, the proposed rule change applies to a GSD member's non-member affiliates that are registered broker-dealers, banks, or futures commission merchants organized in the United States ("covered affiliates"). The proposed rule change requires members to submit on a trade-by-trade basis eligible trades, both buy-sells and repos, executed by their covered affiliates with other netting members or with other netting members' covered affiliates. The proposed rule change also requires members to submit on a trade-by-trade basis eligible trades cleared and guaranteed as to their settlement by their covered affiliates. The proposed rule change is limited to covered affiliates because these are the types of entities that comprise the majority of GSD netting members and because the failure to submit trades executed by registered broker-dealers, banks, and futures commission merchants organized in the United States has given rise to the systemic risk concerns discussed above.

It is important to note that covered affiliates will not be required to join FICC as members. As such, FICC is affording members and their affiliates the flexibility of choosing to have their trades processed by FICC either through direct membership or through a correspondent clearing relationship with an affiliate or with another entity. In addition, the proposed rule filing exempts the following trades from its

[6] Trades that the affiliate clears for another entity but does not guarantee the settlement of will be excluded from the trade submission requirement.

coverage: (1) An affiliate that engages in *de minimis* eligible activity, which is defined as less than an average of 30 trades per business day per month within the prior twelve-month period; (2) trades executed between a member and its affiliates or between affiliates of the same member; and (3) trades whose submission to FICC would cause the member to violate an applicable law, rule, or regulation.[7]

The proposed rule filing provides that failure to abide by the new trade submission requirements will trigger the disciplinary consequences currently in the GSD rules, which can ultimately result in termination of membership.[8]

III. Amendment

As originally filed the proposed rule change would have required GSD members of FICC to submit trades that were executed or whose settlement was cleared and guaranteed by affiliates of GSD members registered as U.S. broker-dealers, banks, or futures commission merchants. Because the proposed rule defined a covered affiliate as an entity organized in the U.S., it would not have applied to trades executed by non-U.S. affiliates of GSD members. FICC has stated to the Commission its belief that most of the pre-netting activity is occurring with domestic affiliates and therefore there is no reason to apply the rule to foreign affiliates. Furthermore, FICC did not want to adopt a rule where compliance or enforcement would be difficult.

After discussion with the staffs of the Commission and other regulatory entities, FICC amended the proposed rule change to require netting members to report to FICC trades of their non-U.S. affiliates. The trades will be reported to FICC on an annual basis in the format and within the timeframe specified by guidelines to be issued by FICC. The reporting requirement will not apply to "foreign affiliate trades" of a foreign affiliate where the foreign affiliate has executed less than an average of 30 "foreign affiliate trades" per business day per month within the prior twelve-month period.

The amendment adds definitions of "foreign affiliate" and "foreign affiliate trade" to GSD's rules. A "foreign affiliate" is defined as an affiliate of a netting member that is not itself a netting member and is a foreign person. A "foreign affiliate trade" is defined as a trade executed by a "foreign affiliate" of a netting member that satisfies the following criteria: (i) the trade is eligible for netting pursuant to GSD's rules and (ii) the trade is executed with another netting member, with a covered affiliate, or with a "foreign affiliate" of another netting member. "Foreign affiliate trade" does not include a trade that is executed between a member and its affiliate or between affiliates of the same member. For purposes of this definition, the term "executed" includes trades that are cleared and guaranteed as to their settlement by the foreign affiliate.

IV. Comments

The Commission received eleven comment letters to the proposed rule change. Cantor Fitzgerald Securities ("Cantor") and Rosenthal Collins Group, LLC ("RCG") wrote letters opposing the proposed rule change.[9] FICC submitted a letter responding to those letters.[10] Additionally, the Bond Market Association submitted a comment letter supporting the proposed rule change but making two recommendations regarding the compliance costs of the proposed rule change and regarding foreign affiliates.[11] The remaining comment letters were submitted by FICC netting members that are in favor of the proposed rule change.[12]

Cantor and RCG are each netting members of FICC. RCG has a wholly-owned subsidiary, Rosenthal Global Securities, LLC ("RGS"), which is not a member of FICC. RGS is a registered broker-dealer that engages in proprietary trading of fixed income securities with various institutional counterparties, including Cantor. RCG had been submitting RGS's trades to FICC on a trade-by-trade basis, but in October 2003 RCG began submitting only a net settlement balance to FICC. It was this activity that first brought the affiliate pre-netting issue to FICC's attention. However, Cantor and RCG each claim that many of FICC's members engage in affiliate pre-netting. Cantor's comment letter contained most of the substantive arguments opposing the proposed rule change. RCG submitted two comment letters to the Commission stating that it substantially agrees with the analysis and positions set forth in Cantor's comment letter.

Cantor and RCG argue that FICC's proposal is anticompetitive and that the proposal is not balanced by any benefit such as FICC's claim that the proposed rule change will reduce systemic risk in the Government securities marketplace. They argue that FICC, as the only registered clearing agency that provides clearance and settlement services for Government securities, has an economic monopoly and that it is using this monopoly to require additional trade submissions in order to raise its revenue from trade submission fees.

Cantor also addresses each of the specific risks FICC listed in its rule filing (*i.e.*, counterparty credit risk, operational risk, legal risk, and resolutions of fails risk) and disagrees with FICC's assertion that the proposed rule change would reduce any of these risks.

1. Counterparty Credit Risk

Cantor and RCG disagree with FICC's claim that the proposal will reduce counterparty credit risk. They argue that pre-netting is not *per se* a risky activity. They claim that netting is a risk reducing measure, whether done or not done by a clearing agency, and that in this circumstance the parties doing the netting are highly regulated entities (*i.e.*, banks, futures commission merchants, and broker-dealers) that are required to conform to certain capital and risk management standards and that have developed sophisticated risk management techniques. Accordingly, Cantor and RCG argue that these entities can net their trades prior to submission to a clearing agency without adding risk to the marketplace.

Cantor and RCG further argue that if the purpose of the proposed rule change is to reduce risk, FICC would not have excluded non-U.S. affiliates from the proposed rule. They claim that compared to U.S. affiliates non-U.S. affiliates present the same or greater level risk to the marketplace. Cantor claims that a significant portion of government securities are held by foreign entities (43.7% of U.S. government securities other than savings bonds) and that cross-border

[7] FICC believes that exclusion of these trades from the submission requirement's coverage does not raise the systemic risk concerns described above.

[8] The disciplinary consequences of GSD Rule 48 are being referred to explicitly to emphasize to members the importance of this rule and to remind members that violations of the GSD's rules may lead to serious disciplinary consequences, including termination of membership.

[9] Scott Gordon, Chief Executive Officer, Rosenthal Collins Group, LLC (November 26, 2004); Stephen Merkel, Executive Managing Director and General Counsel, Cantor Fitzgerald Securities (November 26, 2004); Scott Gordon, Chief Executive Officer, Rosenthal Collins Group, LLC (November 29, 2004).

[10] Jeffrey F. Ingber, General Manager, Fixed Income Clearing Corporation (January 14, 2005).

[11] Eric L. Foster, Vice President and Associate General Counsel, The Bond Market Association (February 28, 2005).

[12] John P. Murphy, Managing Director of Operations, Hilliard Farber & Co., Inc. (December 8, 2004); Ronald A. Purpora, Chief Executive Officer, ICAP North American Securities, Garban LLC (December 17, 2004); Robert F. Gartland, Managing Director, Morgan Stanley & Co. Incorporated (December 23, 2004); Frank Tripodi, Managing Director & CFO, TD Securities (USA) LLC (December 17, 2004); David Cassan, Countrywide Securities Corp. (January 4, 2004); and Emil Assentato, President, Tradition Asiel Securities, Inc. (February 17, 2005).

transactions raise a number of complex issues.

2. Operational Risk

Cantor does not agree with FICC's assertion that the submission of affiliate trades to FICC on a trade-by-trade basis will reduce operational risk. In the event of operational difficulties in the government securities clearance and settlement system, participants in the government securities markets in all likelihood would be adversely impacted whether or not a transaction was submitted to FICC. Although submitting trades in real-time to FICC's RTTM System reduces the risk of trade data being lost, it does not follow that transactions submitted to FICC somehow reduce operational risk.

3. Legal Risk

Cantor disagrees with FICC's assertion that market participants will have more legal protections in an insolvency proceeding if the trade is submitted to a registered clearing agency. Cantor argues that there are sufficient legal protections in place to protect market participants in the event of an insolvency, with special treatment under several applicable laws for protecting non-defaulting financial institutions upon their repo counterparty's insolvency.

4. Resolution of Fails Problem

Cantor argues that submission of affiliate trades will not make it more likely for FICC to identify round-robin chains as FICC claims. Many market participants are still excluded from FICC's system, including institutional investors which represent most of the buy-side of the government securities market.

Finally, Cantor and RCG claim that the proposed rule change may actually increase systemic risk because it will result in higher fees that will prevent small firms from joining or maintaining membership in FICC. As a result, more transactions will be settled outside of FICC. Cantor also claims that the proposed rule change will affect FICC members disparately because some of FICC's members trade often with affiliates, some not at all, and others trade with foreign affiliates, which are exempt from the proposed rule.

In response to the comment letters from Cantor and RCG, FICC in its comment letter reiterates the reasoning that it laid out in its filing that the proposed rule change would significantly reduce the systemic risk in the government securities clearance and settlement process. FICC disputes Cantor's and RCG's claim that FICC is proposing the rule as a way to collect additional fees by noting that it is owned and governed by its members and pays substantial rebates to its members. Additionally, FICC states that it recently amended its netting fees in recognition of the proliferation of large volume/small dollar trading and to provide cost savings to those firms that engage in this type of trading.[13]

FICC responds to Cantor's comments regarding foreign affiliates by stating that the rule filing was designed to encompass those entities (*i.e.*, banks, futures commission merchants, and broker-dealers) that make up the large majority of its membership. It excluded non-U.S. affiliates from the proposed rule because of the limited ability of domestic FICC members to submit the activity of their non-U.S. affiliates. FICC also states that there are potential regulatory and other legal barriers under foreign law to the application of FICC's rules to non-U.S. affiliates. However, as discussed previously, FICC has amended the proposed rule change to require disclosure from its members regarding foreign affiliate pre-netting following discussion with the Commission.

Finally, FICC addresses the claim that the proposed rule change would create an unfair burden on competition by stating that any burden on competition that the proposal could be regarded as imposing is not unreasonable or inappropriate in light of the substantial benefits that submission of affiliate trades will yield.

The Bond Market Association ("BMA"), an industry group that represents securities firms and banks that underwrite, distribute, and trade in fixed income securities, submitted a comment letter in support of the proposed rule change but made two comments regarding the cost of compliance for FICC's members and the exclusion of foreign affiliates from the scope of the proposed rule. In its comment letter, the BMA notes the value of FICC as a centralized and automated system for clearing and settling trades, comparison and netting services for its members, and a credit risk reduction and containment system for its members. It states that FICC plays an important role in increasing efficiency and reducing risk in the Government securities markets and that practices designed to deliberately delay and reduce submission of trades to FICC should be discouraged. Accordingly, because the proposed rule change should increase the number of transactions that are compared, novated, and settled by FICC everyday, the BMA recommends that the Commission approve the proposed rule change.

However, the BMA has two concerns regarding the proposed rule change. First, the BMA is concerned of the costs to FICC's members of the implementation of the proposed rule change. The BMA believes that a new trade submission requirement for covered affiliates will require its members to develop, test, and implement new systems for submitting transactions by covered affiliates. The BMA requested that FICC evaluate the costs and benefits of the proposed rule change and assist its members in the implementation of compliance with the new rule.

Second, the BMA noted that the proposed rule change would have a disparate impact on FICC's members because it will not apply to foreign affiliates of FICC members. The BMA notes that as drafted the rule proposal will apply to the U.S. branch of a foreign bank but not to the foreign branch of a U.S. bank. The BMA recommends that FICC consider excluding any entity, including U.S. banks' foreign branches, that is domiciled (instead of "organized") outside of the U.S. The BMA also recommends that FICC review the de minimus transaction exclusion to ensure that the proposed level is appropriate.

The Commission received seven comment letters from FICC netting members in favor of the proposed rule change. These commenters highlight the importance of FICC's netting and risk management processes and state that the proposed rule change should help to preserve the integrity of these processes by reducing systemic risk. Several commenters note that pre-netting gives FICC members the opportunity to "cherry-pick" among their covered affiliate trades and to submit only the riskiest of those trades to FICC for clearance and settlement. One commenter states that if the proposed rule change is not approved other FICC netting members will be driven by competitive forces to lower costs to their customers by also engaging in pre-netting with non-member affiliates. This would further harm FICC's netting and risk management processes and also the Government securities marketplace.

V. Discussion

After carefully considering the proposed rule change as amended and all of the written comments received, the Commission has determined that the

[13] Securities Exchange Act Release No. 50806 (December 7, 2004), 69 FR 72237 (December 13, 2004) [File No. SR–FICC–2004–21].

proposed rule change meets the requirements of Section 17A(b)(3)(F) of the Act. That section provides that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and to assure the safeguarding of securities and funds which are in the clearing agency's control or for which it is responsible. FICC has long recognized that pre-netting of trades by its members affects the operation of its netting system and, accordingly, FICC's Rules expressly require netting members to submit all eligible trades with another FICC netting member to FICC. The proposed rule change extends this requirement to netting between FICC members and their covered affiliates. For the following reasons, the Commission finds that the proposed rule change prohibiting pre-netting between FICC members and covered affiliates meets the requirements of Section 17A. Additionally, in consideration of the comments from Cantor and RCG regarding competition, the Commission finds that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act in accordance with section 17A(b)(3)(I).

Section 3(a)(23)(A) of the Act defines a clearing agency as any person who, among other things, acts as an intermediary to reduce the number of settlements of securities transactions.[14] section 17A(b)(1) of the Act requires that an entity performing the functions of a clearing agency must register as a clearing agency with the Commission.[15] Although netting of affiliates trades alone may not require an entity to register as a clearing agency with the Commission, netting is clearly contemplated by the Act as an operation central to clearing. In general, the Commission feels that a proposed rule change that is designed to require netting to be provided by a registered clearing agency is designed to further the purposes of section 17A of the Act. In this case in particular, FICC's ability to perform the netting function for Government securities is well-established. A rule that is designed to bring additional securities transactions into its netting system is clearly designed to promote the prompt and accurate clearance and settlement of those transactions and to preserve the safety and soundness of the national clearance and settlement system.

Cantor and RCG have argued that netting may occur outside of a clearing agency without presenting any additional risks to the clearing agency or to its members and that while FICC as a registered clearing agency is the appropriate party to provide a multilateral netting service it should not be able to prohibit its members from netting trades on a bilateral basis with their non-member affiliates. Netting may be a risk-reducing measure outside of a clearing agency, but here FICC has shown that it is important for it to prohibit its members from pre-netting in order for FICC to maintain the effective operation of its netting service.

FICC has represented to the Commission that its netting system may fail to operate effectively if its members may delay trade submission or cherry-pick among their trades by pre-netting some trades prior to submission to FICC. The Commission finds persuasive FICC's argument that FICC's netting and risk management services are compromised if it receives some but not all of the trade data it needs to effectively perform its netting function. Accordingly, the Commission finds that it is appropriate for FICC to prohibit its members from engaging in pre-netting with covered affiliates before submitting their trades to FICC.

The proposed rule change is also designed to alleviate the risks pre-netting presents to the marketplace which FICC describes in its filing as counterparty credit risk, operational risk, legal risk, and fails risk. The Commission is particularly concerned about the risks that counterparties will be unable to settle their obligations or that trade data will be lost in the event of a market crisis. The proposed rule change, by requiring trade information to be submitted to FICC on a trade-by-trade basis and, in particular, through FICC's RTTM system, will substantially reduce the risk that trades between FICC's members will not settle. Cantor and RCG have argued that requiring trades between members and covered affiliates to be netted within FICC's netting system will not reduce counterparty credit risk or operational risk and that FICC's members are regulated entities that can appropriately manage these risks. Despite these arguments, FICC's netting process and risk management processes are highly sophisticated and specialized services that are subject to Commission oversight. Accordingly, because the proposed rule change should bring more member trades into FICC's netting system, the Commission finds that it is designed to promote prompt and accurate clearance and settlement of securities transactions and to assure the safeguarding of securities and funds which are in FICC's control or for which it is responsible.

Cantor and the BMA have commented that the proposed rule change will result in disparate treatment of FICC's members because it does not apply to trades with foreign affiliates of FICC's members. Section 17(b)(3)(F) provides that the rules of a clearing agency shall not permit unfair discrimination among participants in the use of the clearing agency. Cantor has essentially argued that FICC is discriminating against its smaller, domestic members by proposing that the rule apply only to domestic affiliates. Cantor also argues that FICC is using the proposed rule change to generate additional fees from its smaller members while allowing its larger, more favored members, to continue to engage in the pre-netting of trades. FICC has denied this and states that it is not requiring the submission of trades by foreign affiliates because of potential regulatory barriers and because it does not believe that those entities are engaging in substantial amounts of pre-netting activities.

As discussed in the previous section, FICC amended the proposed rule change to require disclosure by its members of their pre-netting with foreign affiliates. The Commission feels that the amendment requiring disclosure of trades with foreign affiliates is an appropriate measure at this time. If FICC learns through these disclosures that its members are engaging in substantial amounts of affiliate pre-netting with their foreign affiliates, the Commission expects FICC to take appropriate steps to similarly address such activities. Accordingly, because FICC has acted at this time appropriately to address the foreign affiliate pre-netting issue, the Commission finds that the proposed rule change would not permit unfair discrimination among FICC's participants as prohibited by section 17A(b)(3)(F).

Cantor and RCG have also argued that the Commission should not approve the proposed rule change because it imposes a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission is not persuaded by Cantor's claim that the proposed rule change will result in an undue burden on competition. We find it unlikely that the proposed rule change will force some FICC members to discontinue their membership in FICC. First the Commission does not believe the increased fee implications of the proposed rule change are as significant as Cantor alleges. As noted by FICC in its filing and in its comment letter, it operates as a not-for-profit corporation

[14] 15 U.S.C. 78c(a)(23)(A).

[15] 15 U.S.C. 78q–1(b)(1).

that matches fees to costs and pays rebates to its members. Furthermore, Cantor and RCG were the only parties to submit negative comments on the proposed rule change. The Commission did not receive comments from any FICC members or potential FICC members, other than from Cantor and RCG, stating that the proposed rule change would make it too expensive for them to remain or to become a member of FICC. Accordingly, for the reasons discussed above, the Commission finds that the proposed rule change is consistent with section 17A(b)(3)(I) of the Act in that it does not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

VI. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder applicable.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR–FICC–2004–15) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[16]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3381 Filed 6–28–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51901; File No. SR–ISE–2005–06]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Fee Changes for Transactions in Options on the Standard & Poor's Depository Receipts®

June 22, 2005.

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 May 20, 2005, the International Securities Exchange, Inc. ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III below, which items have been prepared by the Exchange. On June 15, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.[3] ISE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to section 19(b)(3)(A) of the Act,[4] and Rule 19b–4(f)(2) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its Schedule of Fees to adopt a $.10 per contract surcharge for certain transactions in options based on the Standard & Poor's Depository Receipts®, or SPDRs® ("SPDRs"). The text of the proposed rule change is available on the Exchange's Internet Web site (*http://www.iseoptions.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Schedule of Fees to adopt a $.10 per contract surcharge fee for certain transactions in options on SPDRs.[6]

The Exchange's Schedule of Fees currently has in place a surcharge fee item that calls for a $.10 per contract fee for transactions in certain licensed products. The Exchange entered into a license agreement with Standard and Poor's, a unit of McGraw-Hill Companies, Inc., authorizing the Exchange to list SPDR options. The Exchange is adopting this fee for transactions in SPDR options to defray the licensing costs. The Exchange believes that charging the participants that trade these instruments is the most equitable means of recovering the costs of the license. However, because competitive pressures in the industry have resulted in the waiver of transaction fees for Public Customers,[7] the Exchange proposes to exclude Public Customer Orders[8] from this surcharge fee. Accordingly, this surcharge fee will only be charged to Exchange members with respect to non-Public Customer Orders (*e.g.*, Market Maker and Firm Proprietary orders) and shall apply to Linkage Orders under a pilot program that is set to expire on July 31, 2005.[9]

Additionally, if it is concluded by the courts, after all avenues of appeal, that no license from Standard and Poor's was required by the Exchange to list SPDR options, then upon any refund by Standard and Poor's, the Exchange shall submit a rule filing to the Commission providing for a reimbursement of the surcharge fees paid by members to the Exchange as a result of this surcharge fee.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act[10] in general, and furthers the objectives of section 6(b)(4)

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange made non-substantive changes to clarify the purpose for the fee change. The effective date of the original proposed rule change is May 20, 2005, and the effective date of Amendment No. 1 is June 15, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on June 15, 2005, the date on which the Exchange submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 5 17 CFR 240.19b–4(f)(2).

[6] The Exchange represents that these fees will be charged only to Exchange members.

[7] Public Customer is defined in ISE Rule 100(a)(32) as a person that is not a broker or dealer in securities.

[8] Public Customer Order is defined in ISE Rule 100(a)(33) as an order for the account of a Public Customer.

[9] *See* ISE Rule 1900(10) (defining Linkage Orders). The surcharge fee will apply to the following Linkage Orders: Principal Acting as Agent Orders and Principal Orders.

[10] 15 U.S.C. 78f(b).

of the Act [11] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties with respect to this proposed rule change.

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 [12] and Rule 19b–4(f)(2) [13] thereunder. Accordingly, the proposed rule change is effective upon filing with the Commission. At any time within 60 days of the filing of the amended proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[14]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–ISE–2005–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–ISE–2005–06. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2005–06 and should be submitted on or before July 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3384 Filed 6–28–05; 8:45 am]

BILLING CODE 8010–01–P

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 19b–4(f)(2).

[14] *See supra* note 3.

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51905; File No. SR–NASD–2005–006]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto to Require Semi-Annual Financial Reporting by Foreign Private Issuers

June 22, 2005.

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 18, 2005, 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" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq submitted Amendment No. 1 to its proposed rule change on February 4, 2005 [3] and submitted Amendment No. 2 to its proposed rule change on June 6, 2005 [4]. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to require that foreign private issuers listed on Nasdaq provide semi-annual financial information. Nasdaq will implement the proposed rule change for interim periods ending after January 1, 2006.

The text of the proposed rule change is below. Proposed additions are italicized.[5]

4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq SmallCap Market Issuers Except for Limited Partnerships

Nasdaq shall review the issuer's past corporate governance activities. This review may include activities taking place while the issuer is listed on Nasdaq or an exchange that imposes corporate governance requirements, as well as activities taking place after a formerly listed issuer is no longer listed on Nasdaq or an exchange that imposes corporate governance requirements. Based on such review, Nasdaq may take any appropriate action, including placing of restrictions on or additional requirements for listing, or the denial of listing of a security if Nasdaq determines that there have been violations or evasions of such corporate

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 modified the proposed rule language to require that interim financial information be published on a press release that would also be submitted on a Form 6-K. As originally proposed, the rule language required that interim financial information be submitted on a press release *or* on a Form 6–K.

[4] Amendment No. 2 made technical corrections to the filing and replaced and superceded the original filing and Amendment No. 1 in its entirety.

[5] The proposed rule change is marked to show changes to the rule text appearing in the electronic NASD Manual available at *http://www.nasd.com*. No pending rule filings would affect the text of this rule.

governance standards. Such determinations shall be made on a case-by-case basis as necessary to protect investors and the public interest.

(a) No change

(b) Distribution of Annual and Interim Reports

(1) No change

(2) No change

(3) No change

(4) *Each foreign private issuer shall publish, in a press release, which would also be submitted on a Form 6–K, an interim balance sheet and income statement as of the end of its second quarter. This information, which must be presented in English but does not have to be reconciled to U.S. GAAP, must be provided not later than six months following the end of the issuer's second quarter.*

(c)–(n) No change

4360. Qualitative Listing Requirements for Nasdaq Issuers That Are Limited Partnerships

(a) No change

(b) Distribution of Annual and Interim Reports

(1) No change

(2)(A)–(B) No change

(C) *Each foreign private issuer that is a limited partnership shall publish, in a press release, which would also be submitted on a Form 6-K, an interim balance sheet and income statement as of the end of its second quarter. This information, which must be presented in English but does not have to be reconciled to U.S. GAAP, must be provided not later than six months following the end of the issuer's second quarter. Such information shall be distributed to limited partners if required by statute or regulation in the jurisdiction in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement.*

(c)–(i) 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

Pursuant to Nasdaq and SEC rules, domestic issuers are required to file quarterly financial reports. While non-U.S. issuers are not subject to this requirement and are only required to file financial reports annually,[6] most non-U.S. issuers listed on Nasdaq do in fact provide more frequent disclosure to investors. Nasdaq believes that it would be beneficial to create a uniform standard, applicable to all Nasdaq-listed foreign private issuers, to assure that investors have access to more recent financial information. As such, Nasdaq proposes to require that non-U.S. issuers provide, in a press release that would also be submitted on a Form 6–K, an interim balance sheet and semi-annual income statement, not later than six months following the end of the issuer's second quarter. Under the proposed rule, the information provided would be required to be translated into English, but would not have to be reconciled to U.S. Generally Accepted Accounting Principles ("GAAP").

In order to allow sufficient time for non-U.S. issuers to modify any necessary practices regarding the preparation of interim financial reports, Nasdaq proposes that this new rule not be immediately effective. Instead, the proposed rule will be effective for interim periods ending after January 1, 2006.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[7] in general and with section 15A(b)(6) of the Act,[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. As noted above, Nasdaq believes that the proposed rule will provide enhanced disclosure to investors regarding foreign private issuers that trade on Nasdaq.

[6] This information is required to be filed six months after the company's fiscal year-end. Accordingly, the only financial information presently available could be as much as 18-months old.

[7] 15 U.S.C. 78o–3.

[8] 15 U.S.C. 78o–3(b)(6).

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2005–006 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NASD–2005–006. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2005–006 and should be submitted on or before July 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3382 Filed 6–28–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51907; File No. SR–NYSE–2004–13]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendments No. 2 and No. 3 Thereto To Adopt Rule 405A ("Non-Managed Fee-Based Account Programs—Disclosure and Monitoring")

June 22, 2005.

I. Introduction

On February 25, 2004, the New York Stock Exchange, Inc. ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or the "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 prescribe certain requirements for members and member organizations that offer programs that charge customers a fixed-fee or percentage of account value in lieu of commissions. On October 22, 2004, the NYSE filed Amendment No. 1 to the proposed rule change.[3] Notice of the proposed rule change, as amended by Amendment No. 1, was published for comment in the **Federal Register** on November 1, 2004.[4] The Commission received four comment letters in response to the proposed rule change.[5] On June 21, 2005, the NYSE filed Amendment No. 2 and Amendment No. 3 to the proposed rule.[6] This order approves the proposed rule change, as amended. The Commission is granting accelerated approval of Amendment No. 2 and Amendment No. 3, and is soliciting comments from interested persons on those amendments.

II. Background and Description of Proposed Rule Change

According to the NYSE, members and member organizations of the NYSE are increasingly offering Non-Managed Fee Based Account Programs ("NFBA Programs") to their customers. NFBA Programs are agreements between a broker-dealer and a customer in which the customer is charged a fixed fee and/or a percentage of account value rather than transaction-based commissions.[7] Because of their fee structure, such arrangements may not be appropriate for customers who trade infrequently. To address the particular regulatory challenges presented by NFBA Programs, the NYSE proposed new Rule 405A.

A. General Disclosure Required

Proposed Rule 405A would require NYSE members to provide to each customer, prior to the opening of an NFBA Program account, a disclosure document describing the types of NFBA Programs available to the customer.[8] For each type of Program, the document must include sufficient information to enable a customer to make a reasonably informed determination as to whether the Program is appropriate for him or her. This information should include, at minimum, a description of the services provided, eligible assets, fees charged, an explanation of how costs will be computed and/or the provision of cost estimates based on hypothetical portfolios, any conditions or restrictions imposed, and a summary of the Program's advantages and disadvantages.

B. Opening of Accounts

Proposed Rule 405A would require NYSE members to make a determination, prior to opening an account in an NFBA Program, that such Program is appropriate for each customer taking into account the services provided, anticipated costs, and customer objectives.[9] In making such determination, cost would be an important factor, but not the only one, that a member should consider. NYSE members would be required to consider the overall needs and objectives of the customer when determining the appropriateness of an NFBA Program for that customer, including the anticipated level of trading activity in the account and non-price factors, such as the importance that a customer places on aligning his or her interests with those of the broker.

C. Monitoring of Accounts

Proposed Rule 405A would require NYSE members to establish and maintain systems and procedures to enable them to monitor, on an ongoing basis, transactional activity by customers in NFBA Programs.[10] These systems and procedures would need to include specific written criteria for identifying customers whose level of account activity may be inappropriate in the context of the customer's Program. The determination of appropriateness would take into consideration not only costs incurred, but also Program services, customer investment objectives, and customer preferences.

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[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Mary Yeager, Assistant Corporate Secretary, NYSE, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 22, 2004.

[4] *See* Securities Exchange Act Release No. 50586 (Oct. 25, 2004), 69 FR 63424 ("Notice").

[5] *See* letters to Jonathan G. Katz, Secretary, Commission, from: Ira D. Hammerman, General Counsel, Securities Industry Association, dated November 22, 2004 ("SIA Letter"); Rosemary J. Shockman, President, Public Investors Arbitration Bar Association, dated November 19, 2004 ("PIABA Letter"); Barbara Black, Co-Director, Jill I. Gross, Co-Director, and Bob Kim, Student Intern, Pace Investor Rights Project, dated November 22, 2004 ("PIRP Letter"); and Curt Bradbury, Chief Operating Officer, Stephens Inc., dated November 22, 2004 ("Stevens Letter").

[6] *See* Form 19b–4 dated June 21, 2005 ("Amendment No. 2") and Form 19b–4 dated June 21, 2005 ("Amendment No. 3"). As discussed below, in response to commenters, in Amendment No. 2, the NYSE proposed to eliminate a requirement that its members provide customers with an annual disclosure document and that its members attempt to determine "projected customer costs." Amendment No. 2 also proposed to make several minor changes to clarify the rule as originally proposed. Amendment No. 3 corrected a non-substantive typographical rule text error included in Exhibit 5 of the Amendment No. 2 filing.

[7] *See* proposed NYSE Rule 405A(6).

[8] *See* proposed NYSE Rule 405A(1).

[9] *See* proposed NYSE Rule 405A(2).

[10] *See* proposed NYSE Rule 405A(3).

D. Review and Follow-Up

The proposed rule would require each NYSE member to maintain written procedures for contacting and following up with customers whose accounts are identified in the monitoring stage.[11] The timeframe for identifying such customers should be, at minimum, a rolling 12 month period, though more frequent contact would be required should circumstances warrant. While the proposed rule does not prescribe specific procedures for identifying, contacting, and following up with customers, the means (*e.g.*, letter, phone call, or e-mail) and general content of any unwritten follow-up customer contact would have to be documented and retained in an easily accessible place.[12]

E. Applicability of Rule

Because proposed Rule 405A is intended to protect the interests of retail customers, it contains an exception for accounts opened on behalf of "Qualified Investors" as that term is defined in section 3(a)(54) of the Act.[13] This exception is based on the assumption that such accounts are generally directed by persons that are financially sophisticated and thus better able to make informed decisions regarding the appropriateness of available NFBA Programs. The proposed rule also does not apply to any NYSE member that does not offer NFBA Programs to its customers.

F. Supplementary Material

Proposed Rule 405A contains supplementary material reminding NYSE members that they have an obligation, under NYSE Rule 405(1), to "use due diligence to learn the essential facts relative to every customer and every cash or margin account, including accounts in Non-Managed Fee-Based Account Programs, accepted or carried by such member organization."[14]

III. Summary of Comments on the Proposed Rule Change

The Commission received four comment letters on the proposed rule change.[15] Two comment letters generally supported the proposal,[16] although one of them thought that the proposed rule failed to address what this commenter viewed as the larger problems customers face with fee-based accounts.[17] Two comment letters opposed it.[18]

Two commenters objected to the requirement in the proposed rule that members determine "projected customer costs."[19] For example, one commenter argued that it would be "difficult and potentially misleading to project customer costs with any degree of accuracy."[20] The same commenter also contended that the disclosure document does not need to be delivered annually, and that it could be incorporated into existing account opening documentation.

One commenter suggested that the proposal should clearly state that members may consider representations by the customer regarding anticipated levels of trading activity when determining whether it is appropriate to open an account in an NFBA Program, even though that representation alone may not be determinative in cases where the NFBA Program offers a preferred level of services.[21] Another commenter criticized the proposed rule because, "by solely focusing on cost," the proposed rule "undervalues the attention given by a broker to his customer and the advice of the broker," including advice not to trade, when appropriate.[22]

Two commenters objected to the requirement that members establish and maintain systems and procedures adequate to monitor, on an ongoing basis, transactional activity by customers in NFBA Programs.[23] One of these argued that, given that activity levels may not be the only factor in determining whether an NFBA Program is appropriate for customers, the development of transactional monitoring systems would be of limited use.[24] Another commenter argued that the proposal's focus on the cost of transactional activity alone to identify customers for follow-up may create the presumption that certain customers should have been in different kinds of accounts.[25]

Two commenters objected to the annual review period for determining which customer accounts must be followed up with.[26] One of these commenters thought that the review period should be 24 months.[27] The other commenter argued that it should be 36 months.[28] One commenter opined that once a customer account is identified in the monitoring stage as requiring follow-up, the proposed rule could imply that members would be required to follow up with the customer indefinitely regardless of whether the customer's account continues to be identified.[29]

Two commenters objected to the exception in the proposed rule for "Qualified Investors."[30] One argued that the exception should be expanded to include "accredited investors" or any institutional customer with at least $10 million invested in securities in the aggregate.[31] It also argued that the proposed rule should not include accounts managed by independent investment advisory firms because these accounts are "managed." The other commenter did not think pension plans with investment advisers should be excepted from the rule.[32]

IV. Amendment No. 2 to the Proposed Rule Change

In Amendment No. 2, the NYSE modified the proposal to address certain comments received concerning the proposed rule change.

A. General Disclosure Requirements

As originally proposed, NYSE Rule 405A would have required NYSE members to provide an annual disclosure document to customers with

[11] *See* proposed NYSE Rule 405A(4).

[12] The proposed rule would not alter any recordkeeping requirements imposed on broker-dealers by Rules 17a–3 and 17a–4 under the Act. 17 CFR 200.17a–3 and 17–4.

[13] *See* proposed NYSE Rule 405A(5).

[14] *See* proposed Rule 405A (Supplementary Material).

[15] *See supra* note 5.

[16] *See* PIRP Letter and PIABA Letter.

[17] *See* PIABA Letter (expressing concern regarding the proposed rule's silence regarding the suitability obligations of members when recommending outside investment advisers and the rule's failure to address the obligations of members to monitor the suitability of the activity within an NFBA Program).

[18] *See* SIA Letter and Stevens Letter.

[19] *Id.*

[20] *See* SIA Letter (suggesting instead that members "explain how costs will be computed and/or provide cost estimates based on hypothetical portfolios"), and *see also* Stevens Letter (arguing that determining "projected customer costs" is "unduly burdensome" and a matter of "pure guesswork"). Another commenter recommended that a disclosure document be provided that would allow a customer "to compare the cost of a fee-based program with a commission-based program for a given level of transaction volume and asset mix." *See* PIRP Letter.

[21] *See* SIA Letter.

[22] *See* Stephens Letter. *See also* SIA Letter and PIRP Letter (arguing that, while non-cost factors should play a role in determining whether a NFBA Program is appropriate for a customer, they should not be used to justify extreme payment differentials over pay-per-trade arrangements).

[23] *See* SIA Letter and Stevens Letter.

[24] *See* SIA Letter (arguing also that requiring each member to develop an "automated surveillance system" would be onerous and costly).

[25] *See* Stevens Letter.

[26] *See* SIA Letter and Stevens Letter.

[27] *See* SIA Letter.

[28] *See* Stevens Letter.

[29] *See* SIA Letter.

[30] *See* SIA Letter and PIABA Letter.

[31] *See* SIA Letter.

[32] *See* PIABA Letter (arguing that many pension plans of medical clinics and professional practices have trustees that are not sophisticated enough to select an appropriate investment adviser).

an NFBA Program account.[33] Concluding that such disclosure would, in many instances, be redundant, the NYSE omitted this requirement.[34] As originally proposed, the NYSE rule would also have required NYSE members to disclose "projected customer costs." [35] Responding to the concerns of two commenters,[36] the NYSE determined that "due to the varying nature of Program features as well as the uncertainty of prospective trading volumes, 'projected customer costs' may be a somewhat speculative standard." Amendment No. 2, therefore, eliminates this requirement and replaces it with the requirement that NYSE members provide "an explanation of how costs will be computed and/or the provision of cost estimates based on hypothetical portfolios."

B. Monitoring of Accounts

As originally proposed, the NYSE rule would have required NYSE members to develop systems and procedures that include "transaction parameters for identifying customer account activity that may be inconsistent with the Program costs incurred by the customers." [37] Amendment No. 2 eliminates the "transaction parameters" requirement and replaces it with a requirement that NYSE members develop systems and procedures that include "written criteria for identifying customers whose level of account activity may be inappropriate in the context of the customer's Program." [38] In making this change, Amendment No. 2 clarifies that it was not the NYSE's intention to require its members to develop or acquire an automated system to monitor their NFBA Program accounts.

C. Review and Follow-Up

As originally proposed, the NYSE rule would have required that NYSE members maintain written procedures for contacting and following up with customers for whom NFBA accounts might be inappropriate, at minimum, every 12 months.[39] Amendment No. 2 modifies the follow-up requirement period to a rolling 12 months. This change responds to the concern of one commenter that the original proposal could imply that members were required to follow up with flagged customers in perpetuity.[40] Amendment No. 2 now clarifies that subsequent contacts are to be based upon subsequent activity reviews (*i.e.*, "as appropriate").[41]

V. Discussion

After careful consideration of the proposal and the comments received, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[42] and, in particular, the requirements of section 6 of the Act [43] and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with section 6(b)(5) of the Act,[44] in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Fee-based accounts have become more popular over the last several years as commission revenue has declined with the decrease in trading volumes. Such accounts can benefit broker-dealers by providing them with a steady stream of revenue that is less dependent on short-term fluctuations in trading activity. Such accounts can also benefit customers by removing an incentive for broker-dealers to encourage trading in an account to increase commission revenue. At the same time, however, such accounts are not appropriate for every investor. One concern raised by fee-based accounts is that customers are being inappropriately moved into these accounts when commission-based accounts would cost them less due to their low volume of trading. Another concern is that there is currently little or no monitoring and follow-up required with customers whose trading activity has changed over time and for whom a fee-based account is no longer appropriate.[45] The NYSE proposal should help to ensure that customers are placed in the account that is the most appropriate for them.[46]

The Commission believes the proposed rule change strengthens the NYSE's ability to address the particular regulatory concerns raised by NFBA Programs.[47] The Commission further believes that the proposed rule change should help to ensure that customers receive sufficient information to make a reasonably informed determination as to whether an NFBA Program is appropriate for them.[48] Although the Commission believes that cost is likely to be the key factor in determining whether a customer should be in an NFBA Program, it also believes that it is appropriate to consider other factors as well, such as the services provided and customer objectives and preferences. This appropriateness determination is strengthened by the requirement in the proposed rule that NYSE members establish and maintain systems and procedures adequate to monitor, on an ongoing basis, transactional activity by customers in NFBA Programs.[49] In Amendment No. 2, the NYSE amended the proposed rule to provide that the systems and procedures must include only "written criteria" (rather than "specific transactional parameters or criteria"). The Commission believes that

[33] *See* Notice, 69 FR at 63424.

[34] Amendment No. 2. However, as a matter of good business practice, the NYSE strongly advises that any significant changes or updates in a member organization's menu of NFBA Programs be brought to the attention of existing customers to assist them in making a determination as to whether they are in a Program that best suits their current investment objectives.

[35] *See* Notice, 69 FR at 63424–25.

[36] *See* SIA Letter and Stevens Letter.

[37] *See* Notice, 69 FR at 63424.

[38] Amendment No. 2 notes that: "The determination of appropriateness should take into consideration costs incurred, Program services, customer investment objectives, and customer preferences."

[39] *See* Notice, 69 FR at 63425.

[40] *See* SIA Letter.

[41] Amendment No. 2 also gives "e-mail" as an example of a permissible means of customer contact.

[42] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[43] 15 U.S.C. 78f.

[44] 15 U.S.C. 78f(b)(5).

[45] *See, e.g.*, Aaron Pressman and Amy Borrus, "A Poor Fit for Investors?," Business Week, May 9, 2005, pp. 78–79; Kaja Whitehouse, "Some Investors Can Be Left Flat by Annual Fees," The Wall Street Journal, April 14, 2004, at D7; and Ruth Simon, "Fee Accounts Face Scrutiny by Regulators—SEC, Others Probe Programs that Charge Investors Fees Instead of Commissions for Trades," The Wall Street Journal, October 5, 2004, at D1.

[46] For dual NYSE and NASD members the new NYSE Rule 405A will augment guidance that NASD provided in NASD NTM 03–68 (Nov. 2003) regarding fee-based compensation programs.

[47] The Commission agrees with the NYSE that, given the growth of these programs, "specific, enforceable standards of compliance are warranted." *See* Amendment No. 2. Because the proposed rule, as amended, provides firms flexibility in implementing compliance procedures, the Commission does not believe that it will discourage firms from offering these programs.

[48] While the Commission believes that an annual disclosure requirement and a requirement that members determine "projected customer costs," both of which were originally proposed, could have strengthened the rule, we do believe that the amended proposal will provide investors with a degree of protection from being in placed in inappropriate accounts that is not currently available. Moreover, the Commission notes that the disclosure requirement is complemented by the additional requirement in the proposed rule that NYSE members make an appropriateness determination prior to opening an account in an NFBA Program. *See* proposed Rule 405A(2).

[49] *See* proposed Rule 405A(3).

this amendment is appropriate because it clarifies that the proposed rule does not require that NYSE members generate "automated exception reports."[50]

The Commission believes that the follow-up requirement in the proposed rule will ensure that members take active steps to contact customers who may be in inappropriate accounts.[51] Amendment No. 2 clarifies that NYSE members are only required to follow up with customers so long as they continue to be identified in the monitoring stage by adding the words "as appropriate" to the end of the first sentence of paragraph (4). The Commission agrees with the NYSE that a 12-month review cycle is a reasonable review period to flag customers who may be in inappropriate accounts. Because the proposed rule does not prescribe the means to follow up with customers, it should not be difficult to integrate the proposed requirements into member organizations' existing systems and procedures for follow-up customer contact.[52]

The Commission believes that the exception in the proposed rule for "Qualified Investors," as that term is defined in section 3(a)(54) of the Exchange Act, is appropriate.[53] As the NYSE correctly notes, underlying the Qualified Investor standard is the presumption that such persons are sophisticated investors who are capable of ensuring responsible handling of funds under management.[54] Accordingly, the level of disclosure required for retail customers may not be warranted for such investors.

The Commission finds good cause for approving Amendment No. 2 and Amendment No. 3 before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 2 clarifies certain aspects of the proposed rule that commenters found confusing, as well as makes minor changes to give members greater flexibility in the administration of the proposed rule. Amendment No. 3 corrects a non-substantive typographical rule text error included in Exhibit 5 of the Amendment No. 2 filing.

[50] Two commenters raised this concern. *See* SIA Letter and Stevens Letter. The Commission notes that identifying customers whose level of account activity may be inappropriate in the context of the customer's Program does not create "a presumption that certain customers should have been in different types of accounts," as one commenter was concerned. *See* Stevens Letter. Rather, the Commission believes it provides, as the NYSE states, "an opportunity to determine appropriateness." *See* Amendment No. 2. Nevertheless, the Commission expects that the NYSE will conduct regular examinations to determine the frequency with which firms are placing customers in NFBA Programs that are inappropriate for those customers. A high percentage of initial placements in inappropriate accounts by a particular member or registered representative may suggest a need for more vigorous procedures for determining the appropriateness of account placement.

[51] *See* proposed Rule 405A(4).

[52] The Commission does not agree with one commenter that it will be difficult to make effective contact with customers on an annual basis or necessitate a "tremendous use of personnel resource, unavailable to most firms." *See* Stevens Letter.

[53] *See* proposed Rule 405A(5).

[54] *See* Amendment No. 2.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 and Amendment No. 3 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml;*) or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2004–13 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NYSE–2004–13. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–9303. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2004–13 and should be submitted on or before July 20, 2005.

VII. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[55] that the proposed rule change (File No. SR–NYSE–2004–13) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[56]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3379 Filed 6–28–05; 8:45 am]

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[55] 15 U.S.C. 78s(b)(2).

[56] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51899; File No. SR–NYSE–2005–16]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change To Rescind the "Nine-Bond" Rule

June 22, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 11, 2005, 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 NYSE. 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 the Substance of the Proposed Rule Change

The Exchange proposes to rescind NYSE Rule 396 (Off Floor Transactions in Bonds), commonly known as the "Nine-bond" rule. The text of the proposed rule change is available on the NYSE's Web site (*http://www.nyse.com*), at the NYSE's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE 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 NYSE 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

NYSE Rule 396 addresses off-floor trading of bonds. The rule, in essence, prohibits a member firm from effecting any transaction in any listed bond in the over-the-counter market, either as principal or agent, without first satisfying all public bids and offers on the Exchange at prices equal to, or better, than the price at which such portion of the order is executed over-the-counter. A member organization may execute, as agent, a transaction for a customer in the over-the-counter market in a listed convertible bond.

The rule contains several exceptions, including:

—Any order for the purchase or sale of ten bonds or more (hence the name of the rule);

—Orders involving less than one unit of trading (generally less than $1,000);

—Orders where the customer has specifically directed that the trade not be executed on the floor of the Exchange;

—Orders for the purchase or sale of U.S. government bonds, municipal bonds, or bonds which have been called or otherwise are to be redeemed within 12 months; and

—Bond transactions related to primary or special distributions

The Exchange believes that the characteristics of bond trading no longer necessitate that NYSE Rule 396 be retained. In addition, in a separate submission, the Exchange has requested that the Commission provide an exemption from the provisions of section 12(a) of the Act[3] to permit NYSE members and member organizations to trade certain unregistered debt securities on the Automated Bond System.[4] If the Commission grants this exemption, the Exchange could add substantially to the inventory of bonds traded in its market. Although the additional bonds would not be subject to NYSE Rule 396 since they would not be "listed" bonds, Rule 396 may be viewed as anti-competitive, particularly because the rule would apply only to a small segment of bonds traded on the Exchange. The Exchange, therefore, proposes to rescind NYSE Rule 396 in its entirety.

2. Statutory Basis

The NYSE believes that the proposed rule change is consistent with the provisions of section 6(b) of the Act,[5] in general, and with section 6(b)(5) of the Act,[6] in particular, which requires that NYSE rules be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NYSE does not believe that the proposed rule change would 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 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. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2005–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NYSE–2005–16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2005–16 and should be submitted on or before July 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3380 Filed 6–28–05; 8:45 am]

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[3] 15 U.S.C. 78*l*(a).

[4] *See* letter from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated May 26, 2005.

[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. 34–51906; File No. SR–NYSE–2004–05]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Amendment No. 5 to a Proposed Rule Change Relating to Enhancements to the Exchange's Existing Automatic Execution Facility Pilot (NYSE Direct+®)

June 22, 2005.

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 June 17, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") Amendment No. 5 [3] to a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change as amended by Amendment No. 5 from interested persons.

The proposed rule change was originally filed on February 9, 2004 and amended by Amendment No. 1 on August 2, 2004.[4] The proposed rule change, as amended by Amendment No. 1, was published for comment in the **Federal Register** on August 16, 2004.[5] On August 26, 2004, the Commission extended the public comment period with respect to the First Notice to September 22, 2004.[6] On November 8, 2004 and November 9, 2004, the Exchange filed Amendment Nos. 2 and 3, respectively.[7] The proposed rule change, as further amended by Amendment Nos. 2 and 3, was published for comment in the **Federal Register** on November 22, 2004.[8] The Commission has received 26 comment letters with respect to the First and Second Notices.[9]

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the rules of the Exchange governing trading in the NYSE HYBRID MARKETSM ("Hybrid Market"). The Exchange Hybrid Market was originally proposed in SR–NYSE–2004–05 and Amendment Nos. 1, 2, and 3. This Amendment No. 5 supplements the description of aspects of the Hybrid Market described in the First and Second Notices [10] and proposes additional amendments to Exchange rules. In addition, Amendment No. 5 describes the proposed Hybrid Market implementation plan. Below is the text of the proposed rule change, as proposed by Amendment No. 5. Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

Definitions of Orders

Rule 13

* * * * *

All or None Order

A market or limited price order [which] *designated all or none may be designated for automatic execution in accordance with, and to the extent provided by Rules 1000–1004. An all or none order* is to be executed in its entirety or not at all, but, unlike a fill or kill order, is not to be treated as cancelled if not executed as soon as it is represented in the Trading Crowd *or routed to the Display Book® for automatic execution.* The making of "all or none" bids or offers in stocks is prohibited and the making of "all or none" bids or offers in bonds is subject to the restrictions of Rule 61 and Rule 86.

* * * * *

Auction Limit Order

An auction limit order is an order that provides an opportunity for price improvement.

The limit price of an auction limit order to buy should be at or above the Exchange best offer at the time the order is entered on the Exchange. The limit price of an auction limit order to sell should be at or below the Exchange best bid at the time the order is entered on the Exchange.

An auction limit order to buy with a limit price that is not at or above the Exchange best offer when it arrives at the Exchange for execution or an auction limit order to sell with a limit price that is not at or below the Exchange best bid when it arrives at the Exchange for execution shall be entered into the Display Book® at its limit price and shall be handled as a non-auto ex limit order.

An auction limit order shall be quoted and executed in accordance with Exchange Rule 123F and routed in accordance with Exchange Rule 15A.50.

Auto Ex Order

An auto ex order is*:*

(a) *a market order designated for automatic execution or a limit order to buy (sell) priced at or above (below) the Exchange best offer (bid) at the time such order is routed to the Display Book® or*

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated June 17, 2005 ("Amendment No. 5"). The Exchange had submitted Amendment No. 4 to the proposed rule change on May 25, 2005, and subsequently withdrew Amendment No. 4 on June 17, 2005. Amendment No. 5 supplements the description of certain aspects of the Exchange's Hybrid Market and proposes additional amendments to the Exchange's rules.

[4] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated July 20, 2004, and accompanying Form 19b–4, which replaced the original filing in its entirety ("Amendment No. 1").

[5] *See* Securities Exchange Act Release No. 50173 (August 10, 2004), 69 FR 50407 ("First Notice").

[6] *See* Securities Exchange Act Release No. 50277, 69 FR 53759 (September 2, 2004).

[7] *See* Form 19b–4 dated November 8, 2004 ("Amendment No. 2") and Partial Amendment dated November 9, 2004 ("Amendment No. 3").

[8] *See* Securities Exchange Act Release No. 50667 (November 15, 2004), 69 FR 67980 ("Second Notice").

[9] *See* letter to William Donaldson, Chairman, Commission, from Donald E. Weeden, dated August 31, 2004; letters to the Commission from: Kim Bang, President and Chief Executive Officer, Bloomberg Tradebook LLC, dated September 22, 2004; Marc L. Lipson, Associate Professor, the University of Georgia, dated January 4, 2005; and Eric D. Roiter, Senior Vice President and General Counsel, Fidelity Management & Research Company, dated October 26, 2004 and December 8, 2004; letters to Jonathan G. Katz, Secretary, Commission, from: Philip Angelides, Treasurer, State of California, dated November 23, 2004; Ari Burstein, Associate Counsel, Investment Company Institute, dated September 22, 2004 and December 13, 2004; Gregory van Kipnis, Managing Partner, Invictus Partners, LLC, dated December 10, 2004; Donald D. Kittell, Executive Vice President, Securities Industry Association, dated October 1, 2004; Edward S. Knight, The Nasdaq Stock Market, dated January 26. 2005; Ellen L.S. Koplow, Executive Vice President and General Counsel, Ameritrade Holding Corporation, dated September 22, 2004; Bruce Lisman, Bear, Stearns & Co. Inc., dated September 28, 2004; Edward J. Nicoll, Chief Executive Officer, Instinet Group Incorporated, dated October 25, 2004; Thomas Peterffy, Chairman, and David M. Battan, Vice President, the Interactive Brokers Group on behalf of its affiliates Timber Hill LLC and Interactive Brokers LLC, dated September 7, 2004 and December 14, 2004; Lisa M. Utasi, President, and Kimberly Unger, Executive Director, the Security Traders Association of New York, Inc., dated September 22, 2004; Ann L. Vlcek, Vice President and Associate General Counsel, Securities Industry Association, dated December 13, 2004; and letter to Annette L. Nazareth, Director, Division, Commission, and Robert L.D. Colby, Deputy Director, Division, Commission, from Eric D. Roiter, Senior Vice President and General Counsel, Fidelity Management & Research Company, dated August 10, 2004. See email to Nancy Reich Jenkins, Managing Director, Market Surveillance, NYSE, from George W. Mann Jr., Executive Vice President and General Counsel, Boston Stock Exchange, Inc., dated September 22, 2004; and emails to the Commission from: Jose L. Marques, Ph.D., Managing Member, Telic Management LLC, dated September 21, 2004; Junius W. Peake, Monfort Distinguished Professor of Finance, Kenneth W. Monfort College of Business, University of Northern Colorado, dated September 22, 2004 and June 17, 2005; James L. Rothenberg, Esq., dated August 30, 2004; and George Rutherfurd, Consultant, dated March 10, 2005 and April 8, 2005.

[10] *See* supra notes 5 and 8.

(b) an immediate or cancel order designated for automatic execution; or

(c) a stop or stop limit order systemically delivered to the Display Book ® that has been elected; or

(d) a buy "minus", sell "plus", or short sale order systemically delivered to the Display Book®; or

(e) an all or none order; or

(f) an elected or converted percentage order that is convertible on a destabilizing tick and for which the entering broker has granted permission for the specialist to be on parity with the order; or

(g) a part of round lot (PRL) order; or

(h) orders initially eligible for automatic execution that have been cancelled and replaced with an auto ex order in a stock, Investment Company Unit (as defined by paragraph 703.16 of the Listed Company Manual), or Trust Issued Receipt (as defined in Rule 1200), subject to [a limit order of 1099 shares or less priced at or above the Exchange's published offer (in the case of an order to buy) or at or below the Exchange's published bid (in the case of an order to sell), which a member or member organization has entered for] automatic execution in accordance with, and to the extent provided by, Exchange Rules 1000–1004[5]*; or*[.]

(i) an intermarket sweep order, as defined in this rule.

[Pursuant to a pilot program to run until December 23, 2004, orders in Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual), or Trust Issued Receipts (as defined in Rule 1200) may be entered as limit orders in an amount greater than 1099 shares. The pilot program shall provide for a gradual, phased-in raising of order size eligibility, up to a maximum of 10,000 shares. Each raising of order size eligibility shall be preceded by a minimum of a one-week advance notice to the Exchange's membership.]

* * * * *

Immediate or Cancel Order

A market or limited price order [which] *designated immediate or cancel* is to be executed [in whole or in part] *to the extent possible* as soon as such order is represented in the Trading Crowd *or if designated auto ex, is to be automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004* and the portion not so executed is to be treated as cancelled. [For the purposes of this definition, a "stop" is considered an execution.] *An immediate or cancel order may be entered before the Exchange opening for participation in the opening trade. If not executed as part of the opening trade, the order shall be treated as cancelled.*

A "commitment to trade" received [on the Floor] through ITS *will be automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004,* [shall be treated in the same manner, and entitled to the same privileges, as would an immediate or cancel order that reaches the Floor at the same time] except as otherwise provided in the Plan and except further that such a commitment may not be "stopped." [and the commitment shall remain irrevocable for the time period chosen by the sender of the commitment.] *After trading with the Exchange published bid (offer) to the extent of the displayed volume associated with such bid (offer), any unfilled balance of a commitment to trade shall be automatically reported to ITS as cancelled.*

Intermarket Sweep Order

An "intermarket sweep order" is a limit order designated for automatic execution in a particular security, that meets the following requirements:

(i) It is identified as an intermarket sweep order in the manner prescribed by the Exchange; and

(ii) Simultaneously with the routing of an intermarket sweep order to the Exchange, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of any protected bid (as defined in (v), below) in the case of a limit order to sell, or the full displayed size of any protected offer (as defined in (v), below) in the case of a limit order to buy with a price that is superior to the limit price of the limit order identified as an intermarket sweep order. These additional routed orders must be identified as intermarket sweep orders; and

(iii) An intermarket sweep order may be designated as immediate or cancel (IOC).

(iv) An intermarket sweep order is immediately executable by the Exchange pursuant to Rules 1000–1004.

(v) A "protected bid or offer" means a quotation in a stock that:

(a) is displayed by an automated trading center;

(b) is disseminated pursuant to an effective national market system plan; and

(c) is an automated quotation that is the best bid or offer of another market center.

Limit, Limited Order or Limited Price Order

An order to buy or sell a stated amount of a security at a specified price, or at a better price, if obtainable, after the order is represented in the Trading Crowd.

A marketable limit order is an order on the Exchange that can be immediately executed; that is, an order to buy priced at or above the Exchange best offer or an order to sell priced at or below the Exchange best bid.

A marketable limit order systemically delivered to the Display Book® is an auto ex order subject to automatic execution in accordance with, and to the extent provided by, Exchange Rules 1000–1004.

Market Order

An order to buy or sell a stated amount of a security at the most advantageous price obtainable after the order is represented in the Trading Crowd *or systemically delivered to the Display Book®.*

A market order is not an auto ex order unless so designated and if not so designated shall be quoted and executed in accordance with Exchange Rule 123F and routed in accordance with Exchange Rule 15A.50.

A market order designated for automatic execution is an auto ex order and shall be executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004.

* * * * *

Percentage Order

A limited price order to buy (or sell) 50% of the volume of a specified stock after its entry. There are four types of percentage orders:

(a) Straight Limit Percentage Orders-Such an order is elected when a transaction has occurred at the limit price or a better price. Unless otherwise specified, only volume at or below the limit subsequent to the receipt of the order will be applied in determining the elected portion of buy orders. Conversely, only volume at or above the limit will be calculated in determining the elected portion of sell orders.

(b) Last Sale Percentage Orders-The elected portion of an order designated "last sale" shall be executed only at the last sale price or at a better price, provided that such price is at or better than the limit specified in the order. If the order is further designated "last sale-cumulative volume", the elected portion shall be placed on the [book] *Display Book®* at the price of the electing sale, but if not executed, shall be cancelled and re-entered on the [book] *Display Book®* at the price of the subsequent transactions on the Exchange, provided the price of such subsequent transactions is at or better than the limit specified in the order.

(c) "Buy Minus"-"Sell Plus" Percentage Orders-The elected portion of an order to "buy minus" shall be executed only on a "minus" or "zero minus" tick. Orders of this type must also be qualified further by designating a limit price. The elected portion of an order to "sell plus" shall be executed only on a "plus" or "zero plus" tick. Orders so designated are handled in the same manner as an order to sell short. (*See* [¶ 2123A.71] *Rule 123A.71*) Orders of this type must also be further qualified by designating a limit price.

If so instructed by the entering broker(s), percentage orders to buy will be converted into regular limit orders for transactions effected on "minus" or "zero minus" ticks. Conversely, if so instructed by the entering broker(s), percentage orders to sell will be converted into regular limit orders for transactions effected on "plus" or "zero plus" ticks.

If further instructed by the entering broker(s), as provided in Rule 123A.30, percentage orders to buy may be converted into regular limit orders for transactions on "plus" or "zero plus" ticks. Conversely, if so instructed by the entering broker(s), percentage orders to sell may be converted into regular limit orders for transactions on "minus" or "zero minus" ticks.

(*See also* [¶ 2123A.30] *Rule 123A.30.*)

(d) "Immediate Execution or Cancel Election" Percentage Orders-The elected portion of a percentage order with this designation is to be executed immediately in whole or in part at the price of the electing transaction. Any elected portion not so executed shall be deemed cancelled, and shall revert to its status as an unelected percentage order and be subject to subsequent election or conversion.

The converted portion of an immediate execution or cancel election percentage order that is convertible on a destabilizing tick (a "CAP–DI order") and which is systemically delivered to the Display Book® will be eligible to be automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004, consistent with the order's instructions.

* * * * *

Sell "Plus"-Buy "Minus" Order

A market order to sell "plus" is a market order to sell a stated amount of a stock provided that the price to be obtained is not lower than the last sale if the last sale was a "plus" or "zero plus" tick, and is not lower than the last sale plus the minimum fractional change in the stock if the last sale was a "minus" or "zero minus" tick. A limited price order to sell "plus" would have the additional restriction of stating the lowest price at which it could be executed.

Sell "plus" limit orders and sell "plus" market orders designated for automatic execution that are systemically delivered to the Display Book® will be eligible to be automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004, consistent with the order's instructions.

A market order to buy "minus" is a market order to buy a stated amount of a stock provided that the price to be obtained i[n]s not higher than the last sale if the last sale was a "minus" or "zero minus" tick, and is not higher than the last sale minus the minimum fractional change in the stock if the last sale was a "plus" or "zero plus" tick. A limited price order to buy "minus" would have the additional restriction of stating the highest price at which it could be executed.

Buy "minus" limit orders and buy "minus" market orders designated for automatic execution that are systemically delivered to the Display Book® will be eligible to be automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004, consistent with the order's instructions.

Stop Order

A stop order to buy becomes a market order when a transaction in the security occurs at or above the stop price after the order is represented in the Trading Crowd. A stop order to sell becomes a market order when a transaction in the security occurs at or below the stop price after the order is represented in the Trading Crowd. *Stop orders that are systemically delivered to the Display Book® will be eligible to be automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004, consistent with the order's instructions.*

Stop Limit Order

A stop limit order to buy becomes a limit order executable at the limit price, or at a better price, if obtainable, when a transaction in the security occurs at or above the stop price after the order is represented in the Trading Crowd. A stop limit order to sell becomes a limit order executable at the limit price or at a better price, if obtainable, when a transaction in the security occurs at or below the stop price after the order is represented in the Trading Crowd. *Stop limit orders that are systemically delivered to the Display Book® will be eligible to be automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004, consistent with the order's instructions.*

* * * * *

(Remainder of rule unchanged)

ITS "Trade-Throughs" and "Locked Markets"

Rule 15A

* * * * *

Supplementary Material:

.10 Nothing in paragraph (d)(2)(B) above is intended to discourage a locking member from electing to ship if the complaint requests him to do so.

.20 The fact that a transaction may be cancelled or the price thereof may be adjusted pursuant to the provisions of paragraph (b)(2) of this Rule 15A, shall not have any effect, under the rules, on other transactions or the execution of orders not involved in the original transaction.

.30 The provisions of this Rule 15A shall supersede the provisions of any other Exchange Rule which might be construed as being inconsistent with Rule 15A.

.40 For the purposes of this Rule:

i. the terms "Exchange trade-through" and "Third participating market center trade-through" do not include the situation where a member who initiates the purchase (sale) of an ITS security at a price which is higher (lower) than the price at which the security is being offered (bid) in another ITS participating market, sends contemporaneously through ITS to such ITS participating market a commitment to trade at such offer (bid) price or better and for at least the number of shares displayed with that market center's better-priced offer (bid); and

ii. a trade-through complaint sent in these circumstances is not valid, even if the commitment sent in satisfaction cancels or expires, and even if there is more stock behind the quote in the other market.

.50 Where a better bid or offer is published by another ITS participating market center in which an automatic execution is immediately available or a published bid or offer is otherwise protected from a trade-through by Securities and Exchange Commission rule or ITS Plan, and the price associated with such published better bid or offer has not been systemically matched by the specialist, the Exchange will automatically route to such other market center a commitment to trade that satisfies such published bid or offer, unless the member entering the order indicates in such manner as required by the Exchange that it is contemporaneously satisfying the better

published bid or offer. If such commitment to trade is not filled or not filled in its entirety, the balance will be returned to the Exchange and handled consistent with the order's instructions, which includes automatic execution, if available. The order entry time associated with the returned portion of the order will be the time of its return, not the time the order was first entered with the Exchange.

.60 Incoming commitments will not trade with any reserve or other non-displayed interest at the Exchange best bid or offer price and will not participate in sweeps as described in Rule 1000(b).

* * * * *

Rule 36

Communications Between Exchange and Members' Offices

No member or member organization shall establish or maintain any telephonic or electronic communication between the Floor and any other location without the approval of the Exchange. The Exchange may to the extent not inconsistent with the Securities Exchange Act of 1934, as amended, deny, limit or revoke such approval whenever it determines, in accordance with the procedures set forth in Rule 475, that such communication is inconsistent with the public interest, the protection of investors or just and equitable principles of trade.

Supplementary Material:

* * * * *

.30 Specialist Post Wires-With the approval of the Exchange, a specialist unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the specialist unit or the unit's clearing firm. *A specialist unit may also maintain wired or wireless devices, such as computer terminals or laptops, to communicate during the day with the firm's off-Floor offices to the extent permitted via a wired telephone line and with the system employing the algorithms and with individual algorithms. The wired or wireless device will enable the specialist to activate or deactivate the system employing the algorithms or an individual algorithm or change such system's pre-set parameters.* Such telephone connection, *wired, or wireless device* shall not be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities, but may be used to enter options or futures hedging orders through the unit's off-Floor office or the unit's clearing firm, or through a member (on the floor) of an options or futures exchange. In addition, a specialist registered in an Investment Company Unit (as defined in Section 703.16 of the Listed Company Manual), or a Trust Issued Receipt (the "receipt") as that term is defined in Rule 1200 may use a telephone connection or order entry terminal at the specialist's post to enter a proprietary order in the Unit or receipt in another market center, in a Component Security of such a Unit or receipt, or in an options or futures contract related to such Unit or receipt, and may use the post telephone to obtain market information with respect to such Units, receipts, options, futures, or Component Securities. If the order in the Component Security of the Unit or receipt is to be executed on the Exchange, the order must be entered and executed in compliance with Exchange Rule 112.20 and SEC Rule 11a2–2(T), and must be entered only for the purpose of hedging a position in the Unit or receipt.

Each specialist firm shall certify in the time, frequency, and manner as prescribed by the Exchange that its wired or wireless device used to communicate with the system employing the firm's algorithms or an individual algorithm operates in accordance with all SEC and Exchange rules, policies, and procedures.

* * * * *

Dissemination of Quotations

Rule 60

* * * * *

(e) Autoquoting of highest bid/lowest offer and automated adjustment of size of liquidity bid and offer. The Exchange will autoquote the NYSE's highest bid or lowest offer whenever a limit order is transmitted to the [specialist's book] *Display Book®* at a price higher (lower) than the previously disseminated highest (lowest) bid (offer). When the NYSE's highest bid or lowest offer has been traded within its entirety, the Exchange will autoquote a new bid or offer reflecting the total size of orders on the [specialist's book] *Display Book®* at the next highest (in the case of a bid) or lowest (in the case of an offer) price. The size of any liquidity bid or offer shall be systemically increased to reflect any additional limit orders transmitted to the [specialist's book] *Display Book®* at prices ranging from the liquidity bid or offer price to the highest bid (lowest offer). The size of any liquidity bid or offer shall be systematically decreased to reflect the execution of any limit orders on the specialist's [book] *Display Book®* at prices ranging from the liquidity bid or offer price to the highest bid (lowest offer). However, de minimis increases or decreases in the size of limit orders on the [book] *Display Book®*, as determined by the specialist, will not result in automated augmenting or decrementing of the size of the liquidity bid or offer where such bid or offer continues to reflect the actual size of limit orders on the [book] *Display Book®*.

[In any instance where the specialist disseminates a proprietary bid (offer) of 100 shares on one side of the market, the bid or offer on that side of the market shall not be autoquoted. In such an instance, any better-priced limit orders received by the specialist shall be manually displayed, unless they are executed at a better price in a transaction being put together in the auction market at the time that the order is received.]

(i) Autoquote will be suspended when (A) the specialist has gapped the quotation in accordance with Exchange policies and procedures, (B) a block-size transaction as defined in Rule 127 that involves orders on the Display Book® is being reported manually or (C) when a liquidity replenishment point ("LRP") as defined in Exchange Rule 1000 (a)(v) has been reached.

(ii) (A) After the specialist has gapped the quotation, autoquote will resume with a manual transaction or the publication of a non-gapped quotation.

(B) Autoquote will resume immediately after the report of a block-size transaction involving orders on the Display Book®.

(C) Autoquote will resume as soon as possible after a sweep LRP as defined in Exchange Rule 1000(a)(v)(A) has been reached, but in no more than five seconds, where the auto ex order that reached the sweep LRP is executed in full, or any unfilled balance of such order is not capable of trading at a price above (in the case of a buy order) or below (in the case of a sell order) the sweep LRP. Where the unfilled balance of an auto ex order is able to trade at a price above (below) the sweep LRP, but the price does not create a locked or crossed market, autoquote will resume upon a manual transaction or the publication of a new quote by the specialist, but in any event in no more than ten seconds. Where the unfilled balance of an auto ex order is able to trade at a price above (below) the sweep LRP and the price creates a locked or crossed market, autoquote will resume upon a manual transaction or the publication of a new quote by the specialist.

(ii) Autoquote will resume as soon as possible after a momentum LRP, as defined in Exchange Rule 1000(a)(v)(B), is reached, but in no more than ten seconds, unless a locked or crossed

market exists. In such case, autoquote will resume upon a manual transaction.
* * * * *

{Below Best] Bids [-] *and* [Above Best] Offers

Rule 70

When a bid is clearly established, no bid or offer at a lower price shall be made. When an offer is clearly established, no offer or bid at a higher price shall be made.

All bids made and accepted, and all offers made and accepted, in accordance with *Exchange* Rules [45 to 86] shall be binding.

Supplementary Material:

.10 Any bid *(offer) systemically delivered to the Display Book®* which is made at the same or higher (*lower*) price of the prevailing offer (*bid*) shall result in *an automatic execution* [transaction at the offer price in an amount equal to the lesser of the bid or offer. The same principle shall apply when an offer is made at the same or lower price as the bid.] *in accordance with, and to the extent provided by, Exchange Rules 1000–1004.*

.20 (a)(i) A Floor broker may place within the Display Book® system broker agency interest files at multiple price points on both sides of the market at or outside the Exchange best bid and offer with respect to each security trading in the location(s) comprising the Crowd such Floor broker is a part of with respect to orders he or she is representing on the Floor, except that the agency interest files shall not include any customer interest that restricts the specialist's ability to be on parity pursuant to Exchange Rules 104.10(6)(i)(C) and 108(a).

(ii) The requirement that a Floor broker be in the Crowd in order to have agency interest files does not apply to orders governed by Section 11(a)(1)(G) of the Securities Exchange Act of 1934 ("G" orders).

(b) All Floor broker agency interest placed within files in the Display Book® system at the same price shall be on parity with each other, except agency interest that establishes the Exchange best bid or offer shall be entitled to priority in accordance with Exchange Rule 72. No Floor broker agency interest placed within files in the Display Book® system shall be entitled to precedence based on size.

(c) (i) Floor broker agency interest placed within files shall become part of the quotation when it is at or becomes the Exchange best bid or offer and shall be executed in accordance with Exchange Rule 72.

(ii) A Floor broker shall have the ability to maintain undisplayed reserve interest at the Exchange best bid and offer provided that a minimum of 1,000 shares of the broker's agency interest is displayed at that price.

(iii) After an execution involving a Floor broker's agency interest at the Exchange best bid or offer that does not exhaust the broker's interest at that price, the displayed interest will be automatically replenished from his or her reserve interest, if any, so that at least 1,000 shares of the broker's interest (or whatever amount remains, if less than 1,000 shares) is displayed.

(iv) An automatically executing order will trade first with the displayed bid (offer) and if there is insufficient displayed volume to fill the order, will trade next with reserve interest, if any. All reserve interest will trade on parity.

(d) A Floor broker's agency interest not at the Exchange best bid or offer shall be on parity with orders on the Display Book,® and the specialist layered interest file at that price if executed as part of a sweep in accordance with, and to the extent provided by, Exchange Rules 1000–1004.

(e) A Floor broker may trade on behalf of his or her orders as part of the Crowd at the same price and on the same side of the market as his or her agency interest placed within files only to the extent that the volume traded in the Crowd is not included in the agency interest files.

(f) A Floor broker's agency interest files must be cancelled when he or she leaves the Crowd. Failure to do so is a violation of Exchange rules. If the Floor broker leaves the Crowd without canceling his or her agency interest files and one or more executions occur with the agency interest, the Floor broker shall be held to such executions.

(g) The aggregate number of shares of agency interest in the files at each price shall be made available to the specialist. A Floor broker has discretion to exclude his or her agency interest from the aggregated agency interest information available to the specialist.

(h) Broker agency interest excluded from the aggregated agency interest information available to the specialist is able to participate in automatic executions, but will not participate in a manual execution unless the broker representing this interest verbally trades on its behalf as part of the Crowd. Interest excluded from the aggregated agency information may trade at a price that is inferior to the price of such manual transaction.

(i) The Floor broker is the executing broker for transactions involving his or her agency interest files.

(j) Floor broker agency interest placed within files may participate in the opening trade in accordance with Exchange policies and procedures governing the open.

(k) The ability of a Floor broker to have reserve interest will not be available during the open and during the close. The ability of a Floor broker to exclude volume from aggregated agency interest information available to the specialist will not be available during the open. Floor broker agency interest excluded from the aggregate agency interest information available to the specialist will not participate in the close.

(l) Nothing in this rule shall be interpreted as modifying or relieving the Floor broker from his or her agency obligations and required compliance with all SEC and Exchange rules, policies and procedures.

.30 Definition of Crowd A Floor broker will be considered to be in a Crowd if he or she is present at one of five contiguous panels at any one post where securities are traded.

Priority and Precedence of Bids and Offers

Rule 72

I. Bids. Where bids are made at the same price, the priority and precedence shall be determined as follows:

Priority of first bid

(a) Except as provided in paragraph (b) below, when a bid is clearly established as the first made at a particular price, the maker shall be entitled to priority and shall have precedence on the next sale at that price, up to the number of shares of stock or principal amount of bonds specified in the bid, irrespective of the number of shares of stock or principal amount of bonds specified in such bid.
* * * * *

Precedence of bids equaling or exceeding amount offered

(c) When no bid is entitled to priority under paragraph (a) hereof, (or when a bid entitled to priority or precedence has been filled and a balance of the offer remains unfilled), all bids for a number of shares of stock or principal amount of bonds equaling or exceeding the number of shares of stock or principal amount of bonds in the offer or balance, shall be on [a] parity and entitled to precedence over bids for less than the number of shares of stock or principal amount of bonds in such offer or balance, subject to the condition that, *with respect to bids made as part of the auction market* if it is possible to determine clearly the order of time in which the bids so entitled to precedence

were made, such bids shall be filled in that order *except that no bids in Floor broker agency interest files or specialist layered interest files shall be entitled to precedence.*

Precedence of bids for amounts less than amount offered

(d) When no bid is entitled to priority under paragraph (a) hereof (or when a bid entitled to priority or precedence has been filled and a balance of the offer remains unfilled) and no bid has been made for a number of shares of stock or principal amount of bonds equaling or exceeding the number of shares of stock or principal amount of bonds in the offer or balance, the bid for the largest number of shares of stock or greatest principal amount of bonds shall have precedence, subject to the condition that, *with respect to bids made as part of the auction market* if two or more such bids for the same number of shares of stock or principal amount of bonds have been made, and it is possible to determine clearly the order of time in which they were made, such bids shall be filled in that order *except that no bids in Floor broker agency interest files or specialist layered interest files shall be entitled to precedence.*

Simultaneous bids

(e) When bids are made simultaneously, or when it is impossible to determine clearly the order of time in which they were made, *with respect to bids made as part of the auction market,* all such bids shall be on [a] parity subject only to precedence based on the size of the bid under the provisions of paragraphs [(b)] (c) and [(c)] (d) hereof[.], *except that no bids in Floor broker agency interest files or specialist layered interest files shall be entitled to precedence.*

Sale *or cancellation* removes bids from Floor

(f) [Except as provided in .50 below, a] *A* sale *or the cancellation of an entire bid or offer entitled to priority* shall remove all bids from the Floor except that if the number of shares of stock or principal amount of bonds offered exceeds the number of shares or principal amount specified in the bid having priority or precedence, a sale of the unfilled balance to other bidders shall be governed by the provisions of these Rules as though no sales had been made to the bidders having priority or precedence.

Subsequent bids

(g) After bids have been removed from the Floor under the provisions of paragraph [(e)] *(f)* hereof, priority and precedence shall be determined, in accordance with these Rules, by subsequent bids.

* * * * *

Transfer of priority, parity and precedence

(i) A bid may be transferred from one member to another and, as long as that bid is continued for the same account, it shall retain the same priority, parity and precedence it had at the time it was transferred.

II. Offers. Where offers are at the same price the priority, parity and precedence shall be determined in the same manner as specified in the case of bids. An offer may be transferred from one member to another and, as long as that offer is continued for the same account, it shall retain the same priority, parity and precedence it had at the time it was transferred.

III. Sale *or Cancellation of a Bid or Offer Entitled to Priority* "Clears the Floor"

Following a sale[,] *or the cancellation of a bid or offer that had been entitled to priority pursuant to this rule,* all bids and offers previously entered are deemed to be re-entered and are on parity with each other. For example, assume that the market in XYZ is 0.20 bid for 5000 shares, with 5000 shares offered at 0.25. On the bid side of the market, Broker A is bidding for 1000 shares and has priority. Brokers B, C, D, and E are each bidding for 1000 shares, with B being ahead of C, C being ahead of D, and D being ahead of E. On the offer side of the market, Broker F is offering 1000 shares and has priority. Brokers G, H, I, and J are each offering 1000 shares, with G being ahead of H, H being ahead of I, and I being ahead of J. Broker K enters the Crowd and sells 1000 shares to Broker A's bid of 0.20. The market then becomes 0.20 bid for 4000 shares, with 5000 offered at 0.25. Brokers B, C, D, and E are now on parity on the bid side of the market, and Brokers F, G, H, I, and J are now on parity on the offer side of the market.

Supplementary Material:

.10 Precedence of bids and offers.—The following examples explain the operations of Rule 72 *in connection with auction market transactions.*

* * * * *

(Remainder of rule unchanged)

Miscellaneous Requirements on Stock and Bond Market Procedures

Rule 79A

Supplementary Material:

.10 Request to make better bid or offer.—When any Floor broker does not bid or offer at the limit of an order which is better than the currently quoted price in the security and is requested by his principal to bid or offer at such limit, he shall do so.

.15 With respect to limit orders received by specialists, each specialist shall publish immediately (*i.e.*, as soon as practicable, which under normal market conditions means no later than 30 seconds from time of receipt) a bid or offer that reflects[;]:

(i) the price and full size of each customer limit order that is at a price that would improve the specialist's bid or offer in such security; and

(ii) the full size of each limit order that

(A) is priced equal to the specialist's bid or offer for such security;

(B) is priced equal to the national best bid or offer; and

(C) represents more than a de minimis change (i.e., more than 10 percent) in relation to the size associated with the Exchange's bid or offer.

[Each specialist shall keep active at all times the quotation processing facilities (known as "Quote Assist") provided by the Exchange. A specialist may deactivate the quotation processing facilities as to a stock or a group of stocks provided that Floor Official approval is obtained. Such approval to deactivate Quote Assist must be obtained no later than three minutes from the time of deactivation.]

Limit orders received by the specialist that improve the Exchange then-current bid or offer or change the size of the Exchange bid or offer, other than de minimis increases or decreases, shall be autoquoted in accordance with Exchange Rule 60(e). The opening trade or opening quotation in each security activates the autoquote facility and thereafter, each specialist shall keep active at all times the autoquote facility provided by the Exchange, except that a specialist may cause the deactivation of the autoquote facility by gapping the quote in accordance with the policies and procedures of the Exchange. Autoquoting will also be automatically suspended when a block-size transaction as defined in Rule 127 that involves orders on the Display Book® being reported manually and a liquidity replenishment point, as defined in Exchange Rule 1000(a)(v), is reached.

The requirements with respect to specialists' display of limit orders shall not apply to any customer limit order that is[;]:

(1) executed upon receipt of the order;

(2) placed by a customer who expressly requests, either at the time the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders, that the order not be displayed;

(3) an odd-lot order;

(4) delivered immediately upon receipt to an exchange or association-sponsored system or an electronic communications network that complies

with the requirements of Securities and Exchange Commission Rule 11Ac1–1 (c)(5)(ii) under the Securities Exchange Act with respect to that order;

(5) delivered immediately upon receipt to another exchange member or over-the-counter market maker that complies with the requirements of Securities and Exchange Commission Rule 11Ac1–4 under the Securities Exchange Act with respect to that order;

(6) an "all or none" order;

(7) a limit order to buy at a price significantly above the current offer or a limit order to sell at a price significantly below the current bid that is handled in compliance with Exchange procedures regarding such orders[;] ("too marketable limit orders"); or

(8) an order that is handled in compliance with Exchange procedures regarding *gap quoting or* block crosses at significant premiums or discounts from the last sale.

* * * * *

(Remainder of rule unchanged)

Limitations on Members' Trading Because of Customers' Orders

Rule 92

(a) Except as provided in this Rule, no member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security for any account in which such member or member organization or any approved person thereof is directly or indirectly interested (a "proprietary order"), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price.

* * * * *

(c) The provisions of this Rule shall not apply to:

(1) any purchase or sale of any security in an amount of less than the unit of trading made by an odd-lot dealer to offset odd-lot orders for customers;

(2) any purchase or sale of any security upon terms for delivery other than those specified in such unexecuted market or limited price order;

(3) transactions by a member or member organization acting in the capacity of a specialist or[f] market maker in a security listed on the Exchange otherwise than on the Exchange; *[and]*

(4) transactions made to correct bona fide errors[.]; *and*

(5) algorithmically-generated messages for the specialist account in accordance with the provisions of Exchange Rule 104.

* * * * *

(Remainder of rule unchanged)

Dealings by Specialists

Rule 104

* * * * *

[(b) Specialists shall have the ability to establish an external quote application interface ("Quote API") which utilizes proprietary algorithms that allow the specialist, on behalf of the dealer account, to systematically update the Exchange published bid or offer within the Display Book® system in Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual), or Trust Issued Receipts (as defined in Rule 1200). Nothing in this rule shall be interpreted as modifying or relieving the specialist from his or her obligations and required compliance with all Exchange rules, policies and procedures.]

(b) Specialists shall have the ability to establish an external quote application programmed interface ("API"), which will allow the specialist, on behalf of the dealer account, to send algorithmically-generated messages to the Display Book® system to electronically quote and trade.

(i) In reaction to information, including but not limited to, an incoming order as it is entering NYSE systems, the system employing the algorithm may generate messages for any of the following quoting or trading actions, provided such algorithmically-generated trading messages are in reaction to only one order at a time, and only as such order is entering the system:

Quoting Messages:

(A) supplement the size of the existing Exchange published best bid or offer;

(B) place within the Display Book® system specialist reserve interest at the Exchange published best bid and offer as described in (d) below;

(C) layer within the Display Book® system specialist interest at varying prices outside the published Exchange quotation ("specialist layered interest");

(D) establish the Exchange best bid and offer; and

(E) withdraw previously established specialist interest at the Exchange best bid and offer.

Trading Messages:

(F) provide additional specialist volume to partially or completely fill an order at the Exchange published best bid or offer;

(G) match better bids and offers published by other market centers where automatic executions are immediately available;

(H) provide price improvement to an order subject to the conditions set forth in (e) below; and

(I) trade with the Exchange published best bid or offer.

(ii) Exchange systems shall:

(A) enforce the proper sequencing of incoming orders and algorithmically-generated messages; and

(B) ensure that algorithmic messages to trade with the Exchange published best bid or offer are processed by the Display Book® in such a manner that specialists and other market participants have a similar opportunity to trade with the published quotation.

(c)(i) All algorithmic messages delivered via the API must include a code identifying the reason for the algorithmic action, the unique identifier of the order to which the algorithmic message is reacting, (if any), the unique identifier of the order immediately preceding the generation of the algorithmic message and any other information the Exchange may require. In addition,

(A) Algorithmic messages to trade with the Exchange published best bid or offer, as provided in (b)(i)(I) above, must include the unique identifier for the publicly-disseminated Exchange best bid or offer to which the algorithmic message is reacting.

(B) The Exchange will designate the reason codes, unique identifiers for orders and quotations and the format of any other required information for use in algorithmically-generated messages.

(C) Identification of a particular order and/or quotation in an algorithmic message does not guarantee that the specialist will trade with that order or quotation or that the specialist has priority in trading with that order or quotation.

(D) The Exchange will automatically cancel algorithmic messages that are unable to interact with the order or quotation identified by the message where the reason code and the proposed algorithmic action are inconsistent, where the message activity would create a locked or crossed market, where the identifiers described above in (c) are not designated, and in other similar situations.

(ii) The API will not have access to the following types of information:

(A) Information which identifies the firms entering orders, customer information, or an order's clearing broker;

(B) Floor broker agency interest files or aggregate Floor broker agency interest available at each price; or

(C) cancellation of an order, except for cancel and replace orders.

(iii) Algorithmic messages must comply with all SEC and Exchange rules, policies and procedures governing specialist proprietary trading.

(iv) Algorithmic messages must not create a locked or crossed market, as defined in Exchange Rule 15A.

(v) The Display Book® will not process algorithmic messages during the time a block-size transaction (as defined in Rule 127) involving orders on the Display Book® is being reported pursuant to manual reporting.

(vi) The Display Book® will not process algorithmic messages when automatic executions are suspended, except that when automatic executions are suspended but autoquote is available, the Display Book® will process algorithmic messages to generate a bid or offer that improves the Exchange best bid or offer or supplements the size of an existing best bid or offer.

(vii) The Display Book® shall not process algorithmic messages from the API that will trigger the automatic execution of an auction limit or a market order not designated for automatic execution pursuant to Rule 123F or that will result in such order's execution with an existing contra-side specialist bid or offer. However, the Display Book® will process algorithmic messages to provide price improvement to auction limit and market orders not designated for automatic execution in accordance with the price improvement parameters described in (e).

(d)(i) Specialists shall have the ability to maintain undisplayed reserve interest on behalf of the dealer account at the Exchange best bid and offer provided at least 2,000 shares of dealer interest is displayed at that price.

(ii) After an execution involving specialist interest at the Exchange best bid or offer that does not exhaust the specialist's interest at that price, the specialist's displayed interest will be automatically replenished from the reserve interest, if any, so that at least 2,000 shares of specialist interest (or whatever amount remains if less than 2,000 shares) is displayed.

(iii) Specialist reserve interest will be on parity with Floor broker agency file reserve interest and, like it, shall yield to all other displayed interest eligible to trade at the Exchange bid or offer (See Rule 70.20(c)).

(e)(i) Specialist may provide algorithmic price improvement to all or part of an incoming order including an auction limit order and a market order not designated for automatic execution provided:

(A) The specialist is represented in the bid with respect to price improvement provided to an incoming sell order and in the offer with respect to price improvement provided to an incoming buy order; and

(B) Where the quotation spread is three–five cents, the price improvement to be supplied by the specialist is at least two cents; or

(C) Where the quotation spread is more than five cents, the price improvement to be supplied by the specialist is at least three cents; or

(D) Where the quotation spread is two cents, the price improvement to be supplied by the specialist is one cent.

(f)(i) Each specialist firm shall maintain an electronic log of all algorithmic events, including the date and time of each algorithmic message and such other information as the Exchange shall designate. Such log shall be maintained in accordance with SEC and Exchange rules regarding books and records and shall be capable of being provided to the Exchange upon request, in such time and in such format as the Exchange shall designate.

(ii) Each specialist firm shall notify the Exchange in writing, within such time as the Exchange shall designate, whenever the system employing an algorithm or an individual algorithm is not operating and the time, cause, and duration of such non-operation.

(g) During the day, specialists on the Floor may interact with the system employing the firm's algorithms or an individual algorithm with respect to the securities they are trading by:

(i) Activating or deactivating the firm's algorithms from a group of pre-set algorithms made available by the specialist firm, or

(ii) Adjusting the firm's pre-set parameters guiding algorithm decision-making.

(h) Each specialist firm shall certify in the time, frequency, and manner as prescribed by the Exchange, that the system employing its algorithms and all algorithms operate in accordance with all SEC and Exchange rules, policies and procedures.

Supplementary Material

Functions of Specialists

.10 Regular Specialists

* * * * *

(6)(i) Transactions on the Exchange by a specialist for his own account in liquidating or decreasing his position in a specialty stock are to be effected in a reasonable and orderly manner in relation to the condition of the general market, the market in the particular stock and the adequacy of the specialist's positions to the immediate and reasonably anticipated needs of the round-lot and the odd-lot market and in this connection:

* * * * *

(C) Transactions by a specialist for his or her dealer account in liquidating or decreasing a position in a specialty security must yield parity to and may not claim precedence based on size over a customer order in the [c]Crowd upon the request of the member representing such order, where such request has been documented as a term of the order, to the extent of the volume of such order that has been included in the quote prior to the transaction. *However, this provision shall not apply to automatic executions involving the specialist dealer account.*

* * * * *

(Remainder of rule unchanged)

Rule 108

On Parity

(a) No bid or offer made by a member or made on an order for stock originated by a member while on the Floor to establish or increase a position in such stock for an account in which such member has an interest shall be entitled to parity with a bid or offer made on an order originated off the Floor, except that such a bid or offer shall be entitled to parity with a bid or offer made on an order originated off the Floor and being executed pursuant to Section 11(a)(1)(G) of the Act and Rule 11a1–1(T) thereunder. *The foregoing shall not apply to specialists, unless at the request of the member representing such order, where such request has been documented as a term of the order, to the extent of the volume of such order that has been included in the quote prior to the transaction.*

On Precedence Based on Size

(b) No bid or offer made by a member or made on an order for stock originated by a member while on the Floor to establish or increase a position in such stock for an account in which such member has an interest shall be entitled to precedence based on size over a bid or offer made on an order originated off the Floor, except that such a bid or offer shall be entitled to precedence based on size over a bid or offer made on an order originated off the Floor and being executed pursuant to Section 11(a)(1)(G) of the Act and Rule 11a1–1(T) thereunder.

* * * * *

(Remainder of rule unchanged)

Disclosure of Specialists' Orders

Rule 115

A member acting as a specialist may disclose any information in regard to the order entrusted to the specialist:

(i) for the purpose of demonstrating the methods of trading to visitors to the Floor;

(ii) to other market centers in order to facilitate the operation of ITS or any other Application of the System; and

(iii) while acting in a market making capacity, to provide information about buying or selling interest in the market, *including aggregated buying or selling interest contained in Floor broker agency interest files other than interest the broker has chosen to exclude from the aggregated buying and selling interest* in response to an inquiry from a member conducting a market probe in the normal course of business.

Information regarding stop orders may be provided if the specialist has a reasonable basis to believe that the member intends to trade the security at a price at which stop orders would be relevant. A specialist shall make information available in a fair and impartial manner to any member while on the Floor. A specialist shall not disclose the identity of any buyer or seller represented on [his] *the Display Book®* [book] if expressly requested not to do so by the broker who entered the order with the specialist.

* * * * *

(Remainder of rule unchanged)

Orders of Members To Be in Writing

Rule 117

No member on the Floor shall make any bid, offer or transaction for or on behalf of another member except pursuant to a written *or electronically recorded* order. If a member to whom an order has been entrusted leaves the Crowd without actually transferring the order to another member, the order shall not be represented in the market during his *or her* absence, *except with respect to any portion of his or her agency interest file that was not cancelled before the member left the Crowd, notwithstanding that such failure to cancel an agency interest file is a violation of Exchange rules.*

Supplementary Material:

.10 Absence from Crowd.—When a member keeps an order in his *or her* possession and leaves the Crowd in which dealings in the security are conducted, the *member* is not entitled during his *or her* absence to have any bid, offer or transaction made in such security on his *or her* behalf or to have dealings in the security held up until he *or she* is summoned to the Crowd, *except that the member shall be held to any executions involving his or her agency interest files.* To insure representation of an order in the market during his *or her* absence, a member must therefore actually turn the order over to another member who will undertake to remain in the Crowd. If a member keeps the order in his *or her* possession and during his *or her* absence from the Crowd the security sells at or through the limit of his or *her* order, the *member* will be deemed to have missed the market.

* * * * *

(Remainder of rule unchanged)

Record of Orders

Rule 123

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(e) System Entry Required

Except as provided in paragraphs .21 and .22 *below,* no Floor member may represent or execute an order on the Floor of the Exchange *or place an agency interest file within the Display Book® system* unless the details of the order *and the agency interest file* have been first recorded in an electronic system on the Floor. Any member organization proprietary system used to record the details of the order *and agency interest file* must be capable of transmitting these details to a designated Exchange data base within such time frame as the Exchange may prescribe.

The details of each order required to be recorded shall include the following data elements, any changes in the terms of the order and cancellations, in such form as the Exchange may from time to time prescribe:

1. Symbol;
2. Clearing member organization;
3. Order identifier that uniquely identifies the order;
4. Identification of member or member organization recording order details;
5. Number of shares or quantity of security;
6. Side of market;
7. Designation as market, *auto ex market,* limit, stop, stop limit, *auction limit, or intermarket sweep order;*
8. Any limit price and/or stop price;
9. Time in force;
10. Designation as held or not held;
11. Any special conditions;
12. System-generated time of recording order details, modification of terms of order or cancellation of order; *and*
13. Such other information as the Exchange may from time to time require.

The Floor member must identify which orders or portions thereof are being made part of the Floor broker agency interest file pursuant to such procedures as required by the Exchange.

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(Remainder of rule unchanged)

Miscellaneous Requirements

Rule 123A

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.30 A specialist may accept one or more percentage orders.—

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(a) The elected or converted portion of a "percentage order that is convertible on a destabilizing tick and designated immediate execution or cancel election" ("CAP–DI order") may be automatically executed and may participate in a sweep.

(i) An elected or converted CAP–DI order on the same side of the market as an automatically executed electing order may participate in a transaction at the bid (offer) price if there is volume associated with the bid (offer) remaining after the electing order is filled in its entirety. An elected or converted CAP–DI order on the same side of the market as an automatically executed electing order that sweeps the Display Book® will participate in a transaction at the sweep clean-up price if there is volume remaining on the Display Book(r) or from contra-side elected CAP–DI orders at that price.

(ii) An elected or converted CAP–DI order on the contra-side of the market as an automatically executed electing order may participate in a transaction at the bid (offer) price and the sweep clean-up price, if any.

(iii) When a specialist is providing price improvement to an order pursuant to Rule 104(e), marketable CAP–DI orders on the Display Book® will be automatically converted to participate in this execution in accordance with this rule.

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(Remainder of rule unchanged)

Order Handling—Auction Limit Orders and Market Orders

Rule 123F

(a) Auction Limit Orders

(i) An auction limit order will be automatically executed or routed to another market pursuant to Rule 15A.50 upon entry if there is a minimum variation quotation on the Exchange at the time the order reaches the Display Book® or a better bid (offer) is displayed by another ITS participating market center in which an automatic execution is immediately available and such better

bid (offer) creates a minimum variation market compared with the Exchange best offer (bid).

(ii) If not executed upon entry, an auction limit order to buy with a limit price that is at or above the Exchange best offer when it reaches the Display Book® shall be autoquoted the minimum variation better than the Exchange best bid at the time and an auction limit order to sell with a limit price that is at or below the Exchange best bid when it reaches the Display Book® shall be autoquoted the minimum variation better than the Exchange best offer at that time, thereby becoming the new published Exchange best bid or offer.

The size associated with a subsequent auction limit order to buy with a limit price that is at or above the Exchange best offer when it reaches the Display Book® and market orders to buy will be added to the bid. The size associated with a subsequent auction limit order to sell with a limit price that is at or below the Exchange best bid when it reaches the Display Book® and market orders to sell will be added to the offer.

(iii) The following events shall cause auction limit orders to automatically execute in accordance with and to the extent provided by Rules 1000–1004:

(A) The arrival of a subsequent order on the same side of the market capable of trading at a price better than the auction limit order is bidding (offering);

(B) the execution of an order on the same side of the market as an auction limit order that exhausts some or all of the contra-side volume available in the Exchange quotation;

(C) the cancellation of some or all of the contra-side volume, or a change in the price of the contra-side of the quotation that would enable an execution of the auction limit order with price improvement; or

(D) the auction limit order that has not been executed within 15 seconds after it reaches the Display Book®.

(iv) An auction limit order may be executed at a price inferior to the market price prevailing at the time it was entered.

(b) Market Orders

(i) A market order designated for automatic execution will be automatically executed in accordance with and to the extent provided by Exchange Rules 1000–1004.

(ii) A market order not designated for automatic execution but delivered systemically to the Display Book® will be automatically executed or routed to another market pursuant to Rule 15A.50 upon entry if there is a minimum variation quotation on the Exchange at the time the order reaches the Display Book® or a better bid (offer) is displayed by another ITS participating market center in which an automatic execution is immediately available and such bid (offer) creates a minimum variation market compared with the Exchange best offer (bid).

(iii) If not executed upon entry, such market order to buy shall be autoquoted the minimum variation better than the Exchange best bid and such market order to sell shall be quoted the minimum variation better than the Exchange best offer at that time, thereby becoming the new Exchange best bid or offer.

The size associated with a subsequent market order and/or auction limit order (consistent with the order's limit) to buy (sell) will be added to the bid (offer).

(iv) The following events shall cause market orders to automatically execute in accordance with, and to the extent provided by Rules 1000–1004:

(A) the arrival of a subsequent order on the same side of the market capable of trading at a better price than such market order is bidding (offering);

(B) the execution of an order on the same side of the market as such market order, that exhausts some or all of the contra-side volume available in the Exchange quotation;

(C) the cancellation of some or all of the contra-side volume, or a change in the price of the contra-side of the quotation that would enable an execution of the market order with price improvement; or

(D) the market order has not been executed within 15 seconds after it reaches the Display Book®.

(v) A market order may be executed at a price inferior to the market price prevailing at the time it was entered.

Odd-Lot Orders

Rule 124

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Supplementary Material:

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.50 [The odd-lot portion of PRL (part of round lot) orders will be executed at the same price as the round lot portion and will be processed through the round lot system.] *A part of round lot (PRL) order shall be automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004.*

* * * * *

.80 Odd-lot executions will be suspended when automatic executions pursuant to Exchange Rules 1000–1004 are suspended. Odd-lot executions will resume when automatic executions pursuant to Exchange Rules 1000–1004 resume.

* * * * *

(Remainder of rule unchanged)

Rule 132B (a) Procedures

Order Tracking Requirements

1. With respect to any security listed on the New York Stock Exchange except bonds, each member and member organization shall:

A. immediately following receipt or origination of an order, record each item of information described in paragraph (b) of this Rule that applies to such order, and record any additional information described in paragraph (b) of this Rule that applies to such order immediately after such information is received or becomes available; and

B. immediately following the transmission of an order to another member, or from one department to another within the same member organization, record each item of information described in paragraph (c) of this Rule that applies with respect to such transmission; and

C. immediately following the modification or cancellation of an order, record each item of information described in paragraph (d) of this Rule that applies with respect to such modification or cancellation.

D. identify which orders or portions thereof are being made part of the Floor broker agency interest file pursuant to such procedures as required by the Exchange.

2. Each required record of the time *of* an event shall be expressed in terms of hours, minutes, and seconds.

3. Each member or member organization shall, by the end of each business day, record each item of information required to be recorded under this Rule in such electronic form as is prescribed by the Exchange from time to time.

4. Maintaining and Preserving Records

[(]A.[)] Each member and member organization shall maintain and preserve records of the information required to be recorded under this Rule for the period of time and accessibility specified in SEC Rule 17a–4(b).

[(]B.[)] The records required to be maintained and preserved under this Rule may be immediately produced or reproduced on "micrographic media" as defined in SEC Rule 17a–4(f)(1)(i) or by means of "electronic storage media" as defined in SEC Rule 17a–4(f)(1)(ii) that meet the conditions set forth in SEC Rule 17a–4(f) and be maintained and preserved for the required time in that form.

(b) Order Origination and Receipt

Unless otherwise indicated, the following order information must be recorded under this Rule when an order is received or originated:

1. an order identifier meeting such parameters as may be prescribed by the Exchange assigned to the order by the member or member organization that uniquely identifies the order for the date it was received;

2. the identification symbol assigned by the Exchange to the security to which the order applies;

3. the market participant symbol assigned by the Exchange to the member or member organization;

4. the identification of any department or the identification number of any terminal where an order is received directly from a customer;

5. where the order is originated by a member or member organization, the identification of the department (if appropriate) of the member that originates the order;

6. the number of shares to which the order applies;

7. the designation of the order as a buy or sell order;

8. the designation of the order as a short sale order;

9. the designation of the order as a market order, *auto ex market order*, limit order, stop order or stop limit order, *auction limit, or intermarket sweep order*;

10. any limit and/or stop price prescribed in the order;

11. the date on which the order expires, and, if the time in force is less than one day, the time when the order expires;

12. the time limit during which the order is in force;

13. any request by a customer that an order not be displayed pursuant to Rule 11Acl–4(c) under the Securities Exchange Act of 1934;

14. special handling requests, specified by the Exchange for purposes of this Rule;

15. the date and time the order is originated or received by a Member or member organization; and

16. the type of account, *i.e.*, retail, wholesale, employee, proprietary, or any other type of account designated by the Exchange, for which the order is submitted.

* * * * *

(Remainder of rule unchanged)

NYSE Direct+®

Automatic Executions [of Limit Orders Against Orders Reflected in NYSE Published Quotation]

Rule 1000

(a) [Only straight limit orders without tick restrictions are eligible for entry as auto ex orders. Auto ex orders to buy shall be priced at or above the price of the published NYSE offer. Auto ex orders to sell shall be priced at or below the price of the NYSE bid.] An auto ex order shall receive an immediate, automatic execution against orders reflected in the Exchange['s] published quotation, *orders on the Display Book®*, Floor broker agency file interest and specialist interest, in accordance with, and to the extent provided by these rules and shall be immediately reported as [NYSE] *Exchange* transactions, unless:

(i) The [NYSE's] *Exchange* published quotation is in the non-firm quote mode;

[(ii) the execution price would be more than five cents away from the last reported transaction price in the subject security on the Exchange];

[(iii)] (ii) with respect to a single-sided auto ex order, a better [price exists] *bid or offer is published* in another ITS participating market center *where an automatic execution is immediately available or where such better bid or offer is protected from a trade-through by Securities and Exchange Commission rule or ITS Plan and the price of such better bid or offer has not been systemically matched on the Exchange, unless the member has entered an intermarket sweep order as defined in Rule 13;*

[(iv) with respect to a single-sided auto ex order, the NYSE's published bid or offer is 100 shares;]

[(v) a transaction outside the NYSE's published bid or offer pursuant to Rule 127 is in the process of being completed, in which case the specialist should publish a bid and/or offer that is more than five cents away from the last reported transaction price in the subject security on the Exchange];

[(vi)] *(iii)* trading in the subject security has been halted; [.]

(iv) the specialist has gapped the quotation in accordance with the policies and procedures of the Exchange;

(v) a liquidity replenishment point has been reached. A liquidity replenishment point ("LRP") is reached when:

(A) During a sweep described in (b) below, a buy order would be executed at a price above a minimum of five cents from the Exchange best offer, rounded to the nearest five-cent increment or a sell order would be executed at a price below a minimum of five cents from the Exchange best bid, rounded to the nearest five-cent increment, or

(B) an automatic execution reaches a momentum liquidity replenishment point ("MLRP") or an automatic execution would result in a transaction at a price on that side of the market outside a MLRP range.

(i) A MLRP range is calculated based on high and low transaction prices on the Exchange in a subject security within the prior 30-seconds;

(ii) The greater of twenty-five cents or 1% of the security's price (rounded to the nearest cent) on the Exchange is added to the security's lowest price in a rolling 30-second period; the same amount is subtracted from its highest price within the same period;

(iii) If there is no transaction on the Exchange within 30-seconds, the MLRP range will be based off the last transaction on the Exchange.

(vi) a block-size transaction as defined in Rule 127 that involves orders on the Display Book® is being reported manually; or

(vii) the order is for a security whose price on the Exchange is $300.00 or more.

(b)(i) Auto ex orders to buy shall trade with the Exchange published best offer. Auto ex orders to sell shall trade with the Exchange published best bid.

(ii) Where the volume associated with the Exchange published best bid (offer) is insufficient to fill an auto ex order in its entirety, other than an incoming commitment to trade received through ITS, the unfilled balance of such order (the "residual") shall trade with available contra-side interest in the following order:

(A) reserve interest at the Exchange published best bid (offer);

(B) additional specialist volume at the Exchange published best bid (offer); and

(C) if a residual remains, it shall then "sweep the Display Book®" as set forth in (iii) below, until it is executed in full, its limit price, if any, is reached, or a liquidity replenishment point is reached, whichever occurs first.

(D) After trading with the Exchange published best bid (offer), the unfilled balance of any incoming commitment to trade received through ITS or any unfilled balance of such commitment to trade shall be automatically cancelled.

(iii) (A) During a sweep, the residual shall trade with the orders on the Display Book® and any broker agency interest files and/or specialist layered interest file capable of execution in accordance with Exchange rules, at a single price, such price being the best price at which such orders and files can trade with the residual to the extent possible, ("clean-up price").

(B) Orders on the Display Book,® Floor broker agency interest, and any specialist layered interest capable of trading with the residual shall receive the clean-up price.

(C) Any specialist layered interest that remains after the residual has traded at the clean-up price will be cancelled automatically by the Exchange.

(D) Where a bid or offer published by another ITS participating market center in which an automatic execution is immediately available is better than the sweep clean-up price or where such better bid or offer is protected from a trade-through by Securities and Exchange Commission rule or ITS Plan, the portion of the sweeping residual that satisfies the size of such better priced bid or offer will be automatically routed as a commitment to trade to the ITS participating market center publishing such better bid or offer.

(iv) Any residual remaining after the sweep described in (ii) above shall be bid (offered) at the order's limit price, if any, or the LRP whichever is lower, unless the order is designated immediate or cancel, in which case the residual shall be automatically cancelled.

[Auto ex orders that cannot be immediately executed shall be displayed as limit orders in the auction market. An auto ex order equal to or greater than the size of the NYSE's published bid or offer shall trade against the entire published bid or offer, and a new bid or offer shall be published pursuant to Rule 60(e). The unfilled balance of the auto ex order shall be displayed as a limit order in the auction market.]

[During a pilot program in 2003, NYSE Direct+ shall not be available in the following five stocks: American Express (AXP), Pfizer (PFE), International Business Machines (IBM), Goldman Sachs (GS), and Citigroup (C). The Exchange will announce in advance to its membership the time the pilot will run.]

Execution of Auto Ex Orders

Rule 1001

(a) Subject to Rule 1000, auto ex orders shall be executed automatically and immediately reported. The contra side of the execution shall be [orders reflected in the Exchange's published quotation], as follows:

(i) the first contra side bid or offer at a particular price shall be entitled to time priority, but after a trade clears the Floor, all bids and offers at such price shall be on parity with each other;

(ii) all bids or offers on parity shall receive a split of executions in accordance with *Exchange* Rule 72;

(iii) the [specialist shall be responsible for assigning] *assignment of* the number of shares to each contra side bidder and offer*or* as appropriate, in accordance with *Exchange* Rule 72, with respect to each automatic execution of an auto ex order *shall be done automatically by the Display Book® system;*

(iv) the specialist shall be the contra party to any automatic execution of an auto ex order where interest reflected in the published quotation against which the auto ex order was executed is no longer available, *except with respect to transactions occurring with the Floor broker agency interest files;*

[(v) a universal contra shall be reported as the contra to each automatic execution of an auto ex order.]

[(b) If the depth of the published bid or offer is not sufficient to fill an auto ex order in its entirety, the unfilled balance of the order shall be routed to the Floor and shall be displayed in the auction market.]

[(c)] (*b*) No published bid or offer shall be entitled to claim precedence based on size with respect to executions against auto ex orders.

Availability of Automatic Execution Feature

Rule 1002

[Orders designated as "a] *A*uto ex["] *orders* in a particular stock, Investment Company Unit (as defined in paragraph 703.16 of the Listed Company Manual), or Trust Issued Receipt (as defined in Rule 1200) shall be eligible to receive an automatic execution if entered after the Exchange has disseminated a published bid or offer, until *the close of regular trading on the Exchange in such security, Investment Company Unit or Trust Issued Receipt* [3:59 p.m. for stocks and Trust Issued Receipts, or 4:14 p.m. for Investment Company Units, or within one minute of any other closing time of the Exchange's floor market]. [Orders designated as "a] *A*uto ex["] *orders* in a particular [stock] *security*, Trust Issued Receipt, or Investment Company Unit that are entered prior to the dissemination of a bid or offer [or after 3:59 p.m. for stocks and Trust Issued Receipts, after 4:14 p.m. for Investment Company Units or within one minute of any other closing time,] shall be [displayed as limit orders] *handled as non-auto-ex market or limit orders* [in the auction market] *except that an incoming commitment to trade received through ITS will be cancelled.*

Application of Tick Tests

Rule 1003

If a transaction has been agreed upon in the auction market, and an automatic execution involving auto ex orders is reported at a different price before the auction market transaction is reported, any tick test applicable to such auction market transaction shall be based on the last reported trade *on the Exchange* prior to such execution of auto ex orders *except that this provision does not apply to any security that is part of the Securities and Exchange Commission's Regulation SHO Pilot.*

Election of Stop Orders and Percentage Orders

Rule 1004

Automatic executions of auto ex orders shall elect stop orders, stop limit orders and percentage orders electable at the price of such executions. Any stop orders so elected shall be *automatically* executed pursuant to [the] Exchange['s auction market procedures] *rules*, and shall not be guaranteed an execution at the same price as subsequent automatic executions of auto ex orders.

[Orders May Not Be Broken Into Smaller Amounts]

[Rule 1005

An auto ex order for any account in which the same person is directly or indirectly interested may only be entered at intervals of no less than 30 seconds between entry of each such order in a stock, Investment Company Unit (as defined in paragraph 703.16 of the Listed Company Manual), or Trust Issued Receipt (as defined in Rule 1200), unless the orders are entered by means of separate order entry terminals, and the member or member organization responsible for entry of the orders to the Floor has procedures in place to monitor compliance with the separate terminal requirement.]

* * * * *

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 and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

SR–NYSE–2004–05 and Amendment Nos. 1, 2, and 3 thereto[11] propose

[11] *See supra* notes 5 and 8.

enhancements to the operation of NYSE DIRECT+® ("Direct+"), the Exchange's electronic execution facility, and amendments to other Exchange rules. Together with this Amendment No. 5, these proposals create a unique, integrated market—a hybrid market—that uses technology to improve the speed and efficiency of the auction, while preserving the advantages of human knowledge and expertise that are central to the Exchange market. By increasing the array of available trading choices, the Hybrid Market benefits all customers, from the smallest investors to the largest institutions.

The proposed enhancements to Direct+ offer immediate execution with speed, certainty and anonymity at the Exchange best bid and offer without restrictions on order size or order frequency, to the extent of the displayed volume associated with such bid and offer. The unfilled portion of the automatically executing order, if any, trades with any reserve interest and additional specialist volume at the Exchange best bid or offer, and, if still not filled, sweeps existing orders on the Display Book®[12] (the "Display Book" or "book") and Floor broker agency interest files and specialist interest files to the extent permitted, until it is filled, its limit price (if any) is reached or a NYSE Liquidity Replenishment Point℠ ("LRP") is reached.

LRPs are pre-determined price points at which the Hybrid Market briefly converts to auction market trading only. LRPs may be triggered by a sweep or electronic trading that results in rapid price movement over a short period. A LRP converts the Hybrid Market to an auction market only on a temporary basis, in order to moderate volatility by affording an opportunity for new orders and Crowd and specialist interest to add liquidity. This promotes reasonable continuity and fosters the market quality that is a hallmark of the Exchange.

While offering the important benefits of automatic execution, the Exchange Hybrid Market preserves the best aspects of the agency auction. It combines the benefits of specialist and Floor broker expertise with the speed, certainty, and anonymity of electronic execution to create a market system offering maximum choice to customers without eliminating time-tested trading procedures that have proven immensely successful in providing stable, liquid, and less volatile markets.

Interaction between Floor brokers and specialists serves as a catalyst to trading, and both functions are integral to the success of the market. Specialists and Floor brokers will continue to perform their vital functions in the Hybrid Market through the use of Floor broker agency interest files, specialist layered interest files, and specialist algorithmic interaction with orders. As such, both "electronically-" and "manually-" executed orders will benefit from the value added by specialists in committing capital and providing depth to the market in response to customer demands, and the competition among orders represented by Floor brokers in the Crowd. This will result in the reduced volatility, stable prices, and fair and orderly markets that are a hallmark of the Exchange.

The Hybrid Market ensures that the opportunity for price improvement available in auction market trading continues and is extended to automatic executions. Proposed new orders types—auction limit orders and market orders not designated for automatic execution ("auction market orders")—specifically incorporate an opportunity for price improvement. In addition, customers may seek price improvement through the use of Floor brokers, who can access the liquidity represented by orders on the Display Book, specialist dealer interest, and the Crowd. The ability of specialists to provide algorithmic price improvement,[13] the sweep functionality, and the ability of Floor broker agency interest files to participate in automatic executions provide a price improvement opportunity regardless of the execution format.

The proposed rules incorporate functionalities to enable specialists and Floor brokers to participate in automatic executions and sweeps. These functionalities, the NYSE Specialist API℠ (*i.e.*, systems that employ algorithms to make trading and quoting decisions on behalf of the specialist), NYSE Specialist Interest Files ℠, and NYSE Floor Broker Agency Interest Files℠, are described in previous amendments. Aspects of their operation are clarified or modified as described below.

All of the proposed functionalities are required to operate in a manner consistent with Commission and Exchange rules governing trading by members and member organizations. For example, Exchange Rule 104(a) prohibits specialists from effecting purchases or sales in any specialty security "unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market* * *" The "reasonable necessity" requirement is defined in Exchange Rule 104.10, which sets forth standards by which the market necessity of specialist trading can be determined. These rules will continue to apply to specialist trading in the Hybrid Market. The ability of specialists to algorithmically quote and trade pursuant to defined parameters, layer interest, and maintain a reserve file at the best bid and offer, as described in these amendments, is consistent with these requirements. They are merely tools to enable specialists to participate in automatic executions and allow them to replicate electronically that which they do today. All specialist trading, whether "electronic" or "manual," must satisfy the requirements governing specialist proprietary trading.

The proposals discussed in these amendments will make for better markets to the benefit of all. They encourage displaying liquidity, which will result in narrower spreads and deeper markets and allow customers to access this liquidity in whatever way best suits their needs. As such, the Exchange's hybrid proposal ensures the continuation of the stable, liquid markets for which the Exchange is known.

Specialist Reserve and Additional Specialist Volume—Exchange Rule 104(d)

Specialists provide significant value to the market, committing capital to narrow quotes, add liquidity, and stabilize prices. To assist specialists in this effort and to enable them to comply more readily with their market-making responsibilities, the proposed rules provide specialists with the ability to implement external application programmed interfaces ("API"), which transmit to the Display Book messages generated by a system employing pre-set proprietary algorithms to quote or trade on behalf of their dealer accounts only in certain, limited ways. By allowing specialists to do electronically that which they are able to do manually today, specialists will provide value and liquidity in the Hybrid Market.

The previous amendments provide that the systems employing algorithms

[12] The Display Book is an order management and execution facility. The Display Book receives and displays orders to the specialist and provides a mechanism to execute and report transactions and publish the results to the Consolidated Tape. In addition, the Display Book is connected to a variety of other Exchange systems for the purposes of comparison, surveillance, and reporting information to customers and other market data and national market systems (*i.e.* the Intermarket Trading System, Consolidated Tape Association, Consolidated Quotation System, etc.).

[13] It should be noted that the Exchange intends to provide Floor brokers with the ability to provide electronic price improvement via a discretionary order type. This will be the subject of a separate filing.

may send messages through the API to, among other things, supplement the size of an existing Exchange best bid and offer, layer specialist interest at prices outside the best bid and offer, and provide a single-priced execution at the best bid and offer. The proposed rules were silent as to the specialists' ability to maintain non-displayed or "reserve" interest at the best bid and offer.

Proposed Exchange Rule 104 has been amended to provide that specialists may, but are not required to, have non-displayed "reserve" interest at the best bid and offer. As with Floor broker reserve interest described in the previous amendments, the specialist must have a minimum amount of interest displayed at the best bid or offer in order to have reserve interest on that side of the quote. For specialists, this minimum amount is 2,000 shares. Like broker reserve interest, specialist reserve interest yields to displayed interest. Similarly, after an execution, if specialist interest remains at the best bid or offer, the amount of such displayed interest will be replenished by the specialist's reserve interest, if any, so that at least a minimum of 2,000 shares of specialist interest is displayed (or whatever specialist interest remains at the best bid or offer, if less than 2,000 shares).

Automatic executions trade first with all displayed interest at the best bid or offer, in accordance with Exchange Rule 72. If not filled by the displayed interest, the order automatically executes against the non-displayed specialist and Floor broker reserve interest, which participate on parity.

Specialists may also supply additional trading volume at the best bid or offer price beyond the amount in the specialist's reserve, if any. In previous amendments, this was referred to as completing an order to provide a single price execution and required that the specialist buy (sell) the entire amount remaining on an order. Rule 104 is amended to provide that this additional volume, which is not part of the reserve and which is not displayed, may complete an order, thereby providing a single-priced execution, or partially fill the remainder of the order. Additional specialist volume yields to displayed and reserve interest.

For example, if 5,000 shares of an automatically executing sell order remains unfilled after trading with the displayed volume at the Exchange best bid and any reserve interest at that price, the specialist can buy all or some of the 5,000 shares at the same price. If the specialist buys less than the full size remaining, it will sweep the orders on the Display Book and Floor broker agency and specialist interest files to the extent permitted, until filled, its limit, if any, is reached or a LRP is triggered, whichever comes first, as described in previous amendments.

It is appropriate to permit specialists to inject additional liquidity at the best bid or offer price without requiring them to fill the entire order because this additional specialist interest does not trade until all displayed and reserve interest at such bid or offer is exhausted. As there is no other interest at that price available to trade other than the specialist's interest, the specialist should be able to trade in any amount with the order, provided the trading is otherwise consistent with Exchange rules governing specialist proprietary trading.

As noted in previous amendments, automatic executions involving reserve interest and any additional specialist volume will print to the Tape separately from the automatic execution of displayed interest at the best bid or offer.

Specialists' Algorithms—Exchange Rules 104, 92 and 36

The previous amendments describe the various types of actions permitted by specialist systems employing algorithms. This amendment clarifies those provisions and proposes changes to them, as follows. Permissible algorithmic actions are limited in scope and restricted by rules governing specialist proprietary trading.

During the day, specialists on the Floor will be able to interact with the systems employing algorithms in the securities they are trading to manage their risk. They may do this by selecting to activate or deactivate algorithms from a group of pre-set algorithms made available by the specialist's firm or by adjusting the parameters that guide an algorithm's decision-making. However, specialists will not have the ability to affect the processing of algorithmically generated messages by the Display Book. NYSE Rule 104(g) has been amended to reflect this. Specialists will be able to interact with the algorithms via a wired or wireless device, such as a computer terminal or laptop. This wired or wireless device will be able to communicate with the specialist's off-Floor office to the same extent as is permitted today via a telephone line, as set forth in Exchange Rule 36.30.[14] In addition, this wired or wireless device will be able to communicate with the firm's algorithms to implement the Floor specialist's decisions to activate or deactivate an algorithm or change an algorithm's pre-set parameters. Each specialist firm shall be required to certify in the time, frequency, and manner prescribed by the Exchange that such wired or wireless devices operate in accordance with all SEC and Exchange rules, policies, and procedures.

Specialist systems employing algorithms are permitted to send messages to the Display Book via the API to quote or trade only in reaction to specified types of information. Previous amendments described that such systems would employ a minimum of two algorithms with access to different types of information (*i.e.*, one would not have direct access to incoming orders as they are entering Exchange systems) and prescribed different permissible quoting and/or trading functions for each algorithm. This has been amended to provide that a specialist may maintain a system that employs one or more algorithms, all of which can have access to the same information and operate as described below.

Algorithms will have access to the following information:

- specialist dealer position;
- quotes;
- information about orders on the Display Book such as limit orders, percentage orders, stop orders, and auction limit and auction market orders ("state of the book");
- any publicly available information the specialist firm chooses to supply to the algorithm, such as the Consolidated Quote stream; and
- incoming orders as they are entering NYSE systems.

Algorithms:

- will not have access to information identifying the firms entering orders, customer information, or an order's clearing broker;

[14] NYSE Rule 36.30 provides that "with the approval of the Exchange, a specialist unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the specialist unit or the unit's clearing firm. Such telephone connection shall not be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities, but may be used to enter options or futures hedging orders through the unit's off-Floor office or the unit's clearing firm, or through a member (on the floor) of an options or futures exchange. In addition, a specialist registered in an * * *(ETF)* * * may use a telephone connection or order entry terminal at the specialists' post to enter a proprietary order in the * * *(ETF) in another market center, in a Component security of such * * *(ETF) or in an options or futures contract related to such* * * (ETF) and may use the post telephone to obtain market information with respect to such * * *(ETFs), options, futures, or Component Securities. If the order in the Component Security of the * * *(ETF) is to be executed on the Exchange, the order must be entered and executed in compliance with Exchange Rule 112.20 and SEC Rule 11a2–2(T), and must be entered only for the purpose of hedging a position in the * * *(ETF)."

• will not have access to order cancellations, except for cancel and replace orders;
• will not be able to delay the arrival of orders at the Display Book;
• will not be able to affect the sequence of orders and messages arriving at the Display Book; and
• will not have access to Floor broker agency interest files or aggregate Floor broker agency interest available at each price.

NYSE systems will ensure that incoming orders and algorithmic messages are processed at the Display Book in their proper sequence. The book will not process an algorithmic message until the order immediately preceding the generation of such message has been processed. The Exchange notes that the specialist algorithm would not be permitted to execute against incoming orders unless providing price improvement or supplementing size. In addition, the specialist algorithm would not be permitted to change its existing quote in response to an incoming order. The specialist algorithm would, however, be permitted to change the quote, as the specialist is permitted to do manually today, once the incoming order is processed. In addition, as described below, algorithmic messages will be required to include certain codes and identifiers for each permissible action. Algorithmic messages without such required information or with codes and identifiers that are inconsistent with the message's quoting or trading action will be cancelled.

As discussed in these amendments, systems employing algorithms will only be able to "read" and react to one incoming order at a time. That order will be processed by the Display Book before any algorithmic message in reaction to such order is processed. While there may be times when a system employing an algorithm could "possess" more than one order at the same time, the system will only be able to process, *i.e.* "read" and react, to only one order at a time, in the sequence in which orders were entered. In addition, there may be times when a permissible algorithmic message has been generated but, before such message has been processed by the Display Book, the system employing the algorithm has "read" or "is reading" a new order. This new order may be better priced than the algorithmically generated order or otherwise be able to trade with the order to which the algorithmic message reacted but, as a result of proper time sequencing, which will be enforced by the Display Book, the algorithmic message will be processed before such new order. Further, once an algorithmic message has been generated, it cannot be stopped, changed, or cancelled on its way to the book.

Examples:

1. At 10:01:0001, a customer market order to buy is received by the specialist system employing algorithms (Order 1). At 10:001:0002, the system employing algorithms receives a customer market order to sell (Order 2). At 10:01:0003, the system "reads" Order 1 and at 10:01:0004 algorithmically generates a message to trade with (sell to) Order 1 (the market buy order). At 10:001:0005, the system generates an algorithmic message to trade with (buy from) Order 2 (the market sell order). At 10:01:0006, the Display Book executes Order 1 (the market buy order) against the specialist's sell interest. At 10:01:0007, the Display Book executes Order 2 (the market sell order) against the specialist's buy interest. Although both the customer buy and customer sell orders are in the specialist's system at the same time, the system processes each order in sequence, "reading" and "reacting" to Order 1 first before "reading" and reacting to Order 2. The algorithmically generated message in reaction to Order 1 cannot be changed or cancelled after the specialist's system "reads" Order 2.

2. The Exchange quotation is 20.04 × 20.06. At 10:01:0001, a customer market order to buy is received by the specialist system employing algorithms (Order 1). At 10:001:0002, the system "reads" Order 1 and algorithmically generates a message to trade with (sell to) Order 1 at 20.05. At 10:01:0003, before the algorithmic message to trade with Order 1 has been processed by the Display Book, the specialist's system employing algorithms receives a customer market order to sell (Order 2). At 10:01:0004, the Display Book executes Order 1 (the market buy order) against the specialist's sell interest at a price of 20.05. At 10:01:0005, the Display Book executes Order 2 against the Exchange bid, at a price of 20.04.[15]

Based on the information noted above, including an incoming order, specialist systems may algorithmically generate messages to quote or trade, as follows:

Quoting messages:
• supplement the size of the existing Exchange published best bid or offer;
• place within the Display Book system specialist reserve interest at the Exchange published best bid and offer;
• layer within the Display Book system specialist interest at varying prices outside the published Exchange quotation;
• establish the Exchange best bid and offer; and
• withdraw previously established specialist interest at the Exchange best bid and offer.

A quoting message would not interact with the order that preceded it. A specialist algorithm may, however, based on information about the preceding incoming order, decide to move its quote away from the inside market after the preceding order has been processed.

Trading messages:
• provide additional specialist volume to partially or completely fill an order at the Exchange published best bid or offer;
• match better bids and offers published by other market centers where automatic executions are immediately available;
• provide price improvement to an order subject to the conditions outlined below; and
• trade with the Exchange published quotation ("hit bids or take offers").

To ensure that an algorithmic message to trade with the Exchange published quotation does not possess any informational advantage with respect an incoming order before the incoming order is processed by the Display Book, an algorithmic message to trade with the Exchange published bid or offer must include, among other things, information designated by the Exchange to indicate that such bid or offer has been publicly disseminated, as well as information identifying the order immediately preceding the generation of such algorithmic message. Without these identifiers, the algorithmic message will not be processed.

Additionally, to ensure that an algorithmic message to trade with the Exchange published quotation does not possess any speed advantage in reaching the Display Book, Exchange systems will make certain that such messages are processed by the book in a manner that gives specialists and other market participants a similar opportunity to trade with the Exchange's published quotation. Based upon the average transit time from the Common Message Switch (CMS)[16] system to the Display Book, the Exchange will determine the appropriate amount of time to delay the processing of algorithmic messages to trade with the Exchange published

[15] Specialist algorithmic price improvement is discussed in more detail below.

[16] CMS is a store-and-forward message-switching application that connects member firms to Exchange systems. CMS validates and routes orders from member firms to the SuperDot ® system and into the Display Book ® system, which then processes them. Algorithmic messages will be delivered to the Display Book via a different set of Exchange systems.

quotation. The delay parameter will be adjusted periodically to account for changes to the average transit time resulting from capacity and other upgrades to Exchange systems.

For example, a buy order arrives at the Exchange with a limit price that is better than the existing best bid, but which is not auto-executable, as its limit is below the existing Exchange best offer. This will become the Exchange's new best bid. The specialist's system employing algorithms "reads" this buy order and generates a message to trade with it (*i.e.*, hit the bid). In order for this message to be processed by the Display Book, the message must include a reason code (*e.g.* "trade with bid"), the designated identifier for the order immediately preceding the generation of the algorithmic message, and the designated identifier of the newly-quoted bid. The Display Book will not process this algorithmic message until a designated period of time has elapsed, to ensure that the specialist does not have a time advantage in the routing of its trading message to the book. The same scenario would apply to an offer to sell where the limit is above the Exchange best bid.

Every algorithmic message delivered via the API must include a code identifying the reason for the algorithmic action (*e.g.* "match ITS," "price improvement," "hit bid," etc.), the unique identifiers of the order to which the algorithm is reacting (where the message is in reaction to an order), the order immediately preceding the generation of the algorithmic message, and any other information the Exchange may require. In addition, as noted above, algorithmic messages to trade with the Exchange published bid or offer must also include the unique designated identifier for the quote to which the algorithm is reacting. The Exchange will designate the reason codes, unique identifiers for orders and quotes, and the format of any other required information for use by the algorithms.

Identification of a particular order or quote by the algorithmic message does not guarantee that the specialist will be able to trade with that order or quote, or that the specialist has priority in trading with that order or quote. The Exchange will automatically cancel algorithmic messages that are unable to interact with the order or quote identified by the message, where the reason code and the proposed algorithmic action are inconsistent, where the identifiers described above are not included, and in other similar situations.

Algorithmic trading and quoting must comply with SEC and Exchange rules, policies, and procedures regarding specialist stabilization and market maintenance requirements. Algorithmic quoting messages must not create a locked or crossed market, as defined in Exchange Rule 15A, and the Exchange will cancel any such algorithmic messages.

As noted in previous amendments, the Display Book will not accept algorithmic messages when automatic executions are unavailable. Proposed Rule 104 is amended to provide that the Display Book will accept algorithmic quoting messages to generate a bid or offer that improves the Exchange best bid or offer or supplements the size of an existing best bid or offer in the infrequent situations when automatic executions are suspended, but autoquote is active. This benefits the market by permitting an opportunity for the specialist to provide liquidity and/or narrow the quote. These situations include:

(i) when the Exchange published quote is such that a NYSE Momentum LRPSM ("MLRP") will be triggered by a trade at the bid or offer (*see infra*); or

(ii) an order in a high-priced security arrives.[17]

In summary, specialists would have the ability to view information about an incoming order before it is publicly disseminated and, subject to specific limitations and conditions, directly interact with the Display Book on behalf of its dealer account based on such information.

Algorithmic Price Improvement

Previous amendments described the ability of specialists to algorithmically provide price improvement to incoming orders and set forth parameters for such price improvement. This amendment modifies these parameters.[18] Proposed Rule 104(e) is amended to provide that specialists may price improve all or part of an incoming order, as follows:

(i) The specialist is represented in the bid if buying and the offer if selling; and

(ii) where the quotation spread is three–five cents, algorithms must provide price improvement of at least two cents; or

(iii) where the quotation spread is more than five cents, algorithms must provide price improvement of at least three cents; or

(iv) where the quotation spread is two cents, algorithms must provide price improvement of one cent.

Examples:

(1) If the Exchange quotation is 20.10–20.15, and the specialist is represented in both the bid and offer, the algorithm can provide price improvement by buying at 20.12, and selling at 20.13.

(2) If the Exchange quotation is 20.10–20.16, and the specialist is represented in both the bid and the offer, the algorithm can buy at 20.13 and sell at 20.13.

(3) If the Exchange quotation is 20.10–20.12, and the specialist is represented in both the bid and the offer, the algorithm can buy at 20.11 and sell at 20.11.

The Exchange is proposing these parameters in an attempt to balance the goals of preserving incentives for the limit orders on the Display Book to establish the best price and of encouraging price improvement for incoming orders. The Exchange believes that the benefit of providing meaningful price improvement to incoming orders under such circumstances would outweigh the potential disincentives to post aggressive limit orders. The Exchange notes that, under the proposed changes to NYSE Rule 104, specialists would be permitted to algorithmically provide price improvement of only one cent in the relatively frequent situation in liquid stocks when the quotation spread is two cents. The ability of the specialist algorithm to provide price improvement of one cent when the quotation spread is two cents is consistent with federal securities laws and Exchange rules. In addition, it is useful to note that the Exchange intends to provide Floor brokers with the ability to provide electronic price improvement via a discretionary order type. This will be the subject of a separate filing.

Algorithms may price improve NYSE Auction Limit Orders[SM] ("AL orders") and NYSE Auction Market Orders[SM] ("AM orders"), consistent with the requirements noted above, by generating a message to trade with the AL or AM order before it is processed by the Display Book, or executing the AL or

[17] Previous amendments define a "high-priced security" as one priced above $300. The availability of automatic executions in high-priced securities is discussed *infra*.

[18] Amendment No. 2 provided: "The algorithms will enable the specialists on behalf of the dealer account to electronically provide price improvement to automatic executions, provided the following conditions are met: (i) the quotation spread is at least three cents; (ii) the specialist is represented in the published bid or offer in a meaningful amount: the lesser of 10,000 shares or 20% of the respective bid (offer) size; (iii) the order receiving price improvement is of "retail" order size, *i.e.*, 2,000 shares or less and the specialist fills the order; and (iv) the price improvement provided by the specialist is (a) at least .02 where the quote spread is .03–.05, (b) at least .03 where the quote spread is .06–.10, (c) at least .04 where the quote spread is .11–.20, and (d) at least .05 where the quote spread is more than .20." As noted above, this filing amends these parameters.

AM order at its quoted price once the order has been processed by the Display Book. Algorithmic messages that will trigger the automatic execution of AL or AM orders or that will result in such orders trading with the specialist's existing contra-side bid or offer are prohibited.

Priority, Parity, Precedence and Yielding—Exchange Rule 108

Current Exchange Rules 72, 104, and 108 require that specialists, when trading for their proprietary accounts, yield to limit orders on the Display Book and, when establishing or increasing a position, to orders represented in the Crowd, unless, under current practice, the broker permits the specialist to be on parity. In addition, when liquidating or decreasing a position, specialists must yield to the Crowd upon the request of a customer. With respect to limit orders on the Display Book, the specialist must always yield even when the specialist clearly has established the Exchange best bid or offer.[19] Unlike specialists, other market participants are rewarded for establishing the best bid or offer, receiving trading priority in all circumstances at that price for one trade and parity for subsequent trades.

Currently, NYSE Rule 108 prohibits the specialist from trading for its proprietary account on parity with the Crowd in situations where the specialist is establishing or increasing its position. The Exchange proposes to amend NYSE Rule 108 to eliminate that restriction and provide that specialists would be entitled to parity with orders represented in the Crowd and agency interest files when establishing or increasing its position. Other limitations on specialist proprietary trading when establishing or increasing its position, set forth in NYSE Rule 104, including Rule 104.10(5)(i)(A–C), would continue to apply. The proposed change to NYSE Rule 108 would increase the instances in which the specialist would be entitled to trade along with public customers. While this represents a shift from the overall scheme of priorities on the Exchange Floor, the Exchange believes that the proposed change, on balance, would benefit the market by encouraging specialists to add depth and liquidity to the market by initiating proprietary transactions on the Floor of the Exchange and comports with existing practice on the Floor where brokers may voluntarily allow specialists to be on parity with them. A separate filing reflecting this practice will be made shortly.

The rules regarding priority, parity, precedence, and yielding among orders automatically executing on the Exchange are as follows:

- Exchange Rule 72 applies to automatic executions, unless otherwise provided;
- An order that establishes the Exchange best bid or offer is entitled to priority at that price for one trade, except a specialist bid or offer entitled to priority must yield to limit orders on the book;
- Displayed interest at the Exchange best bid and offer always trades first, after the order that established such best bid or offer, but ahead of any reserve and additional specialist interest. All displayed interest (other than displayed interest entitled to priority) is on parity, except that specialist displayed interest yields to limit orders on the book;
- Specialists and brokers may maintain non-displayed reserve interest at the best bid or offer, provided brokers display a minimum of 1,000 shares at that price, and specialists display a minimum of 2,000 shares at that price;
- All reserve interest trades on parity;
- Additional specialist volume, which is not displayed and not included in the reserve, yields to all displayed and all reserve interest; and
- No published bid or offer is entitled to claim precedence based on size with respect to automatic executions (current Exchange Rule 1001(c), which has been re-lettered as Rule 1001(b)), and no electronic interest is entitled to precedence based on size.

In addition, Exchange Rule 108 is amended to reflect that a specialist may not be on parity with the Crowd when establishing or increasing its position, if a customer requests and such request is entered as a term of the order in appropriate Exchange systems. Exchange Rule 70.20(a)(i) is amended to provide that in instances where a customer does not want the specialist to be on parity, such orders may not be entered in Floor broker agency interest files.

The combination of proposals discussed in these amendments—displayed interest always trades first other than specialist displayed interest, which yields to limit orders on the book; minimum display requirements for specialists and brokers in order to have reserve interest; limit orders on the book receiving the "clean-up" price during a sweep; and the opportunity for price improvement provided by auction limit and auction market orders—provide a significant incentive to market participants to display orders. The resulting tighter spreads and more liquid market is a significant benefit.

Examples:

The following scenario applies to all of the examples below:

The Exchange quotation is 20.10 – 20.15 (5,000 × 8,000). The following interest arrives, in order: The specialist algorithm bids 20.11 for 4,000 shares (thereby establishing the best bid); one Floor broker bids 20.11 for 1,000 shares, with 3,000 shares in reserve; a limit order arrives on the book to buy 4,000 shares at 20.11; and a CAP–DI order arrives to buy 20,000 shares at 20.20.

An auto-ex market order to buy 1,000 shares arrives and is automatically executed at 20.15. This transaction clears the Floor and all bids are deemed re-entered simultaneously. The market is autoquoted 20.11 – 20.15 (9,000 × 7,000), with 3,000 shares in reserve at 20.11.

(1) Specialist Yields to the Book and Broker Agency Interest:

An auto-ex order to sell 3,000 shares at 20.11 (or an auto-ex market order) arrives. The broker and the book are on parity and 1,000 shares from the broker and 2,000 shares from the book are executed. (The broker displayed interest trades along with the displayed limit order interest on the book. The undisplayed reserve interest does not trade). The specialist does not participate, as 2,000 shares remain unexecuted on the limit order on the book. The specialist must yield to limit orders on the book even though the specialist's bid for 4,000 shares arrived before the limit order and established the best bid price. The CAP order does not participate, as there is no more sell liquidity at 20.11.

(2) Price Improvement:

If the specialist algorithm determined to provide price improvement to the 3,000-share auto-ex sell order, buying at 20.13 (two cents better than best bid of 20.11 and therefore consistent with the price improvement parameters), the CAP–DI order would be automatically converted (*see* discussion on CAP–DI orders, below). The specialist and the CAP–DI order would each buy 1,500 shares.

(3) Trade with Contra-Side of Quote:

If a sell order arrives at 20.14, which improves the 20.15 offer, the specialist algorithm cannot generate a message to trade with this order until it is quoted as the new best offer, as the algorithmic message must include the identifier of the new quote, among other information, in order to be processed. In addition, the algorithmic message will be delayed by a time factor that places

[19] Specialists establishing the best bid or offer are entitled to priority over the Crowd for one trade.

the specialist on a par with broker and off-Floor electronic access.

(4) Parity with Reserve:

If the specialist also had 3,000 shares to buy in a reserve file (permissible because the specialist has at least 2,000 shares displayed at the best bid), and an auto-ex market order arrives to sell 11,000 shares:

(a) All displayed interest trades before any reserve interest, so the specialist buys 4,000 shares, the broker buys 1,000 shares and the book buys 4,000 shares;

(b) The specialist reserve and broker reserve split the 2,000 shares remaining on the order to sell, each purchasing 1,000 shares.

(c) If the specialist had displayed less than 2,000 shares, the specialist would not have been able to have any reserve interest, so the broker reserve interest would buy the remaining 2,000 shares from the sell order.

(d) If the specialist provided additional volume to facilitate a single-priced execution or to partially fill the order, such volume would yield to all displayed and reserve interest.

(e) If there was no reserve interest and no additional specialist volume and the sell market order was unfilled, it would sweep the book until executed or a LRP is triggered. If it had been a sell limit order, it would sweep until filled, its limit was reached or a LRP was triggered.

Record Requirements and Specialist Algorithms

Previous amendments state that algorithmic messages reacting to incoming orders must identify the specific order to which the algorithm is responding. As discussed above, proposed Rule 104(c) is amended to require that each algorithmic message must also include a code identifying the reason for the algorithmic action, the unique identifier of the order to which the algorithm is reacting (if any), the unique identifier of the last order that the algorithm had access to before generating the message, and any other information the Exchange may require. In addition, algorithmic actions in response to a quotation must also include the unique identifier for the quote to which the algorithm is reacting. The Exchange will designate the reason codes, unique identifiers for orders and quotes, and the format of any other required information for use by the algorithms.

Exchange Rule 132A requires members and member organizations to synchronize the business clocks used to record the date and time of any event that the Exchange requires to be recorded, with reference to a time source as designated by the Exchange. NYSE Rule 132A also requires that members maintain the synchronization of this equipment in conformity with procedures prescribed by the Exchange. Proposed Exchange Rule 104(f)(i) requires specialists to record information regarding algorithmic messages as designated by the Exchange, including the date and time of each algorithmic action. As such, Exchange Rule 132A applies to the algorithms. Further, proposed Exchange Rule 104(f)(i) requires that specialists maintain an electronic log of all algorithmic actions in accordance with Exchange and Commission Rules and that the data and documentation shall be made available to the Exchange upon request, and in a format as designated by the Exchange.

Proposed Exchange Rule 104(f)(ii) requires that specialists notify the Exchange in writing within such time as the Exchange shall designate, whenever an algorithm is not operating and the time, cause, and duration of such non-operation.

Proposed Exchange Rule 104(h) provides that algorithms shall be certified in the manner and frequency designated by the Exchange.

Dissemination of Specialist Interest

Previous amendments provide that specialist interest not at the Exchange best bid or offer will not be disseminated. This amendment clarifies that specialists may choose to have their interest at prices away from the Exchange best bid or offer included in information disseminated via NYSE OPENBOOK® or another Exchange data distribution channel.

NYSE Floor Broker Agency Interest File℠—Exchange Rule 70.20

Previous amendments describe NYSE Floor Brokers Agency Interest Files℠, which will enable Floor brokers to electronically represent agency interest at various prices at or outside the Exchange quote with respect to orders they are handling. This functionality allows customers to reap the benefits of Floor broker knowledge and trading expertise combined with the efficiencies of automatic executions.

Proposed Rule 70.20(b) has been amended to clarify that all interest at the same price in the agency interest files is on parity with each other, unless entitled to priority in accordance with Exchange Rule 72, and that none is entitled to invoke precedence based on size.

Proposed Rule 70.20(c)(iv) has been amended to provide that Floor brokers may enter interest at various prices in their agency interest files regardless of their location prior to the opening of the Exchange, for participation in the opening trade, with respect to the orders they have received, provided they have complied with the requirements of Exchange Rule 123(e).[20] There will be no reserve capability for broker agency interest entered into the files before the open, and brokers will not have the option to exclude such interest from the specialist before and during the open. Broker agency interest entered into files before the open may participate in the opening trade on parity with the book, as the Crowd does today, in accordance with the policies and procedures governing the open. However, brokers must be in the Crowd at the open in order to participate, and any file interest entered prior to the open in securities that are not part of such Crowd must be cancelled. After the open, the reserve capability and the ability of brokers to exclude agency interest from the aggregate agency interest information available to the specialist will be available.

Similarly, the broker reserve file will not be available at the close. Broker agency interest files will participate at the close on parity with the book, as the Crowd does today; however, broker agency interest that has been excluded from the aggregate information available to the specialist will not participate in the close.

Proposed Exchange Rule 70.20 has been amended to clarify that brokers are permitted to have agency interest files at multiple price points on both sides of the market in all securities trading within the area constituting the Crowd, provided the broker has orders in such securities and has complied with the requirements of Exchange Rule 123(e).

Proposed Rule 70.20(i) clarifies that a Floor broker whose agency interest participates in an execution will be deemed to be the executing broker for that transaction.

Transactions that "Clear the Floor"—Exchange Rule 72 (III)

This amendment also proposes to modify Exchange Rule 72 (III). The rule currently provides that a transaction "clears the Floor," after which all bids and offers are deemed resubmitted simultaneously and are on parity, except that specialists must yield to limit orders on the book. The rule is amended to add that a cancellation of an entire bid or offer entitled to priority

[20] Exchange Rule 123(e) (Records of Orders) requires that all orders in any security traded on the Exchange be entered into an electronic system ("Front-End Systemic Capture" or "FESC") before they can be represented in the Exchange market.

under the rule[21] clears the Floor, after which all bids and offers are deemed to be re-entered and are on parity. This amendment is warranted because a cancellation of a bid or offer that was entitled to priority has the same effect as a trade.

"G" Order Interest in Floor Broker Agency Interest Files—Exchange Rule 70.20(a)

This is to clarify that the provisions regarding priority, parity, and yielding will be incorporated into the programming of the Exchange's systems governing automatic executions and interest files. This includes yielding requirements for "G" orders, which are proprietary orders represented pursuant to Section 11(a)(1)(G) of the Act.[22] Accordingly, proposed Exchange Rule 70.20(a) is amended to permit "G" order interest to be included in Floor broker agency interest files.

Availability of Direct+—Exchange Rule 1002

Exchange Rule 1002 currently provides that automatic executions in securities and Trust Issued Receipts (defined in Exchange Rule 1200) are available until 3:59 p.m. and in Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual) until 4:14 p.m., or until one minute of any other closing time of the Exchange's Floor market.

Rule 1002 is proposed to be amended to provide that automatic executions continue to be available through the close of regular trading for that product (*e.g.*, 4:00 p.m. / 4:15 p.m.). Extending automatic executions through the close will contribute to more efficient closes and provide customer choice during a significant part of the trading day.

NYSE Auction Limit Orders SM ("AL") and NYSE Auction Market Orders SM ("AM")—Exchange Rule 123F

Previous amendments describe two new order types—AL and AM orders. These orders provide customers with an opportunity for price improvement while retaining the possibility of automatic execution in the event the specialist is unable to obtain price improvement for the order within a reasonable period.

This amendment clarifies that Exchange systems may execute AL and AM orders at a price (consistent with the AL order's limit) that matches immediately accessible better away bids or offers.

For example, the NYSE quote is 20.15 bid, offered at 20.20. Another market is posting the national best offer of 20.18. An AL order to sell, limited to a price of 20.10 arrives. This AL order will be automatically offered at 20.19, one penny better than the Exchange best offer existing at the time the AL order arrived. The NYSE quote is now 20.15 bid, offered at 20.19. An order arrives on the Exchange to buy at a limit of 20.19. The order will automatically execute against the AL order at a price of 20.18, providing price improvement to the limit order and matching the better offer away.

In addition, the Exchange is clarifying the sequence in which orders will execute when a trade causes an automatic execution of an AL or AM order and also elects stop orders and CAP–DI (convert and parity percentage) orders. The AL or AM would be executed first, followed by stop orders and CAP–DI orders. AL and AM orders execute first because they are executable at the time of entry but seek an opportunity for price improvement. Unlike AL and AM orders, CAP–DI and stop orders are contingent orders, not executable until elected. As such, it is more appropriate for AL and market orders not designated for automatic execution to be executed first.[23]

Immediate or Cancel Orders—Exchange Rule 13

In previous amendments, the Exchange proposed to define an Immediate or Cancel ("IOC") order as a: "market or limited price order designated immediate or cancel is to be executed to the extent possible as soon as such order is represented in the Trading Crowd or automatically executed in accordance with, and to the extent provided by, Exchange Rules 1000–1004, and the portion not so executed is to be treated as cancelled."

The above definition is amended to provide that IOC orders would be able to be entered before the Exchange opens for participation in the opening trade. Once the stock has opened, an IOC order that is not executed on the opening will be treated as cancelled.

Intermarket Sweep Order—Exchange Rule 13

Consistent with Commission Rule 600(6)(30) of Regulation NMS,[24] the Exchange proposes to amend Rule 13 to adopt a new order type—an intermarket sweep order. An intermarket sweep order is a limit order designated for automatic execution, that meets the following requirements: (1) the limit order is identified as part of an intermarket sweep in the manner prescribed by the Exchange, and (2) simultaneously with the routing of the intermarket sweep order to the Exchange, one or more additional intermarket sweep orders are routed by the entering party to execute against the full displayed size of all other protected bids (offers) in that security. These additional orders must be marked as intermarket sweep orders. The Exchange will automatically execute an intermarket sweep order on its receipt. In addition, the Exchange proposes that the customer may designate an intermarket sweep order sent to the Exchange as IOC.

The Exchange intends to identify Tape prints involving intermarket sweep orders to reflect that such transaction did not trade through better bids and offers published by other markets that were entitled to trade-through protection.

CAP–DI Orders—Exchange Rule 123A.30

Exchange Rule 123A.30 provides that specialists have the ability, subject to certain restrictions noted in the rule, to convert CAP–DI orders to participate in transactions or to bid or offer without an electing trade.

Rule 123A.30 is proposed to be amended to provide that when a specialist algorithmically price improves an order in accordance with the provisions of proposed Rule 104(e), any CAP–DI orders that have been entered and that are capable of trading at that price will be automatically converted and will trade along with the specialist in accordance with Exchange rules governing executions of converted CAP–DI orders.

Momentum LRP ("MLRP")—Exchange Rule 1000(a)(v)(B)

Proposed Exchange Rule 1000(a)(v)(B) is amended to clarify the operation of MLRPs. Automatic executions may occur at prices at or within the MLRP range. Automatic executions that could occur at prices outside the MLRP range would cause the suspension of Direct+, as described in the previous amendments. The MLRP range is calculated by adding the greater of twenty-five cents or 1% of a security's

[21] Cancellation of part of an order retains priority for the uncancelled portion of such order. However, canceling an order and replacing it with a larger order would result in a loss of priority for the original order.

[22] 15 U.S.C. 78k(a)(1)(G).

[23] Amendment No. 2 described the execution order of CAP–DI and stop orders elected by automatic executions. *See supra* note 7.

[24] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 17 CFR 200, 201, 230, 240, 242, 249, and 270.

price [25] to its lowest price within a rolling 30-second period and subtracting that amount from its highest price within the same period. Where there are no trades within a 30-second period, the last sale price will be used in calculating the MLRP.

Odd-Lot Orders—Exchange Rule 124.80

Exchange Rule 124 provides that odd-lot orders shall be received, processed, and executed by means of the Exchange system designated for such purpose. Odd-lot orders are executed by this system with the specialist as the contra-party at the price of certain round-lot transactions, as set forth in the rule. As such, the odd-lot execution system provides a type of automatic execution, but odd-lot trading is governed by Exchange Rule 124, not the rules governing Direct+. For this reason, prior amendments provide that odd-lot orders are ineligible for automatic execution via Direct+.

This amendment clarifies that when automatic executions are suspended, odd-lot executions also will be suspended. This will prevent odd lots from trading at prices unrelated to round-lot orders in the same security and will provide consistency in the availability of automatic executions.

Autoquoting—Exchange Rule 79A.15

Exchange Rule 79A.15 governs limit order display and provides for the autoquoting of limit orders in accordance with the rule. The rule also describes the way in which the Exchange autoquote facility is activated.

Previous amendments provide that the Exchange shall activate the autoquote facility in each security by initiating a NYSE LIQUIDITYQUOTE.® Rule 79A.15 is proposed to be amended to clarify that the opening trade or opening quotation, rather than a liquidity quote, activates the autoquote facility. This will ensure that autoquoting for each security is operational with the opening of the Exchange market.

Availability of Automatic Executions on Only One Side of the Market

This is to clarify that in the following situation, automatic executions will be available on only one side of the market: when the Exchange published quote is such that a NYSE MLRP will be triggered by a trade at the bid or offer.

For example, the market is 20.05 bid, offered at 20.10, the last sale is 20.08, and the MLRP range is 19.80–20.09 (based on high and low trades within the operative 30-second period). A trade could take place at the bid price because it falls within the MLRP, but a trade cannot take place at the offer price (20.10) because it falls outside the MLRP range. As a result, automatic executions would be suspended on the offer side, but continue on the bid side. However, autoquoting would continue, and orders and cancellations will update the book.[26]

Availability of Automatic Executions in High-Priced Securities

Previous amendments defined a high-priced security as one priced above $300 and noted that automatic executions would not be available for high-priced securities. This amendment clarifies that automatic executions will be unavailable in such securities priced at $300 or more. If the price of a security dips below $300 during the trading day, automatic executions continue to be unavailable that day. If the security closes below $300, automatic executions will be available the next trading day, even if the price during that day rises to $300 or above.

Incoming Commitments to Trade—Exchange Rule 15A.60

Previous amendments provide that an auto ex order trades against the displayed interest in the quote and any reserve interest at the bid or offer price, before sweeping. Proposed Rule 15A.60 is amended to clarify that incoming commitments to trade from other market centers will trade only with the displayed bid or offer. Incoming commitments will not trade with any reserve interest at the bid or offer price, or additional specialist volume and will not participate in sweeps.

Record of Orders/Order Tracking—Rules 123(e) and 132B

Rule 123(e) provides that an order may not be represented for execution on the Floor or placed within an agency interest file within the Display Book® system, as proposed in previous amendments, unless certain details of the order and the agency interest file have been first recorded in an electronic system on the Floor.

Rule 123(e)(7) provides that the type of order be designated: market, limit, stop, and stop limit. Previous amendments provided that auction limit be added to this list. This amendment proposes to provide that an auto ex market order be added to the rule.

Rule 132B prescribes requirements and procedures with respect to orders in any security listed on the Exchange received or originated by a member. It requires a member to immediately record data elements as detailed in the rule. If an order is transmitted to another member or is transmitted to another department of the same member, or is modified or cancelled, information detailed in the rule must be recorded. Additionally, the recipient of the order must record the order details as provided in the rule.

Similar changes to Rule 132B(b)(9) with regard to the designation of an order are proposed. Similarly, Rule 132B(a)(1)(D) is proposed to be amended to require that member and member organizations must identify which orders or portions thereof are being made part of the agency interest file pursuant to such procedures as required by the Exchange. This conforms Rule 132B with a change made in previous amendments to Rule 123(e).

Conclusion

In these rule amendments, including this Amendment No. 5, the Exchange has proposed significant changes to its systems that seek to more fully integrate the auction market with automatic trading, including changes that facilitate the participation of the specialist in the Hybrid Market. The Exchange has attempted to enable many of the functions that the specialist performs on the Floor to be conducted in the Hybrid Market. For example, specialists would establish electronic connections to the Display Book that "see" certain limited information before other market participants, and the specialist would be permitted to make a range of specified quoting and trading decisions based on that information designed to permit the specialist to supply greater depth and liquidity to the market. In particular, specialists could provide price improvement to incoming orders in a similar manner as they do today on the Floor.[27]

In addition, the Exchange proposes to modify the ability of the specialist to trade for its own account by amending NYSE Rule 108 to permit the specialist to trade electronically on parity with the Crowd and Floor Broker agency interest files when establishing or increasing its position in a way not currently permitted by Rule 108, but which

[25] When calculating 1% of a security's price, the result will be rounded to the nearest cent using usual rounding conventions. For example, if a security is trading at $26.49, and 1% of its price is calculated, this would be rounded down to 0.26. If a security is trading at $26.53, and 1% of its price is calculated, this would be rounded up to 0.27.

[26] *See* Amendment No. 2, *supra* note 7.

[27] As noted above, the Exchange intends to provide Floor brokers with the ability to provide electronic price improvement via a discretionary order type.

comports with existing practice on the Floor where brokers may voluntarily allow specialists to be on parity with them. The Exchange believes that this change would provide incentives for the specialist to actively participate in the Hybrid Market, which should increase liquidity and reduce volatility.

The Exchange recognizes that the Hybrid Market represents a significant change to the operation of its market by providing greater electronic access and executions within the context of the continuing benefits of the auction market. The Exchange also recognizes that views of various market participants may differ on how the ideal market should operate as a business matter. Nevertheless, the Exchange believes that the rules proposed for the Hybrid Market comply with the Act and the rules and regulations thereunder.

Hybrid Market Implementation Plan

The Exchange proposes to implement the changes described in these amendments in four phases over a period of months leading into the spring of 2006. This will help ensure proper functioning of Exchange, specialist, broker and vendor-based systems, and hybrid-related functionalities, and will promote the seamless integration of hybrid facilities into the market place. In addition, this phased implementation plan will provide time for market participants to become familiar with the different functions and features, so that they will be adequately prepared to employ them properly once the Hybrid Market is fully functional. Within each of the four phases, the various functions that will become operational during that phase will be made available over a period of several weeks.

Phase 1—Broker Agency Interest Files, Specialist Interest Files, Systemic Integration of Priority, Parity and Yielding Requirements

During the first phase of Hybrid Market implementation, the Exchange contemplates activating the Floor broker agency file to permit brokers to enter their interest at or outside the best bid and offer. This will enable brokers to gain experience using this tool. Brokers will be able to populate the reserve file, but it will be visible to the specialist in this phase. The feature permitting brokers to exclude their interest from the aggregate information available to the specialist will not be available in the phase. As noted below, the Exchange contemplates making the exclusion feature operational in Phase 2. In addition, commencing in Phase 2, broker reserve interest will not be visible to the specialist if chosen as an option by the broker.

Specialists will be able to manually layer their interest at and outside the best bid and offer during the first phase. However, they will not be able to disseminate this information via NYSE OPENBOOK® or another Exchange data distribution channel until Phase 2, as noted below. The API will not be activated during Phase 1; so specialists will not be able to use algorithms to layer their interest or to otherwise trade or quote, nor will the specialist's reserve capability be operational.

During Phase 1, the systemic programming of priority, parity, and yielding requirements, as proposed by these amendments, other than the yielding requirements for additional specialist interest, will be completed, enabling "G" order interest to be included in Floor broker agency files and to be handled by the book. Lastly, other system changes will be made to enhance systemic reporting of transactions and associated audit trail, such as eliminating specialist responsibility for allocation of volume in automatic executions (current Exchange Rule 1001(a)(3)).

During Phase 1, Direct+ will continue to operate as it does under the current rules and will be subject to the same restrictions and availability as set forth in Exchange Rules 1000–1005. Accordingly, the Exchange anticipates that most trading will continue to be effected in the auction market, subject to the same rules and conditions as trading on the Exchange today.

Phase 2—Specialist API and Reserve Files

Phase 2 will see the introduction of the specialist API and algorithmic functionalities for the specialists. During this phase, the specialist's systemic trading and quoting abilities, as described in these amendments, will become operational. For example, the specialist will be able to provide algorithmic price improvement pursuant to the formula described in these amendments regardless of the size of the incoming order. Algorithmic trading with the bid and offer, algorithmic ability to make new bids and offers and to withdraw previously made bids and offers, to add size to an existing bid and offer, to match better bids and offers away, to layer specialist interest at prices outside the best bid and offer, and to add size to the bid and offer will also be available. Reserve file capability and the yielding requirements for additional specialist interest will become operational during this phase. In addition, specialists will be able to disseminate information regarding their layered interest via NYSE OPENBOOK® or another Exchange data distribution channel. Specialist algorithmic interaction with auction limit and auction market orders will not yet be available. It is anticipated that this feature will become operational in Phase 3 when these new order types are introduced.

Brokers' reserve files and their ability to exclude their interest from the aggregate information available to the specialist will become operational during this phase and will no longer be visible to the specialist, if that option is chosen by the broker.

As in Phase 1, Direct+ will continue to operate according to the same restrictions and availability as set forth in Exchange Rules 1000–1005 today, and the Exchange anticipates that most trading will continue to be effected in the auction market.

Phase 3—Automatic Routing of Orders, Elimination of Direct+ Restrictions, Sweeps, LRPs, New Order Types, "Slow" Market Indicators, Gap Quoting

During Phase 3, most of the remaining changes discussed in these amendments will be capable of implementation:

- Automatic routing of orders to markets posting better bids and offers;
- Implementation of the sweep functionality for automatic executions;
- Activation of LRPs (both sweep and momentum), and the publication via NYSE OPENBOOK® or another Exchange data distribution channel of the most restrictive LRP;
- Availability of new order types—auction limit and auction market orders, and intermarket sweep orders;
- Availability of IOC orders for automatic executions;
- Use of indicators to identify quotations that are not immediately available for automatic executions;
- Use of indicators to identify an execution involving an intermarket sweep order;
- Implementation of gap quoting consistent with these amendments;
- Elimination of size restrictions for automatic executions;
- Elimination of 30-second restriction on the entry of auto ex orders on orders from the same person;
- Availability of automatic executions through the close;
- Elimination of Direct+ availability only to straight limit orders;
- Elimination of Direct+ suspensions due to price (*i.e.*, a trade at a price that would be more than five cents from the last trade in the stock on the Exchange);
- Elimination of Direct+ suspensions due to size (*i.e.*, a 100-share published bid or offer);

• Conversion of marketable limit orders automatically to auto ex orders; and

• Automatic executions of market orders so designated (*i.e.*, an "NX" market order).

In addition, the ability of specialists to have algorithmic interaction with auction limit and auction market orders will become operational.

Not all of these features will be made available at the same time during this phase, and they will be made available in all securities over a period of time.

Phase 4—New Reporting Templates, Elimination of Suspensions of Autoquote and Automatic Executions

Finally, Phase 4 will see the implementation of new reporting templates and the elimination of the suspension of autoquoting and automatic executions (when the bid or offer decrements to 100 shares), except as otherwise provided in these amendments.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under section 6(b)(5)[28] that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of section 11A(a)(1)[29] in that it seeks to assure economically efficient execution of securities transactions, make it practicable for brokers to execute investors' orders in the best market and provide an opportunity for investors' orders to be executed without the participation of a dealer.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change, as amended.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended by Amendment No. 5, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2004–05 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NYSE–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, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2004–05 and should be submitted on or before July 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[30]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3386 Filed 6–28–05; 8:45 am]

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[28] 15 U.S.C. 78f(b)(5).

[29] 15 U.S.C. 78k–1(a)(1).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51909; File No. SR–Phlx–2005–37]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Payment for Order Flow and Directed Orders

June 22, 2005.

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 June 2, 2005, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Phlx has designated this proposal as one changing a fee imposed by the Phlx under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) 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

The Phlx proposes to modify its equity options payment for order flow program in order to establish a payment for order flow program that takes into account Directed Orders[5] pursuant to

[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).

[5] The Exchange states that the term "Directed Order" means any customer order to buy or sell which has been directed to a particular specialist, Remote Streaming Quote Trader (defined below), or Streaming Quote Trader (defined below) by an Order Flow Provider (defined below). The provisions of Rule 1080(l) are in effect for a one-year pilot period to expire on May 27, 2006. *See* Securities Exchange Act Release No. 51759 (May

new Exchange Rule 1080(l). Pursuant to Exchange Rule 1080(l), Exchange specialists,[6] Streaming Quote Traders ("SQTs"),[7] and Remote Streaming Quote Traders ("RSQTs")[8] trading on the Exchange's electronic options trading platform, Phlx XL,[9] may receive Directed Orders from Order Flow Providers.[10]

In addition, the Exchange proposes to modify the time periods during which the specialists, SQTs, and RSQTs must notify the Exchange in connection with electing to participate or not to participate in the Exchange's payment for order flow program.

Equity Options Payment for Order Flow Program in Effect Prior to June 2, 2005

The Exchange currently charges a payment for order flow fee to ROTs of $0.40 on all equity options traded on the Phlx when the specialist unit has opted into the Exchange's payment for order flow program, other than options on the Nasdaq-100 Index Tracking Stock℠ traded under the symbol QQQQ ("QQQ"),[11] which are assessed $1.00 and options on the iShares FTSE/Xinhua China Index Fund ("FXI Options"), an exchange-traded fund, which are not assessed a payment for order flow fee.[12]

The payment for order flow fee applies, in effect, to equity option transactions between a ROT and a customer.[13] In addition, a 500-contract cap per individual cleared side of a transaction is imposed.[14]

Specialists request payment for order flow reimbursements on an option-by-option basis. The collected funds are to be used by each specialist unit to reimburse it for monies expended to attract options orders to the Exchange by making payments to Order Flow Providers who provide order flow to the Exchange. The specialists receive their respective funds only after submitting an Exchange certification form identifying the amount of the requested funds.[15]

Specialist units elect to participate or not to participate in the program in all options in which they are acting as a specialist by notifying the Exchange in writing no later than five business days prior to the start of the month.[16] If electing not to participate in the program, the specialist unit waives its right to any reimbursement of payment for order flow funds for the month(s) during which it elected to opt out of the program. Payment for order flow charges apply to ROTs as long as the specialist unit for that option has elected to participate in the Exchange's payment for order flow program.[17] Specialist units may opt out entirely from the program as long as they notify the Exchange in writing by the 15th of the month, or the next business day if the 15th of the month is not a business day. If a specialist unit opts out of the program by the 15th of the month, no payment for order flow charges will be incurred by the ROTs for transactions in the affected options for that month.

In addition to opting out entirely from the program, specialists may opt out of the program on an option-by-option basis if they notify the Exchange in writing no later than three business days after the end of the month (which is before the payment for order flow fee is billed). If a specialist unit opts out of an option at the end of the month then no payment for order flow fees are assessed on the applicable ROT(s) for that option. If a specialist unit opts out of the program in a particular option more than two times in a six-month period, it will be precluded from entering into the payment for order flow program for that option for the next three months.

The payment for order flow fee is billed and collected on a monthly basis. Because the specialists are not being charged the payment for order flow fee for their own transactions, they may not request reimbursement for order flow

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27, 2005), 70 FR 32860 (June 6, 2005) (SR–Phlx–2004–91).

[6] The Exchange uses the terms "specialist" and "specialist unit" interchangeably herein.

[7] An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange-approved proprietary electronic quoting device in eligible options to which such SQT is assigned. AUTOM is the Exchange's electronic order delivery, routing, execution, and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. *See* Exchange Rules 1014(b)(ii) and 1080.

[8] An RSQT is an Exchange ROT that is a member or member organization of the Exchange with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. An RSQT may only trade in a market making capacity in classes of options in which he is assigned. *See* Exchange Rule 1014(b)(ii)(B). *See* Securities Exchange Act Release Nos. 51126 (February 2, 2005), 70 FR 6915 (February 9, 2005) (SR–Phlx–2004–90); and 51428 (March 24, 2005), 70 FR 16325 (March 30, 2005) (SR–Phlx–2005–12).

[9] In July, the Exchange began trading equity options on Phlx XL, followed by index options in December 2004. *See* Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 46612 (August 3, 2004) (SR–Phlx–2003–59).

[10] The term "Order Flow Provider" means any member or member organization that submits, as agent, customer orders to the Exchange. *See* Exchange Rule 1080(l).

[11] The Nasdaq-100®, Nasdaq-100 Index®, Nasdaq®, The Nasdaq Stock Market®, Nasdaq-100 Shares℠, Nasdaq-100 Trust℠, Nasdaq-100 Index Tracking Stock℠, and QQQ℠ are trademarks or service marks of The Nasdaq Stock Market, Inc. ("Nasdaq") and have been licensed for use for certain purposes by the Exchange pursuant to a License Agreement with Nasdaq. The Nasdaq-100 Index® (the "Index") is determined, composed, and calculated by Nasdaq without regard to the Licensee, the Nasdaq-100 Trust℠, or the beneficial owners of Nasdaq-100 Shares℠. The Exchange states that Nasdaq has complete control and sole discretion in determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

[12] *See* Securities Exchange Act Release No. 50723 (November 23, 2004), 69 FR 69978 (December 1, 2004) (SR–Phlx–2004–68).

[13] Thus, currently, the ROT payment for order flow fee is not assessed on transactions between: (1) a specialist and a ROT; (2) a ROT and a ROT; (3) a ROT and a firm; and (4) a ROT and a broker-dealer. The ROT payment for order flow fee does not apply to index options or foreign currency options.

[14] Thus, the applicable payment for order flow fee is imposed only on the first 500 contracts, per individual cleared side of a transaction. For example, if a transaction consists of 750 contracts by one ROT, the applicable payment for order flow fee would be applied to, and capped at, 500 contracts for that transaction. Also, if a transaction consists of 600 contracts, but is equally divided among three ROTs, the 500 contract cap would not apply to any such ROT and each ROT would be assessed the applicable payment for order flow fee on 200 contracts, as the payment for order flow fee is assessed on a per ROT, per transaction basis. *See* Securities Exchange Act Release Nos. 47958 (May 30, 2003), 68 FR 34026 (June 6, 2003) (proposing SR–Phlx–2002–87); 48166 (July 11, 2003), 68 FR 42450 (July 17, 2003) (approving SR–Phlx–2002–87); and 50471 (September 29, 2004), 69 FR 59636 (October 5, 2004) (SR–Phlx–2004–60).

[15] Specialist units are given instructions as to when the certification forms are required to be submitted. The Exchange states that, while all determinations concerning the amount that will be paid for orders and which Order Flow Providers shall receive these payments are made by the specialists, the specialists provide to the Exchange on an Exchange form certain information, including what firms they paid for order flow, the amount of the payment and the price paid per contract. The Exchange states that the purpose of the form, in part, is to assist the Exchange in determining the effectiveness of the proposed fee and to account for and track the funds transferred to specialists, consistent with normal bookkeeping and auditing practices. In addition, certain administrative duties are provided by the Exchange to assist the specialists.

[16] A specialist unit must notify the Exchange in writing to either elect to participate or not to participate in the program. Once a specialist unit has either elected to participate or not to participate in the Exchange's payment for order flow program in a particular month, it is not required to notify the Exchange in a subsequent month if it does not intend to change its participation status. For example, if a specialist unit elected to participate in the program and provided the Exchange with the appropriate notice, that specialist unit would not be required to notify the Exchange in the subsequent month(s) if it intends to continue to participate in the program. However, if it elects not to participate (a change from its current status), it would need to notify the Exchange in accordance with the requirements stated above.

[17] For example, a payment for order flow fee will be assessed, even beginning mid-month, if an option is allocated, or reallocated from a non-participating specialist unit, to a specialist unit that participates in the Exchange's payment for order flow program.

funds in connection with any transactions to which they were a party.[18]

The Exchange states that excess funds are returned to the ROTs (reflected as a credit on the monthly invoices) and distributed on a pro rata basis to the applicable ROTs.[19]

Proposed Equity Options Payment for Order Flow Program Commencing June 2, 2005

The Exchange proposes to modify its payment for order flow program to establish a payment for order flow program that takes into account Directed Orders that are sent to the Exchange.

The amount of the payment for order flow fee would not change. The Exchange would continue to charge a payment for order flow fee of $0.40 on equity options traded on the Phlx, other than options on the QQQ, which would continue to be assessed a payment for order flow fee of $1.00 and FXI Options, which would continue to not be assessed a payment for order flow fee. However, the way in which the payment for order flow fees would be charged and reimbursed would be changed to take into account Directed Orders.

Pursuant to Exchange Rule 1080, specialists, SQTs and RSQTs may receive Directed Orders in accordance with the provisions of Exchange Rule 1080(l). When a Directed Order is received, the specialist, SQT, or RSQT to whom the order is directed (the "Directed Participant") would not be assessed a payment for order flow fee.[20] For trades involving Directed Orders, the payment for order flow fee would be assessed, however, on a specialist and ROT when they are not Directed Participants for that transaction,[21] as long as they are allocated any remaining contracts after the Directed Participant receives its trade allocation if the specialist or Directed ROT has made arrangements to pay for order flow (a "Participant") and has elected to participate in the Exchange's payment for order flow program.[22] The Exchange states that, thus, consistent with current practice, the payment for order flow fee would be applied, in effect, to equity option transactions between a ROT and a customer, and now also to trades between a specialist and a customer when an order is directed to a Directed ROT.

For orders that are delivered electronically,[23] but are not directed to a Directed Participant, the specialist would continue not to be assessed a payment for order flow fee.[24] Similarly, ROTs would continue to be assessed the applicable payment for order flow fee if the specialist participates in the Exchange's payment for order flow program.

For orders that are not delivered electronically and thus not directed to a Directed Participant, such as orders represented by a floor broker, ("Non-Directed Orders"), a payment for order flow fee would be assessed if more than one specialist or Directed ROT participates in the Exchange's payment for order flow program for that option. Thus, for Non-Directed Orders, a payment for order flow fee would be assessed on equity option transactions between: (1) A specialist and customer if a Directed ROT participates in the Exchange's payment for order flow program in that option[25] and; (2) a ROT and a customer, if either the specialist or Directed ROT participates in the Exchange's payment for order flow program for that option. Conversely, a Directed ROT would be charged a payment for order flow fee if the specialist has elected to participate in the Exchange's payment for order flow program.

The Exchange also proposes to modify the time periods during which Participants elect to participate in the program. Consistent with current practice, the Exchange must be notified of the election to participate or not to participate in the payment for order flow program in writing no later than five business days prior to the start of the month for which reimbursement for monies expended on payment for order flow would be requested.[26] The result of electing not to participate in the program is a waiver of the right to any reimbursement of payment for order flow funds for such month(s). If a Participant opts in its entirety into the program and does not request any payment for order flow reimbursement more than two times in a six-month period, it would be precluded from entering in its entirety in the payment for order flow program for the next three months.[27]

Participants may also elect to participate or not to participate in the

[18] The amount a specialist may receive in reimbursement is limited to the percentage of ROT monthly volume to total specialist and ROT monthly volume in the equity option payment for order flow program. For example, if a specialist unit has a payment for order flow arrangement with an Order Flow Provider to pay that Order Flow Provider $0.70 per contract for order flow routed to the Exchange and that Order Flow Provider sends 90,000 customer contracts to the Exchange in one month for one option, then the specialist would be required, pursuant to its agreement with the Order Flow Provider, to pay the Order Flow Provider $63,000 for that month. Assuming that the 90,000 represents 30,000 specialist transactions, 20,000 ROT transactions and 40,000 transactions from firms, broker-dealers and other customers, the specialist may request reimbursement of up to 40% (20,000/50,000) of the amount paid ($63,000 × 40% = $25,200). However, because the ROTs will have paid $8,000 into the payment for order flow fund for that month, the specialist may collect only $8,000 (20,000 contracts × $0.40 per contract) of its $25,200 reimbursement request.

[19] For example, if a specialist unit requests $10,000 in reimbursement for one option and the total amount billed and collected from the ROTs was $30,000, the remaining $20,000 will be rebated to the ROTs on a pro rata basis. If ROT A was assessed $15,000 in payment for order flow fees, it would receive a rebate of $10,000 ($15,000/$30,000 = 50%, and 50% of $20,000 is $10,000). If ROT B was assessed $8,000 in payment for order flow fees, it would receive $5,333.33, which represents 26.67% ($8,000/$30,000) of $20,000. If ROT C was assessed $7,000 in payment for order flow fees, it would receive $4,666.67, which represents 23.33% ($7,000/$30,000) of $20,000.

[20] 20 The Exchange states that this is similar to the previous program where the payment for order flow fee was not assessed on the specialist because the specialist would be asking, in effect, for reimbursement of its own funds.

[21] References to ROTs include all ROTs, *i.e.*, on-floor ROTs, SQTs, and RSQTs, other than an SQT or RSQT to whom an order is directed ("Directed ROT").

[22] For example, if an order is directed to an RSQT and the RSQT receives its trade allocation, after all public customers bidding or offering at the same price have received allocations, any contracts remaining from the Directed Order may be allocated to the specialist, SQTs or RSQTs as well as other ROTs in accordance with Exchange Rule 1014(g)(viii).

[23] The Exchange states that electronically-delivered orders do not include orders delivered through the Floor Broker Management System pursuant to Exchange Rule 1063.

[24] The Exchange states that this is similar to the previous program where the payment for order flow fee was not assessed on the specialist because the specialist would be asking, in effect, for reimbursement of its own funds.

[25] For example, if there are no Directed ROTs participating in the Exchange's payment for order flow program, the specialist would not be billed a payment for order flow fee for that option. Also, if the specialist does not participate in the payment for order flow program and there is one Directed ROT who participates in the payment for order flow program for that option, the Directed ROT would not be charged a payment for order flow fee.

[26] Consistent with the current practice, Participants would be required to notify the Exchange in writing to either elect to participate or not to participate in the program. Once an election to participate or not to participate in the Exchange's payment for order flow program in a particular month has been made, no notice to the Exchange is required in a subsequent month, as described above, unless there is a change in participation status. For example, if a Directed ROT elected to participate in the program and provided the Exchange with the appropriate notice, that Directed ROT would not be required to notify the Exchange in the subsequent month(s) if it intends to continue to participate in the program. However, if it elects not to participate (a change from its current status), it would need to notify the Exchange in accordance with the requirements stated above. Participants who have already notified the Exchange in writing as to whether they have elected to participate or not to participate in the program that was in effect prior to June 2, 2005 do not need to notify the Exchange again, unless there is a change from their current status.

[27] Specialist units would no longer be able to opt out of the program entirely by notifying the Exchange in writing by the 15th of the month.

payment for order flow program on an option-by-option basis if they notify the Exchange in writing no later than three business days prior to entering into or opting out of the payment for order flow program. Participants may only opt into or out of the Exchange's payment for order flow program by option one time in any given month.

Thus, if at any time during a month, a Participant opts into the payment for order flow program for a particular option, a payment for order flow fee would be assessed that month. For example, a payment for order flow fee would be assessed, even beginning mid-month, if an option is allocated, or reallocated from a non-participating specialist unit, to a specialist unit that participates in the Exchange's payment for order flow program. In addition, payment for order flow fees would be assessed, even beginning mid-month, if order flow is directed to a Directed ROT who has elected to participate in the Exchange's payment for order flow program, even if the specialist to whom the option is allocated has opted out of the program.

The payment for order flow fee would continue to be billed and collected on a monthly basis. Because the Participants in the payment for order flow program would not be charged the payment for order flow fee for orders directed to them, they may not request reimbursement for order flow funds in connection with any transactions directed to them to which they were a party.

Payment for order flow reimbursements would be requested on an option-by-option basis, consistent with the payment for order flow program in effect prior to June 2, 2005. The Exchange states that the collected funds are to be used as a reimbursement for monies expended to attract options orders to the Exchange by making payments to Order Flow Providers who provide order flow to the Exchange. The Exchange states that the funds would be received only after submitting an Exchange certification form identifying the amount of the requested funds.[28]

The Exchange further states that the amount received in reimbursement would be limited. For a specialist who has elected to participate in the Exchange's payment for order flow program ("Participating specialist"), the amount of reimbursement would be limited to the percentage of ROT monthly volume to total Participating specialist and ROT monthly volume in the equity option payment for order flow program. For a Directed ROT, the amount of reimbursement would be limited to the percentage of ROT and specialist monthly volume to total ROT, specialist, and that Directed ROT's monthly volume in the payment for order flow program. Thus, payment for order flow charges may be assessed and reimbursed as described in detail below:

Participating Specialist Method

If a Participating specialist unit has a payment for order flow arrangement with an Order Flow Provider to pay that Order Flow Provider $0.50 per contract for order flow routed to the Exchange and that Order Flow Provider sends 90,000 customer contracts to the Exchange in one month for one option, then the Participating specialist would be required, pursuant to its agreement with the Order Flow Provider, to pay the Order Flow Provider $45,000 for that month. Assuming that the 90,000 represents 30,000 Participating specialist contracts, 30,000 ROT contracts (which includes 10,000 from Directed ROTs who, in effect, are ROTs for that order) and 30,000 contracts from firms, broker-dealers and other customers, the Participating specialist may request reimbursement of up to 50% (30,000 ROTs contracts / 60,000, which is comprised of 30,000 ROT contracts + 30,000 specialist contracts)) of the amount paid ($45,000 × 50% = $22,500). Although the ROTs would have paid a total of $30,000 (30,000 contracts × $.40 per contract, which equals $12,000, + $18,000 non-directed orders (calculated below)) into the payment for order flow fund for that month, the Participating specialist may collect up to $22,500 of its $22,500 reimbursement request. Consistent with current practice, the excess funds (funds remaining after reimbursement requests are processed, which in this instance totals $7,500 ($30,000 − $22,500) for that particular month would be rebated on a pro rata basis by option to all those who were billed payment for order flow charges in that option for that same month.

Directed ROT Method

If a Directed ROT unit has a payment for order flow arrangement with an Order Flow Provider to pay that Order Flow Provider $0.60 per contract for order flow routed to the Exchange and that Order Flow Provider sends 90,000 customer contracts to the Exchange in one month for one option, then the Directed ROT would be required, pursuant to its agreement with the Order Flow Provider, to pay the Order Flow Provider $54,000 for that month. Assuming that the 90,000 represents 30,000 specialist contracts, 20,000 ROT contracts, 10,000 Directed ROT contracts, and 30,000 contracts from firms, broker-dealers and other customers, the Directed ROT may request reimbursement of up to 83.33% (50,000 which is comprised of 30,000 + 20,000 / 60,000, which is comprised of 30,000 + 20,000 + 10,000) of the amount paid ($54,000 × 83.33% = $44,998.20). However, because the specialist and ROTs would have paid $26,000 (50,000 contracts × $0.40 per contract, which equals $20,000, + $6,000 from the non-directed funds (calculated below)) into the payment for order flow fund for that month, the Directed ROT may collect only $26,000 of its $44,998.20 reimbursement request. Any excess funds for that particular month would be rebated on a pro rata basis by option to all those who were billed payment for order flow charges in that option for that same month.

Non-Directed Order Method

Non-Directed Orders would also be billed the applicable per contract payment for order flow charge for all specialist and ROT orders matching with a customer order if a Directed ROT participates in the Exchange's payment for order flow program along with a specialist or more than one Directed ROT in that option. The Exchange states that the funds billed and collected for Non-Directed Orders would be apportioned on a pro rata basis among those seeking reimbursement. For example, if Order Flow Providers send 90,000 Non-Directed customer contracts to the Exchange's trading floor via a floor broker in one month for one option in which both the specialist and Directed ROT participate in the payment for order flow program, then the specialists and ROTs (including the Directed ROT) would be billed the applicable per contract payment for order flow fee on orders matching with a customer.

Assuming that the 90,000 represents 30,000 specialist contracts, 30,000 ROT contracts, and 30,000 contracts from firms, broker-dealers and other customers, the Exchange would bill payment for order flow charges of $24,000 on these transactions.

Funds collected from the payment for order flow program would be available

[28] The Exchange states that, consistent with the current practice regarding specialist units, all Participants would be given instructions as to when the certification forms are required to be submitted. The Exchange states that, while all determinations concerning the amount that would be paid for orders and which Order Flow Providers shall receive these payments are made by the Participants, the Participants would provide to the Exchange on an Exchange form certain information, including what Order Flow Providers they paid for order flow, the amount of the payment and the price paid per contract. *See infra* note 15.

as described below. The payment for order flow funds would be collected and distributed on a pro rata basis. Each Participant in the payment for order flow program has an amount from which it can request payment for order flow funds. The Participating specialist fund would contain payment for order flow funds as calculated by the Participating specialist reimbursement method plus payment for order flow funds allocated to it from the Non-Directed allocation method. The Directed ROT fund would contain payment for order flow funds as calculated by the Directed ROT reimbursement method plus payment for order flow funds allocated to it from the Non-Directed method.

For example, the payment for order flow funds generated from Non-Directed Orders to multiple Participants in the payment for order flow program would be calculated as follows: assuming the activity in the month is 300,000 contracts for which the specialist traded 150,000 contracts and the Directed ROT traded 50,000 contracts and 100,000 contracts from firms, broker-dealers, ROTs, and other customers, the Participating specialist fund, which includes Directed Orders and Non-Directed Orders ("Participating specialist fund") represents 75% (150,000 / 150,000 + 50,000) of the total non-directed payment for order flow charges for that option $24,000, which totals $18,000 (75% × $24,000) and the Directed ROT fund represents (25% (50,000 / 150,000 + 50,000) × $24,000) of the total non-directed payment for order flow charges for that option ($6,000). Thus, the Participating specialist fund would include $18,000 (75% (150,000 / 150,000 + 50,000) × $24,000) from the non-directed calculation plus $12,000 from the Directed specialist calculation above and the Directed ROT fund would include $6,000 (25% (50,000 / 150,000 + 50,000) × $24,000) from the non-directed calculation plus $20,000 from the Directed ROT calculation above. As stated above, any excess funds for that particular month would be rebated on a pro rata basis by option to all those who were billed payment for order flow charges in that option for that same month.

The Exchange states that excess funds would be reflected as a credit on the monthly invoices and rebated on a pro rata, option-by-option, basis to the specialists and ROTs who were billed payment for order flow charges for that same month.

The Exchange states that reimbursements may not exceed the payment for order flow amount billed and collected in a given month.

The Exchange states that no other changes to the Exchange's payment for order flow program are being proposed at this time.[29]

This proposal would be in effect for trades settling on or after June 2, 2005 and would remain in effect as a pilot program that is scheduled to expire on May 27, 2006, the same date as the one-year pilot period in effect in connection with Directed Orders.[30]

Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Summary of Equity Option Charges (p. 3/6)

For any top 120 option listed after February 1, 2004 and for any top 120 option acquired by a new specialist unit** within the first 60-days of operations, the following thresholds will apply, with a cap of $10,000 for the first 4 full months of trading per month per option provided that the total monthly market share effected on the Phlx in that top 120 Option is equal to or greater than 50% of the volume threshold in effect:

First full month of trading: 0% national market share

Second full month of trading: 3% national market share

Third full month of trading: 6% national market share

Fourth full month of trading: 9% national market share

Fifth full month of trading (and thereafter): 12% national market share thereafter):

** A new specialist unit is one that is approved to operate as a specialist unit by the Options Allocation, Evaluation, and Securities Committee on or after February 1, 2004 and is a specialist unit that is not currently affiliated with an existing options specialist unit as reported on the member organization's Form BD, which refers to direct and indirect owners, or as reported in connection with any other financial arrangement, such as is required by Exchange Rule 783.

Real-Time Risk Management Fee

$.0025 per contract for firms/members receiving information on a real-time basis

Equity Option Payment for Order Flow Fees*(*1*) (*2*)

Registered Option Trader [(on-floor)] **+

QQQ (NASDAQ–100 Index Tracking Stock℠) $1.00 per contract

Remaining Equity Options, except FXI Options $0.40 per contract

See Appendix A for additional fees.

*Assessed on transactions resulting from customer orders, subject to a 500-contract cap, per individual cleared side of transaction

**Any excess payment for order flow funds billed but not reimbursed to specialists will be returned to the applicable ROTs (reflected as a credit on the monthly invoices) and distributed on a pro rata basis.

+Only incurred when the specialist *or Directed ROT* elects to participate in the payment for order flow program.

(1) *For orders delivered electronically (a) Assessed on ROTs and Directed ROTs when the specialist unit opts into the program; (b) assessed on specialists and ROTs when a Directed ROT opts into the program*

(2) *For orders not delivered electronically, the above-referenced fees are assessed on all ROTs, including Directed ROTs, and specialists if two or more specialist/ROTs have elected to participate in the Exchange's payment for order flow program.*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange represents that the purpose of the proposed rule change is to adopt a competitive payment for order flow program that incorporates the

[29] For example, the 500-contract cap per individual cleared side of a transaction would continue to be imposed. The Exchange would also continue to implement a quality of execution program.

[30] See Securities Exchange Act Release No. 51759 (May 27, 2005), 70 FR 32860 (June 6, 2005) (SR–Phlx–2004–91).

Directed Order trading model. Payment for order flow programs are in place at each of the other options exchanges in varying amounts and covering various options. The Exchange states that the revenue generated by the payment for order flow fee, as outlined in this proposed rule change, is intended to be used by Participating specialist units and Directed ROTs to compete for order flow in equity options listed for trading on the Exchange. The Exchange believes that, in today's competitive environment, changing its payment for order flow program to compete more directly with other options exchanges is important and appropriate.

The Exchange further represents that the purpose of modifying the time periods in which to elect to participate or not to participate in the Exchange's payment for order flow program is to accommodate Participating Specialists and Directed ROTs who would make individual payment for order flow arrangements.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of dues, fees, and charges is consistent with section 6(b) of the Act[31] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act[32] in particular, in that it is an equitable allocation of reasonable fees among Phlx members and that it is designed to enable the Exchange to compete with other markets in attracting customer order flow. Because the payment for order flow fees are collected only from member organizations respecting customer transactions, the Phlx believes that there is a direct and fair correlation between those members who fund the payment for order flow fee program and those who receive the benefits of the program. The Exchange states that Participating specialists and Directed ROTs potentially benefit from additional customer order flow. In addition, the Phlx believes that the proposed payment for order flow fees would serve to enhance the competitiveness of the Phlx and its members and that this proposal therefore is consistent with and furthers the objectives of the Act, including section 6(b)(5) thereof,[33] which requires the rules of exchanges to be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that attracting more order flow to the Exchange, should, in turn, result in increased liquidity, tighter markets, and more competition among Exchange members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to section 19(b)(3)(A)(ii) of the Act[34] and Rule 19b–4(f)(2)[35] thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR-Phlx-2005–37 on the subject line.

Paper comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303. All submissions should refer to File Number SR–Phlx-2005–37. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx-2005–37 and should be submitted on or before July 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[36]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3383 Filed 6–28–05; 8:45 am]

BILLING CODE 8010–01–P

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(4)–(5).

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78s(b)(3)(A)(ii).

[35] 17 CFR 240.19b–4(f)(2).

[36] CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51910; File No. SR–Phlx–2005–34]

Self-Regulatory Organizations: Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Electronic Submission of Financial Reports

June 22, 2005.

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 May 9, 2005, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

in items I, II, and III below, which Items have been prepared by the Phlx. On June 13, 2005, Phlx filed Amendment No. 1 to the proposed rule change.[3] The Exchange has designated this proposal as a practice with respect to the administration of an existing rule pursuant to section 19(b)(3)(A)(i) of the Act,[4] and Rule 19b4(f)(1) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.[6]

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx, pursuant to section 19(b)(1)[7] and Rule 19b–4 thereunder,[8] proposes to amend Exchange Rule 703. The proposed amendment would require Phlx members that compute net capital or positive net liquid assets and for which the Exchange is their designated examining authority ("DEA"), to submit electronically certain financial reports to the Exchange in lieu of manual filings.

The text of the proposed rule change is below. New text is italicized.

* * * * *

Rule 703. Financial Responsibility and Reporting

(a)–(f) No change.

Commentary

.01 No Change

.02 Organizations designated to the Exchange for financial responsibility pursuant to SEC Rule 17d–1 and subject to SEC Rules 15c3–1 and 17a–5 or exempt from SEC Rule 15c3–1 and maintaining net liquid assets in accordance with Rule 703(a), must file electronically with the Exchange's Examinations Department, utilizing such method as required by the Exchange, FOCUS Reports and filings required by SEC Rule 17a–5(a) and (b) and Rule 703(c), (d) and (f). Exchange members are still obligated to submit such filings to the Securities and Exchange Commission as specified in the Securities Exchange Act of 1934 ("Act"), as amended, and the rules promulgated under the Act.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to create an efficient method of collecting FOCUS reports and other financial filings, including those required by SEC Rules 17a–5(a) and (b) and Rule 703(c), (d) and (f) ("Financial Documents"). Currently, the Financial Documents are provided in hard copy format to Exchange staff. The information is manually key punched by Exchange staff into a database utilized by the Exchange for submissions to the Commission and for collecting monthly financial information. The proposed rule change would require Exchange members, for which the Exchange is their DEA, to electronically submit their Financial Documents to the Exchange, utilizing Exchange proprietary software.

The features of the electronic submission system are designed to eliminate errors and provide more efficient means of gathering necessary financial information. The Exchange expects to provide each user with password and logon identification and create a profile for each user. It is the Exchange's intention to design the software with required fields of entry, as well as edit checks for various balances that are entered by the users. Additionally, the software is intended to automatically provide alerts, if the user is past the due date or the financial information indicates the firm is below a financial requirement when submitting the report. These safeguards should lead to fewer mistakes and provide users with helpful tools to assist with filings.

The Exchange anticipates it will have the ability to receive summary and exception reports and review the information gathered by the software. The Exchange will submit required financials to the Commission. In summary, the electronic submission process should create a greater likelihood that data from members will be accurate and efficient, as well as utilize fewer Exchange resources.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act[9] in general, and furthers the objectives of section 6(b)(5) of the Act[10] in particular, in that it is designed to promote just and equitable principles of trade and to 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 inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a practice with respect to the administration of an existing rule pursuant to section 19(b)(3)(A)(i)[11] of the Act and Rule 19b–4(f)(1)[12] thereunder. Accordingly, the proposal will take effect upon filing with the Commission. Notwithstanding that this rule change would be effective immediately upon filing, the Exchange will start rolling out member firms onto the electronic filing system on approval of this filing, and after notice to membership, with complete implementation and mandatory rollout by January 2006. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors,

[3] The effective date of the original proposed rule change is May 9, 2005 and the effective date of the amendment is June 13, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on June 13, 2005, the date on which the Phlx submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

[4] 15 U.S.C. 78s(b)(3)(A)(i).

[5] 17 CFR 240.19b–4(f)(1).

[6] In an e-mail from Angela Dunn, Director, Phlx, to E. David Hwa, Special Counsel, Division of Market Regulation, Commission, dated June 17, 2005, Phlx agreed to minor revisions by Commission staff made to the rule change and this notice.

[7] 15 U.S.C. 78s(b)(1).

[8] 17 CFR 240.19b–4.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(i).

[12] 17 CFR 240.19b–4(f)(1).

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, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S–Phlx–2005–34 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Phlx–2005–34. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2005–34 and should be submitted on or before July 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3385 Filed 6–28–05; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–369 (Sub–No. 5X)]

Buffalo & Pittsburgh Railroad, Inc.—Discontinuance of Service Exemption—Between Brookville and Mahoning in Jefferson and Armstrong Counties, PA

Buffalo & Pittsburgh Railroad, Inc. (BPRR) has filed a notice of exemption under 49 CFR 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over a 40.0-mile portion of a line operated by BPRR between milepost 22.0 south of Brookville in Jefferson County, PA, and milepost 62.0 in Mahoning in Armstrong County, PA.[1] The line traverses United States Postal Service ZIP Codes 15472, 15663, 15770, 15778, 15847, 16232, 16259, 17821, and 17844. BPRR states that it intends to operate over the track between milepost 22.0 and milepost 24.0, and between milepost 56.0 and milepost 62.0, as private sidetracks or spurs.

BPRR has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice of governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 29, 2005,[2] unless stayed pending reconsideration. Petitions to stay and formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), must be filed by July 11, 2005. Petitions to reopen must be filed by July 19, 2005, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to BPRR's representative: Eric M. Hocky, Four Penn Center, Suite 200, 1600 JFK Blvd., Philadelphia, PA 19103.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: June 23, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–12845 Filed 6–28–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–979X]

Connecticut Southern Railroad, Inc.—Abandonment Exemption—in Hartford County, CT

Connecticut Southern Railroad, Inc. (CSO) has filed a notice of exemption under 49 CFR part 1152 subpart F–*Exempt Abandonments* to abandon a 942-foot long stub-ended line of railroad extending from milepost 9.4 (Station 5673+42 on the north side of Colonial Drive) to the end of the line at milepost 9.6 (Station 5664+00), in Manchester, Hartford County, CT. The line traverses United States Postal Service ZIP Code 06040.

CSO has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic can be rerouted over other lines; (3) no formal complaint filed by a user of rail

[13] 17 CFR 200.30–3(a)(12).

[1] Simultaneously with this filing, in STB Docket No. AB–976X, the owner of this line, Pittsburg & Shawmut Railroad, LLC has filed a petition for exemption to abandon the line.

[2] Because this is a discontinuance of service proceeding and not an abandonment, there is no need to provide an opportunity for trail use/rail banking or public use condition requests. Likewise, no environmental or historic documentation is required under 49 CFR 1105.6(c)(6) and 1105.8.

service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 29, 2005, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by July 11, 2005. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by July 19, 2005, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSO's representative: Louis E. Gitomer, Esq., Ball Janik LLP, 1455 F Street, NW., Suite 225, Washington, DC 20005.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

CSO has filed an environmental and historic report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by July 1, 2005. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.) Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSO shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CSO's filing of a notice of consummation by June 29, 2006, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: June 22, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–12741 Filed 6–28–05; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,200. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–976X]

Pittsburg & Shawmut Railroad, LLC—Abandonment Exemption—in Armstrong and Jefferson Counties, PA

On June 9, 2005, Pittsburg & Shawmut Railroad, LLC (PSR LLC), a subsidiary of Buffalo & Pittsburgh Railroad, Inc. (BPRR),[1] filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a line of railroad between milepost 22.0 south of Brookville in Jefferson County, PA, and milepost 62.0 in Mahoning in Armstrong County, PA, a distance of approximately 40.0 miles. The line traverses United States Postal Service Zip Codes 15472, 15663, 15770, 15778, 15847, 16232, 16259, 17821, and 17844, and includes the stations of Norman, Knoxdale, East Br., Coulter, Sprankle Mills, Mauk, Dora, Ringgold, Timblin, McWilliams, Putneyville, Oakland, Colwell, Reddco, Reedy, and Mahoning.

The line does not contain federally granted rights-of-way. Any documentation in PSR LLC's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by September 27, 2005.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,200 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than July 19, 2005. Each trail use request must be accompanied by a $200 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–976X and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001, and (2) Eric M. Hocky, Four Penn Center, Suite 200, 1600 JFK Blvd., Philadelphia, PA 19103. Replies to the PSR LLC petition are due on or before July 19, 2005.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1539. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.)

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary), prepared by SEA, will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS).

[1] The subject line is currently operated by BPRR. BPRR has simultaneously filed a notice of exemption in STB Docket No. AB–369 (Sub-No. 5X) to discontinue its operations over the subject line.

EAs in these abandonment proceedings normally will be available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: June 23, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–12901 Filed 6–28–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Termination Atlantic Mutual Insurance Company Centennial Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 15 to the Treasury Department Circular 570; 2004 Revision, published July 1, 2004, at 69 FR 40224.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–7102.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Certificate of Authority issued by the Treasury to the above named Companies, under the United States Code, Title 31, Sections 9304–9308, to qualify as acceptable sureties on Federal bonds is terminated effective June 30, 2005.

The Companies were last listed as acceptable sureties on Federal bonds at 69 FR 40230 and 40232, July 1, 2004.

With respect to any bonds, including continuous bonds, currently in force with above listed Company, bond-approving officers should secure new bonds with acceptable sureties in those instances where a significant amount of liability remains outstanding. In addition, in no event, should bonds that are continuous in nature be renewed.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570/index.html.* A hard copy may be purchased from the Government Printing Office (GPO), Subscription Service, Washington, DC, telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number: 769–004–04926–1.

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: June 21, 2005.

Wanda J. Rogers,

Assistant Commissioner, Financial Operations, Financial Management Service.

[FR Doc. 05–12820 Filed 6–28–05; 8:45 am]

BILLING CODE 4810–35–M

Federal Register

Wednesday,
June 29, 2005

Part II

Securities and Exchange Commission

17 CFR Parts 200, 201, et al.
Regulation NMS; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 201, 230, 240, 242, 249, and 270

[Release No. 34–51808; File No. S7–10–04]

RIN 3235–AJ18

Regulation NMS

AGENCY: Securities and Exchange Commission.

ACTION: Final rules and amendments to joint industry plans.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting rules under Regulation NMS and two amendments to the joint industry plans for disseminating market information. In addition to redesignating the national market system rules previously adopted under Section 11A of the Securities Exchange Act of 1934 ("Exchange Act"), Regulation NMS includes new substantive rules that are designed to modernize and strengthen the regulatory structure of the U.S. equity markets. First, the "Order Protection Rule" requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution of trades at prices inferior to protected quotations displayed by other trading centers, subject to an applicable exception. To be protected, a quotation must be immediately and automatically accessible. Second, the "Access Rule" requires fair and non-discriminatory access to quotations, establishes a limit on access fees to harmonize the pricing of quotations across different trading centers, and requires each national securities exchange and national securities association to adopt, maintain, and enforce written rules that prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross automated quotations. Third, the "Sub-Penny Rule" prohibits market participants from accepting, ranking, or displaying orders, quotations, or indications of interest in a pricing increment smaller than a penny, except for orders, quotations, or indications of interest that are priced at less than $1.00 per share. Finally, the Commission is adopting amendments to the "Market Data Rules" that update the requirements for consolidating, distributing, and displaying market information, as well as amendments to the joint industry plans for disseminating market information that modify the formulas for allocating plan revenues ("Allocation Amendment") and broaden participation in plan governance ("Governance Amendment").

DATES: *Effective Date:* August 29, 2005. *Compliance Dates:* For specific phase-in dates for compliance with the final rules and amendments, see section VII of this release.

FOR FURTHER INFORMATION CONTACT: *Order Protection Rule:* Heather Seidel, Senior Special Counsel, at (202) 551–5608, Marc F. McKayle, Special Counsel, at (202) 551–5633, David Hsu, Special Counsel, at (202) 551–5664, or Raymond Lombardo, Attorney, at (202) 551–5615; *Access Rule:* Heather Seidel, Senior Special Counsel, at (202) 551–5608, or David Liu, Attorney, at (202) 551–5645; *Sub-Penny Rule:* Michael Gaw, Senior Special Counsel, at (202) 551–5602; *Market Data Rules, Allocation Amendment, and Governance Amendment:* David Hsu, Special Counsel, at (202) 551–5664; *Regulation NMS:* Yvonne Fraticelli, Special Counsel, at (202) 551–5654; all of whom are in the Division of Market Regulation, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission is adopting Regulation NMS, a series of initiatives designed to modernize and strengthen the national market system ("NMS") for equity securities.[1] These initiatives include:

[1] The Commission originally proposed Regulation NMS in February 2004. Securities Exchange Act Release No. 49325 (Feb. 26, 2004), 69 FR 11126 (Mar. 9, 2004) ("Proposing Release"). It issued a supplemental request for comment in May 2004. Securities Exchange Act Release No. 49749 (May 20, 2004), 69 FR 30142 (May 26, 2004)

(1) A new Order Protection Rule,[2] which reinforces the fundamental principle of obtaining the best price for investors when such price is represented by automated quotations that are immediately accessible;

(2) a new Access Rule, which promotes fair and non-discriminatory access to quotations displayed by NMS trading centers through a private linkage approach;

(3) a new Sub-Penny Rule, which establishes a uniform quoting increment of no less than one penny for quotations in NMS stocks equal to or greater than $1.00 per share to promote greater price transparency and consistency;

(4) amendments to the Market Data Rules and joint industry plans that allocate plan revenues to self-regulatory organizations ("SROs") for their contributions to public price discovery and promote wider and more efficient distribution of market data; and

(5) a reorganization of existing Exchange Act rules governing the NMS to promote greater clarity and understanding of the rules.

The Commission is adopting Regulation NMS in furtherance of its statutory responsibilities. In 1975, Congress directed the Commission, through enactment of Section 11A of the Exchange Act, to facilitate the establishment of a national market system to link together the multiple individual markets that trade securities. Congress intended the Commission to take advantage of opportunities created by new data processing and communications technologies to preserve and strengthen the securities markets. By incorporating such technologies, the NMS is designed to achieve the objectives of efficient, competitive, fair, and orderly markets that are in the public interest and protect investors. For three decades, the Commission has adhered to these guiding objectives in its regulation of the NMS, which are essential to meeting the investment needs of the public and reducing the cost of capital for listed companies. Over this period, the Commission has continued to revise and refine its NMS rules in light of changing market conditions.

Today, the NMS encompasses the stocks of more than 5000 listed companies, which collectively represent more than $14 trillion in U.S. market capitalization. Consistent with Congressional intent, these stocks are traded simultaneously at a variety of different venues that participate in the NMS, including national securities exchanges, alternative trading systems ("ATSs"), and market-making securities dealers. The Commission believes that the NMS approach adopted by Congress is a primary reason that the U.S. equity markets are widely recognized as being the fairest, most efficient, and most competitive in the world. The rules that the Commission is now adopting represent an important and needed step forward in its continuing implementation of Congress's objectives for the NMS. By modernizing and strengthening the nation's regulatory structure, the rules are designed to assure that the equity markets will continue to serve the interests of investors, listed companies, and the public for years to come.

In recent years, the equity markets have experienced sweeping changes, ranging from new technologies to new types of markets to the initiation of trading in penny increments. The pressing need for NMS modernization to reflect these changes is inescapable. Thus, for the last five years, the Commission has undertaken a broad and systematic review to determine how best to keep the NMS up-to-date. This review has required the Commission to grapple with many difficult and contentious issues that have lingered unresolved for many years. We have devoted a great deal of effort to studying these issues, listening to the views of the public, and have carefully considered the comments contained in the record to craft rule proposals that would achieve the statutory objectives for the NMS.

Given the wide range of perspectives on market structure issues, it is perhaps inevitable that there would be differences of opinion on the Commission's policy choices. The time has arrived, however, when decisions must be made and contentious issues must be resolved so that the markets can move forward with certainty concerning their future regulatory environment and appropriately respond to fundamental economic and competitive forces. The Commission always seeks to achieve consensus, but trying to achieve consensus should not impede the achievement of the statutory objectives for the NMS and should not damage the competitiveness of the U.S. equity markets, both at home and internationally. We believe that further delay is not warranted and therefore have adopted final rules needed to modernize and strengthen the NMS. The following discussion briefly summarizes the deliberate and open rulemaking process that the Commission has undertaken and the extensive record that supports the adoption of Regulation NMS, including the many empirical studies undertaken by the Commission staff.

A. Summary of Rulemaking Process and Record

The Commission has engaged in a thorough, deliberate, and open rulemaking process that has provided at every point an opportunity for public participation and debate. We have actively sought out the views of the public and securities industry participants. Even prior to formulating proposals, our review included multiple public hearings and roundtables, an advisory committee, three concept releases, the issuance of temporary exemptions intended in part to generate useful data on policy alternatives, and a constant dialogue with industry participants and investors. This process continued after the proposals were published for public comment.[3] We held a public hearing on the proposals in April 2004 ("NMS Hearing") that included more than 30 panelists representing investors, individual markets, and market participants from a variety of different sectors of the securities industry.[4] Because we believed that there were a number of important developments at the public hearing, we published a supplemental request for comment and extended the comment period on the proposals in May 2004 to give the public a full opportunity to respond to these developments.[5] We then carefully considered the more than 700 comment letters submitted by the public, which encompassed a wide range of views.

The insights of the commenters, as well as those of the NMS Hearing panelists, contributed to significant refinements of the original proposals. In addition, the Commission staff prepared

("Supplemental Release"). On December 16, 2004, the Commission reproposed Regulation NMS in its entirety for public comment. Securities Exchange Act Release No. 50870 (Dec. 16, 2004), 69 FR 77424 (Dec. 27, 2004) ("Reproposing Release").

[2] Although the Reproposing Release referred to Rule 611 as the "Trade-Through Rule," the reproposed Rule itself was named "Order Protection Rule." The term "Trade-Through Rule" was used in the Reproposing Release to avoid confusion, given that the term had been widely used in public debate. The term "Order Protection Rule," however, better captures the nature of the adopted Rule. For example, the term helps distinguish the existing trade-through provisions for exchange-listed stocks, which do not really protect orders. Limit order users want a fast, efficient execution of their orders, not a slow, costly "satisfaction" process that is provided by the existing trade-through provisions. *See infra*, note 30 and accompanying text.

[3] Proposing Release, 69 FR at 11126.

[4] A list of all panelists and full transcript of the NMS Hearing ("Hearing Tr."), as well as an archived video and audio webcast, are available on the Commission's Internet Web site (http://www.sec.gov).

[5] Supplemental Release, 69 FR at 30142.

several studies of relevant trading data to help evaluate and respond to the views of commenters. Consequently, rather than immediately adopting rules, the Commission reproposed Regulation NMS in its entirety in December 2004 to afford the public an additional opportunity to review and comment on the details of the rules and on the staff studies. The Commission then received, and carefully considered, more than 1500 additional comments on the reproposal.[6]

This extensive rulemaking process has generated an equally extensive record, which is discussed at length throughout this release as it relates to each of the four substantive rulemaking initiatives. Indeed, substantial parts of the release are devoted to responding to the many public comments (particularly those opposing the proposals) and to discussing the estimated costs and benefits of the rules. This rulemaking raised difficult policy issues on which commenters submitted differing views. To move forward, the Commission necessarily has had to make policy decisions that not everyone will agree with.

The fact that each of the adopted rules provoked conflicting views from commenters should not, however, obscure the very substantial evidence in the record strongly supporting each of the four substantive rulemaking initiatives in Regulation NMS. Clearly, the Order Protection Rule was most controversial and attracted the most public comment and attention, yet the breadth of support in the record for the Rule is compelling. Indeed, support for an intermarket price protection rule begins with the adoption by Congress in 1975 of the national market system itself. Both the House and Senate committees responsible for drafting Section 11A specifically considered and endorsed the Commission's authority to adopt a price protection rule as a means to achieve the statutory objectives for the NMS.[7]

Consistent with the drafters' views, a broad spectrum of commenters supported adoption of the Order Protection Rule for all NMS stocks, including investors, listed companies, individual markets, market participants, and academics.[8] Many individual and institutional investors particularly supported the Commission's view that significant problems exist that require the Commission to modernize its regulations. They also suggested the need for strengthened intermarket price protection to further their interests, as did major groups representing investors, such as the Investment Company Institute (whose mutual fund members manage assets of $7.8 trillion that account for more than 95% of all U.S. mutual fund assets), the Committee on Investment of Employee Benefit Assets (which represents 110 of the nation's largest corporate retirement funds managing $1.1 trillion on behalf of 15 million plan participants and beneficiaries), the National Association of Investors Corporation (whose membership consists of investment clubs and individual investors with aggregate personal investments of approximately $116 billion), and the Consumer Federation of America.

Moreover, the commenters' views on the need for an intermarket price protection rule were supported by the various empirical studies of trading data performed by Commission staff. These studies found, among other things, that an estimated 1 out of 40 trades for both NYSE and Nasdaq stocks are executed at prices inferior to the best displayed quotations, or approximately 98,000 trades per day in Nasdaq stocks alone.[9] While the Commission believes that the total number of trade-throughs should not be the sole consideration in making its policy choices, the staff studies and analyses demonstrate that trade-through rates are significant and indicate the need for strengthened order protection for all NMS stocks.

Why did a broad spectrum of commenters, many of which have extensive experience and expertise regarding the inner workings of the equity markets, support the Order Protection Rule and its emphasis on the principle of best price? They based their support on two fundamental rationales, with which the Commission fully agrees. First, strengthened assurance that orders will be filled at the best prices will give investors, particularly retail investors, greater confidence that they will be treated fairly when they participate in the equity markets. Maintaining investor confidence is an essential element of well-functioning equity markets. Second, protection of the best displayed and accessible prices will promote deep and stable markets that minimize investor transaction costs. More than 84 million individual Americans participate, directly or indirectly, in the U.S. equity markets.[10] The transaction costs associated with the prices at which their orders are executed represent a continual drain on their long-term savings. Although these costs are difficult to calculate precisely, they are very real and very substantial, with estimates ranging from $30 billion to more than $100 billion per year.[11] Minimizing these investor costs to the greatest extent possible is the hallmark of efficient markets, which is a primary objective of the NMS. The Order Protection Rule is needed to help achieve this objective, thereby improving the long-term financial well-being of millions of investors and reducing the cost of capital for listed companies.

In sum, the rules adopted today are the culmination of a long and comprehensive rulemaking process. Reaching appropriate policy decisions in an area as complex as market structure requires an understanding of the relevant facts and of the often subtle ways in which the markets work, as well as the balancing of policy objectives that sometimes may not point in precisely the same direction. Based on the extensive record that we have developed over the course of the rulemaking process, the Commission firmly believes that Regulation NMS will protect investors, promote fair competition, and enhance market efficiency, and therefore fulfills its Exchange Act responsibility to facilitate the development of the NMS.

B. NMS Principles and Objectives

1. Competition Among Markets and Competition Among Orders

The NMS is premised on promoting fair competition among individual markets, while at the same time assuring that all of these markets are linked together, through facilities and rules, in a unified system that promotes interaction among the orders of buyers and sellers in a particular NMS stock. The NMS thereby incorporates two distinct types of competition—competition among individual markets and competition among individual orders—that together contribute to efficient markets. Vigorous competition among markets promotes more efficient and innovative trading services, while

[6] The Reproposing Release stated that the Commission would continue to consider all comments received on the Proposing Release and Supplemental Release, in addition to those on the Reproposing Release, in evaluating further rulemaking action. 69 FR at 77426. Accordingly, this release discusses comments received in response to all three previous releases. Comments on the Proposing Release and Supplemental Release are referred to as "[name of commenter] Letter." Comments on the Reproposing Release are referred to as "[name of commenter] Reproposal Letter."

[7] *See infra*, notes 920–922 and accompanying text.

[8] *See infra*, notes 56–59, 939–941, 957–960, and accompanying text.

[9] *See infra*, notes 66–69, 104, and accompanying text.

[10] *See infra*, notes 25–26 and accompanying text.

[11] *See infra*, note 990.

integrated competition among orders promotes more efficient pricing of individual stocks for all types of orders, large and small. Together, they produce markets that offer the greatest benefits for investors and listed companies.

Accordingly, the Commission's primary challenge in facilitating the establishment of an NMS has been to maintain an appropriate *balance* between these two vital forms of competition. It particularly has sought to avoid the extremes of: (1) Isolated markets that trade an NMS stock without regard to trading in other markets and thereby fragment the competition among buyers and sellers in that stock; and (2) a totally centralized system that loses the benefits of vigorous competition and innovation among individual markets. Achieving this objective and striking the proper balance clearly can be a difficult task. Since Congress mandated the establishment of an NMS in 1975, the Commission frequently has resisted suggestions that it adopt an approach focusing on a single form of competition that, while perhaps easier to administer, would forfeit the distinct, but equally vital, benefits associated with both competition among markets and competition among orders.

With respect to competition among markets, for example, the record of the last thirty years should give pause to those who believe that any market structure regulation is inherently inconsistent with vigorous market competition. Other countries with significant equity trading typically have a single, overwhelmingly dominant public market.[12] The U.S., in contrast, is fortunate to have equity markets that are characterized by extremely vigorous competition among a variety of different types of markets. These include: (1) Traditional exchanges with active trading floors, which even now are evolving to expand the range of choices that they offer investors for both automated and manual trading; (2) purely electronic markets, which offer both standard limit orders and conditional orders that are designed to facilitate complex trading strategies; (3) market-making securities dealers, which offer both automated execution of smaller orders and the commitment of capital to facilitate the execution of larger, institutional orders; (4) regional exchanges, many of which have adopted automated systems for executing smaller orders; and (5) automated matching systems that permit investors, particularly large institutions, to seek counter-parties to their trades anonymously and with minimal price impact.

In sum, while NMS regulation may channel specific types of market competition (*e.g.*, by mandating the display to investors of consolidated prices and including the prices displayed internally by significant electronic markets), it has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.

The difficulty, however, is that competition among multiple markets trading the same stocks can detract from the most vigorous competition among orders in an individual stock, thereby impeding efficient price discovery for orders of all sizes. The importance of competition among orders has long been recognized. Indeed, when Congress mandated the establishment of an NMS, it well stated this basic principle: "Investors must be assured that they are participants in a system which maximizes the opportunities for the most willing seller to meet the most willing buyer." [13] To the extent that competition among orders is lessened, the quality of price discovery for all sizes of orders can be compromised. Impaired price discovery could cause market prices to deviate from fundamental values, reduce market depth and liquidity,[14] and create excessive short-term volatility that is harmful to long-term investors and listed companies. More broadly, when market prices do not reflect fundamental values, resources will be misallocated within the economy and economic efficiency—as well as market efficiency—will be impaired.

2. Serving the Interests of Long-Term Investors and Listed Companies

In its extended review of market structure issues and in assessing how best to achieve an appropriate balance between competition among markets and competition among orders, the Commission has been guided by a firm belief that one of the most important goals of the equity markets is to minimize the transaction costs of long-term investors and thereby to reduce the cost of capital for listed companies. These functions are inherently related because the cost of capital of listed companies is influenced by the transaction costs of those who are willing to accept the risk of holding corporate equity for an extended period.[15]

The Reproposing Release touched on this issue in the specific context of assessing the effect of the Order Protection Rule on the interests of professional traders in conducting extremely short-term trading strategies that can depend on millisecond differences in order response time from markets. Noting that any protection against trade-throughs could interfere to some extent with such short-term trading strategies, the release framed the Commission's policy choice as follows: "Should the overall efficiency of the NMS defer to the needs of professional

[12] These markets include the London Stock Exchange in the United Kingdom, the Tokyo Stock Exchange in Japan, Euronext in France, and the Deutsche Bourse in Germany.

[13] H.R. Rep. 94–123, 94th Cong., 1st Sess. 50 (1975). The quotation from the text of the House Report concludes a cogent description of the importance of maintaining the proper balance between competition among markets and competition among orders that is worth quoting in full:

> Critics of this development [multiple trading of stocks] suggest that the markets are becoming dangerously fragmented. Others contend that the dilution of large market dominance is the result of healthy competitive forces which have done much to add to the liquidity and depth of the securities markets to the benefit of the investing public. The Committee shares the opinion that our markets will be strengthened by the infusion of marketmaker competition in listed securities with the concomitant increase in capital availability and diminution of risk which results from increased competition among specialists and marketmakers. Nonetheless, market fragmentation becomes of increasing concern in the absence of mechanisms designed to assure that public investors are able to obtain the best price for securities regardless of the type or physical location of the market upon which his transaction may be executed. Investors must be assured that they are participants in a system which maximizes the opportunities for the most willing seller to meet the most willing buyer.

Id.

[14] The Proposing Release and Reproposing Release frequently emphasized the importance of promoting greater depth and liquidity. Some commenters appeared to equate depth and liquidity with other factors, such as trading volume and frequency of quotation updates. *See, e.g.*, Letter from Edward J. Nicoll, Chief Executive Officer, Instinet Group Incorporated, to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("Instinet Reproposal Letter") at 9; Letter from Marc E. Lackritz, President, Securities Industry Association, to Jonathan G. Katz, Secretary, Commission, dated Feb. 1, 2005 ("SIA Reproposal Letter") at 12. The Commission, however, uses the terms specifically to refer to the ability of investors to trade in large size at low cost and in general to a market's capacity to absorb order imbalances with minimized price impact. Depth is measured in terms of the volume of stock that can be readily traded at a particular price point. Liquidity is measured by the price movement experienced by investors when attempting to trade in large size. *See infra*, section II.A.6 (estimate of transaction costs for equity mutual funds). Although depth and liquidity are correlated with trading volume, they are not synonymous. For example, one stock might have less trading volume than another stock, but still have greater depth available at and close to the best quoted prices and lower transaction costs for large institutional investors.

[15] Investors are more willing to own a stock if it can be readily traded in the secondary market with low transaction costs. The greater the willingness of investors to own a stock, the higher its price will be, thereby reducing the issuer's cost of capital.

traders, many of whom rarely intend to hold a position overnight? Or should the NMS serve the needs of longer-term investors, both large and small, that will benefit substantially from intermarket price protection?" [16] The Reproposing Release emphasized that the NMS must meet the needs of longer-term investors, noting that any other outcome would be contrary to the Exchange Act and its objectives of promoting fair and efficient markets that serve the public interest.[17]

In response, some commenters disputed this focus on the interests of long-term investors in formulating Regulation NMS, one even questioning the Commission's statutory authority to do so.[18] Other commenters appeared to share this view, as evidenced by their downplaying, or failing entirely to address, indications of a need for improvements in market quality that are important to long-term investors, such as minimizing short-term price volatility.[19]

Most of the time, the interests of short-term traders and long-term investors will not conflict. Short-term traders clearly provide valuable liquidity to the market. But when the interests of long-term investors and short-term traders diverge, few issues are more fundamentally important in formulating public policy for the U.S. equity markets than the choice between these interests. While achieving the right balance of competition among markets and competition among orders will always be a difficult task, there will be no possibility of accomplishing it if in the case of a conflict the Commission cannot choose whether the U.S. equity markets should meet the needs of long-term investors or short-term traders.

The objective of minimizing short-term price volatility offers an important example where the interests of long-term investors can diverge from those of short-term traders. Deep and liquid markets that minimize volatility are of most benefit to long-term investors. Such markets help reduce transaction costs by furthering the ability of investors to establish and unwind positions in a stock at prices that are as close to previously prevailing prices as possible. Indeed, the 1975 Senate Report on the NMS emphasized that one of the "paramount" objectives for the NMS is "the maintenance of stable and orderly markets with maximum capacity for absorbing trading imbalances without undue price movements." [20]

Excessively volatile markets, in contrast, can generate many opportunities for traders to earn short-term profits from rapid price swings. Short-term traders, in particular, typically possess the systems capabilities and expertise necessary to enter and exit the market rapidly to exploit such price swings. Moreover, short-term traders have great flexibility in terms of their choice of stocks, choice of initially establishing a long or short position, and time of entering and exiting the market. Long-term investors (both institutional and retail), in contrast, typically have an opinion on the long-term prospects for a company. They therefore want to buy or sell a particular stock at a particular time. These investors thus are inherently less able to exploit short-term price swings and, indeed, their buying or selling interest often can initiate short-term price movements.[21] Efficient markets with maximum liquidity and depth minimize such price movements and thereby afford long-term investors an opportunity to achieve their trading objectives with the lowest possible transaction costs.

The Commission recognizes that it is important to avoid false dichotomies between the interests of short-term traders and long-term investors, and that many difficult line-drawing issues potentially can arise in precisely defining the difference between the two terms. For present purposes, however, these issues can be handled by simply noting that it makes little sense to refer to someone as "investing" in a company for a few seconds, minutes, or hours.[22]

Short-term traders and market intermediaries unquestionably provide needed liquidity to the equity markets and are essential to the welfare of investors. Consequently, much, if not most, of the time the interests of long-term investors and short-term traders in market quality issues such as speed and operational efficiency will coincide. Indeed, implementation of Regulation NMS likely will lead to a significant expansion of automated trading in exchange-listed stocks that both benefits all investors and opens up greater potential for electronic trading in such stocks than currently exists. But when the interests of long-term investors and short-term traders conflict in this context, the Commission believes that its clear responsibility is to uphold the interests of long-term investors.

Indeed, the core concern for the welfare of long-term investors who depend on equity investments to meet their financial goals was first expressed in the foundation documents of the Exchange Act itself. In language that remains remarkably relevant today, the 1934 congressional reports noted how the national public interest of the equity markets had grown as more and more Americans had begun to place their savings in equity investments, both directly and indirectly through investment intermediaries.[23] Given this development, the reports emphasized that "stock exchanges which handle the distribution and trading of a very substantial part of the entire national wealth * * * cannot operate under the same traditions and practices as pre-war stock exchanges which handled substantially only the transactions of professional investors and speculators." [24]

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[16] Reproposing Release, 69 FR at 77440.

[17] Id.

[18] Letter from Phylis M. Esposito, Executive Vice President, Chief Strategy Officer, Ameritrade, Inc., to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("Ameritrade Reproposal Letter") at 9 (among other issues, questioning Commission's statutory authority); Letter from James A. Duncan, Chairman, and John C. Giesea, President and CEO, Security Traders Association, to Jonathan G. Katz, Secretary, Commission, dated Jan. 19, 2005 ("STA Reproposal Letter") at 6; Letter from William A. Vance, Stephen Kay, and Kimberly Unger, The Security Traders Association of New York, Inc., dated Jan. 24, 2005 ("STANY Reproposal Letter") at 8 n. 18.

[19] *See, e.g.*, Instinet Reproposal Letter at 7–8 ("We further believe there is no basis for the Commission's assertion that the reproposed trade-through rule would increase fill rates or reduce transitory volatility on the Nasdaq market (or, for that matter, whether these are in fact 'weaknesses' that need to be addressed."). Short-term price volatility for Nasdaq stocks is discussed further in section II.A.1.b below.

[20] S. Rep. No. 94–75, 94th Cong., 1st Sess. 7 (1975).

[21] Long-term investors, of course, also can be interested in fast executions. One of the primary effects of the Order Protection Rule adopted today will be to promote much greater speed of execution in the market for exchange-listed stocks. The difference in speed between automated and manual markets often is the difference between a 1-second response and a 15-second response—a disparity that clearly can be important to many investors.

[22] The concept of ownership for a significant time period is inherent in the meaning of word "invest." A dictionary definition of "investor," for example, is "one that seeks to commit funds for long-term profit with a minimum of risk." *Webster's Third New International Dictionary of the English Language* 1190 (Unabridged 1993).

[23] H.R. Rep. No. 1383, 73rd Cong., 2d Sess. 3–4 (1934) ("It is estimated that more than 10,000,000 individual men and women in the United States are the direct possessors of stocks and bonds; that over one-fifth of all the corporate stock outstanding in the country is held by individuals with net incomes of less than $5,000 a year. Over 15,000,000 individuals held insurance policies, the value of which is dependent on the security holdings of insurance companies. Over 13,000,000 men and women have savings accounts in mutual savings banks and at least 25,000,000 have deposits in national and State banks and trust companies—which are in turn large holders of corporate stocks and bonds.").

[24] *Id.* at 4. The Congressional emphasis on the interests of long-term investors versus short-term traders also was expressed in the 1934 Report on

In the years since 1934, the priority placed by Congress on the interests of long-term investors has grown more and more significant. Today, more than 84 million individuals representing more than one-half of American households own equity securities.[25] More than 70 million of these individuals participate indirectly in the equity markets through ownership of mutual fund shares. Most of them hold their investments, at least in part, in retirement plans. Indeed, nearly all view their equity investments as savings for the long-term, and their median length of ownership of equity mutual funds, both inside and outside retirement plans, is 10 years.[26]

In assessing the current state of the NMS and formulating its rule proposals, the Commission has focused on the interests of these millions of Americans who depend on the performance of their equity investments for such vital needs as retirement security and their children's college education. Their investment returns are reduced by transaction costs of all types, including the explicit costs of commissions and mutual fund fees. But the largely hidden costs associated with the prices at which trades are executed often can dwarf the explicit costs of trading. For example, the implicit transaction costs associated with the price impact of trades and liquidity search costs of mutual funds and other institutional investors is estimated at more than $30 billion per year.[27] Such hidden costs eat away at the long-term returns of millions of individual mutual fund shareholders and pension plan participants. One of the primary objectives of the NMS is to help reduce such costs by improving market liquidity and depth. The best way to promote market depth and liquidity is to encourage vigorous competition among orders. As a result, the Commission cannot merely focus on one type of competition—competition among markets to provide trading services—at the expense of competition among orders. The interests of U.S. long-term investors and listed companies require that the NMS continue to promote both types of competition.

C. Overview of Adopted Rules

1. Order Protection Rule

The Order Protection Rule (Rule 611 under Regulation NMS) establishes intermarket protection against trade-throughs for all NMS stocks. A trade-through occurs when one trading center executes an order at a price that is inferior to the price of a protected quotation, often representing an investor limit order, displayed by another trading center.[28] Many commenters on the proposals, particularly large institutional investors, strongly supported the need for enhanced protection of limit orders against trade-throughs.[29] They emphasized that limit orders are the building blocks of public price discovery and efficient markets. They stated that a uniform rule for all NMS stocks, by enhancing protection of displayed prices, would encourage greater use of limit orders and contribute to increased market liquidity and depth. The Commission agrees that strengthened protection of displayed limit orders would help reward market participants for displaying their trading interest and thereby promote fairer and more vigorous competition among orders seeking to supply liquidity. Moreover, strong intermarket price protection offers greater assurance, on an order-by-order basis, that investors who submit market orders will receive the best readily available prices for their trades. The Commission therefore has adopted the Order Protection Rule to strengthen the protection of displayed and automatically accessible quotations in NMS stocks.

The Order Protection Rule takes a substantially different approach than the trade-through provisions currently set forth in the Intermarket Trading System ("ITS") Plan,[30] which apply only to exchange-listed stocks. The ITS provisions are not promulgated by the Commission, but rather are rules of the markets participating in the ITS Plan. These rules were drafted decades ago and do not distinguish between manual and automated quotations. Moreover, they state that markets "should avoid" trade-throughs and provide an after-the-fact complaint procedure pursuant to which, if a trade-through occurs, the aggrieved market may seek satisfaction from the market that traded through. Finally, the ITS provisions have significant gaps in their coverage, particularly for off-exchange positioners of large, block transactions (10,000 shares or greater), that have weakened their protection of limit orders.

In contrast, the adopted Order Protection Rule protects only quotations that are immediately accessible through automatic execution. It thereby addresses a serious weakness in the ITS provisions, which were drafted for a world of floor-based markets and fail to reflect the disparate speed of response between manual and automated quotations. By requiring order routers to wait for a response from a manual market, the ITS trade-through provisions can cause an order to miss both the best price of a manual quotation and slightly inferior prices at automated markets that would have been immediately accessible. The Order Protection Rule eliminates this potential inefficiency by protecting only automated quotations. It also promotes equal regulation and fair competition among markets by eliminating any potential advantage that the ITS trade-through provisions may have given manual markets over automated markets.

In addition, the Order Protection Rule incorporates an approach to trade-throughs that is stricter and more comprehensive than the ITS provisions. First, it requires trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs, or, if relying on one of the rule's exceptions, that are reasonably designed to assure compliance with the exception. To assure effective compliance, such policies and procedures will need to incorporate objective standards that are coded into a trading center's automated systems.

Stock Exchange Practices prepared by investigators for the Senate Committee on Banking and Currency:

"Transactions in securities on organized exchanges and over-the-counter markets are affected with the national public interest. * * * In former years transactions in securities were carried on by a relatively small portion of the American people. During the last decade, however, due largely to the development of the means of communication * * * the entire Nation has become acutely sensitive to the activities on the securities exchanges. While only a fraction of the multitude who now own securities can be regarded as actively trading on the exchanges, the operations of these few profoundly affect the holdings of all."

S. Rep. No. 73–1455, 73rd Cong., 2d Sess. 5 (1934).

[25] Investment Company Institute and Securities Industry Association, *Equity Ownership in America* 17 (2002).

[26] *Id.* at 85, 89, 92, 96.

[27] *See infra*, section II.A.6.

[28] The nature and scope of quotations that will be protected under the Order Protection Rule are discussed in detail in sections II.A.2 and II.B.1 below.

[29] *See infra*, note 56 (overview of commenters supporting trade-through proposal).

[30] The full title of the ITS Plan is "Plan for the Purpose of Creating and Operating an Intermarket Communications Linkage Pursuant to Section 11A(c)(3)(B) of the Securities Exchange Act of 1934." The ITS Plan was initially approved by the Commission in 1978. Securities Exchange Act Release No. 14661 (Apr. 14, 1978), 43 FR 17419 (Apr. 24, 1978). All national securities exchanges that trade exchange-listed stocks and the NASD are participants in the ITS Plan. It requires each participant to provide electronic access to its displayed best bid or offer to other participants and provides an electronic mechanism for routing orders, called commitments to trade, to access those displayed prices. The participants also agreed to avoid trade-throughs and locked markets and to adopt rules addressing such practices.

Moreover, a trading center is required to regularly surveil to ascertain the effectiveness of its policies and procedures and to take prompt action to remedy deficiencies. Second, the Order Protection Rule eliminates very significant gaps in the coverage of the ITS provisions that have undermined the extent to which they protect limit orders and promote fair and orderly trading. In particular, the ITS provisions do not cover the transactions of broker-dealers acting as off-exchange block positioners in exchange-listed stocks. They also exclude trade-throughs of 100-share quotations, thereby allowing some limit orders of small investors to be bypassed. The Order Protection Rule closes both of these gaps in coverage.

The definition of "protected bid" or "protected offer" in paragraph (b)(57) of adopted Rule 600 controls the scope of quotations that are protected by the Order Protection Rule. The Commission is adopting the reproposed "Market BBO Alternative" that protects only the best bids and offers ("BBOs") of the nine self-regulatory organizations ("SROs") and The Nasdaq Stock Market, Inc. ("Nasdaq") whose members currently trade NMS stocks. As discussed further in section II.A.5 below, the Commission has decided not to adopt the reproposed "Voluntary Depth Alternative." In particular, it believes that the Market BBO Alternative: (1) Strikes an appropriate balance between competition among markets and competition among orders; and (2) will be less difficult and costly to implement than the Voluntary Depth Alternative.

The rule text of the original proposal included a general "opt-out" exception that would have allowed market participants to disregard displayed quotations. While the opt-out proposal was intended to provide flexibility to market participants, such an exception would have left a gap in protection of the best displayed prices and thereby reduced the proposal's potential benefits for investors. The elimination of any protection for manual quotations is the principal reason that this broad exception is no longer necessary in the Order Protection Rule as adopted. In addition, the Rule adds a number of tailored exceptions that carve out those situations in which many investors may otherwise have felt they legitimately needed to opt-out of a displayed quotation. These exceptions are more consistent with the principle of protecting the best price than a general opt-out exception would have been. The additional exceptions also will help assure that the Order Protection Rule is workable for high-volume stocks. Examples of these exceptions include intermarket sweep orders, quotations displayed by markets that fail to meet the response requirements for automated quotations, and flickering quotations with multiple prices displayed in a single second.[31]

Some commenters questioned the need to extend the Order Protection Rule to Nasdaq stocks.[32] These commenters generally emphasized the much improved efficiency of trading in Nasdaq stocks in recent years. They particularly were concerned that extension of intermarket price protection to Nasdaq stocks, at least in the absence of a general opt-out exception, would interfere with current trading methods.

The Commission believes, however, that intermarket price protection will benefit investors and strengthen the NMS in both exchange-listed and Nasdaq stocks. It will contribute to the maintenance of fair and orderly markets and, thereby, promote investor confidence in the markets. As discussed below,[33] trade-through rates are significant in both Nasdaq and exchange-listed stocks. For example, an estimated 1 of every 40 trades in both Nasdaq and NYSE stocks represents a significant trade-through of a displayed quotation. For many active Nasdaq stocks, approximately 1 of every 11 shares traded is a significant trade-through. The execution of trades at prices inferior to those offered by displayed and accessible limit orders is inconsistent with basic notions of fairness and orderliness, particularly for investors, both large and small, who post limit orders and see those orders routinely traded through. These trade-throughs can undermine incentives to display limit orders. Moreover, many of the investors whose market orders are executed at inferior prices may not, in fact, be aware they received an inferior price from their broker and executing market. In sum, the Commission believes that a rule establishing price protection on an order-by-order basis for all NMS stocks is needed to protect the interests of investors, promote the display of limit orders, and thereby improve the efficiency of the NMS as a whole.

2. Access Rule

The Access Rule (Rule 610 under Regulation NMS) sets forth new standards governing access to quotations in NMS stocks. As emphasized by many commenters on the proposals,[34] protecting the best displayed prices against trade-throughs would be futile if broker-dealers and trading centers were unable to access those prices fairly and efficiently. Accordingly, Rule 610 is designed to promote access to quotations in three ways. First, it enables the use of private linkages offered by a variety of connectivity providers,[35] rather than mandating a collective linkage facility such as ITS, to facilitate the necessary access to quotations. The lower cost and increased flexibility of connectivity in recent years has made private linkages a feasible alternative to hard linkages, absent barriers to access. Using private linkages, market participants may obtain indirect access to quotations displayed by a particular trading center through the members, subscribers, or customers of that trading center. To promote this type of indirect access, Rule 610 prohibits a trading center from imposing unfairly discriminatory terms that would prevent or inhibit the access of any person through members, subscribers, or customers of such trading center.

Second, Rule 610 generally limits the fees that any trading center can charge (or allow to be charged) for accessing its protected quotations to no more than $0.003 per share.[36] The purpose of the fee limitation is to ensure the fairness and accuracy of displayed quotations by establishing an outer limit on the cost of accessing such quotations. For example, if the price of a protected offer to sell an NMS stock is displayed at $10.00, the total cost to access the offer and buy the stock will be $10.00, plus a fee of no more than $0.003. The adopted rule thereby assures order routers that displayed prices are, within a limited range, true prices.

The adopted fee limitation substantially simplifies the originally-proposed limitation on fees, which, in general, would have limited the fees of individual market participants to $0.001 per share, with an accumulated cap of $0.002 per share. Perhaps more than any other single issue, the proposed limitation on access fees splintered the commenters.[37] Some supported the proposal as a worthwhile compromise

[31] Flickering quotations are discussed further in section II.A.3 below.

[32] *See infra*, notes 61–62 and accompanying text.

[33] *See infra*, section II.A.1.a.ii.

[34] *See infra*, section III.A.1.

[35] Private linkages are discussed further in section III.A.1 below.

[36] If the price of a protected quotation is less than $1.00, the fee cannot exceed 0.3% of the quotation price. The rule as adopted also applies the fee limitation to quotations other than protected quotations that are the BBOs of an SRO or Nasdaq. *See infra*, section III.A.2.

[37] The comments on access fees are addressed in section III.A.2 below.

on an extremely difficult issue. They believed that it would level the playing field in terms of who could charge fees, as well as give greater certainty to market participants that quoted prices will, essentially, be true prices. Others were strongly opposed to any limitation on fees, believing that competition alone would be sufficient to address high fees that distort quoted prices. Still others were equally adamant that all access fees of electronic communications networks ("ECNs") charged to non-subscribers should be prohibited entirely, although they did not see a problem with fees charged to a market's members or subscribers. Although consensus could not be achieved on any particular approach, commenters expressed a strong desire for resolution of a difficult issue that has caused discord within the securities industry for many years.

The Commission believes that a single, uniform fee limitation of $0.003 per share is the fairest and most appropriate resolution of the access fee issue. First, it will not seriously interfere with current business practices, as trading centers have very few fees on their books of more than $0.003 per share or earn substantial revenues from such fees.[38] Second, the uniform fee limitation promotes equal regulation of different types of trading centers, where previously some had been permitted to charge fees and some had not. Finally and most importantly, the fee limitation of Rule 610 is necessary to support the integrity of the price protection requirement established by the adopted Order Protection Rule. In the absence of a fee limitation, some "outlier" trading centers might take advantage of the requirement to protect displayed quotations by charging exorbitant fees to those required to access the outlier's quotations. Rule 610's fee limitation precludes the initiation of this business practice, which would compromise the fairness and efficiency of the NMS.

Finally, Rule 610 requires SROs to establish, maintain, and enforce written rules that, among other things, prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross the protected quotations of other trading centers. Trading centers will be allowed, however, to display automated quotations that lock or cross the *manual* quotations of other trading centers. The Access Rule thereby reflects the disparity in speed of response between automated and manual quotations, while also promoting fair and orderly markets by establishing that the first protected quotation at a price, whether it be a bid or an offer, is entitled to an execution at that price instead of being locked or crossed by a quotation on the other side of the market.

3. Sub-Penny Rule

The Sub-Penny Rule (adopted Rule 612 under Regulation NMS) prohibits market participants from displaying, ranking, or accepting quotations in NMS stocks that are priced in an increment of less than $0.01, unless the price of the quotation is less than $1.00. If the price of the quotation is less than $1.00, the minimum increment is $0.0001. A strong consensus of commenters supported the sub-penny proposal as a means to promote greater price transparency and consistency, as well as to protect displayed limit orders.[39] In particular, Rule 612 addresses the practice of "stepping ahead" of displayed limit orders by trivial amounts. It therefore should further encourage the display of limit orders and improve the depth and liquidity of trading in NMS stocks.

4. Market Data Rules and Plans

The adopted amendments to the Market Data Rules (adopted Rules 601 and 603 under Regulation NMS) and joint industry plans ("Plans")[40] are designed to promote the wide availability of market data and to allocate revenues to SROs that produce the most useful data for investors. They will strengthen the existing market data system, which provides investors in the U.S. equity markets with real-time access to the best quotations and most recent trades in the thousands of NMS stocks throughout the trading day. For each stock, quotations and trades are continuously collected from many different trading centers and then disseminated to the public in a consolidated stream of data. As a result, investors of all types have access to a reliable source of information for the best prices in NMS stocks. When Congress mandated the creation of the NMS in 1975, it noted that the systems for disseminating consolidated market data would "form the heart of the national market system."[41] Accordingly, one of the Commission's most important responsibilities is to preserve the integrity and affordability of the consolidated data stream.

The adopted amendments promote this objective in several different respects. First, they update the formulas for allocating revenues generated by market data fees to the various SRO participants in the Plans. The current Plan formulas are seriously flawed by an excessive focus on the number of trades, no matter how small the size, reported by an SRO. They thereby create an incentive for distortive behavior, such as wash sales and trade shredding,[42] and fail to reflect an SRO's contribution to the best displayed quotations in NMS stocks. The adopted formula corrects these flaws. It also is much less complex than the original proposal, primarily because, consistent with the approach of the Order Protection Rule and Access Rule, the new formula eliminates any allocation of revenues for manual quotations. It therefore will promote an allocation of revenues to the various SROs that more closely reflects the usefulness to investors of each SRO's market information.

The adopted amendments also are intended to improve the transparency and effective operation of the Plans by broadening participation in Plan governance. They require the creation of advisory committees composed of non-SRO representatives. Such committees will give interested parties an opportunity to be heard on Plan business, prior to any decision by the Plan operating committees. Finally, the amendments promote the wide availability of market data by authorizing markets to distribute their own data independently (while still providing their best quotations and trades for consolidated dissemination through the Plans) and streamlining outdated requirements for the display of market data to investors.

Many commenters on the market data proposals expressed frustration with the current operation of the Plans.[43] These commenters generally fell into two groups. One group, primarily made up of individual markets that receive market data fees, believed that the current model of consolidation should be discarded in favor of a new model, such as a "multiple consolidator" model

[38] *See infra*, section III.A.2.

[39] The comments on the sub-penny proposal are discussed in section IV.C below.

[40] The three joint-industry plans are (1) the CTA Plan, which is operated by the Consolidated Tape Association and disseminates transaction information for exchange-listed securities, (2) the CQ Plan, which disseminates consolidated quotation information for exchange-listed securities, and (3) the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for Nasdaq-listed securities. The CTA Plan and CQ Plan are available at *www.nysedata.com*. The Nasdaq UTP Plan is available at *www.utpdata.com*.

[41] H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 93 (1975).

[42] Trade shredding, or the splitting of large trades into a series of 100-share trades, is discussed further in section V.A.3 below.

[43] Comments on the market data proposals are discussed in section V.A below.

under which each SRO would sell its own data separately. The other group, primarily made up of securities industry participants that pay market data fees, believed that the current level of fees is too high. This group asserted that, prior to modifying the allocation of market data revenues, the Commission should address the level of fees that generated those revenues.[44]

The Commission has considered these concerns at length in the recent past. As was noted in the Proposing Release,[45] a drawback of the current market data model, which requires all SROs to participate jointly in disseminating data through a single consolidator, is that it affords little opportunity for market forces to determine the overall level of fees or the allocation of those fees to the individual SROs. Prior to publishing the proposals, therefore, the Commission undertook an extended review of the various alternatives for disseminating market data to the public in an effort to identify a better model. These alternatives were discussed at length in the Proposing Release, but each has serious weaknesses. The Commission particularly is concerned that the integrity and reliability of the consolidated data stream must not be compromised by any changes to the market data structure.

For example, although allowing each SRO to sell its data separately to multiple consolidators may appear at first glance to subject the level of fees to competitive forces, this conclusion does not withstand closer scrutiny. If the benefits of a fully consolidated data stream are to be preserved, each consolidator would need to purchase the data of each SRO to assure that the consolidator's data stream in fact included the best quotations and most recent trade report in an NMS stock. Payment of every SRO's fees would effectively be mandatory, thereby affording little room for competitive forces to influence the level of fees.

The Commission also has considered the suggestion of many in the second group of commenters that market data fees should be cut back to encompass only the costs of the *Plans* to collect and disseminate market data. Under this approach, the individual SROs would no longer be allowed to fund any portion of their operational and regulatory functions through market data fees.[46] Yet, as discussed in the Commission's 1999 concept release on market data,[47] nearly the entire burden of collecting and producing market data is borne by the individual markets, not by the Plans. If, for example, an SRO's systems fail on a high-volume trading day and it can no longer provide its data to the Plans, investors will suffer the consequences of a flawed data stream, regardless of whether the Plan is able to continue operating.

If the Commission were to limit market data fees to cover only Plan costs, SRO funding would have been cut by $393.7 million in 2004.[48] Given the potential harm if vital SRO functions are not adequately funded, the Commission believes that the level of market data fees is most appropriately addressed in a context that looks at SRO funding as a whole. It therefore has requested comment on this issue in its recent concept release on SRO structure.[49] In addition, the recently proposed rules to improve SRO transparency would, if adopted, assist the public in assessing the level and use of market data fees by the various SROs.[50]

In sum, there is inherent tension between assuring consolidated price transparency for investors, which is a fundamental objective of the Exchange Act,[51] and expanding the extent to which market forces determine market data fees and SRO revenues. Each alternative model for data dissemination has its particular strengths and weaknesses. The great strength of the current model, however, is that it benefits investors, particularly retail investors, by helping them to assess quoted prices at the time they place an order and to evaluate the best execution of their orders against such prices by obtaining data from a single source that is highly reliable and comprehensive. In the absence of full confidence that this benefit would be retained if a different model were adopted, the Commission has decided to adopt such immediate steps as are necessary to improve the operation of the current model.

II. Order Protection Rule

The Commission is adopting Rule 611 under Regulation NMS to establish protection against trade-throughs for all NMS stocks. Rule 611(a)(1) requires a trading center (which includes national securities exchanges, exchange specialists, ATSs, OTC market makers, and block positioners)[52] to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations and, if relying on an exception, that are reasonably designed to assure compliance with the terms of the exception. Rule 611(a)(2) requires a trading center to regularly surveil to ascertain the effectiveness of its policies and procedures and to take prompt action to remedy deficiencies. To qualify for protection, a quotation must be automated. Rule 600(b)(3) defines an automated quotation as one that, among other things, is displayed and immediately accessible through automatic execution. Thus, Rule 611 does not require market participants to route orders to access manual quotations, which generally entail a much slower speed of response than automated quotations.

Rule 611(b) sets forth a variety of exceptions to make intermarket price protection as efficient and workable as possible. These include an intermarket sweep exception, which allows market participants to access multiple price levels simultaneously at different trading centers—a particularly important function now that trading in penny increments has dispersed liquidity across multiple price levels. The intermarket sweep exception enables trading centers that receive sweep orders to execute those orders immediately, without waiting for better-priced quotations in other markets to be updated. In addition, Rule 611 provides exceptions for the quotations of trading centers experiencing, among other things, a material delay in providing a response to incoming orders and for flickering quotations with prices that have been displayed for less than one second. Both exceptions serve to limit the application of Rule 611 to

[44] Some commenters mistakenly believed that the level of market data fees had been left unreviewed for many years. In fact, the Commission comprehensively reviewed market data fees in 1999, which led to a 75% reduction in fees paid by retail investors for market data. *See infra*, note 574.

[45] Proposing Release, 69 FR at 11177.

[46] The U.S. equity markets are not alone in their reliance on market information revenues as a significant source of funding. All of the other major world equity markets currently derive large amounts of revenues from selling market information. *See infra*, note 587 and accompanying text.

[47] Securities Exchange Act Release No. 42208 (Dec. 9, 1999), 64 FR 70613 (Dec. 17, 1999) ("Market Information Release").

[48] *See infra*, text accompanying note 564 (table setting forth revenue allocations for 2004).

[49] Securities Exchange Act Release No. 50700 (Nov. 18, 2004), 69 FR 71256 (Dec. 8, 2004) ("SRO Structure Release").

[50] Securities Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71126 (Dec. 8, 2004) ("SRO Transparency Release").

[51] Section 11A(a)(1)(C)(iii) of the Exchange Act.

[52] An "OTC market maker" in a stock is defined in Rule 600(b)(52) of Regulation NMS as, in general, a dealer that holds itself out as willing to buy and sell the stock, otherwise than on a national securities exchange, in amounts of less than block size (less than 10,000 shares). A block positioner in a stock, in contrast, limits its activity in the stock to transactions of 10,000 shares or greater.

quotations that are truly automated and accessible.

By strengthening price protection in the NMS for quotations that can be accessed fairly and efficiently, Rule 611 is designed to promote market efficiency and further the interests of both investors who submit displayed limit orders and investors who submit marketable orders.[53] Price protection encourages the display of limit orders by increasing the likelihood that they will receive an execution in a timely manner and helping preserve investors' expectations that their orders will be executed when they represent the best displayed quotation. Limit orders typically establish the best prices for an NMS stock. Greater use of limit orders will increase price discovery and market depth and liquidity, thereby improving the quality of execution for the large orders of institutional investors. Moreover, strong intermarket price protection offers greater assurance, on an order-by-order basis, to investors who submit market orders that their orders in fact will be executed at the best readily available prices, which can be difficult for investors, particularly retail investors, to monitor. Investors generally can know the best quoted prices at the time they place an order by referring to the consolidated quotation stream for a stock. In the interval between order submission and order execution, however, quoted prices can change. If the order execution price provided by a market differs from the best quoted price at order submission, it can be particularly difficult for retail investors to assess whether the difference was attributable to changing quoted prices or to an inferior execution by the market. The Order Protection Rule will help assure, on an order-by-order basis, that markets effect trades at the best available prices. Finally, market orders need only be routed to markets displaying quotations that are truly accessible. Accordingly, as discussed in detail below, the Commission finds that the Order Protection Rule is necessary and appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Exchange Act.

A. Response to Comments and Basis for Adopted Rule

Rule 611 as adopted reflects a number of changes to the rule as originally proposed. As discussed below, the Commission has made these changes in response to substantial public comment on the proposed rule and on the issues arising out of the NMS Hearing that were addressed in the Supplemental Release. In addition, the adopted rule includes a new exception for certain "stopped orders" in response to the suggestions of commenters on the reproposal. The public submitted more than 2200 comments addressing the trade-through proposal and reproposal.[54] Although the comments covered a very wide range of matters, they particularly focused on the following issues:

(1) Whether an intermarket trade-through rule is needed to promote fair and efficient equity markets, particularly for Nasdaq stocks which have not been subject to the current ITS trade-through provisions;

(2) whether only automated and immediately accessible quotations should be given trade-through protection and, if so, what is the best approach for defining such quotations;

(3) whether intermarket protection against trade-throughs can be implemented in a workable manner, particularly for high-volume stocks;

(4) whether the exception in the original proposal allowing a general opt-out of protected quotations is necessary or appropriate, particularly if manual quotations are excluded from trade-through protection;

(5) whether the scope of quotations entitled to trade-through protection should extend beyond the best bids and offers of the various markets; and

(6) whether the benefits of an intermarket trade-through rule would justify its cost of implementation.

In the following sections, the Commission responds to comments on the trade-through proposal and reproposal and discusses the basis for its adoption of Rule 611.

1. Need for Intermarket Order Protection Rule

Commenters were divided on the central issue of whether intermarket protection of displayed quotations is needed to promote the fairest and most efficient markets for investors.[55] Many commenters strongly supported the adoption of a uniform rule for all NMS stocks to promote best execution of market orders, to protect the best displayed prices, and to encourage the public display of limit orders.[56] They stressed that limit orders are the cornerstone of efficient, liquid markets and should be afforded as much protection as possible.[57] They noted, for

[53] For ease of reference in this release, the term "limit order" generally will refer to a non-marketable order and the term "marketable order" will refer to both market orders and marketable limit orders. A non-marketable limit order has a limit price that prevents its immediate execution at current market prices. Because these orders cannot be executed immediately, they generally are publicly displayed to attract contra side interest at the price. In contrast, a "marketable limit order" has a limit price that potentially allows its immediate execution at current market prices. As discussed further below, marketable limit orders often cannot be filled at current market prices because of insufficient liquidity and depth at the market price. *See infra*, text accompanying notes 121–123, 134–136.

[54] The Commission has considered the views of all commenters in formulating Rule 611 as adopted, as well as the other rules and amendments adopted today.

[55] Nearly all commenters, both those supporting and opposing the need for an intermarket trade-through rule, agreed that the current ITS trade-through provisions are seriously outdated and in need of reform. They particularly focused on the problems created by affording equal protection against trade-throughs to both automated and manual quotations. *See supra*, section II.A.2. Adopted Rule 611 responds to these problems by protecting only automated quotations.

[56] Approximately 1689 commenters on the proposal and reproposal favored a uniform trade-through rule without an opt-out exception. These commenters included: (1) several mutual fund companies and the Investment Company Institute; (2) the Consumer Federation of America and the National Association of Individual Investors Corporation; (3) the floor-based exchanges and their members; (4) approximately 107 listed companies; (5) a variety of securities industry participants; and (6) approximately 42 members of Congress. Of the commenters supporting the reproposal, approximately 452 utilized "Letter Type G" (noting the existence of two alternative proposals and urging "support for the Regulation NMS proposal without the CLOB" alternative), 70 utilized "Letter Type H" ("we support the 'top of the book' proposal that has been discussed for the past year as part of the Regulation NMS discussion"), 204 utilized "Letter Type I" ("I believe a better approach would be the SEC's proposed alternative to the CLOB, to protect the best price in each market center"), 548 utilized "Letter Type J" ("Of the two alternatives laid out in the rule as re-proposed on December 15, 2004, protecting the best bid and offer in each market center preserves both types of competition in a way that benefits all securities industry participants."), 28 utilized "Letter Type K" ("One alternative is that of protecting the "best bid and offer" in each market center. This concept enhances competition, allows for price negotiation, encourages innovation, and treats all market participants fairly and equally."), and 109 utilized "Letter Type L" (noting the existence of two alternative proposals and urging support for "the Regulation NMS proposal without the CLOB" alternative). Each of the letter types is posted on the Commission's Internet Web site *(http://www.sec.gov/rules/proposed.shtml)*. Those commenters that only expressed opposition to the Voluntary Depth Alternative were not included in the foregoing summary. In addition, many commenters supported an opt-out exception to a trade-through rule, but varied in the extent to which they made clear whether they supported a trade-through rule in general. These commenters are not included in the foregoing summary, but are included in note 232 below addressing supporters of an opt-out exception.

[57] *See, e.g.*, Letter from John J. Wheeler, Vice President, Director of U.S. Equity Trading, American Century Investment Management Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("American Century Letter") at 2; Letter from Matt D. Lyons, Capital Research and Management Company, to Jonathan G. Katz, Secretary, Commission, dated June 28, 2004 ("Capital Research Letter") at 2; Letter from Ari Burstein, Associate Counsel, Investment Company

Continued

example, that limit orders typically establish the "market" for a stock.[58] In the absence of limit orders setting the current market price, there would be no benchmark for the submission and execution of marketable orders. Focusing solely on best execution of marketable orders (and the interests of orders that *take* displayed liquidity), therefore, would miss a critical part of the equation for promoting the most efficient markets (*i.e.*, the best execution of orders that *supply* displayed liquidity and thereby provide the most transparent form of price discovery). Commenters supporting the need for an intermarket trade-through rule also believed that it would increase investor confidence by helping to eliminate the impression of unfairness when an investor's order executes at a price that is worse than the best displayed quotation, or when a trade occurs at a price that is inferior to the investor's displayed order.[59]

Other commenters, in contrast, opposed any intermarket trade-through rule.[60] These commenters did not believe that such a rule is necessary to promote the protection of limit orders, the best execution of market orders, or efficient markets in general. They asserted that, given public availability of each market's quotations and ready access by all market participants to such quotations, competition among markets, a broker's existing duty of best execution, and economic self-interest would be sufficient to protect limit orders and produce the most fair and efficient markets. They therefore believed that any trade-through rule would be unnecessary and costly. These commenters also were concerned that any trade-through rule could interfere with the ability of competitive forces to produce efficient markets, particularly for Nasdaq stocks.

Commenters on the original proposal who were opposed to any trade-through rule also expressed their view that there is a lack of empirical evidence justifying the need for intermarket protection against trade-throughs. They noted, for example, that trading in Nasdaq stocks has never been subject to a trade-through rule, while trading in exchange-listed stocks, particularly NYSE stocks, has been subject to the ITS trade-through provisions. Given the difference in regulatory requirements between Nasdaq and NYSE stocks, many commenters relied on two factual contentions to show that a trade-through rule is not needed: (1) Fewer trade-throughs occur in Nasdaq stocks than NYSE stocks;[61] and (2) trading in Nasdaq stocks currently is more efficient than trading in NYSE stocks.[62] Based on these factual contentions, opposing commenters concluded that a trade-through rule is not necessary to promote efficiency or to protect the best displayed prices.

The Commission has carefully evaluated the views of these commenters on both the original proposal and the reproposal. In addition, Commission staff has prepared several studies of trading in Nasdaq and NYSE stocks to help assess and respond to commenters' claims. The studies and the Commission's conclusions are discussed in detail below. In general, however, the Commission has found that current trade-through rates are not lower for Nasdaq stocks than NYSE stocks, despite the fact that nearly all quotations for Nasdaq stocks are automated, rather than divided between manual and automated as they are for exchange-listed stocks. Moreover, the majority of the trade-throughs that currently occur in NYSE stocks fall within gaps in the coverage of the existing ITS trade-through rules that will be closed by the Order Protection Rule. Consequently, the Commission believes that the Order Protection Rule, by establishing effective intermarket protection against trade-throughs, will materially reduce the trade-through rates in both the market for Nasdaq stocks and the market for exchange-listed stocks.

In addition, the commenters' claim that the Order Protection Rule is not needed because trading in Nasdaq stocks, which currently does not have any trade-through rule, is more efficient than trading in NYSE stocks, which has the ITS trade-through provisions, also is not supported by the relevant data.[63] This conclusion is particularly evident when market efficiency is examined from the perspective of the transaction costs of long-term investors, as opposed to short-term traders. The data reveals that the markets for Nasdaq and NYSE stocks each have their particular strengths and weaknesses. In assessing the need for the Order Protection Rule, the Commission has focused primarily on whether effective intermarket protection against trade-throughs will materially contribute to a fairer and more efficient market for investors in Nasdaq stocks, given their particular trading characteristics, and in exchange-listed stocks, given their particular trading characteristics. Thus, the critical issue is whether each of the markets would be improved by adoption of the Order Protection Rule, not whether one or the other currently is, on some absolute level, superior to the other. The Commission believes that effective intermarket protection against trade-throughs will produce substantial benefits for investors in both markets and, therefore, has adopted the Order

Institute, to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("ICI Reproposal Letter") at 2; Letter from Henry H. Hopkins, Vice President and Chief Legal Counsel, and Andrew M. Brooks, Vice President and Head of Equity Trading, T. Rowe Price Associates, Inc., to Jonathan G. Katz, Commission, dated Jan. 27, 2005 ("T. Rowe Price Repróposal Letter") at 2; Letter from George U. Sauter, Managing Director, The Vanguard Group, Inc., to Jonathan G. Katz, Secretary, Commission, dated Jan. 27, 2005 ("Vanguard Reproposal Letter") at 2.

[58] *Id.*

[59] *See, e.g.*, Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Jonathan G. Katz, Secretary, Commission, dated June 17, 2004 ("Consumer Federation Letter") at 2; Letter from Ari Burstein, Associate Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("ICI Letter") at 7.

[60] Approximately 448 commenters on the proposal and reproposal opposed a trade-through rule. Approximately 179 of these commenters utilized "Letter Type C," which primarily supported an opt-out exception to the proposed rule, but also suggested that having no trade-through rule would be simpler. Letter Type C is posted on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). The remaining commenters included securities industry participants, particularly electronic markets and their participants, a variety of local political and community groups and individuals, and 34 members of Congress.

[61] *See, e.g.*, Letter from Kim Bang, President & Chief Executive Officer, Bloomberg Tradebook LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("Bloomberg Tradebook Letter") at 10; Letter from Eric D. Roiter, Senior Vice President & General Counsel, Fidelity Management and Research Company, to Jonathan G. Katz, Secretary, Commission, dated June 22, 2004 ("Fidelity Letter I") at 11; Letter from Suhas Daftuar, Managing Director, Hudson River Trading, to Jonathan G. Katz, Secretary, Commission, dated August 13, 2004 ("Hudson River Trading Letter") at 1; Letter from Edward J. Nicoll, Chief Executive Officer, Instinet Group Incorporated, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("Instinet Letter") at 14; Letter from Edward S. Knight, The Nasdaq Stock Market, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 2, 2004 ("Nasdaq Letter II") at 6 and Attachment III.

[62] *See, e.g.*, Letter from Ellen L. S. Koplow, Executive Vice President and General Counsel, Ameritrade Holding Corporation, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("Ameritrade Letter I"), Appendix at 10; Letter from William O'Brien, Chief Operating Officer, Brut LLC, to Jonathan G. Katz, Secretary, Commission, dated July 29, 2004 ("Brut Letter") at 10; Fidelity Letter I at 11; Instinet Letter at 3, 9 and Exhibit A; Nasdaq Letter II at 6 and Attachment II; Letter from Bruce N. Lehmann & Joel Hasbrouck, Organizers, Reg NMS Study Group, to Jonathan G. Katz, Secretary, Commission (no date) ("NMS Study Group Letter") at 4; Letter from David Colker, Chief Executive Officer & President, National Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated June 29, 2004 ("NSX Letter") at 3; Letter from Huw Jenkins, Managing Director, Head of Equities for the Americas, UBS Securities LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("UBS Letter") at 4.

[63] *See infra*, section II.A.1.b.

Protection Rule for both Nasdaq and exchange-listed stocks.

a. Trade-Through Rates in Nasdaq and NYSE Stocks

The first principal factual contention of commenters on the original proposal who were opposed to a trade-through rule is premised on the claim that there are fewer trade-throughs in Nasdaq stocks, which are not covered by any trade-through rule, than in NYSE stocks, which are covered by the ITS trade-through provisions.[64] One commenter asserted that, outside the exchange-listed markets, competition alone had been sufficient to create a "no-trade through zone."[65] To respond to these commenters, the Commissions staff reviewed public quotation and trade data to estimate the incidence of trade-throughs for Nasdaq and NYSE stocks.[66] It found that the overall trade-through rates for Nasdaq stocks and NYSE stocks were, respectively, 7.9% and 7.2% of the total volume of traded shares.[67] When considered as a percentage of number of trades, the overall trade-through rate for both Nasdaq and NYSE stocks was 2.5%. When considered as the size of traded-through quotations as a percentage of total share volume, the overall rates for Nasdaq and NYSE stocks were, respectively, 1.9% and 1.2%.[68] In addition, the staff study found that the amount of the trade-throughs was significant—2.3 cents per share on average for Nasdaq stocks and 2.2 cents per share for NYSE stocks.[69]

The staff study also revealed that a large volume of block transactions (10,000 shares or greater) trade through displayed quotations. Block transactions represent approximately 50% of total trade-through volume for both Nasdaq and NYSE stocks.[70] Importantly, many block transactions currently are not subject to the ITS trade-through provisions that apply to exchange-listed stocks. Broker-dealers that act solely as block positioners are not covered by the ITS trade-through provisions if they print their trades in the over-the-counter ("OTC") market. In addition to not covering the trades of block positioners, the ITS trade-through provisions include an exception for 100-share quotations. They therefore often may fail to protect the small orders of retail investors. When block trade-throughs and trade-throughs of 100-share quotations are eliminated, the overall trade-through rate for NYSE stocks is reduced from 7.2% to approximately 2.3% of total share volume.[71] The two gaps in ITS coverage therefore account for most of the trade-through volume in NYSE stocks. The Order Protection Rule, by closing these gaps in protection against trade-throughs, will establish much stronger price protection than the ITS provisions.

Commenters opposed to the trade-through reproposal offered a number of criticisms of the staff study. Such criticisms generally fall into two categories: (1) Possible reasons why the staff study might have overestimated trade-through rates, particularly for Nasdaq stocks; and (2) even assuming the estimated trade-through rates were accurate, arguments for why such rates do not support a conclusion that the Order Protection Rule is needed or will benefit the markets, particularly for Nasdaq stocks. These criticisms are evaluated below.

i. Accuracy of Estimated Trade-Through Rates

Several commenters asserted that the staff study overestimated trade-through rates because it failed to consider the existence of reserve size and sweep orders in the Nasdaq market, which could have caused "false positive" trade throughs.[72] In theory, order routers could intend to sweep the market of all superior quotations before trading at an inferior price, but if they did not effectively sweep both displayed size and reserve size, the superior quotations would not change and the staff study would report a false indication of a trade-through when the trade in another market occurred at an inferior price. In practice, however, those who truly intend to sweep the best prices are quite capable of routing orders to execute against both displayed and estimated reserve size, thereby precluding the possibility of a false positive trade-through. Indeed, although commenters asserted that the staff study failed to consider the existence of reserve size for Nasdaq stocks, the validity of their own argument is premised on the failure of sophisticated market participants to consider the existence of reserve size when routing sweep orders.

It currently is impossible to determine from publicly available trade and quotation data whether the initiator of a trade-through in one market has simultaneously attempted to sweep better-priced quotations in other markets.[73] The data can reveal, however, the extent to which false-positive indications of a trade-through were even a possibility by examining trading volume at the traded-through market. If the accumulated volume of trades in that market did not equal or exceed the displayed size of a traded-through quotation, it shows that a sweep order, even one attempting to execute only against displayed size, could not have been routed to the market that was traded-through. Commission staff therefore has supplemented its trade-through study to check this possibility and to help the Commission assess and respond to commenters' criticisms. It found that this possibility rarely occurs—a finding that fully supports an inference that market participants are capable of effectively sweeping the best prices, both displayed and reserve, when they intend to do so.[74] Thus, it is

[64] *See, e.g.*, Bloomberg Tradebook Letter at 10; Fidelity Letter I at 11; Hudson River Trading Letter at 1; Instinet Letter at 14; Nasdaq Letter II at 6 and Attachment III.

[65] Letter from Kevin J. P. O'Hara, Chief Administrative Officer & General Counsel, Archipelago Holdings, Inc., to Jonathan G. Katz, Secretary, Commission, dated September 24, 2004 ("ArcaEx Letter") at 3.

[66] Memorandum to File, from Office of Economic Analysis, dated December 15, 2004 (analysis of trade-throughs in Nasdaq and NYSE issues) ("Trade-Through Study"). The Trade-Through Study has been placed in Public File No. S7–10–04 and is available for inspection on the Commission's Internet Web site (*http://www.sec.gov*). To eliminate false trade-throughs, the staff calculated trade-through rates using a 3-second window—a reference price must have been displayed one second before a trade and still have been displayed one second after a trade. In addition, the staff eliminated quotations displayed by the American Stock Exchange LLC ("Amex") from the analysis of Nasdaq stocks because they were manual quotations. Finally, the staff used the time of execution of a trade, if one was given, rather than time of the trade report itself. This methodology was designed to address manual trades, such as block trades, that might not be reported for several seconds after the trade was effected manually.

[67] Trade-Through Study, Tables 4, 11. The 7.9% and 7.2% figures include the entire size of trades that were executed at prices inferior to displayed quotations.

[68] *Id.* at 2. The 1.9% and 1.2% figures include only the total displayed size of quotations that were traded through by trades executed at prices inferior to the displayed quotations.

[69] *Id.*, Tables 3, 10.

[70] *Id.*, Tables 4, 11.

[71] *Id.*, Table 11.

[72] Letter from Kim Bang, Bloomberg L.P., to Jonathan Katz, Secretary, dated Jan. 25, 2005 ("Bloomberg Reproposal Letter") at 6; Letter from Edward S. Knight, The Nasdaq Stock Market, Inc., to Jonathan G. Katz, Secretary, dated Jan. 26, 2005 ("Nasdaq Reproposal Letter"), Exhibit A at 4; Letter from Daniel Coleman, Managing Director and Head of Equities for the Americas, UBS Securities LLC ("UBS Reproposal Letter") at 4.

[73] After implementation of Rule 611, such orders generally will be marked as intermarket sweep orders pursuant to the exceptions set forth in Rule 611(b)(5) and (6). As discussed in note 317 below, the Commission intends to request that the NMS trade reporting plans consider collecting and disseminating special modifiers for all trades that are executed pursuant to an exception from Rule 611. Such modifiers would greatly enhance transparency and minimize the potential for false appearances of violations of Rule 611.

[74] Memorandum to File, from Office of Economic Analysis, dated April 6, 2005, at 1 (supplemental trade-through analysis—reserve size analysis,

Continued

very unlikely that the existence of reserve size and sweep orders caused a significant number of false positive trade-throughs in Nasdaq stocks.[75]

One commenter asserted that the staff study was flawed because its sample trading days involved unusual trading activity.[76] Commission staff chose the sample trading days, however, only after affirming that they were representative of normal trading. To respond to this commenter's claim, Commission staff reaffirmed that all four days were well within the norms for trading volume and price volatility.[77] In addition, the trade-through rates remained quite stable across the four days (*e.g.*, ranging only from 2.3% to 2.6% for Nasdaq stocks).[78]

Two commenters asserted that, even if the staff study's estimate of trade-through rates was correct for the trading days chosen in the Fall of 2003, such rates are now outdated for Nasdaq stocks because of structural changes in the market.[79] In particular, they cited the merger of the Island and Instinet ECNs and Nasdaq's acquisition of the BRUT ECN. Nasdaq also presented statistics indicating that the trade-through rates for Nasdaq stocks in some trading centers had dropped from the Fall of 2003 to the Fall of 2004. The staff study used data from the Fall of 2003, however, because it was prior to the Commission's proposal of a trade-through rule and its public announcement that the staff was reviewing trade-through rates. While the conduct of market participants may have changed in certain respects when they were a focus of regulatory attention, the Commission cannot be assured that such behavior would continue if the Commission did not adopt the proposed regulatory action to address trade-throughs.

Indeed, Nasdaq's own data illustrates this possibility.[80] Although Nasdaq asserts that the reduction in trade-through rates from 2003 to 2004 is a result of fewer independently operating ECNs, its data undercuts this explanation. For example, Nasdaq's data shows that the trade-through rate at internalizing securities dealers dropped from 3.2% in 2003 to 1.4% in 2004.[81] It is unlikely that ECN consolidation could have caused such a major reduction in trade-through rates at securities dealers when they execute their customer orders internally.[82] The great majority of internalized trades are the small trades of retail investors. The fact that, in 2003, nearly 1 of 30 of these millions of trades appears to have been executed at a price inferior to an automated and accessible quotation is troubling. Given that one of the primary benefits of the Order Protection Rule is to backstop a broker's duty of best execution on an order-by-order basis, Nasdaq's data appears to indicate a continuing need for regulatory action to reinforce the fundamental principle of best price for all NMS stocks.

Nasdaq also criticized the staff study for failing to address whether large block trades "intentionally avoid interacting with the posted quotes."[83] Far from demonstrating a flaw in the staff study, however, the fact that large trades intentionally avoid interacting with displayed quotations was one of the primary reasons identified in the Reproposing Release supporting the need for intermarket order protection.[84] The opportunity for displayed limit orders to begin interacting with this substantial volume of block trades is likely to be one of the most significant incentives for increased display of limit orders after implementation of the Order Protection Rule. Moreover, the Order Protection Rule will promote a more level playing field for retail investors that currently see their smaller displayed orders bypassed by block trades.

Two commenters did not believe the staff study should have included trades larger than quoted size, asserting that "[e]ven in a hard CLOB environment, orders larger than the inside quote would still 'trade through' the inside quote in effect at the time the order was received."[85] These commenters do not appear to have understood the methodology of the staff study or the operation of a central limit order book ("CLOB"). As discussed above, large trades would not have been identified as trade-throughs in the staff study if orders simultaneously had been routed to sweep displayed quotations with superior prices. To exclude such trades from its analysis, the study used a three-second quotation window in which the lowest best bid or the highest best offer during the three-second period must be traded-through before a trade was identified as a trade-through. The 3-second quotation window particularly was designed to allow sufficient time for quotations to update to reflect the arrival of sweep orders (just as in a CLOB environment, the execution of a large order simultaneously would eliminate all superior-priced quotations). In sum, large orders would trade *with*, rather than trade *through*, the superior-priced displayed quotations, thereby leaving only quotations that did not have superior prices to the trade price. Such large orders therefore would not have been identified as trade-throughs in the staff study.

Commenters also criticized the staff study for allegedly failing to consider

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sample day activity analysis, and analysis of quote depth) ("Supplemental Trade-Through Study"). For example, the Supplemental Trade-Through Study found that, when the trade-through statistics are adjusted to reflect possible instances in which sweep orders could have failed to execute against reserve size, the estimated trade-through rates for Nasdaq stocks declined slightly from 2.5% of total trades to 2.3% of total trades, and from 7.9% of total share volume to 7.7% of total share volume. These small reductions do not support the assertion of commenters that market participants systematically fail to take out reserve size when routing sweep orders. Rather, the reductions are much more consistent with the random distribution of trade volume that would be expected to occur in the traded-through markets from time to time.

[75] ArcaEx noted that it was common practice in the market for exchange-listed stocks to send commitments to trade through the ITS to avoid trading through quotations in other markets. Letter from Kevin J. P. O'Hara, Chief Administrative Officer and General Counsel, Archipelago Holdings, Inc., to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("ArcaEx Reproposal Letter"), Annex A at 1. Given the slowness with which ITS commitments to trade often are processed and manual quotations are updated, ArcaEx suggested that trade-through rates for exchange-listed stocks might be overestimated. The Commission agrees that this criticism may well be valid to some extent. Thus, the trade-through rates for NYSE stocks in the staff study may be overstated for ArcaEx and other markets trading exchange-listed stocks. The occurrence of apparent trade-throughs in exchange-listed stocks caused by manual quotations under the current ITS provisions is addressed in the Order Protection Rule by protecting only automated quotations.

[76] ArcaEx Reproposal Letter, Annex A.

[77] Supplemental Trade-Through Study at 3.

[78] *Id.*

[79] Bloomberg Reproposal Letter at 5; Nasdaq Reproposal Letter, Exhibit 1 at 3–4.

[80] Nasdaq Reproposal Letter, Exhibit 1 at 4.

[81] *Id.*

[82] Nasdaq also mentions "less developed" matching systems as contributing to the high rate of trade-throughs in Fall 2003, but does not identify any major technology advances from Fall 2003 to Fall 2004 that would have enabled the reduction in trade-through rates at internalizing securities dealers. *Id.* at 4.

[83] Nasdaq Reproposal Letter, Exhibit 1 at 4. *See also* UBS Reproposal Letter at 4 (describing numbers in staff study as "inflated" because they included institutional block trades).

[84] 69 FR at 77434.

[85] Letter from James J. Angel, Associate Professor of Finance, Georgetown University, to Jonathan G. Katz, Secretary, Commission, dated Jan. 25, 2005 ("Angel Reproposal Letter") at 3; Letter from Eric D. Roiter, Senior Vice President and General Counsel, Fidelity Management & Research Company, to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("Fidelity Reproposal Letter") at 7. These commenters also criticized the staff study for including average-price trades, even when the individual pieces of such trades may have been executed at or within the relevant quotations. The staff study, however, addressed this issue by excluding any trade reported as an average-price trade, along with all other trades that included a non-blank condition code (primarily out-of-sequence trades, late trades, and previous reference price trades). Trade-Through Study at 9.

the effect of locked or crossed quotations for Nasdaq stocks.[86] By using a 3-second quotation window, however, the staff study excluded any trade-throughs that would have been caused by short periods of locking or crossing quotations. The staff analysis appropriately did not exclude longer periods of *locked* quotations. Indeed, locked quotations do not qualify for an exception from the Order Protection Rule—both the best bid and best offer are readily accessible at the same price and should not be traded through. Quotations rarely are *crossed* for three seconds and therefore are unlikely to have caused a material number of false trade-throughs.[87]

Finally, commenters asserted a variety of arguments relating to timing latencies in the quotation and trade data that might have caused the staff study to include false trade-throughs, including delayed trade reports, flickering quotations, stale quotations, manual quotations, and poor clock synchronization.[88] The staff study, however, used a variety of means to minimize the effect of these factors on the data, as well as to check for the extent to which timing latencies might affect its results. The goal of the staff study was to obtain a reasonable estimate of the true trade-through rates for Nasdaq and NYSE stocks. It is important to recognize that, in designing a methodology to achieve this goal, the more conservative the methodology used to eliminate potentially false indications of trade-throughs, the greater the number of true trade-throughs that are likely to be eliminated. Thus, a methodology designed simply to assure the elimination of every conceivable false indication of a trade-through would not have been useful to the Commission in assessing its policy options because it would have severely underestimated true trade-through rates. The staff study's conservative methodology was designed to produce reasonable estimates of true trade-through rates, but still is more likely to have resulted in an understatement of trade-through rates than an overstatement, particularly for Nasdaq stocks. Nasdaq stocks are traded primarily on automated markets, and the data for such stocks therefore should be less affected by timing latencies than the data for NYSE stocks, which is produced by both automated and manual markets.

For example, the staff study used a three-second quotation window for both Nasdaq and NYSE stocks to minimize the effect of possible timing lags between trade data and quotation data. Given that in Fall 2003 the overwhelming proportion of trades in Nasdaq stocks were executions of automated orders against automated quotations, with automated reporting of trades to the relevant Plan processor, three seconds is a conservative time frame to assess overall trade-through rates. But even when the quotation window is extended to an overly conservative eight seconds and thereby clearly excludes a large number of true trade-throughs, trade-through rates remain significant—1.7% of trades and 6.8% of share volume in Nasdaq stocks.[89]

In addition, the trade execution time derived from audit trail data for Nasdaq stocks, rather than trade report time, was used when it was supplied and whenever the two times differed to minimize timing latencies in the data caused by delayed reporting. Separate times derived from audit trail data are not reported for NYSE stocks, and delayed trade reports therefore could have contributed to false reports of trade-throughs in NYSE stocks. Similarly, for Nasdaq stocks, the quotations of Amex—the only market that displays manual quotations—were excluded from the staff study. Because the NYSE currently displays primarily manual quotations in NYSE stocks, while other markets display automated quotations, the difficulties of integrating data from manual and automated markets could have caused false indications of trade-throughs for NYSE stocks.[90] The occurrence of false indications of trade-throughs caused by manual quotations in exchange-listed stocks is addressed in the Order Protection Rule by protecting only automated quotations that are immediately accessible and immediately updated.

Fidelity incorrectly believed that the staff study failed to use the time of trade execution derived from audit trail data when analyzing trade-through rates in Nasdaq stocks.[91] Fidelity also attached to its comment letter a paper prepared by two academics, Robert Battalio and Robert Jennings, which included a variety of criticisms of the staff study and the Reproposing Release in general ("Battalio/Jennings Paper").[92] Among other things, the Battalio/Jennings Paper cited an academic paper which, for trading in Nasdaq stocks in 1996 and 1997, found significant delays between the time of trade execution reflected in proprietary trading center data and the time of trade report in public data disseminated by Nasdaq as Plan processor.[93] The authors of the Battalio/Jennings Paper, however, did not account for significant improvements in the quality of trade data for Nasdaq stocks since 1997. In particular, the NASD developed and implemented a new order audit trail system ("OATS").[94] As summarized in a 1998 NASD Notice to Members, OATS specifically was designed, among other things, to address the discrepancies between proprietary trade data and trade data reported to Nasdaq's Automated Confirmation Transaction Service ("ACT"):

> OATS is designed to provide NASD Regulation, Inc. (NASD Regulation) with the ability to reconstruct markets promptly, conduct efficient surveillance, and enforce NASD and SEC rules. The SEC has directed that OATS must provide an accurate, time-sequenced record of orders and transactions from the receipt of an order through its execution. To accomplish this, NASD Regulation will combine information submitted to OATS with transaction data reported by members through ACT and quotation information disseminated by Nasdaq * * *. The ACT trade data and the OATS order information will be used to construct an integrated audit trail. Under the amended rules, all trade reports for OATS-eligible securities entered into Nasdaq's ACT system will be required to have a time of execution expressed in hours, minutes, and seconds.[95]

To obtain the most accurate analysis of trade-through rates in Nasdaq stocks, the staff study used the audit trail record of the time of trade execution, rather than the time of trade report, whenever it was supplied and whenever

[86] Bloomberg Reproposal Letter at 5; Nasdaq Reproposal Letter, Exhibit 1 at 5.

[87] *See, e.g.*, Nasdaq Reproposal Letter, Exhibit 1 at 5 n. 14 ("rare" for market to be crossed for the entirety of the three-second window).

[88] Angel Reproposal Letter at 3; Bloomberg Reproposal Letter at 7; Fidelity Reproposal Letter at 7; Nasdaq Reproposal Letter, Exhibit 1 at 5; UBS Reproposal Letter at 4.

[89] Trade-Through Study, Table 1.

[90] *See infra*, section II.A.2 (discussion of need to limit coverage of Order Protection Rule to automated quotations).

[91] Letter from Eric D. Roiter, Senior Vice President and General Counsel, Fidelity Management & Research Company, to Jonathan G. Katz, Secretary, Commission, dated Mar. 28, 2005 ("Fidelity Reproposal Letter II") at 2.

[92] Robert Battalio and Robert Jennings, *Analysis of the Re-Proposing Release of Reg NMS and the OEA's Trade-Through Study* (Mar. 28, 2005) (attached to Fidelity Reproposal Letter II). Other claims made in the Battalio/Jennings Paper are addressed below at notes 151–158, 296 and accompanying text.

[93] Battalio/Jennings Paper at 12–13. For example, the academic study of 1996–1997 Nasdaq data found that 65% of trades were reported with delays of more than 8 seconds.

[94] *See, e.g.*, NASD Notice to Members 98–82 (Oct. 1998) at 1.

[95] *Id.*

the two times differed.[96] The Battalio/Jennings Paper therefore was mistaken when it stated that "[w]ith the data OEA chose to use, we simply cannot conclude anything about actual trade-through rates" and when it "urge[d] the OEA to revise their methodology and conduct a trade-through analysis using audit-trail data."[97] The staff study did indeed use audit trail data when available for Nasdaq stocks and therefore provides a reasonable basis for estimating true trade-through rates for Nasdaq stocks.

As noted above, however, the data for exchange-listed stocks may be more affected by timing latencies because it is generated by both automated and manual markets. The trade-through rates estimated in the staff study therefore may somewhat overstate the true trade-rates for NYSE stocks. Given that the ITS trade-through provisions currently apply to exchange-listed stocks, however, the Commission does not believe that the possibility that true trade-through rates potentially are lower than estimated in the staff study detracts from the strong policy reasons to maintain and strengthen trade-through protection for exchange-listed stocks. Rather, eliminating any trade-through protection for exchange-listed stocks could lead to rates that are as high, or higher, than were conservatively estimated for Nasdaq stocks, which have not been subject to any trade-through restrictions.

Moreover, the evidence from the staff study itself indicates that the concerns about delayed trade reporting discussed at length in the Battalio/Jennings Paper with respect to historical data have largely been resolved. For example, if delayed trade reporting were truly a serious problem that caused the staff study to be flawed, one would expect to see significant rates of trade-throughs by a single trading center's trades of its own quotations—the two data feeds would be out of synchronization with each other because trades were reported slower than quotation updates. In fact, however, the staff study found very low trade-through rates for single trading centers of their own quotations.[98] The primary exception is for trades reported on Nasdaq that trade through Nasdaq quotations, but Nasdaq, unlike the other major markets, does not consist of a single trading center. Rather, it includes the NASDAQ Market Center, several ECNs, and many market makers that trade, to a great extent, separately. Thus, the trade-through rates for Nasdaq reflect true trade-throughs among different trading centers, not false trade-throughs of a single trading center of its own quotations.

Finally, problems with clock synchronization at the various trading centers are unlikely to have materially detracted from the accuracy of the staff study. The great majority of time stamps were assigned to quotations and trades as the data was received by a single entity—Nasdaq as the Plan processor for Nasdaq stocks and SIAC as the Plan processor for NYSE stocks.[99] One commenter, however, asserted that the two Plan processors themselves had major clock synchronization problems between quotation data and trade data.[100] If this were in fact the case, the staff study likely would have found a high rate of trade-throughs by a single market of its own quotations, because the Plan processor's time stamps for the market's quotations would have been out of synchronization with its time stamps for the market's trades. As noted in the preceding paragraph, the staff study found few trade-throughs by a single market of its own quotations, thereby indicating that the Plan processors' quotation data and trade data are not materially out of synchronization.

ii. Significance of Trade-Through Rates

Some commenters questioned whether the trade-through rates found by the staff study were significant enough to warrant adoption of the trade-through reproposal.[101] They believed, for example, that the rates were low, particularly when considered as a percentage of total trades (2.5% for both Nasdaq and NYSE stocks) and as the percentage of total share volume represented by the total displayed size of quotations that were traded through (1.9% and 1.2%, respectively, for Nasdaq and NYSE stocks).[102] They therefore asserted that the rates did not demonstrate a serious problem or a need for regulatory action to address trade-throughs.

The Commission does not agree that the trade-through rates found in the staff study are insignificant, nor does it believe that the total number of trade-throughs is the sole consideration in evaluating the need for the Order Protection Rule. A valid assessment of their significance and the need for intermarket protection against trade-throughs must be made in light of the Exchange Act objectives for the NMS that would be furthered by the Order Protection Rule, including: (1) To promote best execution of customer market orders; (2) to promote fair and orderly treatment of customer limit orders; and (3) by strengthening protection of limit orders, to promote greater depth and liquidity for NMS stocks and thereby minimize investor transaction costs. The staff study examined trade-through rates from a variety of different perspectives, including percentage of trades, percentage of total share volume, percentage of share volume of trades of less than 10,000 shares, and percentage of total share volume of traded-through quotations.[103] In evaluating the need for the Order Protection Rule, the different measures vary in their relevance depending on the particular objective under consideration.

For example, the percentage of total trades that receive inferior prices is a particularly important measure when assessing the need to promote best

[96] Trade-Through Study at 8 ("Trade data from the Nastraq file was used for the analysis of Nasdaq stocks. This file contains the executed price, share volume, trade report time, trade execution time, and an indicator of non-regular or unusual trade reporting or settlement conditions. The Nastraq trade file was selected over the TAQ trade file, as the latter does not have trade execution time, only trade report time.").

[97] Battalio/Jennings Paper at 20.

[98] *See, e.g.*, Trade-Through Study, Table 5 (a rounded 0.0% of CSE trades are trade-throughs of CSE quotations in Nasdaq stocks; a rounded 0.0% of PCX trades are trade-throughs of PCX quotations in Nasdaq stocks), and Table 12 (0.2% of NYSE trades are trade-throughs of NYSE quotations in NYSE stocks).

[99] As discussed above, the staff study used the time of trade execution assigned by individual trading centers in their audit trail data for Nasdaq stocks when this time was available and differed from the time of trade report. The staff study noted that this occurred for approximately 5–10% of Nasdaq trades. Trade-Through Study at 8 n. 8. As a result, problems with synchronization of clocks at the various Nasdaq trading centers (which must be synchronized within three seconds of the standard set by the National Institute of Standards and Technology) could have affected the time stamps for these trades. Nevertheless, the fact that trade-through rates remain significant for both Nasdaq stocks and exchange-listed stocks even when the quotation window is extended to a full eight seconds (thereby eliminating many true trade-throughs as well as false trade-throughs caused by unsynchronized time stamps) indicates that the staff study's estimates of trade-through rates were not materially affected by potential clock synchronization problems. Moreover, the trades most likely to be reported with different trade execution times than trade report times are large, manually-executed block trades reported by dealers. These are the very types of trades that commenters admitted often deliberately bypass displayed quotations. *See, e.g.*, Fidelity Reproposal Letter at 3; Nasdaq Reproposal Letter, Exhibit 1 at 4.

[100] Angel Reproposal Letter at 3.

[101] ArcaEx Reproposal Letter at 6; Fidelity Reproposal Letter at 8; Instinet Reproposal Letter at 6 n. 6; Nasdaq Reproposal Letter, Exhibit 1 at 4; UBS Reproposal Letter at 4.

[102] The 1.9% and 1.2% figures include only the total displayed size of quotations that were traded through by trades executed at prices inferior to the displayed quotations.

[103] *See, e.g.*, Trade-Through Study at 1–2 and Tables 1, 4, 6, 7–8, 11, 13.

execution of customer market orders. The staff study found that 1 of every 40 trades (2.5%) for both Nasdaq and NYSE stocks have an execution price that is inferior to the best displayed price, or approximately 98,000 trades per day in Nasdaq stocks alone.[104] As discussed above,[105] investors (and particularly retail investors) often may have difficulty monitoring whether their orders receive the best available prices, given the rapid movement of quotations in many NMS stocks. The Commission believes that furthering the interests of these investors in obtaining best execution on an order-by-order basis is a vitally important objective that warrants adoption of the Order Protection Rule.

The percentage of total trades that receive inferior prices also is quite relevant when assessing the need to promote fair and orderly treatment of limit orders for NMS stocks. Many of the limit orders that are bypassed are small orders that often will have been submitted by retail investors. One of the strengths of the U.S. equity markets and the NMS is that the trading interests of all types and sizes of investors are integrated, to the greatest extent possible, into a unified market system. Such integration ultimately works to benefit both retail and institutional investors. Retail investors will participate directly in the U.S. equity markets, however, only to the extent they perceive that their orders will be treated fairly and efficiently. The perception of unfairness created when a retail investor has displayed an order representing the best price for an NMS, yet sees that price bypassed by 1 in 40 trades, is a matter of a great concern to the Commission. The Order Protection Rule is needed to maintain the confidence of all types of investors that their orders will be treated fairly and efficiently in the NMS.

The third principal objective for the Order Protection Rule is to promote greater depth and liquidity for NMS stocks and thereby minimize investor transaction costs. Depth and liquidity will be increased only to the extent that limit order users are given greater incentives than currently exist to display a larger percentage of their trading interest. The potential upside in terms of greater incentives for display is most appropriately measured in terms of the share volume of trades that currently do not interact with displayed orders. It is this volume of trading interest that will begin interacting with displayed orders after implementation of the Order Protection Rule.

The share volume of trade-throughs, rather than the number of trade-throughs, is most useful for assessing the effect of the Order Protection Rule on depth and liquidity because very small trades represent such a large percentage of trades in today's markets, but a small percentage of share volume. For example, the staff study found that, for Nasdaq stocks, 100-share trades represented 32.7% of the number of trade-throughs, but only 0.8% of the share volume of trade-throughs.[106] Thus, the number of trade-throughs is useful for assessing the number of investors, particularly retail investors, affected by trade-throughs, while the share volume of trade-throughs is useful for assessing the extent to which depth and liquidity are affected by trade-throughs. For example, 41.1% of the share volume of trade-throughs in Nasdaq stocks is attributable to trades of greater than 1000 shares that bypass quotations of greater than 1000 shares.[107] Addressing the failure of this substantial volume of trading interest to interact with significant displayed quotations is a primary objective of the Order Protection Rule.

In contrast, the share volume of quotations that currently are traded through grossly underestimates the potential for increased incentives to display because it reflects only the current size of displayed quotations in the *absence* of strong price protection. As a result, the share volume of quotations that currently are traded through is a symptom of the problem that the Order Protection Rule is designed to address—a shortage of quoted depth—rather than an indication of the benefits that the Order Protection Rule will achieve. For example, when many Nasdaq stocks can trade millions of shares per day, but have average displayed size of less than 2000 shares at the NBBO, it will be nearly impossible for trade-throughs of displayed size to account for a large percentage of total share volume—there simply is not enough displayed depth.[108] Small displayed depth is evidence of a market problem, not market quality.

Every trade-through transaction in today's markets potentially sends a message to limit order users that their displayed quotations can be and are ignored by other market participants. The cumulative effect of such messages over time as trade-throughs routinely occur each trading day should not be underestimated. When the total share volume of trade-through transactions that do not interact with displayed quotations reaches 9% or more for many of the most actively traded Nasdaq stocks,[109] this message is unlikely to be missed by those who watched their quotations being traded through. Certainly, the routine practice of trading through displayed size is most unlikely to prompt market participants to display even greater size.

Thus, the Commission believes that the percentage of share volume in a stock that trades through displayed and accessible quotations is a useful measure for assessing the potential increase in incentives for display of limit orders after implementation of the Order Protection Rule. In particular, the dual measurements of percentage of share volume of traded-through quotations (an overall 1.9% for Nasdaq stocks) and the percentage of share volume of trades that bypass displayed quotations (an overall 7.9% for Nasdaq stocks) likely represent the lower and upper bounds for a potential improvement in depth and liquidity after implementation of the Order Protection Rule.

Commenters opposing the trade-through reproposal questioned whether protection against trade-throughs would lead to any increase in the use of limit orders, particularly given the many reasons militating against display (*e.g.*, displayed limit orders give a free option to all other market participants to trade at the limit order price).[110] The Commission is aware of a variety of reasons that currently deter market participants from displaying their trading interest in full. Indeed, it is the existence of these negative factors, combined with a shortage of positive incentives for display, that have contributed to the relatively small displayed depth at the best prices that characterizes the market for many NMS stocks today. A large investor interested in buying 50,000 shares of a stock is unlikely to suddenly decide to display all of its trading interest simply because its order is given trade-through

[104] *Id.*, Tables 1, 8. In October 2004, there were 3.9 million average daily trades reported in Nasdaq stocks. Source: *http://www.nasdaqtrader.com*. The average trade-through rate of 2.5% for Nasdaq stocks yields average daily trade-throughs of approximately 98,000.

[105] *Supra*, note 53 and accompanying text.

[106] Trade-Through Study, Table 6.

[107] *Id.*

[108] *See* Supplemental Study at 4. Commission staff examined the average displayed depth in Nasdaq stocks to help evaluate commenters' claims concerning the current level of depth and liquidity for such stocks. The Supplemental Study measured the total depth displayed at the NBBO in Nasdaq stocks as follows: an average of 1,833 shares, a median of 581 shares, 384 shares at the 25th percentile, and 987 shares at the 75th percentile.

[109] *See* Trade-Through Study, Tables 4 and 11.

[110] *See, e.g.*, Instinet Reproposal Letter at 6 and n. 6; UBS Reproposal Letter at 3.

protection. The objective for the Order Protection Rule is more modest. The Rule is designed to increase the perceived benefits of order display, against which the negatives are balanced. As a result, the market participant that currently displays only 500 shares of its 50,000-share trading interest might be willing to display 1000 shares. The collective effect of many market participants reaching the same conclusion would be a material increase in the total displayed depth in the market, thereby improving the transparency of price discovery and reducing investor transaction costs.

Moreover, because of the enormous volume of trading in NMS stocks, even a small percentage improvement in depth and liquidity could lead to very significant dollar benefits for investors in the form of reduced transaction costs. As discussed in section II.A.6 below, for example, the annual implicit transaction costs of large institutional investors are estimated at more than $30 billion in 2003.[111] As a result, even a small percentage reduction in these costs because of improved depth and liquidity would result in very substantial annual savings for millions of mutual fund and pension fund investors. The Commission therefore believes that the estimated trade-through rates in the staff study support the need for enhanced protection of limit orders as a means to promote greater depth and liquidity in NMS stocks.

b. Efficiency of Trading in Nasdaq and NYSE Stocks

A few commenters on the original proposal submitted empirical data to support their claim that trading in Nasdaq stocks currently is more efficient than trading in NYSE stocks.[112] Specifically, they submitted tables asserting that effective spreads in Nasdaq stocks in the S&P 500 are significantly narrower than effective spreads in NYSE stocks in the S&P 500.[113] To help assess and respond to the views of commenters on market efficiency, the Commission staff analyzed Rule 11Ac1–5 reports and other trading data to evaluate the markets for Nasdaq and NYSE stocks.[114]

In its comment on the reproposal, Nasdaq argued that the staff studies contained flaws in their methodologies.[115] With respect to the S&P Index Study, Nasdaq stated that the execution quality statistics were drawn from an atypical month and that the methodology for analyzing effective spreads favored higher-priced NYSE stocks over lower-priced Nasdaq stocks. The S&P Index Study presented statistics from January 2004, however, because this was the month selected by Nasdaq in the comment letter that it submitted on the proposal in July 2004. Moreover, the general statistics reported by Nasdaq for later months do not appear to differ materially from those for January 2004.[116] In addition, the S&P Index Study analyzed investor transaction costs in terms of a percentage of investment rather cents per share because, as discussed below, the percentage of investment methodology most reflects economic reality for investors.[117]

With respect to the Matched Pairs Study, Nasdaq asserted that it largely examined small stocks. Nasdaq noted, for example, that more than 25% of the stocks included in the Matched Pairs Study were not eligible for NYSE listing and that only 10% of the stocks were included in the Nasdaq-100 Index. The purpose of the Matched Pairs Study, however, was to compare execution quality in Nasdaq and NYSE across a broad range of stocks, not solely for large stocks or those that were eligible for NYSE listing. Although 25% of the stocks may not have been eligible for NYSE listing, the staff analysis used matching criteria more directly designed to produce an "apples-to-apples" comparison—market capitalization, price, average daily dollar volume (adjusted downward by 30% for Nasdaq stocks to reflect trade reporting practices in such stocks), and relative price range. The Commission therefore believes that the staff studies provide a valid basis to compare trading in Nasdaq stocks and NYSE stocks.

The staff studies indicate that the execution quality statistics submitted by commenters on the original proposal are flawed. The claimed large and systematic disparities between Nasdaq and NYSE effective spreads disappear when an analysis of execution quality more appropriately controls for differences in stocks, order types, and order sizes.[118] The staff studies reveal that both the market for Nasdaq stocks and the market for NYSE stocks have significant strengths. But, as discussed below, both markets also have weaknesses that could be reduced by strengthened protection against trade-throughs.

First, the effective spread analyses submitted by commenters do not, in a number of respects, reflect appropriately the comparative transaction costs in Nasdaq and NYSE stocks.[119] They were

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[111] Implicit transaction costs are associated with the prices at which trades are executed, in contrast with explicit transaction costs such as commissions. Implicit costs include the adverse price movements experienced by institutional investors when searching for the liquidity and executing the orders necessary to trade in large size. *See infra*, notes 146, 300–305, 990, and accompanying text.

[112] Instinet Letter, Exhibit A; Nasdaq Letter II, Attachment II. One commenter on the reproposal referred the Commission to an academic study of trading in Nasdaq and NYSE stocks, asserting that its conclusion was that "bid-ask spreads were shown to be narrower and liquidity shown to be greater in Nasdaq stocks." STANY Reproposal Letter at 8. The referred study was Lehn, Patro, and Shastri, *Information Shocks and Stock Market Liquidity: A Comparison of the New York Stock Exchange and Nasdaq* (presented at the American Enterprise Institute on June 10, 2004) (available at *www.aei.com*). The commenter misinterpreted, however, the results of the study. The study found that "during both the calm and stress periods, quoted and effective bid-ask spreads are significantly lower for NYSE versus Nasdaq stocks, a result generally consistent with the existing literature." *Id.* at 2. Finally, the Mercatus Center referenced several statistical studies in its comment letter and concluded that the findings of such studies are mixed. Letter from Susan E. Dudley, Director, Regulatory Studies Program, Mercatus Center, George Mason University, to Jonathan G. Katz, Secretary, Commission, dated May 24, 2004 ("Mercatus Center Letter") at 3.

[113] Nasdaq and Instinet based their tables on statistics derived from the reports ("Dash 5 Reports") on order execution quality made public by markets pursuant to Exchange Act Rule 11Ac1–5 (redesignated as Rule 605 under Regulation NMS). Their source for these reports is Market Systems, Inc. ("MSI"), a private vendor that collects the reports of all markets each month and includes them in a searchable database. MSI also is the source of the Dash 5 Reports used in the staff analyses.

[114] Memorandum to File, from Office of Economic Analysis, dated December 15, 2004 (comparative analysis of execution quality for NYSE and NASDAQ stocks based on a matched sample of stocks) ("Matched Pairs Study"); Memorandum to File, from Division of Market Regulation, dated December 15, 2004 (comparative analysis of Rule 11Ac1–5 statistics by S&P Index) ("S&P Index Study"). The Matched Pair Study and S&P Index Study are in Public File No. S7–10–04 and are available for inspection on the Commission's Internet Web site (*http://www.sec.gov*).

[115] Nasdaq Reproposal Letter, Exhibit 1 at 1.

[116] *See, e.g.*, id., Exhibit 1 at 15 (table showing that blended effective spread statistics in terms of cents-per-share for both market orders and marketable limit orders generally declined throughout 2004 for both Nasdaq and NYSE stocks).

[117] To the extent Nasdaq has more low-priced stocks than the NYSE, the Dash 5 statistics favor Nasdaq in the larger order size categories because of "bracket creep" "*i.e.*, it typically will be easier to execute a 2000 share order in a $5 stock ($10,000 total volume) than to execute a 2000 share order in a $40 stock ($80,000 total volume), assuming the stocks are otherwise comparable.

[118] Matched Pairs Study, Tables 4–10; S&P Index Study, Tables 2–9.

[119] The effective spread is a useful measure of transaction costs for market orders, particularly for small order sizes, because it reflects the prices actually received by investors when compared to the best quotes at the time a market received an order. Consequently, unlike the quoted spread, the effective spread reflects any cost to investors caused by movement in prices during a delay between receipt of an order and execution of an order. In other words, the effective spread penalizes slow

presented in terms of "cents-per-share" and therefore failed to control for the varying level of stock prices between Nasdaq stocks and NYSE stocks in the S&P 500. Lower priced stocks naturally will tend to have lower spreads in terms of cents-per-share than higher priced stocks, even when such cents-per-share spreads constitute a larger percentage of stock price and therefore represent transaction costs for investors that consume a larger percentage of their investment. By using cents-per-share statistics, commenters did not adjust for the fact that the average prices of Nasdaq stocks are significantly lower than the average prices of NYSE stocks. For example, the average price of Nasdaq stocks in the S&P 500 in January 2004 was $34.14, while the average price of NYSE stocks was $41.32.[120]

The effective spread analyses submitted by commenters also were weakened by their failure to address the much lower fill rates of orders in Nasdaq stocks than orders in NYSE stocks. The commenters submitted "blended" statistics that encompassed both market orders and marketable limit orders. The effective spread statistics for these order types are not comparable, however, because market orders do not have a limit price that precludes their execution at prices inferior to the prevailing market price at time of order receipt. In contrast, the limit price of marketable limit orders often precludes an execution, particularly when there is a lack of liquidity and depth at the prevailing market price. For example, the fill rates for marketable limit orders in Nasdaq stocks generally are less than 75%, and often fall below 50% for larger order sizes.[121]

Accordingly, investors must accept trade-offs when deciding whether to submit market orders or marketable limit orders (particularly when the limit price equals the current market price). Use of a limit price generally assures a narrower spread by precluding an execution at an inferior price. By precluding an execution, however, the limit price may cause the investor to "miss the market" if prices move away (for example, if prices rise when an investor is attempting to buy). Effective spreads for marketable limit orders therefore represent transaction costs that are conditional on execution, while effective spreads for market orders much more completely reflect the entire implicit transaction cost for a particular order. Market orders represent only approximately 14% of the blended flow of market and marketable limit orders in Nasdaq stocks (reflecting the fact that ECNs now dominate Nasdaq order flow and limit orders represent the vast majority of ECN order flow).[122] In contrast, market orders represent approximately 36% of the blended order flow in NYSE stocks.[123] Accordingly, the effective spread statistics for marketable limit orders, and particularly for orders in Nasdaq stocks, must be considered in conjunction with the fill rate for such orders "while a narrow spread is good, the benefits are greatly limited if investors are unable to obtain an execution at that spread. The analyses presented by the commenters, however, did not address the respective fill rates for Nasdaq stocks and NYSE stocks or reflect the inherent differences in measuring the transaction costs of market orders and marketable limit orders.

The analyses prepared by Commission staff are designed to provide appropriate evaluations of comments on the efficiency of trading in Nasdaq and NYSE stocks. In particular, they are more finely tuned to evaluate trading for different types of stocks with varying trading volume, different types of orders, and different sizes of orders. These analyses indicate that the markets for Nasdaq and NYSE stocks each have weaknesses that an intermarket price protection rule could help address. By "weakness," the Commission simply means that there appears to be considerable room for improvement. For example, the effective spread statistics for large, electronically-received market orders in NYSE stocks show significant "slippage"—the amount by which orders are executed at prices inferior to the national best bid or offer ("NBBO") at the time of order receipt.[124] Slippage often results in effective spreads for large orders that are many times wider than the effective spreads for small orders in the same NYSE stocks. By protecting automated quotations, the Order Protection Rule should enhance the depth and liquidity available for large, electronic orders in NYSE stocks and thereby improve their execution quality.

For Nasdaq stocks, the Rule 11Ac1–5 statistics reveal very low fill rates for larger sizes of marketable limit orders (*e.g.*, 2000 shares or more), which generally fall below 50% for most Nasdaq stocks. Contrary to the assertion of some commenters,[125] certainty of *execution* for large marketable limit orders clearly is not a strength of the current market for Nasdaq stocks. Certainty of a fast response is a strength, but much of the time the response to large orders will be a "no fill" at any given trading center.[126]

Two commenters on the reproposal disputed whether low fill rates for marketable limit orders in Nasdaq stocks indicate any weakness that needed to be addressed.[127] Instinet, for example, believed that "the Commission is misplaced in its contention that low fill rates in Nasdaq stocks are a weakness of that market," and that they are a phenomenon "intrinsic to electronic markets in which market participants are free to cancel and replace orders."[128] Instinet also noted that many market centers in Nasdaq stocks have significant reserve size in addition to displayed size and that market participants commonly routed oversized marketable limit orders to attempt to interact with reserve size.[129]

markets for failing to execute trades at their quoted prices at the time they received an order. It therefore provides an appropriate criterion with which to compare execution quality between automated and manual markets for comparable stocks, order types, and order sizes. As discussed below, however, effective spread statistics do not capture transaction costs that are attributable to low fill rates—the failure to obtain an execution—for marketable limit orders.

[120] S&P Index Study, Table 1.

[121] Matched Pairs Study, Table 10; S&P Index Study, Tables 7, 9.

[122] Most market orders in Nasdaq stocks are executed by market-making dealers pursuant to agreement with their correspondent or affiliated brokers.

[123] Matched Pairs Study at 1.

[124] Matched Pairs Study, Tables 4, 7; S&P Index Study, Tables 2, 4, 6, 8.

[125] *See, e.g.*, Instinet Reproposal Letter at 7; Nasdaq Letter II at 6. In addition to effective spread statistics, Instinet submitted statistics indicating that combined market and marketable limit orders in Nasdaq stocks were more likely to be executed at or inside the NBBO than such orders in NYSE stocks. Instinet Letter, Table I–C. These statistics, however, only reflect orders that in fact receive an execution—not the large volume of orders in Nasdaq stocks that fail to receive any execution at all.

[126] Some commenters asserted that the large number of limit orders in Nasdaq stocks indicates that sufficient incentives exist for the placement of limit orders in such stocks. *See, e.g.*, Instinet Letter at 11; Letter from Thomas N. McManus, Managing Director & Counsel, Morgan Stanley & Co. Incorporated, to Jonathan G. Katz, Secretary, Commission, dated August 19, 2004 ("Morgan Stanley Letter") at 14. Strengthened intermarket trade-through protection, however, is designed to improve the *quality* of limit orders in a stock, particularly their displayed size, and thereby promote greater depth and liquidity. This goal is not achieved, for example, by a large number of limit orders with small sizes and high cancellation rates.

[127] Instinet Reproposal Letter at 6–7; Nasdaq Reproposal Letter at 5.

[128] Instinet Reproposal Letter at 6–7.

[129] Instinet Reproposal Letter at 7. Instinet also asserted that low fill rates for large marketable limit orders might be attributable to the frequent locking of markets in low-priced stocks. In fact, however, the Dash 5 fill rates for large orders in low-priced stocks generally are higher than those for high-priced stocks, likely because the dollar value of such orders is low (*i.e.*, 5000 shares of a $5 stock ($25,000) generally will be easier to trade than 5000

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Similarly, Nasdaq stated that the staff studies "erroneously conclude that differential fill rates for large marketable limit orders in Nasdaq-listed and NYSE-listed stocks are evidence of a defect in Nasdaq's market structure," and that they failed "to consider a widely used order routing technique of intentionally sending oversized orders at displayed quotes searching (also known as "pinging") for reserves within the many limit order books trading Nasdaq-listed securities." [130] Nasdaq also asserted that marketable limit orders are "exceedingly popular in electronic venues where they have effectively supplanted market orders as the order of choice in accessing availability liquidity at the current price." [131]

The Commission continues to believe that fill rates for large marketable limit orders are a useful measure of order execution quality for Nasdaq stocks. They are especially useful because they measure the availability of both displayed and undisplayed liquidity, whereas simply measuring displayed size would understate the total liquidity readily available for Nasdaq stocks. Indeed, the existence of "pinging" orders searching for reserve size in Nasdaq stocks at electronic markets is widely known. Such oversized orders (*i.e.*, orders with sizes greater than displayed size) could as aptly be labeled "liquidity search" orders as "pinging" orders. Given the relatively small displayed size in nearly all Nasdaq stocks (*i.e.*, significantly less than 2000 shares),[132] orders with sizes of 2000 to 4999 shares and 5000 to 9999 shares (the two largest Dash 5 size categories) generally will exceed the displayed size. Thus, low fill rates demonstrate that the total displayed and reserve liquidity available for Nasdaq stocks at any particular trading center typically is small compared to the demand for liquidity at the inside prices. Moreover, increased displayed liquidity—a principal goal of the Order Protection Rule—would promote market efficiency by reducing the uncertainty and costs associated with the need for market participants to "ping" electronic markets for liquidity that is held in reserve.

The Reproposing Release did not suggest, however, that the *differential* fill rates for large marketable limit orders in Nasdaq and NYSE stocks were useful in comparing the liquidity and depth available in each market. Instead, the Reproposing Release focused on the most relevant Dash 5 statistic for each market, given its particular trading characteristics. As noted above, the significant amount of "slippage" in the execution of electronically-received large market orders in NYSE stocks suggest that improved incentives for display of automated trading interest will help improve execution quality for NYSE stocks. Notably, Instinet and Nasdaq agreed that slippage rates for automated market orders represented a problem in the market for NYSE stocks.[133] Because market participants generally choose not to submit market orders to electronic markets in Nasdaq stocks, however, the fill rates for marketable limit orders are a more relevant Dash 5 statistic to assess depth and liquidity in Nasdaq stocks.

Accordingly, the Commission's concern with fill rates for larger orders in Nasdaq stocks is not that they are lower than those for NYSE stocks, but that they are very low in absolute terms—often falling well below 50%.[134] Moreover, the larger order sizes typically account for a small percentage of executed shares compared to the executed shares of smaller order sizes.[135] When considered in conjunction with one another, the low fill rates and small percentage of executed shares indicate substantial room for improvement in depth and liquidity in many Nasdaq stocks. An important objective for Regulation NMS as a whole is to facilitate more efficient trading in larger sizes, an objective that has become much more important to large investors since decimalization.[136] An improvement in fill rates for larger sized orders (or an increase in their percentage of executed shares) would evidence progress toward this objective.

Fill rates for marketable limit orders, however, offer only indirect evidence of the total transaction costs incurred by investors. They indicate that no execution was obtained for an investor order at a particular trading center, but do not indicate how the investor subsequently fared in obtaining an execution. As discussed above, there are significant trade-offs between marketable limit orders and market orders. The use of a restrictive limit price at the NBBO precludes any slippage in execution price, but also may cause an investor to miss the market if prices subsequently move away from the order (*i.e.*, rise when an investor is attempting to buy or fall when an investor is attempting to sell). To evaluate the total transaction costs associated with an order that goes unfilled or receives a partial fill, it is necessary to know the price at which the investor ultimately obtained an execution for its full order.

To help the Commission evaluate and respond to commenters' criticisms and, in particular, to supplement its analysis of fill rates as a measure of depth and liquidity for Nasdaq stocks and to evaluate the extent to which missed fills may lead to higher investor transaction costs, Commission staff also examined execution quality statistics for marketable limit orders in Nasdaq-100 Index stocks that are executed outside the best quotes at the Inet ATS and the NASDAQ Market Center.[137] By definition, such orders have been placed with liberal limit prices that give more flexibility for executions away from the NBBO than orders with limit prices that are restrictively set at the NBBO. Accordingly, the slippage rates for such orders give another indication of

shares of a $50 stock ($250,000)). *See infra*, text accompanying notes 141–142 (average fill rates for large orders in low-priced stocks in Nasdaq–100 Index are much higher than fill rates for most other stocks in Index).

[130] Nasdaq Reproposal Letter at 5.

[131] *Id.*, Exhibit 1 at 8.

[132] Supplemental Trade-Through Study at 5. In Fall 2003, only 273 Nasdaq stocks had average displayed size at the NBBO of 2000 or greater shares, 213 of which were low-priced stocks (prices of less than $10 per share).

[133] Instinet Reproposal Letter at 6 ("we ourselves make a point of a high level of slippage as being an issue in the NYSE market"); Nasdaq Letter II, Attachment II (table comparing market order shares traded outside the quote for Nasdaq and NYSE stocks).

[134] *See, e.g.*, Matched Pairs Study, Table 10.

[135] *See, e.g.*, Matched Pairs Study, Table 3. Nasdaq also asserted that the difference in share volume of Dash 5 marketable limit orders for Nasdaq stocks versus NYSE stocks indicated the superiority of Nasdaq execution quality for marketable limit orders. The difference in marketable limit order share volume in Nasdaq and NYSE stocks, however, is attributable to structural differences between the two markets. For example, many large orders in NYSE stocks are handled manually by brokers on the NYSE floor and therefore are not included in the Dash 5 statistics, which only encompass electronic orders. In addition, a greater volume of market orders are executed in NYSE stocks than in Nasdaq stocks. Matched Pairs Study, Table 3. As discussed below, the need for a restrictive limit price to prevent outside-the-quote executions likely is an additional reason that Nasdaq market participants choose to use marketable limit orders rather than market orders. *See infra*, notes 138–139 and accompanying text.

[136] *See* Reproposing Release, 69 FR at 77425.

[137] Memorandum to File, from Division of Market Regulation, dated April 6, 2005 (analysis of Rule 11Ac1–5 statistics for Nasdaq-100 Index) ("Nasdaq-100 Index Supplemental Study"). The Nasdaq100 Index Supplemental Study has been placed in Public File No. S7–10–04 and is available for inspection on the Commission's Internet Web site (*http://www.sec.gov*). The staff examined Nasdaq-100 stocks in response to Nasdaq's suggestion that they are most appropriate for evaluating execution quality in the market for Nasdaq stocks. *See* Nasdaq Reproposal Letter, Exhibit 1 at 1, 11. The statistics are from December 2004 and are equal-stock weighted to give a more representative view of trading across all stocks, rather than a view concentrated on a few stocks that are much more actively traded than the others.

available liquidity for Nasdaq-100 stocks.

The statistics for outside-the-quote executions in marketable limit orders buttress a conclusion that there is significant room for improved depth and liquidity in Nasdaq stocks. For example, the Inet ATS did not fill 83.0% of its large marketable limit orders.[138] Of the orders it executed, 19.5% of shares were executed outside the quote by an average of 2.7 cents. Thus, while the overall quoted and effective spreads for executed shares for large orders were, respectively, 1.6 cents and 2.5 cents, the spread for outside the quote executions was 7.0 cents—438% wider than the narrow quoted spread. The statistics for the NASDAQ Market Center are similar. It did not fill 68.4% of its large marketable limit orders.[139] Of the orders it executed, 14.7% were executed outside the quote by an average of 2.3 cents. The overall quoted and effective spreads for large orders were, respectively, 1.6 cents and 2.5 cents, compared to 6.2 cents for outside the quote executions—388% wider than the narrow quoted spread. The outside-the-quote spreads provide the best available indication of execution quality that otherwise would have been obtained at the time orders were placed for the 83.0% and 68.4% of shares that were not filled due to their restrictive limit price. The outside-the-quote spreads also are relevant in assessing the reasons why market participants most often use marketable limit orders with limit prices at the NBBO rather than market orders when trading Nasdaq stocks.

In addition, the supplemental staff study separately examined fill rates and executed share volume for types of Nasdaq-100 stocks where liquidity for orders with large share sizes can reasonably be expected to be highest.[140] These stock groupings were selected primarily to assess whether low fill rates for large marketable limit orders are an inherent part of the structure of the market for Nasdaq stocks. Specifically, the supplemental staff study calculated fill rates and executed share volume for the three Nasdaq stocks with the largest capitalization—Microsoft, Intel, and Cisco. These three stocks are widely recognized among all Nasdaq stocks as having markets with significant depth and liquidity. In addition, the supplemental staff study examined the seven Nasdaq-100 stocks with share prices of less than $10 per share. Liquidity for orders with large *share* sizes in these stocks can be expected to be higher than for stocks with higher prices because the *dollar* sizes are much smaller (*e.g.*, a 5000 share order in a $5 stock totals $25,000, whereas a 5000 share order in a $30 stock totals $150,000). In terms of economic reality, therefore, large orders in a low-priced stock generally are easier to execute than large orders in a higher-priced stock, assuming the stocks are otherwise comparable. Finally, the supplemental staff study separately examined the other 90 stocks in the Nasdaq-100 Index (*i.e.*, stocks with prices of at least $10 per share other than Microsoft, Intel, and Cisco).

The supplemental staff study reveals that low fill rates for large marketable limit orders are not an inherent feature of the market for Nasdaq stocks. For example, the NASDAQ Market Center fill rates for large orders are 76.7% for the three large-cap stocks, 70.1% for the low-priced stocks, and 27.1% for the other 90 stocks in the Nasdaq-100 Index.[141] Similarly, the Inet ATS fill rates for large orders are 58.5% for the three large-cap stocks, 55.0% for low-priced stocks, and 12.6% for the other 90 stocks in the Nasdaq-100 Index.[142]

The order execution quality measures included in Dash 5 reports do not, of course, reflect all types of investor transaction costs. They generally focus on the execution price of individual orders in comparison with the best quoted prices at the time orders are received. As a result, they do not capture transaction costs that are associated with the short-term movement of quoted prices. To further assist the Commission in evaluating the views of commenters, Commission staff has analyzed price volatility for trading in Nasdaq and NYSE stocks.[143] This analysis particularly focuses on transitory volatility—short-term fluctuations away from the fundamental or "true" value of a stock. Transitory volatility should be distinguished from fundamental volatility—price fluctuations associated with factors independent of market structure, such as earnings changes and other economic determinants of stock prices. The staff analysis found that on average both intraday volatility and transitory volatility are higher for Nasdaq stocks than for NYSE stocks.[144] Excessive transitory volatility indicates a shortage of depth and liquidity that otherwise would minimize the effect of short-term order imbalances. Such volatility may provide benefits in the form of profitable trading opportunities for short-term traders or market makers, but these benefits come at the expense of other investors, who would be buying at artificially high or selling at artificially low prices. Retail investors, in particular, tend to be relatively uninformed concerning short-term price movements and are apt to bear the brunt of the trading costs associated with excessive transitory volatility.[145] The Order Protection Rule, by promoting greater depth and liquidity, is designed to help reduce excessive transitory volatility in Nasdaq stocks.

Finally, an important measure of depth and liquidity for NMS stocks is the transaction costs actually incurred by institutional investors when they trade in large size. These costs are not readily available for public view because their measurement requires access to a large volume of private order and execution data of institutional investors. One of the leading authorities on institutional transaction costs uses an extensive database of such data obtained from its clients to calculate their transaction costs. It recently published calculations of average transaction costs for Nasdaq and NYSE stocks during the fourth quarter of 2003 as, respectively, 83 basis points and 55 basis points.[146] Given the significant

[138] Nasdaq-100 Index Supplemental Study, Table 1 (orders with sizes of 5000 to 9999 shares).

[139] Nasdaq-100 Index Supplemental Study, Table 5 (orders with sizes of 5000 to 9999 shares).

[140] Nasdaq-100 Index Supplemental Study, Tables 2–3, 6–7.

[141] Nasdaq-100 Index Supplemental Study, Tables, 6–8.

[142] Nasdaq-100 Index Supplemental Study, Tables 2–4.

[143] Memorandum to File, from Office of Economic Analysis, dated December 15, 2004 (analysis of volatility for stocks switching from NASDAQ to NYSE) ("Volatility Study"). The Volatility Study has been placed in Public File No. S7–10–04 and is available for inspection on the Commission's Internet Web site (*http://www.sec.gov*).

[144] Volatility Study at 1. Nasdaq raised a number of objections to the Volatility Study in its comment on the reproposal. Nasdaq Reproposal Letter, Exhibit 1 at 16–19. To help the Commission evaluate these objections, Commission staff performed supplemental analysis to reflect Nasdaq's concerns and to provide a fuller description of volatility for Nasdaq and NYSE stocks. The results of the additional analysis confirm the basic conclusions reached in the original analysis "the stocks that switched from Nasdaq listing to NYSE listing during the sample period experienced a decrease in total volatility and in transitory volatility. Memorandum to File, from Office of Economic Analysis, dated April 6, 2005 (additional analysis of volatility for stocks switching from NASDAQ to NYSE) ("Supplemental Volatility Study"). The Supplemental Volatility Study has been placed in Public File No. S7–10–04 and is available for inspection on the Commission's Internet Web site (*http://www.sec.gov*).

[145] *See infra*, section I.A.2 (discussion of Exchange Act emphasis on minimizing volatility to protect interests of investors).

[146] Wayne H. Wagner, *Faster!*, 1 *FIXGlobal* 54, 55 (3rd Quarter 2004) (estimate of Plexus Group, Inc.). Explicit transaction costs such as commissions represent only a small part of total transaction costs calculated by Plexus (*e.g.*, 12 basis points for large capitalization stocks). The remaining implicit

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differences in the overall nature of Nasdaq and NYSE stocks, these figures cannot be used to assess the relative efficiency of the two markets. The figures for both, however, suggest room for improved depth and liquidity, particularly when compared with the average quoted spreads in NMS stocks, which generally are less, and often much less, than 10 basis points for large capitalization stocks that dominate trading volume.[147]

c. Need for Intermarket Rule to Achieve Effective Protection Against Trade-Throughs

As discussed in the preceding section, the relevant data, as well as the policy choices the Commission has articulated above, supports the need for strengthened protection against trade-throughs in both Nasdaq and exchange-listed stocks. Some commenters argued, however, that competitive forces alone would achieve the fairest and most efficient markets.[148] In particular, they asserted that reliance on efficient access to markets and brokers' duty of best execution would be sufficient without the need for an intermarket rule against trade-throughs. This argument, however, fails to take into account two structural problems—principal/agent conflicts of interest and "free-riding" on displayed prices.

Agency conflicts may occur when brokers have incentives to act otherwise than in the best interest of their customers. For example, brokers may have strong financial and other interests in routing orders to a particular market, which may or may not be displaying the best price for a stock. Moreover, the Commission has not interpreted a broker's duty of best execution for retail orders as requiring that a separate best execution analysis be made on an order-by-order basis.[149] Nevertheless, retail investors generally expect that their small orders will be executed at the best displayed prices. They may have difficulty monitoring whether their individual orders miss the best displayed prices at the time they are executed and evaluating the quality of service provided by their brokers.[150] Given the large number of trades that fail to obtain the best displayed prices (*e.g.*, approximately 1 in 40 trades for both Nasdaq and NYSE stocks), the Commission is concerned that many of the investors that ultimately received the inferior price in these trades may not be aware that their orders did not, in fact, obtain the best price. The Order Protection Rule will backstop a broker's duty of best execution on an order-by-order basis by prohibiting the practice of executing orders at inferior prices, absent an applicable exception.

Just as importantly, even when market participants act in their own economic self-interest, or brokers act in the best interests of their customers, they may deliberately choose, for various reasons, to bypass (*i.e.*, not protect) limit orders with the best displayed prices. For example, an institution may be willing to accept a dealer's execution of a particular block order at a price outside the NBBO, thereby transferring the risk of any further price impact to the dealer. Market participants that execute orders at inferior prices without protecting displayed limit orders are effectively "free-riding" on the price discovery provided by those limit orders. Displayed limit orders benefit all market participants by establishing the best prices, but, when bypassed, do not themselves receive a benefit, in the form of an execution, for providing this public good. This economic externality, in turn, creates a disincentive for investors to display limit orders and ultimately could negatively affect price discovery and market depth and liquidity.

Fidelity's comment letters on the reproposal questioned whether large trades that bypass displayed quotations should be considered as free-riding on the price discovery provided by displayed limit orders.[151] It emphasized that the price-formation process reflects information stemming from all trading interest and that institutional trading interest is an important part of the process. As evidence, it noted that almost one-third of reported volume on the NYSE in 2004 was of block size, typically representing undisplayed institutional trading interest.

Institutional trading interest, both displayed and undisplayed, undoubtedly is an important part of the price discovery process. Notably, the large volume of block trades currently executed on the NYSE is subject both to the NYSE's order interaction rules and the ITS trade-through rules. Accordingly, NYSE block trades cannot be considered as free-riding on displayed limit orders, in contrast to block trades reported by block positioners in the OTC market that currently do not interact with (and thereby are free-riding on) displayed liquidity and are not covered by the ITS provisions.

Moreover, the Order Protection Rule does not require that all institutional trading interest be displayed. Rather, the Rule strengthens the incentive for the *voluntary* display of a greater proportion of latent trading interest by assuring that, when such interest is displayed, it is protected against most trade-throughs. In these circumstances, institutions will choose to display when they determine it is in their own interests, not because it is mandated by Commission rule. Greater displayed size will improve the quality and transparency of price discovery for all market participants.

Fidelity also asserted that "an institutional investor, seeking to acquire or dispose a large block of stock will be put to a distinct and unfair advantage if it is deprived of the ability to negotiate, at one time and at a specified price, an all-in price for its block trade with a dealer."[152] Similarly, the Battalio/Jennings Paper suggests that, for large marketable limit orders of institutions, "it might be better to ignore a penny quote for a few hundred shares in order to get a large order done quickly rather than try to chase the small quote and risk losing the ability to fill the size desired."[153] These contentions do not recognize that the Order Protection Rule does not, in fact, preclude institutions from negotiating "all-in" prices for their trades with dealers or immediately routing orders to access larger-sized depth-of-book quotations. Rather, the Rule simply requires a dealer, at the same time as executing a large institutional order at an all-in price, to route an intermarket sweep order to execute against the displayed size of protected quotations with superior prices to the institution's trade price. Similarly, the Rule allows an institution to simultaneously route intermarket sweep orders to execute against both

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transaction costs are attributable to the impact of the trade on market price as it interacts with other buyers and sellers, delay or liquidity search costs that occur when portions of the trade are held back for fear of upsetting the supply/demand balance, and opportunity costs that arise when the trade is abandoned before all desired shares have been acquired. *Id.*

[147] *See, e.g.*, Matched Pairs Study, Tables 3, 8.

[148] *See, e.g.*, ArcaEx Reproposal Letter at 5; STA Reproposal Letter at 3; STANY Reproposal Letter at 2.

[149] *See, e.g.*, Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290, 48323 n. 362 ("Order Handling Rules Release") ("Commission has recognized that it may be impractical, both in terms of time and expense, for a broker that handles a large volume of orders to determine individually where to route each order it received."). *See also infra*, section II.B.4 (discussion of duty of best execution).

[150] *See supra*, note 53 and accompanying text (discussion of difficulty for investors to monitor whether their order execution prices equal the best quoted prices at the time of order execution).

[151] Fidelity Reproposal Letter at 5; Fidelity Reproposal Letter II at 2. *See also* Battalio/Jennings Paper at 2.

[152] Fidelity Reproposal Letter at 3.

[153] Battalio/Jennings Paper at 29.

small-sized quotations at the best prices and larger-sized depth-of-book quotations. The Rule therefore does not require institutions to parcel out their block orders in a series of transactions over time.

Fidelity and the Battalio/Jennings Paper also incorrectly asserted that the Commission's concern about free-riding on displayed quotations related only to the limit orders of retail investors, citing a number of academic studies indicating that institutional trades and quotations are important contributors to price discovery.[154] In fact, however, the Reproposing Release did not distinguish between the limit orders of retail investors and those of institutions when discussing the problem of free-riding.[155] Rather, the Order Protection Rule is designed to promote displayed liquidity from *all* sources, and institutional limit orders clearly are a significant source of such liquidity. Indeed, the Battalio/Jennings Paper itself notes that "institutions dominate price discovery via quoting" and that "the preponderance of quote-based discovery for NYSE-listed securities takes place at the NYSE" where "institutions dominate trading."[156] Many institutional investors and the NYSE are strong supporters of strengthened limit order protection for all NMS stocks.[157] For example, the ICI, whose members manage assets that account for more than 95% of assets of all U.S. mutual funds, stated that it "strongly supports the establishment of a marketwide trade-through rule. * * * [S]uch a rule represents a significant step in providing protection for limit orders. By affirming the principle of price priority, a trade-through rule should encourage the display of limit orders, which in turn would improve the price discovery process and contribute to increased market depth and liquidity."[158]

Another commenter asserted that the reproposal overly emphasized the importance of displayed limit orders in the price discovery process.[159] It stated that the interaction of displayed limit orders with marketable orders is only one aspect of price discovery, which is "a dynamic process that operates in the context of other transactions that have recently been made, current quotes, and a richer tapestry of the expressed and latent interest of a broader array of market participants."[160] The Commission generally concurs with this characterization of the price discovery process, but believes that displayed limit orders are a critically important element of efficient price discovery that deserve greater protection against trade-throughs. Publicly displayed and automated limit orders are the most transparent and accessible source of liquidity in the equity markets. Moreover, displayed limit orders provide price discovery on a going forward basis—they indicate the prices at which trades can be effected in the future. Trade reports, in contrast, look backward at the prices of trades that already have occurred, which may or may not be still available.

There are, of course, other sources of liquidity, including: (1) Reserve size (limit orders with undisplayed size); (2) "not held" institutional orders that are worked by floor brokers on an exchange; (3) automated matching networks that allow large buyers and sellers to meet directly and anonymously; and (4) securities dealers that are willing to commit capital to facilitate customer orders. Displayed limit orders, however, give anyone the ability to trade when they want to trade on a first-come, first-served basis. They thereby act as a vital reference point for all other sources of liquidity. Specifically, reserve size, undisplayed floor interest, automated matching, and dealer capital commitments all are facilitated by displayed information concerning the price and size of stock that is available for immediate trading in the public markets.

As demonstrated by the current rate of trade-throughs of the best quotations in Nasdaq and NYSE stocks, the problems of agent/principal conflicts and the free-riding externality often can lead to executions at prices that are inferior to displayed quotations, meaning that limit orders are being bypassed. The frequent bypassing of limit orders can cause fewer limit orders to be placed. The Commission therefore believes that the Order Protection Rule is needed to encourage greater use of limit orders. The more limit orders available at better prices and greater size, the more liquidity available to fill incoming marketable orders. Moreover, greater displayed liquidity will at least lower the search costs associated with trying to find liquidity. Increased liquidity, in turn, could lead market participants to interact more often with displayed orders, which would lead to greater use of limit orders, and thus begin the cycle again. We expect that the end result will be an NMS that more fully meets the needs of a broad spectrum of investors.

2. Limiting Protection to Automated and Accessible Quotations

The original trade-through proposal sought to strengthen protection against trade-throughs, while also addressing problems posed by the inherent differences in quotations displayed by automated markets (which are immediately accessible) and quotations displayed by manual markets (which are not), by distinguishing between automated and non-automated markets with respect to trade-through protection. The proposal included an exception that would have allowed automated markets to trade through manual markets, but only up to certain amounts that varied depending upon the price of the security. Under the proposal, a market would have been classified as "manual" if it did not provide for an immediate automated response to *all* incoming orders attempting to access its displayed quotations.[161]

At the NMS Hearing, a significant portion of the discussion of the trade-through proposal addressed issues relating to quotations of automated and

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[154] Battalio/Jennings Paper at 4 n. 1, 30–36; Fidelity Reproposal Letter II at 2.

[155] *See, e.g.*, Reproposing Release, 69 FR at 77434 ("Displayed limit orders benefit all market participants by establishing the best prices, but, when bypassed, do not themselves receive a benefit, in the form of an execution, for providing this public good. This economic externality, in turn, creates a disincentive for investors to display limit orders, *particularly limit orders of any substantial size.*") (emphasis added). In contrast, the Commission's concern specifically for the limit orders of retail investors relates primarily to the perception of unfairness created when retail orders are ignored by other market participants. Although some of these orders may subsequently be executed or cancelled, the retail investors that submitted orders with the best prices have not received the appropriate reward for their use of an aggressive limit price—a prompt, efficient execution consistent with the principle of price priority. Moreover, the orders that ultimately never receive an execution are also likely to be the very orders that would have been most profitable for the investor (*e.g.*, when the order was to buy a stock and the stock's price climbed after the trade-through occurred). To meet the Exchange Act's objectives for the NMS, investors of all types should have confidence that their orders will be handled in a fair and orderly fashion.

[156] Battalio/Jennings Paper at 35.

[157] *See, e.g.*, American Century Letter at 2; Capital Research Letter at 2; ICI Reproposal Letter at 2; NYSE Reproposal Letter at 3; T. Rowe Price Reproposal Letter at 2; Vanguard Reproposal Letter at 2.

[158] ICI Reproposal Letter at 2.

[159] Letter from Stewart P. Greene, Chief Counsel, Securities Law, to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("TIAA–CREF Reproposal Letter"), Attachment at 15–16. This commenter also asserted that the reproposal failed to appreciate the importance of "quantity discovery," in addition to price discovery. *Id.* at 9. As evidenced by the repeated concern expressed in both the proposal and reproposal for improving market depth and liquidity, the Commission considers the term "price discovery" to encompass both the inside prices for a stock *and* the quantity of stock that can be traded at and away from the inside prices. It believes, however, that displayed limit orders are a vital source of price discovery in all of its forms.

[160] *Id.* at 16.

[161] Proposing Release, 69 FR at 11140.

manual markets. Representatives of two floor-based exchanges announced their intent to establish "hybrid" trading facilities that would offer automatic execution of orders seeking to interact with their displayed quotations, while at the same time maintaining a traditional floor.[162] These representatives acknowledged the difficulties posed in developing an efficient hybrid market, but emphasized that they were committed to developing such facilities and that such facilities were likely to become operational prior to any implementation of Regulation NMS.

Other panelists at the NMS Hearing strongly believed that manual quotations should not receive any protection against trade-throughs and that the proposed trade-through amounts should be eliminated.[163] They noted, however, that existing order routing technologies are capable of identifying, on a quote-by-quote basis, indications from a market that a particular quotation is not immediately and automatically accessible (*i.e.*, is a manual quotation). Using this functionality, a trade-through rule could classify individual quotations as automated or manual, rather than classifying an entire market as manual solely because it displayed manual quotations on occasion.

To give the public a full opportunity to comment on these issues, the Supplemental Release described the developments at the NMS Hearing and requested comment on whether a trade-through rule should protect only automated quotations and whether the rule should adopt a "quote-by-quote" approach to identifying protected quotations.[164] The Supplemental Release also requested comment on the requirements for an automated quotation, including whether the rule should impose a maximum response time, such as one second, on the total time for a market to respond to an order in an automated manner. Comment also was requested on mechanisms for enforcing compliance with the automated quotation requirements.

Nearly all commenters on the original proposal believed that only automated quotations should receive protection against trade-throughs and that therefore the proposed limitation on trade-through amounts for manual markets should be eliminated.[165] In response to these commenters, the Commission modified the proposed Rule in the Reproposing Release to protect only those quotations that are immediately and automatically accessible. As noted above in Section II.A.1, a substantial number of commenters supported the reproposed Order Protection Rule, with some commenters specifically supporting limiting trade-through protection to automated and immediately accessible quotations.[166]

The Commission agrees with commenters that providing protection to manual quotations, even limited to trade-throughs beyond a certain amount, potentially would lead to undue delays in the routing of investor orders, thereby not justifying the benefits of price protection. The Commission therefore is adopting, as reproposed, an approach that excludes manual quotations from trade-through protection. Under the Order Protection Rule as adopted, investors will have the choice of whether to access a manual quotation and wait for a response or to access an automated quotation with an inferior price and obtain an immediate response. Moreover, those who route limit orders will be able to control whether their orders are protected by evaluating the extent to which various trading centers display automated versus manual quotations.

Commenters expressed differing views, however, on the appropriate standards for automated quotations and on the standards that should govern "hybrid" markets—those that display both automated and manual quotations. These issues are discussed below.

a. Standards for Automated Quotations

Nearly all commenters addressing the issue believed that only quotations that are truly firm and fully accessible should qualify as "automated."[167] To achieve this goal, they suggested that, at a minimum, the market displaying an automated quotation should be required to provide a functionality for an incoming order to receive an immediate and automated (*i.e.*, without human intervention) execution up to the full displayed size of the quotation. In addition, they believed the market should be required to provide an immediate and automated response to the sender of the order indicating whether the order had been executed (in full or in part) and an immediate and automated updating of the quotation. A number of commenters advocated requiring a specific time standard for distinguishing between manual and automated quotations, ranging from one second down to 250 milliseconds.[168] Other commenters did not believe the definition of automated quotation should require a specific time standard, generally because setting a specific standard might discourage innovation and become a "ceiling" on market performance.[169]

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[162] Hearing Tr. at 90–92, 94–97, 120.

[163] Hearing Tr. at 57–58, 67, 142–143, 157–158.

[164] Supplemental Release, 69 FR at 30142–30144.

[165] *See, e.g.*, Ameritrade Letter I at 8; Letter from Lou Klobuchar Jr., President and Chief Brokerage Officer, E*TRADE Financial Corporation, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("E*Trade Letter") at 6; ICI Letter at 12; Nasdaq Letter II at 9, 14; Letter from Marc Lackritz, President, Securities Industry Association, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("SIA Letter") at 15.

[166] *See, e.g.*, Letter from George W. Mann, Jr., General Counsel, Boston Stock Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("BSE Reproposal Letter") at 5; Letter from David Baker, Global Head of Cash Trading and Global Head of Portfolio Trading, Deutsche Bank Securities Inc., to Jonathan G. Katz, Secretary, Commission, dated February 3, 2005 ("Deutsche Bank Reproposal Letter") at 2; ICI Reproposal Letter at 3, n. 6; Letter from James T. Brett, Managing Director, J.P. Morgan Securities Inc., to Jonathan G. Katz, Secretary, Commission, dated January 28, 2005 ("JP Morgan Reproposal Letter") at 3–4; Letter from Bernard L. Madoff and Peter B. Madoff, Bernard L. Madoff Investment Securities L.L.C., to Jonathan G. Katz, Secretary, Commission, dated February 3, 2005 ("Madoff Reproposal Letter") at 1; Letter from David Humphreville, President, The Specialist Association of the New York Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("Specialist Assoc. Reproposal Letter") at 2–3.

[167] *See, e.g.*, Letter from John J. Wheeler, Vice President, Director of U.S. Equity Trading, American Century Investment Management Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("American Century Letter") at 3; Letter from C. Thomas Richardson, Citigroup Global Markets, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 20, 2004 ("Citigroup Letter") at 6–7; Letter from Gary Cohn, Managing Director, Goldman, Sachs & Co., to Jonathan G. Katz, Secretary, Commission, dated July 19, 2004 ("Goldman Sachs Letter") at 4–5; ICI Letter at 13; Morgan Stanley Letter at 7; SIA Letter at 6.

[168] *See, e.g.*, Ameritrade Letter I at 6; Bloomberg Tradebook Letter at 13; Letter from Kenneth R. Leibler, Chairman, Boston Stock Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("BSE Letter") at 7; Consumer Federation Letter at 3; Letter from David A. Herron, Chief Executive Officer, Chicago Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("CHX Letter") at 7–8; Letter from C. Thomas Richardson, Citigroup Global Markets, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 20, 2004 ("Citigroup Letter") at 7; Letter from Gary Cohn, Managing Director, Goldman, Sachs & Co., to Jonathan G. Katz, Secretary, Commission, dated July 20, 2004 ("Goldman Sachs Letter") at 4; ICI Letter at 3, 10; Nasdaq Letter II at 3, 13; Letter from John Martello, Managing Director, Tower Research Capital LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("Tower Research Letter") at 5.

[169] *See, e.g.*, American Century Letter at 3; Letter from Salvatore F. Sodano, Chairman & Chief Executive Officer, American Stock Exchange LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("Amex Letter"), Exhibit A at 6; Letter from Matt D. Lyons, Capital Research and Management Company, to Jonathan G. Katz, Secretary, Commission, dated June 28, 2004 ("Capital Research Letter") at 2; Fidelity Letter I at 8; Letter from John H. Bluher, Executive Vice President & General Counsel, Knight Trading

The Commission included in the Reproposing Release a definition of automated quotation that incorporated the three elements suggested by commenters:[170] (1) Acting on an incoming order; (2) responding to the sender of the order; and (3) updating the quotation. The proposed definition of automated quotation did not set forth a specific time standard for responding to an incoming order. As noted above, a significant number of commenters on the Reproposing Release supported the reproposed Order Protection Rule,[171] with a few commenters specifically supporting the definition of automated quotation.[172] As discussed in detail below, the Commission has adopted the definition of automated quotation as proposed.

In particular, Rule 600(b)(3) requires that the trading center displaying an automated quotation must provide an "immediate-or-cancel" ("IOC") functionality for an incoming order to execute immediately and automatically against the quotation up to its full size, and for any unexecuted portion of such incoming order to be cancelled immediately and automatically without being routed elsewhere. The trading center also must immediately and automatically respond to the sender of an IOC order. To qualify as "automatic," no human discretion in determining any action taken with respect to an order may be exercised after the time an order is received. Trading centers are required to offer this IOC functionality only to market participants that request immediate action and response by submitting an IOC order. Market participants therefore have the choice of whether to require an immediate response from the trading center, or to allow the market to take further action on the order (such as by routing the order elsewhere, seeking additional liquidity for the order, or displaying the order). Finally, trading centers are required to immediately and automatically update their automated quotations to reflect any change to their material terms (such as a change in price, displayed size, or "automated" status).

The definition of automated quotation as adopted does not set forth a specific time standard for responding to an incoming order. The Commission agrees with commenters that the standard should be "immediate" "*i.e.*, a trading center's systems should provide the fastest response possible without any programmed delay. Nevertheless, the Commission also is concerned that trading centers with well-functioning systems should not be unnecessarily slowed down waiting for responses from a trading center that is experiencing a systems problem. Consequently, rather than specifying a specific time standard that may become obsolete as systems improve over time, Rule 611(b)(1) addresses the problem of slow trading centers by providing an exception for quotations displayed by trading centers that are experiencing, among other things, a material delay in responding to incoming orders. Given current industry conditions, the Commission believes that repeatedly failing to respond within one second after receipt of an order would constitute a material delay.[173] Accordingly, a trading center would act reasonably in the current technological environment if it bypassed the quotations of another trading center that had repeatedly failed to respond to orders within a one-second time frame (after adjusting for any potential delays in transmission not attributable to the other trading center).[174] This "self-help" remedy, discussed further in sections II.A.3 and II.B.3 below, will give trading centers needed flexibility to deal with another trading center that is experiencing systems problems, rather than forcing smoothly-functioning trading centers to slow down for a problem trading center.

b. Standards for Automated Trading Centers

The original trade-through proposal would have classified a market as manual if it did not provide automated access to *all* orders seeking access to its displayed quotations. Many commenters responded positively to the concept of allowing hybrid markets to display both automated and manual quotations that was raised at the NMS Hearing and discussed in the Supplemental Release. Most national securities exchanges believed that focusing on whether individual quotations are automated or manual would permit hybrid markets to function, thereby expanding the range of trading choices for investors.[175] For example, Amex stated that hybrid markets would offer investors the choice to utilize auction markets when advantageous for them to do so, while at the same time offering automatic execution to those investors desiring speed and certainty of a fast response.[176] A majority of other commenters also believed that the application of any trade-through rule should depend on whether a particular quotation is automated.[177] They believed that such a rule would achieve the benefits of encouraging limit orders and improving market depth and liquidity, while avoiding indirectly mandating a particular market structure.

Although generally supportive of the concept of hybrid markets, several commenters on the original proposal expressed concern about how the "quote-by-quote" approach to protected quotations would operate in practice.[178]

Group, to William H. Donaldson, Chairman, Commission, dated July 2, 2004 ("Knight Letter II") at 5; Letter from James T. Brett, J.P. Morgan Securities Inc., to Jonathan G. Katz, Secretary, Commission, dated July 8, 2004 ("JP Morgan Letter") at 3; Morgan Stanley Letter at 7; Letter from Darla C. Stuckey, Corporate Secretary, New York Stock Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 2, 2004 ("NYSE Letter"), Attachment at 3; Letter from David Humphreville, President, The Specialist Association, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("Specialist Assoc. Letter") at 8; Letter from Lisa M. Utasi, President, *et al.*, The Security Traders Association of New York, Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("STANY Letter") at 4; Letter from George U. Sauter, Managing Director, The Vanguard Group, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 14, 2004 ("Vanguard Letter") at 4.

[170] *See, e.g.*, Letter from Kevin J. P. O'Hara, Chief Administrative Officer and General Counsel, Archipelago Holdings, Inc., to Jonathan G. Katz, Secretary, Commission, dated September 24, 2004 ("Archipelago Letter") at 7; Brut Letter at 7; Letter from Lisa M. Utasi, President, *et al.*, The Security Traders Association of New York, Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("STANY Letter") at 4; Letter from George U. Sauter, Managing Director, The Vanguard Group, to Jonathan G. Katz, Secretary, Commission, dated July 14, 2004 ("Vanguard Letter") at 4.

[171] *See supra* section II.A.1.

[172] Letter from Adam Cooper, Senior Managing Director and General Counsel, Citadel Investment Group, L.L.C., to Jonathan G. Katz, Secretary, Commission, dated July 9, 2004 ("Citadel Reproposal Letter") at 3; ICI Reproposal Letter at 3, n. 6; SIA Reproposal Letter at 4–5.

[173] *Cf.* Ameritrade Letter I at 6 (one second response time is appropriate); Letter from David A. Herron, Chief Executive Officer, The Chicago Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("CHX Letter") at 8 (receive, execute, and report back within one second); Citigroup Letter at 7 (turnaround time of no more than one second); Goldman Sachs Letter at 4 (orders executed or cancelled within not more than one second).

[174] As discussed further in section II.B.3 below, a trading center utilizing the material delay exception will be required to establish specific objective parameters for its use of the exception in its required policies and procedures.

[175] *See, e.g.*, Amex Letter at 5; Letter from William J. Brodsky, Chairman & Chief Executive Officer, Chicago Board Options Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 1, 2004 ("CBOE Letter") at 3; CHX Letter at 7; NYSE Letter at 4.

[176] Amex Letter, Appendix A at 4–5.

[177] *See, e.g.*, Letter from Joseph M. Velli, Senior Executive Vice President, The Bank of New York, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("BNY Letter") at 2; Letter from Lou Klobuchar Jr., President and Chief Brokerage Officer, E*Trade Financial Corporation, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("E*Trade Letter") at 6; ICI Letter at 13; Morgan Stanley Letter at 6.

[178] *See, e.g.*, Citigroup Letter at 6; ICI Letter at 13; Morgan Stanley Letter at 7; Nasdaq Letter II at 13–14; Vanguard Letter at 5.

The ICI noted that "[w]e are concerned that if it is left completely up to an individual market's discretion when a quote is 'automated' or manual, that market could base its decision on what is in the best interests of that market and its members, as opposed to the best interests of investors and other market participants." [179] These commenters suggested that the Commission should provide clear guidelines as to when and how a market could switch its quotations from automated to manual, and vice versa, so as to prevent abuse by the market.

After considering the views of commenters, the Commission included in the reproposed Rule certain requirements for a trading center to qualify as an "automated trading center," one of which requires that a trading center adopt reasonable standards limiting when its quotations change from automated quotations to manual quotations (and vice versa) to specifically defined circumstances that promote fair and efficient access to its automated quotations and that are consistent with the maintenance of fair and orderly markets. The reproposed Rule also provided that only a trading center that met all of the requirements could display protected quotations. Although a substantial number of commenters supported the reproposed Rule,[180] a few commenters continued to express concern with the ability of a trading center to switch from automated to manual quotations.[181]

The Commission recognizes the concerns of commenters regarding the ability of a trading center to change from automated to manual quotation mode, but believes that the requirements necessary to qualify as an automated trading center will sufficiently mitigate this concern. Any standards established by an SRO trading center to govern when its quotations change from automated to manual will be subject to public notice and comment and Commission approval pursuant to the rule filing process of Section 19(b) of the Exchange Act. If a non-SRO trading center intends to display both automated and non-automated quotations, it will be subject to the oversight of the SRO through whose facilities its quotations are displayed with respect to the reasonableness of its procedures, as well as Commission oversight.

The Commission therefore is adopting the definition of automated trading center as reproposed. The adopted approach offers flexibility for a hybrid market to display both automated and manual quotations, but only when such a market meets basic standards that promote fair and efficient access by the public to the market's automated quotations. This approach is designed to allow markets to offer a variety of trading choices to investors, but without requiring other markets and market participants to route orders to a hybrid market with quotations that are not truly accessible.

To qualify as an automated trading center, the trading center must have implemented such systems, procedures, and rules as are necessary to render it capable of displaying quotations that meet the action, response, and updating requirements set forth in the definition of an automated quotation.[182] Further, the trading center must identify all quotations other than automated quotations as manual quotations, and must immediately identify its quotations as manual quotations whenever it has reason to believe that it is not capable of displaying automated quotations.[183] These requirements will enable other trading centers readily to determine whether a particular quotation displayed by a hybrid trading center is protected by the Order Protection Rule. Finally, an automated trading center must adopt reasonable standards limiting when its quotations change from automated quotations to manual quotations, and vice versa, to specifically defined circumstances that promote fair and efficient access to its automated quotations and are consistent with the maintenance of fair and orderly markets.[184]

These requirements are designed to promote efficient interaction between a hybrid market and other trading centers. The requirement that automated quotations cannot be switched on and off except in specifically defined circumstances is particularly intended to assure that hybrid markets do not give their members, or anyone else, overbroad discretion to control the automated or manual status of the trading center's quotations, which potentially could disadvantage market participants that must protect these quotations. Changes from automated to manual quotations, and vice versa, must be subject to specific, enforceable limitations as to the timing of switches. For a trading center to qualify as entitled to display any protected quotations, the public in general must have fair and efficient access to a trading center's quotations.

Some commenters on the Reproposing Release expressed a concern about the scope of the exception for *single-priced* reopenings in Rule 611(b)(3), particularly in the context of a trading center switching back and forth from automated quotation to manual quotation mode.[185] They asserted that the applicability of the exception to the recommencement of trading after a non-regulatory trading halt in one market (such as a trading halt due to an intra-day order imbalance) could lead to disruptive trading activity and provide an unfair competitive advantage for the trading center that halted trading. They believed this could create a significant loophole in the protections provided by the Rule. For instance, one commenter expressed concern that a trading center could halt trading and reopen solely to enable it to trade-through other trading centers.[186] Another commenter expressed concern regarding the interplay of the proposed exception and the operation of the NYSE's proposed hybrid trading system, stating that it is unclear what would be considered a reopening under NYSE's proposal, particularly with respect to when a liquidity refreshment point is reached or when the quotation is gapped.[187] Two commenters suggested that the exception apply only to reopenings after regulatory trading halts.[188]

The Commission recognizes the commenters' concern, but emphasizes that the exception will not permit a trading center to declare a trading halt

[179] ICI Letter at 13.

[180] *See supra* section II.A.1.

[181] *See* Ameritrade Reproposal Letter at 7 (questioning whether certain aspects of NYSE's hybrid proposal are "consistent with the requirement that an automated trading center has 'adopted reasonable standards limiting when its quotations change from automated quotations to manual quotations, and vice versa' "); Letter from Alistair Brown, Managing Director, Lime Brokerage LLC, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("Lime Brokerage Reproposal Letter") at 1 (expressing concerns regarding the operation of NYSE's hybrid proposal in conjunction with the Order Protection Rule); Letter from J. Greg Mills, Managing Director, Head of Global Equity Trading, RBC Capital Markets Corporation, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("RBC Capital Markets Reproposal Letter") at 8–9 (requesting that the Commission establish and define standards as to when a hybrid market can switch from automated to manual quotations).

[182] Rule 600(b)(4)(i). The Commission is modifying this requirement from the reproposal to include the term "procedures," to clarify that non-SRO trading centers have procedures, not rules.

[183] Rule 600(b)(4)(ii) and (iii).

[184] Rule 600(b)(4)(iv).

[185] *See* Letter from C. Thomas Richardson, Citigroup Global Markets, Inc., to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("Citigroup Reproposal Letter") at 8; Nasdaq Reproposal Letter at 6–7; SIA Reproposal Letter at 20–21.

[186] Citigroup Reproposal Letter at 8.

[187] Nasdaq Reproposal Letter at 6. *See also infra*, note 190.

[188] Nasdaq Reproposal Letter at 7; SIA Reproposal Letter at 21 (agreeing that the exception should apply to regulatory halts).

merely to be able to circumvent the operation of the Order Protection Rule upon reopening. The exception applies only to single-priced reopenings and therefore requires that a trading center conduct, pursuant to its rules or written procedures, a formalized and transparent process for executing orders during reopening after a trading halt that involves the queuing and ultimate execution of multiple orders at a single equilibrium price.[189] In addition, the trading center must have formally declared a trading halt pursuant to its rules or written procedures. Thus, the exception would not include a situation where a trading center merely spread its quotations or switched back to automated quotation mode from manual quotation mode.[190]

3. Workable Implementation of Intermarket Trade-Through Protection

Several commenters expressed concern that the original proposed trade-through rule could not be implemented in a workable manner, particularly for high-volume stocks.[191] Morgan Stanley, for example, asserted that an inefficient trading center might have inferior systems that would delay routed orders and potentially diminish their quality of execution.[192] Instinet emphasized that protecting a market's quotations "confers enormous power on a market * * * Such power can and will be abused either directly (*e.g.*, by quoting slower than executing orders) or indirectly (*e.g.*, not investing in more than minimum system capacity or redundancy)."[193] Hudson River Trading noted that markets sometimes experience temporary systems problems and questioned how a trade-through rule would address these scenarios.[194] Nasdaq observed that quotations in many Nasdaq stocks are updated more than two times per second. It said that these frequent changes could lead to many false indications of trade-throughs and that eliminating these "false positives" would greatly reduce the percentage of transactions subject to a trade-through rule.[195] Finally, many commenters noted that market participants need the ability to sweep multiple price levels simultaneously at different trading centers. They emphasized that a trade-through rule should accommodate this trading strategy by freeing each trading center to execute orders immediately without waiting for other trading centers to update their better priced quotations.[196]

The Commission agreed with these commenters that intermarket protection against trade-throughs must be workable and implemented in a way that promotes fair and orderly markets, and therefore amended the original proposal in the reproposal to better achieve this objective in a variety of ways. As discussed below, commenters were generally supportive of the measures included in the reproposal as providing necessary flexibility, although several commenters made specific recommendations as to how to improve the operation of the exceptions. In response to these comments, the Commission has made additional modifications to the Order Protection Rule that, in conjunction with the reproposed measures, will further promote its workability.

First and most importantly, as included in the reproposal and as adopted today, only automated trading centers, as defined in Rule 600(b)(4), that are capable of providing immediate responses to incoming orders are eligible to have their quotations protected. Moreover, an automated trading center is required to identify its quotations as manual (and therefore not protected) whenever it has reason to believe that it is not capable of providing immediate responses to orders.[197] Thus, a trading center that experiences a systems problem, whether because of a flood of orders or otherwise, must immediately identify its quotations as manual.

The Commission will monitor and enforce the adopted requirements for automated trading centers and automated quotations. Nevertheless, it concurs with commenters' concerns that well-functioning trading centers should not be dependent on the willingness and capacity of other markets to meet, and the Commission's ability to enforce, these automation requirements. The adopted Order Protection Rule therefore provides a "self-help" remedy that will allow trading centers to bypass the quotations of a trading center that fails to meet the immediate response requirement. Rule 611(b)(1) sets forth an exception that applies to quotations displayed by trading centers that are experiencing a failure, material delay, or malfunction of its systems or equipment. To implement this exception consistent with the requirements of Rule 611(a), trading centers will have to adopt policies and procedures reasonably designed to comply with the self-help remedy. Such policies and procedures will need to set forth specific objective parameters for dealing with problem trading centers and for monitoring compliance with the self-help remedy, consistent with Rule 611. Given current industry capabilities, the Commission believes that trading centers should be entitled to bypass another trading center's quotations if it repeatedly fails to respond within one second to incoming orders attempting to access its protected quotations. Accordingly, trading centers will have the necessary flexibility to respond to problems at another trading center as they occur during the trading day.

Most commenters that addressed the self-help exception supported the exception as providing necessary flexibility to trading centers to avoid inaccessible quotations.[198] Some commenters, however, objected to a statement in the Reproposing Release that a trading center must attempt to contact the non-responsive trading center to resolve a problem prior to disregarding its quotations.[199] They believed that such a requirement would not be practicable or workable, especially during real-time trading.[200]

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[189] *See* section III.D.3 of the Proposing Release for a discussion of the practical need for an exception for single-priced openings and reopenings. 69 FR at 11142.

[190] Under NYSE's hybrid proposal, the turning off of automatic execution, for example, for a gap-quoting situation, the triggering of a liquidity refreshment point, or the reporting of a block transaction, would not in and of itself halt trading and thus trigger a reopening pursuant to paragraph (b)(3) of Rule 611.

[191] *See, e.g.*, Hudson River Trading Letter at 3; Instinet Letter at 18–19; Morgan Stanley Letter at 11–12; Letter from Edward S. Knight, The Nasdaq Stock Market, Inc., to Jonathan G. Katz, Secretary, Commission, dated September 29, 2004 ("Nasdaq Letter III") at 3.

[192] Morgan Stanley Letter at 12.

[193] Instinet Letter at 17.

[194] Hudson River Trading Letter at 3. This commenter also raised a number of specific questions concerning the operation of an intermarket trade-through rule. To address these detailed order sequencing and response scenarios, trading centers will be able to adopt policies and procedures that reasonably resolve the practical difficulties of handling fast-arriving orders in a fair and orderly fashion. For example, if a trading center routed orders to another market to access the full displayed size of its protected quotations under the Order Protection Rule, the routing trading center will be allowed to continue trading without regard to that market's quotations until it has received a response from such market. With respect to concern that traders will not be able to control the routing of their own orders if markets are required to route out to other markets, a trader's use of the IOC functionality specified in Rule 600(b)(3) will preclude the first market from routing to other markets.

[195] Nasdaq Letter III at 3–4.

[196] *See, e.g.*, Brut Letter at 10; Citigroup Letter at 10; E*Trade Letter at 8; Goldman Sachs Letter at 7.

[197] Rule 600(b)(4)(iii).

[198] *See, e.g.*, BSE Reproposal Letter at 5; Citigroup Reproposal Letter at 7; ICI Reproposal Letter at 6, n. 10; Nasdaq Reproposal Letter at 7; SIA Reproposal Letter at 19.

[199] Citigroup Reproposal Letter at 7; Nasdaq Reproposal Letter at 7–8; SIA Reproposal Letter at 19.

[200] Citigroup Reproposal Letter at 7; Nasdaq Reproposal Letter at 7–8.

One commenter recommended that, instead of requiring notice as a "condition precedent," the Commission require the trading center electing the self-help exception to contact the slow or non-responding trading center immediately after it elects self-help.[201]

The Commission agrees with the concerns of the commenters that a prior notice requirement may not be practicable or workable in real-time, and that a trading center should be allowed simply to notify the non-responding trading center immediately after (or at the same time as) electing self-help pursuant to objective standards consistent with Rule 611 that are contained in its policies and procedures. An electing trading center must also assess, however, whether the cause of a problem lies with its own systems and, if so, take immediate steps to resolve the problem appropriately.

Another commenter suggested that third-party vendors that provide connectivity among trading centers should be allowed to determine when a trading center has failed to meet the immediate response requirement.[202] The Commission agrees that a third-party vendor could perform such a function, but, as with use of the intermarket sweep order exception, the responsibility for compliance with the exception remains with the relevant trading center that uses the services of the third-party vendor. Thus, a trading center is responsible for compliance with the requirements of the exception, including the obligation to establish, maintain, and enforce written policies and procedures and to surveil for their effectiveness, regardless of whether it routes orders using its own systems or a third-party vendor's systems.

Some commenters believed that the trading center experiencing a problem should have primary responsibility for notifying other trading centers and market participants when such problems occur and when they are resolved.[203] The definition of automated market center in both the reproposed and adopted rule directly imposes this responsibility on the trading center experiencing difficulties.[204] It requires such a trading center immediately to identify its quotations as manual whenever it has reason to believe that it is not capable of displaying automated quotations. The trading center must continue to identify its quotations as manual until it no longer has reason to believe that there will be a problem with its quotations. A trading center that continues to identify its quotations as automated when it has reason to believe otherwise would make a material misstatement to other trading centers, investors, and the public.

One commenter believed that, in the absence of an opt-out, the material delay exception was too narrowly drawn, and that market participants should be allowed to avoid trading with trading centers for any objective, reasonable basis as they do today in the context of fiduciary and best execution obligations, and not just for slow response times.[205] The Commission does not believe that the scope of the exception should be expanded to give a trading center the ability to avoid another trading center for reasons not related to reliable and efficient accessibility because to do so would be inconsistent with the objectives of the Rule. The exception in paragraph (b)(1) of Rule 611, however, covers any failure or malfunction of a trading center's systems or equipment, as well as any material delay. The Commission believes that there may be certain limited instances where repeated, critical system problems, even those that do not necessarily cause a delayed response time during trading (such as systems problems that repeatedly result in the breaking of trades), would justify use of the exception by other trading centers until the problem trading center has provided reasonable assurance to all other trading centers that the problems have been corrected.[206]

In many active NMS stocks, the price of a trading center's best displayed quotations can change multiple times in a single second ("flickering quotations"). These rapid changes can create the impression that a quotation was traded-through, when in fact the trade was effected nearly simultaneously with display of the quotation.[207] To address the problem of flickering quotations, the Commission included in the reproposal a proposed exception from Rule 611 that would allow trading centers a one-second "window" prior to a transaction for trading centers to evaluate the quotations at another trading center. Specifically, the Commission proposed that pursuant to Rule 611(b)(8) trading centers would be entitled to trade at any price equal to or better than the least aggressive best bid or best offer, as applicable, displayed by the other trading center during that one-second window. For example, if the best bid price displayed by another trading center has flickered between $10.00 and $10.01 during the one-second window, the trading center that received the order could execute a trade at $10.00 without violating Rule 611.

Most of the commenters that addressed this exception supported it.[208] The SIA noted that the exception would provide "much-needed practical relief."[209] Several commenters, however, raised issues regarding the time frame for the exception, with some supporting a longer window[210] and some questioning whether it was necessary to establish a specific time frame in the rule, rather than through interpretive guidance.[211] One commenter opposed the exception because it believed that it would create an arbitrage opportunity that could be taken advantage of by computerized market participants.[212] Another commenter expressed concern that the exception would enable trading centers to execute trades internally and route

[201] Nasdaq Reproposal Letter at 7.

[202] Letter from Richard A. Kornhammer, Chairman and Chief Executive Officer, Lava Trading Inc., to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("Lava Reproposal Letter") at 3.

[203] SIA Reproposal Letter at 19–20; STANY Reproposal Letter at 12.

[204] Rule 600(b)(4)(iii).

[205] Letter from Thomas N. McManus, Managing Director and Counsel, Morgan Stanley & Co. Incorporated, to Jonathan G. Katz, Secretary, Commission, dated February 7, 2005 ("Morgan Stanley Reproposal Letter") at 11–12.

[206] During the implementation period for the Order Protection Rule, the Commission staff will be available to provide guidance to trading centers as they develop objective standards to implement this exception consistent with Rule 611.

[207] A number of commenters on the original proposal were concerned about flickering quotations and recommended an exemption to address the problem. CHX Letter at 7, n.19; E*Trade Letter at 9; JP Morgan Letter at 3; Letter from Richard A. Korhammer, Chairman & Chief Executive Officer, Lava Trading Inc., to Jonathan G. Katz, Secretary, Commission (no date) ("Lava Trading Letter") at 5; Letter from Marc Lackritz, President, Securities Industry Association, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("SIA Letter") at 10; Letter from Mary McDermott-Holland, Chairman & John C. Giesea, President, Security Traders Association, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("STA Letter") at 5.

[208] BSE Reproposal Letter at 5; ICI Reproposal Letter at 6, n. 10; JP Morgan Reproposal Letter at 4; Letter from Michael J. Lynch, Managing Director, Merrill Lynch, Pierce, Fenner & Smith Incorporated, to Jonathan G. Katz, Secretary, Commission, dated February 4, 2005 ("Merrill Lynch Reproposal Letter") at 7; SIA Reproposal Letter at 3, 18.

[209] SIA Reproposal Letter at 18.

[210] Letter from Bruce C. Turner, Managing Director, CIBC World Markets Corp., to Jonathan G. Katz, Secretary, Commission, dated February 4, 2005 ("CIBC Reproposal Letter") at 3 (supporting a 3 second window); SIA Reproposal Letter at 18 (questioning whether the proposed one second window is too narrow).

[211] Merrill Lynch Reproposal Letter at 7; SIA Reproposal Letter at 18–19.

[212] Letter from Meyer S. Frucher, Chairman and Chief Executive Officer, Philadelphia Stock Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated January 31, 2005 ("Phlx Reproposal Letter") at 3.

orders using the worst quotation during the one second window.[213]

After reviewing the response from commenters, the Commission is adopting the exception as proposed. Allowing a one-second "window" prior to a transaction for trading centers to evaluate the quotations at another trading center will ease implementation of and compliance with the Order Protection Rule by giving trading centers added flexibility to deal with the practical difficulties of protecting quotations displayed by other trading centers, without significantly reducing the benefits of the Rule.[214] It appears that many of the potential implementation difficulties with respect to high-volume stocks are related to the problem of dealing with sub-second time increments. The Commission generally does not believe that the benefits would justify the costs imposed on trading centers of attempting to implement an intermarket price priority rule at the level of sub-second time increments. Accordingly, Rule 611 has been formulated to relieve trading centers of this burden.[215] The Commission does not believe, however, that it is necessary to allow more than a one second window, given the realities of today's trading environment and the frequency with which many quotations update.[216] The Commission also is concerned that allowing for a greater than one second window would permit the execution of many trade-throughs that could have been reasonably prevented. The Commission also notes that opportunities for arbitrage between trading centers displaying different prices for the same NMS stock would exist irrespective of whether the Commission adopted an order protection rule, and does not believe that the adoption of the flickering quotation exception to the Rule increases these arbitrage opportunities.

The Commission also included in the reproposal paragraphs (b)(5) and (b)(6) of Rule 611 that provided exceptions for intermarket sweep orders that respond to the need of market participants to access multiple price levels simultaneously at different trading centers. Commenters that addressed this exception overwhelmingly supported it.[217] Citadel, for instance, stated that the intermarket sweep exception is crucial, addresses most of its concerns about the Commission's initial trade-through proposal, and would have many benefits.[218] The ICI believed that the exception would allow institutional investors to continue to execute large-sized orders in an efficient manner.[219] As discussed below, the Commission is adopting this exception as reproposed.

An intermarket sweep order is defined in Rule 600(b)(30) as a limit order that meets the following requirements: (1) The limit order is identified as an intermarket sweep order when routed to a trading center; and (2) simultaneously with the routing of the limit order, one or more additional limit orders are routed to execute against all better-priced protected quotations displayed by other trading centers up to their displayed size. These additional orders also must be marked as intermarket sweep orders to inform the receiving trading center that they can be immediately executed without regard to protected quotations in other markets. Paragraph (b)(5) allows a trading center to execute immediately any order identified as an intermarket sweep order, without regard for better-priced protected quotations displayed at one or more other trading centers. The exception is fully consistent with the principle of protecting the best displayed prices because it is premised on the condition that the trading center or broker-dealer responsible for routing the order will have attempted to access all better-priced protected quotations up to their displayed size.[220] Consequently, there is no reason why the trading center that receives an intermarket sweep order while displaying an inferior-priced quotation should be required to delay an execution of the order.

Paragraph (b)(6) authorizes a trading center itself to route intermarket sweep orders and thereby enable immediate execution of a transaction at a price inferior to a protected quotation at another trading center. For example, paragraph (b)(6) can be used by a dealer that wishes immediately to execute a block transaction at a price three cents away from the NBBO, as long as the dealer simultaneously routed orders to access all better-priced protected quotations. By facilitating intermarket sweep orders of all kinds, Rule 611 as adopted will allow a much wider range of beneficial trading strategies than as originally proposed. In addition, the intermarket sweep exception will help prevent an "indefinite loop" scenario in which waves of orders otherwise might be required to chase the same quotations from trading center to trading center, one price level at a time.[221]

Several commenters suggested that the Commission provide an exception from the Rule for very actively-traded and highly liquid NMS stocks.[222] They argued that the trading of these stocks already is highly efficient and does not raise the concerns that the Commission is trying to address through the proposed Order Protection Rule, and that imposing the Rule on the trading of these stocks would not improve efficiency or protect limit orders in any meaningful way. They also believed that providing such an exception would make the Rule more workable, particularly for NMS stocks with rapid quotation updates, thus easing compliance and surveillance costs of the Rule. Some of these commenters

[213] Nasdaq Reproposal Letter at 8. As emphasized in section II.B.4 below, Rule 611 is designed to facilitate intermarket trade-through protection only. It does not lessen the best execution responsibilities of broker-dealers. In making a best execution determination, for example, a broker-dealer can not rely on the Rule's exception for flickering quotations to justify ignoring a recently displayed, better-priced quotation when experience shows that the quotation is likely to be accessible.

[214] Even with the one-second exception for flickering quotations, Rule 611 will address a large number of trade-throughs that currently occur in the equity markets. The substantial trade-through rates discussed in section II.A.1 above were calculated using a 3-second window. Rule 611 will address all of these trade-throughs, assuming no other exception is applicable.

[215] Several commenters raised questions concerning "clock drift" and time lags between different data sources. *See, e.g.*, Hudson River Trading Letter at 2; Letter from Edward S. Knight, The Nasdaq Stock Market, Inc., to Jonathan G. Katz, Secretary, Commission, dated September 29, 2004 ("Nasdaq Letter III") at 4. These implementation issues are most appropriately addressed in the context of a trading center's reasonable policies and procedures. Clearly, one essential procedure will be implementation of clock synchronization practices that meet or exceed industry standards. In addition, a trading center's compliance with the Order Protection Rule will be assessed based on the times that orders and quotations are received, and trades are executed, at that trading center.

[216] Specifically, given the advanced trading and routing technology available today, a one-second window should significantly ease the compliance burden of trading centers for stocks with many quotation updates.

[217] *See, e.g.*, BSE Reproposal Letter at 5; Citadel Reproposal Letter at 1, 2; ICI Reproposal Letter at 5; JP Morgan Reproposal Letter at 4; Merrill Lynch Reproposal Letter at 3; SIA Reproposal Letter at 3.

[218] Citadel Reproposal Letter at 1, 2.

[219] ICI Reproposal Letter at 5.

[220] Reserve size, in contrast, is not displayed. Trading centers and broker-dealers therefore will not be required to route orders to access reserve size.

[221] The indefinite loop scenario also is addressed by: (1) The self-help remedy in Rule 611(b)(1) for trading centers to deal with slow response times; and (2) the requirement that trading centers immediately stop displaying automated (and therefore protected) quotations when they can no longer meet the immediate response requirement for automated quotations.

[222] CIBC Reproposal Letter at 1; Citigroup Reproposal Letter at 2–3 (advocating granting the exception on a pilot basis); Letter from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, to Jonathan G. Katz, Secretary, Commission, dated February 4, 2005 ("FSR Reproposal Letter") at 4; Merrill Lynch Reproposal Letter at 7; SIA Reproposal Letter at 2, 12–14 (advocating granting the exception on a pilot basis).

suggested defining liquidity and active trading by reference to the frequency of quotation updates.[223]

The Commission recognizes that commenters have raised a serious concern regarding implementation of the Order Protection Rule, particularly for many Nasdaq stocks that are very actively traded and whose trading is spread across many different individual trading centers. An exemption for active stocks, however, would be particularly inconsistent with the investor protection objectives of the Order Protection Rule because these also are the stocks that have the highest level of investor participation. For example, the need for a trade-through rule to backstop a broker's duty of best execution by assuring that retail investors receive the best available price on an order-by-order basis is perhaps most acute with respect to the most active NMS stocks.

One of the Commission's goals throughout its review of market structure issues has been to formulate rules for the national market system that adequately reflect current technologies and trading practices and that promote equal regulation of stocks and markets. This goal does not reflect a mere desire for uniformity, but is identified in the Exchange Act as a vital component of a truly national market system.[224] Active stocks obviously are a vital part of the national market system. It should not be that the orders of ordinary investors are protected by a Commission rule for some NMS stocks, but that caveat emptor still prevails for others.

A number of provisions in the Order Protection Rule are specifically designed to address the legitimate concern that the Rule must be workable for active stocks. These include the flickering quotation exception, the intermarket sweep order exception, and the self-help exception. The Commission is committed to working closely with trading centers and the securities industry in general to make these exceptions as practical and useful as possible, consistent with the price protection objectives of the Rule and the technology currently available. In addition, the operative provision of the Order Protection Rule requires each trading center to establish, maintain, and enforce policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations and to comply with the Rule's exceptions. Implementation of intermarket trade-through protection is likely to present the greatest challenge for agency markets trading active stocks that handle a large volume of buy and sell orders and must assure that such orders interact in an orderly and efficient manner in compliance with all applicable priority rules. The requirements to have procedures reasonably designed to prevent trade-throughs will mitigate this challenge. In this regard, the Commission is encouraged that several trading centers executing the largest number of agency orders currently exhibit the lowest rates of trade-throughs.[225]

4. Elimination of Proposed Opt-Out Exception

The rule text of the original proposal included a broad exception for persons to opt-out of the best displayed prices if they provided informed consent. The Proposing Release indicated that the exception was particularly intended to allow investors to bypass manual markets, to execute block transactions without moving the market price, and to help discipline markets that provided slow executions or inadequate access to their quotations.[226] The Commission also noted, however, that an opt-out exception would be inconsistent with the principle of price protection and, if used frequently, could undermine investor confidence that their orders will receive the best available price. It therefore requested comment on an automated execution alternative to the opt-out exception, under which all markets would be required to provide an automated response to electronic orders. At the subsequent NMS Hearing, some panelists questioned whether, assuming only truly accessible and automated quotations were protected, there was a valid reason for opting-out of such a quotation.[227] To address this issue, the Commission requested comment in the Supplemental Release on whether the proposed opt-out exception would be necessary if manual quotations were excluded from trade-through protection.

Many commenters on the original proposal opposed a general opt-out exception.[228] They believed that it would be inconsistent with the principle of price protection and undermine the very benefits the trade-through rule is designed to provide. American Century, for example, asserted that the Commission should focus on the limit order investors who have "opted-in" to the NMS, rather than on those that wish to opt-out.[229] Vanguard noted that an opt-out exception might serve a short-term desire to obtain an immediate execution, but "without recognizing the second order effect of potentially significantly reducing liquidity in the long term."[230] Similarly, the ICI stated that "while our members may be best served on a particular trade by 'opting-out' from executing against the best price placed in another market, we believe that in the long term, *all* investors will benefit by having a market structure where all limit orders are protected and investors are provided with an incentive to place those orders in the markets."[231] All of the foregoing views were conditioned on an assumption that only accessible, automated quotations would be protected by a trade-through rule.

Many other commenters, in contrast, supported the proposed opt-out exception.[232] Aside from concerns that a trade-through rule would be unworkable without an opt-out exception, which were discussed in the preceding section, the primary concerns of these commenters were that, without an opt-out exception, a trade-through rule would: (1) Dampen competition among markets, particularly with respect to factors other than price; and (2) restrict the freedom of choice for market participants to route marketable orders to trading centers that are most appropriate for their particular trading objectives and to achieve best execution. The Commission formulated the reproposed Order Protection Rule to respond to these concerns, while still preserving the benefits of intermarket price protection.

In response to the Reproposing Release, many commenters supported the reproposed Order Protection Rule,[233] with some specifically addressing, and supporting, the elimination of the opt-out exception.[234]

[223] CIBC Reproposal Letter at 1; Citigroup Reproposal Letter at 3; SIA Reproposal Letter at 12. The Commission notes that the existence of rapid quotation updates does not necessarily mean that a security is actively traded or highly liquid.

[224] Exchange Act Section 11A(c)(1)(F).

[225] *See* Trade-Through Study, Tables 2, 9.

[226] Proposing Release, 69 FR at 11138.

[227] Hearing Tr. at 32, 58, 65, 74, 80, 84–85, 154.

[228] *See supra* note 56 (overview of commenters supporting a strong trade-through rule without an opt-out exception).

[229] American Century Letter at 4.

[230] Vanguard Letter at 5.

[231] ICI Letter at 14 (emphasis in original).

[232] Approximately 371 commenters supported an opt-out exception. Approximately 211 of these commenters opposed a trade-through rule and endorsed an opt-out to remediate what they viewed as its adverse effects. Of these 211 commenters, 179 commenters utilized Form Letter C. The remaining commenters supporting an opt-out exception included a variety of securities industry participants and 22 members of Congress.

[233] See supra, section II.A.1.

[234] Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Jonathan G. Katz, Secretary, Commission, dated

For example, the ICI noted its strong support of the decision to eliminate the opt-out exception, agreeing that the elimination of protection for manual quotations makes such an exception unnecessary.[235] Other commenters continued to express the concern that a trade-through rule without an opt-out exception would impede intermarket competition and innovation and restrict the ability of investors and market intermediaries to choose how best to execute their or their customers' orders to achieve best execution.[236] For the reasons discussed more fully below, after carefully considering the views of all commenters, the Commission has determined to adopt the Order Protection Rule as reproposed, without an opt-out exception.

a. Preserving Competition Among Markets

Many commenters believed that an opt-out exception was necessary to promote competition among trading centers, particularly competition based on factors other than price, such as speed of response. For example, 179 commenters on the original proposal submitted letters stating that, in the absence of an opt-out exception, "Reg. NMS will freeze market development and, over the long term, could hurt investors."[237] Morgan Stanley asserted that allowing market participants to opt-out "would reward markets that provide faster and surer executions, and conversely, would penalize those markets that are materially slower or are displaying smaller quote sizes by ignoring those quotes."[238] Although agreeing that changes made to the reproposal in the absence of an opt-out exception generally would strengthen any Order Protection Rule, Morgan Stanley continued to be concerned that, without an opt-out exception, the Order Protection Rule may not provide a sufficient amount of flexibility to market participants that encounter a minimally competitive or outright non-compliant trading center.[239] Instinet believed that, without an opt-out exception, a trade-through rule "would virtually eliminate intermarket competition by forcing operational and technological uniformity on each marketplace, negating price competition, system performance, or any other differentiating feature that a market may develop."[240] In its comments on the Reproposing Release, Instinet continued to oppose an Order Protection Rule without an opt-out exception, stating that it does not believe that the exclusion of manual quotations from protection and the proposed "tailored exceptions" are adequate substitutes for an opt-out exception.[241]

The Commission recognizes the vital importance of preserving vigorous competition among markets, but continues to believe that commenters have overstated the risk that such competition will be eliminated by adoption of an order protection rule without a general opt-out exception. The Commission believes that markets likely will have strong incentives to continue to compete and innovate to attract both marketable orders and limit orders. Market participants and intermediaries responsible for routing marketable orders, consistent with their desire to achieve the best price and their duty of best execution, will continue to rank trading centers according to the total range of services provided by those markets. Such services include cost, speed of response, sweep functionality, and a wide variety of complex order types.[242] The most competitive trading center will be the first choice for routing marketable orders, thereby enhancing the likelihood of execution for limit orders routed to that trading center. Because likelihood of execution is of such great importance to limit orders, routers of limit orders will be attracted to this preferred trading center. More limit orders will enhance the depth and liquidity offered by the preferred trading center, thereby increasing its attractiveness for marketable orders, and beginning the cycle all over again. Importantly, Rule 611 will not require that limit orders be routed to any particular market. Consequently, competitive forces will be fully operative to discipline markets that offer poor services to limit orders, such as limiting the extent to which limit orders can be cancelled in changing market conditions or providing slow speed of cancellation.

Conversely, trading centers that offer poor services, such as a slower speed of response, likely will rank near the bottom in order-routing preference of most market participants and intermediaries. Whenever the least-preferred trading center is merely posting the same price as other trading centers, orders will be routed to other trading centers. As a result, limit orders displayed on the least preferred trading center will be least likely to be executed in general. Moreover, such limit orders will be the least likely to be executed when prices move in favor of the limit orders, and the most likely to be executed only when prices are moving against the limit order, adding the cost of "adverse selection" to the cost of a low likelihood of execution. In sum, the lowest ranked trading center in order-routing preference, with or without intermarket price protection, will suffer the consequences of offering a poor range of services to the routers of marketable orders.[243] The Commission therefore does not believe that the absence of an opt-out exception would freeze market development or eliminate competition among markets.

Commenters have, however, identified a troubling potential for intermarket price protection to lessen the competitive discipline that market participants now can impose on inefficient trading centers in Nasdaq stocks. The Order Protection Rule generally requires that trading centers match the best quoted prices, cancel orders without an execution, or route orders to the trading centers quoting the best prices. This is good for investors generally, but may not be if the quoting market is inefficient. For example, a trading center may have poor systems that do not process orders quickly and

January 24, 2005 ("CFA Reproposal Letter") at 1; ICI Reproposal Letter at 5, n. 8; Letter from Kenneth S. Janke, Chairman, National Association of Investors Corporation, to Jonathan G. Katz, Secretary, Commission, dated January 14, 2005 ("NAIC Reproposal Letter") at 2.

[235] ICI Reproposal Letter at 5, n. 8.

[236] *See, e.g.*, Letter from Daniel M. Clifton, Executive Director, American Shareholder Association, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("ASA Reproposal Letter") at 2; Fidelity Reproposal Letter at 3–6; Instinet Reproposal Letter at 5; Morgan Stanley Reproposal Letter at 2, 5–6; Nasdaq Reproposal Letter at 3–4; RBC Capital Markets Reproposal Letter at 3–5. Comments discussing concerns that a trade-through rule would be unworkable without an opt-out exception are discussed in the preceding section.

[237] Letter Type C.

[238] Morgan Stanley Letter at 11–12.

[239] Morgan Stanley Reproposal Letter at 6.

[240] Instinet Letter at 19.

[241] Instinet Reproposal Letter at 5. Other commenters on the Reproposing Release also continued to express a concern about the impact the reproposed Rule would have on competition and innovation. See, *e.g.*, JP Morgan Reproposal Letter at 7–8; RBC Capital Reproposal Letter at 3–4; Letter from Jeffrey T. Brown, Senior Vice President, Charles Schwab & Co., Inc., to Jonathan G. Katz, Secretary, Commission, dated February 1, 2005 ("Schwab Reproposal Letter") at 2.

[242] One commenter expressed the view that market participants would continue to compete on a total range of services even with an Order Protection Rule without an opt-out and with depth-of-book protection. Vanguard Reproposal Letter at 4.

[243] As discussed below in section III.A.2, a competitive problem could arise if a least preferred market was allowed to charge exorbitant fees to access its protected quotations, and then pass most of the fee on as rebates to liquidity providers to offset adverse selection costs. To address the problem of such an "outlier" market, Rule 610(c) sets forth a uniform fee limitation for accessing protected quotations, as well as manual quotations that are the best bid or best offer of an exchange, The NASDAQ Market Center, or the ADF.

reliably. Or a low-volume trading center may not be nearly as accessible as a high-volume trading center.

Currently, consistent with their best execution and other agency responsibilities, participants in the market for Nasdaq stocks can choose not to deal with any trading center that they believe provides unsatisfactory services. Under the Order Protection Rule, market participants can limit their involvement with any trading center to routing IOC orders to access only the best bid or best offer of the trading center. Nevertheless, even this limited involvement potentially could lessen the competitive discipline that otherwise would be imposed on an inefficient trading center. The Commission therefore believes that this potentially serious effect must be addressed at multiple levels in addition to the specific exceptions included in the Rule that were discussed above.

First, trading centers themselves have a legal obligation to meet their responsibilities under the Exchange Act to provide venues for trading that is orderly and efficient.[244] Through registration and other requirements, the Exchange Act regulatory regime is designed to preclude entities that are not capable of meeting high standards of conduct from doing business with the public. This critically important function would be undermined by a trading center that displayed quotations in the consolidated data stream, but could not, because of poor systems or otherwise, provide efficient access to market participants and efficient handling of their orders. In addition, a trading center would violate its Exchange Act responsibilities if it failed to comply fully with the requirements set forth in Rule 600(b)(3) and (4) for automated quotations and automated trading centers. In particular, an automated trading center must implement such systems, procedures, and rules as are necessary to render it capable of meeting the requirements for automated quotations and must immediately identify its quotations as manual whenever it has reason to believe that it is not capable of displaying automated quotations. These requirements place an affirmative and vitally important legal duty on trading centers to identify their quotations as manual at the first sign of a problem, not after a problem has fully manifested itself and thereby caused a rippling effect at other trading centers that damages investors and the public interest.

Second, those responsible for the regulatory function at SROs have an affirmative responsibility to examine for and enforce all Exchange Act requirements and the SRO rules that apply to the trading centers that fall within their regulatory authority. One of the key policy justifications for a self-regulatory system is that industry regulators have close proximity to, and significant expertise concerning, their particular trading centers. In addition, industry regulators typically have greater flexibility to address problems than governmental authorities. Implementation of the Order Protection Rule will heighten the importance of effective self-regulation. Those responsible for the market operation functions of an SRO may have business incentives that militate against dealing with potential problems in an effective and forthright manner. Regulatory personnel are expected to be independent of such business concerns and have an affirmative responsibility to prevent improper factors from interfering with an SRO's full compliance with regulatory requirements.

Finally, the Commission itself plays a critical role in the Exchange Act regulatory regime. Effective implementation of the Order Protection Rule also will depend on the Commission taking any action that is necessary and appropriate to address trading centers that fail to meet fully their regulatory requirements. The Commission and its staff must continue to monitor the markets closely for signs of problems and listen to the concerns of market participants as they arise, especially with regard to the new requirements imposed by the Order Protection Rule. Quick and effective action will be needed to assure that all responsible parties do not feel that inattention to problems is an acceptable course of action.

b. Promoting the Interests of Both Marketable Orders and Limit Orders

Many commenters that supported an opt-out exception believed that an ability to opt-out of the best displayed prices was necessary to promote full freedom of choice in the routing of marketable orders, and particularly to allow factors other than quoted prices to be considered. For example, 179 commenters on the original proposal submitted a letter stating that "[i]nvestors are driven by price, but prices that are inaccessible either because of lagging execution time within a market or insufficient liquidity at the best price point impact the overall costs associated with trading securities in today's markets. The Trade Through rule may harm investors by restricting their ability to achieve best execution, and investors deserve the opportunity to make choices."[245] Similarly, Fidelity asserted that "as a fiduciary to the mutual funds under our management, we should be free to reach our own informed judgment regarding the market center where our funds' trades are to be executed, particularly when delay may open the way for exchange floor members and others to exploit an informational advantage that arises not from their greater investment or trading acumen but merely from their privileged presence on the physical trading floor."[246] Fidelity continues to support an opt-out exception, stating in response to the Reproposing Release that there is a substantial risk that an institutional investor, seeking to trade a large block of stock, will be put to a "distinct and unfair" disadvantage if it cannot negotiate an all-in price for a block trade with a dealer.[247]

The Commission agrees that the interests of investors in choosing the trading center to which to route marketable orders are vitally important, but believes that advocates of the opt-out exception have failed to consider the interests of *all* investors—both those who submit marketable orders and those who submit limit orders. A fair and efficient NMS must serve the interests of both types of investors. Moreover, their interests are inextricably linked together. Displayed limit orders are the primary source of public price discovery. They typically set quoted spreads, supply liquidity, and in general establish the public "market" for a stock. The quality of execution for marketable orders, which, in turn, trade with displayed liquidity, depends to a great extent on the quality of markets established by limit orders (*i.e.*, the narrowness of quoted spreads and the available liquidity at various price levels).

Limit orders, however, make the first move—when submitted, they must be displayed rather than executed, and therefore offer a "free option" for other

[244] *See, e.g.*, Exchange Act Sections 6(b)(1) and 6(b)(5); Exchange Act Section 15; Exchange Act Sections 15A(b)(2) and 15A(b)(6); Exchange Act Section 11A(a)(1)(C); Regulation ATS.

[245] Letter Type C.

[246] Fidelity Letter I at 6–7.

[247] Fidelity Reproposal Letter at 3. Other commenters continued to express a concern that the reproposed Order Protection Rule would limit the ability of investors and market intermediaries to choose how to best execute orders, and, by focusing exclusively on price, would interfere with the ability of institutional investors to achieve best execution. See, *e.g.*, JP Morgan Reproposal Letter at 4–5; Morgan Stanley Reproposal Letter at 5; RBC Capital Reproposal Letter at 4–5; UBS Reproposal Letter at 2.

market participants to trade a stock by submitting marketable orders and taking the liquidity supplied by limit orders. Consequently, the fate of limit orders—whether or when they receive an execution—is dependent on the choices made by those who route marketable orders. Much of the time, the interests of marketable orders in obtaining the best available price are aligned with those of limit orders that are displaying the best available price. But, as shown by the significant trade-through rates discussed in section II.A.1 above (even for automated quotations in Nasdaq stocks), the interests of marketable orders and limit orders are not always aligned.

One important example of where the interests of limit orders and marketable orders often diverge is large, block trades. Several commenters noted that they often are willing to bypass the best quoted prices if they can obtain an immediate execution of large orders at a fixed price that is several cents away from the best prices.[248] Yet these block trades often will be priced based on the displayed quotations in a stock. They thereby demonstrate the "free-riding" economic externality that, as discussed in section II.A.1 above, is one of the factors at the heart of the need for intermarket price protection. To achieve the full benefits of intermarket price protection, all investors should be governed by a uniform rule that encompasses their individual trades. For any particular trade, an investor may believe that the best course of action is to bypass displayed quotations in favor of executing larger size immediately. The Commission believes, however, that the long-term strength of the NMS as a whole is best promoted by fostering greater depth and liquidity, and it follows from this that the Commission should examine the extent to which it can encourage the limit orders that provide this depth and liquidity to the market at the best prices. Allowing individual market participants to pick and choose when to respect displayed quotations could undercut the fundamental reason for displaying the liquidity in the first place.

Consequently, the Commission is adopting the Order Protection Rule as reproposed without an opt-out exception because such an exception could severely detract from the benefits of intermarket order protection. Instead, Rule 611 addresses the concerns of those who otherwise may have felt they needed to opt-out of protected quotations in a more targeted manner. In particular, the Rule incorporates an approach that seeks to serve the interests of both marketable orders and limit orders by appropriately balancing these interests in the contexts where they may diverge. In this way, the Order Protection Rule is designed to promote the fairness and efficiency of the NMS for all investors.

First and most importantly, Rule 611 protects only immediately accessible quotations that are available through automatic execution. It does not require investors submitting marketable orders to access "maybe" quotations that, after arrival of the order, are subject to human intervention and thereby create the potential for other market participants to determine whether to honor the quotation. Moreover, as discussed in section II.A.2 above, Rule 611 includes a variety of provisions designed to assure that marketable orders must be routed only to well-functioning trading centers displaying executable quotations.

Second, Rule 611 has been formulated to promote the interests of investors seeking immediate execution of specific order types that reduce their total trading costs, particularly for larger orders. Although the Rule does not provide a general exception for block orders, it addresses the legitimate interest of investors in obtaining an immediate execution in large size (and thereby minimizing price impact). The intermarket sweep order exception will allow broker-dealers to continue to facilitate the execution of block orders.[249] The entire size of a large order can be executed immediately at any price, so long as the broker-dealer routes orders seeking to execute against the full displayed size of better-priced protected quotations. The size of the order therefore need not be parceled out over time in smaller orders that might tip the market about pending orders. By both allowing immediate execution of the large order and protecting better-priced quotations, Rule 611 is designed to appropriately balance the interests for investors on both sides of the market.[250]

In the Reproposing Release, the Commission stated that it preliminarily did not believe that "stopped" orders should be excepted from Rule 611,[251] and requested comment on the extent to which the proposed rule language appropriately designated those transactions that should be excepted because they are consistent with the price protection objectives of Rule 611.[252] Several commenters on the Reproposing Release recommended that the Commission except the execution of stopped orders from the operation of Rule 611.[253] They believed that, because dealers executing stopped orders provide a source of liquidity that does not otherwise exist in the market at the time the order is stopped, the use of stopped orders represents a common and valuable form of capital commitment by dealers that inures to the benefit of investors. They were concerned that, in the absence of an exception for stopped orders, dealers may be unwilling to commit capital in this manner, or, at a minimum, may charge investors a greater risk premium for the capital commitment.

The Commission agrees that stopped orders can provide a valuable tool for the execution of institutional orders, but is concerned that a broad exception for all stopped orders would undermine the price protection objectives of Rule 611. Several commenters recognized this concern and suggested criteria for a stopped order exception that would limit the possibility of abuse.[254] For instance, UBS suggested limiting the applicability of the exception to instances where the stop price is "in the

[248] *See, e.g.*, Fidelity Letter I at 9; Morgan Stanley Letter at 12.

[249] *Cf.* ICI Reproposal Letter at 5 (stating its belief that the intermarket sweep exception would allow institutional investors to continue to execute large-sized orders in an efficient manner).

[250] One commenter requested that the Commission consider the practical aspects of executing and reporting large block transactions in compliance with the Rule. For instance, if a dealer agreed to execute a large institutional investor order at three cents outside the market and sent intermarket sweep orders to execute against protected quotations at the same time that it executed and reported the trade, practical issues could arise as to how the dealer could pass through to the investor any better-priced executions of the sweep orders without canceling and correcting the reported block trade. Morgan Stanley Reproposal Letter at 7–9. The Commission agrees that compliance with Rule 611 should not interfere with the ability of a dealer to provide its customers the benefit of better executions and should not cause confusion with respect to the accurate reporting of transactions. As the commenter noted, the practical issues for reporting block trades could be resolved in a variety of ways. The Commission will work with the industry during the implementation period to achieve the most appropriate resolution.

[251] For purposes of this discussion and Rule 611, a stopped order is an order for which a trading center has guaranteed, at the time of order receipt, an execution at a price no worse than a specified price (referred to in this discussion as the "stop" price).

[252] Reproposing Release, 69 FR at 77440 n. 149.

[253] *See, e.g.*, Letter from Bruce Lisman, Bear, Stearns & Co., to Jonathan G. Katz, Secretary, Commission, dated January 27, 2005 ("Bear Stearns Reproposal Letter") at 2–3; Citigroup Reproposal Letter at 7–8; Morgan Stanley Reproposal Letter at 9–10; SIA Reproposal Letter at 16–18; UBS Reproposal Letter at 6. *But see* Goldman Sachs Letter at 7–8, n. 14; Letter from Mary Yeager, Assistant Secretary, New York Stock Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated January 12, 2005 ("NYSE Reproposal Letter I"), Detailed Comments at 3 n. 13.

[254] Bear Stearns Reproposal Letter at 3; Morgan Stanley Reproposal Letter at 10; SIA Reproposal Letter at 17–18; UBS Reproposal Letter at 6.

money" when elected (*i.e.*, below the current best bid for buy stops and above the current best offer for sell stops). In these circumstances, the dealer is required to commit capital at a disadvantageous price that would be exacerbated if the dealer also had to satisfy protected quotations at the time it executed the stopped order.[255] The SIA also suggested that a stopped order guarantee subject to the exception only be available to a non-broker-dealer or a broker-dealer for the benefit of a non-broker-dealer customer and that the customer must agree to the stopped price on an order-by-order basis.[256]

In response to these comments, the Commission has adopted a separate exception for the execution of stopped orders in Rule 611(b)(9). The exception is narrowly drawn to prevent abuse, while also facilitating the continued use of stopped orders by institutional customers. As suggested by the commenters, the exception will apply to the execution of so-called "underwater" stops. Specifically, the exception applies to the execution by a trading center of a stopped order when the price of the execution of the order was, for a stopped buy order, lower than the national best bid in the stock at the time of execution or, for a stopped sell order, higher than the national best offer in the stock at the time of execution. To qualify for the exception, the stopped order must be for the account of a customer and the customer must have agreed to the stop price on an order-by-order basis.[257]

In addition, as proposed in the Reproposing Release, paragraph (b)(7) of Rule 611 sets forth an exception that would allow the execution of volume-weighted average price ("VWAP") orders, as well as other types of orders that are not priced with reference to the quoted price of a stock at the time of execution and for which the material terms were not reasonably available at the time the commitment to execute the order was made. This exception will serve the interests of marketable orders and is consistent with the principle of protecting the best displayed quotations.

Several commenters suggested that Rule 611 should include exceptions for additional types of transactions, such as those involving an equity security and a related derivative (for instance, a stock-option transaction), risk arbitrage strategies, and convertible or merger arbitrage.[258] These commenters noted that the economics of these transactions are based on the relationship between the prices of a security and the related derivative (or between two related securities), and the execution of one trade is contingent upon the execution of the other trade. Thus, the parties to these transactions are less concerned with the price of the individual transactions than with the spread between the individual transaction prices. They believed that the economics of these transactions would be distorted, and additional risk would be introduced, if the dealer or an investor was forced to comply with the Order Protection Rule with respect to the execution of one or both sides of the transaction.[259]

The Commission has given a great deal of consideration to the comments favoring a general exception from Rule 611 for broad categories of transactions, variously described as "contingency" transactions, "arbitrage" transactions, "spread" transactions, and transactions priced with reference to derivatives. Any exception for such a broad category of transactions, however, potentially could unduly detract from the price protection objectives of the Rule. For example, one of the well-known benefits of arbitrage transactions in general is that they promote more efficient pricing of securities in the public markets. Excluding all such transactions from interacting with public quotations potentially could lessen the price discovery benefits of arbitrage. Accordingly, the Commission has determined that the most appropriate process to handle suggestions that specific types of transactions should be excluded from the coverage of Rule 611 is through its exemptive procedure set forth in paragraph (d) of the Rule. The extended implementation period for Regulation NMS will provide a full opportunity for the public to request specific exemptions that they believe are necessary or appropriate in the public interest and consistent with the protection of investors. Of course, the Commission also will consider exemptive requests once Regulation NMS has been implemented.

Even given all the exceptions set forth in Rule 611, however, the Commission recognizes that the existence of intermarket price protection without an opt-out exception may interfere to some extent with the extremely short-term trading strategies of some market participants. Some of these strategies can be affected by a delay in order-routing or execution of as little as 3/10ths of one second. Given the current NMS structure with multiple competing markets, *any* protection of displayed quotations in one market could affect the implementation of short-term trading strategies in another market. This conflict between protecting the best displayed prices and facilitating short-term trading strategies raises a fundamental policy question—when such a conflict exists, should the overall efficiency of the NMS defer to the needs of short-term traders, many of whom rarely intend to hold a position overnight? Or should the NMS serve the needs of longer-term investors, both large and small, that will benefit substantially from intermarket price protection?

The Commission believes that two of the most important public policy functions of the secondary equity markets are to minimize trading costs for long-term investors and to reduce the cost of capital for listed companies. These functions are inherently connected, because the cost of capital of listed companies is influenced by the transaction costs of those who are willing to accept the investment risk of holding corporate stock for an extended period. To the extent that the interests of short-term traders and market intermediaries in a broad opt-out exception conflict with those of investors, the Commission believes that the interests of long-term investors are entitled to take precedence.[260] In this way, the NMS will fulfill its Exchange Act objectives to promote fair and efficient equity markets for investors and to serve the public interest.

5. Scope of Protected Quotations

The original trade-through proposal would have protected all quotations disseminated by a Plan processor in the consolidated quote stream. Currently, the scope of these quotations depends on the regulatory status of an SRO. Under Exchange Act Rule 11Ac1–1 ("Quote Rule") (redesignated as Rule 602), exchange SROs are required to provide only their best bids and offers ("BBOs") in a stock. In contrast, a national securities association, which currently encompasses Nasdaq's trading facilities and the NASD's ADF, must provide BBOs of its individual members. Consequently, the original

[255] UBS Reproposal Letter at 6. *See also* SIA Reproposal Letter at 17 (recommending that the exception only be available if the customer that received the stop guarantee is on the advantaged side and the dealer that gave the guarantee is on the disadvantaged side).

[256] SIA Reproposing Letter at 17.

[257] Rule 611(b)(9)(i), (ii), and (iii). "Customer" is defined in Rule 600(b)(16) as any person that is not a broker or dealer.

[258] Bear Stearns Reproposal Letter at 3–4; Citigroup Reproposal Letter at 7; Morgan Stanley Reproposal Letter at 10; SIA Reproposal Letter at 16.

[259] *See, e.g.*, Morgan Stanley Reproposal Letter at 10.

[260] *See supra*, section I.B.2.

proposal would have protected only a single BBO of an exchange and not any additional quotations in its depth of book ("DOB"). For Nasdaq facilities and the ADF, however, the proposal would have protected member BBOs at multiple price levels. The Proposing Release requested comment on whether only a single BBO for Nasdaq and the ADF should be protected.[261]

Commenters expressed concern that the proposed rule text would protect the BBOs of individual market makers and ATSs in Nasdaq's facilities and the ADF, but only a single BBO of exchange SROs.[262] The Specialist Association, for example, believed that it would be unfair to offer greater protection to the quotations of members of an association SRO than to those of an exchange SRO.[263] Morgan Stanley stated that to "equalize the protections available to all market participants, we believe the Commission should treat SuperMontage as a single market for purposes of the trade-through rule, instead of treating each individual Nasdaq market maker as a separate quoting market participant."[264]

The Commission agrees with these commenters that Rule 611 should not mandate a regulatory disparity between the quotations displayed through exchange SROs and those displayed through Nasdaq facilities and the ADF. Potentially, Nasdaq and the ADF could attract a significant number of limit orders if they were able to offer order protection that was not available at exchange SROs. This result would not be consistent with the Exchange Act goals of fair competition among markets and the equal regulation of markets.[265] The Commission therefore modified the definition of "protected bid" and "protected offer" in the reproposal to encompass the BBOs of an exchange, Nasdaq, and the ADF. In this way, exchange markets would be treated comparably with Nasdaq and the ADF.

The Proposing Release also addressed the issue of extending trade-through protection to DOB quotations, but questioned whether protecting all DOB quotations would be feasible at this time.[266] Comment specifically was requested, however, on whether protection should be extended beyond the BBOs of SROs if individual markets *voluntarily* provided DOB quotations through the facilities of an effective national market system plan.[267] At the subsequent NMS Hearing, a panelist specifically endorsed the policy and feasibility of extending trade-through protection to DOB quotations, as long as such quotations were automated and accessible: "Automatically executable quotes, whether they are on the top of the book or up and down the book, should be protected by the trade-through rule, and manual quotes should not be. This is a simple and technically easy idea to implement* * *."[268]

Most of the subset of comment letters on the original proposal that specifically addressed the DOB issue supported the approach of extending trade-through protection to all limit orders displayed in the NMS, not merely the BBOs of the various markets.[269] The Consumer Federation of America, for example, stated that "such an approach would result in better price transparency and help to address complaints that decimal pricing has reduced price transparency because of the relatively thin volume of trading interest displayed in the best bid and offer."[270] The ICI noted that protecting all displayed limit orders might not be feasible at this time, but urged the Commission to examine the issue further.[271]

The Commission recognized, however, that other commenters may have chosen not to address the alternative of protecting voluntary DOB quotations because it was not included in the proposed rule text. In the Reproposing Release, therefore, the Commission proposed rule text for two alternatives: (1) The Market BBO Alternative that would protect only the BBOs of the exchange SROs, Nasdaq, and the ADF; or (2) the Voluntary Depth Alternative that, in addition to protecting BBOs, would protect the DOB quotations that markets voluntarily disseminate in the consolidated quotations stream. The Commission requested comment on which of the two alternatives would most further the Exchange Act objectives for the NMS in a practical and workable manner. In particular, comment was requested on whether extending trade-through protection to DOB quotations would significantly increase the benefits of the Order Protection Rule, and on the effect that adoption of the Voluntary Depth Alternative would have on competition among markets. The Commission also requested comment on whether the Voluntary Depth Alternative could be implemented in a practical and cost-effective manner.[272]

A large majority of commenters that supported the reproposed Order Protection Rule supported the Market BBO Alternative.[273] Many commenters

[261] Proposing Release, 69 FR at 11136.

[262] *See, e.g.*, Goldman Sachs Letter at 6; Morgan Stanley Letter at 8; NYSE Letter, Attachment at 4; Specialist Assoc. Letter at 3.

[263] Specialist Assoc. Letter at 3.

[264] Morgan Stanley Letter at 8.

[265] Exchange Act Sections 11A(a)(1)(C)(ii) and 11A(c)(1)(F).

[266] Proposing Release, 69 FR at 11136.

[267] *Id.*

[268] Hearing Tr. at 57 (testimony of Thomas Peterffy, Chairman, Interactive Brokers Group).

[269] American Century Letter at 2; Ameritrade Letter I at 4; BNY Letter at 2; Capital Research Letter at 2; Consumer Federation Letter at 2; Goldman Sachs Letter at 6; ICI Letter at 8. *See also* ArcaEx Letter at 7 (supported trade-through protection for exchange-listed stocks only, but for entire depth-of-book). *But see* Letter from Samuel F. Lek, Chief Executive Officer, Lek Securities Corporation, to Jonathan G. Katz, Secretary, Commission, dated May 24, 2004 ("Lek Securities Letter") at 7; Letter from David Humphreville, President, the Specialist Association of the New York Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("Specialist Assoc. Letter") at 3.

[270] Consumer Federation Letter at 2.

[271] ICI Letter at 8.

[272] See Section II.A.5 in the Reproposing Release for a detailed discussion of the request for comment on the Market BBO Alternative and the Voluntary Depth Alternative.

[273] Approximately 1,556 commenters expressed support for the Market BBO Alternative, of which approximately 1,411 were form letters. See, *e.g.*, Letter from Brendan R. Dowd and Zdrojeski, Co-Presidents, Alliance of Floor Brokers, to Jonathan G. Katz, Secretary, Commission, dated January 20, 2005 ("Alliance of Floor Brokers Reproposal Letter") at 1; Letter from Neal L. Wolkoff, Acting Chief Executive Officer, American Stock Exchange, LLC, to Jonathan G. Katz, Secretary, Commission, dated January 27, 2005 ("Amex Reproposal Letter") at 2; Bear Stearns Reproposal Letter at 1 (if properly modified); Letter from Minder Cheng, Managing Director, CIO, US Active Equities, Global Head of Equity and Currency Trading, Barclays Global Investors, N.A., to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("BGI Reproposal Letter") at 2; Letter from Joseph M. Velli, Senior Executive Vice President, The Bank of New York, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("BNY Reproposal Letter") at 2; BSE Reproposal Letter at 2; Letter from David A. Herron, Chief Executive Officer, The Chicago Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("CHX Reproposal Letter") at 2; Letter from Kimberly G. Walker, Chairman, Committee on Investment of Employee Benefit Assets, to Jonathan G. Katz, Secretary, Commission, dated January 25, 2005 ("CIEBA Reproposal Letter") at 2; Deutsche Bank Reproposal Letter at 2; Form Letters G, H, I, J, and K; Letter from D. Keith Ross, Jr., Chief Executive Officer, Getco, LLC, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("Getco Reproposal Letter") at 2; Letter from Thomas Peterffy, Chairman, and David M. Battan, Vice President, The Interactive Brokers Group, to Jonathan G. Katz, Secretary, Commission, dated January 24, 2005 ("Interactive Brokers Group Reproposal Letter") at 1; NAIC Reproposal Letter at 2; Letter from John M. Schaible, President, NexTrade Holdings, Inc., to Jonathan G. Katz, Secretary, Commission, dated December 22, 2004 ("Nextrade Reproposal Letter") at 3; NYSE Reproposal Letter I at 1–3; Letter from Kenneth J. Polcari, President, *et al.*, Organization of Independent Floor Brokers, to Jonathan G. Katz, Secretary, Commission, dated January 12, 2005 ("Organization of Independent Floor Brokers Reproposal Letter") at 2; Phlx Reproposal Letter at 1; Letter from Richard A. Rosenblatt, CEO, and Joseph C. Gawronski, COO, Rosenblatt Securities Inc., to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("Rosenblatt Securities Reproposal Letter") at 2; Specialist Association Reproposal Letter at 2; T. Rowe Price Reproposal Letter at 2.

believed that the Market BBO Alternative achieves the appropriate balance between the need to promote competition among orders and to preserve competition among markets,[274] but that the Voluntary Depth Alternative, by focusing too exclusively on competition among orders, would unduly restrict competition among markets.[275] Many commenters also believed that implementing the Voluntary Depth Alternative would be significantly more difficult and costly than implementing the Market BBO Alternative.[276]

The Commission has determined to adopt the Market BBO Alternative. The Commission believes that providing enhanced protection for the best bids and offers of each exchange, Nasdaq, and the ADF will represent a major step toward achieving the objectives of intermarket price protection, but with fewer of the costs and drawbacks associated with the Voluntary Depth Alternative. In particular, the Market BBO Alternative will promote best execution for retail investors on an order-by-order basis, given that most retail investors justifiably expect that their orders will be executed at the NBBO. In addition, implementation of the Market BBO Alternative will not require an expansion of the data disseminated through the Plans. The Plans currently disseminate the BBOs of each SRO, but do not disseminate the depth of book of all SROs.

The Commission does not agree with commenters that the Voluntary Depth Alternative would be a CLOB, virtual or otherwise.[277] The essential characteristic of a CLOB is strict price/time priority. To achieve time priority, all orders must be funneled through a single trading facility so that they can be ranked by time. Such a facility would greatly reduce the opportunity for markets to compete by offering a variety of different trading services. Price priority alone, however, would not cause nearly as significant an impact on competition among markets because it allows price-matching by competing markets. Thus, while a CLOB requires centralization of essentially all orders, price priority (whether the Market BBO Alternative or the Voluntary Depth Alternative) merely requires the routing of a much smaller subset of orders that otherwise would be executed at inferior prices.

A number of commenters believed that enhanced order interaction with quotations beyond the best bids and offers of the various SROs would likely result even if the Commission adopted the Market BBO Alternative.[278] Given the existence of highly sophisticated order routing technology and the requirement to route orders to access the best bids and offers under the Market BBO Alternative, these commenters asserted that competition and best execution responsibilities would lead market participants to voluntarily access depth-of-book quotations in addition to quotations at the top-of-book. The Commission believes that such a competition-driven outcome would benefit investors and the markets in general.

Another group of commenters advocated protecting only the NBBO.[279] They believed that NBBO protection would be a more measured first step forward that would strengthen existing price protection while helping to mitigate implementation problems and potential unintended consequences with either the Market BBO or Voluntary Depth Alternative.[280]

The Commission does not support the NBBO approach. The marginal benefits to be gained from protecting only the NBBO would not justify the costs of implementing the approach. In addition, protecting only the NBBO would be a step backwards from the scope of the existing ITS trade-through rule, which covers the best bids and offers of each exchange and the NASD. The Commission also is concerned that an order protection rule that protected only the NBBO would be excessively vulnerable to gaming behavior, because a market participant could post a 100-share order improving the NBBO and then execute a much larger order away from the NBBO while protecting only the 100-share quotation. This result would not be consistent with the purposes of the Order Protection Rule.

6. Benefits and Implementation Costs of the Order Protection Rule

Commenters were concerned about the cost of implementing the original trade-through proposal. Some argued that, in general, implementing the proposed rule would be too expensive and would outweigh any perceived benefits of the rule.[281] Commenters also were concerned about the cost of specific requirements in the proposed rule, particularly the procedural requirements associated with the proposed opt-out exception (*e.g.*, obtaining informed consent from customers and disclosing the NBBO to customers).[282]

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[274] See, *e.g.*, Amex Reproposal Letter at 3; BGI Reproposal Letter at 2; BNY Reproposal Letter at 2–3; Form Letter J; Specialist Association Reproposal Letter at 3.

[275] See, *e.g.*, Alliance of Floor Brokers Reproposal Letter at 2; Amex Reproposal Letter at 3; Bear Stearns Reproposal Letter at 2; BNY Reproposal Letter at 2–3; BSE Reproposal Letter at 6; CHX Reproposal Letter at 3; CIEBA Reproposal Letter at 2; Deutsche Bank Reproposal Letter at 2; Getco Reproposal Letter at 1–2; Interactive Brokers Reproposal Letter at 3; NAIC Reproposal Letter at 1–2; NYSE Reproposal Letter I at 2; Organization of Independent Floor Brokers Reproposal Letter at 2; Rosenblatt Securities Reproposal Letter at 2; Specialist Association Reproposal Letter at 5.

[276] See, *e.g.*, Amex Reproposal Letter at 3; BNY Reproposal Letter, at 3; BSE Reproposal Letter at 7; CHX Reproposal Letter at 2; Letter from W. Leo McBlain, Chairman, and Thomas J. Jordan, Executive Director, Financial Information Forum, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("FIF Reproposal Letter") at 2–3; Getco Reproposal Letter at 1; Interactive Brokers Group Reproposal Letter at 1; Nextrade Reproposal Letter at 3; NYSE Reproposal Letter I, Detailed Comments at 8; Phlx Reproposal Letter at 2; Specialist Association Reproposal Letter at 4.

[277] Many of these commenters expressed the view that implementation of the Voluntary Depth Alternative effectively would amount to a virtual CLOB. See, *e.g.*, Alliance of Floor Brokers Reproposal Letter at 2; BGI Reproposal Letter at 3; BNY Reproposal Letter at 2–3; CHX Reproposal Letter at 2–3; Letter from Congressman Peter T. King *et al.*, to Jonathan G. Katz, Secretary, Commission, dated January 25, 2005 ("Congressman King *et al.* Reproposal Letter") at 1; Letter from Congressman Edward R. Royce and Congressman George Radanovich to Jonathan G. Katz, Secretary, Commission, dated January 25, 2005 ("Congressmen Royce & Radanovich Reproposal Letter"); Letter from Congresswoman Lydia M. Velázquez to Jonathan G. Katz, Secretary, Commission, dated January 25, 2005 ("Congresswoman Velázquez Letter") at 1; NAIC Reproposal Letter at 1; NYC Comptroller Reproposal Letter; NYSE Reproposal Letter at 2; Organization of Independent Floor Brokers Reproposal Letter at 1; Form Letters G, H, I, J, K, and L.

[278] See, *e.g.*, Bear Stearns Reproposal Letter at 2; BNY Reproposal Letter at 2; Interactive Brokers Reproposal Letter at 4.

[279] CIBC Reproposal Letter at 1 (joining positions taken by SIA in its letter); Citigroup Reproposal Letter at 6 (arguing that to the extent a trade-through rule is necessary, it prefers protecting the NBBO, with an exception for most liquid securities preferred); FSR Reproposal Letter at 4; JP Morgan Reproposal Letter at 3 (stating that if Commission does not provide large order exception then NBBO preferred); Lava Reproposal Letter at 1,3 (not supporting or opposing the reproposed Order Protection Rule but indicating NBBO would facilitate adoption and ease implementation concerns); Merrill Lynch Reproposal Letter at 3; SIA Reproposal Letter at 5–12; STANY Reproposal Letter at 10.

[280] See, *e.g.*, SIA Reproposal Letter at 5–12.

[281] *See, e.g.*, Bloomberg Tradebook Letter at 14; Fidelity Letter I at 12; Instinet Letter at 14, 15; Nasdaq Letter II at 2; Letter from Junius W. Peake, Monfort Distinguished Professor of Finance, Kenneth W. Monfort College of Business, University of Northern Colorado, dated April 23, 2004 ("Peake Letter I") at 2; NMS Study Group Letter at 4; Letter from Richard A. Rosenblatt, Chief Executive Officer, & Joseph C. Gawronski, Chief Operating Officer, Rosenblatt Securities Inc., to William H. Donaldson, Chairman, Commission, dated June 23, 2004 ("Rosenblatt Securities Letter II") at 4; STANY Letter at 3; UBS Letter at 8.

[282] *See, e.g.*, Ameritrade Letter I at 8; Brut Letter at 12; Citigroup Letter at 8–9; E*TRADE Letter at 7; Letter from W. Leo McBlain, Chairman, & Thomas J. Jordan, Executive Director, Financial Information Forum, to Jonathan G. Katz, Secretary,

Some of the commenters based their concerns about implementation costs on the estimated costs included in the Proposing Release for purposes of the Paperwork Reduction Act of 1995 ("PRA").[283] In the Reproposing Release, the Commission revised its estimate of the PRA costs associated with the proposed rule to reflect the streamlined requirements of Rule 611 as reproposed, and to reflect a further refinement of the estimated number of trading centers subject to the rule.[284] In particular, Rule 611 as reproposed did not contain an opt-out exception, and thus costs associated with the proposed exception, which represented a large portion of the overall estimated costs described in the Proposing Release, were no longer applicable.[285] In total, eliminating the opt-out procedural requirements alone reduced the estimate of costs in the Proposing Release by $294 million in start-up costs and $207 million in annual costs. In the Reproposing Release, the Commission also refined its estimate of the number of broker-dealers that would be required to establish, maintain, and enforce written policies and procedures designed to prevent trade-throughs pursuant to the reproposed Rule from 6,788 registered broker-dealers to approximately 600 broker-dealers.[286]

Taken together, these changes substantially reduced the estimated costs associated with implementation of and ongoing compliance with reproposed Rule 611. As discussed further in section VIII.A below, the estimated PRA costs associated with reproposed Rule 611 were $17.8 million in start-up costs and $3.5 million in annual costs. In addition, as discussed further in section IX.A.2 below, the estimated implementation costs in the Reproposing Release for necessary systems modifications were $126 million in start-up costs and $18.4 million in annual costs. Accordingly, the total estimated costs in the Reproposing Release were $143.8 million in start-up costs and $21.9 million in annual costs.

Although a number of commenters generally expressed the view that there would be significant costs associated with implementing and complying with the reproposed Rule, they did not discuss the specific estimated cost figures included in the Reproposing Release or include their own estimates.[287] Many commenters expressed concerns with the costs associated with implementing the Voluntary Depth Alternative, believing that the costs of implementing the Voluntary Depth Alternative would be substantially greater than the Market BBO Alternative.[288] As discussed above in Section II.A.5, the Commission is adopting the Market BBO Alternative and not the Voluntary Depth Alternative. The Commission does not believe that the inclusion of a stopped order exception will materially impact the estimated costs included in the Reproposing Release.[289] The Commission continues to estimate implementation costs for the Order Protection Rule as adopted of approximately $143.8 million and annual costs of approximately $21.9 million.[290]

In assessing the implementation costs of the Order Protection Rule, it is important to recognize that much, if not all, of the connectivity among trading centers necessary to implement intermarket price protection has already been put in place. Trading centers for exchange-listed securities already are connected through the ITS. The Commission understands that, at least as an interim solution, ITS facilities and rules can be modified relatively easily and at low cost to provide the current ITS participants a means of complying with the provisions of Rule 611. With respect to Nasdaq stocks, connectivity among many trading centers already is established through private linkages. Routing out to other trading centers when necessary to obtain the best prices for Nasdaq stocks is an integral part of the business plan of many trading centers, even when not affirmatively required by best execution responsibilities or by Commission rule. Moreover, a variety of private vendors currently offer connectivity to NMS trading centers for both exchange-listed and Nasdaq stocks.

The Commission believes that the benefits of strengthening price protection for exchange-listed stocks (*e.g.*, by eliminating the gaps in ITS coverage of block positioners and 100-share quotes) and introducing price protection for Nasdaq stocks will be substantial, although the total amount is difficult to quantify. One objective, though quite conservative, estimate of benefits is the dollar amount of quotations that annually are traded through. The Commission staff's analysis of trade-through rates indicates that over 12 billion shares of displayed quotations in Nasdaq and NYSE stocks were traded through in 2003, by an average amount of 2.3 cents for Nasdaq stocks and 2.2 cents for NYSE stocks.[291] These traded-through quotations represent approximately $209 million in Nasdaq stocks and $112 million in NYSE stocks, for a total of $321 million in bypassed limit orders and inferior prices for investors in 2003 that could have been addressed by strong trade-through protection.[292] The Commission believes that this $321 million estimated *annual* benefit, particularly when combined with the benefits of enhanced investor confidence in the fairness and orderliness of the equity markets, justifies the one-time costs of implementation and ongoing annual costs of the Order Protection Rule.

Two commenters on the reproposal asserted that the dollar amount of traded-through quotations overstated the benefits of order protection because "trading is for the most part a zero-sum

Commission, dated July 9, 2004 ("Financial Information Forum Letter") at 2; JP Morgan Letter at 4; SIA Letter at 12–14.

[283] 44 U.S.C. 3501 *et seq.*

[284] The PRA analysis is forth in section VIII.A below.

[285] Specifically, the estimated costs of providing investors with disclosure necessary to obtain informed consent to opt-outs and retaining records relating to such disclosures were $100 million in start-up costs and $59 million annually. Further, the estimated costs of the proposed requirement for broker-dealers to provide every customer that opted out with the NBBO at the time of execution were $194 million in start-up costs and almost $148 million annually.

[286] In the Proposing Release, the Commission estimated that potentially all of the 6,768 registered broker-dealers would be subject to this requirement, but acknowledged that it believed the figure was likely overly-inclusive because it might include registered broker-dealers that do not effect transactions in NMS stocks. As noted in the Reproposing Release, after further consideration, the Commission believes that this number indeed greatly overestimated the number of registered broker-dealers that would be subject to the rule, given that most of those broker-dealers do not engage in the business of executing orders internally. The estimated number therefore was reduced to approximately 600 broker-dealers in the Reproposing Release. No comments were received on this estimate. The estimate is described further in section VIII.A below.

[287] *See, e.g.*, CIBC Reproposal Letter at 4; Letter from Thomas M. Joyce, CEO & President, Knight Trading Group, Inc., to Jonathan G. Katz, Secretary, Commission, dated January 25, 2005 ("Knight Securities Reproposal Letter" "Knight Reproposal Letter") at 5 (expressing the view that the costs of either the Market BBO or Voluntary Depth Alternative outweigh the nominal benefits of the Rule); Merrill Lynch Reproposal Letter at 5; Nasdaq Reproposal Letter at 2; SIA Reproposal Letter at 11.

[288] Amex Reproposal Letter at 3; Letter from Steve Swanson, CEO & President, Automated Trading Desk, LLC, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("ATD Reproposal Letter") at 4; BNY Reproposal Letter at 3; CHX Reproposal Letter at 2; NYSE Reproposal Letter I, Detailed Comments at 8; RBC Capital Markets Reproposal Letter at 6; STANY Reproposal Letter at 9.

[289] The estimated cost figures included the Reproposing Release did not include additional costs that would be associated with the Voluntary Depth Alternative. *See* section IX.A.2 of the Reproposing Release.

[290] *See infra* sections VIII.A and IX.A.2.

[291] Trade-Through Study at 3, 5.

[292] *Id.* at 3.

game." [293] They believed that trades executed at inferior prices were random noise that sometimes benefited and sometimes disadvantaged a particular investor, stating that "[i]t is only if one class of investors systematically loses out to another class as a result of trade-throughs that there is a problem." [294]

The Commission does not agree that trades executed at inferior prices should be considered merely a transfer of benefits from one group of investors to another equally-situated group of investors. There are at least three parties affected by every trade-through transaction: (1) The party that received an inferior price; (2) the party whose superior-priced limit order was traded-through; and (3) the contra party to the trade-through transaction that received an advantageous price. The redistributions of welfare resulting from trade-through transactions cannot reasonably be expected to occur randomly across these parties. Customers of brokers that are doing a poor job of routing orders are more likely to be harmed than customers of brokers that are doing a better job.[295] Investors who generally submit limit orders at the best prices are more likely to be harmed than customers who generally submit less aggressively-priced limit orders.

Thus, trade-through transactions can result in direct harm to two parties, as well as more general harm to the efficiency of the markets by dampening the incentive for aggressive quoting. Moreover, even when the party receiving an inferior price does so willingly (such as when an institution accepts a block trade at a price away from the inside quotation),[296] the party whose quotation was traded through and the efficiency of the markets still are harmed. Finally, many trade-throughs are dealer internalized trades, where the party receiving the advantageous price is not an investor but a market intermediary, and therefore such trades cannot be considered a transfer of benefits from one group of investors to another equally-situated group of investors. This transfer of benefits from investors to market intermediaries cannot be dismissed as mere "random noise."

In addition, economic theory predicts that, in an auction market, buyers who place the highest value on a stock will bid most aggressively.[297] If an incoming market order is allocated to an investor who is not bidding the best price, this re-allocation is neither zero-sum nor random. It systematically reallocates trades away from those investors for whom the welfare gains would be largest. The argument also can be framed in terms of an investor's preferences with respect to the tradeoff between price and execution speed. Among those investors who trade using limit orders, we would expect more aggressive limit orders to be submitted by those investors who place more value on speed or certainty of execution and relatively less value on price. Conversely, we would expect investors who place a lower value on speed and certainty of execution and a higher value on price to submit less aggressive limit orders. When an incoming market order is executed against a limit order with an inferior price, the result is: (1) A faster execution for an investor who does not place as much value on speed of execution; and (2) a lost execution or slower execution for the investor who places a higher value on prompt execution. This is not a zero-sum redistribution.

Moreover, the $321 million estimate is a conservative measure of the total benefits of the Order Protection Rule. It does not attempt to measure any gains from trading associated with investors' private values, beyond those expressed in their limit order prices. The Order Protection Rule can be expected to generate other categories of benefits that are not quantified in the $321 million estimate, such as the benefits that can be expected to result from increased use of limit orders, increased depth, and increased order interaction.

Thus, the Commission believes that the $321 million estimate of benefits is conservative because it is based solely on the size of displayed quotations in the absence of strong price protection. In essence, it measures the problem—a shortage of quoted depth—that the Order Protection Rule is designed to address, rather than the benefits that it could achieve. Every trade-through transaction potentially sends a message to market participants that their displayed quotations can be and are ignored by other market participants. When the total share volume of trade-through transactions that do not interact with displayed quotations reaches 9% and above for hundreds of the most actively traded NMS stocks,[298] this message is unlikely to be missed by those who watched their quotations being traded through. Certainly, the common practice of trading through displayed size is most unlikely to prompt market participants to display even greater size.

A primary objective of the Order Protection Rule is to increase displayed depth and liquidity in the NMS and thereby reduce transaction costs for a wide spectrum of investors, particularly institutional investors that must trade in large sizes. Precisely estimating the extent to which strengthened price protection will improve market depth and liquidity, and thereby lower the transaction costs of investors, is very difficult. The difficulty of estimation should not hide from view, however, the enormous potential benefits for investors of improving the depth and efficiency of the NMS. Because of the huge dollar amount of trading volume in NMS stocks—more than $17 trillion in 2003 [299]—even the most incremental improvement in market depth and liquidity could generate a dollar amount of benefits that annually would dwarf the one-time start-up costs of implementing trade-through protection.

One approach to evaluating the potential benefits of the Order Protection Rule is to examine a category of investors that stand to benefit a great deal from improved depth and liquidity for NMS stocks—the shareholders in U.S. equity mutual funds. In 2003, the total assets of such funds were $3.68 trillion.[300] The average portfolio turnover rate for equity funds was 55%,

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[293] Angel Reproposal Letter at 4; Fidelity Reproposal Letter at 8.

[294] Angel Reproposal Letter at 4.

[295] As discussed above, it can be difficult for retail investors in particular to monitor whether their orders in fact received the best available price at the time of order execution. *See supra*, note 53 and accompanying text.

[296] Fidelity and the Battalio/Jennings Paper asserted that the staff study should not have included block trades in its estimate of the benefits of strengthened trade-through protection. Fidelity Reproposal Letter II at 1; Battalio/Jennings Paper at 2. The Commission does not agree. First, the amount that block trades contributed to the $321 million estimate is very small. Block trades represented only 1.9% of total trade-throughs in Nasdaq stocks and 1.1% of total trade-throughs in NYSE stocks. Trade-Through Study, Tables 6, 13. Most importantly, the staff study used the *lesser* of the size of the traded-through quotation and the size of the trade-through transaction when calculating the $321 million. *Id.* at 3. Thus, if a 10,000 share transaction traded through a 100-share quotation, only 100 shares counted toward the estimation of benefits. The Battalio/Jennings Paper incorrectly asserted that the staff study did not use this conservative approach. Battalio/Jennings Paper at 2. Finally, block trades are appropriately included in the estimation of benefits because their failure to interact with significant displayed quotations is one of the most serious problems with respect to the protection of limit orders that the Order Protection Rule is designed to address. *See supra*, section II.A.1.c.

[297] *See, e.g.*, B. Hollifield, R. Miller and P. Sandas, "Empirical Analysis of Limit Order Markets," 71 *Review of Economic Studies* 1027–1063 and n. 4 (2004).

[298] *See* Trade-Through Study, Tables 4.

[299] World Federation of Exchanges, *Annual Report* (2003), at 86.

[300] Investment Company Institute, *Mutual Fund Fact Book* (2004), at 55.

meaning that their total purchases and sales of securities amounted to approximately $4.048 trillion.[301] A leading authority on the trading costs of institutional investors has estimated that in the second quarter of 2003 the average price impact experienced by investment managers ranged from 17.4 basis points for giant-capitalization stocks, 21.4 basis points for large-capitalization stocks, and up to 35.4 basis points for micro-capitalization stocks.[302] In addition, it estimated the cost attributable to adverse price movements while searching for liquidity for institutional orders, which often are too large simply to be presented to the market. Its estimate of these liquidity search costs ranged from 13 basis points for giant capitalization stocks, 23 basis points for large capitalization stocks, and up to 119 basis points for micro-capitalization stocks.

To obtain a conservative estimate of price impact costs and liquidity search costs incurred across all stocks, the total market impact and liquidity search costs for giant capitalization stocks (30.4 basis points) and the total market impact and liquidity search costs for large capitalization stocks (44.4 basis points) are averaged together to yield a figure of 37.4 basis points.[303] The much higher market impact and liquidity search costs of midcap, smallcap, and microcap stocks are not included. Using this estimate of 37.4 basis points, the shareholders in U.S. equity mutual funds incurred implicit transaction costs of $15.1 billion in 2003. Based on a hypothetical assumption that, in light of the current share volume of trade-through transactions that does not interact with displayed liquidity, intermarket trade-through protection could improve depth and liquidity for NMS stocks by 5% (or an average reduction of 1.87 basis points in price impact and liquidity search costs for large investors), the savings in transaction costs for U.S equity funds alone, and the improved returns for their millions of individual shareholders, would have amounted to approximately $755 million in 2003.

Of course, the benefits of improved depth and liquidity for the equity holdings of other types of investors, including pension funds, insurance companies, and individuals, are not incorporated in the foregoing calculations. In 2003, these other types of investors held 78% of the value of publicly traded U.S. equity outstanding, with equity mutual funds holding the remaining 22%.[304] For example, pension funds alone held $9 trillion in assets in 2003, of which an estimated $4.9 trillion was held in equity investments other than mutual funds.[305] Thus, the implicit transaction costs incurred by institutional investors each year is likely at least double the $15.1 billion estimated for equity mutual funds, for a total of more than $30 billion. Assuming that these other types of investors experienced a reduction in transaction costs that equaled the reduction of trading costs for equity mutual funds, the assumed 5% improvement in market depth and liquidity could yield total transaction cost savings for all investors of over $1.5 billion annually. Such savings would improve the investment returns of equity ownership, thereby promoting the retirement and other long-term financial interests of individual investors and reducing the cost of capital for listed companies.

B. Description of Adopted Rule

Rule 611 can be divided into three elements: (1) The provisions that establish the scope of the Rule's coverage, most of which are set forth in the definitions of Rule 600(b); (2) the operative requirements of paragraph (a) of Rule 611, which, among other things, mandate the adoption and enforcement of written policies and procedures that are reasonably designed to prevent trade throughs on that trading center of protected quotations and, if relying on an exception, that are reasonably designed to assure compliance with the terms of the exception; and (3) the exceptions set forth in paragraph (b) of Rule 611. These elements are discussed below, followed by a section emphasizing that a broker's duty of best execution is not lessened by the adoption of Rule 611.

1. Scope of Rule

The scope of Rule 611 is largely determined by a series of definitions set forth in Rule 600(b). In general, the Rule addresses trade-throughs of protected quotations in NMS stocks by trading centers. A "trading center" is defined in Rule 600(b)(78) as a national securities exchange or national securities association that operates an SRO trading facility,[306] an ATS,[307] an exchange market maker,[308] an OTC market maker,[309] or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. This last phrase is intended particularly to cover block positioners. An "NMS stock" is defined in paragraphs (b)(47) and (b)(46) of Rule 600 as a security, other than an option, for which transaction reports are collected, processed and made available pursuant to an effective national market system plan. This definition effectively covers stocks listed on a national securities exchange and stocks included in either the National Market or SmallCap tiers of Nasdaq. It does not include stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market.

The term "trade-through" is defined in Rule 600(b)(77) as the purchase or sale of an NMS stock during regular trading hours,[310] either as principal or agent, at a price that is lower than a protected bid or higher than a protected offer. Rule 600(b)(57), which defines a "protected bid" or "protected offer,"[311] includes three main elements: (1) An automated quotation; (2) displayed by an automated trading center; and (3) that is the best bid or best offer of an exchange, The NASDAQ Stock Market, or an association other than The NASDAQ Stock Market (currently, the best bid or offer of the NASD's ADF).[312]

As discussed above, an "automated quotation" is defined in Rule 600(b)(3) as a quotation displayed by a trading

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[301] *Id.* at 64. Portfolio turnover is reported as the lesser of portfolio sales or purchases divided by average net assets. Because price impact occurs for both purchases and sales, the turnover rate must be doubled, then multiplied by total fund assets, to estimate the total value of trading that would be affected by an improvement in depth and liquidity.

[302] Plexus Group, Inc., Commentary 80, "Trading Truths: How Mis-Measurement of Trading Costs Is Leading Investors Astray," (April 2004), at 2–3.

[303] *Cf. supra*, note 146 and accompanying text (Plexus estimate of average transaction costs, including commissions, during the fourth quarter of 2003 for Nasdaq and NYSE stocks as, respectively, 83 basis points and 55 basis points; commissions average 12 basis points for large capitalization stocks).

[304] Mutual Fund Factbook, *supra* note 300, at 59.

[305] *Id.* at 91 (employer-sponsored pension market held estimated $9.0 trillion in assets in 2003, $7.7 trillion of which were not represented by mutual fund assets); Milliman, Inc., Pension Fund Survey (available at www.milliman.com) (consulting firm's survey of 2003 annual reports for 100 of largest U.S. corporations found that the median equity allocation for pension fund assets was 65%).

[306] An "SRO trading facility" is defined in Rule 600(b)(72) as a facility operated by or on behalf of an SRO that executes orders in a security or presents orders to members for execution.

[307] An "alternative trading system" is defined in Rule 600(b)(2) with a cross reference to Regulation ATS.

[308] An "exchange market maker" is defined in Rule 600(b)(24).

[309] An "OTC market maker" is defined in Rule 600(b)(52).

[310] The term "regular trading hours" is defined in Rule 600(b)(64) as the time between 9:30 a.m. and 4:00 p.m. Eastern time, unless otherwise specified.

[311] Protected bid and protected offer are collectively defined as a "protected quotation" in Rule 600(b)(58).

[312] *See* section II.A.5 above for a discussion of the Commission's determination to adopt the Market BBO Alternative with respect to the scope of protected quotations.

center that: (1) Permits an incoming order to be marked as immediate-or-cancel; (2) immediately and automatically executes an order marked as immediate-or-cancel against the displayed quotation up to its full size;[313] (3) immediately and automatically cancels any unexecuted portion of an order marked as immediate-or-cancel without routing the order elsewhere; (4) immediately and automatically transmits a response to the sender of an order marked as immediate-or-cancel indicating the action taken with respect to such order; and (5) immediately and automatically displays information that updates the displayed quotation to reflect any change to its material terms.

Consequently, a quotation will not qualify as "automated" if any human intervention after the time an order is received is allowed to determine the action taken with respect to the quotation. The term "immediate" precludes any coding of automated systems or other type of intentional device that would delay the action taken with respect to a quotation. Although a trading center must provide an IOC/no-routing functionality for incoming orders, it also can offer additional functionalities. Among the changes to material terms that require an immediate update to a quotation are price, displayed size, and automated/manual indicator. Any quotation that does not meet the requirements for an automated quotation is defined in Rule 600(b)(37) as a "manual quotation."

As discussed above, an "automated trading center" is defined in Rule 600(b)(4) as a trading center that: (1) Has implemented such systems, procedures, and rules as are necessary to render it capable of displaying quotations that meet the requirements for an automated quotation set forth in paragraph (b)(3) of this section; (2) identifies all quotations other than automated quotations as manual quotations; (3) immediately identifies its quotations as manual quotations whenever it has reason to believe that it is not capable of displaying automated quotations; and (4) has adopted reasonable standards limiting when its quotations change from automated quotations to manual quotations, and vice versa, to specifically defined circumstances that promote fair and efficient access to its automated quotations and are consistent with the maintenance of fair and orderly markets. The requirement of reasonable standards for switching the automated/manual status of quotations is designed to preclude practices that would cause confusion among market participants concerning the status of a trading center's quotations or that would inappropriately advantage the members or customers of a trading center at the expense of the public.

The third element of the definition of "protected bid" and "protected offer" identifies which automated quotations are protected under the Order Protection Rule. Specifically, Rule 600(b)(57) provides that an automated quotation displayed by an automated trading center that is the BBO of an exchange SRO, the BBO of Nasdaq, or the BBO of the NASD (*i.e.*, the ADF) qualifies as a protected quotation. Thus, only a single, accessible best bid and best offer for each of the exchange SROs, Nasdaq, and the NASD is protected under the Order Protection Rule. A best bid and best offer must be accessible by routing an order to a single market destination (*i.e.*, currently, either to a single exchange execution system, a single Nasdaq execution system, or a single ADF participant).

2. Requirement of Reasonable Policies and Procedures

Paragraph (a)(1) of Rule 611 requires a trading center to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations in NMS stocks that do not fall within an exception set forth in paragraph (b) of Rule 611 and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception.[314] In addition, paragraph (a)(2) of Rule 611 requires a trading center to regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (a)(1) and to take prompt action to remedy deficiencies in such policies and procedures.

As discussed in the Proposing Release, the Commission believes it would be inappropriate to implement a complete prohibition against any trade-throughs, particularly given the realities of intermarket trading and order-routing in many high-volume NMS stocks,[315] and has not adopted such an approach. In this trading environment, despite reasonable attempts to prevent them, false positive or accidental trade-throughs may result from timing discrepancies resulting from technology limitations, latencies in the delivery and receipt of quotation updates, and data discrepancies. The requirement of written policies and procedures, as well as the responsibility assigned to trading centers to regularly surveil to ascertain the effectiveness of their procedures and take prompt remedial steps, is designed to achieve the objective of eliminating all trade-throughs that reasonably can be prevented, while also recognizing the inherent difficulties of eliminating trade-through transactions that, despite a trading center's reasonable efforts, may occur.

In the Reproposing Release, the Commission requested comment on whether this approach would be sufficient to address enforceability concerns. Several commenters expressed a concern about the significant burden that would be placed on market participants to prove compliance and defend each execution that appears to be a trade-through (*i.e.*, they could be presumed to have violated the Rule unless they can prove they did not), particularly in light of the significant number of false positives that are likely to result.[316] The Commission

[313] The requirement that an automated quotation be accessible up to its full size does not mean that a trading center must automate all of its available trading interest. For example, trading centers will be permitted to operate hybrid markets with different order types and rules for automated trading and manual trading. Rather, the "full size" term in the definition of automated quotation requires that, once a trading center offers an automated execution of a particular displayed quotation and thereby obtains protection under Rule 611, such quotation must be immediately and automatically accessible up to its full size, which will include both the displayed and reserve size of the quotation. Given that to comply with Rule 611, market participants need to be able to access the displayed size of protected quotations at all trading centers (even when the displayed size of the quotation may be less than the size of the market participant's total trading interest), the Commission believes trading centers must provide fair and efficient access to the full size available for the quotation. *Cf. infra*, sections III.B.1 and III.B.2 (access standard and fee limitation of Rule 610 apply to both displayed and reserve size of displayed quotations). This requirement, which is applicable to trading centers that display automated quotations, does not mean that market participants are required to route orders in an attempt to execute against the reserve size of a protected quotation. Rather, Rule 611 operates as follows. In the first instance, the Rule protects prices—a trading center cannot execute a transaction at a price inferior to the price of a protected quotation, absent an exception. One of the most commonly used exceptions to the Rule is likely to be the intermarket sweep order exception, which applies to sweep orders that are routed to execute against the full displayed size of better-priced protected quotations. *See infra*, note 320 and accompanying text.

[314] The Commission has modified the language of Rule 611(a)(1) to make clear that a trading center's policies and procedures must only be reasonably designed to prevent trade-throughs on *its own trading center* of protected quotations in NMS stocks that do not fall within an exception set forth in paragraph (b) of Rule 611 and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception.

[315] Proposing Release, 69 FR at 11137 (noting the problem of "false positive" trade-throughs caused by rapidly changing quotations, even when a trading center took reasonable precautions to prevent trade-throughs).

[316] Morgan Stanley Reproposal Letter at 15; Letter from David Cummings, Chief Executive Officer, Tradebot Systems, Inc., to Jonathan G. Katz,

recognizes this concern and intends to work closely with industry participants during the implementation period for the Order Protection Rule to provide useful and practical guidance for trading centers on the policies and procedures needed to comply with the Rule.

At a minimum, a trading center's policies and procedures must enable the trading center (and persons responsible for transacting on its market, such as specialists) to monitor, on a real-time basis, the protected quotations displayed by other trading centers so as to determine the prices at which the trading center can and cannot execute trades. In addition, a trading center's policies and procedures must establish objective standards and parameters governing its use of the exceptions set forth in Rule 611(b). A trading center's automated order-handling and trading systems must be programmed in accordance with these policies and procedures. Finally, the trading center must take such steps as are necessary to enable it to enforce its policies and procedures effectively. For example, trading centers will need to establish procedures such as regular exception reports to evaluate their trading and order-routing practices. Such reports will need to be examined to affirm that a trading center's policies and procedures have been followed by its personnel and properly coded into its automated systems and, if not, to promptly identify the reasons and take remedial action.

Of course, surveillance is an important component of a trading center's satisfaction of its legal obligations. In the context of Rule 611, paragraph (a)(2) of the Rule reinforces the ongoing maintenance and enforcement requirements of paragraph (a)(1) of the Rule by explicitly assigning an affirmative responsibility to trading centers to surveil to ascertain the effectiveness of their policies and procedures. Trading centers cannot merely establish policies and procedures that may be reasonable when created and assume that such policies and procedures continue to satisfy the requirements of Rule 611. Rather, trading centers must regularly assess the continuing effectiveness of their procedures and take prompt action when needed to remedy deficiencies. In particular, trading centers must engage in regular and periodic surveillance to determine whether trade-throughs are occurring without an applicable exception and whether they have failed to implement and maintain policies and procedures that would have reasonably prevented such trade-throughs.

As a further means to bolster compliance with the Order Protection Rule, the Commission has instructed its staff to develop for our consideration and for notice and comment a rule proposal that would require trading centers to publicly disclose standardized and comparable statistics on the incidence of trade-through transactions that do not fall within an exception to the Rule. Such industry-wide statistics would promote greater public accountability by trading centers for the quality of their policies and procedures. The statistics also would be helpful for trading centers, as well as regulatory authorities, in assessing the reasonableness and effectiveness of the policies and procedures adopted by various trading centers. In particular, a trading center that generated a materially higher rate of trade-throughs than other comparable trading centers would need to closely evaluate the types of policies and procedures used by the other trading centers as a means to upgrade its own policies and procedures. On the other hand, the fact that many trading centers generated comparable rates of trade-throughs would not shield them from a violation of the Order Protection Rule if a material number of the trade-through transactions could reasonably have been prevented by the use of particular policies and procedures. In general, the Commission preliminarily believes that comparable, industry-wide statistics on trade-throughs would provide a valuable resource to identify the most effective policies and procedures and to promote their use by all relevant trading centers.

3. Exceptions

Rule 611(b) sets forth a variety of exceptions addressing transactions that may fall within the definition of a trade-through, but which are not subject to the operative requirements of the Rule. The exceptions primarily are designed to achieve workable intermarket price protection and to facilitate certain trading strategies and order types that are useful to investors, but also are consistent with the principle of price protection.[317]

Paragraph (b)(1) excepts a transaction if the trading center displaying the protected quotation that was traded through was experiencing a failure, material delay, or malfunction of its systems or equipment when the trade-through occurred. As discussed in section II.A.3 above, the exception for a "material delay" gives trading centers a self-help remedy if another trading center repeatedly fails to provide an immediate response (within one second) to incoming orders attempting to access its quotes. The trading center receiving an order can only be held responsible for its own turnaround time (*i.e.*, from the time it first received an order to the time it transmits a response to the order). Accordingly, the routing trading center will be required to develop policies and procedures that allow for any potential delays in transmission not attributable to the receiving trading center. The exception in paragraph (b)(1) also covers any failure or malfunction of a trading center's systems or equipment, as well as any material delay.

Trading centers will need to establish specific objective parameters governing their use of the "self-help" exemption as part of their reasonable policies and procedures. For example, a single failure to respond within one second generally will not justify future bypassing of another trading center's quotations. Many failures to respond within one second in a short time period, in contrast, clearly will warrant use of the exception. A trading center making use of the exception must notify the non-responding trading center immediately after (or at the same time as) electing this exception pursuant to reasonable and objective standards contained in its policies and procedures.[318]

Paragraph (b)(8) of Rule 611 sets forth an exception for flickering quotations. It excepts a transaction if the trading center displaying the protected quotation that was traded through had displayed, within one second prior to execution of the trade-through, a best bid or best offer, as applicable, for the

Secretary, Commission, dated January 26, 2005 ("Tradebot Reproposal Letter") at 1; UBS Reproposal Letter at 5 (expressing the view that the Rule would be unenforceable).

[317] Several commenters recommended that the consolidated tape should identify trades that were executed and reported pursuant to an exception to the Rule. *See, e.g.*, Citigroup Reproposal Letter at 7; SIA Reproposal Letter at 17. The Commission agrees that increased transparency would be greatly beneficial. Such identification would give market participants and investors timely notice that a trade qualified for an exception and was not a true trade-through. The Commission therefore intends to request that the market data Plans explore the feasibility of identifying trade-through exceptions. It also intends to initiate a discussion with the Plans on shortening the current 90-second time frame for reporting trades in light of current technology and trading practices. Reporting trades in substantially less than 90 seconds would reduce the number of trades that are reported out of sequence, thus improving the accuracy and reliability of the consolidated trade stream and helping to reduce the false appearance of trade-throughs.

[318] For instance, a trading center may wish to use electronic mail to make this notification.

NMS stock with a price that was equal or inferior to the price of the trade-through transaction. This exception thereby provides a "window" to address false indications of trade-throughs that in actuality are attributable to rapidly moving quotations. It also potentially will reduce the number of instances in which a trading center must alter its normal trading procedures and route orders to other trading centers to comply with Rule 611. The exception is thereby intended to promote more workable intermarket price protection.

Paragraphs (b)(5) and (b)(6) of Rule 611 set forth exceptions for intermarket sweep orders. An intermarket sweep order is defined in Rule 600(b)(30) as a limit order[319] that meets the following requirements: (1) When routed to a trading center, the limit order is identified as an intermarket sweep order; and (2) simultaneously with the routing of the limit order identified as an intermarket sweep order, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of all protected quotations with a superior price. These additional limit orders must be marked as intermarket sweep orders to allow the receiving market center to execute the order immediately without regard to better-priced quotations displayed at other trading centers (by definition, each of the additional limit orders would meet the requirements for an intermarket sweep order).

Paragraph (b)(5) allows a trading center immediately to execute any order identified as an intermarket sweep order. It therefore need not delay its execution for the updating of the better-priced quotations at other trading centers to which orders were routed simultaneously with the intermarket sweep order. Paragraph (b)(6) allows a trading center itself to route intermarket sweep orders and thereby clear the way for immediate internal executions at the trading center. This exception particularly will facilitate the immediate execution of block orders by dealers on behalf of their institutional clients. Specifically, if a dealer wishes to execute internally a customer order at a price that would trade through one or more protected quotations on other trading centers, the dealer will be able to do so if it simultaneously routes one or more intermarket sweep orders to execute against the full displayed size of each such better-priced protected quotations. If there is only one better-priced protected quotation, then the dealer is only required to route an intermarket sweep order to execute against that protected quotation.

Paragraph (c) of Rule 611 requires that the trading center, broker, or dealer responsible for the routing of an intermarket sweep order take reasonable steps to establish that orders are properly routed in an attempt to execute against all applicable protected quotations. A trading center, broker, or dealer is required to satisfy this requirement regardless whether it routes the order through its own systems or sponsors a customer's access through a third-party vendor's systems.

To illustrate the operation of the intermarket sweep order exception, assume that a broker-dealer's customer wished to sell a large amount of an NMS stock. Trading Center A is displaying the national best bid of 500 shares at $10.00, along with quotations in its proprietary depth-of-book data feed of 1500 shares at $9.99, and 5000 shares at $9.97. The customer decides to sweep all liquidity on Trading Center A down to $9.97. Assume also that Trading Center B is displaying a protected bid of 2000 shares at $9.99, Trading Center C is displaying a protected bid of 400 shares at $9.98, and Trading Center D is displaying a protected bid of 200 shares at $9.97. The broker-dealer could execute this trade for its customer, subject to its best execution responsibilities, by simultaneously routing the following orders: (1) An intermarket sweep order to Trading Center A with a limit price of $9.97 and a size of 7000 shares; (2) an intermarket sweep order to Trading Center B with a limit price of $9.99 and a size of 2000 shares; and (3) an intermarket sweep order to Trading Center C with a limit price of $9.98 and a size of 400 shares. All of these orders would meet the requirements of Rule 600(b)(30) because the necessary orders simultaneously were routed to execute against the displayed size of all better-priced protected quotations. Trading Centers A, B, and C all could execute their orders immediately without regard to the protected quotations displayed at other trading centers. No order would need to be routed to Trading Center D because the price of its bid was not superior to the most inferior limit price of the order routed to Trading Center A. Assuming the customer obtained a fill for each of its orders at the displayed prices and sizes,[320] it would have been able to obtain an immediate execution of a 9400-share trade by sweeping through four price levels at Trading Center A, while also honoring the protected quotations at two other trading centers.[321] The trade therefore would have both upheld the principle of price protection and served the customer's legitimate interest in obtaining an immediate execution of large size.

The exception in paragraph (b)(7) of Rule 611 will facilitate other types of orders that often are useful to investors—benchmark orders. It excepts the execution of an order at a price that was not based, directly or indirectly, on the quoted price of an NMS stock at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made. A common example of a benchmark order is a VWAP order. Assume a broker-dealer's customer decides to buy a stock at 9 a.m. before the markets open for normal trading. The customer submits, and the broker-dealer accepts, an order to buy 100,000 shares at the volume-weighted average price of the stock from opening until 1 p.m. At 1 p.m., the national best offer in the stock is $20.00, but the relevant volume-weighted average price (in a rising market) is $19.90. The broker-dealer would be able to rely on the benchmark order exception to execute the order at $19.90 at 1 p.m., without regard to better-priced protected quotations at other trading centers. Of course, any transactions effected by the broker-dealer during the course of the day to obtain sufficient stock to fill the benchmark order would remain subject to Rule 611. The benchmark exception also would encompass the execution of an order that is benchmarked to a market's single-priced opening, as the

[319] Such a limit order would be "marketable" because it would be immediately subject to execution at current displayed prices. Consequently, "limit order" is used differently in this context than elsewhere in this release, where it is used to refer to non-marketable orders that generally will be displayed, in contrast to marketable orders that generally will not be displayed. *See supra*, note 53 (description of marketable limit orders and non-marketable limit orders).

[320] An intermarket sweep order could go unfilled because the protected quotation at a trading center was accessed or withdrawn prior to the trading center's receipt of the intermarket sweep order. In addition, the existence of undisplayed orders or reserve size at some trading centers could result in an execution at better prices than may have been indicated by the displayed prices and sizes. The router of an intermarket sweep order would only be responsible, however, for routing orders in accordance with the displayed price and size of protected quotations. Whether the orders actually execute against the protected quotations, or go unfilled because the quotations have been previously executed or withdrawn, is not within the responsibility or control of the router of the intermarket sweep order.

[321] If a trading center has routed intermarket sweep orders to access the full displayed size of protected quotations under the Order Protection Rule, it will be allowed to continue trading without regard to a particular trading center's quotations until it has received a response from such trading center. *See supra*, note 194.

Commission would not interpret such an opening price to be the "quoted price" of the NMS stock at the time of execution.

Paragraph (b)(9) of Rule 611 provides an exception for the execution of certain stopped orders.[322] Specifically, the exception applies to the execution by a trading center of a stopped order where the price of the execution of the order was, for a stopped buy order, lower than the national best bid at the time of execution or, for a stopped sell order, higher than the national best offer at the time of execution.[323] To illustrate the operation of this requirement, assume that a dealer's customer wished to buy a large amount of an NMS stock. Assume further that the dealer has agreed to guarantee execution of the order at an average price no worse than $10.12 (the stop price), and that the national best bid and offer for the stock at the time was 10.05 to 10.07. If the dealer buys on behalf of the customer until half of the order is completed and has averaged 10.10 to that point, but the national best bid and offer for the stock is then 10.15 to 10.17, the dealer would be obligated to execute the remainder of the order by selling to the customer at 10.14 to average 10.12 for the entire order. The exception in paragraph (b)(9) of Rule 611 permits the dealer to execute the remainder at 10.14 without being obligated to route to all protected bids at 10.15. In addition, to qualify for the exception, the stopped order must be for the account of a customer[324] and the customer must have agreed to the "stop" price on an order-by-order basis.[325] The Commission notes that any individual transactions executed by the dealer in the market for the customer must be executed in compliance with Rule 611.

Finally, paragraph (b) of Rule 611 includes a variety of other exceptions: (1) Transactions other than "regular way" contracts;[326] (2) single-price opening, reopening, or closing transactions;[327] and (3) transactions executed at a time when protected quotations were crossed.[328] The crossed quotation exception would not apply when a protected quotation crosses a non-protected (*e.g.*, manual) quotation.[329] The exception for single-priced reopenings will only apply to single-priced reopening transactions after a trading halt conducted pursuant to a trading center rule. To qualify, the reopening process must be transparent and provide for the queuing and ultimate execution of multiple orders at a single equilibrium price.[330]

4. Duty of Best Execution

Several commenters on the original proposal who supported excluding manual quotations from trade-through protection also suggested that manual quotations should be excluded from the NBBO that is calculated and disseminated by Plan processors.[331] Under this approach, market participants could disregard manual quotations for purposes of assessing the best execution of customer orders and calculating execution quality statistics under Rule 11Ac1–5 (redesignated as Rule 605 of Regulation NMS). The Reproposing Release did not propose to eliminate manual quotations from the NBBO and emphasized that adoption of Rule 611 would not lessen a broker-dealer's duty of best execution.[332] Noting the common business practice of market makers to use the NBBO to price investors orders (particularly retail orders), the Reproposing Release expressed concern that eliminating manual quotations from the NBBO potentially would widen the spreads in many stocks, even though the quotations often may in fact represent the best indication of the current market price of the stock.

In response to the Reproposing Release, some commenters continued to assert that manual quotations should be excluded from the NBBO.[333] They believed that that it would be inconsistent and unreasonable to distinguish between automated and manual quotations for purposes of trade-through protection, market data revenue, access fees, and requirements regarding locked and crossed markets, but not to remove such quotations from the calculation of the NBBO.[334] They argued that including manual quotations in the benchmark against which a broker-dealer's best execution responsibility is judged provides an unfair standard of comparison, particularly to the extent manual quotations are not accessible.[335] Several commenters requested that, at a minimum, the Commission clarify a broker-dealer's duty of best execution with respect to manual quotations.[336] Another commenter suggested that manual quotations be removed from the NBBO when the manual market is not the primary market.[337]

The Commission continues to be concerned that eliminating all manual quotations from the NBBO would exclude not only inaccessible manual quotations, but also manual quotations that truly establish the best available price for a stock, particularly for those stocks with relatively small trading volume in which a manual market has a dominant share of trading. Such a result could lead to decreased execution quality for investors in these stocks by allowing broker-dealers to ignore the best available quotations when executing customer orders. The Commission therefore is not at this time excluding manual quotations from the NBBO or from the benchmark used for calculating execution quality statistics under Rule 605.

The Commission continues to emphasize that adoption of Rule 611 in no way lessens a broker-dealer's duty of best execution. A broker-dealer has a legal duty to seek to obtain best execution of customer orders.[338] According to the Report of the Special Study of Securities Markets, "[t]he integrity of the industry can be maintained only if the fundamental principle that a customer should at all times get the best available price which

[322] *See* section II.A.4.b and notes 251 to 257 and accompanying text above for a discussion of this exception.

[323] Rule 611(b)(9)(iii).

[324] Rule 611(b)(9)(i). Customer is defined in Rule 600(b)(16) as any person that is not a broker or dealer.

[325] Rule 611(b)(9)(ii).

[326] Rule 611(b)(2). "Regular way" refers to bids, offers, and transactions that embody the standard terms and conditions of a market. Thus, this exception applies to a transaction that was executed other than pursuant to standardized terms and conditions, for instance a transaction that has extended settlement terms.

[327] Rule 611(b)(3).

[328] Rule 611(b)(4).

[329] *Id.*

[330] *See supra*, section II.A.2.b for a discussion of this exception.

[331] *See, e.g.*, Citigroup Letter at 3, 6; Goldman Sachs Letter at 5–6; Morgan Stanley Letter at 2–3, 7; SIA Letter at 13.

[332] Reproposing Release, 69 FR at 77447.

[333] *See, e.g.*, Ameritrade Reproposal Letter at 7; ATD Reproposal Letter at 7; Citigroup Reproposal Letter at 8; Knight Reproposal Letter at 6; Madoff Reproposal Letter at 2–3; Morgan Stanley Reproposal Letter at 12; SIA Reproposal Letter at 3, 14–15; STANY Reproposal Letter at 10–11; UBS Reproposal Letter at 6.

[334] *See, e.g.*, ATD Reproposal Letter at 6; Citigroup Reproposal Letter at 8; Madoff Reproposal Letter at 4.

[335] *See, e.g.*, Citigroup Reproposal Letter at 8; Knight Reproposal Letter at 6; STANY Reproposal Letter at 11.

[336] Ameritrade Reproposal Letter at 7–8; Merrill Lynch Reproposal Letter at 8; SIA Reproposal Letter at 15.

[337] ATD Reproposal Letter at 7.

[338] *See, e.g.*, *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 269–70, 274 (3d Cir.), *cert. denied*, 525 U.S. 811 (1998); *Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 40900 (Jan. 11, 1999) (settled case) (citing *Sinclair* v. *SEC*, 444 F.2d 399 (2d Cir. 1971); *Arleen Hughes*, 27 SEC 629, 636 (1948), *aff'd sub nom. Hughes* v. *SEC*, 174 F.2d 969 (D.C. Cir. 1949)). *See also* Order Execution Obligations, Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) ("Order Handling Rules Release").

can reasonably be obtained for him is followed."[339] A broker-dealer's duty of best execution derives from common law agency principles and fiduciary obligations, and is incorporated in SRO rules and, through judicial and Commission decisions, the antifraud provisions of the federal securities laws.[340]

The duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances, *i.e.*, at the best reasonably available price.[341] The Commission has not viewed the duty of best execution as inconsistent with the automated routing of orders or requiring automated routing on an order-by-order basis to the market with the best quoted price at the time. Rather, the duty of best execution requires broker-dealers to periodically assess the quality of competing markets to assure that order flow is directed to the markets providing the most beneficial terms for their customer orders.[342] Broker-dealers must examine their procedures for seeking to obtain best execution in light of market and technology changes and modify those practices if necessary to enable their customers to obtain the best reasonably available prices.[343] In doing so, broker-dealers must take into account price improvement opportunities, and whether different markets may be more suitable for different types of orders or particular securities.[344]

The protection against trade-throughs required of trading centers by Rule 611 undergirds the broker-dealer's duty of best execution, by helping ensure that customer orders are not executed at prices inferior to the best protected quotations. Nonetheless, the Order Protection Rule does not supplant or diminish the broker-dealer's responsibility for achieving best execution, including its duty to evaluate the execution quality of markets to which it routes customer orders, regardless of the exceptions set forth in the Rule.

At the same time, however, the Commission recognizes the validity of concerns expressed by commenters with respect to the need for guidance concerning their best execution responsibilities after implementation of Regulation NMS. As they do today, broker-dealers will continue to be able to assess the level of accessibility and availability of manual quotations in making their best execution determinations. In particular, when the market for a stock is dominated by trading centers that display automated quotations, and a trading center that is not a dominant market for the stock displays manual quotations, a broker-dealer reasonably could determine, as part of its regular and rigorous review of execution quality, to bypass such a market with manual quotations in the particular stock if its prior experience demonstrated that attempting to access the market would not be in its customers' best interest. In making its assessment the broker-dealer would be entitled to consider both the likelihood of receiving an execution at displayed prices and the potential cost to its customers of failed attempts. The Commission also emphasizes that any trading center posting quotations, whether automated or manual, in the public quotation stream has a responsibility to be firm for its quotations pursuant to Rule 602.

III. Access Rule

For the NMS to fulfill its statutory objectives, fair and efficient access to each of the individual markets that participate in the NMS is essential. One of the statutory NMS objectives, for example, is to assure the practicability of brokers executing investors' orders in the best market.[345] Another is to assure the efficient execution of securities transactions.[346] Clearly, neither of these objectives can be achieved if brokers cannot fairly and efficiently route orders to execute against the best quotations for a stock, wherever such quotations are displayed in the NMS. In 1975, Congress determined that the "linking of all markets" for NMS stocks through communications and data processing facilities would "foster efficiency; enhance competition; increase the information available to brokers, dealers, and investors; facilitate the offsetting of investors' orders; and contribute to the best execution of investors' orders."[347] Since 1975, there have been dramatic improvements in communications and processing technologies. Rule 610 is intended to capitalize on these improvements and thereby enhance the "linking of all markets" for the future NMS.

All SROs that trade exchange-listed stocks currently are linked through ITS, a collective intermarket linkage facility. ITS provides a means of access to exchanges and Nasdaq by permitting each market to send a "commitment to trade" through the system, with receiving markets generally having up to 30 seconds to respond.[348] ITS also provides access to quotations of participants without fees and establishes uniform rules to govern quoting practices.[349] Although ITS promotes access among participants that is uniform and free, it also is often slow

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[339] H.R. Doc. No. 95, 88th Cong., 1st Sess. Pt. II, 624 (1963).

[340] Order Handling Rules Release, 61 FR at 48322. *See also Newton*, 135 F.3d at 270. Failure to satisfy the duty of best execution can constitute fraud because a broker-dealer, in agreeing to execute a customer's order, makes an implied representation that it will execute it in a manner that maximizes the customer's economic gain in the transaction. *See Newton*, 135 F.3d at 273 ("[T]he basis for the duty of best execution is the mutual understanding that the client is engaging in the trade—and retaining the services of the broker as his agent—solely for the purpose of maximizing his own economic benefit, and that the broker receives her compensation because she assists the client in reaching that goal."); *Marc N. Geman*, Securities Exchange Act Release No. 43963 (Feb. 14, 2001) (citing *Newton*, but concluding that respondent fulfilled his duty of best execution). *See also* Payment for Order Flow, Securities Exchange Act Release No. 34902 (Oct. 27, 1994), 59 FR 55006, 55009 (Nov. 2, 1994) ("Payment for Order Flow Final Rules"). If the broker-dealer intends not to act in a manner that maximizes the customer's benefit when he accepts the order and does not disclose this to the customer, the broker-dealer's implied representation is false. *See Newton*, 135 F.3d at 273–274.

[341] *Newton*, 135 F.3d at 270. *Newton* also noted certain factors relevant to best execution—order size, trading characteristics of the security, speed of execution, clearing costs, and the cost and difficulty of executing an order in a particular market. *Id.* at 270 n. 2 (citing Payment for Order Flow, Exchange Act Release No. 33026 (Oct. 6, 1993), 58 FR 52934, 52937–38 (Oct. 13, 1993) (Proposed Rules)). *See In re E.F. Hutton & Co.* ("Manning"), Securities Exchange Act Release No. 25887 (July 6, 1988). *See also* Payment for Order Flow Final Rules, 59 FR at 55008–55009.

[342] Order Handling Rules Release, 61 FR at 48322–48333 ("In conducting the requisite evaluation of its internal order handling procedures, a broker-dealer must regularly and rigorously examine execution quality likely to be obtained from different markets or market makers trading a security."). *See also Newton*, 135 F.3d at 271; Market 2000: An Examination of Current Equity Market Developments V–4 (SEC Division of Market Regulation January 1994) ("Without specific instructions from a customer, however, a broker-dealer should periodically assess the quality of competing markets to ensure that its order flow is directed to markets providing the most advantageous terms for the customer's order."); Payment for Order Flow Final Rules, 59 FR at 55009.

[343] Order Handling Rules, 61 FR at 48323.

[344] Order Handling Rules, 61 FR at 48323. For example, in connection with orders that are to be executed at a market opening price, "[b]roker-dealers are subject to a best execution duty in executing customer orders at the opening, and should take into account the alternative methods in determining how to obtain best execution for their customer orders." Disclosure of Order Execution and Routing Practices, Securities Exchange Act Release No. 43590 (Nov.17, 2000), 65 FR 75414, 75422 (Dec. 1, 2000) (adopting new Exchange Act Rules 11Ac1–5 and 11Ac1–6 and noting that alternative methods offered by some Nasdaq market centers for pre-open orders included the mid-point of the spread or at the bid or offer).

[345] Section 11A(a)(1)(C)(iv) of the Exchange Act.

[346] Section 11A(a)(1)(C)(i) of the Exchange Act.

[347] Section 11A(a)(1)(D) of the Exchange Act.

[348] ITS Plan, Section 6(b)(i).

[349] ITS Plan, Sections 6(b), 8(d), and 11(b).

and limited. Moreover, it is governed by a unanimous vote requirement that has at times impeded innovation in the system or its set of rules.

In contrast, there is no collective intermarket linkage system for Nasdaq stocks. Instead, access is achieved primarily through private linkages among individual trading centers. This approach has demonstrated its benefits among electronic markets; it is flexible and can readily incorporate technological advances as they occur. There is no intermarket system, however, that offers free access to quotations in Nasdaq stocks. Nor are the trading centers for Nasdaq stocks subject to uniform intermarket standards governing their quoting and trading practices. The fees for access to ECN quotations in Nasdaq stocks, as well as the absence of standards for quotations that lock and cross markets, have been the source of disputes among participants in the market for Nasdaq stocks for many years. Moreover, access problems have arisen with respect to small market centers operating outside of an SRO trading facility and markets like the Amex that engage in manual trading of Nasdaq stocks. Access problems also have arisen with respect to intentional barriers to access, especially involving fees.

Rule 610 reflects the Commission's determination that fair and efficient access to markets can be achieved without a collective intermarket linkage facility such as ITS, if baseline intermarket access rules are established.[350] The rule adopts a private linkage approach for all NMS stocks with modifications to address the most serious problems that have arisen with this approach in the trading of Nasdaq stocks. Rule 610 addresses three subject areas: (1) Means of access to quotations; (2) fees for access to protected quotations and any other quotations that are the best bid or best offer of an exchange, The NASDAQ Market Center, or the NASD's ADF; and (3) locking and crossing quotations.[351] In response to comments on the reproposal, the Commission is modifying the fee limitation to apply to any quotation at the best bid or offer as well as protected quotations.[352] In addition, the Commission is modifying the fair access requirements of Regulation ATS to extend their application to ATSs with 5% of trading volume in a security.[353]

A. Response to Comments and Basis for Adopted Rule

1. Means of Access to Quotations

Paragraphs (a) and (b) of Rule 610 address means of access to quotations. Among the variety of services offered by equity markets, access to displayed quotations, particularly the best quotations of a trading center, is vital for the smooth functioning of intermarket trading. Brokers responsible for routing their customers' orders, as well as investors that make their own order-routing decisions, clearly must have fair and efficient access to the best displayed quotations of all trading centers to achieve best execution of those orders. In addition, trading centers themselves must have the ability to execute orders against the displayed quotations of other trading centers. Indeed, the very concept of intermarket protection against trade-throughs is premised on the ability of trading centers to trade with, rather than trade through, the protected quotations displayed by other trading centers.

Access to quotations, sometimes referred to as "order execution access," [354] should be distinguished from broader access to all of the different types of services offered by markets, such as the right to display limit orders or to submit complex order types. To obtain the full range of their services, markets generally require that an individual or firm become a member or subscriber of the market. This type of access, or "membership access," subsumes access to quotations and is governed by particular regulatory requirements. Sections 6(b)(2) and 15A(b)(3) of the Exchange Act, for example, provide for fair access to membership in SROs. Similarly, Rule 301(b)(5) of Regulation ATS prohibits certain high volume ATSs from denying fair access to their services.[355] Rules 610(a) and (b), in contrast, only address the responsibilities of trading centers to provide order execution access to their quotations.

Rules 610(a) and (b) further the goal of fair and efficient access to quotations primarily by prohibiting trading centers from unfairly discriminating against non-members or non-subscribers that attempt to access their quotations through a member or subscriber of the trading center. Market participants can either become members or subscribers of a trading center to obtain direct access to its quotations, or they can obtain indirect access by "piggybacking" on the direct access of members or subscribers. These forms of access are widely used today in the market for Nasdaq stocks (as well as to a lesser extent in the market for exchange-listed stocks). Instead of every market participant establishing separate linkages with every trading center, many different private firms have entered the business of linking with a wide range of trading centers and then offering their customers access to those trading centers through the private firms' linkages. Competitive forces determine the types and costs of these private linkages.

Most commenters supported this private linkage approach for access to quotations.[356] They noted the success of private linkages among electronic markets for Nasdaq stocks and contrasted the speed and usefulness of those linkages with the ITS linkage for exchange-listed stocks. Morgan Stanley stated that "[p]rivate linkages are much easier to establish and operate and can be constructed directly between [order execution facilities] or through market intermediaries. The smooth operation of the market for Nasdaq stocks today clearly demonstrates the power of private linkages." [357] The NYSE concluded that "[i]n the market for listed stocks, we believe that proposed Regulation NMS will provide the framework for alternatives to ITS for intermarket access." [358] The SIA stated that "[p]rivate linkages, as opposed to ITS-type linkages, will provide the flexibility—technologically and otherwise—that is vital to the continued development of the markets.[359] Bloomberg expressed the belief that private linkages have proven to be effective in the market for Nasdaq securities and "can readily, quickly and

[350] With the implementation of Rule 610, the Commission believes that SROs can withdraw from the ITS Plan, assuming they have otherwise arranged to meet their access responsibilities.

[351] The Commission has modified the language of Rule 610(d) to require that an exchange or association "establish, maintain, and enforce" rules relating to certain locking and crossing activity, and to clarify that such rules must be written, to conform the language to the operative language of Rule 611(a)(1). *See infra* note 455 and accompanying text.

[352] *See infra*, section III.A.2.

[353] The modification of Regulation ATS is discussed in section III.B.4 below.

[354] *See* Rule 301(b)(3) of Regulation ATS (order display and execution access requirements).

[355] As discussed in section III.B.4 below, the Commission is amending the fair access requirements of Regulation ATS to extend their application to ATSs with 5% of trading volume in a security.

[356] *See, e.g.*, Citigroup Letter at 12; Consumer Federation Letter at 4; Goldman Sachs Letter at 4; ICI Letter at 16–17; Morgan Stanley Letter at 17; Nasdaq Letter II at 20; NYSE Letter, Attachment at 6; Letter from Carrie E. Dwyer, General Counsel & Executive Vice President, Charles Schwab & Co., Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("Schwab Letter") at 17; SIA Letter at 16; UBS Letter at 8.

[357] Morgan Stanley Letter at 17.

[358] NYSE Letter, Attachment at 7.

[359] SIA Reproposal Letter at 21.

inexpensively be adapted for use in exchange-listed securities," and even believed that ITS can be abandoned.[360]

A few commenters opposed the proposed private linkages approach.[361] Some questioned whether multiple private linkages could match the efficiency of a single, uniform intermarket linkage, although they generally emphasized that the current ITS linkage needed to be enhanced. The Alliance of Floor Brokers, for example, suggested that problems with the ITS linkage, such as its slow speed and lack of structural flexibility, "should be addressed before it is determined to replace it with some, as yet unspecified, routing methodology or mechanism."[362] While agreeing that private linkages could promote access if they were not the sole means of communications between trading facilities and trading centers, and that ITS' "archaic technology and restrictive membership provisions actively limit access," NexTrade contended that private linkages, if used to replace existing and universal industry links, could reduce total access.[363] STANY believed that the Commission vastly underestimated the access issues represented by the proposal, and raised a number of concerns regarding the costs and feasibility of implementing the private linkage approach, including issues relating to software, hardware, maintenance, and protocols.[364]

The Commission has carefully considered the views of all the commenters. The Commission agrees with the commenters that stated that private linkages currently work well in the market for Nasdaq securities.[365] The Commission believes that the benefits of private linkages, including their flexibility to meet the needs of different market participants and the scope they allow for competitive forces to determine linkages, justifies reliance on this model rather than a single intermarket linkage. Recognizing, however, that the adoption of the Order Protection Rule increases the importance of efficient access to each trading center, particularly with respect to access to ADF participants, the requirements in the Rule are designed to mitigate concerns about the cost of access to ADF participants, as discussed below. In addition, the Commission believes, given the significant number and variety of entities that currently provide access services and the competitive nature of the market for these services, that competition will be sufficient to provide routing services for any trading center that chooses to utilize an outside vendor rather than incur costs associated with building its own linkages. One ECN, for example, can be accessed through five extranets and at least 21 other access providers, as well as through direct connections.[366]

Several commenters, including some that otherwise supported the proposal, expressed concern about particular problems that might arise under a private linkage approach.[367] Some were concerned that requiring non-discriminatory access to markets might undermine the value of SRO membership. CHX stated that "[b]y requiring the Exchange to grant non-members access to the full capabilities of its order execution systems, the Commission's fair access proposal would inappropriately require the Exchange's members to help fund the costs of operating a market that could be routinely used by non-members. It would severely undercut the value of membership and enable non-members to free-ride on the fees paid by members."[368] Amex stated that "to the extent that the proposed rule undermines our right to differentiate between members (who pay fees and have duties and responsibilities to the Exchange) and non-members in our charges, it could effectively remove any incentive for Amex membership."[369]

The Commission does not believe that the private linkage approach adopted today will seriously undermine the value of membership in SROs that offer valuable services to their members. First, the fact that markets will not be allowed to impose unfairly discriminatory terms on non-members who obtain indirect access to quotations through members does not mean that non-members will obtain *free* access to quotations. Members who provide piggyback access to non-members will be providing a useful service and presumably will charge a fee for such service. The fee will be subject to competitive forces and likely will reflect the costs of SRO membership, plus some element of profit to the SRO's members. As a result, non-members that frequently make use of indirect access are likely to contribute indirectly to the costs of membership in the SRO market. Moreover, the unfair discrimination standard of Rule 610(a) will apply only to access to quotations, not to the full panoply of services that markets generally provide only to their members. These other services will be subject to the more general fair access provisions applicable to SROs and large ECNs, as well as the statutory provisions that govern SRO rules.

On the other hand, any attempt by an SRO to charge differential fees based on the non-member status of the person obtaining indirect access to quotations, such as whether it is a competing market maker, would violate the anti-discrimination standard of Rule 610. As noted above, fair and efficient access to quotes is essential to the functioning of the NMS. To comply with the Order Protection Rule and their duty of best execution, trading centers often may be required to access the quotations of other trading centers. If a trading center charged discriminatory fees to non-members, including competitors, accessing its quotations, this would interfere with the functioning of the private linkage approach and detract from its usefulness to trading centers in meeting their regulatory responsibilities.

Other types of differential fees, however, would not violate the anti-discrimination standard of Rule 610. Fees with volume-based discounts or fees that are reasonably based on the cost of providing a particular service will be permitted, so long as they do not vary based on the non-member status of a person obtaining indirect access to quotations. For example, a member providing indirect access could be given a volume discount on the full amount of its volume, including the volume accounted for by persons obtaining indirect access to quotations.

Another specific concern expressed by commenters about the private linkage approach was the cost and difficulty of building efficient linkages to trading centers with a small amount of trading volume that do not make their quotations accessible through an SRO

[360] Bloomberg Reproposal Letter at 7–8.

[361] *See, e.g.*, Letter from Brendan R. Dowd, Daniel W. Tandy & Ronald Zdrojeski, Alliance of Floor Brokers, to Jonathan G. Katz, Secretary, Commission, dated June 24, 2004 ("Alliance of Floor Brokers Letter") at 2; Ameritrade Letter I, Appendix at 11; BSE Letter at 7; CHX Letter at 13; E*Trade Letter at 9.

[362] Alliance of Floor Brokers Letter at 2.

[363] NexTrade Reproposal Letter at 4.

[364] STANY Reproposal Letter at 3.

[365] *See, e.g.*, Bloomberg Reproposal Letter at 7–8; Brut Letter at 18; Letter from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("FSR Letter") at 4; Merrill Lynch Reproposal Letter at 8; Nasdaq Letter II at 20.

[366] *See www.nasdaqtrader.com/trader/ebrut/ourofferings/connectivity.shtm.*

[367] Alliance of Floor Brokers Letter at 10; Amex Letter, Exhibit A at 25–26; BSE Letter at 12; CHX Letter at 14; Citigroup Letter at 12; Letter from Edith H. Hallahan, First Vice President, Deputy General Counsel, Philadelphia Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated August 10, 2004 ("Phlx Letter") at 2; STANY Letter at 9.

[368] CHX Letter at 14.

[369] Amex Letter, Exhibit A at 26.

trading facility.[370] Such concerns arise at present with respect to the ADF, a display-only quotation facility operated by the NASD, because quotations displayed by ADF participants can only be reached by obtaining direct access to that trading center. As a result, the greater the number of ADF participants, the greater the number of separate connectivity points that market participants will need to access to comply with the Order Protection Rule and to meet their best execution responsibilities. The Commission's original proposal would have required such trading centers to provide access only to SROs and other ADF participants. At the NMS Hearing, several panelists expressed concern that this requirement would be inadequate to assure sufficient access, which prompted the Commission to request comment on the matter in its Supplemental Release.[371] It noted that panelists at the NMS Hearing had suggested that relatively inactive ATSs and market makers should be required to publish their quotations in an SRO trading facility, at least until their share of trading reached a point where the cost of direct connections to those markets would not be out of proportion to their volume of trading. Alternatively, the Supplemental Release requested comment on whether an SRO without a trading facility, of which the NASD is currently the only one, should be required to ensure that any ATS or market maker is directly connected to most market participants before publishing its quotations in a display-only facility.

Several commenters on the original proposal supported the approach of requiring low-volume trading centers to make their quotations available through an SRO trading center.[372] Brut, for example, stated that the presence of such low-volume trading centers "requires vast industry investments to establish private connectivity (or utilize vendors) to access these markets—no matter how small or potentially how fleeting—to satisfy best execution obligations and avoid market disruption. The effort and investment to establish such connectivity is disproportionate to the liquidity on such market."[373] Brut further noted that it had sought to avoid such ADF trading centers in the past, but that the extension of trade-through protection to Nasdaq stocks would eliminate this option.

The SIA also believed that "reliance solely on the SEC's proposed market access rules would fail to address access issues related to smaller markets * * *. If the SEC obligates market participants to trade with [a smaller ADF market maker or ATS] by promulgating a trade-through rule, we are concerned about the firms' burden of creating many private linkages to many small ATSs that may charge exorbitant fees for the necessary access."[374] SIA members were divided, however, on the best means to resolve the issue. Some favored requiring smaller trading centers to make their quotes accessible through an SRO trading facility. Other SIA members, as well as other commenters, recommended requiring all trading centers to make their best quotations available through a public intermarket linkage facility.[375]

One commenter, in contrast, believed that access to trading centers quoting on the ADF should be addressed by requiring the NASD to add an order execution functionality to ADF. NexTrade stated that the ADF was created to make participation in Nasdaq's SuperMontage facility voluntary. It believed that "the Commission should re-evaluate whether or not 'private sector' solutions for SROs without an execution mechanism are sufficient for the investment community to satisfy its various obligations under the Act."[376]

After considering the various views of commenters on the original proposal, in the Reproposing Release the Commission proposed to require ADF participants to bear the costs of providing the necessary connectivity that would facilitate efficient access to their quotations.[377] Specifically, under reproposed Rule 610(b)(1) those ATSs and market makers that choose to display quotations in the ADF would bear the responsibility of providing a level and cost of access to their quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities.

A large number of commenters on the reproposal supported the proposed requirements in Rule 610(b)(1).[378] The SIA, for example, stated that this requirement would likely address most of its previously stated concerns about ATSs and market makers that choose to make their quotations accessible only through the ADF.[379] One commenter noted that it thought the approach was fair and appropriate.[380]

At the same time, some commenters (both those supporting and those opposing the reproposed access standards) continued to voice their concerns about the potential need to develop, and the costs of developing, connections to numerous small trading centers in the ADF.[381] For instance, one commenter, noting that the ADF is not a single market and that the expense of access increases proportionally by the number of markets that must be accessed, stated that the cost of accessing more than one or two additional markets would be prohibitive for most of its members.[382] Several commenters believed that non-SRO trading centers should make their quotations available through the automatic execution facilities of an SRO, thereby requiring other market participants to only have to maintain access to six or seven markets, rather than potentially dozens.[383] In contrast, one commenter that is an ADF participant continued to express its concerns with the proposed access requirements, stating its belief that the proposal to require ADF participants to establish the necessary connectivity that would facilitate efficient access to their quotations would create a cost barrier that discriminates against smaller firms in the ADF.[384]

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[370] Amex Letter at 8; Brut Letter at 19; Citigroup Letter at 13; E*Trade Letter at 9; Nasdaq Letter II at 22; SIA Letter at 16; Specialist Assoc. Letter at 12; STA Letter at 4; STANY Letter at 10; UBS Letter at 9.

[371] Hearing Tr. at 135, 138–140; Supplemental Release, 69 FR at 30146.

[372] *See, e.g.*, Brut Letter at 13; Citigroup Letter at 13; SIA Letter at 17 (some firms).

[373] Brut Letter at 13.

[374] SIA Letter at 16.

[375] *See, e.g.*, Ameritrade Letter I, Appendix at 11; E*Trade Letter at 9; SIA Letter at 17.

[376] Letter from John M. Schaible, President, NexTrade Holdings, Inc., to Jonathan G. Katz, Secretary, Commission, dated July 29, 2004 ("NexTrade Letter") at 14.

[377] *See* Section III.A.1 of the Reproposing Release for a discussion of the comments.

[378] *See, e.g.*, CIBC Reproposal Letter at 1; JP Morgan Reproposal Letter at 2; Letter from Paul W. Lerro to Jonathan G. Katz, Secretary, Commission, dated January 22, 2005 ("Lerro Reproposal Letter") at 14; Merrill Lynch Reproposal Letter at 9; Nasdaq Reproposal Letter at 18 (although advocating requiring trading facilities with less than a five percent share volume to make their quotations available through an SRO trading facility, thought that the Commission's proposal was the "next best approach"); SIA Reproposal Letter at 3, 21; UBS Reproposal Letter at 1; Vanguard Reproposal Letter at 5.

[379] SIA Reproposal Letter at 3.

[380] Citigroup Reproposal Letter at 4.

[381] *See, e.g.*, Merrill Lynch Reproposal Letter at 9; SIA Reproposal Letter at 21; STANY Reproposal Letter at 3–4.

[382] STANY Reproposal Letter at 3.

[383] *See, e.g.*, Knight Reproposal Letter at 5; Nasdaq Reproposal Letter at 17–18 (expressing the view that trading facilities with less than a five percent volume shares should be required to make their quotations available through an SRO trading facility); STA Reproposal Letter at 6; Type N Reproposal Letter at 1.

[384] NexTrade Reproposal Letter at 4–6.

The Commission has decided to adopt Rule 610(b)(1) as reproposed, but does not believe that its adopted access approach discriminates against smaller firms or creates a barrier to access for innovative new market entrants. Rather, smaller firms and new entrants have a range of alternatives from which to choose that will allow them to avoid incurring any costs to meet the connectivity requirements of Rule 610(b)(1) if they wish to do so. This approach is fully consistent with Congressional policy set forth in the Regulatory Flexibility Act, which directs the Commission to consider significant alternatives to regulations that accomplish the stated objectives of the Exchange Act and minimize the economic impact on small entities.[385]

Small ATSs are exempt from participation in the consolidated quotation system and, therefore, from the connectivity requirements of Rule 610. Under Rule 301(b)(3) of Regulation ATS, an ATS is required to display its quotations in the consolidated quotation stream only in those securities for which its trading volume reaches 5% of total trading volume. Consequently, smaller ATSs are not required to provide their quotations to any SRO (whether an SRO trading facility or the NASD's ADF) and thereby trigger the access requirements of Rule 610. Moreover, potential new entrants with innovative trading mechanisms can commence business without having to incur any costs associated with participation in the consolidated quotation system.

Some smaller ATSs, however, may wish to participate voluntarily in the consolidated quotation system. Such participation can benefit smaller firms and promote competition among markets by enabling smaller firms to obtain wide distribution of their quotations among all market participants.[386] Here, too, such firms will have alternatives that would not obligate them to comply with the connectivity requirements of Rule 610(b)(1). ATSs and market makers that wish to trade NMS stocks can choose from a number of options for quoting and trading. They can become a member of a national securities exchange and quote and trade through the exchange's trading facilities. They can participate in The NASDAQ Market Center and quote and trade through that facility. By choosing either of these options, an ATS or market maker would not create a new connectivity point that all other market participants must reach and would not be subject to Rule 610(b)(1). Some firms, however, may not want to participate in an SRO trading facility. These ATSs and market makers can quote and trade in the OTC market. The existence of the NASD's ADF makes this third choice possible by providing a facility for displaying quotations and reporting transactions in the consolidated data stream.

The NASD is not, however, statutorily required to provide an order execution functionality in the ADF. As a national securities association, the NASD is subject to different regulatory requirements than a national securities exchange. It is responsible for regulating the OTC market (*i.e.*, trading by broker-dealers otherwise than on a national securities exchange). Section 15A(b)(11) of the Exchange Act requires an association to have rules governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange that are published by a member of the association. Such rules must be designed to produce fair and informative quotations and to promote orderly procedures for collecting, distributing, and publishing quotations. The Exchange Act does not expressly require an association to establish a facility for executing orders against the quotations of its members, although it could choose to do so.

The Commission believes that market makers and ECNs should continue to have the option of operating in the OTC market, rather than on an exchange or The NASDAQ Market Center. As noted in the Commission's order approving Nasdaq's SuperMontage trading facility, this ability to operate in the ADF is an important competitive alternative to Nasdaq or exchange affiliation.[387] Therefore, the Commission has determined not to require small trading centers to make their quotations accessible through an SRO trading facility.

Instead, Rule 610(b)(1) requires all trading centers that choose to display quotations in an SRO display-only quotation facility to provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities. Rule 610(b) therefore may cause trading centers that display quotations in the ADF to incur additional costs to enhance the level of access to their quotations and to lower the cost of connectivity for market participants seeking to access their quotations. The extent to which these trading centers in fact incur additional costs to comply with the adopted access standards will be largely within the control of the trading center itself. As noted above, ATSs and market makers that wish to trade NMS stocks can choose from a number of options for quoting and trading, including quoting and trading in the OTC market. As a result, the additional connectivity requirements of Rule 610(b) will be triggered only by a trading center that displays its quotations in the consolidated data stream and chooses not to provide access to those quotations through an SRO trading facility.

Currently, nine SROs operate trading facilities in NMS stocks. Market participants throughout the securities industry generally have established connectivity to these nine points of access to quotations in NMS stocks. By choosing to display quotations in the ADF, a trading center effectively could require the entire industry to establish connectivity to an additional point of access. Potentially, many trading centers could choose to display quotations in the ADF, thereby significantly increasing the overall costs of connectivity in the NMS. Such an inefficient outcome would become much more likely if an ADF trading center were not required to assume responsibility for the additional costs associated with its decision to display quotations outside of an established SRO trading facility.

Although the Exchange Act envisions an individual broker-dealer having the option of trading in the OTC market,[388] it does not mandate that the securities industry in general must subsidize the costs of accessing a broker-dealer's quotations in the OTC market if the NASD chooses not to provide connectivity. The Commission believes that it is reasonable and appropriate to require those ATSs and market makers that choose to display quotations in the ADF to bear the responsibility of providing a level and cost of access to their quotations that is substantially equivalent to the level and cost of access

[385] 5 U.S.C. 603(c). In the Reproposing Release, the Commission noted that only two of the approximately 600 broker-dealers (including ATSs) that would be subject to Rule 610 are considered small (total capital of less than $500,000) for purposes of the Regulatory Flexibility Act. 69 FR at 77492. The adopted access approach provides alternatives that will benefit a wider range of smaller ATSs than the two that are considered small entities.

[386] *See infra*, note 566 (the Commission's Advisory Committee on Market Information recommended retention of the consolidated display requirement because, among other things, it "may promote market competition by assuring that information from newer or smaller exchanges is widely distributed.").

[387] See Securities Exchange Act Release No. 43863 (Jan. 19, 2001), 66 FR 8020 (Jan. 26, 2001).

[388] *See* Sections 11A(c)(3)(A) and (4) of the Exchange Act, 15 U.S.C 78k–1(c)(3)(A) and (4).

to quotations displayed by SRO trading facilities. Under Rule 610(b)(1), therefore, ADF participants will be required to bear the costs of the necessary connectivity to facilitate efficient access to their quotations. This standard will help ensure that additional connectivity burdens are not imposed on the securities industry each time that an additional ADF participant necessitates a new connectivity point by choosing to begin displaying quotations in the consolidated quotation stream.

To clarify the intent of this requirement, the Commission emphasizes that a "substantially equivalent" cost of access will not be evaluated in terms of absolute dollar costs of access and therefore does not necessarily allow an ATS or market maker quoting in the ADF to charge the same fees or impose the same costs that an SRO trading facility charges or imposes. Rather, the standard in Rule 610(b)(1) compares the costs to an ADF participant's relative degree of trading volume.[389] Consequently, the cost of access to an ADF participant must be substantially equivalent to the cost of access to SRO trading facilities on a per transaction basis. For example, a $1000 port fee charged by an ECN participating in the ADF that trades one million shares a day would *not* be substantially equivalent to a $1000 port fee charged by an SRO trading facility trading 100 million shares a day.

As discussed above, the Commission recognizes that trading centers subject to Rule 610(b)(1) may incur costs associated with providing access to their quotations in compliance with the Rule, although the costs will vary depending upon the manner in which each trading center determines to provide such access. As noted in the Commission's order approving the pilot program for the ADF, the reduction in communications line costs in recent years and the advent of competing access providers offer the potential for multiple competitive means of access to the various trading centers that trade NMS stocks.[390] To meet their regulatory requirements, ADF participants will have the option of establishing and, when necessary, paying for connections to industry access providers that have extensive connections to a wide array of market participants through a variety of direct access options and private networks. The option of participation in existing market infrastructure and systems should reduce a trading center's cost of compliance.

Two commenters raised concerns about reliance on third party private vendors to provide access, since they may not be regulated by the Commission and thus could deny access to a trading center they viewed as a competitor, or because utilizing their services to link to other trading centers is outside the control of a trading center.[391] The Commission believes that the requirement in Rule 610(b)(1) that ADF participants provide a substantially equivalent level of access will preclude the ADF participant from providing access only through a narrow range of private access providers. The range of access providers must be sufficient to provide access substantially equivalent to SRO trading facilities. In these circumstances, and given the significant number and variety of entities that currently provide access services and the competitive nature of the market for these services, the Commission believes that competition will be sufficient to provide services for any trading center choosing to utilize an outside vendor.[392]

One commenter emphasized the importance of the NASD carefully assessing and monitoring the extent to which ADF participants meet the access standards of Rule 610(b).[393] The Commission agrees that effective NASD oversight of ADF participants' compliance with the Rule is critical to the viability of the access standards adopted today, given that these participants are not accessible through an SRO trading facility. As the self-regulatory authority responsible for the OTC market, the NASD must act as the "gatekeeper" for the ADF, and, as such, will need to closely assess the extent to which ADF participants meet the access standards of Rule 610. Prior to implementation of Rule 610, the NASD will need to make an affirmative determination that existing ADF participants are in compliance with the requirements of the Rule.[394] If an ADF participant is not complying with these access standards, the NASD would have a responsibility to stop publishing the participant's quotations until the participant comes into compliance.[395] The Commission also believes that, in light of these new access standards, the addition of a new ADF participant would constitute a change in a material aspect of the operation of the NASD's facilities, and thus require the filing of a proposed rule change pursuant to Section 19(b) of the Exchange Act that would be subject to public notice and comment.[396] Alternatively, the NASD could choose to provide a communications facility that would link all of the ADF participants to each other and that would provide a single point of access to market participants attempting to access an ADF participant.[397]

2. Limitation on Access Fees

A number of ECN trading centers charge fees to incoming orders that execute against their displayed quotations.[398] These ECNs typically pass a substantial portion of the access fee on to limit order customers as rebates for supplying the accessed liquidity (*i.e.*, submitting non-marketable limit orders). For Nasdaq stocks, ECNs have charged access fees directly to their subscribers, but also have charged access fees to non-subscribers when their quotations have been displayed and executed through Nasdaq facilities. Market makers have not been permitted to charge any fee for counterparties accessing their quotations under the Quote Rule. Other types of trading centers, including exchange SROs, may charge fees that are triggered when incoming orders access their displayed quotations. These fees have only been charged to their members, because only members have the right to route orders to an exchange other than through ITS. For exchange-listed stocks, however, the ITS has provided free intermarket access to quotations in other markets for its participants.

The trade-through protection and linkage requirements adopted today will significantly alter the conditions that have shaped access fee practices in the past. For exchange-listed stocks, Rule 610 adopts a private linkage approach that relies on access through members and subscribers rather than through a public intermarket linkage system. For

[389] *Cf.* NexTrade Reproposal Letter at 6. *See* Section III.A.1 of the Reproposing Release and *supra* notes 370 to 375 discussing the concerns of commenters and panelists at the NMS Hearings regarding access to relatively inactive ATSs and market makers with a small amount of trading volume.

[390] Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002).

[391] NexTrade Reproposal Letter at 6; STANY Reproposal Letter at 4.

[392] For example, as noted above, one ECN can be accessed through five extranets and at least 21 other access providers, as well as through direct connections.

[393] SIA Reproposal Letter at 21.

[394] *See* Section 15A of the Exchange Act, 15 U.S.C. 78*o*–3.

[395] *Id.*

[396] *See* Rule 19b–4(b)(1) under the Exchange Act, 17 CFR 240.19b–4(b)(1).

[397] The Commission does not believe that NASD, solely by providing such a communications facility, would fall within the definition of SRO trading facility, which applies to an SRO that operates a facility that executes orders in a security or presents orders to members for execution.

[398] A full description of the current framework for access fees is provided in the Proposing Release. 69 FR at 11156.

access outside of ITS, markets will pay, directly or indirectly, the fees charged by other markets to their members and subscribers. For Nasdaq stocks, the Order Protection Rule will, for the first time, establish price protection, so market participants will no longer have the option of bypassing the quotations of trading centers with access fees that they view as too high.

The benefits of strengthened price protection and more efficient linkages could be compromised if trading centers are able to charge substantial fees for accessing their quotations. Moreover, the wider the disparity in the level of access fees among different market centers, the less useful and accurate are the prices of quotations displayed for NMS stocks. For example, if two trading centers displayed quotations to sell an NMS stock for $10.00 per share, one offer could be accessible for a total price of $10.00 plus a $0.009 fee, while the second trading center might not charge any access fee. What appeared in the consolidated data stream to be identical quotations would in fact be far from identical.

To address the potential distortions caused by substantial, disparate fees, the original access proposal included a limitation on fees. Trading centers would have been limited to a fee of no more than $0.001 per share. Liquidity providers also would have been limited to a fee of no more than $0.001 per share for attributable quotations, but could not have charged any fee for non-attributable quotations. In addition, the proposal established an accumulated fee limitation of no more than $0.002 per share for any transaction. At the NMS Hearing, panelists sharply disagreed about access fees, with some panelists arguing that agency markets must be allowed to charge access fees for their services, and other panelists arguing that access fees distort quotation prices and should be banned.[399] In the Supplemental Release, therefore, the Commission requested comment on all aspects of the proposed fee limitations, including whether it should adopt a single accumulated fee limitation that would apply to all types of market centers, and, if so, whether the proposed $0.002 per share was an appropriate amount, or whether the amount should be higher or lower.[400]

Commenters on the original proposal were splintered on the issue of access fees. A number supported the Commission's proposal as a worthwhile compromise resolution on an extremely difficult issue.[401] They believed that the proposal would level the playing field in terms of who could charge fees, and provide some measure of certainty to market participants that the quoted price will be, essentially, the price they will pay. Other commenters were strongly opposed to any limitation on fees, believing that competition alone would sufficiently address the high fees that distort quoted prices.[402] One asserted that "[c]ompetitive forces have satisfactorily dealt with the issue of outlier ECNs * * * [M]arket participants have put them at the bottom of their order routing tables, which means that orders placed on these ECNs would be the last to be executed at any price level, a position that no market participant wants to be in."[403] In contrast, some commenters argued that all access fees charged to non-members and non-subscribers should be prohibited, but believed that the proposed fee limitations should not apply to SRO transaction fees, particularly those that are filed with the Commission for approval.[404] Finally, a few commenters questioned the Commission's authority to set limitations on access fees.[405]

After considering the many divergent views of the commenters on the original proposal, the Commission reproposed a flat $0.003 per share access fee cap.[406] Commenters on the reproposal also held varying views with regard to the proposal to limit access fees to $0.003 per share. One group of commenters supported the reproposal's simplified approach to access fees.[407] For example, one commenter stated that the reproposal is a reasonable alternative to either banning access fees outright or permitting access fees with relatively high price caps.[408]

Another group of commenters opposed the Commission's access fee limitation,[409] with some opposing any effort to limit fees through regulatory means[410] and others believing that all access fees should be prohibited.[411] Many of those against imposing any fee limitation believed that competition was the best means for determining prices,[412] although at least one commenter acknowledged a trade-through rule could change this competitive dynamic.[413] One commenter questioned the Commission's statutory authority to impose an access fee cap.[414]

Some of the commenters that supported a total ban on access fees nonetheless supported the Commission's efforts to limit fees, if the Commission were to permit access fees.[415] Some commenters, although opposed to a fee limitation, thought that the reproposal improved on the original proposal.[416] One commenter stated that

[399] *See, e.g.*, Hearing Tr. at 166, 168.

[400] Supplemental Release, 69 FR at 30147.

[401] *See, e.g.*, BNY Letter at 4; Letter from Kenneth Griffin, President & Chief Executive Officer, Citadel Investment Group, L.L.C., to Jonathan G. Katz, Secretary, Commission, dated July 9, 2004 ("Citadel Letter") at 9; Citigroup Letter at 14; E*Trade Letter at 10; Nasdaq Letter II at 3; SIA Letter (some members) at 18.

[402] *See, e.g.*, Brut Letter at 12; Instinet Letter at 24; SIA Letter (some firms) at 18.

[403] Instinet Letter at 27.

[404] See, *e.g.*, Amex Letter at 7–8; Goldman Sachs Letter at 5; Knight Letter II at 2; NYSE Letter at 5; STA Letter at 6.

[405] *See, e.g.*, Instinet Letter at 24; Letter from Roderick Covlin, Executive Vice President, TrackECN, to William H. Donaldson, Chairman, Commission, dated May 10, 2004 ("TrackECN Letter") at 1.

[406] For the relatively small number of NMS stocks priced under $1.00, fees will be limited to 0.3% of the quotation price per share to prevent fees from constituting an excessive percentage of share price.

[407] *See, e.g.*, BNY Reproposal Letter at 1,3; Deutsche Bank Reproposal Letter at 3; FSR Reproposal Letter at 4 (some members supported the proposal, which they believed would provide certainty for all market participants, while other members believed that access fees should be banned entirely); JP Morgan Reproposal Letter at 2; SIA Reproposal Letter at 3 (members were split). Nasdaq, although questioning the inflexibility of the fee limitation, stated that the fee limits were an inevitable consequence of the trade-through proposal, needed because markets and market participants could otherwise take advantage of the power granted to them. Nasdaq Reproposal Letter at 19.

[408] Deutsche Bank Reproposal Letter at 3.

[409] *See* Ameritrade Reproposal Letter at 10; ArcaEx Reproposal Letter at 9–10; BGI Reproposal Letter at 3; Bloomberg Reproposal Letter at 1, 8; BSE Reproposal Letter at 2; CHX Reproposal Letter at 4; Letter from Lawrence E. Harris, Fred V. Keenan Chair in Finance, Department of Finance and Business Economics, Marshall School of Business, University of Southern California, to Jonathan G. Katz, Secretary, Commission, dated February 5, 2005 ("Harris Reproposal Letter") at 4–5; Instinet Reproposal Letter at 10; Merrill Lynch Reproposal Letter at 3, 9; Morgan Stanley Reproposal Letter at 12–13; NexTrade Reproposal Letter at 7–8; Phlx Reproposal Letter at 4–5.

[410] *See, e.g.*, ArcaEx Reproposal Letter at 10; BGI Reproposal Letter at 3; BSE Reproposal Letter at 2; CHX Reproposal Letter at 4; Phlx Reproposal Letter at 4–5.

[411] *See, e.g.*, Bloomberg Reproposal Letter at 8; Harris Reproposal Letter at 4–5; Merrill Lynch Reproposal Letter at 3.

[412] Ameritrade Reproposal Letter at 10; ArcaEx Reproposal Letter at 10; CHX Reproposal Letter at 4; Instinet Reproposal Letter at 10.

[413] Nasdaq Reproposal Letter at 19.

[414] Instinet Reproposal Letter at 10.

[415] *See, e.g.*, Citigroup Reproposal Letter at 4 (although advocating that the access fee limitation should be set at $0.001, or the original proposal's tiered cap of $0.002); Knight Trading Group Reproposal Letter at 6; STA Reproposal Letter at 4 (supporting the $0.003 per share cap in the absence of complete prohibition on fees); STANY Reproposal Letter at 5 (supporting the $0.003 per share cap in the absence of complete elimination of non-subscriber fees).

[416] Bloomberg Reproposal Letter at 8 (supporting abolishment of all access fees, but praising the Reproposal's simplified approach); Instinet Reproposal Letter at 3, 10–11.

the reproposal improved on the original fee limitation proposal by eliminating the attribution requirement, reducing the potential for unintended consequences, and simplifying its administration.[417]

Although acknowledging the many difficult issues associated with access fees, the Commission remains concerned that these issues must be resolved to promote a fair and efficient NMS, particularly under the regulatory structure adopted today. As the SIA noted in its discussion of access fees, its members continue to be united in their desire for a market-wide resolution of the access fee issue, although divided on the optimum solution.[418]

After considering the continuing divergent views of commenters, the Commission believes that a flat limitation on access fees to $0,003 per share is the fairest and most appropriate solution to what has been a longstanding and contentious issue.[419] The limitation is intended to achieve several objectives. First, Rule 610(c) promotes the NMS objective of equal regulation of markets and broker-dealers by applying equally to all types of trading centers and all types of market participants.[420] As noted above, although ECNs and other types of trading centers, including SROs, may currently charge access fees, market makers have not been permitted to charge any fee for counterparties accessing their quotations. The Commission believes, however, that it is consistent with the Quote Rule for market makers to charge fees for access to their quotations, so long as such fees meet the requirements of Rule 610(c). In particular, market makers will be permitted to charge fees for executions of orders against their quotations, irrespective of whether the order executions are effected on an SRO trading facility or directly by the market maker.

Second, the adopted fee limitation is designed to preclude individual trading centers from raising their fees substantially in an attempt to take improper advantage of strengthened protection against trade-throughs and the adoption of a private linkage regime. In particular, the fee limitation is necessary to address "outlier" trading centers that otherwise might charge high fees to other market participants required to access their quotations by the Order Protection Rule. It also precludes a trading center from charging high fees selectively to competitors, practices that have occurred in the market for Nasdaq stocks. In the absence of a fee limitation, the adoption of the Order Protection Rule and private linkages could significantly boost the viability of the outlier business model. Outlier markets might well try to take advantage of intermarket price protection by acting essentially as a toll booth between price levels. The high fee market likely will be the last market to which orders would be routed, but prices could not move to the next level until someone routed an order to take out the displayed price at the outlier market. Therefore, the outlier market might see little downside to charging exceptionally high fees, such as $0.009, even if it is last in priority. While markets would have significant incentives to compete to be near the top in order-routing priority,[421] there might be little incentive to avoid being the least-preferred market if fees were not limited.

The $0.003 cap will limit the outlier business model. It will place all markets on a level playing field in terms of the fees they can charge and the rebates they can pass on to liquidity providers. Some markets might choose to charge lower fees, thereby increasing their ranking in the preferences of order routers. Others might charge the full $0.003 and rebate a substantial proportion to liquidity providers. Competition will determine which strategy is most successful.

Moreover, the fee limitation is necessary to achieve the purposes of the Exchange Act. Access fees tend to be highest when markets use them to fund substantial rebates to liquidity providers, rather than merely to compensate for agency services. If outlier markets are allowed to charge high fees and pass most of them through as rebates, the published quotations of such markets would not reliably indicate the true price that is actually available to investors or that would be realized by liquidity providers. Section 11A(c)(1)(B) of the Exchange Act authorizes the Commission to adopt rules assuring the fairness and usefulness of quotation information. For quotations to be fair and useful, there must be some limit on the extent to which the true price for those who access quotations can vary from the displayed price. Consequently, the $0.003 fee limitation will further the statutory purposes of the NMS by harmonizing quotation practices and precluding the distortive effects of exorbitant fees. Moreover, the fee limitation is necessary to further the statutory purpose of enabling broker-dealers to route orders in a manner consistent with the operation of the NMS.[422] To protect limit orders, orders must be routed to those markets displaying the best-priced quotations. This purpose would be thwarted if market participants were allowed to charge exorbitant fees that distort quoted prices.

The Commission notes the $0.003 fee limitation is consistent with current business practices, as very few trading centers currently charge fees that exceed this amount.[423] It appears that only two ECNs currently charges fees that exceed $0.003, charging $0.005 for access through the ADF. These ECNs currently do not account for a large percentage of trading volume. In addition, while a few SROs have large fees on their books for transactions in ETFs that exceed a certain size (*e.g.*, 2100 shares), it is unlikely that these fees generate a large amount of revenues.

Accordingly, the adopted fee limitation will not impair the agency market business model. The Commission recognizes that agency trading centers perform valuable agency services in bringing buyers and sellers together, and that their business model historically has relied, at least in part, on charging fees for execution of orders against their displayed quotations. Under current conditions, the Commission believes that prohibiting access fees entirely would unduly harm this business model.

Several commenters believed that, because best execution responsibilities may require a broker-dealer to access non-protected quotations, the Commission should extend the access fee cap to all quotations, not just protected quotations.[424] One commenter

[417] Instinet Reproposal Letter at 3, 10–11.

[418] SIA Reproposal Letter at 3.

[419] For the relatively small number of NMS stocks priced under $1.00, fees will be limited to 0.3% of the quotation price per share to prevent fees from constituting an excessive percentage of share price.

[420] Section 11A(c)(1)(F) of the Exchange Act.

[421] *See supra*, section II.A.4.a (discussion of competitive implications of trade-through protection).

[422] Section 11A(c)(1)(E) of the Exchange Act authorizes the Commission to adopt rules assuring that broker-dealers transmit orders for NMS stocks in a manner consistent with the establishment and operation of a national market system.

[423] *Cf.* Instinet Letter at 38 ("there is no basis for adopting any limitation other than at the prevailing $0.003 per share level, which was arrived at through open competition among ATSs, ECNs, and SRO markets in the Nasdaq market") and Instinet Reproposal Letter at 11 ("as for an appropriate amount for such an accumulated fee limitation, the Reproposal sets the cap at the prevailing $0.003 per share level for stocks priced above $1.00, which was arrived at through open competition among marketplaces").

[424] Ameritrade Reproposal Letter at 10 (only if fee limitation is adopted); Citigroup Reproposal Letter at 4; Madoff Reproposal Letter at 5 (also stating that

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argued that the potential contribution of manual quotations to a market center's execution quality could require market participants to access those quotations to fulfill their duty of best execution, even though they are not protected by Rule 611.[425] Thus, the commenter suggested that the access fee limitation should apply to all quotations, including manual quotations, so as not to disincent market participants from attempting to access those quotations.[426]

The Commission agrees that the access fee limitation should apply to manual quotations that are best bids and offers to the same extent it applies to protected quotations, to preclude any incentive for trading centers to display manual quotations as a means to charge a higher access fee. In addition, the Commission recognizes that at present a trading center's execution quality statistics will be evaluated against the NBBO, whether that quotation is a manual or automated quotation. The Commission therefore has modified the proposed fee limitation in Rule 610(c) to apply to any quotation that is the best bid or best offer of an exchange, the ADF, or The NASDAQ Market Center, in addition to any protected quotations as defined in Rule 600(b)(57).[427]

The Commission is not, however, extending the fee cap to all quotations displayed by a trading center. Thus, the fee cap will not apply to depth-of-book quotations, or to any other services offered by markets. By applying only to the best bid and offer of an exchange, the ADF, or The NASDAQ Market Center, the limitation is narrowly drafted to have minimal impact on competition and individual business models while furthering the objectives of the Exchange Act by preserving the fairness and usefulness of quotations, as discussed above. It will provide the necessary support for proper functioning of the Order Protection Rule and private linkages, while leaving trading centers otherwise free to set fees subject only to other applicable standards (*e.g.*, prohibiting unfair discrimination).

Two commenters expressed a concern with the ability to determine after-the-fact whether a quotation against which an incoming order executed was subject to an access fee cap, given that under the Rule a market participant could be charged different fees based on whether or not a quotation was protected.[428] In particular, one commenter raised the issue in the context of a sweep order that could hit non-protected quotations, and advocated applying the access fee limit to all sweep orders.[429] The Commission acknowledges these concerns, but notes that market participants will be able to control the extent to which their orders interact with protected and non-protected quotations. First, under the Order Protection Rule, the definition of intermarket sweep order requires market participants to route orders to interact only with protected quotations. The objective can be achieved by routing an IOC, marketable limit order with a limit price that equals the price of the protected quotation. The extent to which they route to non-protected quotations will be subject to the full range of competitive forces, including the fees that trading centers choose to charge for access to non-protected quotations.

The Commission recognizes, however, the concern that a market participant could intend to interact only with a protected quotation but in fact execute against a non-protected quotation. For example, at the time a market participant routes an order to a trading center, it may be attempting to execute against only that trading center's best bid or offer, which will be subject to the fee cap under adopted Rule 610(c) (for instance, by sending an intermarket sweep order with a limit price equal to the price of the protected quotation). By the time the order arrives at the trading center, the incoming order may, if a better priced bid or offer has been displayed at the trading center for a size smaller than the size of the incoming order, execute against both the new best bid or offer and the quotation that previously was the trading center's best bid or offer. To meet the requirements of Rule 610(c), however, a trading center must ensure that it never charges a fee in excess of the cap for executions of an order against its quotations that are subject to the fee cap. The operation of this limitation will be based on quotations as they are displayed in the consolidated quotation stream. Thus, the trading center is responsible for ensuring that any time lag between prices in its internal systems and its quotations in the consolidated quotation system do not cause fees to be charged that violate the limitation of Rule 610(c). Compliance with this requirement obviously will not be a problem for trading centers that do not charge any fees in excess of the cap. Given the often rapid updating of quotations in NMS stocks, however, the Commission does not believe a trading center that charges fees above the cap for quotations that are not subject to the fee cap could comply with the Rule unless it provides a functionality that enables market participants to assure that they will never inadvertently be charged a fee in excess of the cap. For example, such a trading center could provide a "top-of-book only" or "limited-fee only" order functionality. By using this functionality, market participants themselves could assure that they were never required to pay a fee in excess of the levels set forth in Rule 610(c).

In restricting the fee cap to the top-of-book, we are attempting to reduce the regulatory impact to the minimum extent necessary to effect the statutory purposes. We intend to monitor the operation of these rules to assess whether in practice, distinguishing which quotations are subject to the cap is so difficult, and accessing non-protected quotations is so essential, that broader coverage of the rule is necessary.

3. Locking or Crossing Quotations

The original access proposal provided that the SROs must establish and enforce rules: (1) Requiring their members reasonably to avoid posting quotations that lock or cross the quotations of other markets; (2) enabling the reconciliation of locked or crossed markets; and (3) prohibiting their members from engaging in a pattern or practice of locking or crossing quotations. In light of the discussion at the NMS Hearing concerning automated quotations and automated markets,[430] the Supplemental Release requested comment on whether market participants should be allowed to submit automated quotations that lock or cross manual quotations.[431] In the Reproposing Release, the Commission reproposed restrictions on the practice of displaying locking or crossing quotations, but, consistent with its approach in the reproposed Order Protection Rule, modified the proposal to allow automated quotations to lock or cross manual quotations. Rule 610(d) as reproposed thereby addressed the concern that manual quotations may not be fully accessible and recognized that allowing automated quotations to lock

extending the fee limitation to all quotations will ensure that all quotations are treated fairly); Merrill Lynch Reproposal Letter at 9; SIA Reproposal Letter at 22; STANY Reproposal Letter at 2, 5.

[425] Madoff Reproposal Letter at 5.

[426] *Id.*

[427] In addition, the Commission notes that the access standards in Rule 610(a) and (b) apply to all quotations, not just automated quotations.

[428] Bloomberg Reproposal Letter at 8, n. 6; SIA Reproposal Letter at 22.

[429] Bloomberg Reproposal Letter at 8, n. 6.

[430] *See supra*, section II.A.2.

[431] Supplemental Release, 69 FR at 30147.

or cross manual quotations may provide useful market information.

Most of the commenters who addressed the issue supported the proposed restrictions on locking and crossing quotations.[432] They generally agreed that the practice of displaying quotations that lock or cross previously displayed quotations is inconsistent with fair and orderly markets and detracts from market efficiency. One noted, for example, that locked and crossed markets "can be a sign of an inefficient market structure" and "may create confusion for investors, as it is unclear under such circumstances what is the true trading interest in a stock."[433] Another commenter stated that "[p]ricing rationality is disrupted by locked and crossed markets, and efforts should be taken to reduce the incidence of such disruptions."[434] Some commenters asserted that locked markets often occur when a market participant deliberately posts a locking quotation to avoid paying a fee to access the quotation of another market and to receive a liquidity rebate for an execution against its own displayed quotation.[435] Nasdaq submitted data regarding the frequency of locked and crossed markets. During a one-week period in March 2004, it found that markets for Nasdaq stocks were locked or crossed an average of 509,018 times each day, with an average of 194,638 of the locks and crosses lasting more than 1 second and an average duration of all locks and crosses of 3.1 seconds.[436] Nasdaq stocks currently are not subject to provisions discouraging intermarket locking or crossing quotations such as those contained in the ITS Plan.

Several commenters specifically supported the modification to allow automated quotations to lock or cross manual quotations.[437] One commenter stated that market participants should not be forced to seek out slow, uncertain executions before being permitted to offer liquidity at prices they find acceptable.[438]

A few comments opposed restricting the practice of locking or crossing quotations.[439] They generally believed that the proposal would impair market transparency and efficiency, such as by prohibiting the display of information as to the true level of trading interest or information that a particular market's quotations may be inaccessible. One commenter identified a number of causes, apart from access fees and liquidity rebates, which could lead to locked and crossed markets.[440] These included determinations by market participants that quotations displayed by a locked or crossed market are not truly accessible, decisions by market participants that the potential disadvantages of routing away outweigh the potential advantages (*e.g.*, loss of execution priority on the market place currently displaying the order), and decisions by market participants to exclusively use a particular market to run a trading strategy, even at the risk of missing some trading opportunities. One commenter stated that providing an exception from the restrictions for manual quotations would do little to mitigate the negative impact of the restrictions on market transparency and efficiency.[441]

The Commission recognizes that Rule 610(d), by restricting locked markets with respect to automated quotations, can prohibit the display of an order that would otherwise have been displayed and reduced the quoted spread to zero. However, although locked markets do occur a certain percentage of the time, they do not occur all the time, even in extremely active stocks, and thus the average effective spread in these stocks typically is between one-half cent and one cent (one cent being the minimum price increment for all but a very few stocks). Thus, the Commission believes that any widening of average effective spreads caused solely by the adopted rule will be limited to the difference between a sub-penny and penny spread. In addition, a locked market currently may not actually represent two market participants willing to buy and sell at the same price. Often, the locking market participant is not truly willing to trade at the displayed locking price, but instead chooses to lock rather than execute against the already-displayed quotation to receive a liquidity rebate.[442]

The Commission agrees with commenters supporting the proposal that an automated quotation is entitled to protection from locking or crossing quotations. When two market participants are willing to trade at the same quoted price, giving priority to the first-displayed automated quotation will encourage posting of quotations and contribute to fair and orderly markets. The basic principle underlying the NMS is to promote fair competition among markets, but within a system that also promotes interaction between all of the buyers and sellers in a particular NMS stock. Allowing market participants simply to ignore accessible quotations in other markets and routinely display locking and crossing quotations is inconsistent with this principle. The Rule will, however, not prohibit automated quotations from locking or crossing manual quotations, thereby permitting market participants to reflect information regarding the inaccessibility of a particular trading center's quotations.

Two commenters requested that the Commission include an exception to the locked and crossed requirements for system malfunctions and material delays, and one commenter requested that the Commission include an exception for flickering quotations, similar to the exceptions proposed for the Order Protection Rule.[443] The SIA also requested that the Commission further clarify the operation of the "ship and post" procedures.[444] The Commission believes that it would be reasonable for the SROs to include in their rules implemented pursuant to Rule 610(d) exceptions equivalent to those included in the Order Protection Rule.[445] The Commission intends to

[432] Amex Letter, Exhibit A at 27–28; Letter from Steve Swanson, Chief Executive Officer & President, Automated Trading Desk, LLC, to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("ATD Letter") at 3; Brut Letter at 17; BSE Letter at 13; Citigroup Letter at 14; E*Trade Letter at 10; ICI Letter at 18; JP Morgan Letter at 6; Nasdaq Letter II at 23–24; NYSE Letter, Attachment at 9; SIA Letter at 19–20; STA Letter at 6; STANY Letter at 8; UBS Letter at 9–10.

[433] ICI Letter at 18.

[434] Deutsche Bank Reproposal Letter at 3.

[435] Amex Letter, Exhibit A at 27–28; ATD Reproposal Letter at 5; ICI Letter at 18; Nasdaq Letter II at 23.

[436] Nasdaq Letter II at 23. One commenter pointed to this data as support for not prohibiting locked and crossed markets, since 314,380 of the 509,018 locks or crosses lasted less than one second, even without a rule. Letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange, Incorporated, to Jonathan G. Katz, Secretary, Commission, dated February 14, 2005 ("CBOE Reproposal Letter") at 7.

[437] Citigroup Reproposal Letter at 4; Nasdaq Reproposal Letter at 18; SIA Reproposal Letter at 23.

[438] Nasdaq Reproposal Letter at 18.

[439] CBOE Reproposal Letter at 1–4; Letter from Linda Lerner, General Counsel, Domestic Securities, Inc., to Jonathan G. Katz, Secretary, Commission, dated September 9, 2004 ("Domestic Securities Letter") at 2–3; Hudson River Trading Letter at 5–6; Instinet Reproposal Letter at 3,11; Letter from Michael J. Simon, Senior Vice President & Secretary, International Securities Exchange, Inc., to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004 ("ISE Letter") at 7–8; Tower Research Letter at 6–8; Tradebot Reproposal Letter at 1.

[440] Instinet Letter at 39.

[441] Instinet Reproposal Letter at 3.

[442] *See supra*, note 435. *See also* AFB Comment Letter at 9; Schwab Comment Letter at 17.

[443] Nasdaq Reproposal Letter at 18; SIA Reproposal Letter at 23.

[444] SIA Reproposal Letter at 23.

[445] Specifically, such exceptions would be included within SRO rules adopted pursuant to Rule 610(d) that require their members to reasonably avoid displaying quotations that lock or cross a protected quotation or displaying manual

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work closely with the SROs and other industry participants during the implementation period for Regulation NMS to achieve reasonable industry-wide standards for SRO rules relating to locked and crossed markets. In addition, such rules must be filed for Commission approval, thereby providing an opportunity for public notice and comment.

B. Description of Adopted Rule

Paragraphs (a) and (b) of Rule 610 address access to all quotations displayed by an SRO trading facility or by an SRO display-only facility. Paragraph (c) addresses the fees charged for access to protected quotations, and paragraph (d) addresses locking and crossing quotations. The Commission also is extending the scope of the fair access requirements of Regulation ATS as proposed and reproposed.

1. Access to Quotations

a. Quotations of SRO Trading Facilities

Paragraph (a) of Rule 610 applies to quotations of an SRO trading facility. In Rule 600(b)(72), an SRO trading facility is defined as a facility operated by or on behalf of a national securities exchange or a national securities association that executes orders in securities or presents orders to members for execution.[446] This definition therefore encompasses the trading facilities of each of the exchanges, as well as The NASDAQ Market Center. The term "quotation" is defined in Rule 600(b)(62) as a bid or an offer, and "bid" or "offer" is defined in Rule 600(b)(8) as the bid price or the offer price communicated by a member of a national securities exchange or national securities association to any broker or dealer or to any customer. Rule 610(a) therefore applies to the entire depth of book of displayed orders of an SRO trading facility, including reserve size as well as displayed size at each price.

Rule 610(a) prohibits an SRO from imposing unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access through a member of the SRO to the quotations in an NMS stock displayed by the SRO trading facility. This anti-discrimination standard is designed to give non-members indirect access to quotations through members. It is premised on fair and efficient access of SRO members themselves to the quotations of the SRO's trading facility. SRO member access currently is addressed by a series of provisions of the Exchange Act. Sections 6(b)(4) and 15A(b)(5) provide that the rules of an exchange or association provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities, while Sections 6(b)(5) and 15A(b)(6) provide in part that its rules not be designed to permit unfair discrimination between customers, brokers, or dealers. In addition, Sections 6(b)(1) and 15A(b)(2) of the Exchange Act require that an exchange or association must have the capacity to be able to carry out the purposes of the Exchange Act. Sections 6(b)(5) and 15A(b)(6) also require an exchange or association to have rules designed to remove impediments to and perfect the mechanism of a free and open market and a national market system. Section 11A(a)(1)(C) provides that two of the objectives of a national market system are to assure the economically efficient execution of securities transactions and the practicability of brokers executing investors' orders in the best market. To achieve these objectives, an SRO's members—broker-dealers that have the right to trade directly on an SRO facility—must themselves have fair and efficient access to the quotations displayed on such facility.

Rule 610(a) builds on this existing access structure by prohibiting unfair discrimination that prevents or inhibits non-members from piggybacking on the access of members. In the absence of mandatory public linkages directly between markets, the ability to obtain indirect access is necessary to assure that non-members can readily access quotations to meet the requirements of the Order Protection Rule and to fulfill their duty of best execution. In general, any SRO rule or practice that treats orders less favorably based on the identity of the ultimate party submitting the order through an SRO member could violate Rule 610(a). Thus, for example, charging differential fees or reducing an order's priority based on the identity of a member's customer would be inconsistent with Rule 610(a).

Given the critical importance of indirect access to the private linkage approach incorporated in Rule 610(a), the Commission intends to review the current extent to which SRO members have fair and efficient access to quotations in NMS stocks that are displayed on an SRO trading facility (which term does not include the NASD's ADF, as discussed below). In this regard, we emphasize that the SROs with trading facilities cannot meet the access requirements of the Exchange Act simply by assuming direct access is available to trading centers that participate in the SRO trading facilities. Thus, if a trading center displays quotations on an SRO trading facility, but also provides direct access to such quotations, that SRO could not rely on the level of direct access to the non-SRO trading center to meet its Exchange Act responsibilities. An SRO trading facility must itself provide fair and efficient access to the quotations that are displayed as quotations of such SRO. Stated another way, an SRO trading facility cannot be used simply as a conduit for the display of quotations that cannot be accessed fairly and efficiently through the SRO trading facility itself. Accordingly, each SRO's facilities will be reviewed to determine whether they are able to meet the enhanced need for access under the adopted regulatory structure.

b. Quotations of SRO Display-Only Facility

Paragraph (b) of Rule 610 applies to all quotations displayed by an SRO display-only facility. The term "SRO display-only facility" is defined in Rule 600(b)(71) as a facility operated by or on behalf of a national securities exchange or national securities association that displays quotations in securities, but does not execute orders against such quotations or present orders to members for execution.[447] For quotations in NMS

quotations that lock or cross any quotation in an NMS stock. The Commission notes that it has modified the language of Rule 610(d)(3) from the reproposal to clarify that, if an SRO's rules (as approved by the Commission) provide for reasonable exceptions to the locking and crossing requirements of Rule 610(d), the prohibition on its members engaging in a pattern or practice of displaying quotations that lock or cross any protected quotation in an NMS stock, or of displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan, will not apply to the display of quotations that lock or cross any protected or other quotation as permitted by an applicable exception.

[446] The Commission has modified the definition of SRO trading facility in Rule 600(b)(72) to include the phrase "or on behalf of" after "operated by" to make clear that the term includes an SRO trading facility for which an exchange or association has contracted out the operation to a third party.

[447] The term "SRO trading facility" is defined in Rule 600(b)(72) to mean a facility operated by or on behalf of a national securities exchange or a national securities association that executes orders in a security or presents orders to members for execution. The Commission has included the phrase "to members" after the phrase "or present orders" in the definition of "SRO display-only facility" in Rule 600(b)(71) as adopted to conform it to the definition of SRO trading facility. The Commission also has modified the definition of SRO display-only facility to include the phrase "or on behalf of" after "operated by" to make clear that the term includes an SRO trading facility for which an exchange or association has contracted out the operation to a third party.

stocks, this definition currently encompasses only the NASD's ADF.[448]

Paragraph (b)(1) of Rule 610 requires any trading center that displays quotations in NMS stocks through an SRO display-only facility to provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities. The phrase "level and cost of access" would encompass both (1) the policies, procedures, and standards that govern access to quotations of the trading center, and (2) the connectivity through which market participants can obtain access and the cost of such connectivity. As discussed in section III.A.1 above, trading centers that choose to display quotations in an SRO display-only facility will be required to bear the responsibility of establishing the necessary connections to afford fair and efficient access to their quotations. The nature and cost of these connections for market participants seeking to access the trading center's quotations would need to be substantially equivalent to the nature and cost of connections to SRO trading facilities.[449] In recent years, a variety of different types of entities have entered the business of providing connections for brokers and market participants to different trading centers. The Commission anticipates that ADF participants will take advantage of linking to these service providers to establish the necessary connectivity.

The NASD, as the self-regulatory authority responsible for enforcing compliance by ADF participants with the requirements of the Exchange Act, will need to evaluate the connectivity of ADF participants to determine whether it meets the requirements of Rule 610(b)(1). Prior to implementation of Rule 610, the NASD will need to make an affirmative determination that existing ADF participants are in compliance with the requirements of the Rule.[450] If an ADF participant is not complying with these access standards, the NASD would have a responsibility to stop publishing the participant's quotations until the participant comes into compliance.[451] The Commission also believes that the addition of a new ADF participant would constitute a material aspect of the operation of the NASD's facilities, and thus require the filing of a proposed rule change pursuant to Section 19(b) of the Exchange Act that would be subject to public notice and comment.[452]

Paragraph (b)(2) of Rule 610 prohibits any trading center that displays quotations through an SRO display-only facility from imposing unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations through a member, subscriber, or customer of the trading center. This prohibition parallels the prohibition in Rule 610(a) that applies to the quotations of SRO trading facilities.[453] Thus, a trading center's differential treatment of orders based on the identity of the party ultimately submitting an order through a member, subscriber, or customer of such trading center generally is inconsistent with this Rule.

2. Limitation on Access Fees

Rule 610(c) limits the fees that can be charged for access to protected quotations and manual quotations at the best bid and offer. It provides that a trading center shall not impose, nor permit to be imposed, any fee or fees for the execution of an order against a protected quotation of the trading center or against any other quotation of the trading center that is the best bid or best offer of a national securities exchange, the best bid or best offer of The Nasdaq Stock Market, Inc., or the best bid or best offer of a national securities association other than the best bid or best offer of The Nasdaq Stock Market, Inc. in an NMS stock ("BBO quotations") that exceed or accumulate to more than $0.003 per share or, for its protected quotations and BBO quotations with a price of less than $1.00, that exceed or accumulate to more than 0.3% of the quotation price per share. Thus, the scope of Rule 610(c) is limited to the price of the best bid and offer, whether automated or manual, of each exchange, The NASDAQ Market Center, and the ADF. When triggered, the fee limitation of Rule 610(c) will apply to any order execution at the displayed price of the protected quotation or the BBO quotation. It therefore would encompass executions against both the displayed size and any reserve size at the price of those quotations.

Rule 610(c) encompasses a wide variety of fees currently charged by trading centers, including both the fees commonly known as access fees charged by ECNs and the transaction fees charged by SROs. So long as the fees are based on the execution of an order against a protected quotation or a BBO quotation, the restriction of Rule 610(c) will apply. Conversely, fees not triggered by the execution of orders against protected quotations or BBO quotations (*e.g.*, certain periodic fees such as monthly or annual fees) generally will not be included.

In addition, Rule 610(c) encompasses any fee charged directly by a trading center, as well as any fee charged by market participants that display quotations through the trading center's facilities. Nothing in Rule 610(c) will preclude an SRO or other trading center from taking action to limit fees beyond what is required by the Rule, and trading centers will have flexibility in establishing their fee schedules to comply with Rule 610(c). In particular, trading centers could impose a limit on the fees that market participants are permitted to charge for quotations that are accessed through a trading center's facilities. For example, Nasdaq has adopted such a limit for quotations displayed by The NASDAQ Market Center.[454]

The Commission believes that it is consistent with the Quote Rule for market makers to charge fees for access to their quotations, so long as such fees meet the requirements of Rule 610(c). In particular, market makers will be permitted to charge fees for executions of orders against their quotations irrespective of whether the order executions are effected on an SRO trading facility or directly by the market maker.

3. Locking or Crossing Quotations

Rule 610(d) restricts locking or crossing quotations, but recognizes that locked and crossed markets can occur accidentally, especially given the differing speeds with which trading centers update their quotations. It requires that each national securities exchange and national securities association establish, maintain, and enforce written rules that:[455] (1) Require

[448] The Commission notes that Rule 610(b)(1) applies to all quotations displayed on an SRO display-only facility, even if the trading center also displays quotations in an SRO trading facility. To preclude the consolidated data stream from giving a misleading indication of available liquidity, separate quotations displayed on an SRO trading facility and an SRO display-only facility must each be fully accessible.

[449] As stated above in section III.A.1, this requirement does not apply on an absolute basis, but instead applies on a per-transaction basis to reflect the costs relative to the ADF participant's trading volume.

[450] *See* Section 15A of the Exchange Act, 15 U.S.C. 78*o*–3.

[451] *Id.*

[452] *See* Rule 19b–4(b)(1) under the Exchange Act, 17 CFR 240.19b–4(b)(1).

[453] Moreover, as with paragraph (a) of Rule 610, paragraph (b) applies to both the displayed and reserve size of the displayed quotations of an SRO display-only facility.

[454] NASD Rule 4623(b)(6).

[455] The Commission has modified the language of adopted Rule 610(d) to require that an exchange or association "establish, maintain, and enforce" such rules, and to clarify that such rules must be written,

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its members to reasonably avoid displaying quotations that lock or cross any protected quotation in an NMS stock, or of displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan; (2) are reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock; and (3) prohibit its members from engaging in a pattern or practice of displaying quotations that lock or cross any protected quotation in an NMS stock, or of displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan, other than displaying quotations that lock or cross any protected or other quotation as permitted by an exception contained in the SRO's rules established pursuant to (1). Of course, the SRO's locking and crossing rules should apply only to its own quoting facility.

Rule 610(d) distinguishes between protected (and therefore automated)[456] quotations and manual quotations. Protected quotations can not be intentionally crossed or locked by any other quotations. Manual quotations, in contrast, can be locked or crossed by automated quotations, but can not themselves intentionally lock or cross any other quotations included in the consolidated data stream, whether automated or manual. Recognizing that quotations may on occasion accidentally lock or cross other quotations, Rule 610(d) requires members to "reasonably avoid" locking and crossing and prohibits a "pattern or practice" of locking or crossing quotations where this can reasonably be avoided. SRO rules can include so-called "ship and post" procedures that require a market participant to attempt to execute against a relevant displayed quotation while posting a quotation that could lock or cross such a quotation. Finally, Rule 610(d)(2) requires that each SRO's rules be reasonably designed to enable the reconciliation of locked or crossed quotations in an NMS stock. Such rules must require the market participant responsible for displaying the locking or crossing quotation to take reasonable action to resolve the locked or crossed market.[457]

4. Regulation ATS Fair Access

The "fair access" standards of Rule 301(b)(5) of Regulation ATS[458] require a covered ATS, among other things, to: (1) Establish written standards for granting access on its system; and (2) not unreasonably prohibit or limit any person in respect to services offered by the ATS by applying its access standards in an unfair or discriminatory manner. As originally proposed and reproposed, the Commission is amending this section of Regulation ATS to lower the threshold that triggers the Regulation ATS fair access requirements from 20% of the average daily volume in a security to 5%.[459] Under the access approach adopted today, the fairness and efficiency of private linkages will assume heightened importance. A critical component of private linkages is the ability of interested market participants to become members or subscribers of a trading center, particularly those trading centers with significant trading volume. As discussed in section III.A.1 above, market participants then may use their membership or subscribership access as a means for others to obtain indirect access by piggybacking on the direct access of members or subscribers. The Commission therefore believes that it is appropriate to lower the fair access threshold of Regulation ATS.[460] Lowering the threshold for paragraph (b)(5) of Rule 301 also makes its coverage consistent with the 5% threshold triggering the order display and execution access requirements of Rule 301(b)(3). As a result, each ATS required to disseminate its quotations in the consolidated data stream also will be prohibited from unreasonably limiting market participants from becoming a subscriber or customer. Aside from lowering the threshold, the substantive requirements of Rule 301(b)(5) are left unchanged.

One commenter, Liquidnet, argued that the fair access standards of Regulation ATS should not apply to systems that display orders only to one other system subscriber, such as through a negotiation feature.[461] Among other things, Liquidnet maintained that the fair access requirement should not apply to it because, in essence, it is an institutional block trading desk that does not publish quotations.[462] By its terms, Rule 301(b)(5) of Regulation ATS will apply to Liquidnet. However, the Commission believes that some form of exemptive relief under Section 36 of the Exchange Act may be appropriate to maintain the fair access threshold at 20% for an ATS, such as Liquidnet, that, among other things, limits its business to institutional block trading and does not disseminate quotations. The Commission intends to consider this matter further during the implementation period for Regulation NMS.

IV. Sub-Penny Rule

The Commission today is adopting Rule 612 under the Exchange Act[463] which will govern sub-penny quoting of NMS stocks. Rule 612 imposes new requirements on any bid, offer, order, or indication of interest that is displayed, ranked, or accepted by a national securities exchange, national securities association, ATS, vendor, or broker-dealer. The Commission is adopting Rule 612 as it was reproposed in December 2004 with only a few minor amendments for clarity.

A. Background

In June 2000, the Commission issued an order directing NASD and the national securities exchanges to act jointly in developing a plan to convert their quotations in equity securities and options from fractions to decimals.[464]

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to conform the language to the operative language of Rule 611(a)(1).

[456] Under Rule 600(b)(57), only automated quotations can qualify as protected quotations.

[457] The Commission notes that the requirement in Rule 610(d)(1) that an SRO establish, maintain, and enforce rules that require its members reasonably to avoid engaging in certain activity relating to locking and crossing of displayed quotations may appear to be similar to the language contained in Section 8(d)(i) of the existing ITS Plan that "[t]he Participants also agree that "locked markets" in System securities should be avoided." The Commission emphasizes, however, that the intent and meaning of Rule 610(d) is more strict and comprehensive than the ITS Plan provision. In particular, as noted above, Rule 610(d) requires SROs to restrict their members' ability to engage in locking and crossing activity. The Commission therefore believes that most existing SRO rules established to implement the locked and crossed provision of the ITS Plan likely would not be sufficient to comply with Rule 610(d).

[458] 17 CFR 242.301(b)(5).

[459] The Regulation ATS fair access requirements are triggered on a security-by-security basis for equity securities. *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70873 (Dec. 22, 1998).

[460] One commenter opposed the proposal to lower the threshold for Regulation ATS fair access, primarily because it largely acts as an agency broker that routes orders to other venues. Bloomberg Tradebook Letter at 7. The Commission believes that ATSs, which by definition have chosen to offer market functions beyond mere agency routing, would appropriately be subject to regulatory requirements that reflect such functions. Commenters on the Proposing and Reproposing Releases supported the proposal to lower the fair access threshold. *See, e.g.*, Amex Letter at 28–29; Citigroup Reproposal Letter at 3; E*TRADE Letter at 10; ICI Letter at 4; Instinet Reproposal Letter at 3,12; Morgan Stanley Letter at 17–18; Merrill Lynch Reproposal Letter at 9; Nasdaq Reproposal Letter at 17; Specialist Assoc. Letter at 11; UBS Letter at 9.

[461] *See* letter to Jonathan G. Katz, Secretary, Commission, from Seth Merrin, Chief Executive Officer, Liquidnet Inc., dated January 26, 2005 ("Liquidnet Reproposal Letter") at 3.

[462] *See id.*

[463] 17 CFR 242.612.

[464] *See* Securities Exchange Act Release No. 42194 (June 8, 2000), 65 FR 38010 (June 19, 2000) ("June 2000 Order"). On January 28, 2000, the

The June 2000 Order stated that the plan could fix the minimum price variation ("MPV") during the phase-in period, provided the MPV was no greater than $0.05 and no less than $0.01 for any equity security.[465] The June 2000 Order also required NASD and the exchanges to provide the Commission with studies analyzing how decimal conversion had affected systems capacity, liquidity, and trading behavior, including an analysis of whether there should be a uniform MPV.[466] The Commission stated that, if NASD or an exchange wished to move to quoting stocks in an increment less than $0.01, its study should include a full analysis of the potential impact on the market requesting the change and on the markets as a whole.[467] Furthermore, the Commission required each SRO to propose a rule change under Section 19(b) of the Exchange Act[468] to establish its individual choice of MPV for securities traded on its market.[469] NASD and the exchanges complied with these requirements, and in August 2002 the Commission approved rule changes from all of these SROs to establish an MPV of $0.01 for equity securities.[470]

Between the June 2000 Order and the August 2002 Order, the Commission issued a Concept Release seeking public comment on the potential impact of sub-penny pricing,[471] including its effect on: (1) Price clarity (*e.g.*, the potential to cause ephemeral or "flickering" quotations); (2) market depth (*i.e.*, the number of shares available at a given price); (3) compliance with the Order Handling Rules and other price-dependent rules; and (4) the operations and capacity of automated systems.[472] The Commission received 33 comments on the Concept Release.[473] The majority of commenters opposed sub-penny pricing. Some stated that the negative effects of decimal trading would be exacerbated by further reducing the MPV, without meaningfully reducing spreads or securing other benefits for the markets or investors.[474] These commenters recommended that all securities have an MPV of at least a penny.[475] A smaller number of commenters believed that the forces of competition, rather than regulation by the Commission or Congress, should determine the MPV.[476] These commenters suggested that a smaller MPV could improve market efficiency and provide investors with greater opportunity for price improvement. They argued generally that the problems accompanying decimals could be resolved through technology enhancements, rather than through regulation.

In August 2003, Nasdaq submitted a proposed rule change to the Commission to adopt an MPV of $0.001 for Nasdaq-listed securities.[477] Nasdaq stated that, unless and until a uniform MPV were established, it felt compelled to implement an MPV of $0.001 to remain competitive with ECNs that permit their subscribers to quote in sub-pennies. At the same time, Nasdaq filed a petition for Commission action urging the Commission "to adopt a uniform rule requiring market participants to quote and trade Nasdaq securities in a consistent monetary increment * * * with the exception of average price trades."[478]

B. Commission Proposal and Reproposal on Sub-Penny Quoting

In February 2004, the Commission proposed new Rule 612 that would govern sub-penny quoting as part of the overall Regulation NMS proposal. In the initial Proposing Release, the Commission summarized the conversion of the U.S. securities markets from fractional to decimalized trading and stated its view that, on balance, the benefits of decimalization have justified the costs. The Commission cautioned, however, that if the MPV were to decrease beyond a certain level, the potential costs to investors and the markets could at some point surpass any potential benefits.[479] To address this concern, Rule 612 as proposed would have prohibited any national securities exchange, national securities association, ATS, vendor, or broker-dealer from displaying, ranking, or accepting from any person a bid, offer, order, or indication of interest in an NMS stock priced in an increment less than $0.01 per share. This restriction would not have applied to any NMS stock the share price of which is below $1.00.

The proposed rule was designed to limit the ability of a market participant to gain execution priority over a competing limit order by stepping ahead by an economically insignificant amount. In issuing the sub-penny proposal, the Commission cited research performed by OEA showing a high incidence of sub-penny trades that cluster around the $0.001 and $0.009 price points. The OEA study concluded that this phenomenon resulted from market participants attempting to step ahead of competing limit orders for the smallest economic increment possible.[480]

In the Proposing Release, the Commission pointed to a variety of additional problems caused by sub-penny quoting, including the following:

- If investors' limit orders lose execution priority for a nominal amount, investors may over time decline to use them, thus depriving the markets of liquidity.
- When market participants can gain execution priority for an infinitesimally small amount, important customer protection rules such as exchange priority rules and NASD's Manning rule[481] could be rendered meaningless.

Commission had ordered NASD and the exchanges to facilitate an orderly transition to decimal pricing in the securities markets. *See* Securities Exchange Act Release No. 42360 (Jan. 28, 2000), 65 FR 5003 (Feb. 2, 2000) ("January 2000 Order"). In that order, the Commission set a timetable for NASD and the exchanges to begin trading some equity securities, and options on those securities, in decimals by July 3, 2000, and to begin trading all equities and options by January 3, 2001. *See* January 2000 Order, 65 FR at 5005. In April 2000, the Commission issued another order staying the original deadlines for decimalization. *See* Securities Exchange Act Release No. 42685 (Apr. 13, 2000), 65 FR 21046 (Apr. 19, 2000).

[465] *See* June 2000 Order, 65 FR at 38013. The June 2000 Order also required that at least some equity securities be quoted in minimum increments of $0.01. *See Id.*

[466] *See Id.*

[467] *See Id.*

[468] 15 U.S.C. 78s(b).

[469] *See* June 2000 Order, 65 FR at 38013.

[470] *See* Securities Exchange Act Release No. 46280 (July 29, 2002), 67 FR 50739 (Aug. 5, 2002) ("August 2002 Order") (approving SR–Amex–2002–02, SR–BSE–2002–02, SR–CBOE–2002–02, SR–CHX–2002–06, SR–CSE–2002–02, SR–ISE–2002–06, SR–NASD–2002–08, SR–NYSE–2002–12, SR–PCX–2002–04, and SR-Phlx-2002–05).

[471] Securities Exchange Act Release No. 44568 (July 18, 2001), 66 FR 38390 (July 24, 2001) ("Concept Release").

[472] *See* 66 FR at 38391–95.

[473] For a list of the commenters, *see* Proposing Release, 69 FR at 11165.

[474] *See Id.*

[475] However, some commenters that opposed sub-penny quoting thought that trading in sub-pennies should be permitted. *See Id.*

[476] *See Id.* at 11165–66.

[477] *See* SR–NASD–2003–121. Nasdaq has since withdrawn this proposal.

[478] Letter to Jonathan G. Katz, Secretary, Commission, from Edward S. Knight, Executive Vice President, Nasdaq, dated August 4, 2003 ("Nasdaq Petition").

[479] *See* Proposing Release, 69 FR at 11165.

[480] *See* 69 FR at 11169–70.

[481] *See* NASD IM–2110–2 (generally requiring that a member firm that accepts and holds an unexecuted limit order from its customer in a Nasdaq security and that continues to trade the subject security for its own market-making account at prices that would satisfy the customer's limit order, without executing that limit order, shall be deemed to have acted in a manner inconsistent with just and equitable principles of trade). The impetus for this rule was a case brought by a customer of an NASD member firm, William Manning, who alleged that the firm had accepted his limit order, failed to execute it, and violated its fiduciary duty to him by trading ahead of the order. In the *Manning* decision, *In re E.F. Hutton & Co.*, Exchange Act Release No. 25887 (July 6, 1988), the Commission affirmed NASD's finding that a member firm, upon acceptance of a customer's limit order, undertakes a fiduciary duty to its customer

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Without these protections, professional traders would have more opportunity to take advantage of non-professionals, which could result in the latter either losing executions or receiving executions at inferior prices.

• Flickering quotations that can result from widespread sub-penny pricing could make it more difficult for broker-dealers to satisfy their best execution obligations and other regulatory responsibilities. The best execution obligation requires a broker-dealer to seek for its customer's transaction the most favorable terms reasonably available under the circumstances.[482] This standard is premised on the practical ability of the broker-dealer to determine whether a displayed price is reasonably obtainable under the circumstances.

• Widespread sub-penny quoting could decrease market depth (*i.e.*, the number of shares available at the NBBO) and lead to higher transaction costs, particularly for institutional investors (such as pension funds and mutual funds) that are more likely to place large orders. These higher transaction costs would likely be passed on to retail investors whose assets are managed by the institutions.

• Decreasing depth at the inside also could cause such institutions to rely more on execution alternatives away from the exchanges and Nasdaq that are designed to help larger investors find matches for large blocks of securities. Such a trend could increase fragmentation of the securities markets.

In the Reproposing Release, the sub-penny rule was fundamentally unchanged although the Commission made certain minor modifications in response to the comments received on the Proposing Release. These modifications in reproposed Rule 612 would have: (1) Based the sub-penny restriction on the price of the quotation rather than the price of the NMS stock itself; and (2) limited a quotation priced less than $1.00 per share to four decimal places.

C. Comments Received

The Commission sought comment on all aspects of reproposed Rule 612. Of the total comments that the Commission received in response to the Reproposing Release, approximately 33 commenters addressed the sub-penny rule. The majority of these commenters supported a restriction on sub-penny quoting.[483] One commenter argued that sub-penny quoting would too easily permit market professionals to step ahead of competing limit orders by an economically insignificant amount.[484] Another commenter stated that "[t]oday, SROs are held to minimum quoting increments, while other market centers are not, and this arbitrage should be eliminated."[485] A third commenter offered a similar perspective, stating that the sub-penny prohibition "will prevent renegade systems from allowing a minority of traders to exploit the majority" that do not offer sub-penny quoting.[486]

Three commenters argued that, in the absence of a general prohibition on sub-penny quoting, market data systems would be severely taxed.[487] One commenter—a trade organization that addresses issues relating to market data and securities processing automation—doubted "whether the impact of sub-penny quoting and trading on rising infrastructure costs is adequately offset by market quality benefits to investors and market participants."[488] A second commenter stated that an industry-wide shift to sub-penny quoting would "forc[e] the industry into another round of substantial capital investments to accommodate the quote traffic."[489] A third commenter echoed that view, stating that the new rule "will protect industry systems from significant data traffic that has little benefit to investors or to the industry."[490]

A few commenters on the Reproposing Release opposed Rule 612,[491] as did a minority of commenters on the initial Proposing Release.[492] Some commenters argued that quoting in sub-pennies should be permitted because it increases liquidity, lowers trading costs, and promotes efficient pricing in the equity markets.[493] Two commenters believed that government intervention was not appropriate, as market forces should address this issue.[494] Alternatively, one commenter who objected to reproposed Rule 612 argued that "[t]he appropriate MPV in the equities market is at least [a] nickel or some reasonable, tiered alternative."[495]

One commenter on the Reproposing Release—INET, an ECN that currently offers its users the ability to quote certain NMS stocks in sub-pennies—argued generally that "the various marketplaces * * * are better positioned than regulators to evaluate

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and cannot trade for its own account at prices more favorable than the customer's order.

[482] *See* Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290, 48322 (Sept. 12, 1996) (adopting the Commission's Order Handling Rules). A broker-dealer's duty of best execution derives from common law agency principles and fiduciary obligations and is incorporated in SRO rules and, through judicial and Commission decisions, the antifraud provisions of the federal securities laws. *See id.*

[483] *See* Ameritrade Reproposal Letter at 10; Angel Reproposal Letter at 6; Archipelago Reproposal Letter at 15; ATD Letter at 4; Barclays Global Investors Reproposal Letter at 4; Bennett Letter at 1; BSE Reproposal Letter at 2; Citigroup Reproposal Letter at 8–9; DBSI Reproposal Letter at 3; Financial Information Forum Reproposal Letter at 3; Financial Services Roundtable Reproposal Letter at 5; GETCO Reproposal Letter at 1; Harris Letter at 3–4; JPMSI Reproposal Letter at 2; Knight Reproposal Letter at 6; Lerro Reproposal Letter, Appendix A, at 1; Merrill Lynch Reproposal Letter at 9–10; Nasdaq Reproposal Letter at 20; e-mail from Chris Sexton to William H. Donaldson, Chairman, Commission, dated January 31, 2005; SIIA/FISD Reproposal Letter at 4–5; STA Reproposal Letter at 7–8; STANY Reproposal Letter at 2; T. Rowe Price Reproposal Letter at 3; UBS Reproposal Letter at 1. *See also* Morgan Stanley Reproposal Letter at 13 (suggesting that "a reasonable compromise" would be to allow sub-penny quotations for the sole purpose of reflecting an access fee but to prohibit them in all other circumstances); SIA Reproposal Letter at 23 (supporting reproposed Rule 612 while noting that a minority of SIA members believe that Commission rulemaking in this area is not necessary).

[484] *See* Knight Reproposal Letter at 6. This comment echoed similar comments in response to the initial Proposing Release. *See, e.g.*, Ameritrade Letter at 10; Archipelago Letter at 14; ATD Letter at 3; Bloomberg Tradebook Letter at 2; Citadel Letter at 9; Citigroup Letter at 14; ICI Letter at 7–8; Tullo Letter at 8.

[485] Archipelago Reproposal Letter at 15.

[486] Harris Letter at 4.

[487] *See* Financial Information Forum Reproposal Letter at 3; Knight Reproposal Letter at 6; SIIA/FISD Reproposal Letter at 5. These comments echoed similar comments on the initial Proposing Release. *See* Financial Information Forum Letter at 2–3; Financial Services Roundtable Letter at 6; Knight Letter at 7; Lehman Brothers Letter at 5; Reuters Letter at 4.

[488] SIIA/FISD Reproposal Letter at 5.

[489] Knight Reproposal Letter at 6.

[490] Financial Information Forum Reproposal Letter at 3.

[491] *See* letter from Alex Goor, President, INET ATS, Inc. to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005 ("INET Reproposal Letter"); Instinet Reproposal Letter at 17–18; Malureanu E-mail (no page numbers); NexTrade Reproposal Letter at 12.

[492] *See* Brut Letter at 24; Domestic Securities Summary of Intended Testimony (no page numbers); GETCO Letter (no page numbers); memorandum to File No. S7–10–04 from Susan M Ameel, Counsel to Commissioner Atkins, dated August 20, 2004 (meeting with Hudson River Trading) (no page numbers); Instinet Letter at 50; King Letter at 1; Mercatus Center Letter at 7; NexTrade Letter at 9–10; Reg NMS Study Group Letter at 9; Tower Research Letter at 8; Vie Securities Letter at 3. In addition, one commenter submitted a study on sub-penny pricing shortly before the Commission approved the Reproposing Release for publication. *See also* e-mail from Dr. Bidisha Chakrabarty, Assistant Professor, John Cook School of Business, Saint Louis University, to *marketreg@sec.gov*, dated December 1, 2004, enclosing two articles, "Can sub-penny pricing reduce trading costs?" ("Chakrabarty and Chung Study") and "One tick fits all? A study of the Island and Instinet ECN merger" ("Chakrabarty and Tripathi Study"). While not explicitly opposing the sub-penny proposal, the studies argued that a general prohibition on sub-penny quoting would keep spreads artificially high for many securities.

[493] *See* Hudson River Trading Testimony (no page numbers); GETCO Letter (no page numbers).

[494] *See* Instinet Letter at 50; Tower Research Summary of Intended Testimony (no page numbers).

[495] NexTrade Reproposal Letter at 12.

the most appropriate trading increment."[496] In addition, INET maintained that the existing penny MPV exacerbates larger market structure problems, such as internalization and payment for order flow,[497] stating that "the convention of only quoting in pennies creates what is in effect an underground market where better prices are remitted back to certain firms through payment for order flow relationships but not reflected in any quotation."[498] Furthermore, INET presented specific examples where, it claimed, moving from penny to sub-penny quoting reduced spreads.[499]

After careful consideration of all comments received, the Commission is adopting Rule 612 as reproposed, with only a few minor amendments for clarity. The Commission notes that a large majority of commenters on both the Reproposing Release[500] and the initial Proposing Release[501] supported a sub-penny quoting prohibition. The comments received have reinforced the Commission's preliminary view that there are substantial drawbacks to sub-penny quoting, and the Commission believes that a uniform rule banning this practice (except for quotations priced less than $1.00 per share) is appropriate. Several commenters agreed with the Commission's view that sub-penny quotations can increase the incidence of quote flickering, which in turn may have adverse effects such as confusing investors or impeding a broker-dealer's ability to fulfill its duty of best execution.[502]

Moreover, the Commission agrees with the many commenters who believe that Rule 612 will deter the practice of stepping ahead of exposed trading interest by an economically insignificant amount. Limit orders provide liquidity to the market and perform an important price-setting function. The Commission is concerned that, if orders lose execution priority because competing orders step ahead for an economically insignificant amount, liquidity could diminish. As one commenter, the Investment Company Institute, stated, "[t]his potential for the increased stepping-ahead of limit orders would create a significant disincentive for market participants to enter any sizeable volume into the markets and would reduce further the value of displaying limit orders."[503]

Some commenters argued, however, that investors would suffer harm from the artificially wide spreads resulting from a prohibition on sub-penny quoting.[504] One commenter stated, for example, that "the primary result of eliminating subpenny trading would be to preserve a minimum profit for market makers, and would result in significantly worse realized prices for the vast majority of market participants not in the business of making markets."[505] These commenters offered various estimates of the costs of prohibiting sub-penny quoting.[506]

Even assuming that quoting in sub-penny increments would reduce spreads, the Commission continues to believe, on balance, that the costs of sub-penny quoting are not justified by the benefits.[507] The Commission instead agrees with the commenters who believe that the substantial costs associated with sub-penny quoting—among others, disincentives to liquidity providers whose limit orders are jumped by an economically insignificant amount and the increased incidence of flickering quotes and the resulting regulatory compliance and capacity burdens—make the adoption of Rule 612 appropriate at this time.

Nevertheless, the Commission acknowledges the possibility that the balance of costs and benefits could shift in a limited number of cases or as the markets continue to evolve. Therefore, Rule 612—as proposed and as adopted—includes a provision setting forth procedures for the Commission, by order, to exempt any person, security, or

[496] *See* INET Reproposal Letter at 1.

[497] INET observed, for example, that NYSE has less than a 50% market share in Lucent Technologies and Nortel Networks, two NMS stocks trading below $5 per share, even though NYSE's overall market share is approximately 80%. INET attributed this phenomenon to the internalization of orders by other market centers that can readily match the BBO set by NYSE, because vigorous price competition—in the form of sub-penny quotations—does not exist. *See id.* at 6.

[498] *Id.* at 7.

[499] For example, INET observed that, with a penny MPV, JD Uniphase (ticker: JDSU) regularly traded at a penny spread with large size quoted on both the bid and the ask. INET claimed that, immediately after reducing the MPV to $0.001 on its system recently, the average spread in JDSU fell to a tenth of a penny and trades occurred "almost uniformly across each sub-penny increment" and were not clustered around the $0.001 and $0.009 price points. *Id.* at 5.

[500] *See supra*, note 483.

[501] *See, e.g.*, Alliance of Floor Brokers Letter at 12; ACIM Letter at 2; Ameritrade Letter at 10; Archipelago Letter at 14; ATD Letter at 3–4; Bloomberg Tradebook Letter at 2, BNY Letter at 4; BSE Letter at 13–14; CBOE Letter at 7; Citadel Letter at 9; Citigroup Letter at 14–15; CSE Letter at 23; Denizkurt Letter (no page numbers); E*Trade Letter at 11; Financial Information Forum Letter at 2–3; Financial Services Roundtable Letter at 5–6; Goldman Sachs Letter at 10; ICI Letter at 19–20; ISE Letter at 8; JPMSI Letter at 6–7; Knight Letter at 7–8; Lava Letter at 5; Lehman Brothers Letter at 5; Liquidnet Letter at 8; LSC Letter at 11; Morgan Stanley Letter at 3; Nasdaq Letter at 1–2; NYSE Letter at 9–10; NSX Letter at 9; Peake Letter I at 13; Reuters Letter at 4; SBA Letter at 2; Schwab Letter at 17; SIA Letter at 20–21; Specialist Association Letter at 13–15; STA Letter at 7; STANY Letter at 13–14; UBS Letter at 10; Vanguard Letter at 6.

[502] *See, e.g.*, Citadel Letter at 9; ICI Letter at 7; Knight Letter at 7; Reuters Letter at 4; SIA Letter at 20–21.

[503] ICI Letter at 20.

[504] *See* Chakrabarty and Chung Study at 24; INET Reproposal Letter at 3; Instinet Letter at 51; Mercatus Center Letter at 9; Tower Research Letter at 8.

[505] Tower Research Letter at 8. Tower Research also criticized the Nasdaq and OEA studies on which the Commission relied in issuing the sub-penny proposal. Tower Research argued, for example, that the studies did not differentiate between sub-penny trades and sub-penny quotations, and that clustering of sub-penny trades around the $0.001 and $0.009 price points could result from sub-penny price improvement rather than quotation activity. In response to this comment, OEA reviewed the sources of data used in the original study and found that sub-penny trades cluster at these two price points in markets where trades necessarily result from quotations, such as ECNs, not only in markets where that is not necessarily the case. *See* Memorandum from Office of Economic Analysis, dated December 15, 2004 (available in Public File No. S7–10–04 and on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed/s71004.shtml*)) ("OEA December 2004 Sub-Penny Analysis"). Accordingly, the Commission continues to believe that market participants frequently used their ability to quote in sub-pennies to step ahead of competing limit orders by the smallest possible amount.

[506] *See* Chakrabarty and Chung Study at 24 (stating that, for high volume stocks, "the spread reduction in the absence of binding constraints * * * translates into savings of millions of dollars"); INET Reproposal Letter at 3 (arguing that allowing sub-penny quoting in "23 of the most appropriate securities" would generate annual savings of anywhere between $342 million and $1.9 billion); Instinet Letter at 50 (arguing that, if all markets traded QQQQ solely in sub-pennies, the savings would be approximately $150 million per year); Tower Research Letter at 9 (arguing that, just in six high-volume securities, the proposed rule would have would have costs of over $400 million due to wider spreads).

[507] The Commission notes that the few commenters who provided detailed, quantitative criticisms of the proposed sub-penny rule relied on a very small number of NMS stocks as examples. These cost estimates appear to assume that all trading in the securities they discuss would occur at narrower quoted spreads if Rule 612 did not exist. The Commission does not believe that the commenters provided any evidence to justify that assumption. Currently, Nasdaq and the national securities exchanges generally do not permit quoting in sub-pennies; this practice exists only a small number of ATSs, and only for a small number of securities. Because spreads on Nasdaq and the exchanges already cannot be smaller than $0.01, Rule 612 will not require these markets to take any action that would cause their spreads to widen. Therefore, the Commission believes that the cost to these markets of not having sub-penny spreads should not be considered costs of the rule. Furthermore, the INET methodology for computing the potential savings to investors from quoting in sub-pennies appears to be based on the unjustified assumption that all of selected stocks in their sample would trade with the same price-point distribution as the average of JDSU, SIRI, and QQQQ. With respect to the ATSs that currently do permit some NMS stocks to be quoted in sub-pennies, the Commission staff has estimated that the gross costs of widened spreads in these securities will be approximately $48 million annually (or approximately $33 million if the Commission were to exempt QQQQ from Rule 612). *See* OEA December 2004 Sub-Penny Analysis.

quotation (or any class or classes or persons, securities, or quotations) from the sub-penny quoting restriction if it determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission could grant such exemption either unconditionally or on specified terms and conditions.

In the Proposing Release, the Commission requested comment on whether certain securities should be exempted from Rule 612.[508] In particular, the Commission asked whether sub-penny quoting of exchange-traded fund shares ("ETFs"), which are derivatively priced, raised the same concerns as with other NMS stocks.[509] Some commenters that addressed this issue argued that the sub-penny prohibition should apply to all NMS stocks, including ETFs.[510] These commenters generally believed that sub-penny quoting raises the same type of concerns for ETFs as for other types of securities.[511] Other commenters provided arguments that exemptions for at least certain securities would be appropriate. One commenter that opposed Rule 612 argued that, if the Commission nevertheless did approve the rule, it should provide an exemption for QQQQ and other ETFs.[512] This commenter argued that these securities "uniquely lend[] themselves to subpenny quoting and trading" because "the[ir] derivative nature * * * enables investors to determine their true value at any point in time by calculating the aggregate price of the securities constituting a particular ETF."[513] Other commenters, while not explicitly recommending that the Commission grant particular exemptions, argued that sub-penny quoting was reasonable for certain securities.[514]

As the Commission stated in the Reproposing Release,[515] a basis may exist to exempt QQQQ and perhaps other actively traded ETFs from Rule 612. The Commission will continue to study this matter during the implementation period for Regulation NMS.

One commenter, although not clearly advocating that the Commission use its authority to exempt certain securities from Rule 612, stated that "the Commission may want to employ objective criteria in determining when it is appropriate to trade in sub-pennies."[516] In this regard, another commenter stated: "If the Commission wanted to permit only certain stocks to be quoted and traded in sub-penny increments, the main factor that should be considered is the average spread and the quoted size. If a security always trades with a penny spread and there is tremendous liquidity available on both sides of the market, this is a strong indication that the minimum increment is too wide."[517] The Commission believes that this would be a reasonable consideration in analyzing whether it would be in the public interest and consistent with the protection of investors to grant an exemption pursuant to Rule 612(c). Other factors that the Commission might consider are:

- Whether the NMS stock is an ETF or other derivative that can readily be converted into its underlying securities or vice versa, in which case the true value of the security as derived from its underlying components might be at a sub-penny increment;
- Large volume of sub-penny executions in that security due to price improvement; and
- Low price of the security.

This list is illustrative, not exclusive. The Commission may consider other factors—noted by a petitioner or in its own analysis—if and when it considers whether to issue an exemption.

The Commission wishes to highlight certain aspects of Rule 612, as adopted, that were raised by commenters on both the Proposing Release and the Reproposing Release.

1. Restriction Based on Price of the Quotation Not Price of the Stock

As initially proposed, the restriction on sub-penny quoting would have been triggered if the price of the NMS stock itself were above $1.00. One commenter sought clarification of when an NMS stock would become sub-penny eligible, suggesting a threshold of trading below $1.00 for 30 consecutive business days.[518] A second commenter suggested instead that the prohibition should derive from the price of the *order*, rather than the price of the stock; in other words, the rule should permit any sub-penny quotation below $1.00 and prohibit any sub-penny quotation above $1.00, regardless of the price where the stock was in fact trading.[519] The second commenter argued that this approach "does not require countless re-classifications of stocks as 'sub-penny eligible' based on fluctuations in their valuation, stock splits, or other price movements."[520]

The Commission agreed with the second commenter and, therefore, revised paragraph (a) of reproposed Rule 612 to prohibit any bid, offer, order, or indication of interest priced equal to or greater than $1.00 in an increment smaller than $0.01. As the Commission stated in the Reproposing Release,[521] basing the restrictions on the price of the quotation or order rather than the price of the NMS stock itself would spare market participants the need to track the eligibility of stocks priced near the $1.00 threshold.

Three commenters on the Reproposing Release noted their approval of basing the sub-penny quoting restriction on the price of the quotation rather than the price of the NMS stock itself;[522] no commenter objected to this approach. The Commission continues to believe in the rationale for this aspect of the proposal as described in the Reproposing Release. Therefore, the Commission is adopting Rule 612(a) substantially in the form reproposed in December 2004. The Commission is making a non-substantive amendment to clarify the rule. Reproposed Rule 612(a) would have stated that no market participant "shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock equal to or greater than $1.00 in an increment smaller than $0.01." Rule 612(a) as adopted provides that no market participant "shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.01 if that bid or offer, order, or indication of interest is priced equal to or greater than $1.00 per share." The purpose of this revision is to clarify that the qualification "priced equal to or greater than $1.00 per share" modifies the phrase "a bid or offer, an order, or an indication of interest" rather than "any NMS stock." The adopted text also makes clear that this proviso applies to bids, offers, orders, and indications of interest priced equal to or greater than $1.00 *per share*. The

[508] *See* Proposing Release, 69 FR at 11172.

[509] *See id.*

[510] *See* Ameritrade Reproposal Letter at 10; Amex Letter, Exhibit A, at 29; Citigroup Reproposal Letter at 9; ICI Letter at 20; Knight Letter at 8; Morgan Stanley Letter at 21; NYSE Letter at 10; SIA Letter at 21; Specialist Association Letter at 14.

[511] *See, e.g.*, Amex Letter, Exhibit A, at 29; ICI Letter at 20.

[512] *See* Instinet Letter at 51; Instinet Reproposal Letter at 18.

[513] *Id.*

[514] *See* Brut Letter at 25; Mercatus Center Letter at 9–10; Tower Research Letter at 9, 14–15.

[515] *See* 69 FR at 77459.

[516] Archipelago Reproposal Letter at 15.

[517] INET Reproposal Letter at 5.

[518] *See* Citigroup Letter at 15.

[519] *See* Brut Letter at 25.

[520] *Id.*

[521] *See* 69 FR at 77457–58.

[522] *See* BSE Reproposal Letter at 2; Nasdaq Reproposal Letter at 20; SIA Reproposal Letter at 23.

modifying phrase "per share" was not present in reproposed Rule 612(a).

As a result of Rule 612(a), a broker-dealer may not, for example, accept a sell order in an NMS stock priced at $1.0025 per share, even if the NMS stock currently trades below $1.00.

2. Quotations Below $1.00

The Commission initially proposed a threshold of $1.00 below which the prohibition on sub-penny quoting would not apply and requested comment on whether that threshold was appropriate. The majority of commenters addressing this issue believed that it would be useful for low-priced securities to trade in increments finer than a penny, because a penny would constitute a significant percentage of the overall price. These commenters viewed $1.00 as an appropriate threshold.[523] One commenter stated that there is "real demand for sub-penny trading (and therefore subpenny quoting) in securities trading below $1.00, due to the low trading value of the security."[524] However, another commenter, Ameritrade, argued that Rule 612 should not contain an exception for securities trading under $1.00.[525] According to Ameritrade, "[t]he appropriate answer to this issue is for the NYSE, AMEX and NASDAQ markets to uniformly enforce listing standards, which generally require a security to trade above $1.00."[526]

The Commission is adopting the $1.00 threshold as proposed. The Commission agrees with the commenters who believe that sub-penny quotations for very low-priced securities largely represent genuine trading interest rather than unfair stepping ahead. In such cases, a sub-penny increment represents a significant amount of the price of the quotation or order. Accordingly, the prohibition on sub-penny quoting in paragraph (a) of Rule 612 will apply only to bids, offers, orders, and indications of interest that are priced $1.00 or more per share. With respect to Ameritrade's comment, while the Commission believes that SROs must vigorously enforce their listing standards, there are legitimate circumstances where securities may be trading below $1.00; therefore, the Commission believes it is appropriate for Rule 612 to address those circumstances.

Before the Reproposing Release, two commenters suggested that the Commission establish an MPV for quotations below $1.00 per share; both recommended allowing such quotations to extend to four decimal places.[527] The Commission agreed with these commenters and added a new paragraph (b) to reproposed Rule 612 that would have prohibited a bid, offer, order, or indication of interest priced less than $1.00 per share in an increment smaller than $0.0001. The Commission believes that, without limiting the number of decimal places used in quotations for very low-priced securities, the problems caused by sub-penny quoting of higher-priced securities, discussed above, could arise. Restricting quotations below $1.00 to four decimal places should avoid these problems. The same two commenters reacted favorably to this aspect of the Reproposing Release.[528]

The Commission is adopting, as reproposed, the provision limiting a quotation under $1.00 per share to four decimal places. Thus, under new Rule 612, a quotation of $0.9987 × $1.00 is permitted but a quotation of $0.9987 × $1.0001 is not.[529]

The Commission notes that it has made non-substantive revisions to Rule 612(b) in a manner similar to Rule 612(a). Reproposed Rule 612(b) would have stated that no market participant "shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock less than $1.00 in an increment smaller than $0.0001." Rule 612(b) as adopted provides that no market participant "shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.0001 if that bid or offer, order, or indication of interest is priced less than $1.00 per share." The purpose of this revision is to clarify that the qualification "priced less than $1.00 per share" modifies the phrase "a bid or offer, an order, or an indication of interest" rather than "any NMS stock." The adopted text also makes clear that this proviso applies to bids, offers, orders, and indications of interest priced less than $1.00 *per share*. The modifying phrase "per share" was not present in reproposed Rule 612(b).

During the Regulation NMS implementation period, the Commission intends to consult with the administrators of the Plans to help ensure that sub-penny quotations permitted by Rule 612 will be widely disseminated to the public. The Commission believes this is necessary so that the problem of hidden markets—where professionals can see and access more competitive sub-penny quotations that average investors cannot—is fully addressed.

3. Revisiting the Penny Increment

Some commenters, while generally acknowledging problems caused by sub-penny quoting, recommended that the Commission consider increasing the MPV above $0.01.[530] One commenter believed that "[t]he Commission should seriously consider experimenting with different tick sizes to help determine the optimal tick policy."[531] A second commenter recommended that the Commission establish an MPV of a $0.01 for high-volume stocks, $0.05 middle-volume stocks, and $0.10 for the low-volume stocks.[532] A third commenter argued that the appropriate MPV in the equities market is at least $0.05 "or some reasonable, tiered alternative."[533] The third commenter previously stated that "sub-penny quoting does little, if anything, to degrade the market from its current state" because "the true damage was done to the market in the shift from a fractionalized environment to a penny spread environment."[534]

Rule 612, as adopted, sets a floor for the MPV but does not, and is not designed to, determine the optimal MPV. Penny pricing in NMS stocks was established by rules proposed by NASD and the national securities exchanges and approved by the Commission pursuant to Section 19(b) of the Exchange Act.[535] While some commenters argue that penny pricing impedes transparency and reduces liquidity, the move to decimals (and specifically the move to a penny

[523] *See* Archipelago Letter at 14; BSE Letter at 14; Citigroup Letter at 15; LSC Letter at 11; SIA Letter at 21; STANY Letter at 14.

[524] Archipelago Letter at 14.

[525] *See* Ameritrade Reproposal Letter at 10.

[526] *Id.*

[527] *See* Citigroup Letter at 15; SIA Letter at 21.

[528] *See* Citigroup Reproposal Letter at 8–9; SIA Reproposal Letter at 23.

[529] One commenter, while supporting the general prohibition on sub-penny quoting, noted that "[t]here are many 'subpenny' stocks on the OTCBB that trade at prices close to or less than $.0001. Imposing a high minimum tick for stocks in this category may adversely trading in those stocks." Angel Reproposal Letter at 6. The Commission notes that new Rule 612 applies only to NMS stocks, the definition of which generally does not include stocks quoted on the OTCBB. *See* 17 CFR 242.600(b)(47) (defining "NMS stock"). Therefore, Rule 612 does not require that quotations below $1.00 per share in securities quoted exclusively on the OTCBB be limited to four decimal places.

[530] *See* Amex Letter at 30; Angel Letter at 10; BNY Letter at 4; Citadel Letter at 10; e-mail from LaBranche & Co. to *rule-comments@sec.gov*, dated January 26, 2005; McGuire Summary of Intended Testimony (no page numbers); Tullo Letter at 9.

[531] Angel Letter at 10.

[532] *See* Tullo Letter at 9.

[533] NextTrade Reproposal Letter at 12.

[534] NexTrade Letter at 9.

[535] 15 U.S.C. 78s(b). *See supra*, note .

quotation increment for NMS stocks) also has significantly reduced spreads and reduced trading costs for investors who enter orders executed at or within the NBBO. As the Commission stated in the Reproposing Release,[536] it believes that the establishment of a $0.01 MPV, on balance, has benefited many investors. Accordingly, the Commission did not propose to raise the MPV in connection with Regulation NMS. The Commission's views on this matter have not changed since issuance of the Reproposing Release, and the Commission is not amending Rule 612 to raise the MPV.

4. Sub-Penny Trading

The Commission stated in the Proposing Release that it did not at that time believe that *trading* in sub-penny increments raised the same concerns as sub-penny *quoting*. Therefore, the proposed rule would not have prohibited a market center or broker-dealer from executing and printing a trade in sub-penny increments that was, for example, the result of a midpoint or volume-weighted pricing algorithm, as long as it did not otherwise violate the proposed rule. In addition, a broker-dealer could, consistent with the proposed rule, provide price improvement to a customer order that resulted in a sub-penny execution as long as the broker-dealer did not accept an order priced above $1.00 per share in a sub-penny increment. The Commission sought specific comment on this aspect of the proposal.

Every commenter that addressed this issue in response to the Proposing Release agreed that Rule 612 should permit sub-penny trades that result from midpoint and average-price algorithms.[537] While most of these commenters believed that the rule should permit broker-dealers to offer sub-penny price improvement to their customers' orders,[538] a few commenters urged the Commission to bar this practice.[539] The Commission did not revise this aspect of the sub-penny rule in the Reproposing Release. Two commenters that addressed this issue in response to the Reproposing Release also believed that the rule should permit sub-penny trades that result from midpoint and average-price algorithms.[540] One of these commenters added that sub-penny trades resulting from price improvement also should be permitted.[541]

After considering all views expressed on this issue, the Commission is adopting this aspect of Rule 612 as proposed and reproposed. Rule 612 will not prohibit a sub-penny execution resulting from a midpoint or volume-weighted algorithm or from price improvement, so long as the execution did not result from an impermissible sub-penny order or quotation. The Commission believes at this time that trading in sub-penny increments does not raise the same concerns as sub-penny quoting. Sub-penny executions do not cause quote flickering and do not decrease depth at the inside quotation. Nor do they require the same systems capacity as would sub-penny quoting. In addition, sub-penny executions due to price improvement are generally beneficial to retail investors.

5. Acceptance of Sub-Penny Quotations

The Commission initially proposed to prohibit national securities exchanges, national securities associations, ATSs, vendors, and broker-dealers from displaying, ranking, or *accepting* sub-penny orders or quotations in NMS stocks. One commenter argued that Rule 612 should allow a market participant to accept sub-penny quotations if it consistently re-prices such quotations to an acceptable increment and does not give the sub-penny quotations any special priority for ranking or execution purposes.[542] A second commenter disagreed, arguing that rounding a sub-penny quotation to the nearest penny may be confusing for investors.[543] The Commission agreed with the second commenter and reproposed Rule 612 continued to include a prohibition on accepting and rounding a sub-penny order.

In response to the Commission's statements on this matter in the Reproposing Release, one commenter stated that the Commission should "continu[e] to allow (but, of course, not require) market centers to adjust the pricing of disallowed sub-penny quotations, so long as the unadjusted quotations are not displayed or considered for purposes of ranking."[544] This commenter argued that adjusting such quotations "is a well-established practice" and that prohibiting the practice "has the potential to create needless confusion and impose additional costs."[545] Another commenter on reproposed Rule 612 argued similarly that keeping the established practice would not present "any real potential for confusion among investors."[546]

Notwithstanding these comments, the Commission is adopting this aspect of Rule 612 as proposed and reproposed. A market participant, therefore, is prohibited from accepting a sub-penny order or quotation that is not permitted by the rule, even if it rounds the order or quotation to the nearest permissible pricing increment. While the Commission does not believe that a great deal of customer confusion is likely to arise in either case, it does believe that confusion is more likely to result if a broker-dealer, for example, accepted a customer order to buy at $20.001, then rounded and ultimately executed it at $20.00. A customer unfamiliar with Rule 612 could conceivably wonder why his or her order did not have priority above orders to buy at $20.00. A much simpler and more transparent approach is for Rule 612 to prohibit the acceptance of sub-penny orders generally (except for orders priced below $1.00 per share, which may extend to four decimal places), and for the broker-dealer to adhere to the rule by rejecting the customer's sub-penny order to buy at $20.001. The Commission sees no purpose that would be served by allowing the broker-dealer to accept this sub-penny order, since Rule 612 would in any case prohibit the full order from being displayed or considered for ranking or execution purposes.[547]

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[536] *See* 69 FR at 77458.

[537] *See* ACIM Letter at 2; Amex Letter at 12; E*Trade Letter at 11; Liquidnet Letter at 8; SIA Letter at 21; STA Letter at 7; STANY Letter at 14; UBS Letter at 10.

[538] *See* ACIM Letter at 2; Amex Letter, Exhibit A, at 31–32; BSE Letter at 14; E*Trade Letter at 11; Liquidnet Letter at 8; Morgan Stanley Letter at 21; SIA Letter at 21; STA Letter at 7; STANY Letter at 14; UBS Letter at 10.

[539] *See* CHX Letter at 23; Goldman Sachs Letter at 10; SIA Letter at 21.

[540] *See* BSE Reproposal Letter at 2; Citigroup Reproposal Letter at 9.

[541] *See* Citigroup Reproposal Letter at 9.

[542] *See* Brut Letter at 26.

[543] *See* CHX Letter at 23.

[544] Nasdaq Reproposal Letter at 20.

[545] *Id.*

[546] Instinet Reproposal Letter at 18.

[547] The Commission previously has granted exemptions from Rules 11Ac1–1, 11Ac1–2, and 11Ac1–4 under the Exchange Act, 17 CFR 240.11Ac1–1, 240.11Ac1–2, and 240.11Ac1–4, that permit orders and quotations to be accepted and executed in sub-penny increments but displayed in rounded, penny increments without a rounding identifier. *See* letter from David S. Shillman, Associate Director, Division, Commission, to Mai S. Shiver, Director of Regulatory Policy, PCX, dated Feb. 10, 2005; letter from David S. Shillman, Associate Director, Division, Commission, to Ellen J. Neely, Senior Vice President and General Counsel, CHX, dated July 15, 2004; letter from David S. Shillman, Associate Director, Division, Commission, to James C. Yong, Senior Vice President, Regulation, and General Counsel, NSX, dated June 30, 2004. *See also* letter to Ronald Aber, Vice President and General Counsel, Nasdaq, from Richard Lindsey, Director, Division, Commission, dated July 30, 1997 (no-action relief provided by Division similar to three Commission exemptions cited above). These exemptions are inconsistent with new Rule 612 but by their terms expire on June 30, 2005, before the implementation date of Rule 612. Nasdaq's no-action letter does not by its

6. Application to Options Markets

As initially proposed, Rule 612, by its terms, would have applied only to NMS stocks. The Commission requested comment on whether the rule also should apply to options.[548] Currently, SRO rules require options to be quoted on the U.S. markets in increments of $0.05 and $0.10. Therefore, the problems that could be created by sub-penny quoting currently do not exist in the options markets.

Two commenters believed that the rule should not apply to quoting in options.[549] One of these commenters, assuming that the rule as proposed would allow options with a premium of less than $1.00 to be quoted in sub-pennies and options with a premium over $1.00 to be quoted in pennies, argued that this approach "would overwhelm the already taxed capacity of existing options quote processing systems."[550] The Commission did not believe at the time it issued the Reproposing Release that it was necessary for the sub-penny rule to extend to options, nor does it believe so now. The concerns created by sub-penny quoting—present to some extent in the equities markets—currently do not exist in the options markets, where the smallest quoting increment is $0.05. Therefore, Rule 612 will not apply to options. If a national securities exchange seeks to quote options in pennies or sub-pennies in the future, it would first need to propose a rule change to that effect under Section 19(b) of the Exchange Act.[551] The Commission would have an opportunity to consider such a proposal at that time, after publishing notice and obtaining public comment.[552]

A third commenter,[553] while agreeing strongly with the proposed sub-penny rule, argued that the Commission should prohibit the Boston Options Exchange ("BOX"), a facility of the Boston Stock Exchange, from using "sub-increment" pricing (*i.e.*, penny prices below the standard $0.05 and $0.10 increments used for options) in its "Price Improvement Period" ("PIP").[554] By initiating a PIP auction, a BOX market participant may execute a portion of its agency order as principal in pennies, and BOX market makers can match that price or offer price improvement to those orders in penny increments during the three-second auction. The Commission previously approved the BOX trading rules, including the rules governing the PIP, pursuant to Section 19(b) of the Exchange Act.[555] The PIP uses pennies in an auction, not in public quotations. Therefore, the Commission does not believe that the PIP raises the same concerns caused by sub-penny quotations of non-option securities and, therefore, that it is not necessary to prohibit the use of pennies in BOX's PIP.

7. One-to-One Negotiating Systems

One commenter—Liquidnet, an ATS whose system allows institutional traders to negotiate large-sized orders—argued that Rule 612 should not prohibit orders priced in half-penny increments for one-to-one negotiating systems.[556] Liquidnet currently permits a user to submit an order at the mid-point of the spread, which would be at a half-penny increment if the spread were an odd number of cents wide (*e.g.*, $10.00 × $10.03). Liquidnet argues that the "sub-penny pricing abuses that the SEC is trying to prevent are not applicable, because any orders are only seen by the two negotiating parties."[557] Although the Commission does not believe it is necessary or appropriate to include in Rule 612 an exception for one-to-one negotiating systems such as Liquidnet's, it would consider a request for exemptive relief that would permit one-to-one negotiations of sub-penny trades through an ATS. The Commission will study this issue further during the Regulation NMS implementation period.

8. Implementation of Rule 612

While the majority of commenters supported the sub-penny rule, a few specifically requested that the Commission implement it as quickly as possible.[558] One of the commenters stated that there are no "significant technological or structural impediments to immediate implementation."[559] The Commission agrees with this view. Currently, sub-penny quoting that would be prohibited by Rule 612 exists only on a small number of ATSs and in a small number of NMS stocks. Nasdaq and all of the national securities exchanges already have rules that permit quoting only in $0.01 increments. No commenter indicated that converting ATS systems to comply with the rule would impose any significant burdens. In light of this, and the small number of impacted NMS stocks, the Commission believes that only minimal systems changes will be necessary for these ATSs to conform to Rule 612 and has determined that the implementation date of Rule 612 will be August 29, 2005.

The Commission notes that it previously has granted exemptions from existing Rules 11Ac1–1, 11Ac1–2, and 11Ac1–4 under the Exchange Act that, among other things, allow certain exchanges to accept sub-penny orders and quotations and to disseminate them in rounded, penny increments without a rounding identifier.[560] By their terms, these exemptions—which are not consistent with new Rule 612—expire on June 30, 2005.

Rule 612 permits, but does not require, a trading center to offer its users the ability to quote in sub-pennies in a limited number of cases. An exchange or association that wishes to offer this ability to its market participants will likely need to amend its rules before doing so. The Commission expects the SROs to consider this matter during the implementation period.[561]

V. Market Data Rules and Plan Amendments

The Exchange Act rules and joint-SRO Plans for disseminating market information to the public are the heart of the NMS. Pursuant to these rules and Plans, investors are able to obtain real-time access to the best current quotes and most recent trades for all NMS stocks. As a result, investors of all types—large and small—have access to a comprehensive, accurate, and reliable source of information for the prices of any NMS stock at any time during the trading day.

terms include a sunset date. However, Nasdaq may not rely on this letter beyond the implementation date of Rule 612.

[548] *See* Proposing Release, 69 FR at 11172.

[549] *See* Amex Letter, Exhibit A, at 32–33; SIA Letter at 21.

[550] Amex Letter, Exhibit A, at 32.

[551] 15 U.S.C. 78s(b).

[552] The Commission has previously stated that, "[g]iven the implications of penny quoting for OPRA, penny quoting would require very careful review by the Commission." Securities Exchange Act Release No. 49068 (Jan. 13, 2004), 69 FR 2775, 2789 (Jan. 20, 2004) ("BOX Approval Order").

[553] *See* CBOE Letter at 8.

[554] *See* BOX Approval Order, 69 FR at 2786–92 (explaining PIP auction).

[555] *See id.*

[556] *See* Liquidnet Reproposal Letter at 4.

[557] *Id.*

[558] *See* ACIM Letter at 2; ATD Reproposal Letter at 4; Charles Schwab Letter at 17; Merrill Lynch Reproposal Letter at 10; Nasdaq Letter at 1.

[559] ATD Reproposal Letter at 4.

[560] *See supra*, note 547.

[561] One commenter argued that the Commission should allow "sufficient time" for systems development to accommodate sub-penny quoting permitted by Rule 612. *See* Amex Reproposal Letter at 1, n.1. Because Rule 612 permits but does not require market participants to quote very low-priced NMS stocks in sub-penny increments, the Commission does not believe it is necessary to offer market participants an extended period in which to build the systems capacity to support this activity before making Rule 612 effective.

The SROs generate consolidated market data by participating in the Plans.[562] Pursuant to the Plans, three separate networks disseminate consolidated market information for NMS stocks: (1) Network A for securities listed on the NYSE; (2) Network B for securities listed on the Amex and other national securities exchanges; and (3) Network C for securities traded on Nasdaq. For each security, the data includes: (1) An NBBO with prices, sizes, and market center identifications; (2) the best bids and offers from each SRO that includes prices, sizes, and market center identifications; and (3) a consolidated set of trade reports in the security. The Networks establish fees for this data, which must be filed for Commission approval.[563-564] The Networks collect the applicable fees and, after deduction of Network expenses (which do not include the costs incurred by SRO participants to generate market data and supply such data to the Networks), distribute the remaining revenues to their individual SRO participants. As set forth in the following table, the Networks collected $434.1 million in revenues derived from market data fees in 2004 and distributed $393.7 million to their individual SRO participants:

2004 Financial Information for Networks A, B, and C [1]

	Network A	Network B	Network C	Total
Revenues	$165,588,000	$103,901,000	$164,656,000	$434,145,000
Expenses	10,317,000	3,921,000	26,196,000	40,434,000
Net Income	155,271,000	99,980,000	138,460,000	393,711,000
Allocations:.				
NYSE	140,661,000	1,296,000	0	141,957,000
NASD/Nasdaq	8,296,000	8,360,000	61,672,000	78,328,000
PCX	2,091,000	43,276,000	30,804,000	76,171,000
NSX	694,000	14,498,000	36,717,000	51,909,000
Amex	0	28,301,000	30,000	28,331,000
BSE	1,345,000	850,000	8,757,000	10,952,000
CHX	1,995,000	2,946,000	480,000	5,421,000
Phlx	189,000	446,000	0	635,000
CBOE	0	7,000	0	7,000

[1] The Network financial information for 2004 is preliminary and unaudited.

The overriding objective of the Rule and Plan amendments adopted today is to preserve the vital benefits that investors currently enjoy, while addressing those particular problems with the current rules and Plans that are most in need of reform. The changes fall into three categories: (1) Modifying the current formulas for allocating market data revenues to the SROs to more appropriately reflect their contributions to public price discovery; (2) establishing non-voting advisory committees to broaden participation in Plan governance; and (3) updating and streamlining the various Exchange Act rules that govern the distribution and display of market information.

A. Response to Comments and Basis for Adopted Rules

1. Alternative Data Dissemination Models

In addition to proposing specific rules and amendments, the Proposing Release discussed and requested comment on the Commission's decision not to propose an alternative model of data dissemination to replace the current consolidation model.[565] The great strength of the current model is that it benefits investors, particularly retail investors, by enabling them to assess prices and evaluate the best execution of their orders by obtaining data from a single source that is highly reliable and comprehensive. But, by requiring vendors and broker-dealers to display data to investors that is consolidated from all markets, the current model effectively also requires the purchase of data from all markets. As a result, the most significant drawback of the current model is that it offers little opportunity for market forces to determine a Network's fees, or the allocation of those fees to a Network's SRO participants. Network fees must be closely scrutinized for fairness and reasonableness, and the revenues resulting from those fees must be allocated to the SROs pursuant to a Plan formula. In addition, individual markets have less freedom to innovate in individually providing their quotation and trade data. On the other hand, the consolidated display requirement can promote competition by assuring that markets, particularly smaller or newer ones, can obtain wide distribution of their displayed quotations.[566] As noted in section I.A.1 above, vigorous competition among multiple markets trading the same securities is one of the distinctive characteristics of the U.S. equity markets. Thus, the existence of the Networks and the consolidated display requirement has not precluded the NMS from promoting the broad objective of assuring competition among markets.

In the Proposing Release, the Commission specifically considered three alternative models that potentially could introduce greater competition and flexibility into the dissemination of market data: (1) A deconsolidation model, (2) a competing consolidators model, and (3) a hybrid model. It decided not to propose any of these alternative models after consideration of the benefits and drawbacks of each model. The Commission did, however, request comment on whether it should develop an alternative model for disseminating market data to the public, and, in particular, on its evaluation of the strengths and weaknesses of the current model and of the various alternative models for the dissemination of market data.

In response to the Commission's request for comment, a minority of commenters expressed their views regarding the appropriate structure for the dissemination of market information to the public. One group believed that the current model requiring the display of consolidated data in a stock through

[562] *See supra*, note 40.

[563-564] *See* Exchange Act Rule 11Aa3–2(c)(1).

[565] Proposing Release, 69 FR at 11176–11179.

[566] *See* Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (September 14, 2001) (available at *http://www.sec.gov*) ("Advisory Committee Report") (recommending retention of the consolidated display requirement because it serves core investor protection and market integrity functions, as well as promoting market competition).

a Plan processor has produced significant benefits for investors and the markets, although several also strongly recommended that its operation needed to be improved in significant respects.[567] Another group of commenters, in contrast, asserted that the current system has inhibited competition among markets and that the Plans should be eliminated.[568] These commenters further suggested deregulation of market data by allowing markets to sell their own data, and by allowing market forces and competition to control the pricing of such data. They advocated a competing consolidators model or a hybrid model.

a. Competing Consolidators Model

Under a competing consolidators model, the consolidated display requirement would be retained, but the Plans and Networks would no longer be necessary. Each of the nine SROs that participate in the NMS, as well as Nasdaq, would be allowed to establish its own fees, to enter into and administer its own market data contracts, and to provide its own data distribution facility. Any number of data vendors or broker-dealers (*i.e.*, "competing consolidators") could purchase data from the individual SROs, consolidate the data, and distribute it to investors and other data users. Of the commenters that urged the Commission to adopt a competing consolidators model,[569] the NYSE, for example, believed that allowing the markets to withdraw from the Plans would "reestablish the link between the value of a market's data * * * and the fair allocation of costs among * * * users," thereby ending inter-market subsidies and market-distortive initiatives created by the current system."[570] Similarly, ArcaEx stated that "the best way to reform the [P]lans is to abolish them altogether and to adopt a competing consolidators model."[571]

The Commission has considered the comments advocating a competing consolidators model, but continues to question the extent to which the model would in fact subject the level of market data fees to competitive forces. If the benefits of a fully consolidated data stream are to be preserved for investors, every consolidator would need to purchase the data of each SRO to assure that the consolidator's data stream in fact included the best quotations and most recent trade report in all NMS stocks. Moreover, to comply with the adopted Order Protection Rule, each trading center would need the quotation data from every other trading center in a security. As a practical matter, payment of every SRO's fees would be mandatory, thereby affording little room for competitive forces to influence the level of fees. Consequently, far from freeing the Commission from involvement in market data fee disputes, the multiple consolidator model would require review of at least ten separate fees for individual SROs and Nasdaq. The overall level of fees would not be reduced unless one or more of the SROs or Nasdaq was willing to accept a significantly lower amount of revenues than they currently are allocated by the Plans. It seems unlikely that any SRO or Nasdaq would voluntarily propose to lower just its own fees and reduce its own current revenues, and some might well propose higher fees to increase their revenues, particularly those with dominant market shares whose information is most vital to investors. No commenter offered useful, objective standards for the Commission to use in evaluating the separate fees of SROs and Nasdaq. For this and for data quality concerns,[572] the Commission remains unconvinced that discarding the current model in favor of a multiple consolidator model would benefit investors and the NMS in general.

b. Hybrid Model

In its comment on the original proposal, Nasdaq advocated a hybrid model of data dissemination as a compromise if the Commission believes that it is necessary to retain the Plans.[573] Under a hybrid approach, basic elements of the current model (including the consolidated display requirement and the Plans) would be retained for quotations representing the NBBO, but all trade reports and all quotations other than the NBBO would be deconsolidated. Because much less consolidated data would be disseminated under this model, the fees for consolidated data would be reduced commensurately. The individual SROs would distribute their own trade and quotation information separately and establish fees for such information. To obtain the data eliminated from the consolidated system, investors would need to pay the separate SRO fees.

In its proposal, Nasdaq suggested that consolidated data fees should be reduced,[574] but only in the context of advocating a hybrid model that would drastically reduce the quantity of consolidated data that would be disseminated to investors (*i.e.*, by eliminating from the consolidated systems all trade reports and all quotations other than the NBBO). Nasdaq stated that the Commission should allow competitive forces to determine the individual SRO fees for deconsolidated data because trade reports and non-NBBO quotations are not "essential to investors."[575]

The Commission believes, however, that comprehensive trade and quotation information, even beyond the NBBO, is vital to investors. The Commission remains concerned that an SRO with a significant share of trading in NMS stocks could exercise market power in setting fees for its data. Few investors could afford to do without the best quotations and trades of such an SRO that is dominant in a significant number of stocks. In the absence of a solid basis to believe that full trade and quotation information would continue to be widely available and affordable to all types of investors under a hybrid model, the Commission has determined that the most responsible course of action is to

[567] *See, e.g.*, Amex Letter, Exhibit A at 11; Angel Letter I at 1; CBOE Letter at 2, 9; CHX Letter at 18–20; Financial Information Forum Reproposal Letter at 3; Schwab Letter at 11–13; SIA Letter at 26–28; STANY Letter at 14.

[568] *See, e.g.*, Alliance of Floor Brokers Letter at 11; Letter from Daniel M. Clifton, Executive Director, American Shareholders Association, to Jonathan G. Katz, Secretary, Commission, dated June 10, 2004 ("ASA Letter") at 2; ArcaEx Letter at 4, 12, 14; Brut Letter at 22; Financial Services Roundtable Letter at 7; ISE Letter at 8–10; Nasdaq Letter II at 24–26; NYSE Letter, Attachment at 10–11; Reuters Letter at 2; Specialist Assoc. Letter at 17.

[569] *See, e.g.*, ArcaEx Letter at 12, 14; ISE Letter at 8–9; NYSE Letter, Attachment at 10–11.

[570] NYSE Letter at 7 and Attachment at 10. The NYSE provided several reasons for the elimination of the Plans.

[571] ArcaEx Letter at 14.

[572] *See* Proposing Release, 69 FR at 11178.

[573] Nasdaq Letter II at 26–28.

[574] At the NMS Hearing, a representative of Nasdaq stated that the current $20 fee for professionals to obtain market data in Nasdaq stocks is too high; that the fee, based on a recent analysis of Nasdaq's cost structure, should be around $5 to $7; and that the $20 fee is a monopoly price "set almost twenty years ago without any active review of how that relates." Hearing Tr. at 223–224, 253. These remarks subsequently engendered some confusion among the public, which was reflected in many comments on the market data proposals addressing the level of fees. To put these comments in perspective and dispel any potential misconceptions, the following points should be kept in mind: (1) in 1999, the Commission undertook a comprehensive review of market data fees and revenues, which led to a 75% reduction in the fees paid by retail investors for market data (Market Information Release, 64 FR at 70614); (2) Nasdaq's suggested $5 to $7 monthly fee for professional investors would entitle them to only the NBBO in Nasdaq stocks, which is a fraction of the data that currently is disseminated for the $20 monthly fee for professional investors for consolidated trades and quotations in Nasdaq stocks; and (3) Nasdaq's $5 to $7 cost estimate encompassed only its own costs and therefore excluded the costs of other SROs that now represent a large percentage of trading in Nasdaq-listed stocks.

[575] Nasdaq Letter II at 27.

take such immediate steps are necessary to improve the operation of the current consolidation model.[576]

2. Level of Fees and Plan Governance

a. Level of Fees

In the Proposing Release, the Commission emphasized that one of its primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of consolidated market data. Comment was requested on the extent to which investors and other data users were relatively satisfied with the products and fees offered by the Networks.[577] At the NMS Hearing, several panelists addressed the current level of fees and questioned whether such fees remained reasonably related to the cost of market data.[578] The Supplemental Release therefore noted the panelists' views and welcomed comments on the reasonableness of market data fees and whether the Commission should modify its approach to reviewing such fees.[579]

Many commenters recommended that the level of market data fees should be reviewed and that, in particular, greater transparency concerning the costs of market data and the fee-setting process is needed.[580] The Commission agrees. To respond to commenters' concerns, it has sought comment on market data fees in its concept release relating to SRO structure.[581] The release discusses and requests comment on a number of issues raised by commenters in the context of SRO revenues and the funding of self-regulation—in particular, whether market data fees are reasonable, whether the Commission should reconsider a flexible cost-based approach as described in the 1999 Market Information Release, and whether market data fees should be used to fund SRO operational or regulatory costs. The Commission also has taken steps to promote more transparency with respect to market data fees and the use of market data revenues through its proposal on SRO transparency.[582] The proposal would greatly increase SRO transparency by requiring, among other things, that SROs file public reports with the Commission detailing their sources of revenues and their uses of these revenues. Such reports would enhance the public's ability to evaluate the role of market data revenues in funding SROs. For example, proposed amendments to Form 1, Exhibit I would require exchange SROs to disclose their revenues earned from market information fees, itemized by product, and proposed new Rule 17a–26 would require SROs to file electronic quarterly and annual reports on particular aspects of their regulatory activities.

Some commenters suggested that, instead of modifying the Plan formulas for allocating market data revenues, the Commission should impose a cost-based limitation on fees.[583] Most, however, adopted a very restricted view of market data costs—solely the costs of the Networks to collect data from the individual SROs and disseminate it to the public.[584] Yet nearly the entire financial burden of collecting and producing market data is borne by the individual markets, not by the Networks. If, for example, an SRO's systems break down on a high-volume trading day and it can no longer provide its data to the Networks, investors would suffer the consequences of a defective data stream, regardless of whether the Networks are able to continue operating.

The commenters' suggested approach to market data fees would eliminate any funding for the SROs that supply data to the Networks, which would have reduced SRO funding by $393.7 million in 2004.[585] Before imposing such a significant and sudden reduction in SRO funding, the Commission must carefully consider the consequences this reduction might have on the integrity of the U.S. equity markets. When the Commission last reviewed market data fees and revenues in 1999, it noted the direct connection between an SRO's operational and regulatory functions and the value of its market information:

> [T]he value of a market's information is dependent on the quality of the market's operation and regulation. Information is worthless if it is cut off during a systems outage (particularly during a volatile, high-volume trading day when reliable access to market information is most critical), tainted by fraud or manipulation, or simply fails to reflect accurately the buying and selling interest in a security.[586]

Moreover, the U.S. equity markets are not alone in their reliance on market data revenues as a substantial source of funding. All of the other major world equity markets currently derive large amounts of revenues from selling market information, despite having significantly less trading volume and less market capitalization than the NYSE and Nasdaq. To illustrate, the following table sets forth the respective market information revenues, dollar value of trading, and market capitalization for the largest world equity markets in 2003:[587]

	Data revenues (millions)	Trading volume (trillions)	Market capitalization (trillions)
London	$180	$3.6	$2.5
NYSE	172	9.7	11.3
Nasdaq	147	7.1	2.8
Deutsche Bourse	146	1.3	1.1
Euronext	109	1.9	2.1
Tokyo	60	2.1	3.0

In sum, the Commission is committed to assuring that investors are not required to pay unreasonable or unfair fees for the consolidated market information that they must have to participate in the U.S. equity markets. On the other hand, we must maintain high standards of SRO performance, without which the data they produce

[576] The Commission also is concerned about the risk of compromising the quality of market information if the hybrid model were adopted. Proposing Release, 69 FR at 11178.

[577] Proposing Release, 69 FR at 11179.

[578] Hearing Tr. at 223–224, 228–229, 230–231, 233.

[579] Supplemental Release, 69 FR at 30148.

[580] *See, e.g.*, Ameritrade Reproposal Letter 10; Bloomberg Tradebook Letter at 8–9; Brut Letter at 21–23; Citigroup Letter at 15; Financial Information Forum Letter at 3; Financial Services Roundtable Letter at 6–7; Goldman Sachs Letter at 2, 10; ICI Letter at 21–22; Morgan Stanley Letter at 21–22; Schwab Reproposal Letter at 3–5; SIA Reproposal Letter at 24; STANY Letter at 14; UBS Letter at 10.

[581] SRO Structure Release, *supra* note 49.

[582] SRO Transparency Release, *supra* note 50.

[583] *See, e.g.*, Ameritrade Letter I at 10; Goldman Sachs Letter at 10; SIA Letter at 22.

[584] *See, e.g.*, ASA Letter at 2; Citigroup Letter at 16; Schwab Letter at 6; SIA Letter at 25.

[585] *See supra*, table accompanying note 564.

[586] Market Information Release, 64 FR at 70614–70615.

[587] Data for this table is derived from the 2003 annual reports of the various markets and from statistics compiled by the World Federation of Exchanges. The exchange rates are as of August 15, 2004.

would be worth little. Some commenters suggested that SRO funding should be provided through more specifically targeted fees, such as an additional regulatory fee to fund market regulation costs.[588] Given the potential harm if vital SRO functions are not adequately funded, we believe that the level of market data fees is most appropriately addressed in a context that looks at SRO funding as a whole. The Commission's review of SRO structure, governance, and transparency provides a useful context in which these competing policy concerns can be evaluated and balanced appropriately.

The Commission does not believe, however, that reform of the current revenue allocation formulas should be delayed until its review of fees is completed.[589] The distortions caused by these formulas are substantial and ongoing. In particular, it appears that market participants increasingly are engaging in the practice of trade shredding (*i.e.*, splitting large trades into multiple 100-share trades) as a means to increase their share of market data revenues under the current Plan formulas. As discussed below, the adopted formula would represent a substantial improvement because it is designed to eliminate trade shredding and other gaming of the current formulas and because it would more directly allocate revenues to those markets that contribute data to the consolidated data stream that is most useful to investors.

b. Plan Governance

The Commission is adopting, as proposed and reproposed, an amendment to the Plans that requires the creation of non-voting advisory committees ("Governance Amendment"). It provides that the members of an advisory committee have the right to submit their views to the Plan operating committees on Plan matters, including any new or modified product, fee, contract, or pilot program. Most commenters supported the Governance Amendment.[590] They generally believed that expanding the participation of non-SROs parties in Plan governance would be a constructive step. Only a few commenters disagreed, stating that interested parties currently have the ability to communicate their views on Plan matters or questioning the efficacy of the committees.[591]

A number of commenters, however, believed that the proposal did not go far enough to reform the Plans and that even greater participation by interested non-SRO parties in the Plans is needed.[592] The SIA recommended that the Commission "amend the governance structures of the Plans to incorporate the types of changes that have been implemented recently in corporate governance generally."[593] These commenters also raised concerns regarding several other aspects of Plan governance, including current administrative costs and burden, the unanimous vote requirement for Plan action, and the current process for reviewing SRO fee filings and Plan amendments. For instance, the SIA also believed that inconsistencies among the Networks regarding administrative requirements and burdens (*i.e.*, agreements and contracts, billing policies, data use policies, and annual audit requirements) contribute to high market data fees and should be reduced, streamlined, and made uniform.[594]

In many respects, the Commission agrees with the concerns expressed by commenters regarding administration of the Plans. Nevertheless, it is reluctant at this point to require more intrusive changes to Plan governance that might interfere with effective Plan operations. The Plans fulfill significant operational functions with respect to the systems that deliver consolidated data to the public on a daily basis. Moreover, improved governance structures at the SRO level also should contribute to improved governance of the Plans through their selection and guidance of SRO representatives on the Plan operating committees. The Commission therefore believes that the Governance Amendment represents a useful first step toward improving the responsiveness of Plan participants and the efficiency of Plan operations. Expanding the participation of interested parties other than SROs in Plan governance should increase the transparency of Plan business, as well as provide an established mechanism for alternative views to be heard by the Plans and the Commission. Earlier and more broadly based participation could contribute to the ability of the Plans to achieve consensus on disputed issues. With respect to Plan administration, promising private efforts are underway to improve consistency among data providers and to reduce administrative burdens.[595] The Commission particularly believes that the Plans should give full consideration to the views of industry participants on steps that would streamline the administrative procedures and burdens of the three Plans. Enhanced participation of advisory committee members in Plan affairs should help further this process. The Commission will continue to monitor and evaluate Plan developments to determine whether any further action is warranted.

3. Revenue Allocation Formula

As discussed below, the Commission has adopted the Allocation Amendment with some modifications from the proposal and reproposal.[596] Given the significant changes from the current Plan formulas, the Commission will monitor the operation of the new formula to assess whether it achieves its goals and whether any further modifications are warranted. As with any other aspects of the Plans, the language added to the Plans by the Allocation Amendment can be adjusted in the future pursuant to the normal

[588] *See, e.g.*, Citigroup Reproposal Letter at 9; Goldman Sachs Letter at 11.

[589] *See, e.g.*, SIA Reproposal Letter at 24 (allocation formula should not be revised prior to evaluating the level of market data fees).

[590] *See, e.g.*, Amex Letter at 10; Citigroup Letter at 17; Financial Information Forum Letter at 4; SIIA/FISD Reproposal Letter at 2; Financial Services Roundtable Letter at 6–7; ICI Letter at 4 and 21 n. 35; Instinet Letter at 7, 46; Nasdaq Letter II at 33; Reuters Letter at 3; STANY Letter at 15.

[591] CBOE Letter at 2, 17; ISE Letter at 2; Specialist Assoc. Letter at 16. Two commenters on the reproposal suggested that the Commission should adopt the advisory committee structure currently in place for the Nasdaq UTP Plan. ArcaEx Reproposal Letter at 14; Letter from Bridget M. Farrell, Co-Chairman, and Michael P. Rountree, Co-Chairman, Operating Committee of the Nasdaq Unlisted Trading Privileges Plan, to Jonathan G. Katz, Secretary, Commission, dated Feb. 2, 2005 ("Nasdaq UTP Plan Reproposal Letter") at 2. The Nasdaq UTP Plan advisory committee meets bi-annually and has the right to present written comments or inquiries to the Plan operating committee. The Commission has retained the reproposed committee structure, primarily because it believes that advisory committee members should have more direct involvement in the deliberations of Plan operating committees. Specifically, the Governance Amendment gives advisory committee members the right to attend meetings of the operating committee and to receive information disseminated to the operating committee.

[592] *See, e.g.*, Letter from W. Hardy Callcott, to Jonathan G. Katz, Secretary, Commission, dated Dec. 30, 2004 ("Callcott Reproposal Letter") at 4; Financial Services Roundtable Letter at 6–7; Goldman Sachs Letter at 12–13; Instinet Reproposal Letter at 17; Morgan Stanley Letter at 22; Schwab Reproposal Letter at 5; SIA Reproposal Letter at 27–28; STANY Letter at 15.

[593] SIA Reproposal Letter at 28.

[594] SIA Letter at 27–28.

[595] *See* SIIA/FISD Reproposal Letter at 2–3 (SIIA/FISD developing guidelines to encourage uniformity in exchange and vendor administrative policies and procedures; guidelines will address exchange data delay intervals, subscriber agreement streamlining, billing and reporting period issues, and unit of count definitions).

[596] As set forth in section VII below, the compliance date for the Allocation Amendment is September 1, 2006. Accordingly, Plan revenues for the first eight months of 2006 will be allocated in accordance with the current Plan formulas. Plan revenues for the remaining part of 2006 will be allocated in accordance with the new formula.

process of Commission-approved amendments.[597]

The proposal and reproposal included an amendment to the Plans that would modify their formulas for allocating market data revenues to SRO Participants. The current Plan formulas are based solely on the trading activity of an SRO. The proposed and reproposed formulas were intended to address three serious weaknesses in the old formulas: (1) The absence of any allocation of revenues for the quotations contributed by an SRO to the consolidated data stream; (2) an excessive emphasis on the number of trades reported by an SRO that has led to distortive trading practices, such as wash sales, trade shredding, and print facilities; and (3) a disproportional allocation of revenues for a relatively small number of stocks with extremely high trading volume, with a much smaller allocation to the thousands of other stocks included in a Network, typically issued by smaller companies, with less trading volume.

To address these problems, the proposed formula included a number of elements, including a Quoting Share, an NBBO Improvement Share, a Trading Share, and a Security Income Allocation. The Quoting Share and NBBO Improvement Share would have provided an allocation of revenues for an SRO's quotations. In particular, the Quoting Share would have allocated revenues for all quotes, both automated and manual, according to the dollar size and length of time that such quotes equaled the price of the NBBO. It included an automatic cutoff of credit for manual quotations, however, when they were left alone at the NBBO. This cut-off was intended to preclude SROs from being allocated revenues merely for slowness in updating their manual quotations. The NBBO Improvement Share would have allocated revenues to SROs for the extent to which they displayed quotations that improved the price of the NBBO.

At the NMS Hearing, representatives of floor-based exchanges stated their intention to adopt hybrid trading models that would primarily display automated quotations.[598] In response, the Commission, in its Supplemental Release, stated that the prospect of hybrid trading models presented an opportunity for simplifying the proposed allocation formula.[599] It noted that the purpose of the automatic cutoff for manual quotations was to minimize the allocation of revenues for potentially stale quotations and requested comment on whether only automated quotes should be entitled to earn an allocation of revenues. The Supplemental Release also noted that the NBBO Improvement Share was significantly more complex than the other aspects of the proposed formula and that it had been proposed largely to counter the potential for an excessive allocation of revenues for manual quotations. As a result, the Reproposing Release included a reproposed allocation formula that eliminated the NBBO Improvement Share and excluded manual quotations from the Quoting Share.[600] It also allocated revenues equally between the trading activity and quoting activity of Plan participants. Based on additional comments received in response to the reproposal, the Commission is adopting the reproposed allocation formula with certain modifications, as discussed below.

The comments on the proposal and reproposal generally addressed four broad categories of issues: (1) Whether the current Plan formulas need to be updated; (2) whether quotations should be considered in allocating revenues; (3) whether the size of trades should be considered in allocating revenues; and (4) whether the allocation of revenues should be allocated more evenly across all of a Network's stocks. These comments are discussed below.

a. Need for New Formula

Many commenters agreed with the Commission that, if the Networks were to continue allocating revenues to the SROs, the current allocation formulas needed to be updated.[601] Many of these commenters also believed that the proposed and reproposed formulas should be modified in several respects, and their specific suggestions to improve the proposed formula are discussed below. In general, however, they agreed with the objectives of the proposal and reproposal to eliminate much of the incentive for distortive trade reporting practices and to begin providing some allocation of revenues for the quotations that SROs contribute to the consolidated data stream.

Other commenters, in contrast, opposed changing the current allocation formulas.[602] Their specific objections to the proposed and reproposed formulas are discussed below, but they also opposed changing the current formulas for more general reasons. First, some believed that, rather than changing the formulas, the Commission simply should prohibit the particular distortive practices caused by the old formulas and enforce the existing prohibitions against such practices. Commenters also opposed the proposed and reproposed formulas because they believed they incorporated arbitrary judgments about the value of quotations and trades. Finally, those opposed to changing the Plan formulas believed that the proposed formula was simply too complex to be implemented effectively and that its costs exceeded any benefits that were likely to be gained.

The Commission has considered the views of these commenters, but does not believe that they warrant leaving the current Plan formulas in place. First, the Commission intends to continue to enforce the existing prohibitions against distortive trade reporting practices. Rather than attempting to devise new prohibitions that address every conceivable harmful practice, however, it has determined to address directly the formula-driven distortions by adopting revisions to the current formulas. As long as the allocation of market data revenues is based primarily on reporting a large number of very small trades, the incentive for distortive trade reporting will continue. Moreover, as discussed below, the current formulas are flawed in several important respects beyond the incentives they create for distortive trade reporting practices.

The Commission does not believe that the adopted formula incorporates arbitrary judgments about the value of trades and quotes. In this regard, it is important to recognize that any formula for allocating market data revenues would reflect some judgment regarding the contribution of the various SROs' data to the consolidated data stream; otherwise, the revenues could simply be allocated equally among all Plan participants. The Commission's goal in adopting a new formula is to improve on the judgments incorporated in the old Plan formulas to more fully achieve NMS objectives.

For example, the current formula for Network A and Network B treats a 100-

[597] *Cf.* Letter from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("NYSE Reproposal Letter II") at 5 (suggesting that, given inability to anticipate all issues that may arise, markets should be allowed to make adjustments to market data plans).

[598] Hearing Tr. at 85, 90–92, 94–97, 120–121.

[599] Supplemental Release, 69 FR at 30148.

[600] Reproposing Release, 69 FR at 77464.

[601] *See, e.g.*, Bloomberg Tradebook Letter at 7; BSE Letter at 15; Deutsche Bank Reproposal Letter at 4; Harris Reproposal Letter at 11; ICI Letter at 21; JP Morgan Reproposal Letter at 2; NYSE Reproposal Letter II at 3; STA Letter at 7; UBS Letter at 10; Vanguard Letter at 6.

[602] *See, e.g.*, Brut Letter at 22; Instinet Reproposal Letter at 13; Letter from David Colker, Chief Executive Officer and President, National Stock Exchange, to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("NSX Reproposal Letter") at 4; Phlx Letter at 4.

share trade the same as a 20,000 share trade in the same stock, even though their importance for price discovery purposes clearly is not equal. All of the current Plan formulas value only the trades reported by an SRO (for Networks A and B, the number of reported trades; for Network C, the average of number and share volume of reported trades), thus treating a quotation as having no value except to the extent it resulted in a trade. Quotations are accorded no value even if they were fully accessible and established the NBBO for a substantial period of time, thereby providing price discovery for trades occurring at other markets that internalize orders with reference to the NBBO price. Such formulas based solely on an SRO's trading activity may have been adequate many years ago when a single market dominated each group of securities, but are seriously outdated now that trading is split among many different markets whose contributions to the public data stream can vary considerably.

The adopted formula reflects fairly straightforward determinations about the kinds of data that, in general, are likely to be useful to investors. For example, a $50,000 quote at the NBBO in a stock is likely more useful to investors than a $2000 quote in the same stock. Similarly, a $50,000 trade in a stock is likely more useful to investors in assessing the trading trend of that stock than a $2000 trade; again, not necessarily in every case, but in general and on average. By more appropriately weighing data that is useful to investors, the adopted formula represents a substantial improvement on the old formulas.[603]

Commenters on the original proposal generally believed that the originally proposed formula was complex and may have been difficult to implement efficiently.[604] They particularly noted that the proposed NBBO Improvement Share was difficult to understand and had the potential to be abused through gaming behavior. The Commission agreed with these commenters and has modified the reproposed formula and adopted formula accordingly. Given that only automated quotations will be entitled to earn an allocation under the adopted formula, the originally proposed NBBO Improvement Share, as well as the proposed cutoff of credits for manual quotations left alone at the NBBO, have been deleted from the reproposed formula and remain deleted in the adopted formula. The elimination of these two elements greatly reduces the complexity of the adopted formula and promotes more efficient implementation of the formula. In addition, the 15% of the Security Income Allocation that was allocated to the NBBO Improvement Share in the proposed formula now has been shifted to the Quoting Share to assign an even allocation of revenues between trading and quoting.

Other commenters asserted that it would overly costly and complex to calculate the other elements of the proposed formula.[605] The Commission does not agree with this assertion. An SRO's Trading Share, for example, will not be materially more difficult to calculate than the current Network C formula, which is based on an average of an SRO's proportion of trades and share volume. The Security Income Allocation uses the square root function which is a simple arithmetic calculation. Some commenters believed that the Quoting Share, which incorporates the total dollar size of the NBBO in a stock throughout the trading year, would result in astronomically high numbers that would be extremely difficult to calculate.[606] In fact, the largest number of Quote Credits in a year for even the highest price stock with the greatest displayed depth at the NBBO is be very unlikely to reach beyond the trillions, a number well within the capabilities of even the most basic spreadsheet program.[607] Moreover, the allocation is determined by the proportion of an SRO's Quote Credits in relation to other SROs, not the absolute amount of Quote Credits.

Some commenters suggested that revenue allocations under the formula should be calculated and paid out on a quarterly basis.[608] Currently, the Networks make estimated quarterly payments subject to a final annual calculation and payment. Commenters believed quarterly calculations and payments would simplify administration of the formula and reduce the potential for disparities between quarterly estimated and annual final payments. The adopted Allocation Amendment does not alter the current Plan provisions for annual final payments. It is important to retain a final annual calculation and payment to minimize the potential for unusual trading activity, or intentional gaming behavior, to inappropriately distort an allocation within a quarter. The annual calculation will be based on numbers that are four times larger than the numbers for a quarterly calculation. These larger numbers will help smooth out the effect of unusual market activity in a particular quarter, as well as increase the difficulty of any attempt at gaming behavior. Of course, all of the formula's calculations can be updated daily, and quarterly estimated payments based on these calculations can continue to be made to SRO participants.

Finally, a few commenters were concerned about the effect of modifying the current allocation formulas on the existing business models and terms of competition for the various markets.[609] The Commission recognizes that reforming formulas that have remained unchanged for many years could affect the competitive position of various markets. Given the severe deficiencies of these formulas, however, it does not believe that the interests of any particular business model should preclude updating the formulas to reflect current market conditions. The adopted formula is intended to reflect more appropriately the contributions of the various SROs to the consolidated data stream and thereby better align the interests of individual markets with the interests of investors. Moreover, by incorporating a much more broad-based measure of an SRO's contribution to the consolidated data stream, the adopted formula should be less subject to any particular type of gaming and distortion

[603] Some commenters were concerned that the formula's use of dollar volume calculations does not sufficiently allocate revenues to markets that trade low-priced stocks. *See, e.g.*, BSE Letter at 18; CHX Letter at 16. The Commission believes that dollar volume is the most appropriate measure, in general, of the importance to investors of trading and quoting information. Per share stock prices, in contrast, are a more arbitrary measure because they are dependent, to a large extent, on the number of shares a company chooses to issue, both originally and through stock splits and reverse stock splits. To the extent the commenters were concerned about the less active stocks of smaller companies, the Security Income Allocation of the adopted formula incorporates the square root function precisely to more appropriately allocate revenues to SROs that provide a venue for price discovery in these stocks. *See* section V.A.3.d below.

[604] *See, e.g.*, Angel Letter I at 11; Financial Information Forum Letter at 3; NYSE Letter, Attachment at 11.

[605] *See, e.g.*, Brut Letter at 22–23; CBOE Letter at 2, 9; NSX Letter at 7.

[606] *See, e.g.*, CBOE Letter at 14 (calculation of Quote Credits will "yield astronomical numbers" that "can be expressed only in exponential terms"); NSX Letter at 7 (calculation of large number of Quote Credits is "particularly ludicrous").

[607] For example, assume a stock with an average price of $100 per share has an unusually large average quoted size of 200,000 shares at both the national best bid and the national best offer throughout every second of the trading year. Over an average 252 trading days during a year, the total Quote Credits in this stock would be 235.9 trillion ($100*400,000*252*23,400 seconds per trading day). Quote Credits are only calculated for individual Network stocks and are not be totaled across all Network stocks.

[608] *See, e.g.*, NYSE Reproposal Letter II at 5; Nasdaq UTP Plan Reproposal Letter at 3.

[609] *See, e.g.*, Brut Letter at 22; CHX Letter at 21–22; NSX Letter at 6.

than the narrowly-focused current Plan formulas.[610]

b. Quotations That Equal the NBBO

Many commenters supported the proposal to allocate a portion of market data revenues based on an SRO's quotations, particularly if only automated and accessible quotations would qualify for an allocation.[611] Some commenters, however, were concerned about the risk of harmful gaming behavior by market participants.[612] For example, Instinet stated that the "fundamental problem with the Commission's proposed formula stems from the inherently low cost for market participants to generate quotation information and the consequent high potential for gaming behavior in any formula that attempts to reward such behavior."[613] A specific type of gaming that concerned commenters was "flickering quotes"—quotes that are flashed for a short period of time solely to earn market data revenues, but are not truly accessible and therefore do not add any value to the consolidated quote stream. Nasdaq discussed a number of other potential gaming behaviors, including posting quotations in inactive markets or for inactive securities so that they are less likely to be executed.[614] Commenters also were concerned that such practices would increase quotation traffic and bandwidth costs, but with little or no benefit for the quality of the consolidated data stream.

The Commission recognizes that abusive quoting behavior is a legitimate concern, particularly given that quotations have not been entitled to an allocation of market data revenues in the past. The adopted formula therefore incorporates a number of modifications to the reproposed formula to minimize the potential for abusive or costly quoting behavior.

First, the adopted formula modifies the language of the reproposed formula to clarify that a quotation must be displayed by the Network processor for a minimum of one full second of time before it is entitled to earn any Quote Credits. This one-second time period is consistent with the one-second time period included in the flickering quotation exception in the Order Protection Rule and is designed to assure that only quotations that are readily accessible can earn Quote Credits. The time stamps assigned to quotations by the Network processors will control this determination. Accordingly, subsecond flickering quotations are excluded from the formula.

Second, the adopted formula modifies the language of the reproposed formula to clarify that, consistent with the approach of the Order Protection Rule, each SRO participant in a Network is entitled to earn Quote Credits only for the SRO's *best* bid and *best* offer. Thus, for example, only a single, accessible best bid and best offer for each of the exchange SROs, Nasdaq, and the NASD will be entitled to earn Quote Credits. A best bid and best offer must be accessible by routing an order to a single market destination (*i.e.*, currently, to a single exchange execution system, a single Nasdaq execution system, or a single ADF participant). By limiting the number of separate quotations that are entitled to earn Quote Credits, the adopted formula both reduces the ability of market participants to "shred" their quotes among many different markets and promotes equal regulation of exchange SROs, Nasdaq, and the NASD.

Third, the adopted formula modifies the language of the reproposed formula to clarify that a quotation cannot earn Quote Credits while it locks or crosses a previously displayed automated quotation. This limitation is needed to remove any potential financial incentive for abusive quoting behavior that would be contrary to the purposes of the provisions on locking and crossing quotations set forth in the Access Rule.

Finally, as discussed further below,[615] the Security Income Allocation in the adopted formula modifies the reproposed formula by limiting the total revenues allocated to any particular Network security to no more than $4 per qualified transaction report. This limitation on each security's revenue allocation therefore will apply to both the Trading Share and Quoting Share. In contrast, the reproposed formula limited the allocation only for the Trading Share of a Network security to $2 per qualified transaction report, but shifted the excess balance of revenues to the Quoting Share for such Network security—thereby potentially increasing the risk of abusive quoting behavior in highly inactive Network securities. Under the adopted formula, the excess balance above the limitation will be allocated across all Network securities in direct proportion to their share of dollar volume of trading.

With these clarifications and modifications, the Commission does not believe that the Quoting Share of the adopted formula will be unacceptably vulnerable to gaming, particularly because only automated and fully accessible quotations will be entitled to earn a share of market data revenues. The potential cost of displaying such quotations, in the form of unprofitable trades, should not be underestimated. Quotations would earn significant revenues only if they represent a significant proportion of the total size of quotations displayed at the NBBO for a stock throughout the trading year. The risk of losses that could result from the execution of orders against large quotations would be likely to dwarf any potential allocation of market data revenues.[616] With the advent of highly sophisticated order-routing algorithms, accessible automated quotations throughout the NMS can be hit at lightning speed. Some of these algorithms are specifically designed to search the market for displayed liquidity and sweep such liquidity immediately when it is displayed. The market discipline imposed by these order-routing practices should greatly reduce the potential for "low cost" quotations at the NBBO. A market participant would have to be prepared to trade at a price, particularly a price as attractive as the NBBO, before displaying accessible and automated quotations to earn market data revenues. Moreover, any quotations submitted for stocks that are inactively traded (and therefore less likely to attract trading

[610] Two commenters on the reproposal suggested adopting an allocation formula based solely on the dollar volume of trading. ArcaEx Reproposal Letter at 13; Nasdaq Reproposal Letter at 14. Dollar volume alone, however, is not a broad-based measure and would miss important aspects of an SRO's contribution to the public data stream. It would, for example, allocate a disproportionately large amount to block trades. Block trades often are internalized by securities dealers at prices based, at least partly, on current public quotations. A formula based solely on dollar volume would not adequately allocate revenues to the source of quotations relied on in pricing block trades.

[611] *See, e.g.*, Bloomberg Tradebook Letter at 7–8; Morgan Stanley Letter at 22–23; NYSE Reproposal Letter II at 3; STA Letter at 7; Vanguard Letter at 6.

[612] *See, e.g.*, ArcaEx Reproposal Letter at 13; CHX Letter at 19; Instinet Reproposal Letter at 14; SIA Reproposal Letter at 30.

[613] Instinet Letter at 41.

[614] Nasdaq Reproposal Letter at 12–13.

[615] *Infra*, section V.A.3.d.

[616] For example, Nasdaq asserted that approximately $1 million per month would be distributed among SROs based on quoting in the 2000 least active Nasdaq stocks. Nasdaq Reproposal Letter at 13. In this scenario, an average of $500 per month would be allocated to each stock. Given the approximately 491,400 seconds of trading in an average month, the average available Quoting Share in a stock for each second would be approximately 1/10th of one cent, which would be further divided among bids and offers to approximately 1/20th of one cent. Moreover, this amount would be shared among all market participants quoting in the stock. Consequently, even the smallest losing trade (*i.e.*, a one-cent loss on an executed 100-share quote) would wipe out 2000 seconds (more than 33 minutes) of the entire Quoting Share allocation for bids or offers in the stock.

interest) will garner a very small Quoting Share allocation because the size of such allocation will be determined by the proportional dollar volume of trading in a stock.

Finally, commenters were concerned that some quotations might be submitted to "hide in the queue" when a stock already has significant depth displayed at the NBBO.[617] The strategy is risky, however, because of the desire for greater liquidity evidenced by the number of marketable limit orders entered but not filled, particularly for Nasdaq stocks, that was discussed above in section II.A.1.b. Typically, the volume of such orders searching for liquidity at the NBBO far exceeds the available liquidity (both displayed size and reserve size). Any quotations attempting to hide in the queue at the NBBO when liquidity seeking orders arrive would necessarily be executed immediately.[618]

A few commenters also opposed the proposed Quoting Share because they believed it represented an inappropriate attempt by the Commission to control the quoting behavior of market participants.[619] ArcaEx, for example, stated that the "most important question is how paying for top-of-book quotes—on a time- and size-weighted basis or on any other basis—encourages beneficial behavior," and questioned whether the Quoting Share would achieve this result. Brut asserted that "[n]ot only would [the proposed formula] increase the potential unnatural trading and quoting behavior, it signifies a desire to use market structure regulation to micro-manage market participant behavior * * *."[620]

These commenters appear to have misunderstood the Commission's objective in proposing to update the current Plan formulas. As noted above,[621] it is unlikely that a marginal increase in market data revenues would significantly alter the quoting behavior of market participants, at least for those not already interested in trading a stock for separate reasons. The potential cost of unprofitable trades would be too high. Rather, the Commission's primary objective is to correct an existing flaw in the current formulas by allocating revenues to those SROs that, even now, benefit investors by contributing useful quotations to the consolidated data stream. Currently, such SROs do not receive any allocation for providing a venue for this beneficial quoting activity. Basing an allocation on the extent to which an SRO's quotes equal the NBBO is an appropriate means to correct this flaw, even if the allocation does not always reflect the precise value of quotations.[622]

c. Number and Dollar Volume of Trades

The current Plan formulas allocate revenues based on the number of trades (Networks A and B) or on the average of number of trades and share volume of trades (Network C) reported by SROs. By focusing solely on trading activity (and particularly by rewarding the reporting of many trades no matter how small their size), these formulas have contributed to a variety of distortive trade reporting practices, including wash sales, shredded trades, and SRO print facilities. To address these practices and to establish a more broad-based measure of an SRO's contribution to the consolidated trade stream, the proposed formula provided that an SRO's Trading Share in a particular stock would be calculated by taking the average of the SRO's percentage of total dollar volume in the stock and the SRO's percentage of qualified trades in the stock. A "qualified trade" was defined as having a dollar volume of $5000 or more. The Proposing Release requested comment on whether this amount should be higher or lower, or whether trades with a size of less than $5000 should receive credit that was proportional to their size.[623]

Several commenters on the original proposal believed that small trades contribute to price discovery and should be entitled to earn at least some credit in the calculation of the number of qualified trades.[624] The Commission agreed and included in the reproposed formula a provision that awards a fractional proportion of a qualified report for trades of less than $5000. The adopted formula also includes this provision. Thus, a $2500 trade will constitute 1/2 of a qualified transaction report. This approach greatly reduces the potential for large allocations attributable to shredded trades, while recognizing the contribution of small trades to price discovery.

Two commenters on the original proposal asserted that the $5000 threshold was arbitrary.[625] As noted in the Proposing Release, an analysis of Network A data indicates that approximately 90% of dollar volume and 50% of trades exceed this threshold. The Commission believes that the $5000 figure represents a reasonable attempt to address the problem of shredding large trades into 100-share trades. By providing only a proportional allocation for trades with dollar amounts below this threshold, the ability of market participants to generate large revenue allocations by shredding trades would be greatly reduced. For example, a 2000-share trade in a $25 stock could be shredded into twenty trades in the absence of a dollar threshold for qualified trades, but could be shredded into only ten qualified trades under the reproposed formula. Moreover, when combined with the allocation of 50% of revenues to the Quoting Share and the allocation of another 25% of revenues based on the dollar volume of trades, the $5000 threshold for qualified trades will eliminate much of the potential reward for trade shredding under reproposed formula. In the example of the 2000-share trade in a $25 stock, the incentive for shredding would have been reduced by a total of 87.5% (75% + (50% * 25%)).[626]

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[617] Nasdaq Reproposal Letter at 13; NYSE Reproposal Letter at 2.

[618] Of course, the Commission and SROs will continue to monitor quoting activity for any conduct that violates the federal securities laws, the rules thereunder, or SRO rules and take appropriate action to address such conduct. For example, one commenter suggested that a market participant might enter a buy order at the national best bid at a time when there already is depth at such bid, but with instructions to "cancel" the order upon execution of orders earlier in the queue. NYSE Reproposal Letter at 2. Such an order type would effectively be impossible to access because it always would be cancelled when at risk of execution. As a result, reflecting these orders in a displayed quotation would be a clear violation of the Rule 602(b) of Regulation NMS, which requires that displayed quotations be firm, as well as constitute a material misstatement to the market and investors concerning trading interest in the stock.

[619] ArcaEx Letter at 13; Brut Letter at 22, Phlx Letter at 4.

[620] Brut Letter at 22.

[621] *Supra*, note 616 and accompanying text.

[622] ArcaEx noted that top-of-book quotes make only a partial contribution to price discovery and that depth-of-book quotes are particularly important since decimalization. ArcaEx Letter at 13. The Commission agrees that depth-of-book quotes are important to investors, and for that reason has adopted amendments to the market data rules to facilitate the independent dissemination of a market's depth of book. The rules will not prevent such a market from charging fees for depth-of-book quotations that are fair and reasonable and not unreasonably discriminatory.

[623] Proposing Release, 69 FR at 11181.

[624] *See, e.g.*, BSE Letter at 16; CHX Letter at 19–20; E*Trade Letter at 11.

[625] E*Trade Letter at 11; Instinet Letter at 42.

[626] One commenter on the reproposal suggested that the dollar volume allocation for block trades be capped at $300,000 to preclude a disproportionate allocation. NYSE Reproposal Letter II at 4–5. The adopted formula does not include a cap on block trades because it would appear to be easily avoidable through trade-shredding. Moreover, the separate allocations for qualified transaction reports and for Quoting Shares serve to limit the extent to which block trades receive a disproportionate allocation under the adopted formula.

d. Allocation of Revenues Among Network Stocks

The proposed formula included a Security Income Allocation, pursuant to which a Network's total distributable revenues would be allocated among each of the Network's stocks based on the square root of dollar volume. The square root function was intended to adjust for the highly disproportionate level of trading in the very top tier of Network stocks. A few hundred stocks (*e.g.*, the top 5%) are much more heavily traded than the other thousands of Network stocks. The Proposing Release noted that an allocation that simply was directly proportional to trading volume would fail to reflect adequately the importance of price discovery for the vast majority of stocks.[627] The Reproposing Release retained this provision in the reproposed formula.[628]

Of the commenters that addressed this issue, several supported the use of a square root function to allocate revenues among stocks.[629] Nasdaq, for example, noted that the "methodology will reduce the disparity between the value of data of the most active and least active securities."[630] Other commenters, in contrast, opposed the use of the square root function to allocate revenues among Network stocks.[631] ArcaEx believed that the proposed allocation method "introduces a steeply progressive tax on liquid stocks to subsidize illiquid stocks" and that the allocation of revenues should remain directly proportional to trading volume.[632]

With one modification, the Commission has retained the square root function in the adopted formula to allocate distributable Network revenues more appropriately among all of the stocks included in a Network. Although the extent to which Network stocks are tiered according to trading volume varies among the three Networks, it is quite pronounced in each of them. The use of the square root function reflects the Commission's judgment that, on average and not necessarily in every particular case, information about a $50,000 trade in a stock with an average daily trading volume of $500,000 is marginally more useful to investors than a $50,000 trade in a stock with an average daily trading volume of $500 million. Markets that provide price discovery in less active stocks serve an extremely important function for investors in those stocks. Price discovery not only benefits those investors who choose to trade on any particular day, but also benefits those who simply need to monitor the status of their investment. Efficient secondary markets support buy-and-hold investors by offering them a ready opportunity to trade at any time at a fair price if they need to buy or sell a stock. Indeed, this enhanced assurance is one of the most important contributions of secondary markets to efficient capital-formation and to reducing the cost of capital for listed companies. The square root function allocates revenues to markets that perform this function for less-active stocks by marginally increasing their percentage of market data revenues, while still allocating a much greater dollar amount to more actively traded stocks.

With respect to very inactively traded stocks, however, the adopted formula modifies the reproposed square root allocation by limiting the revenues that can be allocated to a single Network security to an amount that is no greater than $4 per qualified transaction report. The amount that exceeds this $4 limitation will be reallocated among all Network securities in direct proportion to their dollar volume of trading (which is heavily weighted toward the most actively traded stocks). The Commission is adopting this $4 limitation to respond to commenters' concerns about the potential for abusive quoting behavior in extremely inactive stocks by anyone seeking to game the Quoting Share allocation.[633]

The $4 limitation is consistent with the $2 limitation on Trading Share allocations in the proposed formula and reproposed formula.[634] Whereas the $2 reproposed limitation applied only to the 50% revenue allocation for Trading Share, the $4 adopted limitation applies to 100% of the revenue allocation for a Network security. The $4 limitation will prevent extremely high allocations per qualified transaction report for very inactive Network stocks, particularly when compared with the current distributable revenues per trade of the Networks, which ranged from $0.14 to $1.03 in 2004.[635] Consequently, the $4 limitation is designed to achieve an appropriately balanced allocation among Network stocks by allowing room for a significant increase in the amounts currently allocated for many less active stocks, while also preventing unjustifiably high allocations for the most extremely inactive stocks that might create an inappropriate incentive for abusive quoting behavior.

To illustrate the operation of the $4 limitation, assume that the initial square root allocation for a security with 10 qualified transaction reports during the year was $300, or an average allocation of $30 per qualified transaction report. Rather than allocate the full $300 to this extremely inactive security, the adopted formula limits the allocation to $4 per qualified transaction report, so that a total of only $40 would be allocated to the stock as its Security Income Allocation. The difference of $260 ($300 minus $40) would be reallocated among all Network securities in direct proportion to their share of dollar volume of trading.

4. Distribution and Display of Data

Most commenters supported the provisions, set forth in both the proposal and reproposal, authorizing the independent distribution of market data outside of what is required by the Plans.[636] They generally agreed that the proposal would allow investors and vendors greater freedom to make their own decisions regarding the data they need. They also believed that the proposed rule amendment's "fair and reasonable" and "not unreasonably discriminatory" standards are appropriate to ensure that the independently distributed market data would be made available to all investors and data users. A few commenters, in contrast, objected to the proposed standards, asserting that the standards would not effectively protect investors and "weaker and newer markets from

[627] Proposing Release, 69 FR at 11180.

[628] Reproposing Release, 69 FR at 77466.

[629] Amex Letter, Exhibit A at 15; Nasdaq Letter II at 32; NYSE Reproposal Letter II at 3; Specialist Assoc. Letter at 16 n. 21.

[630] Nasdaq Letter II at 32.

[631] ArcaEx Reproposal Letter at 11; CBOE Letter at 11; Instinet Reproposal Letter at 13; Letter from Ronald A. Orguss, President, Xanadu Investment Co., to Jonathan G. Katz, Secretary, Commission, dated Jun. 29, 2004 ("Xanadu Letter") at 2–3.

[632] ArcaEx Letter at 12.

[633] *See supra*, section V.A.3.b.

[634] *See* Proposing Release, 69 FR at 11181; Reproposing Release, 69 FR at 77467.

[635] The distributable revenue per trade for a Network is calculated by dividing the total distributable net income of the Network by the total number of reported trades for the Network's securities. For the Networks in 2004, the distributable revenue per trade was 15.1 cents for Network A, 14.5 cents for Network C, and 103.1 cents for Network B. The foregoing Network financial information is preliminary and unaudited.

[636] *See, e.g.*, Brut Letter at 21, 23; CBOE Letter at 2, 17; Citigroup Letter at 16; Financial Information Forum Reproposal Letter at 4; Letter from Coleman Stipanovich, Executive Director, State Board of Administration of Florida, to Jonathan G. Katz, Secretary, Commission, dated June 29, 2004 ("Florida State Board Letter") at 2; Financial Services Roundtable Letter at 6; Goldman Sachs Letter at 12; ICI Letter at 4, 21 n. 35; Instinet Letter at 45; Nasdaq Letter II at 33; NYSE Letter, Attachment at 12; Letter from P. Howard Edelstein, President and CEO, Radianz Americas, Inc., to Jonathan G. Katz, Secretary, Commission, dated Jan. 27, 2005 ("Radianz Reproposal Letter") at 1–2; Reuters Letter at 3.

predatory actions by stronger markets or the potential loss of data integrity."[637]

The Commission is adopting Rule 603(a) as proposed and reproposed.[638] The "fair and reasonable" and "not unreasonably discriminatory" requirements in adopted Rule 603(a) are derived from the language of Section 11A(c) of the Exchange Act. Under Section 11A(c)(1)(C), the more stringent "fair and reasonable" requirement is applicable to an "exclusive processor," which is defined in Section 3(a)(22)(B) of the Exchange Act as an SRO or other entity that distributes the market information of an SRO on an exclusive basis. Adopted Rule 603(a)(1) extends this requirement to non-SRO markets when they act in functionally the same manner as exclusive processors and are the exclusive source of their own data. Applying this requirement to non-SROs is consistent with Section 11A(c)(1)(F) of the Exchange Act, which grants the Commission rulemaking authority to "assure equal regulation of all markets" for NMS Securities.

Commenters were concerned about the statement in the Proposing Release that the distribution standards would prohibit a market from distributing its data independently on a more timely basis than it makes available the "core data" that is required to be disseminated through a Network processor.[639] Instinet, for example, requested that the Commission clarify that the proposal would not require a market center to artificially slow the independent delivery of its data in order to synchronize its delivery with the data disseminated by the Network.[640] Adopted Rule 603(a) will not require a market center to synchronize the delivery of its data to end-users with delivery of data by a Network processor to end-users. Rather, independently distributed data could not be made available on a more timely basis than core data is made available to a Network processor. Stated another way, adopted Rule 603(a) prohibits an SRO or broker-dealer from transmitting data to a vendor or user any sooner than it transmits the data to a Network processor.

A majority of the commenters supported the Commission's proposed reduction of the consolidated display requirements, stating that it should lead to lower costs for investors.[641] A few commenters, however, opposed eliminating the requirement to display a full montage of market BBOs.[642] Amex, for example, believed that elimination of the montage would confuse investors and make it more complicated for vendors and broker-dealers to manage market data. Some commenters believed that, rather than reducing the consolidated display requirement, the Commission should expand the requirement to include additional information on depth-of-book quotations, stating that the NBBO alone has become less informative since decimalization.[643]

The Commission does not believe that streamlining the quotations included in the consolidated display requirement will detract from the quality of information made available to investors. Adopted Rule 603(c), which is adopted today as proposed and reproposed, will continue to require the disclosure of basic quotation information (*i.e.*, prices, sizes and market center identifications of the NBBO). Particularly for retail investors, the NBBO continues to retain a great deal of value in assessing the current market for small trades and the quality of execution of such trades. For example, statistics on order execution quality for small market orders (the order type typically used by retail investors) reveal that their average execution price is very close to, if not better than, the NBBO.[644] The adopted consolidated display requirement will allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors. Investors who need the BBOs of each SRO, as well as more comprehensive depth-of-book information, will be able to obtain such data from markets or third party vendors.

B. Description of Adopted Rules and Amendments

1. Allocation Amendment

For the reasons just discussed, the Commission is adopting with modifications an amendment to each of the Plans ("Allocation Amendment") that incorporates a broad based measure of the contribution of an SRO's quotes and trades to the consolidated data stream.[645] The adopted formula reflects a two-step process. First, a Network's distributable revenues (*e.g.*, $150 million) will be allocated among the many individual securities (*e.g.*, 3000) included in the Network's data stream. Second, the revenues that are allocated to an individual security (*e.g.*, $200,000) will be allocated among the SROs based on measures of the usefulness to investors of the SROs' trades and quotes in the security. The Allocation Amendment provides that, notwithstanding any other provision of a Plan, its SRO participants shall receive an annual payment for each calendar year that is equal to the sum of the SRO's Trading Shares and Quoting Shares in each Network security for the year.[646] These two types of Shares are dollar amounts that are calculated based on SRO trading and quoting activity in each Network security.

For the reasons discussed in section V.A.3 above, the Commission finds that

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[637] *See, e.g.*, Amex Letter at 10, Exhibit A at 13.

[638] The Commission also is adopting the reproposed amendment to current Rule 11Aa3–1 (redesignated as Rule 601 under Regulation NMS), which rescinds the prohibition on SROs and their members from disseminating their trade reports independently. Given that members of an SRO will continue to be required to transmit their trades to the SRO (and SROs will continue to transmit trades to the Networks pursuant to the Plans), the Commission believe that SROs and their members also should be free to distribute their trades independently.

[639] Amex Letter, Exhibit A at 12; Instinet Letter at 47; Reuters Letter at 2.

[640] Instinet Letter at 47.

[641] *See, e.g.*, Brut Letter at 21, 23; Financial Information Forum Letter at 3–4; Instinet Letter at 7, 45; Nasdaq Letter II at 27, 32; Reuters Letter at 2–3.

[642] *See, e.g.*, Amex Letter at 9 & Exhibit A at 12; Bloomberg Tradebook Letter at 9; Callcott Letter at 1, 2, 5.

[643] *See, e.g.*, Bloomberg Reproposal Letter at 9; Schwab Reproposal Letter at 5.

[644] *See, e.g.*, S&P Index Study, Table 2 (slippage rates—the extent to which executions occur at prices inferior to the NBBO at time of order receipt—for small market orders range from -2.5 basis points (*i.e.*, price improvement) to 0.5 basis points). The Dash 5 statistics used in the S&P Index Study were calculated using the NBBO at time of order *receipt*, whereas trade-through statistics used in the Trade-Through Study were calculated using the market BBOs at the time of order *execution*. In addition, the Dash 5 statistics reflect the overall average of order executions inside the NBBO, at the NBBO, and outside the NBBO. The trade-through statistics focus solely on trades executed outside the best prices. Consequently, the two sets of statistics are not directly comparable.

[645] In 2002, the Commission abrogated several SRO proposals for rebating data revenues to market participants. Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775 (July 10, 2002). The purpose of the abrogation was to allow more time for the Commission to consider market data issues. Given that the current Plan allocation formulas will be updated to allocate revenues for more beneficial quoting and trading behavior, the Commission will consider whether rebates will be permitted after implementation of the adopted formula, taking into account whether their terms meet applicable Exchange Act standards and SROs are able to meet their regulatory responsibilities. Such SRO rebates would, of course, have to be filed with the Commission for notice, comment, and Commission consideration pursuant to Section 19(b) of the Exchange Act.

[646] Two commenters were concerned that the new formula might prohibit the Network's current practice of making estimated quarterly payments of Network revenues, with a final reconciliation at the end of the year. BSE Letter at 18, 19; CHX Letter at 22. The language of the reproposed formula and adopted formula, however, merely tracks existing Plan language for the calculation of "Annual Shares" or "annual payments." Nothing in the adopted formula prohibits Networks from making estimated quarterly payments.

the Allocation Amendment is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, and otherwise in furtherance of the purposes of the Exchange Act.

a. Security Income Allocation

The first step of the adopted formula is to allocate a Network's total distributable revenues among the many different securities that are included in a Network (the "Security Income Allocation"). Paragraph (b) of the adopted Allocation Amendment bases this allocation primarily on the square root of dollar volume of trading in each security. Use of the square root function will more appropriately allocate revenues among stocks with widely differing trading volume. A small number of Network stocks are much more heavily traded than the great majority of Network stocks. By proportionally shifting revenues away from the very top tier of active stocks and increasing the allocation across other stocks, the Security Income Allocation is intended to reflect more adequately the importance of price discovery for all Network stocks.

For the most inactively traded securities, however, the square root function can disproportionately allocate revenues for a small number of trades during the year. For example, the square root allocation for a security with 10 qualified transaction reports during the year might be $300. Rather than allocate the full $300 to such an inactively traded security (for an average allocation per qualified transaction report of $30), the adopted formula includes a cap of $4 per qualified transaction report, so that a total of only $40 will be allocated to the inactive security pursuant to the square root allocation. The difference of $260 ($300 minus $40) will be reallocated among all Network securities in direct proportion to the dollar volume of transaction reports in Network securities. A transaction report with a dollar volume of $5000 or more constitutes one qualified report. A transaction report with a dollar volume of less than $5000 constitutes a proportional fraction of a qualified transaction report.

b. Trading Share

Under paragraph (c) of the adopted Allocation Amendment, an SRO's Trading Share in a particular Network security will be a dollar amount that is determined by multiplying: (1) an amount equal to 50% of the Security Income Allocation for the Eligible Security by (2) the SRO's Trade Rating in the security. A Trade Rating will be a number that represents the SRO's proportion of dollar volume and qualified trades in the security, as compared to the dollar volume and qualified trades of all SROs. The Trade Ratings of all SROs will add up to a total of one. Thus, for example, multiplying 50% of the Security Income Allocation for a Network security (*e.g.*, $200,000) by an SRO's Trade Rating in that security (*e.g.*, 0.2555) would produce a dollar amount (*e.g.*, 50% × $200,000 × 0.2555 = $25,550) that is the SRO's Trading Share for the security for the year.

Applying 50% of the Security Income Allocation to the Trading Share reflects a judgment that generally trades and quotes are of approximately equal importance for price discovery purposes. An SRO's Trade Rating will be calculated by taking the average of: (1) the SRO's percentage of total dollar volume reported in the Network security during the year and (2) the SRO's percentage of the total number of qualified transaction reports in the Network security for the year. A transaction report with a dollar volume of $5000 or more will constitute one qualified report. A transaction report with a dollar volume of less than $5000 will constitute a proportional fraction of a qualified transaction report. As a result, all sizes of transaction reports will contribute toward an SRO's Trade Rating.

c. Quoting Share

Under paragraph (d) of the adopted Allocation Amendment, an SRO's Quoting Share in a particular Network Security will be a dollar amount that is determined by multiplying (1) an amount equal to 50% of the Security Income Allocation for the security by (2) the SRO's Quote Rating in the security. A Quote Rating will be a number that represents the SRO's proportion of best bids and best offers that equaled the price of the NBBO during the year ("Quote Credits"), as compared to the Quote Credits of all SRO's during the year. The Quote Ratings of all SROs will add up to a total of one. Multiplying 50% of the Security Income Allocation for a Network security by an SRO's Quote Rating in that security will produce a dollar amount that is the SRO's Quoting Share for the security for the year.

An SRO will earn one Quote Credit for each second of time and dollar value of size that the SRO's automated best bid or best offer during regular trading hours equals the price of the NBBO and does not lock or cross a previously displayed automated quotation.[647] To qualify for credits, the quoted price must be displayed for at least one full second, and the relevant size will be the minimum size that was displayed during the second. Thus, for example, a bid with a dollar value of $4000 (*e.g.*, a bid of $20 with a size of 200 shares) that equals the national best bid for three full seconds would be entitled to 12,000 Quote Credits. If an SRO quotes simultaneously at both the national best bid and the national best offer, it would earn Quote Credits for each quote. An automated quotation is defined by reference to adopted Rule 600(b)(3) under Regulation NMS. Thus, an SRO's manual quotations will not be entitled to earn any Quote Credits.

2. Governance Amendment

For the reasons discussed above in section V.A.2.b, the Governance Amendment is adopted as proposed and reproposed. Paragraph (a) mandates the formation of a Plan advisory committee. Paragraph (b) of the Governance Amendment sets forth the composition and selection process for such an advisory committee. Members of the advisory committee will be selected by the Plan operating committee, by majority vote, for two-year terms. At least one representative must be selected from each of the following five categories: (1) A broker-dealer with a substantial retail investor customer base; (2) a broker-dealer with a substantial institutional investor customer base; (3) an ATS; (4) a data vendor; and (5) an investor. Each Plan participant also will have the right to select one additional member to the advisory committee that is not employed by or affiliated with any Plan participant or its affiliates or facilities.

Paragraphs (c) and (d) of the Governance Amendment set forth the function of the advisory committee and the requirements for its participation in Plan affairs. Pursuant to paragraph (c), members of an advisory committee have the right to submit their views to the operating committee on Plan matters, including, but not limited to, any new or modified product, fee, contract, or pilot program that is offered or used

[647] Regular trading hours are defined in Rule 600(b)(64) of Regulation NMS as between 9:30 a.m. and 4:00 p.m. Eastern Time, unless otherwise specified pursuant to the procedures established in Rule 605(a)(2). One commenter suggested that the reproposal trades also should have limited trades to those reported during regular trading hours. NYSE Reproposal Letter II at 4. The Commission believes that after-hours trades generally have price discovery value and is retaining the current Plan practice of including them in the allocation formula.

pursuant to the Plan. Paragraph (d) provides that members have the right to attend all operating committee meetings and to receive any information distributed to the operating committee relating to Plan matters, except when the operating committee, by majority vote, decides to meet in executive session after determining that an item of Plan business requires confidential treatment.

For the reasons discussed in section V.A.2.b above, the Commission finds that the Governance Amendment is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, and otherwise in furtherance of the purposes of the Exchange Act.

3. Consolidation, Distribution, and Display of Data

a. Independent Distribution of Information

The Commission is adopting the reproposed amendment to current Rule 11Aa3–1 (redesignated as Rule 601), which rescinds the prohibition on SROs and their members from disseminating their trade reports independently.[648] Under adopted Rule 601, members of an SRO will continue to be required to transmit their trades to the SRO (and SROs would continue to transmit trades to the Networks pursuant to the Plans), but such members also will be free to distribute their own data independently, with or without fees.

For the reasons discussed above in section V.A.4, the Commission also is adopting, as proposed and reproposed, Rule 603(a), which establishes uniform standards for distribution of both quotations and trades that will create an equivalent regulatory regime for all types of markets. First, Rule 603(a)(1) requires that any market information[649] distributed by an exclusive processor, or by a broker or dealer (including ATSs and market makers) that is the exclusive source of the information, be made available to securities information processors on terms that are fair and reasonable. Rule 603(a)(2) requires that any SRO, broker, or dealer that distributes market information must do so on terms that are not unreasonably discriminatory. These requirements prohibit, for example, a market from making its "core data" (*i.e.*, data that it is required to provide to a Network processor) available to vendors on a more timely basis than it makes available the core data to a Network processor. With respect to non-core data, however, Network processors occupy a unique competitive position. As Network processor, it acts on behalf of all markets in disseminating consolidated information, yet it also may be closely associated with the competitor of a market. The Commission believes that markets should have considerable leeway in determining whether, or on what terms, they provide additional, non-core data to a Network processor.

b. Consolidation of Information

For the reasons discussed above in section V.A.1, the Commission is retaining the current consolidation model and adopting the consolidation requirements of Rule 603(b) as proposed and reproposed. All of the SROs currently participate in Plans that provide for the dissemination of consolidated information for the NMS stocks that they trade. The Plans were adopted in order to enable the SROs to comply with Exchange Act rules regarding the reporting of trades and distribution of quotations. With respect to trades, paragraph (b) of Exchange Act Rule 11Aa3–1 (redesignated as Rule 601(a)) requires each SRO to file transaction reporting plans that specify, among other things, how its transactions are to be consolidated with the transactions of other SROs. With respect to quotations, paragraph (b)(1) of Exchange Act Rule 11Ac1–1 (redesignated as Rule 602(a)(1)) requires an SRO to establish and maintain procedures for making its best quotes available to vendors.

To confirm by Exchange Act rule that both existing and any new SROs will be required to continue to participate in such joint-SRO plans, adopted Rule 603(b) requires SROs to act jointly pursuant to one or more NMS plans to disseminate consolidated information for NMS stocks. Such consolidated information must include an NBBO that is calculated in accordance with the definition set forth in adopted Rule 600(b)(42).[650] In addition, the NMS plans will be required to provide for the dissemination of all consolidated information for an individual NMS stock through a single processor. Thus, different processors would be permitted to disseminate information for different NMS stocks (*e.g.*, SIAC for Network A stocks, and Nasdaq for Network C stocks), but all quotations and trades in a stock must be disseminated through a single processor. As a result, information users, particularly retail investors, will be able to obtain data from a single source that reflects the best quotations and most recent trade price for a security, no matter where such quotations and trade are displayed in the NMS.

c. Display of Consolidated Information

For the reasons discussed above in section V.A.4, the Commission is adopting, as proposed and reproposed, Rule 603(c) (previously Exchange Act Rule 11Ac1–2), which substantially revises the consolidated display requirement. It incorporates a new definition of "consolidated display" (set forth in adopted Rule 600(b)(13)) that is limited to the prices, sizes, and market center identifications of the NBBO and "consolidated last sale information" (which is defined in Rule 600(b)(14)). The consolidated information on quotations and trades must be provided in an equivalent manner to any other information on quotations and trades provided by a securities information processor or broker-dealer. Beyond disclosure of this basic information, market forces, rather than regulatory requirements, will be allowed to determine what, if any, additional data from other market centers is displayed. In particular, investors and other information users ultimately will be able to decide whether they need additional information in their displays.

In addition, adopted Rule 603(c) narrows the contexts in which a consolidated display is required to those when it is most needed—a context in which a trading or order-routing decision could be implemented. For example, the consolidated display requirement will continue to cover broker-dealers who provide on-line data to their customers in software programs from which trading decisions can be implemented. Similarly, the

[648] *See supra*, note 638. Adopted Regulation NMS removes the definitions in former paragraph (a) of Rule 11Aa3–1 and places them in adopted Rule 600(b). Current subparagraphs (c)(2) and (c)(3) of Rule 11Aa3–1 are rescinded. As a result, current subparagraph (c)(4) of current Rule 11Aa3–1 is redesignated as subparagraph (b)(2) of adopted Rule 601.

[649] The information covered by the amendment tracks the language of Section 11A(c) of the Exchange Act, which applies to "information with respect to quotations for or transactions in" securities. This statutory language encompasses a broad range of information, including information relating to limit orders held by a market center. *See, e.g.*, S. Report No. 94–75, 94th Cong., 1st Sess. 9 (1975) ("In the securities markets, as in most other active markets, it is critical for those who trade to have access to accurate, up-to-the-second information as to the prices at which transactions in particular securities are taking place (*i.e.*, last sale reports) and the prices at which other traders have expressed their willingness to buy or sell (*i.e.*, quotations).").

[650] Adopted Rule 600(b)(42) of Regulation NMS defines "national best bid and national best offer."

requirement will continue to apply to vendors who provide displays that facilitate order routing by broker-dealers. It will not apply, however, when market data is provided on a purely informational Web site that does not offer any trading or order-routing capability.[651]

VI. Regulation NMS

To simplify the structure of the rules adopted under Section 11A of the Exchange Act ("NMS rules"), the rules adopted today will designate the NMS rules as Regulation NMS, renumber the NMS rules, and establish a new definitional rule, Rule 600 ("NMS Security Designation and Definitions"). Rule 600(a) replaces Exchange Act Rule 11Aa2–1, which designates "reported securities" as NMS securities. In addition, Rule 600(b) includes, in alphabetical order, all of the defined terms used in Regulation NMS. Regulation NMS includes Rules 610, 611, and 612, which are adopted in this release, in addition to the existing NMS rules. The new rule series is Rule 600 through Rule 612 (17 CFR 242.600–612).

Rule 600 provides a single set of definitions that will be used throughout Regulation NMS. To create a single set of definitions, Rule 600 updates or deletes from the existing NMS rules some terms that have become obsolete and eliminates the use of multiple inconsistent definitions for identical terms. In addition, Rule 600 adopts new terms, "NMS security" and "NMS stock," to replace some terms that have been eliminated. These terms are necessary to maintain distinctions between NMS rules that apply only to equity securities and ETFs (*e.g.*, Exchange Act Rules 11Ac1–4 and 11Ac1–5, redesignated as Rules 604 and 605) and those that apply to equity securities, ETFs, and options (*e.g.*, Exchange Act Rules 11Ac1–1 and 11Ac1–6, redesignated as Rules 602 and 606). Rule 600 retains, unchanged, most definitions used in the existing NMS rules and includes definitions used in the new NMS rules adopted today. The definitional changes do not affect the substantive requirements of the existing NMS rules. In addition, the Commission is adopting technical amendments to a number of other Commission rules that cross-reference current NMS rules or that use terms that Regulation NMS amends or eliminates.

The Commission received no comments regarding reproposed Rule 600, the reproposed redesignation of the NMS rules as Regulation NMS, or the reproposed changes to other Commission rules. Accordingly, the Commission is adopting Rule 600 and redesignating the NMS rules as Regulation NMS, and adopting technical amendments to certain other Commission rules that cross-reference current NMS rules or that use terms that Regulation NMS amends or eliminates, substantially as proposed.

A. Description of Regulation NMS

Regulation NMS renumbers and, in some cases, renames the existing NMS rules, and incorporates Rule 600 and the other NMS rules adopted today. Where applicable, existing NMS rules are being amended to remove the definitions that have been consolidated in Rule 600. The titles and numbering of the rules in Regulation NMS, including the NMS rules adopted today, are as follows:

- Rule 600: NMS Security Designation and Definitions (replaces Exchange Act Rule 11Aa2–1, which the Commission is rescinding, and incorporates definitions from the existing NMS rules and the new rules adopted today);
- Rule 601: Dissemination of Transaction Reports and Last Sale Data with Respect to Transactions in NMS Stocks (renumbers and renames Exchange Act Rule 11Aa3–1, the substance of which is being modified);[652]
- Rule 602: Dissemination of Quotations in NMS Securities (renumbers and renames Exchange Act Rule 11Ac1–1 ("Quote Rule"), the substance of which remains largely intact);
- Rule 603: Distribution, Consolidation, and Display of Information with Respect to Quotations for and Transactions in NMS Stocks (renumbers and renames Exchange Act Rule 11Ac1–2 ("Vendor Display Rule"), the substance of which is being modified substantially);[653]
- Rule 604: Display of Customer Limit Orders (renumbers Exchange Act Rule 11Ac1–4 ("Limit Order Display Rule"), the substance of which remains largely intact);
- Rule 605: Disclosure of Order Execution Information (renumbers Exchange Act Rule 11Ac1–5, the substance of which remains largely intact);
- Rule 606: Disclosure of Order Routing Information (renumbers Exchange Act Rule 11Ac1–6, the substance of which remains largely intact);
- Rule 607: Customer Account Statements (renumbers Exchange Act Rule 11Ac1–3, the substance of which remains largely intact);
- Rule 608: Filing and Amendment of National Market System Plans (renumbers Exchange Act Rule 11Aa3–2, the substance of which remains largely intact);
- Rule 609: Registration of Securities Information Processors: Form of Application and Amendments (renumbers Exchange Act Rule 11Ab2–1, the substance of which remains largely intact);
- Rule 610: Access to Quotations (adopted in this release);
- Rule 611: Order Protection Rule (adopted in this release); and
- Rule 612: Minimum Pricing Increment (adopted in this release).

B. Rule 600—NMS Security Designation and Definitions

1. NMS Security Designation—Transaction Reporting Requirements for Equities and Listed Options

Section 11A(a)(2) of the Exchange Act directs the Commission to "designate the securities or classes of securities qualified for trading in the national market system."[654] The 1975 Amendments and the legislative history to the 1975 Amendments were silent as to the particular standards the Commission should employ in designating NMS securities.[655] Instead, Congress provided the Commission with the flexibility and discretion to base NMS designation standards on the Commission's experience in facilitating the development of an NMS.[656]

To satisfy the requirement that it designate the securities qualified for trading in the NMS, the Commission adopted Exchange Act Rule 11Aa2–1 in 1981.[657] Exchange Act Rule 11Aa2–1 (redesignated as Rule 600(a)) defined the term "national market system security" to mean "any reported

[651] The amendment would retain the exemptions currently set forth in Rule 11Ac1–2(f) (redesignated as Rule 603(c)(2)) for exchange and market linkage displays. The current exemption for displays used by SROs for monitoring or surveillance purposes would no longer be necessary because of the limitation of the amendment to trading and order-routing contexts.

[652] In the market data rules, discussed in section V, the Commission is adopting substantive amendments to Exchange Act Rule 11Aa3–1 (redesignated as Rule 601).

[653] *See supra* section V for a discussion of the substantive amendments to the Vendor Display Rule.

[654] 15 U.S.C. 78k–1(a)(2).

[655] *See* Securities Exchange Act Release No. 23817 (Nov. 17, 1986), 51 FR 42856 (Nov. 26, 1986) (proposing amendments to Exchange Act Rules 11Aa2–1 and 11Aa3–1).

[656] *See id.*

[657] *See* Securities Exchange Act Release No. 17549 (Feb. 17, 1981), 46 FR 13992 (Feb. 25, 1981) (adopting Exchange Act Rule 11Aa2–1).

security as defined in Rule 11Aa3–1." A "reported security" was "any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan."[658] An "effective transaction reporting plan" was "any transaction reporting plan approved by the Commission pursuant to this section."[659] A "transaction reporting plan" was "any plan for collecting, processing, making available or disseminating transaction reports with respect to transactions in reported securities filed with the Commission pursuant to, and meeting the requirements of, this section."[660] The effective transaction reporting plans are the CTA Plan and the Nasdaq UTP Plan.

In addition to identifying those securities deemed to be NMS securities, when adopted, the Exchange Act Rule 11Aa2–1 designation also tacitly identified those securities that did not meet that designation (*i.e.*, securities other than those that were so designated as NMS securities). Historically, securities excluded from this designation included standardized options and small capitalization equity securities (a subset of which has been identified as Nasdaq SmallCap securities). Trading in options and Nasdaq SmallCap securities has increased over the past three decades and gradually many of the rules that govern NMS securities have been applied to these securities. As a result, much of the terminology that has been used to distinguish NMS securities from options and Nasdaq SmallCap securities has become obsolete.

For example, the Nasdaq UTP Plan provides for the collection from Plan participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in "eligible securities." Prior to 2001, the Nasdaq UTP Plan defined an "eligible security" as any Nasdaq National Market security as to which unlisted trading privileges have been granted to a national securities exchange pursuant to Section 12(f) of the Exchange Act or that is listed on a national securities exchange.[661] In 2001, the Nasdaq UTP Plan was amended to include Nasdaq SmallCap securities.[662] As a result, Nasdaq SmallCap securities became "eligible securities" because they are now reported through an effective transaction reporting plan (*i.e.*, the Nasdaq UTP Plan), bringing them within the purview of the NMS security designation. Several definitions in the existing NMS rules, however, do not reflect the inclusion of Nasdaq SmallCap securities in the Nasdaq UTP Plan and therefore must be updated. Regulation NMS does so.

In addition, transactions in exchange-listed options are reported through the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan").[663] Unlike the CTA Plan and the Nasdaq UTP Plan—transaction reporting plans that the Commission approved pursuant to Exchange Act Rules 11Aa3–1 and 11Aa3–2 (redesignated as Rules 601 and 608)—the Commission approved the OPRA Plan pursuant to Exchange Act Rule 11Aa3–2 (redesignated as Rule 608).[664] As such, the OPRA Plan is an "effective national market system plan" but not an "effective transaction reporting plan." While at their core the CTA Plan, the Nasdaq UTP Plan, and the OPRA Plan perform essentially the same function (*i.e.*, they govern the consolidated reporting of securities transactions by Plan participants), because the OPRA Plan is not an effective transaction reporting plan, listed options covered by the OPRA Plan are technically not "securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan." Therefore, listed options were not considered NMS securities as defined by Exchange Act Rule 11Aa2–1. While the impact of this distinction may not be readily apparent, the differences in the way the Plans are designated dictates the securities laws and regulations that apply to securities reported pursuant to those Plans.

Further, as discussed below, some terms in the existing NMS rules have become superfluous or outdated, and some NMS rules define identical terms differently. To provide a consolidated set of definitions applicable to all of the NMS rules, Regulation NMS eliminates these inconsistencies. The definitional changes adopted today, however, are not intended to change materially the scope of the existing NMS rules.

2. NMS Security and NMS Stock

Some NMS rules, including the Quote Rule (redesignated as Rule 602) and Exchange Act Rule 11Ac1–6 (redesignated as Rule 606), currently apply to both: (1) Equities, ETFs and related securities for which transaction reports are made available pursuant to an effective transaction reporting plan; and (2) listed options for which market information is made available pursuant to an effective national market system plan. To provide a single term that will be used in any provision of Regulation NMS that applies to both categories of securities, Regulation NMS adopts a new term, "NMS security." Specifically, Regulation NMS defines an "NMS security" as "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options."[665]

Because many rules in Regulation NMS, including the Limit Order Display Rule (redesignated as Rule 604) and Exchange Act Rule 11Ac1–5 (redesignated as Rule 605), continue to be inapplicable to listed options, Regulation NMS adopts a new term, "NMS stock" that will be used in those provisions. Regulation NMS defines the term "NMS stock" as "any NMS security other than an option."[666]

3. Changes to Existing Definitions in the NMS Rules

Rule 600(b) provides a single set of definitions that will be used throughout Regulation NMS. To create a single set of definitions, Regulation NMS eliminates multiple, inconsistent definitions of identical terms. In addition, Regulation NMS amends some definitions in the NMS rules to reflect changed conditions in the marketplace

[658] *See* former Exchange Act Rule 11Aa3–1(a)(4).

[659] *See* former Exchange Act Rule 11Aa3–1(a)(3).

[660] *See* former Exchange Act Rule 11Aa3–1(a)(2).

[661] *See* Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (order approving the Nasdaq UTP Plan on a pilot basis

[662] In 2001, the Nasdaq UTP Plan was amended to, among other things, revise the definition of "eligible securities" to include Nasdaq SmallCap securities. *See* Securities Exchange Act Release No. 45081 (Nov. 19, 2001), 66 FR 59273 (Nov. 27, 2001) (order approving Amendment No. 12 to the Nasdaq UTP Plan). *See* NASD Rule 4200 for the definition of a Nasdaq SmallCap security.

[663] The exchanges that are participants to the OPRA Plan are Amex, BSE, CBOE, ISE, PCX, and Phlx.

[664] *See* Securities Exchange Act Release No. 17638 (Mar. 18, 1981), 22 S.E.C. Docket 484 (Mar. 31, 1981). Exchange Act Rule 11Aa3–2 (redesignated as Rule 608) codifies the procedures that SROs must follow to seek approval for or amendment of a national market system plan.

[665] Rule 600(b)(46). This definition was used to define a "reported security" in the Quote Rule. *See* former Exchange Act Rule 11Ac1–1(a)(20). For the reasons described below, the Commission is eliminating the term "reported security" from the Quote Rule and does not include it in Regulation NMS.

[666] Rule 600(b)(47). The term "NMS stock" is defined in part with reference to the term "transaction reporting plan." The definition of the term "transaction reporting plan" as proposed used the term "NMS stocks." Thus, to avoid circularity, the Commission has clarified the definition of "transaction reporting plan" in Rule 600(b)(82) as adopted by replacing the phrase "NMS stocks" with the term "securities."

or to modernize references.[667] For example, as discussed above, several definitions in the existing NMS rules have been rendered obsolete by the extension of the Nasdaq UTP Plan to Nasdaq SmallCap securities.[668] Because the Nasdaq UTP Plan includes Nasdaq SmallCap securities, those securities now are "securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan" (*i.e.*, they are "reported" securities).[669] For this reason, it is no longer necessary to distinguish, as several existing NMS rules do, between "reported" securities and equity securities for which market information is made available through Nasdaq.[670] Accordingly, Regulation NMS eliminates or revises the defined terms in the existing NMS rules that make this distinction.

a. Covered Security

Different definitions of the term "covered security" appeared in the Quote Rule, the Limit Order Display Rule, and Exchange Act Rule 11Ac1–6 (redesignated as Rule 606).[671] In addition, as discussed below, the term has become obsolete. Therefore, Regulation NMS eliminates the term "covered security" from the NMS rules and replaces it with the term "NMS security" or "NMS stock," as applicable, depending upon the scope of the particular rule.

b. Reported Security

Several NMS rules used the term "reported security." Although the Limit Order Display Rule, the Vendor Display Rule, and Exchange Act Rule 11Aa3–1 (redesignated as Rule 601) contained identical definitions of "reported security," the Quote Rule provided a different definition.[672] Because the term "reported security" was defined inconsistently in the NMS rules and in light of the changes to related terms, Regulation NMS eliminates the term "reported security" from the NMS rules and replaces it with the term "NMS security" or "NMS stock," depending on the scope of the particular rule.

The Limit Order Display Rule used the term "reported security" solely for the purpose of defining the term "covered security."[673] Because Regulation NMS eliminates the term "covered security," the term "reported security" also is not needed in the Limit Order Display Rule (redesignated as Rule 604). Therefore, the term "NMS stock" replaces the term "covered security" in the Limit Order Display Rule.

Similarly, the Quote Rule used the term "reported security" primarily to define the term "covered security."[674] Because Regulation NMS eliminates the term "covered security," the redesignated Quote Rule (redesignated as Rule 602) also will not use the term "reported security."[675]

c. Subject Security

The Quote Rule and the Vendor Display Rule both used the term "subject security," although they define the term differently. To eliminate this inconsistency, the amended Vendor Display Rule (redesignated as Rule 603) does not use the term "subject security" and Regulation NMS retains a slightly modified version of the definition of "subject security" currently found in the Quote Rule.

The Vendor Display Rule defined the term "subject security" to mean "(i) any reported security; and (ii) any other equity security as to which transaction reports, last sale data or quotation information is disseminated through NASDAQ."[676] As discussed above, the extension of the Nasdaq UTP Plan to include Nasdaq SmallCap securities rendered obsolete the distinction between a "reported security" and a security for which market information is disseminated through Nasdaq.

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[667] The term "electronic communications network" was proposed to be defined in the Proposing Release and Reproposing Release to mean "any electronic system that widely disseminates to third parties orders entered therein by an exchange market maker or OTC market maker, and permits such orders to be executed against in whole or in part; except that the term *electronic communications network* shall not include: (i) Any system that crosses multiple orders at one or more specified times at a single price set by the system (by algorithm or by any derivative pricing mechanism) and does not allow orders to be crossed or executed against directly by participants outside of such times; or (ii) Any system operated by, or on behalf of, an OTC market maker or exchange market maker that executes customer orders primarily against the account of such market maker as principal, other than riskless principal." The Commission has modified this definition to insert the phrase "for the purposes of § 242.602(b)(5)" at the beginning of the definition to avoid inadvertently narrowing the scope of the term "electronic communications network" as used in the term "vendor" in Rule 600(b)(83) (formerly Exchange Act Rule 11Ac1–2(a)(2)). *See also infra*, section VI.B.3.g. This modification makes the definition consistent with the definition of "electronic communications network" in former Rule 11Ac1–1(a)(8).

[668] *See supra*, section VI.B.1.

[669] The Vendor Display Rule and Exchange Act Rule 11Aa3–1 (redesignated as Rule 601) defined the term "reported security" to mean "any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan." *See* former Exchange Act Rules 11Ac1–2(a)(20) and 11Aa3–1(a)(4). As discussed more fully below, the Quote Rule provides a different definition of "reported security."

[670] *See e.g.*, paragraph (a)(4) of the Vendor Display Rule (defining "subject security" to mean "(i) any reported security; and (ii) any other equity security as to which transaction reports, last sale data or quotation information is disseminated through NASDAQ"); and paragraph (a)(6) of the Quote Rule (defining "covered security" to mean "any reported security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as described in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii))").

[671] Although the Quote Rule and the Limit Order Display Rule each defined the term "covered security" as "any reported security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as described in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii))," the scope of the definitions was not identical because each rule defines the term "reported security" differently. The Quote Rule defined a "reported security" to mean "any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." *See* former Exchange Act Rule 11Ac1–1(a)(20). The Limit Order Display Rule defined a "reported security" to mean "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan." *See* former Exchange Act Rule 11Ac1–4(a)(10).

Exchange Act Rule 11Ac1–6 (redesignated as Rule 606) defined the term "covered security" to mean: "(i) any national market system security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as defined in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii)); and (ii) any option contract traded on a national securities exchange for which last sale reports and quotation information are made available pursuant to an effective national market system plan." *See* former Exchange Act Rule 11Ac1–6(a)(1).

[672] The Limit Order Display Rule, the Vendor Display Rule, and Exchange Act Rule 11Aa3–1 defined a "reported security" to mean "any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan." *See* former Exchange Act Rules 11Ac1–4(a)(10), 11Ac1–2(a)(20), and 11Aa3–1(a)(4). The Quote Rule defined the term "reported security" to mean "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." *See* former Exchange Act Rule 11Ac1–1(a)(20). As discussed above, this release adopts substantial modifications to the Vendor Display Rule.

[673] The Limit Order Display Rule defined a "covered security" to include both reported securities and other securities for which market information is disseminated through Nasdaq. *See* former Exchange Act Rule 11Ac1–4(a)(5).

[674] The Quote Rule defined a "covered security" to include both reported securities and other securities for which market information is disseminated through Nasdaq. *See* former Exchange Act Rule 11Aa1–1(a)(6).

[675] In paragraph (b)(1)(ii) of the Quote Rule (redesignated as Rule 602), which requires a registered national securities association to disseminate quotations at all times when last sale information is available with respect to "reported securities," the reference to "reported security" is being replaced by a reference to "NMS security."

[676] *See* former Exchange Act Rule 11Ac1–2(a)(4).

Accordingly, the amended Vendor Display Rule (redesignated as Rule 603) uses the term "NMS stock" rather than "subject security."

The Quote Rule defined the term "subject security" to mean:

(i) With respect to an exchange: (A) Any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported in the consolidated system; and (B) Any other covered security for which such exchange has in effect an election, pursuant to paragraph (b)(5)(i) of this section, to collect, process, and make available to quotation vendors bids, offers, quotation sizes, and aggregate quotation sizes communicated on such exchange; and

(ii) With respect to a member of an association: (A) Any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported in the consolidated system; and (B) Any other covered security for which such member acts in the capacity of an OTC market maker and has in effect an election, pursuant to paragraph (b)(5)(ii) of this section, to communicate to its association bids, offers and quotation sizes for the purpose of making such bids, offers and quotation sizes available to quotation vendors.[677]

Because the Quote Rule (redesignated as Rule 602) will continue to apply to both listed options and equities covered by an effective transaction reporting plan, Regulation NMS's definition of "subject security" revises the Quote Rule's definition of "subject security" by replacing references to a "covered security" with references to an "NMS security." In addition, for the reasons discussed below, Regulation NMS replaces the phrase "reported in the consolidated system" with the phrase "reported pursuant to an effective transaction reporting plan or effective national market system plan."

d. Consolidated System

As noted above, the definition of the term "subject security" in the Quote Rule used the phrase "reported in the consolidated system."[678] Paragraph (a)(5) of the Quote Rule defines the term "consolidated system" to mean "the consolidated transaction reporting system, including a transaction reporting system operating pursuant to an effective national market system plan."[679]

Regulation NMS clarifies the definition of "subject security" by eliminating the phrase "reported in the consolidated system" and replacing it with the phrase "reported pursuant to an effective transaction reporting plan or an effective national market system plan." Thus, Regulation NMS defines a "subject security" to include, among other things: (1) With respect to a national securities exchange, any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and (2) with respect to a member of a national securities association, any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan.[680]

This change provides a clearer definition of "subject security" by indicating that the trading volume referred to in the definition is the trading volume in a security that is reported pursuant to an effective transaction reporting plan or an effective national market system plan. Although replacing the phrase "reported in the consolidated system" with the phrase "reported pursuant to an effective transaction reporting plan or an effective national market system plan" produces a clearer definition of "subject security," it does not alter the scope or the substance of the definition.[681]

e. National Securities Exchange

Section 3(a)(1) of the Exchange Act defines the term "exchange" to mean "any organization, association, or group of persons * * * which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood * * *."[682] Exchange Act Rule 3b–16,[683] adopted in 1998, interprets the statutory definition of "exchange" broadly to include any organization, association, or group of persons that: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade. Exchange Act Rule 3b–16 was designed to provide "a more comprehensive and meaningful interpretation of what an exchange is in light of today's markets."[684]

The Quote Rule's definition of an "exchange market maker" defined the term "national securities exchange" as an "exchange."[685] To avoid confusion between a "national securities exchange" and the broader interpretation of "exchange" set forth in Exchange Act Rule 3b–16, Regulation NMS uses the term "national securities exchange" rather than "exchange" throughout the Regulation. The national securities exchange definition is intended to capture only those entities that operate as national securities exchanges and that are registered as such with the Commission. It is not intended to capture those entities that meet the "exchange" definition under Regulation ATS but that operate as something other than a national securities exchange. The use of this term is consistent with the use of the term "exchange" in the existing NMS rules.

f. OTC Market Maker

The Quote Rule and Exchange Act Rule 11Ac1–5 (redesignated as Rule 605) defined the term "OTC market maker" differently.[686] Unlike the Quote Rule, Exchange Act Rule 11Ac1–5 defined the term "OTC market maker" to include an explicit reference to a securities dealer that holds itself out as being willing to buy from and sell to customers or others in the United States.

[677] *See* former Exchange Act Rule 11Ac1–1(a)(25) (emphasis added).

[678] *Id.*

[679] *See* former Exchange Act Rule 11Ac1–1(a)(5).

[680] Rule 600(b)(73).

[681] This change also impacts certain non-NMS rules that define the term "consolidated system." *See, e.g.*, Exchange Act Rule 10b–18(a)(7) ("consolidated system means the consolidated transaction reporting system contemplated by Rule 11Aa3–1"). As discussed below, the Commission also is amending certain non-NMS rules that are affected by the definitional changes adopted today.

[682] 15 U.S.C. 78c(a)(1).

[683] 17 CFR 240.3b–16.

[684] *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998) (adopting Regulation ATS).

[685] Specifically, the Quote Rule stated that the term "exchange market maker" shall mean "any member of a national securities exchange ('exchange') who is registered as a specialist or market maker pursuant to the rules of such exchange." *See* former Exchange Act Rule 11Ac1–1(a)(9). The statutory requirements applicable to a national securities exchange are set forth in Section 6 of the Exchange Act, 15 U.S.C. 78f.

[686] *Compare* former Exchange Act Rules 11Ac1–1(a)(13) and 11 AC1–5(a)(18).

Regulation NMS retains the reference to transactions with "customers or others in the United States" to indicate clearly that a foreign dealer could be an "OTC market maker" if it acts as a securities dealer with respect to customers or others in the United States.

Accordingly, Regulation NMS defines "OTC market maker" as "any dealer that holds itself out as being willing to buy from and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange."[687]

g. Vendor

The term "vendor" or "quotation vendor" was defined differently in three NMS rules: The Quote Rule, the Vendor Display Rule, and Exchange Act Rules 11Aa3–1 (redesignated as Rule 601).[688] Although the definitions are similar, the definition of "vendor" in the Vendor Display Rule was the most comprehensive because it encompasses any SIP that disseminates transaction reports, last sale data, or quotation information, whereas the other definitions were less complete in identifying the types of information that vendors typically make available. To provide a uniform and comprehensive definition of the term "vendor," Regulation NMS includes the definition of "vendor" as it was defined in the Vendor Display Rule.[689]

h. Best Bid, Best Offer, and National Best Bid and National Best Offer

The Quote Rule and the Vendor Display Rule defined the terms "best bid" and "best offer" differently. The Quote Rule stated that "[t]he terms *best bid* and *best offer* shall mean the highest priced bid and the lowest priced offer."[690] The Vendor Display Rule defined the terms "best bid" and "best offer" as follows:[691]

(i) With respect to quotations for a reported security, the highest bid or lowest offer for that security made available by any reporting market center pursuant to § 240.11Ac1–1 (Rule 11Ac1–1 under the Act) (excluding any bid or offer made available by an exchange during any period such exchange is relieved of its obligations under paragraphs (b)(1) and (2) of § 240.11Ac1–1 by virtue of paragraph (b)(3)(i) thereof); Provided, however, that in the event two or more reporting market centers make available identical bids or offers for a reported security, the best bid or best offer (as the case may be) shall be computed by ranking all such identical bids or offers (as the case may be) first by size (giving the highest ranking to the bid or offer associated with the largest size), then by time (giving the highest ranking to the bid or offer received first in time); and

(ii) With respect to quotations for a subject security other than a reported security, the highest bid or lowest offer (as the case may be) for such security disseminated by an over-the-counter market maker in Level 2 or 3 of NASDAQ.

In addition, Exchange Act Rule 11Ac1–5(a)(7) defined the term "consolidated best bid and offer" to mean "the highest firm bid and the lowest firm offer for a security that is calculated and disseminated on a current and continuous basis pursuant to an effective national market system plan."

Regulation NMS retains the definitions of "best bid" and "best offer" used in the Quote Rule. A new term called "national best bid and national best offer": (1) Replaces the term "best bid and best offer" as that term is used in the Vendor Display Rule; and (2) replaces the term "consolidated best bid and offer" as that term is used in Exchange Act Rule 11Ac1–5 (redesignated as Rule 605). This new term refers to the best quotations that are calculated and disseminated by a plan processor pursuant to an effective national market system plan.[692] The definition of "national best bid and national best offer" also addresses instances where multiple market centers transmit identical bids and offers to the plan processor pursuant to an NMS plan by establishing the way in which these bids and offers are to be prioritized.[693]

i. Bid, Offer, Customer, Nasdaq Security, Quotations, Quotation Information, and Responsible Broker or Dealer

Regulation NMS also updates or clarifies the following terms in the NMS rules: "Bid;" "offer;" "customer;" "Nasdaq security;" "quotations"; "quotation information;" and "responsible broker or dealer."

The Quote Rule defined the terms "bid" and "offer" to mean "the bid price and the offer price communicated by an exchange member or OTC market maker to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of a covered security, as either principal or agent, but shall not include indications of interest."[694] Regulation NMS updates this definition by replacing the term "OTC market maker" with the phrase "member of a national securities association" and calls the term "bid or offer" rather than "bid and offer" to reflect the fact that the terms are not always used in the conjunctive. Modifying the definition to apply to any member of a national securities association clarifies that bids and offers include quotations communicated not only by OTC market makers but also by ATSs, ECNs, and order entry firms that are members of the NASD but that are not market makers.

Expanding the definition of "bid" and "offer" could have the unintended consequence of also expanding the scope of the Quote Rule (redesignated as Rule 602) where those terms are used to apply to members of a national

[687] The definition of "OTC market maker" uses the term "NMS stock" because there is no OTC market in standardized options.

[688] The Quote Rule defined the term "quotation vendor" to mean "any securities information processor engaged in the business of disseminating to brokers, dealers or investors on a real-time basis, bids and offers made available pursuant to this section, whether distributed through an electronic communications network or displayed on a terminal or other display device." *See* former Exchange Act Rule 11Ac1–1(a)(19). Former Exchange Act Rule 11Aa3–1(a)(11) defined the term "vendor" to mean "any securities information processor engaged in the business of disseminating transaction reports or last sale data with respect to transactions in reported securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker or interrogation device." The Vendor Display Rule defined the term "vendor" to mean "any securities information processor engaged in the business of disseminating transaction reports, last sale data or quotation information with respect to subject securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker or interrogation device." *See* former Exchange Act Rule 11Ac1–2(a)(2).

[689] *See* former Exchange Act Rule 11Ac1–2(a)(2). The Commission modified the adopted definition of vendor to conform to a technical change being made to the definition of "quotations" and "quotation information" in Rule 600(b)(62). *See infra*, note 699 and accompanying text.

[690] *See* former Exchange Act Rule 11Ac1–1(a)(3).

[691] *See* former Exchange Act Rule 11Ac1–2(a)(15).

[692] The definition of "reporting market center" in paragraph (a)(14) of the Vendor Display Rule, which was incorporated into that Rule's definitions of "best bid" and "best offer," is no longer necessary and therefore is being deleted.

[693] *See* Rule 600(b)(42).

[694] *See* former Exchange Act Rule 11Ac1–1(a)(4). Paragraph (a)(6) of the Vendor Display Rule used the Quote Rule's definition of "bid" and "offer" for reported securities, but it defined "bid" and "offer" for Nasdaq SmallCap securities as "the most recent bid or offer price of an over-the-counter market maker disseminated through Level 2 or 3 of NASDAQ." Because Nasdaq SmallCap securities now are reported securities, it is unnecessary to maintain the distinction between reported securities and Nasdaq SmallCap securities. Accordingly, to update and provide a single definition of the terms "bid" and "offer," Regulation NMS eliminates the definitions of "bid" and "offer" used in the Vendor Display Rule and retains modified versions of the terms as they are defined in the Quote Rule.

securities association that are not OTC market makers (*e.g.*, ECNs and ATSs). To avoid this unintended expansion of the scope of the Quote Rule (redesignated as Rule 602), Regulation NMS proposed a revised version of the Quote Rule's definition of "responsible broker or dealer."[695] In particular, Regulation NMS proposed to amend the portion of the definition of "responsible broker or dealer" found in paragraph (a)(21)(ii) of the Quote Rule[696] to limit its scope to bids and offers communicated by an OTC market maker. The Commission does not believe, however, that amending the definition of "responsible broker or dealer" is necessary because the definition of the term "subject security" effectively serves to limit the scope of the Quote Rule, with respect to a member of a national securities association, to members acting in the capacity of an OTC market maker.[697] The Commission therefore is modifying the proposed definition of "responsible broker or dealer" in Rule 600(b)(65)(ii) to replace the term "an OTC marker maker" with the term "a member of an association" and to replace the term "the OTC market maker" with the term "the member."[698]

The Commission also is making a non-substantive modification to the definition of "quotations" and "quotation information" in Rule 600(b)(62) from the reproposal to delete the term "quotation information" and to delete the phrase "where applicable, quotations sizes and aggregate quotation sizes." The deleted term and phrase are no longer necessary because they were included in a definition used in the Vendor Display Rule, which is being substantially modified and no longer uses the deleted term or phrase.[699] As adopted, Rule 600(b)(62) simply defines the term "quotation" to mean a bid or an offer.

Regulation NMS also amends the definition of the term "customer." The Quote Rule defined that term to mean "any person that is not a registered broker-dealer."[700] To indicate that the scope of the definition includes broker-dealers that are exempt from registration as well as registered broker-dealers, Regulation NMS revises the definition by deleting the term "registered." Thus, Regulation NMS defines the term "customer" to mean "any person that is not a broker-dealer."

Exchange Act Rule 11Aa3–1 (redesignated as Rule 601) defined the term "NASDAQ security" to mean "any registered equity security for which quotation information is disseminated in the National Association of Securities Dealers Automated Quotation system ("NASDAQ")."[701] This acronym is now outdated. Therefore, to modernize this definition and to ensure that any type of registered security that Nasdaq lists is covered by the definition, Regulation NMS defines the term "Nasdaq security" to mean "any registered security listed on The Nasdaq Stock Market, Inc."

4. Definitions in the Regulation NMS Rules Adopted Today

Rule 600(b) includes a number of new definitions used in Regulation NMS Rules 610 through 612, which are adopted in this release. These new terms are discussed in detail in Sections II through V above. Specifically, for the reasons discussed above, Regulation NMS adopts the following terms: automated quotation, automated trading center, consolidated display, consolidated last sale information, intermarket sweep order, manual quotation, protected bid or protected offer, SRO display-only facility, SRO trading facility, trade-through, and trading center.

C. Changes to Other Rules

In addition to the changes described above, the rules adopted today amend a number of rules that cross-reference current NMS rules or that use terms that Regulation NMS amends or eliminates. These amendments are intended to be non-substantive. Specifically, the rules adopted today make conforming changes to the following rules:[702] § 200.30–3;[703] § 200.800, Subpart N;[704] § 201.101;[705] Rule 144[706] under the Securities Act of 1933;[707] Exchange Act Rule 0–10;[708] Exchange Act Rule 3a51–1;[709] Exchange Act Rule 3b–16;[710] Exchange Act Rules 10a–1;[711] Exchange Act Rule 10b–10;[712] Exchange Act Rule 10b–18;[713] Exchange Act Rule 15b9–1;[714] Exchange Act Rule 12a–7;[715] Exchange Act Rule 12f–1;[716] Exchange Act Rule 12f–2;[717] Exchange Act Rule 15c2–11;[718] Exchange Act Rule 19c–

[695] *See* former Exchange Act Rule 11Ac1–1(a)(21).

[696] *See* former Exchange Act Rule 11Ac1–1(a)(21)(ii).

[697] Rule 600(b)(73)(ii) as adopted defines "subject security" to mean, with respect to a member of a national securities association, (A) any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and (B) any other NMS security for which such member acts in the capacity of an OTC market maker and has in effect an election, pursuant to § 242.602(a)(5)(ii), to communicate to its association bids, offers, and quotation sizes for the purpose of making such bids, offers, and quotation sizes available to a vendor.

[698] As adopted, Rule 600(b)(65)(ii) defines the term "responsible broker or dealer" to mean, when used with respect to bids and offers communicated by a member of an association to a broker or dealer or a customer, the member communicating the bid or offer (regardless of whether such bid or offer is for its own account or on behalf of another person). This modification conforms the definition of "responsible broker or dealer" in Rule 600(b)(65)(ii) as adopted to the definition of "responsible broker or dealer" in former Rule 11Ac1–1(a)(21)(ii) with respect to its application to a member of an association.

The Commission also is making a change to paragraph (b)(3)(i) of Rule 602 from the reproposal to insert the word "size" after the phrase "such revised quotation." This change will correct the inadvertent deletion of "size" in a prior amendment to this rule (the Quote Rule) and will not have any substantive effect.

[699] Conforming modifications are being made to the definition of "dynamic market monitoring device," "interrogation device," and "vendor" in Rules 600(b)(20), 600(b)(31), and 600(b)(83) to replace the term "quotation information" with the term "quotations."

[700] *See* former Exchange Act Rule 11Ac1–1(a)(26).

[701] *See* former Exchange Act Rule 11Aa3–1(a)(6).

[702] In addition, the Commission voted to approve a conforming amendment to Exchange Act Rule 3a55–1 and Commodity Exchange Act ("CEA") Rule 41.11. These rules were adopted jointly by the Commission and the Commodity Futures Trading Commission ("CFTC") pursuant Section 3(a)(55)(F)(ii) of the Exchange Act and Section 1a(25)(E)(ii) of the CEA and the amendment also must be adopted jointly. Section 3(a)(55)(F)(ii) of the Exchange Act and Section 1a(25)(E)(ii) of the CEA provide that the two Commissions shall, by rule or regulation, jointly specify the method to be used to determine market capitalization and dollar value of average daily trading volume for purposes of definition of "narrow-based security index" (and exclusions from that definition). Exchange Act Rule 3a55–1 and CEA Rule 41.11 refer to "reported securities as defined in § 240.11Ac1–1." The rules adopted today eliminate the term "reported security" from the NMS rules and replace it with the term "NMS security" or "NMS stock," depending on the scope of the particular rule. To reflect these changes, the joint technical amendment would replace the phrase "reported securities as defined in § 240.11Ac1–1" with the phrase "NMS securities, as defined in § 242.600 of this chapter" in Exchange Act Rule 3a55–1 and make a corresponding change in CEA Rule 41.11.

[703] 17 CFR 200.30–3. In addition to conforming changes, the Commission is amending this rule to delegate to the Director of the Division of Market Regulation the authority to grant exemptions to Rules 610 through 612.

[704] 17 CFR 200.800, Subpart N.

[705] 17 CFR 201.101.

[706] 17 CFR 230.144.

[707] 15 U.S.C. 77a *et seq.*

[708] 17 CFR 240.0–10.

[709] 17 CFR 240.3a51–1.

[710] 17 CFR 240.3b–16.

[711] 17 CFR 240.10a–1.

[712] 17 CFR 240.10b–10.

[713] 17 CFR 240.10b–18.

[714] 17 CFR 240.15b9–1.

[715] 17 CFR 240.12a–7.

[716] 17 CFR 240.12f–1.

[717] 17 CFR 240.12f–2.

[718] 17 CFR 240.15c2–11.

3;[719] Exchange Act Rule 19c–4;[720] Exchange Act Rule 31;[721] Rule 100 of Regulation M under the Exchange Act;[722] Rule 300 of Regulation ATS under the Exchange Act;[723] Rule 301 of Regulation ATS under the Exchange Act;[724] § 249.1001;[725] and Rule 17a–7 under the Investment Company Act of 1940.[726]

VII. Effective Date and Phased-In Compliance Dates

Rules 610, 611, 612, the amendment to Rule 301 of Regulation ATS, the amendments to the Market Data Rules and Plans discussed above in Section V, and the Regulation NMS amendments discussed above in Section VI will become effective on August 29, 2005. The compliance date for Rule 612, the amendment to Rule 301 of Regulation ATS, the amendments to the Market Data Rules and Plans discussed above in Section V other than the Allocation Amendment, and the Regulation NMS amendments discussed above in Section VI will be the same date as the effective date. Given the significant systems and other changes necessary to implement the remaining regulatory changes adopted today, the Commission has decided to establish delayed compliance dates for these new regulatory requirements.

Compliance with Rules 610 and Rule 611 will be phased-in as follows:

- *Phase I.* The first phase-in of NMS stocks subject to Rule 610 and 611 will begin on June 29, 2006. Beginning on June 29, 2006, and continuing until the beginning of Phase II, all trading centers must begin trading 100 NMS stocks of each of Networks A and C, and 50 NMS stocks of Network B, pursuant to the requirements of Rules 610 and 611. The particular NMS stocks will be chosen by the primary listing market, in consultation with Commission staff, to be reasonably representative of the range of each Network's securities. The primary purpose of Phase 1 is to allow all market participants to verify the functionality of their systems and procedures necessary to effectively comply with the Rules.
- *Phase II.* Phase II will begin on August 31, 2006. As of that date, trading centers must begin trading all NMS stocks pursuant to the requirements of Rules 610 and 611.

The compliance date for the Allocation Amendment to the Plans will be September 1, 2006.

VIII. Paperwork Reduction Act

A. Order Protection Rule

The Order Protection Rule contains collection of information requirements within the meaning of the Paperwork Reduction Act of 1995.[727] The Commission published a notice requesting comment on the collection of information requirements in both the Proposing Release and Reproposing Release, and submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number. The title of the affected collection is "Order Protection Rule" under OMB control number 3235–0600.

In the Proposing Release, the Commission proposed to create three new information collections.[728] The first collection of information arose from the proposed requirement that trading centers adopt policies and procedures reasonably designed to prevent the execution of a transaction at prices inferior to prices displayed by other trading centers. The other two collections of information related to requirements in a proposed exception to the Order Protection Rule included in the Proposing Release—the opt-out exception.[729] The Order Protection Rule as reproposed did not, and as adopted does not, contain an opt-out exception, and therefore, the collections of information associated with the proposed opt-out exception are no longer applicable.

The discussion below reflects the information collection requirements of the Order Protection Rule as adopted.

1. Summary of Collection of Information

The Order Protection Rule requires a trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution of trades on that trading center at prices inferior to protected quotations displayed by other trading centers, unless a valid exception applies, and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception. The nature and extent of the policies and procedures that a trading center will be required to establish to comply with this requirement will depend upon the type, size, and nature of the trading center.

2. Proposed Use of Information

The requirement that each trading center establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution of trades on that trading center at prices inferior to protected quotations displayed by other trading centers or to assure compliance with the terms of an exception will help ensure that the trading center and its customers, subscribers, members, and employees, as applicable, generally avoid engaging in trade-throughs, unless a valid exception is applicable.

3. Respondents

The requirement for each trading center to establish written policies and procedures reasonably designed to prevent the execution of trade-throughs will apply to eight registered national securities exchanges that trade NMS stocks and the NASD,[730] and approximately 600 broker-dealers registered with the Commission.[731] The Commission did not receive any comment on these estimates.

The Commission has considered each of these respondents for the purposes of calculating the reporting burden under the Order Protection Rule.

4. Total Annual Reporting and Recordkeeping Burden

Trading centers will need to develop written policies and procedures for preventing and monitoring for trade-throughs that do not fall within an enumerated exception, and, if relying on such an exception, that are reasonably

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[719] 17 CFR 240.19c–3.

[720] 17 CFR 240.19c–4.

[721] 17 CFR 240.31.

[722] 17 CFR 242.100.

[723] 17 CFR 242.300.

[724] 17 CFR 242.301. The Commission also is adopting a technical change to Rule 301(b)(3)(iii) of Regulation ATS to correct a cross-reference to Rule 301(b)(3)(ii)(A) by deleting the reference to subparagraph (A). This change has no substantive effect.

[725] 17 CFR 249.1001.

[726] 17 CFR 270.17a–7.

[727] 44 U.S.C. 3501 *et seq.* ("Paperwork Reduction Act").

[728] *See* section III.G.1. of the Proposing Release.

[729] *See* section III.G.1. of the Proposing Release.

[730] There are eight national securities exchanges (Amex, BSE, CBOE, CHX, NSX, NYSE, Phlx and PCX) and one national securities association (NASD) that trade NMS stocks and thus will be subject to the Rule. The ISE does not trade NMS stocks and thus will not be subject to the Rule.

[731] This estimate includes the approximately 585 firms that were registered equity market makers or specialists at year-end 2003 (this number was derived from annual FOCUS reports and discussion with SRO staff), as well as ATSs that operate trading systems that trade NMS stocks. The Commission believes it is reasonable to assume that in general, firms that are block positioners—*i.e.*, firms that are in the business of executing orders internally—are the same firms that are registered market makers (for instance, they may be registered as a market maker in one or more Nasdaq stocks and carry on a block positioner business in exchange-listed stocks), especially given the amount of capital necessary to carry on such a business.

designed to assure compliance with the terms of the exception, to assure that they are in compliance with the Rule.

Although the exact nature and extent of the required policies and procedures that a trading center will be required to establish likely will vary depending upon the nature of the trading center (*e.g.*, SRO vs. non-SRO, full service broker-dealer vs. market maker), the Commission broadly estimates that it would take an SRO trading center approximately 270 hours of legal,[732] compliance,[733] information technology[734] and business operations personnel[735] time,[736] and a non-SRO trading center approximately 210 hours of legal, compliance, information technology and business operations personnel time,[737] to develop the required policies and procedures.

Included within this estimate, the Commission expects that SRO and non-SRO respondents may incur one-time external costs for out-sourced legal services. While the Commission recognizes that the amount of legal outsourcing utilized to help establish written policies and procedures may vary widely from entity to entity, it estimates that on average, each trading center would outsource 50 hours of legal time in order to establish policies and procedures in accordance with the Rule.

The Commission estimates that there will be an initial one-time burden of 220 burden hours per SRO trading center or 1,980 hours,[738] and 160 burden hours per non-SRO trading center[739] or 96,000 hours, for a total of 97,980 burden hours to establish policies and procedures reasonably designed to prevent the execution of a trade-through, for an estimated one-time initial cost of $8,646,405.[740] The Commission estimates a capital cost of approximately $9,135,000 for both SRO and non-SRO trading centers resulting from outsourced legal work[741] for a total one-time initial cost of $17,781,405.[742]

Once a trading center has established written policies and procedures reasonably designed to prevent trade-throughs in its market, the Commission estimates that it will take the average SRO and non-SRO trading center approximately two hours per month of internal legal time and three hours of internal compliance time to ensure that its written policies and procedures are up-to-date and remain in compliance with Rule 611. The Commission staff estimates that these ongoing costs will be 60 hours annually per respondent, for a total estimated annual cost of $3,456,684.[743]

The Commission did not receive any comments on its PRA burden estimates.

5. General Information About Collection of Information

This collection of information will be mandatory. The Commission expects that the written policies and procedures that will be generated pursuant to Rule 611 will be communicated to the members, subscribers, and employees (as applicable) of all entities covered by the Rule. To the extent that this information is made available to the Commission, it will not be kept confidential. Any records generated in connection with the Rule's requirement to establish written policies and procedures will be required to be preserved in accordance with, and for the periods specified in, Exchange Act Rules 17a–1[744] and 17a–4(e)(7).[745]

B. Access Rule

In the Proposing Release and Reproposing Release, the Commission requested comment on its preliminary view that proposed Rule 610 and the proposed amendment to Rule 301(b)(5) under Regulation ATS do not contain a collection of information requirement as defined by the Paperwork Reduction Act.[746] No comments were received that addressed the issue. The Commission continues to believe that Rule 610 and the amendment to Rule 301(b)(5) do not contain a collection of information requirement.

C. Sub-Penny Rule

In the Proposing Release and Reproposing Release, the Commission stated its preliminary view that proposed Rule 612 does not contain a collection of information requirement as defined by the Paperwork Reduction Act.[747] No comments were received that addressed this issue. The Commission continues to believe that Rule 612 does not contain a collection of information requirement.

[732] Based on industry sources, the Commission estimates that the average hourly rate for outsourced legal service in the securities industry is between $150 per hour and $300 per hour. For purposes of this Release, the Commission will use the highest rate of $300 per hour to determine potential outsourced legal costs associated with the proposed rule. For in-house legal services, the Commission estimates that the average hourly rate for an attorney in the securities industry is approximately $82 per hour. The $82 per hour figure for an attorney is from the Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2003* (Sept. 2003), adjusted by the SEC staff for an 1800-hour work-year with a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support.

[733] The Commission estimates that the average hourly rate for an assistant compliance director in the securities industry is approximately $103 per hour. The $103 per hour figure for an assistant compliance director is from the Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2003* (Sept. 2003), adjusted by the SEC staff for an 1800-hour work-year with a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support.

[734] The Commission estimates that the average hourly rate for a senior computer programmer in the securities industry is approximately $67 per hour. The $67 per hour figure for a senior computer programmer is from the Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2003* (Sept. 2003), adjusted by the SEC staff for an 1800-hour work-year with a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support.

[735] The Commission estimates that the average hourly rate for an operations manager in the securities industry is approximately $70 per hour. The $70 per hour figure for an operations manager is from the Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (Sept. 2002), adjusted by the SEC staff for an 1800-hour work-year with a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support.

[736] The Commission anticipates that of the 270 hours it estimates will be spent to establish the required policies and procedures, 120 hours will be spent by legal personnel, 105 hours will be spent by compliance personnel, 20 hours will be spent by information technology personnel and 25 hours will be spent by business operations personnel of the SRO trading center.

[737] The Commission anticipates that of 210 hours it estimates will be spent to establish policies and procedures, 87 hours will be spent by legal personnel, 77 hours will be spent by compliance personnel, 23 hours will be spent by information technology personnel and 23 hours will be spent by business operations personnel of the non-SRO trading center.

[738] The estimated 1,980 burden hours necessary for SRO trading centers to establish policies and procedures are calculated by multiplying nine times 220 hours (9 × 220 hours = 1,980 hours).

[739] The estimated 96,000 burden hours necessary for non-SRO trading centers to establish policies and procedures are calculated by multiplying 600 times 160 hours (600 × 160 hours = 96,000 hours).

[740] This figure was calculated as follows: (70 legal hours × $82) + (105 compliance hours × $103) + (20 information technology hours × $67) + (25 business operation hours × $70) = $19,645 per SRO × 9 SROs = $176,805 total cost for SROs; (37 legal hours × $82) + (77 compliance hours × $103) + (23 information technology hours × $67) + (23 business operation hours × $70) = $14,116 per broker-dealer × 600 broker-dealers = $8,469,600 total cost for broker-dealers; $176,805 + $8,469,600 = $8,646,405.

[741] This figure was calculated as follows: (50 legal hours × $300 × 9 SROs) + (50 legal hours × $300 × 600 broker-dealers) = $9,135,000.

[742] This figured was calculated by adding $8,646,405 and $9,135,000.

[743] This figure was calculated as follows: (2 legal hours × 12 months × $82) × (9 + 600) + (3 compliance hours × 12 months × $103) × (9 + 600)) = $3,456,684.

[744] 17 CFR 240.17a–1.

[745] 17 CFR 240.17a–4(e)(7).

[746] Proposing Release, 69 FR at 11160; Reproposing Release, 69 FR at 77476.

[747] Proposing Release, 69 FR at 11172; Reproposing Release, 69 FR at 77476.

D. Market Data Rules and Plan Amendments

In the Proposing Release and Reproposing Release, the Commission stated its preliminary view that the proposed amendments to the joint-industry plans and to Exchange Act Rules 11Aa3–1 and 11Ac1–2 (redesignated as Rules 601 and 603) do not impose a collection of information requirement as defined by the Paperwork Reduction Act.[748] No comments were received that addressed this issue. The Commission continues to believe that these amendments do not contain a collection of information requirement.

E. Regulation NMS

In the Proposing Release and Reproposing Release, the Commission stated its preliminary view that proposed Rule 600, the redesignation of the NMS rules, and the conforming amendments to various rules do not impose a collection of information requirement as defined by the Paperwork Reduction Act.[749] No comments were received that addressed this issue. The Commission continues to believe that these amendments do not contain a collection of information requirement.

IX. Consideration of Costs and Benefits

In the Proposing Release and Reproposing Release, the Commission identified certain costs and benefits of the Regulation NMS proposals, and, to help evaluate the costs and benefits, requested comment on all aspects of the costs and benefits and encouraged commenters to identify or supply any relevant data concerning the costs or benefits of the proposal.[750] To the extent commenters discussed costs and benefits, the Commission has considered those comments.

A. Order Protection Rule

Rule 611 requires a trading center (which includes national securities exchanges and national securities associations that operate SRO trading facilities, ATSs, market makers, and block positioners) to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations, and, if relying on an exception, that are reasonably designed to assure compliance with the terms of the exception. To qualify for protection, a quotation is required to be displayed and immediately accessible through automatic execution. The Rule also requires a trading center to regularly surveil to ascertain the effectiveness of the policies and procedures and to take prompt remedial action to remedy deficiencies in such policies and procedures. As discussed above in Section II.A.5, the Commission has determined to adopt the Market BBO Alternative with respect to the scope of quotations that will be protected under the Rule. The Commission believes that providing enhanced protection for the best bids and offers of each exchange, The NASDAQ Stock Market, and the ADF will represent a major step toward achieving the objectives of intermarket price protection, but with fewer of the costs and potential drawbacks associated with the Voluntary Depth Alternative.

Rule 611 includes a variety of exceptions to make intermarket price protection as efficient and workable as possible. These include an intermarket sweep exception, which allows market participants simultaneously to access multiple price levels at different trading centers—a particularly important function now that trading in penny increments has dispersed liquidity across multiple price levels. The intermarket sweep exception enables trading centers that receive sweep orders to execute those orders immediately, without waiting for better-priced quotations in other markets to be updated. In addition, Rule 611 provides exceptions for the quotations of trading centers experiencing, among other things, a material delay in providing a response to incoming orders, as well as for flickering quotations with prices that have been displayed for less than one second. Both exceptions serve to limit the application of Rule 611 to quotations that are truly automated and accessible. In response to commenters, the Commission also is including in the Rule an exception for certain "stopped" orders.[751]

1. Benefits

Although commenters were divided on the central issue of whether intermarket protection of displayed quotations is needed to promote the fairest and most efficient markets for investors, many commenters strongly supported the adoption of a rule against trade-throughs without an opt-out for all NMS stocks to promote best execution of market orders, to protect the best displayed prices, and encourage the public display of limit orders.[752] These commenters noted that such a rule would encourage the use of displayed limit orders, thus increasing depth and liquidity in the market.[753] Some of these commenters also stated that the trade-through proposal would increase investor confidence by helping to eliminate the impression of unfairness when an investor's order executes at a price that is worse than the best displayed quotation, or when a trade occurs at a price that is inferior to the investor's displayed order.[754] As discussed above in Section II.A.1, the Commission agrees with these commenters.

The Commission believes that the Order Protection Rule will enhance the overall fairness and efficiency of the NMS and produce significant benefits for investors. The Order Protection Rule will benefit investors by promoting the best execution of customer market orders, promoting the fair treatment of customer limit orders, and strengthening protection of limit orders to promote greater depth and liquidity for NMS stocks and thereby minimize investor transaction costs. By providing greater protection for displayed prices, the Rule should serve to enhance the depth and liquidity of the NMS, and thus contribute to the maintenance of fair and orderly markets. By better protecting the interests of investors, both those that post limit orders and those that execute against posted limit orders, the Rule will promote investor confidence in the NMS. The Rule will be a significant improvement over the existing ITS trade-through rule, and will level the competitive playing field among markets by eliminating the potential advantage that the ITS rule afforded to manual markets.

By requiring trading centers to establish written policies and procedures reasonably designed to prevent trade-throughs on their markets and to comply with exceptions, and by requiring them to regularly surveil to ascertain the effectiveness of the policies and procedures and to take prompt remedial action to remedy deficiencies in such policies and procedures, the Commission believes that the Rule also will offer greater assurance, on an order-by-order basis, to investors that submit market orders that their orders in fact will be executed at

[748] Proposing Release, 69 FR at 11186; Reproposing Release, 69 FR at 77476–77.

[749] Proposing Release, 69 FR at 11197; Reproposing Release, 69 FR at 77477.

[750] Proposing Release, 69 FR at 11148–11150, 11161, 11172–73, 11186–89, 11197–98; Reproposing Release, 69 FR at 77441, 77474, 77475, 77477, 77480, 77488, 77489.

[751] *See supra*, section II.A.4.

[752] *See supra*, section II.A.1.

[753] *See, e.g.*, BNY Letter at 2; Consumer Federation Letter at 2; ICI Letter at 7.

[754] *See, e.g.*, Consumer Federation Letter at 2; ICI Letter at 7.

the best readily available prices, which can be difficult for investors, particularly retail investors, to monitor. As noted above, some commenters stated that the trade-through proposal would increase investor confidence by helping to eliminate the impression of unfairness when an investor's order executes at a price that is worse than the best displayed quotation.[755] Most retail investors justifiably expect that their orders will be executed at the NBBO. Investors generally can know the best quoted prices at the time they place an order by referring to the consolidated quotation stream for a stock. In the interval between order submission and order execution, however, quoted prices can change. If the order execution price differs from the quoted price at order submission, it can be particularly difficult for retail investors to assess whether the difference was attributable to changing quoted prices or to an inferior execution by the market. By protecting the BBO of each exchange, the NASDAQ Stock Market, and the NASD, the Rule will further the interests of investors, particularly retail investors, in obtaining—and the ability of broker-dealers to achieve—best execution on an order-by-order basis, because the market to which a broker-dealer routes an order will not execute the order at a price that is inferior to a protected bid or offer displayed on the other market (unless an exception applies).[756]

The Order Protection Rule also will promote the fair and orderly treatment of limit orders for NMS stocks. Many of the limit orders that are bypassed are small orders that often will have been submitted by retail investors. Retail investors will participate directly in the U.S. equity markets only to the extent that they perceive that their orders will be treated fairly and efficiently. The Commission agrees with commenters that the Order Protection Rule will increase investor confidence by helping to eliminate the impression of unfairness when a trade occurs at a price that is inferior to the investor's displayed order.[757] By better protecting the interests of all investors—both those that execute against posted limit orders and those that post limit orders—the Rule will bolster investor confidence in the integrity of the NMS, which will encourage investors to be more willing to invest in the market, thus adding depth and liquidity to the markets and promoting the ability of listed companies to raise capital.

The Order Protection Rule also is designed to promote greater depth and liquidity for NMS stocks and thereby minimize implicit investor transaction costs. Depth and liquidity will be increased only to the extent that limit order users are given greater incentives than currently exist to display a larger percentage of their trading interest. Investors who post limit orders should not see trades occurring on another market at a price inferior to their orders, except in circumstances where an exception applies. Price protection encourages the display of limit orders by increasing the likelihood that they will realize an execution in a timely manner. Limit orders typically establish the best prices for an NMS stock. Greater use of limit orders will enhance price discovery and increase market depth and liquidity, thereby improving the quality of execution for large orders of institutional investors. The Commission believes that the Order Protection Rule is necessary to, and will serve to, enhance protection of displayed prices. By requiring trading centers to establish written policies and procedures reasonably designed to prevent trade-throughs and to comply with exceptions, and by requiring them to regularly surveil to ascertain the effectiveness of the policies and procedures and to take prompt remedial action to remedy deficiencies in such policies and procedures, the Rule will help ensure that displayed limit orders are not routinely bypassed by transactions occurring in other markets at inferior prices.

Almost all commenters agreed that the current ITS trade-through rule must be fixed to accommodate the realities of today's NMS, in particular the differences in operation among automated and non-automated markets. The Commission believes that Rule 611, by providing protection only for automated quotations displayed by automated trading centers, will significantly update the ITS trade-through rule. Intermarket efficiency and certainty of execution in the NMS will be improved as automated markets will no longer need to wait for responses from non-automated markets and thus will be able to execute trades more quickly without regard for potentially unavailable quotations displayed on non-automated markets. The Rule also will level the playing field by eliminating the potential competitive advantage the existing ITS rule provides to manual markets. In addition, by providing an incentive for non-automated markets to automate—because market participants may be less likely to send their order flow to a market center whose orders are not protected by the Order Protection Rule—the Rule generally should improve the accessibility of bids and offers for all investors and increase the efficiency of the NMS.

The Commission believes that the benefits of strengthening price protection for exchange-listed stocks (*e.g.*, by eliminating the gaps in ITS coverage of block positioners and 100-share quotes) and introducing price protection for Nasdaq stocks will be substantial, although the total amount is difficult to quantify. One objective, though quite conservative, estimate of benefits is the dollar amount of quotations that annually are traded through. The Commission staff's analysis of trade-through rates indicates that over 12 billion shares of displayed quotations in Nasdaq and NYSE stocks were traded through in 2003, by an average amount of 2.3 cents for Nasdaq stocks and 2.2 cents for NYSE stocks.[758] These traded-through quotations represent approximately $209 million in Nasdaq stocks and $112 million in NYSE stocks, for a total of $321 million in bypassed limit orders and inferior prices for investors in 2003 that could have been addressed by strong trade-through protection.[759] The Commission believes that this $321 million estimated *annual* benefit, particularly when combined with the benefits of enhanced investor confidence in the fairness and orderliness of the equity markets, justifies the one-time costs of implementation and ongoing annual costs of the Order Protection Rule.

Two commenters on the reproposal asserted that the dollar amount of traded-through quotations overstated the benefits of order protection because "trading is for the most part a zero-sum game."[760] They believed that trades executed at inferior prices were random noise that sometimes benefited and sometimes disadvantaged a particular investor, stating that "[i]t is only if one class of investors systematically loses out to another class as a result of trade-throughs that there is a problem* * *"[761]

The Commission does not agree that trades executed at inferior prices should be considered merely a transfer of benefits from one group of investors to another equally-situated group of investors. There are at least three parties

[755] *See supra*, note 59.

[756] The Commission emphasizes that adoption of Rule 611 would in no way lessen a broker-dealer's duty of best execution. *See supra*, section II.B.4.

[757] *See supra*, note 59.

[758] Trade-Through Study at 3, 5.

[759] *Id.* at 3.

[760] Angel Reproposal Letter at 4; *see also* Fidelity Reproposal Letter at 8.

[761] Angel Reproposal Letter at 4.

affected by every trade-through transaction (1) The party that received an inferior price; (2) the party whose superior-priced limit order was traded-through; and (3) the contra party to the trade-through transaction that received an advantageous price. The redistributions of welfare resulting from trade-through transactions cannot reasonably be expected to occur randomly across these parties. Customers of brokers that are doing a poor job of routing orders are more likely to be harmed than customers of brokers that are doing a better job.[762] Investors who generally submit limit orders at the best prices are more likely to be harmed than customers who generally submit less aggressively-priced limit orders.

Thus, trade-through transactions can result in direct harm to two parties, as well as more general harm to the efficiency of the markets by dampening the incentive for aggressive quoting. Moreover, even when the party receiving an inferior price does so willingly (such as when an institution accepts a block trade at a price away from the inside quotation),[763] the party whose quotation was traded through and the efficiency of the markets still are harmed. Finally, many trade-throughs are dealer internalized trades, where the party receiving the advantageous price is not an investor but a market intermediary, and therefore such trades cannot be considered a transfer of benefits from one group of investors to another equally-situated group of investors. This transfer of benefits from investors to market intermediaries cannot be dismissed as mere "random noise."

In addition, economic theory predicts that, in an auction market, buyers who place the highest value on a stock will bid most aggressively.[764] If an incoming market order is allocated to an investor who is not bidding the best price, this re-allocation is neither zero-sum nor random. It systematically reallocates trades away from those investors for whom the welfare gains would be largest. The argument also can be framed in terms of an investor's preferences with respect to the tradeoff between price and execution speed. Among those investors who trade using limit orders, we would expect more aggressive limit orders to be submitted by those investors who place more value on speed or certainty of execution and relatively less value on price. Conversely, we would expect investors who place a lower value on speed and certainty of execution and a higher value on price to submit less aggressive limit orders. When an incoming market order is executed against a limit order with an inferior price, the result is: (1) A faster execution for an investor who does not place as much value on speed of execution; and (2) a lost execution or slower execution for the investor who places a higher value on prompt execution. This is not a zero-sum redistribution.

Moreover, the $321 million estimate is a conservative measure of the total benefits of the Order Protection Rule. It does not attempt to measure any gains from trading associated with investors' private values, beyond those expressed in their limit order prices. The Order Protection Rule can be expected to generate other categories of benefits that are not quantified in the $321 million estimate, such as the benefits that can be expected to result from increased use of limit orders, increased depth, and increased order interaction.

Thus, the Commission believes that the $321 million estimate of benefits is conservative because it is based solely on the size of displayed quotations in the *absence* of strong price protection. In essence, it measures the problem—a shortage of quoted depth—that the Order Protection Rule is designed to address, rather than the benefits that it could achieve. Every trade-through transaction potentially sends a message to market participants that their displayed quotations can be and are ignored by other market participants. When the total share volume of trade-through transactions that do not interact with displayed quotations reaches 9% and above for hundreds of the most actively traded NMS stocks,[765] this message is unlikely to be missed by those who watched their quotations being traded through. Certainly, the common practice of trading through displayed size is most unlikely to prompt market participants to display even greater size.

A primary objective of the Order Protection Rule is to increase displayed depth and liquidity in the NMS and thereby reduce transaction costs for a wide spectrum of investors, particularly institutional investors that must trade in large sizes. Precisely estimating the extent to which strengthened price protection will improve market depth and liquidity, and thereby lower the transaction costs of investors, is very difficult. The difficulty of estimation should not hide from view, however, the enormous potential benefits for investors of improving the depth and efficiency of the NMS. Because of the huge dollar amount of trading volume in NMS stocks—more than $17 trillion in 2003[766]—even the most incremental improvement in market depth and liquidity could generate a dollar amount of benefits that annually would dwarf the one-time start-up costs of implementing trade-through protection.

One approach to evaluating the potential benefits of the Order Protection Rule is to examine a category of investors that stand to benefit a great deal from improved depth and liquidity for NMS stocks—the shareholders in U.S. equity mutual funds. In 2003, the total assets of such funds were $3.68 trillion.[767] The average portfolio turnover rate for equity funds was 55%, meaning that their total purchases and sales of securities amounted to approximately $4.048 trillion.[768] A leading authority on the trading costs of institutional investors has estimated that in the second quarter of 2003 the average price impact experienced by investment managers ranged from 17.4 basis points for giant-capitalization stocks, 21.4 basis points for large-capitalization stocks, and up to 35.4 basis points for micro-capitalization

[762] As discussed above, it can be difficult for retail investors in particular to monitor whether their orders in fact received the best available price at the time of order execution. *See supra*, note 53 and accompanying text.

[763] Fidelity and the Battalio/Jennings Paper stated that the staff study should not have included block trades in its estimate of the benefits of strengthened trade-through protection. Fidelity Reproposal Letter II at 1; Battalio/Jennings Paper at 2. The Commission does not agree. First, the amount that block trades contributed to the $321 million estimate is very small. Block trades represented only 1.9% of total trade-throughs in Nasdaq stocks and 1.1% of total trade-throughs in NYSE stocks. Trade-Through Study, Tables 6, 13. Most importantly, the staff study used the *lesser* of the size of the traded-through quotation and the size of the trade-through transaction when calculating the $321 million. *Id.* at 3. Thus, if a 10,000 share transaction traded through a 100-share quotation, only 100 shares counted toward the estimation of benefits. The Battalio/Jennings Paper incorrectly asserted that the staff study did not use this conservative approach. Battalio/Jennings Paper at 2. Finally, block trades are appropriately included in the estimation of benefits because their failure to interact with significant displayed quotations is one of the most serious problems with respect to the protection of limit orders that the Order Protection Rule is designed to address. *See supra*, section II.A.1.c.

[764] *See, e.g.*, B. Hollifield, R. Miller and P. Sandas, "Empirical Analysis of Limit Order Markets," 71 *Review of Economic Studies* 1027–1063 and n. 4 (2004).

[765] *See* Trade-Through Study, Tables 4.

[766] World Federation of Exchanges, *Annual Report* (2003), at 86.

[767] Investment Company Institute, *Mutual Fund Fact Book* (2004), at 55.

[768] *Id.* at 64. Portfolio turnover is reported as the lesser of portfolio sales or purchases divided by average net assets. Because price impact occurs for both purchases and sales, the turnover rate must be doubled, then multiplied by total fund assets, to estimate the total value of trading that would be affected by an improvement in depth and liquidity.

stocks.[769] In addition, it estimated the cost attributable to adverse price movements while searching for liquidity for institutional orders, which often are too large simply to be presented to the market. Its estimate of these liquidity search costs ranged from 13 basis points for giant capitalization stocks, 23 basis points for large capitalization stocks, and up to 119 basis points for micro-capitalization stocks.

To obtain a conservative estimate of price impact costs and liquidity search costs incurred across all stocks, the total market impact and liquidity search costs for giant capitalization stocks (30.4 basis points) and the total market impact and liquidity search costs for large capitalization stocks (44.4 basis points) are averaged together to yield a figure of 37.4 basis points.[770] The much higher market impact and liquidity search costs of midcap, smallcap, and microcap stocks are not included. Using this estimate of 37.4 basis points, the shareholders in U.S. equity mutual funds incurred implicit transaction costs of $15.1 billion in 2003. Based on a hypothetical assumption that, in light of the current share volume of trade-through transactions that does not interact with displayed liquidity, intermarket trade-through protection could improve depth and liquidity for NMS stocks by 5% (or an average reduction of 1.87 basis points in price impact and liquidity search costs for large investors), the savings in transaction costs for U.S equity funds alone, and the improved returns for their millions of individual shareholders, would have amounted to approximately $755 million in 2003.

Of course, the benefits of improved depth and liquidity for the equity holdings of other types of investors, including pension funds, insurance companies, and individuals, are not incorporated in the foregoing calculations. In 2003, these other types of investors held 78% of the value of publicly traded U.S. equity outstanding, with equity mutual funds holding the remaining 22%.[771] For example, pension funds alone held $9 trillion in assets in 2003, of which an estimated $4.9 trillion was held in equity investments other than mutual funds.[772] Thus, the implicit transaction costs incurred by institutional investors each year is likely at least double the $15.1 billion estimated for equity mutual funds, for a total of more than $30 billion. Assuming that these other types of investors experienced a reduction in transaction costs that equaled the reduction of trading costs for equity mutual funds, the assumed 5% improvement in market depth and liquidity could yield total transaction cost savings for all investors of over $1.5 billion annually. Such savings would improve the investment returns of equity ownership, thereby promoting the retirement and other long-term financial interests of individual investors and reducing the cost of capital for listed companies.

2. Costs

Some commenters expressed concern over the anticipated cost of implementing the original trade-through proposal.[773] These commenters argued that Rule 611 would be too expensive and that the costs associated with implementing it would outweigh the perceived benefits of the Rule. Some commenters were concerned about the cost of specific requirements in the proposed rule, particularly the procedural requirements associated with the proposed opt-out exception (*e.g.*, obtaining informed consent from customers and disclosing the NBBO to customers).[774] As discussed above, however, the Order Protection Rule as reproposed did not (and as adopted does not) contain an opt-out exception, as was originally proposed.[775] Therefore, the concerns expressed by commenters relating to the costs of implementing an opt-out exception are not applicable, and were not included in the Reproposing Release. In the Reproposing Release, the Commission also refined its estimate of the number of broker-dealers that would be required to establish, maintain, and enforce written policies and procedures to prevent trade-throughs.[776] Taken together, these changes substantially reduced the estimated costs associated with the implementation of and ongoing compliance with the reproposed Rule. Commenters also expressed concern that applying the trade-through proposal to the Nasdaq market would harm market efficiency and execution quality.[777] As discussed above, the Commission believes that a rule that serves to limit the incidence of trade-throughs will improve market efficiency and benefit execution quality.[778]

A number of commenters generally expressed the view that there would be significant costs associated with implementing and complying with the reproposed Rule,[779] with some commenters stating the belief that the costs would outweigh any potential benefits.[780] Commenters did not, however, discuss the specific estimated cost figures included in the Reproposing Release or include their own estimates. Many commenters expressed concerns with the costs associated with implementing the Voluntary Depth Alternative, believing that the costs of implementing the Voluntary Depth Alternative would be substantially greater than the Market BBO Alternative.[781] As discussed above in Section II.A.5, the Commission is adopting the Market BBO Alternative and not the Voluntary Depth Alternative. The Commission does not

[769] Plexus Group, Inc., Commentary 80, "Trading Truths: How Mis-Measurement of Trading Costs Is Leading Investors Astray," (April 2004), at 2–3.

[770] *Cf. supra*, note 146 and accompanying text (Plexus estimate of average transaction costs, including commissions, during the fourth quarter of 2003 for Nasdaq and NYSE stocks as, respectively, 83 basis points and 55 basis points; commissions average 12 basis points for large capitalization stocks).

[771] Mutual Fund Factbook, *supra* note 767, at 59.

[772] *Id.* at 91 (employer-sponsored pension market held estimated $9.0 trillion in assets in 2003, $7.7 trillion of which were not represented by mutual fund assets); Milliman, Inc., Pension Fund Survey (available at www.milliman.com) (consulting firm's survey of 2003 annual reports for 100 of largest U.S. corporations found that the median equity allocation for pension fund assets was 65%).

[773] *See, e.g.*, Bloomberg Tradebook Letter at 14; Fidelity Letter I at 12; Instinet Letter at 14, 15; Nasdaq Letter II at 2; Peake Letter I at 2; Reg NMS Study Group Letter at 4; Rosenblatt Securities Letter II at 4; STANY Letter at 3; UBS Letter at 8.

[774] *See, e.g.*, Ameritrade Letter I at 8; Brut Letter at 10–12; Citigroup Letter at 8–9; E*TRADE Letter at 7; Financial Information Forum Letter at 2; JP Morgan Letter at 4; SIA Letter at 12–15.

[775] *See supra*, section II.A.4.

[776] As noted in the Reproposing Release, the Commission revised the estimated number of broker-dealers that would be subject to the reproposed Rule from the original proposal. The revised number includes the approximately 585 firms that were registered equity market makers or specialists at year-end 2003 (this number was derived from annual FOCUS reports and discussion with SRO staff), as well as ATSs that operate trading systems that trade NMS stocks. The Commission believes it is reasonable to assume that in general, firms that are block positioners—*i.e.*, firms that are in the business of executing orders internally—are the same firms that are registered market makers (for instance, they may be registered as a market maker in one or more Nasdaq stocks and carry on a block positioner business in exchange-listed stocks), especially given the amount of capital necessary to carry on such a business.

[777] *See, e.g.*, Archipelago Reproposal Letter at 5–6; Citadel Letter at 6; Hudson River Trading Letter at 1–2; Instinet Reproposal Letter at 9, 14; Nasdaq Reproposal Letter at 2.

[778] *See supra*, section II.A.1.

[779] *See, e.g.*, CIBC Reproposal Letter at 4; Knight Securities Reproposal Letter at 5; Lava Reproposal Letter at 1; Merrill Lynch Reproposal Letter at 5; SIA Reproposal Letter at 11.

[780] *See, e.g.*, Angel Reproposal Letter at 2; Instinet Reproposal Letter at 7; Knight Securities Reproposal Letter at 5; MFA Reproposal Letter at 2.

[781] *See, e.g.*, Amex Reproposal Letter at 3; ATD Reproposal Letter at 4; BNY Reproposal Letter at 3; CHX Reproposal Letter at 2; NYSE Reproposal Letter I, Detailed Comments at 8; RBC Capital Markets Reproposal Letter at 6; STANY Reproposal Letter at 9.

believe that the inclusion of a stopped order exception will materially impact the estimated costs included in the Reproposing Release.[782] The Commission therefore continues to estimate implementation costs for the Order Protection Rule of approximately $143.8 million and annual costs of approximately $21.9 million, as discussed below.

The Commission recognizes, as noted by commenters, that there will be significant one-time costs to implement the Order Protection Rule. Trading centers will necessarily incur costs associated with establishing written policies and procedures reasonably designed to prevent trade-throughs—in other words, with determining a course of action for how the trading center will comply with the requirements of the Rule, including compliance with the exceptions contained in the Rule. Although the extent of these costs will vary because the exact nature and extent of each trading center's written policies and procedures will depend on the type, size and nature of each entity's business, as discussed above in Section VIII.A., for purposes of the PRA the Commission broadly estimates that SRO trading centers will incur a one-time initial cost for establishing such policies and procedures of approximately $311,805 (calculated by multiplying the average cost of $34,645 per SRO trading center by the 9 SRO trading centers), and non-SRO trading centers will incur a one-time initial cost for establishing policies and procedures of approximately $17,469,600 (calculated by multiplying the average cost of $29,116 per non-SRO trading center by the 600 non-SRO trading centers), for a total of $17,781,405.[783]

Each trading center also will incur initial up-front costs associated with taking action necessary to implement the written policies and procedures it has developed, which will include necessary modifications to order routing and execution systems to "hard-code" compliance with the Rule and the exceptions. For instance, modifications to order routing and execution systems will need to be made to route and execute orders in compliance with the requirements of the Rule to prevent trade-throughs of protected quotations (which include, for instance, the ability to recognize quotations identified in the consolidated quotation system as manual quotations on a quotation-by-quotation basis). Trading centers will need to make sure they have connectivity to other trading centers in the NMS that could post protected quotations, whether through proprietary linkages or through use of third-party services. As noted below, however, the Commission believes that most of this private linkage functionality already exists, particularly in the market for Nasdaq securities. Surveillance systems will need to be modified to assure an effective mechanism for monitoring transactions after-the-fact for ongoing compliance purposes. Also, trading systems will need to be programmed to recognize when exceptions to the operative provisions of Rule 611 are applicable. For example, trading centers will need to be able to identify outgoing and recognize incoming orders as intermarket sweep orders. Data feeds and market vendor systems will need to be modified to accommodate order identifiers for manual quotations and intermarket sweep orders, which costs (to the extent incurred) will likely be passed along to the end users of these systems, the trading centers. These costs are included within the estimates below.

For non-SRO trading centers that rely upon their own internal order routing and execution management systems, of which the Commission estimated in the Reproposing Release that there are approximately 20, the Commission estimates the average cost of necessary systems changes to implement the Rule will be approximately $3 million per trading center, for a total one-time start-up cost of approximately $60 million.[784] The Commission estimates that the remaining non-SRO trading centers that will be subject to the Rule will utilize outside vendors to provide these services, consistent with their current use of such services for order routing and execution management. For these non-SRO trading centers, the Commission estimates the cost of necessary systems modifications that will be passed along to the trading centers to be approximately $50,000 per trading center, for a total initial cost of $21 million.[785] The Commission also estimates that the average cost to the nine SROs to make necessary system modifications to implement the Rule will be $5 million per SRO, for a total of $45 million. Therefore, estimated overall total one-time implementation costs, added to PRA costs, are approximately $144 million.

In addition, broker-dealers that do not fall within the definition of a trading center but that employ their own smart-order routing technology to route orders to multiple trading centers could choose to route orders in compliance with the intermarket sweep exception. These broker-dealers would need to make necessary modifications to their order routing practices and proprietary order routing systems to monitor the protected quotations of trading centers and to properly identify such intermarket sweep orders. The Commission does not believe that this category of broker-dealers is very large. The Commission also believes it likely that most if not all of these non-trading center broker-dealers that employ their own order-routing technology already have systems in place that monitor best-priced quotations across markets, and thus does not believe that the changes necessary to implement the intermarket sweep order will be substantial.

With respect to maintaining and updating its required written policies and procedures to ensure they continue to be in compliance with the Rule, for purposes of the PRA the Commission estimates that the average annual cost for each trading center will be approximately $5,676 per trading center per year, for a total annual cost for all trading centers of $3,456,684.[786] With regard to ongoing monitoring for and enforcement of trading in compliance with the Rule, the Commission believes that, once the tools necessary to carry out on-going monitoring have been put in place (which are included in the above cost estimates), a trading center will be able to incorporate ongoing monitoring and enforcement within the scope of its existing surveillance and enforcement policies and procedures without a substantial additional burden.

The Commission recognizes, however, that this ongoing compliance will not be cost-free, and that trading centers will incur some additional annual costs associated with ongoing compliance, including compliance costs of reviewing transactions. For instance, the Commission recognizes that access to a

[782] The estimated cost figures included the Reproposing Release did not include additional costs that would have been associated with the Voluntary Depth Alternative.

[783] *See supra*, notes 736 to 742 and accompanying text.

[784] This number is an average estimated cost; thus, it likely overestimates the costs for some trading centers and underestimates it for others. For instance, it likely overestimates the cost for ATS trading centers, particularly smaller ones, as opposed to full-service broker-dealer trading centers, in part because of the narrower business focus of some ATSs.

[785] Given that floor-based market-makers and specialists utilize exchange execution systems, the Commission believes it is reasonable to assume that such market-makers and specialists will not incur substantial systems-related costs to implement the Rule independent of the costs that will be incurred by the exchange on whose floor they operate to make changes to the exchange's execution systems. Thus, these entities (approximately 160 of the 585) are not directly included within the cost estimates.

[786] *See supra*, note 743 and accompanying text.

database of BBO information for each trading center whose quotations will be protected by the Order Protection Rule will be necessary to monitor transactions for compliance with the Rule on an after-the-fact basis. The Commission believes that this information currently is available and understands that such information currently is maintained by at least one industry vendor. The Commission believes that the cost to each trading center to access this database will be incremental in relation to the cost of other services provided by the vendor. The Commission estimates that each trading center will incur an average annual ongoing compliance cost of $30,144 for a total annual cost of $18,357,696 for all trading centers.[787]

In assessing the costs of systems changes that may be required by the Order Protection Rule, it is important to recognize that much, if not all, of the connectivity among trading centers necessary to implement intermarket price protection has already been put in place. For example, trading centers for exchange-listed securities already are connected through the ITS. The Commission understands that, at least as an interim solution, ITS facilities and rules can be modified relatively easily and at low cost to provide the current ITS participants a means of complying with the provisions of Rule 611. With respect to Nasdaq stocks, connectivity among many trading centers already is established through private linkages. Routing out to other trading centers when necessary to obtain the best prices for Nasdaq stocks is an integral part of the business plan of many trading centers, even when not affirmatively required by best execution responsibilities. Moreover, a variety of private vendors currently offer connectivity to NMS trading centers for both exchange-listed and Nasdaq stocks. Many of the broker-dealers that are non-SRO trading centers that will be subject to the Rule already employ smart order routing technology, either their own systems or those of outside vendors, which should limit the cost of implementing systems changes. The Commission also understands that the cost to the Plan processors to incorporate the Order Protection Rule and its exceptions will be minimal.

In determining these estimates the Commission also has considered that many market participants are already making changes to their systems to become more competitive. Many of the changes being made will assist the market participants in preparing for implementation of the Order Protection Rule. For example, Nasdaq, which previously did not have an order routing system, purchased Brut, LLC last year in order to acquire access to such a system. The Commission believes that this acquisition should reduce the costs that will be incurred by Nasdaq to implement the Order Protection Rule. The Commission also notes that the NYSE is in the process of modifying its Direct+ System to make more quotations available on an automated basis.[788] These changes that the NYSE has undertaken should reduce the cost of additional systems changes needed to implement the Order Protection Rule.

Overall, the Commission believes that the Order Protection Rule will produce significant benefits that justify the costs of implementation of the Rule.

B. Access Rule

Rule 610 of Regulation NMS sets forth new standards governing means of access to quotations in NMS stocks. These standards will prohibit trading centers from imposing unfairly discriminatory terms that would prevent or inhibit the efficient access of any person through members, subscribers, or customers of such trading center, and enable access to NMS quotations through private linkages, rather than mandating a collective intermarket linkage facility. In addition, the Rule is designed to ensure the fairness and accuracy of displayed quotations by establishing an outer limit on the cost of accessing protected quotations and any other quotations at the best bid and offer of no more than $0.003 per share (or 0.3% of the quotation price per share for quotations priced less than $1). Rule 610 also requires SROs to establish, maintain, and enforce rules that would, among other things, prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross the automated quotations of other trading centers. Finally, the adopted amendment to Rule 301 of Regulation ATS lowers the threshold that triggers the Regulation ATS fair access requirements from 20% to 5% of average daily volume in a security.

1. Benefits

The Commission believes that the adopted Access Rule will help achieve the statutory objectives for the NMS by promoting fair and efficient access to each individual market. By enabling reliance on private linkages, rather than mandating a collective intermarket linkage facility, the access provisions of Rule 610(a) and (b) allow market centers to connect through flexible and cost effective technologies widely used in the markets today, particularly in the market for Nasdaq-listed stocks. This will allow firms to capitalize on the dramatic improvements in communications and processing technologies in recent years, and thereby enhance the linking of all markets for the future NMS. Private linkages also will provide flexibility to meet the needs of different market participants and allow competitive forces to determine the specific nature and cost of connectivity. The access provisions of Rule 610(a) and (b) thus should allow market participants to fairly and efficiently route orders to execute against the best displayed quotations for a stock, wherever such quotations are displayed in the NMS. The Commission believes that fair and efficient access to the best displayed quotations of all trading centers is critical to achieving best execution of those orders.

The access provisions of Rule 610(a) and (b) also will promote fair and efficient means of access to quotations by prohibiting a trading center from unfairly discriminating against non-members or non-subscribers that attempt to access its quotations through a member or subscriber of such trading center. Such fair access to the quotations of other trading centers is critical for access to all displayed quotations and compliance with the adopted Order Protection Rule and broker-dealers' duty of best execution.

The fee limitation of Rule 610(c) will address the potential distortions caused by substantial, disparate fees. The wider the disparity in the level of access fees among different market centers, the less useful and accurate are the prices of displayed quotations. As a result of the adopted fee limitation, displayed prices will more closely reflect actual costs to trade, thereby enhancing the usefulness of market information. The fee limitation also will establish a level playing field across all market participants and trading centers. The rule promotes the NMS objective of equal regulation of markets and broker-

[787] This estimate was included in the Reproposing Release. The Commission continues to estimate that each trading center will incur an average annual ongoing compliance cost of $30,144 for a total annual cost of $18,357,696 for all trading centers. This figure was calculated as follows: (16 compliance hours × $103) + (8 information technology hours × $67) + (4 legal hours × $82) × 12 months = $30,144 per trading center × 609 trading centers = $18,357,696. *See supra*, notes 732 to 735 for notation as to hourly rates.

[788] *See* Securities Exchange Act Release Nos. 50173 (Aug. 10, 2004), 69 FR 50407 (Aug. 16, 2004), 50277 (Aug 26, 2004), 69 FR 53759 (Sept. 2, 2004) and 50667 (Nov. 15, 2004), 69 FR 67980 (Nov. 22, 2004) (SR–NYSE–2004–05).

dealers by applying equally to all types of trading centers and all types of market participants.[789] As noted above in Section III.A.2, although ECNs and other types of trading centers, including SROs, may currently charge access fees, market makers have not been permitted to charge any fee for counterparties accessing their quotations. The Commission believes, however, that it is consistent with the Quote Rule for market makers to charge fees for access to their quotations pursuant to Rule 610(c), so long as such fees meet the requirements of Rule 610(c).

The fee limitation also will address "outlier" trading centers that otherwise might charge high fees to other market participants required to access their quotations by the Order Protection Rule. In the absence of a fee limitation, the adoption of the Order Protection Rule and private linkages could significantly boost the viability of the outlier business model. Outlier markets might well try to take advantage of intermarket price protection by acting essentially as a toll booth between price levels. Even though high fee markets likely would be the last market to which orders would be routed, prices could not move to the next level until someone routed an order to take out the displayed price at the outlier market. Such a business model would detract from the usefulness of quotation information and impede market efficiency and competition. The fee cap will limit the outlier business model. It will place all markets on a level playing field in terms of the fees they can charge and ultimately the rebates they can pass on to liquidity providers. Some markets might choose to charge lower fees, thereby increasing their ranking in the preferences of order routers. Others might charge the full $0.003 and rebate a substantial proportion to liquidity providers.[790] Competition will determine which strategy is most successful.[791] The Rule also precludes a trading center from charging high fees selectively to competitors, practices that have occurred in the market for Nasdaq stocks.[792]

Moreover, the fee limitation is necessary to achieve the purposes of the Exchange Act. If outlier markets are allowed to charge high fees and pass most of them through as rebates, the published quotations of such markets would not reliably indicate the true price that is actually available to investors or that would be realized by liquidity providers. Section 11A(c)(1)(B) of the Exchange Act authorizes the Commission to adopt rules assuring the fairness and usefulness of quotation information. For quotations to be fair and useful, there must be some limit on the extent to which the true price for those who access quotations can vary from the displayed price. Consequently, the $0.003 fee limitation will further the statutory purposes of the NMS by harmonizing quotation practices and precluding the distortive effects of exorbitant fees. Moreover, the fee limitation is necessary to further the statutory purpose of enabling broker-dealers to route orders in a manner consistent with the operation of the NMS.[793] To protect limit orders, orders must be routed to those markets displaying the best-priced quotations. This purpose would be thwarted if market participants were allowed to charge exorbitant fees that distort quoted prices.

As discussed above in Section III.A.2, the Commission agrees that the access fee limitation should apply to manual quotations that are best bids and offers to the same extent it applies to protected quotations, to preclude any incentive for trading centers to display manual quotations as a means to charge a higher access fee. In addition, the Commission recognizes that at present a trading center's execution quality statistics will be evaluated against the NBBO, whether that quotation is a manual or automated quotation. The Commission therefore has modified the proposed fee limitation in Rule 610(c) to apply to any quotation that is the best bid or best offer of an exchange, the ADF, or The NASDAQ Market Center, in addition to any protected quotations as defined in Rule 600(b)(57).[794]

The restrictions on locking or crossing quotations in Rule 610(d) will promote fair and orderly markets. Locked and crossed markets can cause confusion among investors concerning trading interest in a stock. Restricting the practice of submitting locking or crossing quotations therefore will enhance the usefulness of quotation information. Consistent with the approach to trade-through protection, however, Rule 610(d) will allow automated quotations to lock or cross manual quotations. Rule 610(d) thereby addresses the concern that manual quotations may not be fully accessible and recognizes that allowing automated quotations to lock or cross manual quotations may provide useful market information regarding the accessibility of quotations. The Commission believes, however, that an automated quotation is entitled to protection from locking or crossing quotations. When two market participants are willing to trade at the same quoted price, giving priority to the first-displayed automated quotation will encourage posting of quotations and contribute to fair and orderly markets. The basic principle underlying the NMS is to promote fair competition among markets, but within a system that also promotes interaction between all of the buyers and sellers in a particular NMS stock. Allowing market participants simply to ignore accessible quotations in other markets and routinely display locking and crossing quotations is inconsistent with this principle. The restrictions on locking or crossing quotations, in conjunction with the Order Protection Rule, should encourage trading against displayed quotations and enhance the depth and liquidity of the markets.

Finally, lowering of the fair access threshold of Rule 301(b)(5) under Regulation ATS[795] from 20% to 5% of average daily trading volume in a security will further strengthen access to the full range of services of ATSs with significant trading volume in NMS stocks. Such access is particularly important for the success of the private linkage approach adopted for access to quotations. The lowering of the fair access threshold also will make its coverage consistent with the existing 5% threshold triggering the order display and execution access requirements of Rule 301(b)(3) of Regulation ATS.[796] As a result, each ATS that is required to disseminate its quotations in the consolidated data stream also will be prohibited from unfairly prohibiting or limiting market participants from becoming a subscriber or customer.

In adopting Rule 610 and the amendment to Rule 301 of Regulation ATS, the Commission seeks to help

[789] Section 11A(c)(1)(F) of the Exchange Act, 15 U.S.C. 78k–1(c)(1)(F).

[790] Nothing in Rule 610(c) will preclude an SRO or other trading center from taking action to limit fees beyond what is required by the rule, and trading centers will have flexibility in establishing their fee schedules to comply with Rule 610(c), consistent with existing requirements of the Exchange Act and the rules and regulations thereunder.

[791] The Commission believes that the fee limitation on protected quotations priced less than $1.00 will provide the same benefits.

[792] Rule 610(c).

[793] Section 11A(c)(1)(E) of the Exchange Act, 15 U.S.C. 78k–1(c)(1)(E), authorizes the Commission to adopt rules assuring that broker-dealers transmit orders for NMS stocks in a manner consistent with the establishment and operation of a national market system.

[794] In addition, the Commission notes that the access standards in Rule 610(a) and (b) apply to all quotations, not just automated quotations.

[795] 17 CFR 242.301(b)(5).

[796] 17 CFR 242.301(b)(3).

ensure that securities transactions can be executed efficiently, at prices established by vigorous and fair competition among market centers. By enabling fair access and transparent pricing among diverse marketplaces within a unified national market, the Commission believes that the access provisions will foster efficiency, enhance competition, and contribute to the best execution of orders for NMS securities.

2. Costs

The Commission believes that Rule 610 and the amendment to Rule 301 of Regulation ATS will not impose significant costs on most trading centers and market participants. When assessing the costs of access, it is important to recognize that much, if not all, of the connectivity among trading centers has already been put in place. For example, trading centers for exchange-listed securities already are connected through the ITS. The Commission understands that the ITS facilities and rules that currently provide intermarket access for exchange-listed stocks could be modified relatively easily and at low cost to provide the current ITS participants a means of access, at least as an interim measure until private linkages are fully established for exchange-listed stocks. In addition, private linkages already are widely used in the equity markets, particularly for trading in Nasdaq-listed stocks. Moreover, a variety of private vendors currently offer connectivity to NMS trading centers for both exchange-listed and Nasdaq stocks, and many broker-dealers already employ smart order routing technology. The Commission also notes that trading centers already are making changes to their systems to become more competitive. The changes being made will assist those trading centers in preparing for implementation of the Access Rule.[797] The Commission therefore believes that the system changes necessary to meet the new access standards will be minor.[798]

While commenters were generally supportive of the Commission's proposal to employ private linkages to provide access between markets, some commenters (both those supporting and those opposing the reproposed access standards) voiced their concerns about the potential need to develop, and the costs of developing, connections to numerous small trading centers in the ADF.[799] Several commenters felt that non-SRO trading centers should make their quotations available through the automatic execution facilities of an SRO, thereby requiring other market participants to only have to maintain access to six or seven markets, rather than potentially dozens.[800] In contrast, one commenter that is an ADF participant stated its belief that the proposal to require ADF participants to establish the necessary connectivity that would facilitate efficient access to their quotations would create a cost barrier that discriminates against smaller firms in the ADF.[801]

The Commission does not believe that its adopted access approach in Rule 610(b)(1) discriminates against smaller firms or creates a barrier to access for innovative new market entrants. Rather, smaller firms and new entrants have a range of alternatives from which to choose that will allow them to avoid incurring any costs to meet the connectivity requirements of Rule 610(b)(1) if they wish to do so. This approach is fully consistent with Congressional policy set forth in the Regulatory Flexibility Act, which directs the Commission to consider significant alternatives to regulations that accomplish the stated objectives of the Exchange Act and minimize the economic impact on small entities.[802]

Small ATSs are exempt from participation in the consolidated quotation system and, therefore, from the connectivity requirements of Rule 610. Under Rule 301(b)(3) of Regulation ATS, an ATS is required to display its quotations in the consolidated quotation stream only in those securities for which its trading volume reaches 5% of total trading volume. Consequently, smaller ATSs are not required to provide their quotations to any SRO (whether an SRO trading facility or the NASD's ADF) and thereby trigger the access requirements of Rule 610. Moreover, potential new entrants with innovative trading mechanisms can commence business without having to incur any costs associated with participation in the consolidated quotation system.

Some smaller ATSs, however, may wish to participate voluntarily in the consolidated quotation system. Such participation can benefit smaller firms and promote competition among markets by enabling smaller firms to obtain wide distribution of their quotations among all market participants.[803] Here, too, such firms will have alternatives that would not obligate them to comply with the connectivity requirements of Rule 610(b)(1). ATSs and market makers that wish to trade NMS stocks can choose from a number of options for quoting and trading. They can become a member of a national securities exchange and quote and trade through the exchange's trading facilities. They can participate in The NASDAQ Market Center and quote and trade through that facility. By choosing either of these options, an ATS or market maker would not create a new connectivity point that all other market participants must reach and would not be subject to Rule 610(b)(1). Some firms, however, may not want to participate in an SRO trading facility. These ATSs and market makers can quote and trade in the OTC market. The existence of the NASD's ADF makes this third choice possible by providing a facility for displaying quotations and reporting transactions in the consolidated data stream.[804]

As noted above in Section III.A.1, however, the NASD is not statutorily required to provide an order execution functionality in the ADF. The Commission believes that market makers and ECNs should continue to have the option of operating in the OTC market, rather than on an exchange or The NASDAQ Market Center. As noted in the Commission's order approving Nasdaq's SuperMontage trading facility, this ability to operate in the ADF is an

[797] For example, Nasdaq, which previously did not have an order routing system, purchased Brut, LLC last year in order to acquire access to such a system. The Commission believes that this acquisition should reduce the costs that will be incurred by Nasdaq to implement the Access Rule.

[798] One commenter, however, felt that the bilateral links required for private linkages would be particularly burdensome to smaller market centers compared to an ITS-type structure. Letter from Donald E. Weeden to Jonathan G. Katz, Secretary, Commission, dated June 30, 2004, at 9–10.

[799] *See supra*, section III.A.1.

[800] *See, e.g.*, Knight Trading Group Reproposal Letter at 5; Nasdaq Reproposal Letter at 17–18 (expressing the view that trading facilities with less than a five percent volume should be required to make their quotations available through an SRO trading facility); STA Reproposal Letter at 6; Type N Reproposal Letter at 1.

[801] NexTrade Reproposal Letter at 4–6.

[802] 5 U.S.C. 603(c). In the Reproposing Release, the Commission noted that only two of the approximately 600 broker-dealers (including ATSs) that would be subject to Rule 610 are considered small (total capital of less than $500,000) for purposes of the Regulatory Flexibility Act. 69 FR at 77493. The adopted access approach provides alternatives that will benefit a wider range of smaller ATSs than the two that are considered small entities.

[803] *See supra*, note 566 (the Commission's Advisory Committee on Market Information recommended retention of the consolidated display requirement because, among other things, it "may promote market competition by assuring that information from newer or smaller exchanges is widely distributed.").

[804] Under Rule 301(b)(3) of Regulation ATS, 17 CFR 242.301(b)(3), an ATS is required to display its quotations in the consolidated data stream only in those securities for which its trading volume reaches 5% of total trading volume.

important competitive alternative to Nasdaq or exchange affiliation.[805] Therefore, the Commission has determined not to require small trading centers to make their quotations accessible through an SRO trading facility.

Instead, Rule 610(b)(1) requires all trading centers that choose to display quotations in an SRO display-only quotation facility (currently, the ADF) to provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities. Rule 610(b)(1) therefore may cause trading centers that display quotations in the ADF to incur additional costs to enhance the level of access to their quotations and to lower the cost of connectivity for market participants seeking to access their quotations. The extent to which these trading centers in fact incur additional costs to comply with the adopted access standard will be largely within the control of the trading center itself. As noted above, ATSs and market makers that wish to trade NMS stocks can choose from a number of options for quoting and trading, including quoting and trading in the OTC market. As a result, the additional connectivity requirements of Rule 610(b) will be triggered only by a trading center that displays its quotations in the consolidated data stream and chooses not to provide access to those quotations through an SRO trading facility.

Currently, nine SROs operate trading facilities in NMS stocks. Market participants throughout the securities industry generally have established connectivity to these nine points of access to quotations in NMS stocks. By choosing to display quotations in the ADF, a trading center effectively could require the entire industry to establish connectivity to an additional point of access. Potentially, many trading centers could choose to display quotations in the ADF, thereby significantly increasing the overall costs of connectivity in the NMS. Such an inefficient outcome would become much more likely if an ADF trading center were not required to assume responsibility for the additional costs associated with its decision to display quotations outside of an established SRO trading facility.

Although the Exchange Act envisions an individual broker-dealer having the option of trading in the OTC market,[806] it does not mandate that the securities industry in general must subsidize the costs of accessing a broker-dealer's quotations in the OTC market if the NASD chooses not to provide connectivity. The Commission believes that it is reasonable and appropriate to require those ATSs and market makers that choose to display quotations in the ADF to bear the responsibility of providing a level and cost of access to their quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities. Under Rule 610(b)(1), therefore, ADF participants will be required to bear the costs of the necessary connectivity to facilitate efficient access to their quotations.[807] This standard will help ensure that additional connectivity burdens are not imposed on the securities industry each time an additional ADF participant necessitates a new connectivity point by choosing to begin displaying quotations in the consolidated quotation stream. The Commission believes that this requirement will help reduce overall industry costs by more closely aligning the burden of additional connectivity with those entities whose choices have created the need for additional connectivity.

As just discussed, the Commission recognizes that trading centers subject to Rule 610(b)(1) may incur costs associated with providing access to their quotations, although the costs will vary depending upon the manner in which each trading center provides such access. The Commission notes that to meet the standard contained in Rule 610(b)(1), a trading center will be allowed to take advantage of the greatly expanded connectivity options that have been offered by competing access service providers in recent years.[808] These industry access providers have extensive connections to a wide array of market participants through a variety of direct access options and private networks. A trading center potentially could meet the requirement of Rule 610(b)(1) by establishing connections to and offering access through such vendors. The option of participation in existing market infrastructure and systems should reduce a trading center's cost of compliance.[809]

Two commenters raised concerns about reliance on third party private vendors to provide access, since they may not be regulated by the Commission and thus could deny access to a trading center they viewed as a competitor, or because utilizing their services to link to other trading centers is outside the control of a trading center.[810] The Commission believes that the requirement in Rule 610(b)(1) that ADF participants provide a substantially equivalent level of access will preclude the ADF participant from providing access only through a narrow range of private access providers. The range of access providers must be sufficient to provide access substantially equivalent to SRO trading facilities. In these circumstances, and given the significant number and variety of entities that currently provide access services and the competitive nature of the market for these services, the Commission believes that competition will be sufficient to provide services for any trading center choosing to utilize an outside vendor.[811]

Several commenters, including some that otherwise supported the proposal, expressed concern that requiring non-discriminatory access to markets might undermine the value of SRO membership.[812] The Commission does not believe that adoption of a private linkage approach will seriously undermine the value of membership in SROs that offer valuable services to their members. First, the fact that markets will not be allowed to impose unfairly discriminatory terms on non-members who obtain indirect access to quotations through members does not mean that non-members will obtain *free* access to quotations. Members who provide piggyback access will be providing a useful service and presumably will charge a fee for such service. The fee will be subject to competitive forces and likely will reflect the costs of SRO membership, plus some element of profit to the SRO's members. As a result,

[805] *See* Securities Exchange Act Release No. 43863 (Jan. 19, 2001), 66 FR 8020 (Jan. 26, 2001).

[806] *See* Sections 11A(c)(3)(A) and (4) of the Exchange Act, 15 U.S.C 78k–1(c)(3)(A) and (4).

[807] Thus, although market participants may still be required to access numerous trading centers in the ADF, the Rule should reduce the cost of access to each such trading center by requiring the ADF trading center to provide a cost and level of access substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities.

[808] As noted in the Commission's order approving the pilot program for the ADF, the reduction in communications line costs in recent years and the advent of competing access providers offer the potential for multiple competitive means of access to the various trading centers that trade NMS stocks. Securities Exchange Act Release No. 46249, *supra* note 390.

[809] As the self-regulatory authority responsible for the OTC market, the NASD must act as "gatekeeper" for the ADF, and, as such, will need to closely assess the extent to which ADF participants meet the requirements of Rule 610.

[810] NexTrade Reproposal Letter at 6; STANY Reproposal Letter at 4.

[811] For example, one large ECN can be accessed through five extranets and at least 21 other access providers, as well as through direct connections. *See supra*, note 366 and accompanying text.

[812] Alliance of Floor Brokers Letter at 10; Amex Letter, Exhibit A at 25–26; BSE Letter at 12; CHX Letter at 14; Citigroup Letter at 12; Phlx Letter at 2; STANY Letter at 9.

non-members that frequently make use of indirect access are likely to contribute indirectly to the costs of membership in the SRO market. Moreover, the unfair discrimination standard of Rule 610(a) will apply only to access to quotations, not to the full panoply of services that markets generally provide only to their members. These other services will be subject to the more general fair access provisions applicable to SROs and large ECNs, as well as the statutory provisions that govern SRO rules.

For the reasons discussed below, the Commission does not believe that the fee limitation of Rule 610(c), including the fee limitation on non-protected quotations at the best bid and offer, will impose significant new costs on most trading centers. First, a few commenters were concerned about the costs to market participants of administering a fee program.[813] The adopted provision, by imposing a single accumulated fee limitation of $0.003 (when the price of the protected quotation is $1 or more), greatly simplifies the fee limitation and likely will leave existing fee practices largely intact. For trading centers that currently charge and collect fees and that will continue to do so, the costs of imposing and collecting fees are already incurred. The fee limitation does not require trading centers that do not currently charge fees to begin charging fees. If market makers determine to begin charging fees, they likely will collect fees through an SRO trading facility or ECN through which they display limit orders or quotations, and the administration of such fee program likely will be handled by the SRO or ECN. Therefore, the adopted fee limitation likely will not impose significant new administrative costs.

Two commenters expressed a concern with the ability to determine after-the-fact whether a quotation against which an incoming order executed was subject to an access fee cap, given that under the Rule a market participant could be charged different fees based on whether or not a quotation was protected.[814] The Commission acknowledges these concerns, but notes that market participants will be able to control the extent to which their orders interact with protected and non-protected quotations. First, under the Order Protection Rule, the definition of intermarket sweep order requires market participants to route orders to interact only with protected quotations. The objective can be achieved by routing an IOC, marketable limit order with a limit price that equals the price of the protected quotation. The extent to which they route to non-protected quotations will be subject to the full range of competitive forces, including the fees that trading centers choose to charge for access to non-protected quotations.

The Commission recognizes, however, the concern that a market participant could intend to interact only with a protected quotation but in fact execute against a non-protected quotation. For example, at the time a market participant routes an order to a trading center, it may be attempting to execute against only that trading center's best bid or offer, which will be subject to the fee cap under adopted Rule 610(c) (for instance, by sending an intermarket sweep order with a limit price equal to the price of the protected quotation). By the time the order arrives at the trading center, the incoming order may, if a better bid or offer has been displayed at the trading center for a size smaller than the size of the incoming order, execute against both the new best bid or offer and the quotation that previously was the trading center's best bid or offer. To meet the requirements of Rule 610(c), however, a trading center must ensure that it never charges a fee in excess of the cap for executions of an order against its quotations that are subject to the fee cap. The operation of this limitation will be based on quotations as they are displayed in the consolidated quotation stream. Thus, the trading center is responsible for ensuring that any time lag between prices in its internal systems and its quotations in the consolidated quotation system do not cause fees to be charged that violate the limitation of Rule 610(c). Compliance with this requirement obviously will not be a problem for trading centers that do not charge any fees in excess of the cap. Given the often rapid updating of quotations in NMS stocks, however, the Commission does not believe a trading center that charges fees above the cap for quotations that are not subject to the fee cap could comply with the Rule unless it provides a functionality that enables market participants to assure that they will never inadvertently be charged a fee in excess of the cap. For example, such a trading center could provide a "top-of-book only" or "limited-fee only" order functionality. By using this functionality, market participants themselves could assure that they were never required to pay a fee in excess of the levels set forth in Rule 610(c).

Although the fee limitation is consistent with current business practices, the fee limitation of Rule 610(c) will affect the few markets that currently impose access fees of greater than $0.003 per share that apply to a wide range of NMS stocks.[815] These markets will be required to re-evaluate their business models in light of the adopted fee limitation. In particular, they likely will need to reduce the rebates they currently pay to liquidity providers. The adopted limitation also will affect a few trading centers that charge significant access fees for large transactions in specific types of NMS stocks, such as ETFs. It is unlikely, however, that such fees currently generate a large amount of revenues.[816]

We do not believe that the locked and crossed provisions of Rule 610(d) will impose significant additional costs for the SROs. All SROs currently have rules restricting locking and crossing quotations in exchange-listed stocks to comply with the provisions of the ITS Plan. Such SROs also collect the data and related information required to monitor locked and crossed markets, and the Commission believes that the additional surveillance and enforcement costs related to the provisions will be minor. The Commission recognizes, however, that Rule 610(d), by restricting locked markets with respect to automated quotations, could prohibit the display of an order that would otherwise have been displayed and reduced the quoted spread to zero. Although locked markets do occur a certain percentage of the time, they do not occur all the time, even in extremely active stocks, and thus the average effective spread in these stocks typically is between one-half cent and one cent (one cent being the minimum pricing increment for all but a very few stocks). Thus, the Commission believes that any widening of average effective spreads caused solely by the adopted rule will be limited to the difference between a sub-penny and penny spread. In addition, a locked market currently may not actually represent two market participants willing to buy and sell at the same price. Often the locking market participant is not truly willing to trade at the displayed locking price, but instead chooses to lock rather than execute against the already-displayed quotation to receive a liquidity rebate.[817]

[813] Brokerage America Letter at 1; NexTrade Reproposal Letter at 8; Oppenheimer Letter at 2; SIA Reproposal Letter at 22; STANY Letter at 11.

[814] Bloomberg Reproposal Letter at 8, note 6; SIA Reproposal Letter at 22.

[815] *See supra*, note 423 and accompanying text.

[816] The Commission believes that the same analysis would apply to the fee limitation on protected quotations priced less than $1.00.

[817] *See supra*, notes 435 and 442.

Finally, reducing the fair access thresholds of Regulation ATS will require ATSs that exceed the 5% threshold level to comply with Rule 301(b)(5) under Regulation ATS. Rule 301(b)(5) requires ATSs, among other things, to establish written standards for granting access to trading on its system, to not unreasonably prohibit or limit access to its services, to keep records of all grants or denials of access, and to report such information on Form ATS–R. The Commission believes that the costs to meet these requirements are justified by the need to promote fair and efficient access to trading centers with significant volume.

Overall, the Commission believes that the benefits of Rule 610 and the amendment to Rule 301 of Regulation ATS justify the costs of implementation.

C. Sub-Penny Rule

Rule 612 will prohibit market participants from displaying, ranking, or accepting quotations in NMS stocks that are priced in an increment less than $0.01 per share, except for quotations priced less than $1.00 per share, which may extend to four decimal places.

1. Benefits

The Commission believes that the markets' conversion to decimal pricing has benefited investors by, among other things, clarifying and simplifying pricing for investors, making the U.S. securities markets more competitive internationally, and reducing trading costs by narrowing spreads. The Commission is concerned, however, that if the MPV decreases beyond a certain point, some of the benefits of decimals could be lost while some of the negative effects would be exacerbated. The Commission believes that Rule 612, which will prohibit an MPV of less than $0.01 for the vast majority of NMS stocks, will have several benefits. The majority of the commenters supported the proposal and noted various benefits of this approach.[818]

The Commission believes that sub-penny quoting impedes transparency by reducing market depth at the NBBO and increasing quote flickering. In an environment where the NBBO can change very quickly, broker-dealers have more difficulty in carrying out their duties of best execution and complying with other regulatory requirements that require them to identify the best bid or offer available at a particular moment (such as the Commission's short sale rule[819] and NASD's Manning rule[820]). Rule 612 should increase market depth at the NBBO and help reduce quote flickering.

In addition, the Commission agrees with the many commenters who believed that prohibiting sub-penny quoting would deter the practice of stepping ahead of exposed trading interest by an economically insignificant amount. Limit orders provide liquidity to the market and perform an important price-setting function. If a quotation or order can lose execution priority because of economically insignificant price improvement from a later-arriving quotation or order, liquidity could diminish and some market participants could incur greater execution costs. As one commenter, the Investment Company Institute, stated, "[t]his potential for the increased stepping-ahead of limit orders would create a significant disincentive for market participants to enter any sizeable volume into the markets and would reduce further the value of displaying limit orders."[821] Improved liquidity should decrease the costs of trading, especially for large orders.[822] Market participants may be more likely to place limit orders if they know that other market participants cannot quote ahead of them by a sub-penny amount.

2. Costs

The Commission recognizes that Rule 612 will impose certain costs on the U.S. securities markets. Currently, a few NMS stocks are quoted—and in the absence of the rule, others in the future could be quoted—in sub-penny increments. For these NMS stocks, quoted spreads will be wider than they otherwise would be, because Rule 612 will prohibit market participants from narrowing the spread by a sub-penny amount.

A few commenters argued that investors would incur costs from artificially widened spreads as a result of Rule 612.[823] One commenter analyzed trading in six high-volume securities and concluded that Rule 612 would have costs of over $400 million in these securities alone due to wider spreads.[824] Another commenter stated that, if all markets traded QQQQ solely in sub-pennies, the savings would be approximately $150 million per year.[825] A third commenter argued that allowing sub-penny quoting in "23 of the most appropriate securities" would generate annual savings of anywhere between $342 million and $1.9 billion.[826] No other commenters provided any quantitative analysis of the costs that a sub-penny quoting rule would impose by widening spreads to at least a full penny.[827]

The commenters who attempted to quantify the costs appear to assume that all trading activity in the securities they discuss would occur at narrower sub-penny spreads if Rule 612 did not exist. The Commission does not believe that these commenters provided any evidence to justify that assumption. Currently, Nasdaq and the national securities exchanges generally do not permit quoting in sub-pennies; this practice exists on only a small number of ATSs, and only for a small number of securities. Because spreads on Nasdaq and the exchanges already cannot be smaller than $0.01, Rule 612 will not require these markets to take any action that would cause spreads to widen. Therefore, the lack of sub-penny spreads on these markets should not be considered costs of Rule 612. With respect to the ATSs that currently do permit some NMS stocks to be quoted in sub-pennies, Commission staff performed a study to better assess and respond to commenters' claims.[828] Based on that study, Commission staff estimated that the costs of widened spreads in these securities would be approximately $48 million annually (or

[818] *See supra*, section IV.C.1.

[819] Rule 10a–1 under the Exchange Act, 17 CFR 240.10a–1.

[820] NASD IM–2110–2.

[821] ICI Letter at 20.

[822] One commenter argued that a prohibition on sub-penny quoting should not affect institutional investors' trading costs because improvements in trading technology (such as auto-execution and VWAP trading algorithms) allow them to fill large orders at minimal cost. *See* Tower Research Letter at 9–10. While the Commission agrees that such improvements have been useful, it believes that this commenter did not consider the costs involved in having to develop these technologies in response, at least in part, to insufficient liquidity. Moreover, the Commission believes that this commenter also did not consider the positive externalities that limit orders have on price discovery and price competition; orders that execute without being displayed do not contribute to price discovery and price competition.

[823] *See* Chakrabarty and Chung Study at 24 (stating that, for high volume stocks, "the spread reduction in the absence of binding constraints * * * translates into savings of millions of dollars"); INET Reproposal Letter at 3; Instinet Letter at 50; Mercatus Center Letter at 9; Tower Research Letter at 9.

[824] Tower Research Letter at 9.

[825] Instinet Letter at 50.

[826] INET Reproposal Letter at 3.

[827] However, one commenter stated: "When analyzed in terms of costs and benefits, we believe that the costs of sub-penny quoting (*i.e.*, less liquidity at quotes, more transactions required to fill large orders, increased quote flickering, and increased ability to displace orders through minimal price improvement) far exceed any incremental benefits that market participants might enjoy through additional pricing conventions for their limit orders." Deutsche Bank Reproposal Letter at 3. This commenter did not provide empirical evidence to justify that assertion.

[828] *See* OEA December 2004 Sub-Penny Analysis.

approximately $33 million if the Commission were to exempt QQQQ from Rule 612).[829]

In this study, Commission staff obtained public data from NYSE's "Trade and Quote" files for all NYSE-listed and Amex-listed stocks, and public data from the Nastraq trade file for Nasdaq-listed stocks, for the period June 7–10, 2004. Based on trading activity of the Nasdaq-listed securities, Commission staff estimated that 1.5% of all trades executed at a per-share price over $1.00 were reported in a sub-penny increment.[830] These trades accounted for 4.7% of share volume. However, not all trades that were reported as having a sub-penny price resulted from a sub-penny quotation. Commission staff excluded VWAP trades which were marked as such in the Nastraq file.[831] Based on this screened dataset, Commission staff estimated that 1.4% of trades were reported in sub-penny increments, accounting for 2.4% of share volume. Commission staff then calculated the dollar cost if all such trades executed at the near-side penny rather than at a sub-penny amount. This price difference, multiplied by the executed volume, produced a dollar cost per trade.[832] Summed across all sub-penny trades, the average daily cost in this sample was $80,973. At 252 trading days per year, this resulted in an estimate of $20,400,235 on an annual basis.

Commission staff performed a similar analysis on the trade data for Amex-listed stocks, except that the dataset did not permit VWAP trades to be excluded. Commission staff estimated that, on an annualized basis, the gross costs resulting from slightly wider spreads would be $16 million (or only $1.2 million if QQQQ were excluded). Similarly, Commission staff estimated that the gross costs from wider spreads would be approximately $12 million annually for NYSE-listed stocks.

Another potential cost of Rule 612 is that market participants that have developed systems allowing their users to quote in sub-pennies will, for most NMS stocks, lose the ability to gain any market advantage from such enhancements. In addition, any market participant that currently allows its users to display, rank, or accept orders or quotations in sub-pennies will incur costs in reprogramming its systems to prevent the entry of sub-penny orders or quotations. The Commission believes, however, that these costs are not significant. Currently, only a few ATSs—but not Nasdaq or any of the national securities exchanges—permit sub-penny quoting, and then only in a small number of securities. These ATSs will have to make only minor adjustments to their systems to comply with Rule 612. One commenter, a technology firm that develops software and systems for electronic securities trading, stated, "we do not believe that there are significant technological or structural impediments to immediate implementation" of Rule 612.[833] No commenter indicated that the compliance costs of ATSs that currently permit sub-penny quoting would be significant.

Finally, the Commission believes that paragraph (b) of Rule 612, which prohibits quotations below $1.00 per share from extending beyond four decimal places, will have negligible systems costs. The Commission currently is not aware of any market that quotes and trades NMS stocks in increments beyond four decimal places and believes, therefore, that no market will incur systems costs to limit such quotations to a maximum of four decimal places.

After carefully considering all the comments received, the Commission believes that, on balance, the benefits of Rule 612 will justify the costs.

D. Market Data Rules and Plan Amendments

The Commission is adopting amendments to the rules relating to the dissemination of market information to the public. In particular, the Commission is adopting amendments to the Plans to modify the current formulas for allocating market data revenues to the SROs, and to require the establishment of non-voting advisory committees comprised of interested parties other than SROs. In addition, the Commission is rescinding the current prohibition in Exchange Act Rule 11Aa3–1 (redesignated as Rule 601) on SROs and their members from independently distributing their own trade reports, and is adopting an amendment to Exchange Act Rule 11Ac1–2 (redesignated as Rule 603) to incorporate uniform standards pursuant to which they may independently distribute their own trade reports and quotations (outside of providing the requisite information to Plan processors). The Commission is further amending Exchange Act Rule 11Ac1–2 (redesignated as Rule 603) to make explicit that all SROs must act jointly through the Plans and through a single processor per security to disseminate consolidated market information in NMS stocks to the public. Finally, the Commission is adopting amendments to Exchange Act Rule 11Ac1–2 (redesignated as Rule 603) to streamline and simplify the consolidated display requirements by reducing the data required to be displayed under the Rule, and by limiting the range of the Rule to the display of such data in trading and order-routing contexts.

1. Revenue Allocation Formula

a. Benefits

The Commission believes, and a number of commenters agreed, that the adopted amendment to the Plans modifying the current formulas for allocating market data revenues will be beneficial to the marketplace because the new formula will allocate revenues to SROs based on the value of their quotations in addition to their trades.[834] The current formulas allocate Plan revenues based solely on the number or share volume of an SRO's reported trades, and do not allocate revenues to those market centers that generate quotations with the best prices and the largest sizes that are an important source of public price discovery. The new allocation formula also should help to reduce the economic and regulatory distortions caused by the current formulas, including wash sales, trade shredding, and SRO print facilities. Because the adopted formula will address these distortive practices and would allocate revenues to those market centers that provide the most useful market information, the Commission

[829] The Commission believes that INET overstated the potential costs of Rule 612. INET's methodology for computing the potential savings to investors from quoting in sub-pennies appears to be based on the incorrect assumption that all of the stocks selected for their sample would trade with the same price-point distribution as the average of JDSU, SIRI, and QQQQ.

[830] Trades executed at a per-share price below $1.00 were excluded from the sample as Rule 612 will not prohibit sub-penny quotations priced less than $1.00.

[831] Executions occurring at a sub-penny price resulting from a midpoint, VWAP, or similar volume-weighted pricing algorithm are not prohibited by Rule 612. For purposes of this study, Commission staff excluded all other trades that had a condition code other than "regular way" (*e.g.*, trades reported after normal trading hours, bunched trades, next-day trades, previous reference price trades, and late trades).

[832] For example, the cost to a sub-penny trade at price $25.248 for 300 shares is as follows. The assumption is that, without sub-penny quotations, this trade would have occurred at $25.25—a difference of $0.002 per share. At 300 shares, this trade incurs a cost of $0.60 ($0.002 x 300). A sub-penny trade at $25.242 would incur a cost of $0.002 per share under the assumption that, under Rule 612, it would execute at $25.24.

[833] ATD Reproposal Letter at 4.

[834] *See, e.g.*, Bloomberg Tradebook Letter at 7–8; BSE Reproposal Letter at 8; ICI Letter at 21; STA Reproposal Letter I at 8; Vanguard Letter at 6.

believes that the NMS will be benefited as a whole.

The adopted new revenue allocation formula will encompass a two-step process. The initial step of the adopted formula, the "Security Income Allocation," allocates a Network's distributable revenues among the many different securities that are included in the Network's data stream primarily based on the square root of the dollar volume of trading in each security. Of those that commented on this aspect of the formula, many generally agreed with the benefits of the Commission's use of square roots.[835] Some commenters, however, believed that the use of the square root function overly rewards illiquid stocks at the expense of liquid stocks.[836] To address this concern, the adopted formula modifies the square root allocation with respect to very inactively traded stocks by limiting the revenues that can be allocated to a single Network security to an amount that is no greater than $4 per qualified transaction report.[837] The amount that exceeds this limitation will be reallocated among all Network securities in direct proportion to their dollar volume of trading.

Following this initial distribution of revenues, the next step in the process is to allocate the revenues distributed to an individual security among the various SROs that trade the security based on each SRO's trading and quoting activity. Specifically, under the "Trading Share" criterion, fifty percent of the revenues allocated to a particular security will be allocated to SROs based on their proportion of the total dollar volume and number of qualified trades (transactions that have a dollar volume of $5,000 or greater) in that security. A few commenters on the original proposal stated that small trades (transactions that have a dollar value of less than $5000) should be entitled to partial credit under this criterion because these trades also contribute to public price discovery.[838] The Commission acknowledged the benefits of small trades and provided for a proportional allocation of revenues for such trades under the reproposed formula. The adopted formula also includes this provision. The Trading Share measure is intended to allocate revenue to those SROs that actively trade in the security, thereby providing liquidity and price discovery, while reducing the potential for the shredding of trade volume.

Under the "Quoting Share" criterion, fifty percent of the revenues allocated to a particular security under the Security Income Allocation measure will be allocated to an SRO based on the SRO's proportion of credits earned for each second of time and dollar value of size that the SRO's automated best bid or offer during regular trading hours equals the price of the NBBO in that security. The Quoting Share criterion of the adopted formula is intended to do what the current formulas do not—allocate revenue to those markets whose quotations frequently equal the best prices and for the largest sizes. Many commenters agreed with the Commission that, if the Networks were to continue allocating revenues to the SROs, the current allocation formulas needed to be updated.[839] In particular, some of these commenters noted the benefits of adding a quoting component to the new formula,[840] especially if revenues are allocated only for automated and accessible quotations.

In sum, the Commission believes that the greatest benefit of allocating Plan revenues to the SROs based equally on the Trading Share and Quoting Share measures is that such measures will allocate revenues to an SRO for its overall contribution of both quotations and trades, while reducing the incentive for distortive trade reporting practices caused by the current formulas. Investors will benefit from the adopted new formula because these broad-based measures will allocate revenues to those SROs that provide investors with the most useful market information, and thus that contribute to public price discovery, by allocating them a larger portion of Plan revenues.

b. Costs

The Commission recognizes that the current allocation formulas have been used since the creation of the Plans and Networks in the 1970s, and that the SROs and the Network processors have become familiar with those formulas for purposes of allocating revenues and structuring their businesses. Because the adopted allocation formula is more detailed than the current formulas, the Network processors will have to learn the particular features of the new formula and will have to consider SRO quotations in addition to reported trades as a measure for allocating Plan revenues. Accordingly, the Network processors, or some other entity retained by the Networks, will be required to develop a program to calculate the Security Income Allocation, Trading Shares, and Quoting Shares of the SRO participants. All of the data necessary for implementation of the formula will be disseminated through the consolidated data stream on a real-time basis. If a single entity were retained to handle the task for all three Networks, the Commission estimates that it will cost approximately $1 million annually to make the requisite calculations under the proposed new formula and to disseminate the results to the SRO participants on a daily basis. This estimated cost of implementation and compliance represents only ¼ of one percent of the total revenues collected and distributed through the Plans for 2004.

The Commission received a number of comments regarding the potential cost and complexity of the originally proposed revenue allocation formula.[841] The Commission notes that, consistent with the approach of the Order Protection Rule and the Access Rule, it eliminated in the reproposed formula the most complex elements of the proposed allocation formula that were intended primarily to address the problem of manual quotations—the "NBBO Improvement Share" criterion and the automatic cut-off for manual quotations left at the NBBO under the Quoting Share criterion. The adopted amendment also eliminates these two elements. Because the adopted formula will allocate revenues for only automated quotations, and manual quotations will be excluded from any revenue allocation, the Commission believes that an NBBO Improvement Share criterion and automatic cut-off for manual quotations are not necessary in the new formula. As a result, the adopted formula is substantially less complex than originally proposed.

Some commenters argued that it would be overly costly and complex to calculate the other elements of the

[835] Amex Letter, Exhibit A at 15; Nasdaq Letter II at 32; NYSE Reproposal Letter II at 3; Specialist Assoc. Letter at 16, note 21.

[836] *See, e.g.*, ArcaEx Reproposal Letter at 11; CBOE Letter at 11; Instinet Reproposal Letter at 13.

[837] The limit of $4 per qualified transaction report is analogous to the reproposal's limit on Trading Shares to $2 per qualified transaction report. Whereas the reproposed limit of $2 applied to the 50% Trading Share allocation (described below), the adopted limit of $4 applies to the 100% Security Income Allocation. *See supra* section V.A.3.

[838] *See, e.g.*, BSE Letter at 16; CHX Letter at 19–20; E*Trade Letter at 11–12.

[839] *See, e.g.*, Bloomberg Tradebook Letter at 7; BSE Letter at 15; Deutsche Bank Reproposal Letter at 4; Harris Reproposal Letter at 11; ICI Letter at 21; JP Morgan Reproposal Letter at 2; NYSE Reproposal Letter II at 3; STA Letter at 7; UBS Letter at 10; Vanguard Letter at 6.

[840] *See, e.g.*, Bloomberg Tradebook Letter at 7–8; Morgan Stanley Letter at 22–23; NYSE Reproposal Letter II at 3; STA Letter at 7; Vanguard Letter at 6.

[841] *See, e.g.*, Angel Letter I at 11; BSE Letter at 15, 18; Brut Letter at 22–23; Callcott Letter at 4; CBOE Letter at 2, 9; Instinet Letter at 42; ISE Letter at 9; Nasdaq Letter II at 31; NSX Letter at 7; NYSE Letter, Attachment at 11; Phlx Letter at 3–4.

proposed formula.[842] The Commission does not agree. An SRO's Trading Share, for example, will not be materially more difficult to calculate than the current Network C formula, which is based on an average of an SRO's proportion of trades and share volume. The Security Income Allocation uses the square root function which is a simple arithmetic calculation. In addition, some commenters believed that the Quoting Share, which incorporates the total dollar size of the NBBO in a stock throughout the trading year, would result in astronomically high numbers that would be extremely difficult to calculate.[843] In fact, the largest number of quote credits in a year for even the highest price stock with the greatest displayed depth at the NBBO is very unlikely to reach beyond the trillions, a number well within the capabilities of even the most basic spreadsheet program.[844] Moreover, the allocation is determined by the proportion of an SRO's quote credits in relation to other SROs, not the absolute amount of quote credits.

Some commenters were concerned that the inclusion of quotations in the proposed new allocation formula could lead new types of "gaming" of the formula, such as flashing quotations with no real intention to trade at those prices simply to earn more quote credits—and thereby more revenues—under the Quoting Share measure.[845] Commenters also were concerned that such practices would increase quotation traffic and bandwidth costs, but with little or no benefit for the quality of the consolidated data stream.[846] Because the Commission recognizes that abusive quoting behavior is a legitimate concern, the adopted formula incorporates a number of modifications to minimize the potential for abusive or costly quoting behavior. First, the adopted formula clarifies that a quotation must be displayed by the Network processor for a minimum of one full second of time before it is entitled to earn any quote credits.[847] Second, the adopted formula clarifies that, consistent with the approach of the Order Protection Rule, each SRO participant in a Network is entitled to earn quote credits only for the SRO's *best* bid and *best* offer.[848] By limiting the number of separate quotations that are entitled to earn quote credits, the adopted formula both reduces the ability of market participants to "shred" their quotes among many different markets and promotes equal regulation of exchange SROs, Nasdaq, and the NASD. Third, the adopted formula modifies the language of the reproposed formula to clarify that a quotation cannot earn Quote Credits while it locks or crosses a previously displayed automated quotation. This limitation is needed to remove any potential financial incentive for abusive quoting behavior that would be contrary to the purposes of the provisions on locking and crossing quotations set forth in the Access Rule. Fourth, the formula limits the revenues that can be allocated to a single Network security to an amount that is no greater than $4 per qualified transaction report, in order to achieve an appropriately balanced allocation among Network stocks by allowing room for a significant increase in the amounts currently allocated for many less active stocks, while also preventing unjustifiably high allocations for the most extremely inactive stocks that might create an inappropriate incentive for abusive quoting behavior.

In addition, the Commission recognizes that some SROs are likely to be allocated a smaller portion of Plan revenues under the new allocation formula than they would have received under the prior formulas, while other SROs will receive a larger portion of revenues. This will result if certain SROs are currently reporting a large number of trades or share volume of trades, but are not necessarily providing the best quotations or trades with larger sizes. A few commenters expressed concern that certain business models would be adversely impacted by the proposed new allocation formula,[849] particularly for those markets that primarily handle small retail order flow.[850] The Commission recognizes that reforming formulas that have remained unchanged for many years may affect the competitive position of various markets. Given the severe deficiencies of these formulas, however, it does not believe that the interests of any particular business model should preclude updating the formulas to reflect current market conditions. The adopted formula is designed to reflect more appropriately the contributions of the various SROs to the consolidated data stream and thereby better align the interests of individual markets with the interests of investors. Moreover, by representing a much more broad-based measure of an SRO's contribution to the consolidated data stream, the adopted formula will be less subject to any particular type of gaming and distortion than the narrowly-focused current Plan formulas.[851] The Commission therefore believes that the benefits of the adopted new allocation formula justify the costs of implementation.

2. Plan Governance

a. Benefits

The Commission believes that the adopted amendment to the Plans requiring the creation of Plan advisory committees will improve Plan governance. Most commenters generally supported the adopted amendment to the Plans, generally believing that expanding the participation of non-SROs parties in Plan governance would be a constructive step.[852] Under the Plans, a representative of each SRO participating in the Plan is a member of the operating committee that governs that Plan. The adopted amendment to the Plans will require the establishment of non-voting advisory committees

[842] *See, e.g.*, Brut Letter at 22–23; CBOE Letter at 2, 9; NSX Letter at 7.

[843] *See, e.g.*, CBOE Letter at 14 (calculation of Quote Credits will "yield astronomical numbers" that "can be expressed only in exponential terms"); NSX Letter at 7 (calculation of large number of Quote Credits is "particularly ludicrous").

[844] For example, assume a stock with an average price of $100 per share has an unusually large average quoted size of 200,000 shares at both the national best bid and the national best offer throughout every second of the trading year. Over an average 252 trading days during a year, the total Quote Credits in this stock would be 235.9 trillion ($100*400,000*252*23,400 seconds per trading day). Quote Credits are only calculated for individual Network stocks and are not totaled across all Network stocks.

[845] *See, e.g.*, ArcaEx Reproposal Letter at 13; CHX Letter at 19; Instinet Reproposal Letter at 14; SIA Reproposal Letter at 30.

[846] *See, e.g.*, Financial Information Forum Reproposal Letter at 4; Nasdaq Reproposal Letter at 13; SIA Reproposal Letter at 30.

[847] *See supra*, section V.A.3.b.

[848] *See supra*, section V.A.3.b.

[849] *See, e.g.*, Brut Letter at 22; CHX Reproposal Letter at 5; CHX Letter at 19, 21–22; NSX Letter at 6–7. *See also* BSE Reproposal Letter at 2, 3, 8 (suggesting a pilot approval process to address any unintended consequences on individual markets).

[850] *See, e.g.*, BSE Letter at 16; CHX Letter at 19, 21–22; E*Trade Letter at 11. The adopted formula will provide a partial allocation of revenues for smaller trades that have a dollar value of less than $5000. This provision should lessen impact of the formula on exchanges that handle small retail orders.

[851] Two commenters on the reproposal suggested adopting an allocation formula based solely on the dollar volume of trading. ArcaEx Reproposal Letter at 13; Nasdaq Reproposal Letter at 14. Dollar volume alone, however, is not a broad-based measure and would miss important aspects of an SRO's contribution to the public data stream. It would, for example, allocate a disproportionately large amount to block trades. Block trades often are internalized by securities dealers at prices based, at least partly, on current public quotations. A formula based solely on dollar volume would not adequately allocate revenues to the source of quotations relied on in pricing block trades.

[852] *See, e.g.*, Amex Letter at 10; Citigroup Letter at 17; Financial Information Forum Letter at 4; Financial Services Roundtable Letter at 6–7; ICI Letter at 4 and 21 n. 35; Nasdaq Letter II at 33; Reuters Letter at 3; SIIA/FISD Reproposal Letter at 2.

comprised solely of persons not employed by or affiliated with an SRO participant. This adopted amendment is intended to broaden participation in the governance of the Plans.

The adopted amendment will require the SRO participants to select the members of the advisory committee comprised, at a minimum, of one or more representatives associated with: (1) A broker-dealer with a substantial retail investor base; (2) a broker-dealer with a substantial institutional investor customer base; (3) an ATS; (4) a data vendor; and (5) an investor. In addition, each SRO participant will be entitled to select an additional committee member. The Commission believes that the composition of the advisory committee will give interested parties other than the SROs a voice in matters that affect them.

The members of the advisory committee will have the right to submit their views to the operating committee on Plan business (other than matters determined to be confidential by a majority of Plan participants), prior to any decision made by the operating committee, and will have the right to attend operating committee meetings. Broader participation in the Plans through the creation of Plan advisory committees will be beneficial to the administration of the Plans because it will provide transparency to the Plan governance process and can promote the formation of industry consensus on disputed issues.

b. Costs

The adopted amendment to the Plans requiring the formation of advisory committees can potentially result in costs to the SRO participants who will be required to engage in a selection process for purposes of establishing such committees. A Plan's operating committee as a whole will be required to select a minimum of five committee members, while each SRO participant will also have the right to select an additional committee member. This selection process can potentially result in added costs and administrative burden and expense to the SRO participants.

The adopted Plan amendment also can potentially disrupt the current governance of the Plans by their participants. Since the creation of the Plans, representatives from the SROs have been the sole participants in the Plans and have been responsible for their administration. A few commenters believed that the additional participation of non-SRO parties could potentially increase the difficulty of reaching a consensus on Plan business, stating that too many members on an advisory committee could complicate and disrupt, rather than assist, Plan operations due to differing party agendas.[853] Although such a result may occur at times, the Commission believes that this cost would be justified by the benefits that can be gained by increasing the transparency of Plan operations and giving parties other than SROs an opportunity to submit their views. In the past, the Plans may not have adequately considered the viewpoints of non-SRO parties on important issues such as fees and administrative burdens. Establishing advisory committees will address this problem and thereby potentially make the Plans more responsive to the needs of market participants and investors.

3. Amendments to Rules 11Aa3–1 and 11Ac1–2 (Redesignated as Rules 601 and 603)

a. Independent Distribution of Information

i. Benefits

The Commission is adopting as proposed the amendment to Rule 11Aa3–1 (redesignated as Rule 601), which rescinds the prohibition on SROs and their members from disseminating their trade reports independently.[854] Under adopted Rule 601, members of an SRO will continue to be required to transmit their trades to the SRO (and SROs will continue to transmit trades to the Networks pursuant to the Plans), but such members also will be free to distribute their own data independently, with or without fees. The Commission believes that independently distributed information can be beneficial to investors and other information users because depth-of-book quotations have become increasingly important as decimal trading has spread displayed depth across a greater number of price points. Similarly, commenters that discussed this aspect of the proposal generally agreed that the proposal would benefit investors and vendors by giving them greater freedom to make their own decisions regarding the data they need.[855] Other commenters believed that the proposal would lead to increased competition, the provision of more data products, and/or lower costs, thus benefiting market participants.[856] In addition, one commenter agreed with the Commission that market centers would benefit from additional revenues and stated that the prospect of additional revenues would encourage markets to provide better markets.[857]

Adopted Rule 603(a) establishes uniform standards for distribution of both quotations and trades. The standards require an exclusive processor, or a broker or dealer with respect to information for which it is the exclusive source, that distributes quotation and transaction information in an NMS stock to a securities information processor ("SIP") to do so on terms that are fair and reasonable. In addition, those SROs, brokers, or dealers that distribute such information to a SIP, broker, dealer, or other persons are required to do so on terms that are not unreasonably discriminatory. Furthermore, these uniform standards are based, in part, on similar requirements found in Sections 3 and 11A of the Exchange Act[858] for SROs and entities that distribute SRO information on an exclusive basis. The Commission believes that extending these requirements to non-SRO market centers, including ATSs and market makers, will help assure equal regulation of all markets that trade NMS stocks.

ii. Costs

The Commission recognizes that the rescission of the prohibition on independent distribution of trade reports under adopted Rule 601 may potentially lead to market centers incurring costs associated with the independent distribution of their market data if they choose to distribute such data without charging a fee. In addition, investors may have to pay for additional data if market centers choose to charge a fee for the additional data. Furthermore, a corollary to one commenter's assertion that market centers could benefit from additional revenues if market centers choose to distribute their own quotation information,[859] is that the data from one or more other market centers can potentially become more or less valuable than another market center's data, and thereby increase or reduce that market center's overall income. The Commission does not believe that there will be any costs associated with

[853] *See, e.g.*, Amex Letter, Exhibit A at 21–22; Reuters Letter at 3.

[854] Regulation NMS removed the definitions in paragraph (a) of Exchange Act Rule 11Aa3–1 (redesignated as Rule 601) and placed them in Rule 600. Subparagraphs (c)(2) and (c)(3) of Exchange Act Rule 11Aa3–1 are being rescinded. As a result, subparagraph (c)(4) of Exchange Act Rule 11Aa3–1 is redesignated as subparagraph (b)(2) of Rule 601.

[855] *See, e.g.*, CBOE Letter at 17; Financial Information Forum Letter at 3–4; Reuters Letter at 3.

[856] *See, e.g.*, Brut Letter at 23; Financial Services Roundtable Letter at 6; Nasdaq Reproposal Letter at 15–16.

[857] Specialist Assoc. Letter at 16–17.

[858] 15 U.S.C. 78c and 15 U.S.C. 78k–1.

[859] Specialist Assoc. Letter at 16–17.

establishment of uniform standards for the distribution of trades and quotations pursuant to adopted Rule 603(a). The Commission did not receive any comments on this issue.

b. Consolidation of Information

i. Benefits

All SROs currently participate in Plans that provide for the dissemination of consolidated information for the NMS stocks that they trade. Adopted Rule 603(b) confirms by Exchange Act rule that both existing and any new SROs will be required to continue to participate in joint-industry plans to disseminate consolidated information in NMS stocks to the public. Adopted Rule 603 provides the benefit of clarifying that all SROs—whether existing or new—will be required to participate jointly in one or more Plans to disseminate consolidated information in NMS stocks. Adopted Rule 603 also requires that all quotation and trade information for an individual NMS stock be disseminated through a single processor (currently, SIAC or Nasdaq). The Commission believes that requiring a single processor for a particular security will help to ensure that investors continue to receive the benefits of obtaining consolidated information from a single source.

ii. Costs

Given that consolidated market information currently is disseminated through a single processor per stock, the Commission does not foresee any new costs associated with adopted Rule 603(b).

c. Display of Consolidated Information

i. Benefits

The Commission is adopting as proposed the amendment to Rule 11Ac1–2 (redesignated as Rule 603(c)) that substantially revises the consolidated display requirement by limiting its scope. It incorporates a new definition of "consolidated display" (set forth in adopted Rule 600(b)(13)) that is limited to the prices, sizes, and market center identifications of the NBBO and the "consolidated last sale information." Beyond disclosure of this basic information, market forces, rather than regulatory requirements, will be allowed to determine what, if any, additional data from other market centers is displayed. In particular, investors and other information users ultimately will be able to decide whether they need additional information in their displays.

As amended, Rule 603(c) also eliminates the burden on vendors and broker-dealers to display a complete montage of quotations from all market centers trading a particular security, which would include the price of quotations that may be far away from the current NBBO. Furthermore, vendors and broker-dealers will have the ability to decide what, if any, additional data from other market centers beyond this basic disclosure to display. Vendors, broker-dealers, and investors will benefit from this reduced consolidated display requirement through a more efficient use of system capacity and because the costs of obtaining necessary data may be lowered. The Commission believes that giving investors the ability to choose (and pay for) only the data they need and use will be beneficial.

Rule 603(c) narrows the contexts in which a consolidated display is required to those when it is most needed—a context in which a trading or order-routing decision could be implemented. For example, the consolidated display requirement will continue to cover broker-dealers who provide on-line data to their customers in software programs from which trading decisions can be implemented. Similarly, the requirement will continue to apply to vendors who provide displays that facilitate order routing by broker-dealers. It will not apply, however, when market data is provided on a purely informational website that does not offer any trading or order-routing capability. Rule 603(c) also simplifies the rule language to require that consolidated data be made available in an equivalent manner as other data and rescinds unnecessary provisions in order to update the Rule.[860] We expect Rule 603(c) to benefit broker-dealers and vendors by making compliance with the adopted Rule's more tailored requirements easier and more efficient.

ii. Costs

A potential cost attributable to Rule 603(c) is that there currently may be individuals who use the displayed montage of quotations from all market centers trading a particular security. If vendors and broker-dealers determined not to display this additional information, these investors would be required to obtain the additional data at additional cost. Rule 603(c) also may potentially result in an administrative cost or burden for vendors and broker-dealers that will be required to assess in what circumstances they are displaying market data information for trading and order-routing purposes and in what circumstances they are displaying such information for other purposes. The Commission believes that such a cost will be minimal.

E. Regulation NMS

The Commission is redesignating the current NMS rules adopted under Section 11A of the Exchange Act[861] as Regulation NMS, making non-substantive conforming changes to various rules, and creating a separate definitional rule, Rule 600, which will contain all of the defined terms used in Regulation NMS. Currently, each NMS rule includes its own set of definitions, and some identical terms, such as "covered security," "reported security," and "subject security," are defined inconsistently. Although Rule 600 retains, unchanged, most of the definitions used in the existing NMS rules, it deletes or revises obsolete definitions and eliminates the use of inconsistent definitions for identical terms. Rule 600 does not alter the requirements or operation of the existing NMS rules.

1. Benefits

The Commission believes that Rule 600 and the related amendments to various Commission rules will benefit all entities that are and will be subject to the requirements of the rules contained in Regulation NMS, including brokers, dealers, national securities exchanges, the NASD, ECNs, SIPS, and vendors. By eliminating or revising obsolete and inconsistent definitions and adopting a single set of definitions that will be used throughout Regulation NMS, Rule 600 should make Regulation NMS clearer and easier to understand, thereby facilitating compliance with the Rules' requirements and potentially easing the compliance burden on entities subject to Regulation NMS. Increased compliance with Regulation NMS will, in turn, benefit investors and the public interest. Similarly, the related non-substantive amendments to various Commission rules will ensure that those rules use the definitions provided in Rule 600 and refer accurately to the redesignated NMS rules.

2. Costs

Rule 600 will update and clarify the definitions used in existing NMS rules. Neither Rule 600 nor the related conforming amendments to various rules will alter the existing requirements of the NMS rules or other Commission rules. Accordingly, the Commission believes that Rule 600 and the related

[860] The provisions being rescinded include requirements relating to moving tickers, categories of market information, and representative bids and offers.

[861] 15 U.S.C. 78k–1.

amendments will impose few additional costs on entities subject to Regulation NMS. Although some additional personnel costs may be incurred in reviewing the changes, the Commission believes that these costs will be minimal.

X. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act[862] requires the Commission, when engaging in rulemaking that requires the Commission 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. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[863] To assist the Commission in evaluating the costs and benefits of Regulation NMS, the Commission solicited comment in the Proposing Release and the Reproposing Release on whether any of the proposals discussed therein would have an adverse effect on competition that was neither necessary nor appropriate in furtherance of the purposes of the Exchange Act, and whether they would promote efficiency, competition and capital formation. The Commission also requested commenters to provide empirical data and other factual support for their views on these subjects. The Commission has considered comments received and has adopted the rules as discussed above, taking into account these comments.

A. Order Protection Rule

The Commission agrees with commenters that supported the Reproposed Rule[864] that the price protection that will be provided by the Order Protection Rule will encourage greater use of limit orders, which will help improve the price discovery process, and contribute to increased liquidity and depth in the markets. The more limit orders available at better prices and greater size, the more liquidity available to fill incoming marketable orders. Greater depth and liquidity will, at a minimum, lower the search costs associated with trying to find liquidity and should lead to improved execution quality, particularly for larger-sized institutional orders. The Commission also believes that the Order Protection Rule, by providing intermarket price protection for accessible, automated orders (but not requiring automated markets to wait for responses from non-automated markets), will help promote efficiency in the markets by more effectively linking markets together and integrating trading centers with different market structures into the NMS, and by providing an incentive for non-automated markets to automate. Rule 611 also will promote investor confidence in the markets by helping to assure, on an order-by-order basis, that customer orders are executed at the best price available and providing protection against limit orders being bypassed by inferior priced executions. In particular, the Commission believes that the providing enhanced protection for the best bids and offers of each exchange, The NASDAQ Stock Market, and the ADF will represent a major step toward achieving the objectives of intermarket price protection. The Order Protection Rule thus will promote best execution for retail investors on an order-by-order basis, given that most retail investors justifiably expect that their orders will be executed at the NBBO.

The Commission believes that Rule 611 will promote intermarket competition by leveling the playing field between automated and non-automated markets and, to the extent that the existing trade-through rule serves to constrain competition, by removing this barrier to competition. The Commission recognizes the vital importance of preserving competition among market centers,[865] but continues to believe that commenters have overstated the risk that such competition will be eliminated by adoption of an order protection rule without an opt-out exception. The Commission believes that markets likely will have strong incentives to compete and innovate to attract both marketable orders and limit orders. Market participants and intermediaries responsible for routing marketable orders, consistent with their desire to achieve the best price and their duty of best execution, will continue to rank trading centers according to the total range of services provided by such markets. The most competitive trading center will be the first choice for routing marketable orders, thereby enhancing the likelihood of execution for limit orders routed to that trading center. Because likelihood of execution is very important to limit orders, routers of limit orders likely will be attracted to this preferred trading center. More limit orders will enhance the depth and liquidity offered by the preferred trading center, thereby increasing its attractiveness for marketable orders, and beginning the cycle over again. In addition, Rule 611 will not require that limit orders be routed to any particular market. Consequently, the Commission believes that competitive forces will be fully operative to discipline markets that offer poor services to limit orders, such as limiting the extent to which limit orders can be cancelled in changing market conditions or providing slow speed of cancellation.

Conversely, trading centers that offer poor services, such as slow response times, will likely rank near the bottom in order-routing preferences of market participants and intermediaries. Whenever a least-preferred trading center is merely posting the same price as other trading centers, orders will be routed to the other trading centers. Competitive forces will continue to dictate that the lowest ranked trading center in order-routing preference will suffer from offering a poor range of services to the routers of marketable orders. The Commission therefore does not believe that Rule 611 will eliminate competition among markets.

Commenters have, however, identified a troubling potential for intermarket price protection to lessen the competitive discipline that market participants now can impose on inefficient trading centers.[866] The Order Protection Rule generally requires that trading centers match the best quoted prices, cancel orders without an execution, or route orders to the trading centers quoting the best prices. This is good for investors generally, but may not be if the quoting market is inefficient. For example, a market center may have poor systems that do not process orders quickly and reliably. Or a low-volume market may not be nearly as accessible as a high-volume market.

Currently, consistent with their best execution and other agency responsibilities, participants in the market for Nasdaq stocks can choose not to deal with any trading center that they believe provides unsatisfactory services. Under the Order Protection Rule, market participants can limit their involvement with any trading center to routing IOC orders to access only the best bid or best

[862] 15 U.S.C. 78c(f).

[863] 15 U.S.C. 78w(a)(2).

[864] *See supra*, section II.A.1.

[865] Many commenters believed that an opt-out exception would be necessary to promote competition among trading centers, particularly competition based on factors other than price, such as speed of response. *See supra*, section II.A.4.a.

[866] *See, e.g.*, Fidelity Reproposal Letter at 2; MFA Reproposal Letter at 2; Morgan Stanley Reproposal Letter at 2; TIAA–CREF Reproposal Letter at 2.

offer of the trading center. Nevertheless, even this limited involvement potentially could lessen the competitive discipline that otherwise will be imposed on an inefficient trading center. The Commission therefore believes that this potentially serious effect must be addressed at multiple levels in addition to the specific exceptions included in the Rule that were discussed above.

First, trading centers themselves have a legal obligation to meet their responsibilities under the Exchange Act to provide venues for trading that is orderly and efficient.[867] Through registration and other requirements, the Exchange Act regulatory regime is designed to preclude entities that are not capable of meeting high standards of conduct from doing business with the public. This critically important function will be undermined by a trading center that displayed quotations in the consolidated data stream, but could not, because of poor systems or otherwise, provide efficient access to market participants and efficient handling of their orders. In addition, a trading center will violate its Exchange Act responsibilities if it failed to comply fully with the requirements set forth in Rule 600(b)(3) and (4) for automated quotations and automated trading centers. In particular, an automated trading center must implement such systems, procedures, and rules as are necessary to render it capable of meeting the requirements for automated quotations and must immediately identify its quotations as manual whenever it has reason to believe that it is not capable of displaying automated quotations. These requirements place an affirmative and vitally important legal duty on trading centers to identify their quotations as manual at the first sign of a problem, not after a problem has fully manifested itself and thereby caused a rippling effect at other trading centers that damages investors and the public interest.

Second, those responsible for the regulatory function at SROs have an affirmative responsibility to examine for and enforce all Exchange Act requirements and the SRO rules that apply to the trading centers that fall within their regulatory authority. One of the key policy justifications for a self-regulatory system is that industry regulators will have close proximity to, and significant expertise concerning, their particular trading centers. In addition, industry regulators typically have greater flexibility to address problems than governmental authorities. Implementation of the Order Protection Rule will heighten the importance of effective self-regulation. Those responsible for the market operation functions of an SRO may have business incentives that militate against dealing with potential problems in an effective and forthright manner. Regulatory personnel are expected to be independent of such business concerns and have an affirmative responsibility to prevent improper factors from interfering with an SRO's full compliance with regulatory requirements.

Finally, the Commission itself plays a critical role in the Exchange Act regulatory regime. Effective implementation of the Order Protection Rule also will depend on the Commission taking any action that is necessary and appropriate to address problem trading centers that fail to meet fully their regulatory requirements. The Commission and its staff must continue to monitor the markets closely for signs of problems and listen to the concerns of market participants as they arise, especially with regard to the new requirements imposed by the Order Protection Rule. Quick and effective action will be needed to assure that all responsible parties do not feel that inattention to problems is an acceptable course of action.

The Commission therefore believes that Rule 611 will not impose any competitive burden that is not necessary and appropriate in furtherance of the purposes of the Exchange Act. The Commission believes that the Order Protection Rule will help create an NMS that more fully meets the needs of a wide spectrum of investors, particularly long-term investors and publicly traded companies, by providing increased efficiency and improved depth and liquidity to our capital markets. By providing increased efficiency and promoting investor confidence in quality executions, investors may be more willing to invest in our capital markets, thus promoting the ability of listed companies to raise capital at lower cost.

B. Access Rule

Rule 610 establishes standards governing access to quotations in NMS stocks that: (1) Prohibit trading centers from unfairly discriminating against non-members members or non-subscribers that attempt to access their quotations through a member or subscriber of the trading center, and enable access to NMS quotations through private linkages; (2) establish an outer limit on the cost of accessing such quotations of no more than $0.003 per share; and (3) require SROs to establish, maintain, and enforce rules that, among other things, prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross the automated quotations of other trading centers. The amendment to Rule 301(b)(5) under Regulation ATS lowers the threshold that triggers the Regulation ATS fair access requirements from 20% to 5% of average daily volume in a security.

The access provisions are intended to bolster investor confidence in the markets by helping to assure investors that their orders will be executed at the best prices and will not subject to hidden fees, regardless of the market on which the execution takes place. By generally imposing a uniform fee limitation of $0.003 per share, the Rule will promote equal regulation of different types of trading centers, where currently some are permitted to charge fees and some are not, thereby leveling the playing field among diverse market centers. Moreover, the Commission believes that, by prohibiting a trading center from imposing unfairly discriminatory terms that would prevent or inhibit the efficient access of any person through members, subscribers, or customers of such trading center, the Rule will promote competition among trading centers.

The Commission believes that Rule 610 also will increase transparency and efficiency in the market, thereby enhancing investor confidence, and thus capital formation. Specifically, the Rule will permit private linkages between markets, rather than mandating a collective intermarket linkage facility. Private linkages will permit market centers to connect through cost effective and technologically advanced communications networks. Such systems are widely utilized in the market for Nasdaq-listed stocks today and likely will provide speed and flexibility to trading centers and their market participants. The use of private linkages can encourage interaction between the markets and reduce fragmentation by removing impediments to the execution of orders between and among marketplaces, thereby increasing efficiency and competition.

Several commenters expressed concerns regarding the impact that the access fee proposal could have on

[867] *See, e.g.*, Exchange Act Sections 6(b)(1) and 6(b)(5); Exchange Act Section 15; Exchange Act Sections 15A(b)(2) and 15A(b)(6); Exchange Act Section 11A(a)(1)(C); Regulation ATS.

competition.[868] As discussed in detail in Section III above, the Commission believes that the flat limitation on access fees of $0.003 per share is the fairest and most appropriate solution to what has been a longstanding and contentious issue. A single accumulated fee cap will apply equally to all types of trading centers and all types of market participants, thereby promoting the NMS objective of equal regulation of markets and broker-dealers, and allowing those entities to compete on equal footing.[869]

A fee limitation also is necessary to preclude individual trading centers from raising their fees substantially in an attempt to take improper advantage of strengthened protection against trade-throughs and the adoption of a private linkage regime. In particular, the fee limitation is necessary to address "outlier" trading centers that otherwise might charge high fees to other market participants required to access their quotations by the Order Protection Rule. It also precludes a trading center from charging high fees selectively to competitors, practices that have occurred in the market for Nasdaq stocks. In the absence of a fee limitation, the adoption of the Order Protection Rule and private linkages could significantly boost the viability of the outlier business model. Outlier markets might well try to take advantage of intermarket price protection by acting essentially as a toll booth between price levels. The high fee market likely would be the last market to which orders would be routed, but prices could not move to the next level until someone routed an order to take out the displayed price at the outlier market. Therefore, the outlier market might see little downside to charging exceptionally high fees, such as $0.009, even if it is last in priority. While markets would have significant incentives to compete to be near the top in order-routing priority,[870] there might be little incentive to avoid being the least-preferred market if fees were not limited.

The $0.003 cap will limit the outlier business model. It will place all markets on a level playing field in terms of the fees they can charge and the rebates they can pass on to liquidity providers. Some markets may choose to charge lower fees, thereby increasing their ranking in the preferences of order routers. Others may charge the full $0.003 and rebate a substantial proportion to liquidity providers. Competition will determine which strategy is most successful.

The Commission notes that the $0.003 fee limitation is consistent with current business practices, as very few trading centers currently charge fees that exceed this amount.[871] It appears that only two ECNs currently charges fees that exceed $0.003, charging $0.005 for access through the ADF. These ECNs currently do not account for a large percentage of trading volume. In addition, while a few SROs have large fees on their books for transactions in ETFs that exceed a certain size (*e.g.*, 2100 shares), it is unlikely that these fees generate a large amount of revenues. Accordingly, the adopted fee limitation will not impair the agency market business model. The Commission recognizes that agency trading centers perform valuable agency services in bringing buyers and sellers together, and that their business model historically has relied, at least in part, on charging fees for execution of orders against their displayed quotations. Under current conditions, prohibiting access fees entirely would unduly harm this business model.

In addition, the Rule is designed to reduce the instances of locked and crossed quotations, which will promote capital formation by providing market participants a clear picture of the true trading interest in a stock. Moreover, the Commission believes that the access provisions will encourage interaction between the markets and reduce fragmentation by removing impediments to the execution of orders between and among marketplaces, thereby increasing efficiency and competition. Finally, the Commission believes that the access provisions likely will assist broker-dealers in evaluating and complying with their best execution obligations. The Commission therefore believes that Rule 610 will not impose any competitive burden that is not necessary and appropriate in furtherance of the purposes of the Exchange Act.

C. Sub-Penny Rule

The Commission has considered Rule 612 in light of Sections 3(f) and 23(a)(2) of the Exchange Act and believes that the Rule will not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. To the contrary, by preserving the benefits of decimalization and guarding against the less desirable effects of further reducing the MPV, Rule 612 should promote fair and vigorous competition. The Commission acknowledges that the rule will, in some circumstances, prevent market participants from offering marginally better prices (through quoting or placing orders in sub-pennies). Some commenters argued that a prohibition on quoting in sub-pennies, at least in some NMS stocks, would inhibit price competition and artificially widen spreads.[872] Nevertheless, the Commission is concerned that sub-penny quoting may be used by market participants more as a means of stepping ahead of competing limit orders for an economically insignificant amount than of promoting genuine price competition.

The Commission believes that Rule 612 will assist broker-dealers in evaluating and complying with their best execution obligations and other rules premised on identifying the price of a security at a particular moment in time. The Commission also believes that Rule 612 will enhance market depth and improve transparency by preventing trading interest from being spread across an unnecessarily large number of price points. Therefore, we believe Rule 612 will encourage market participants to use limit orders, an important source of liquidity, and thereby promote market efficiency, competition, and capital formation. The Commission also believes that the new Rule will bolster investor confidence by helping ensure that their orders, especially large orders, can be executed without incurring large transaction costs. This increase in investor confidence also will promote market efficiency, competition, and capital formation.

Rule 612 will establish common quoting conventions that will increase transparency in the securities markets. Moreover, the Commission believes that the Rule will encourage interaction between the markets and reduce

[868] *See, e.g.*, Amex Letter, Exhibit A at 23–24; ArcaEx Reproposal Letter at 10; BGI Reproposal Letter at 3; Bloomberg Summary of Intended Testimony at 3; BrokerageAmerica Letter at 1; Brut Letter at 14; CHX Letter at 15; Domestic Securities Summary of Intended Testimony; Instinet Reproposal Letter at 10; NexTrade Reproposal Letter at 7–8; Phlx Reproposal Letter at 4 (stating its belief that the proposal is not justified under Section 23(a)(2) of the Exchange Act); TrackECN Letter at 3.

[869] Section 11A(c)(1)(F) of the Exchange Act, 15 U.S.C. 78k-1(c)(1)(F).

[870] *See supra*, section II.A.4.a (discussion of competitive implications of trade-through protection).

[871] Cf. Instinet Letter at 35 ("there is no basis for adopting any limitation other than at the prevailing $0.003 per share level, which was arrived at through open competition among ATSs, ECNs, and SRO markets in the Nasdaq market") and Instinet Reproposal Letter at 11 ("as for an appropriate amount for such an accumulated fee limitation, the Reproposal sets the cap at the prevailing $0.003 per share level for stocks priced above $1.00, which was arrived at through open competition among marketplaces").

[872] *See, e.g.*, Instinet Letter at 47; Mercatus Center Letter at 9–10; Tower Research Letter at 8–11.

fragmentation by removing impediments to the execution of orders between and among markets. The increased transparency in the markets and reduction of fragmentation between the markets will bolster investor confidence, thereby promoting capital formation.

D. Market Data Rules and Plan Amendments

The Commission believes that the adopted Plan amendment updating the current revenue allocation formulas will promote efficiency in the marketplace by eliminating incentives for market participants to engage in distortive trading practices such as wash trades, trade shredding, and SRO print facilities to obtain market data revenues. Similarly, commenters supported the need to update the current allocation formulas.[873] In addition, the Commission believes, and several commenters concurred, that the adopted Plan amendment requiring the creation of non-voting advisory committees will promote efficiency in the administration of the Plans by allowing interested parties other than SROs to have a voice in Plan matters,[874] which can, in turn, contribute to the resolution of potential disputes that SRO participants will otherwise bring before the Commission. Furthermore, we expect Rule 603(a) will promote efficiency and competition among market centers by helping to assure that independently reported trade and quotation information is distributed on terms that are fair and reasonable and not unreasonably discriminatory. Commenters that discussed this Rule generally agreed that adopted Rule 603(a) would allow investors and vendors greater freedom to make their own decisions regarding the data they need and that the proposal should lead to lower costs to investors.[875] The Commission agrees with these commenters and notes that efficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data. Adopted Rule 603(b) also likely will promote efficiency in the dissemination of consolidated market information by requiring that all SROs act jointly through the Plans to disseminate such information to the public.

The Commission believes that the adopted Plan amendments will assist in capital formation through a more appropriate allocation of the Networks' revenues to those SROs that contribute most to public price discovery. Rule 603(c) also will eliminate the requirement to display a complete montage of quotations from all market centers and will therefore promote capital formation by reducing the costs to vendors and broker-dealers that are currently required to display quotations that may be far away from the NBBO. One commenter stated that broker-dealers currently are discouraged from making quotation and price information on a stock available because, under the current rule, this information must be accompanied by consolidated information for which they must pay market data fees.[876] Accordingly, the Commission believes that, in certain circumstances, Rule 603(c) will result in additional market data information being provided, which will assist capital formation.

The Commission further believes that the adopted amendments to the Plans and to Rules 601 and 603 will not impose any competitive burden that is not necessary and appropriate in furtherance of the purposes of the Exchange Act. One regional exchange urged the Commission to consider the impact of the formula on competition, because, according to this commenter, most regional market centers rely on market data revenues to fund a significant portion of their budgets and thus a material decrease in such revenues could affect their financial plans, making it infeasible to compete with listing markets, which can survive on listing revenues.[877] Although any change to the current formulas may result in a competitive advantage for some SROs and in a competitive disadvantage for other SROs, the Commission does not believe that this should preclude the adoption of an allocation formula that would provide a more useful distribution of market data revenues based on the quality of an SROs contribution of quotations and trades to the consolidated data stream. The Commission also believes that the adopted Plan amendment requiring the Plans to form non-voting advisory committees will enhance and promote competition by broadening Plan governance to include non-SRO parties, and thereby provide greater transparency in the administration of such Plans. Furthermore, we expect adopted Rules 601 and 603 to lessen the burden on vendors and broker-dealers from having to comply with certain consolidated display requirements. A few commenters generally noted that allowing market centers to independently disseminate certain market data information could increase competition among markets.[878] The Commission agrees that the competition among market centers will be enhanced when such markets also choose to independently distribute their own market data. In addition, the amendment providing that all SROs consolidate information in each NMS stock and disseminate such information through a single processor per security will clarify that SROs are on an equal competitive footing with each other. Thus, the Commission believes that the amendments will enhance rather than burden competition by creating a more equal competitive environment for market centers and others.

E. Regulation NMS

Rule 600, the redesignation of the existing NMS rules as Regulation NMS, and the related conforming changes to other Commission rules will help to promote efficiency and capital formation by making the NMS rules easier to understand, thereby helping to reduce compliance costs for entities subject to the rules. Enhanced clarity in the definitions used in Regulation NMS also will benefit investors and the public interest by facilitating compliance with the requirements of Regulation NMS. Because Rule 600 will clarify the existing definitions used in Regulation NMS without imposing new requirements, and because the redesignation of the NMS rules as Regulation NMS and the conforming changes to other Commission rules will create no new substantive requirements, Rule 600 and the related changes will not impose a burden on competition or alter the competitive standing of entities subject to Regulation NMS.

[873] *See, e.g.*, BGI Reproposal Letter at 3; Citigroup Reproposal Letter at 9; Deutsche Bank Reproposal Letter at 4; Harris Reproposal Letter at 11; JP Morgan Reproposal Letter at 2; STA Letter at 7; UBS Letter at 10; Vanguard Letter at 6.

[874] See, *e.g.*, Financial Services Roundtable Letter at 7; Reuters Letter at 3; SIIA/FISD Reproposal Letter at 2.

[875] *See, e.g.*, Brut Letter at 23; Financial Services Roundtable Letter at 6; Nasdaq Reproposal Letter at 16. In addition, two commenters believed that the proposal would reduce some regulatory burdens imposed on market participants. Financial Information Forum Reproposal Letter at 4–5; Instinet Reproposal Letter at 16.

[876] Reuters Letter at 2–3.

[877] CHX Reproposal Letter at 5.

[878] *See, e.g.*, Amex Letter at 10; Specialist Assoc. Letter at 16–17; *see also* Brut Letter at 23.

XI. Regulatory Flexibility Act

A. Order Protection Rule

The Commission certified, pursuant to Section 605(b) of the Regulatory Flexibility Act, that the Order Protection Rule will not have a significant economic impact on a substantial number of small entities.[879] This certification was incorporated into the Reproposing Release.[880] The Commission did not receive any comments on this certification.

B. Access Rule

The Commission certified, pursuant to Section 605(b) of the Regulatory Flexibility Act, that Rule 610 and the amendments to Rule 301 of Regulation ATS will not have a significant economic impact on a substantial number of small entities.[881] This certification was incorporated into the Reproposing Release.[882] The Commission received one comment discussing the certification. The commenter, an ADF participant, believed that the Commission in the certification recognized that Rule 610 could result in a significant economic impact on small firms, just not a substantial number of small firms.[883] This commenter continued to express its concerns with the proposed access requirements, stating its belief that the proposal to require ADF participants to establish the necessary connectivity that would facilitate efficient access to their quotations would create a cost barrier that discriminates against smaller firms in the ADF.[884]

The Commission does not believe that its adopted access approach in Rule 610(b)(1) discriminates against smaller firms or creates a barrier to access for innovative new market entrants. Rather, smaller firms and new entrants have a range of alternatives from which to choose that will allow them to avoid incurring any costs to meet the connectivity requirements of Rule 610(b)(1) if they wish to do so. This approach is fully consistent with Congressional policy set forth in the Regulatory Flexibility Act, which directs the Commission to consider significant alternatives to regulations that accomplish the stated objectives of the Exchange Act and minimize the economic impact on small entities.[885]

Small ATSs are exempt from participation in the consolidated quotation system and, therefore, from the connectivity requirements of Rule 610. Under Rule 301(b)(3) of Regulation ATS, an ATS is required to display its quotations in the consolidated quotation stream only in those securities for which its trading volume reaches 5% of total trading volume. Consequently, smaller ATSs are not required to provide their quotations to any SRO (whether an SRO trading facility or the NASD's ADF) and thereby trigger the access requirements of Rule 610. Moreover, potential new entrants with innovative trading mechanisms can commence business without having to incur any costs associated with participation in the consolidated quotation system.

Some smaller ATSs, however, may wish to participate voluntarily in the consolidated quotation system. Such participation can benefit smaller firms and promote competition among markets by enabling smaller firms to obtain wide distribution of their quotations among all market participants.[886] Here, too, such firms will have alternatives that would not obligate them to comply with the connectivity requirements of Rule 610(b)(1). ATSs and market makers that wish to trade NMS stocks can choose from a number of options for quoting and trading. They can become a member of a national securities exchange and quote and trade through the exchange's trading facilities. They can participate in The NASDAQ Market Center and quote and trade through that facility. By choosing either of these options, an ATS or market maker would not create a new connectivity point that all other market participants must reach and would not be subject to Rule 610(b)(1). Some firms, however, may not want to participate in an SRO trading facility. These ATSs and market makers can quote and trade in the OTC market. The existence of the NASD's ADF makes this third choice possible by providing a facility for displaying quotations and reporting transactions in the consolidated data stream.[887]

As noted above in Section III.A.1, however, the NASD is not statutorily required to provide an order execution functionality in the ADF. The Commission believes that market makers and ECNs should continue to have the option of operating in the OTC market, rather than on an exchange or The NASDAQ Market Center. As noted in the Commission's order approving Nasdaq's SuperMontage trading facility, this ability to operate in the ADF is an important competitive alternative to Nasdaq or exchange affiliation.[888] Therefore, the Commission has determined not to require small trading centers to make their quotations accessible through an SRO trading facility.

Instead, Rule 610(b)(1) requires all trading centers that choose to display quotations in an SRO display-only quotation facility (currently, the ADF) to provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities. Rule 610(b)(1) therefore may cause trading centers that display quotations in the ADF to incur additional costs to enhance the level of access to their quotations and to lower the cost of connectivity for market participants seeking to access their quotations. The extent to which these trading centers in fact incur additional costs to comply with the adopted access standard will be largely within the control of the trading center itself. As noted above, ATSs and market makers that wish to trade NMS stocks can choose from a number of options for quoting and trading, including quoting and trading in the OTC market. As a result, the additional connectivity requirements of Rule 610(b) will be triggered only by a trading center that displays its quotations in the consolidated data stream and chooses not to provide access to those quotations through an SRO trading facility.

Currently, nine SROs operate trading facilities in NMS stocks. Market participants throughout the securities industry generally have established connectivity to these nine points of access to quotations in NMS stocks. By choosing to display quotations in the ADF, a trading center effectively could require the entire industry to establish

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[879] 5 U.S.C. 605(b).

[880] Reproposing Release, 69 FR at 77492.

[881] 5 U.S.C. 605(b).

[882] Reproposing Release, 69 FR at 77493.

[883] In the Reproposing Release, the Commission noted that only two of the approximately 600 broker-dealers (including ATSs) that would be subject to the Rule are considered small for purposes of the Regulatory Flexibility Act. *See* Section XII.B of the Reproposing Release, 69 FR at 77493.

[884] NexTrade Reproposal Letter at 4–6.

[885] 5 U.S.C. 603(c). The adopted access approach provides alternatives that will benefit a wider range of smaller ATSs than the two that are considered small entities. *See supra* note 385.

[886] *See supra*, note 566 (the Commission's Advisory Committee on Market Information recommended retention of the consolidated display requirement because, among other things, it "may promote market competition by assuring that information from newer or smaller exchanges is widely distributed.").

[887] Under Rule 301(b)(3) of Regulation ATS, 17 CFR 242.301(b)(3), an ATS is required to display its quotations in the consolidated data stream only in those securities for which its trading volume reaches 5% of total trading volume.

[888] *See* Securities Exchange Act Release No. 43863 (Jan. 19, 2001), 66 FR 8020 (Jan. 26, 2001).

connectivity to an additional point of access. Potentially, many trading centers could choose to display quotations in the ADF, thereby significantly increasing the overall costs of connectivity in the NMS. Such an inefficient outcome would become much more likely if an ADF trading center were not required to assume responsibility for the additional costs associated with its decision to display quotations outside of an established SRO trading facility.

Although the Exchange Act envisions an individual broker-dealer having the option of trading in the OTC market,[889] it does not mandate that the securities industry in general must subsidize the costs of accessing a broker-dealer's quotations in the OTC market if the NASD chooses not to provide connectivity. The Commission believes that it is reasonable and appropriate to require those ATSs and market makers that choose to display quotations in the ADF to bear the responsibility of providing a level and cost of access to their quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities. Under Rule 610(b)(1), therefore, ADF participants will be required to bear the costs of the necessary connectivity to facilitate efficient access to their quotations.[890] This standard will help ensure that additional connectivity burdens are not imposed on the securities industry each time an additional ADF participant necessitates a new connectivity point by choosing to begin displaying quotations in the consolidated quotation stream. The Commission believes that this requirement will help reduce overall industry costs by more closely aligning the burden of additional connectivity with those entities whose choices have created the need for additional connectivity.

As just discussed, the Commission recognizes that trading centers subject to Rule 610(b)(1) may incur costs associated with providing access to their quotations, although the costs will vary depending upon the manner in which each trading center provides such access. The Commission notes that to meet the standard contained in Rule 610(b)(1), a trading center will be allowed to take advantage of the greatly expanded connectivity options that have been offered by competing access service providers in recent years.[891] These industry access providers have extensive connections to a wide array of market participants through a variety of direct access options and private networks. A trading center potentially could meet the requirement of Rule 610(b)(1) by establishing connections to and offering access through such vendors. The option of participation in existing market infrastructure and systems should reduce a trading center's cost of compliance.[892]

Section 3(a) of the Regulatory Flexibility Act[893] requires the Commission to undertake an Initial Regulatory Flexibility Analysis of proposed rules on small entities unless the Commission certifies that the proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. The Commission continues to believe that the Access Rule will not have a significant economic impact on a substantial number of small entities.

C. Sub-Penny Rule

This Final Regulatory Flexibility Act Analysis ("FRFA") relating to Rule 612 of Regulation NMS has been prepared in accordance with the Regulatory Flexibility Act.[894]

1. Need for and Objective of Rule 612

Although the conversion from fractional to decimal trading benefited investors by clarifying and simplifying prices, making our markets more competitive internationally, and reducing trading costs by narrowing spreads, these benefits could be diluted if market participants could quote NMS stocks in increments less than a penny. The Commission is particularly concerned that sub-penny orders may be used to step ahead of competing limit orders for an economically insignificant amount.

New Rule 612 prohibits an exchange, association, vendor, ATS, or broker-dealer from accepting, ranking, or displaying an order, quotation, or indication of interest in an NMS stock priced in a sub-penny increment (except for an order, quotation, or indication of interest priced less than $1.00 per share, in which case the price may not extend beyond four decimal places). The rule is designed to improve market depth by preventing quotations from spreading across an unduly large number of price points, while also encouraging the use of limit orders—an important source of liquidity—by preventing competing market participants from stepping ahead of a limit order by an economically insignificant amount. We expect the rule to reduce the instances of quote flickering and to facilitate broker-dealers' efforts to meet their best execution and other regulatory duties premised on identifying a security's prevailing market price.

2. Significant Issues Raised by Public Comment

The IRFA appeared in the Proposing Release and in the Reproposing Release.[895] The Commission requested comment in the IRFA on the impact the proposals would have on small entities and how to quantify the impact. The Commission did not receive any comment letters addressing the IRFA.

3. Small Entities Subject to the Rule

Rule 612 applies to every national securities exchange, national securities association, ATS, vendor, and broker-dealer. Each type of market participant that will be affected by the new Rule 612 is discussed below.

a. National Securities Exchanges and National Securities Associations

Rule 0–10(e) under the Exchange Act[896] provides that the term "small business" or "small organization," when referring to an exchange, means any exchange that: (1) Has been exempted from the reporting requirements of Rule 601 under the Exchange Act; and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined by Rule 0–10. No national securities exchange meets these criteria; therefore, no national securities exchange is a small entity. Currently, there is one national securities association (NASD) that is subject to Rule 612. NASD is not a small entity as defined by 13 CFR 121.201.

b. Broker-Dealers

Commission rules generally define a broker-dealer as a small entity for

[889] See Sections 11A(c)(3)(A) and (4) of the Exchange Act, 15 U.S.C 78k–1(c)(3)(A) and (4).

[890] Thus, although market participants may still be required to access numerous trading centers in the ADF, the Rule should reduce the cost of access to each such trading center by requiring the ADF trading center to provide a cost and level of access substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities.

[891] As noted in the Commission's order approving the pilot program for the ADF, the reduction in communications line costs in recent years and the advent of competing access providers offer the potential for multiple competitive means of access to the various trading centers that trade NMS stocks. Securities Exchange Act Release No. 46249, *supra* note 390.

[892] As the self-regulatory authority responsible for the OTC market, the NASD must act as "gatekeeper" for the ADF, and, as such, will need to closely assess the extent to which ADF participants meet the requirements of Rule 610.

[893] 5 U.S.C. 603(a).

[894] 5 U.S.C. 604.

[895] Proposing Release, 69 FR at 11174–75; Reproposing Release, 69 FR 77493–94.

[896] 17 CFR 240.0–10(e).

purposes of the Exchange Act and the Regulatory Flexibility Act if the broker-dealer had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and the broker-dealer is not affiliated with any person (other than a natural person) that is not a small entity.[897] The Commission estimates that, as of the end of 2003, there were approximately 6,565 Commission-registered broker-dealers,[898] of which approximately 905 are considered small entities pursuant to Rule 0–10(c) under the Exchange Act.[899]

c. Vendors

A vendor is any securities information processor engaged in the business of disseminating transaction reports or last sale data with respect to transactions in reported securities to brokers, dealers, or investors on a real-time or other current and continuing basis, whether through an ECN, moving ticker, or interrogation device.[900] Rule 0–10(g)[901] provides that the term "small business" or "small organization," when referring to a securities information processor, means any securities information processor that: (1) Had gross revenues of less than $10 million during the preceding fiscal year (or in the time it has been in business, if shorter); (2) provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization under this section. The Commission estimates that there are approximately 80 vendors, 16 of which are considered small entities.

4. Reporting, Recordkeeping, and Other Compliance Requirements

Rule 612 will not impose any new reporting, recordkeeping, or other compliance requirements on any entities subject to the rule, including small entities.

5. Agency Action To Minimize Effect on Small Entities

Rule 612 establishes a uniform pricing increment for NMS stocks. All entities subject to the rule generally are prohibited from displaying, ranking, or accepting an order, quotation, or indication of interest priced in a sub-penny increment. Imposing different compliance requirements for small entities would be impractical and undermine the goal of uniformity. Furthermore, the Commission does not believe it necessary or appropriate to consider whether small entities should be permitted to use performance rather than design standards to comply with Rule 612. The rule already establishes performance standards and does not dictate any particular design standard that must be employed to achieve the rule's objectives.

D. Market Data Rules and Plan Amendments

1. Regulatory Flexibility Act Certification for the Plan Amendments

The Commission certified, pursuant to Section 605(b) of the Regulatory Flexibility Act, that amending the Plans to: (1) Modify the current formulas for allocating market data revenues, and; (2) require the establishment of non-voting advisory committees will not have a significant economic impact on a substantial number of small entities.[902] This certification was incorporated into the Proposing Release and Reproposing Release.[903] The Commission did not receive any comments on this certification.

2. Final Regulatory Flexibility Analysis for Amendments to Rules 11Aa3–1 and 11Ac1–2 (Redesignated as Rules 601 and 603)

This FRFA has been prepared in accordance with the Regulatory Flexibility Act.[904] This FRFA relates to Exchange Act Rules 11Aa3–1 and 11Ac1–2 (redesignated as Rules 601 and 603).

a. Need for and Objectives of Rules 601 and 603

The Commission believes that an overall modernization of the rules for disseminating market data to the public is necessary to address problems posed by the current market data rules. In adopting Rules 601 and 603 as reproposed, the Commission retains the core elements of the existing rules—price discovery and mandatory consolidation—which provide important benefits to investors and to others who use market information, but amends other parts of the existing rules that have resulted in serious economic and regulatory distortions. More specifically, adopted Rules 601 and 603 reduce the burden on, and provide simplification and uniformity for, those market centers, broker-dealers, and data vendors that have to comply with requirements under the Rules.

Adopted Rules 601 and 603 are designed to fulfill several objectives, including: (1) Providing market centers, including ATSs and market makers, with flexibility to independently distribute their own trade reports, aside from their obligation to provide their trade reports and best quotations to an SRO or to the Networks (depending on the type of market center); (2) providing uniform standards for all market centers, including non-SRO market centers and entities that are exclusive processors of SRO market data, for the independent distribution of market data; (3) providing that all SROs act jointly through the Plans and disseminate their consolidated information through a single processor, to clarify the practice among the SROs and to require continued participation in the Plans and dissemination through one processor per security; (4) reducing consolidated display requirements on broker-dealers and vendors and limiting their consolidated display obligations to the disclosure of the NBBO and consolidated last sale information and to the display of market information in a trading or order-routing context; and (5) easing the burden of compliance by simplifying the current consolidated display requirements under the Rule and by rescinding old provisions in the Rule that are outdated and no longer necessary.

b. Significant Issues Raised by Public Comment

The IRFA appeared in the Proposing Release and in the Reproposing Release.[905] The Commission requested comment in the IRFA on the impact the proposals would have on small entities and how to quantify the impact. The Commission did not receive any comment letters addressing the IRFA.

c. Small Entities Subject to the Rule

Adopted Rules 601 and 603 affect ATSs, market makers, broker-dealers, and SIPs that could potentially be small entities. Paragraph (c) of Rule 0–10

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[897] *See* 17 CFR 240.0–10(c).

[898] This number reflects the number of FOCUS filings. ATSs that are not registered as exchanges are required to register as broker-dealers. Accordingly, an ATS would be considered a small entity if it fell within the definition of "small entity" as it applies to broker-dealers.

[899] 17 CFR 240.0–10(c).

[900] *See* 17 CFR 11Aa3–1(a)(11).

[901] 17 CFR 240.0–10(g).

[902] 5 U.S.C. 605(b).

[903] Proposing Release, 69 FR at 11190–91; Reproposing Release, 69 FR at 77495–96.

[904] 5 U.S.C. 604.

[905] Proposing Release, 69 FR at 11190–91; Reproposing Release, 69 FR 77495–96.

under the Exchange Act[906] defines the term "small business" or "small organization," when referring to a broker-dealer, to mean a broker or dealer that had total capital of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, or, if not required to file such statements, that had total capital of less than $500,000 on the last business day of the preceding fiscal year; and is not affiliated with any person (other than a natural person) that is not a small business or small organization. ATSs and market makers would be considered broker-dealers for purposes of this definition. Paragraph (g) of Rule 0–10[907] defines the term "small business" or "small organization," when referring to a SIP, to mean a SIP that had gross revenues of less than $10 million during the preceding fiscal year and provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year; and is not affiliated with any person (other than a natural person) that is not a small business or small organization.

In the IRFA included in the Reproposing Release, the Commission estimated that, as of December 31, 2003, there were approximately 905 registered broker-dealers, including ATSs and market makers that would be considered small entities. In addition, approximately 16 SIPs would be considered small entities. In the Proposing Release and in the Reproposing Release, the Commission requested comment on the number of small entities that would be impacted by adopted Rules 601 and 603, including any available empirical data. No commenters responded with cost estimates pertaining to the requested data listed above. Adopted Rule 601 enables small market centers, including ATSs and market makers, that contribute to consolidated information, if they so choose, to also independently distribute their own trade reports. Adopted Rule 603 reduces the compliance burden on small broker-dealers and SIPs by limiting the data required to be displayed under the Rule.[908]

[906] 17 CFR 240.0–10(c).

[907] 17 CFR 240.0–10(g).

[908] Adopted Rule 603, providing that all SROs act jointly through the Plans and disseminate their consolidated information through a single processor, would only apply to the SROs, which are not "small entities" for purposes of the Regulatory Flexibility Act.

d. Reporting, Recordkeeping and Other Compliance Requirements

Adopted Rules 601 and 603 do not impose any new reporting, recordkeeping or other compliance requirements on ATSs, market makers, broker-dealers, and SIPs that are small entities. SROs that would be subject to these proposed amendments are not considered small entities.[909]

e. Agency Action To Minimize Effects on Small Entities

As required by the Regulatory Flexibility Act, the Commission has considered alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. As discussed in the Proposing Release and in the Reproposing Release, the Commission has considered the following alternative models for disseminating market data to the public: (1) A competing consolidators model under which each SRO would be allowed to sell its market data separately to any number of consolidators; (2) a rescission of the consolidated display requirement and allowing all SROs and other market centers to distribute their market data individually; and (3) a hybrid model that would retain the consolidated display requirement and existing Networks solely for the dissemination of the NBBO, but allow the SROs to distribute their own quotations and trades independently and without a consolidated display requirement.

The primary goal of the adopted amendments to Rules 11Aa3–1 and 11Ac1–2 (redesignated as Rules 601 and 603) is to retain the benefits of the consolidated display requirement, which provides a uniform, consolidated stream of data and is the single most important tool for unifying all of the market centers trading NMS Stocks, while providing market centers that contribute to consolidated information with the ability to independently distribute their own market data and reducing the consolidated display requirements on broker-dealers and SIPs. As stated in the Proposing Release and in the Reproposing Release and in Section V.A.1 above, the Commission believes that these potential alternative models pose an unacceptable risk of losing important benefits that investors and other information users receive under the current system—an affordable and highly reliable stream of quotations and trades that is consolidated from all significant market centers trading an NMS Stock.

[909] *See supra*, section XI.C.3.a.

The Commission believes that different compliance or reporting requirements for small entities, and further clarification, consolidation, or simplification of Rules 601 and 603, is not necessary because adopted Rules 601 and 603 do not establish any new reporting, recordkeeping or other compliance requirements for small entities and, in fact, adopted Rule 603 should reduce the compliance burden on small broker-dealers and SIPs by limiting the data required to be consolidated and displayed under the Rule. The Commission also notes that the amendments contain performance standards and do not dictate for entities of any size any particular design standards (*e.g.*, technology) that must be employed to achieve the objectives of the adopted amendments.

E. Regulation NMS

The Commission certified, pursuant to Section 605(b) of the Regulatory Flexibility Act, that Rule 600 and the redesignation of the NMS rules as Regulation NMS will not have a significant economic impact on a substantial number of small entities.[910] This certification was incorporated into the Reproposing Release.[911] The Commission did not receive any comments on this certification.

XII. Response to Dissent

The Commission has added this section to its release to respond directly to the dissent's claims that the Commission's "statutory interpretations and policy changes are arbitrary, unreasonable and anticompetitive" and that they are "not supported by substantial evidence that, notwithstanding their anti-competitive effect, they are necessary or appropriate to further the purposes of the Exchange Act."[912] Previous sections of this release discuss in greater detail the basis of the Commission's decision to adopt Regulation NMS. By modernizing and strengthening the regulatory structure of the U.S. equity markets, Regulation NMS will protect investors, promote fair competition, and enhance market efficiency. Because the dissent appears to have misconstrued a number of the Commission's policy positions and the reasoning underlying them, we are including this section to clarify the record.

We understand that reasonable minds can disagree with the policy decisions reflected in Regulation NMS. In light of

[910] 5 U.S.C. 605(b).

[911] Reproposing Release, 69 FR at 77496.

[912] Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Adoption of Regulation NMS ("Dissent"), Introduction.

the substantial record, however, the Commission rejects any assertion that this rulemaking is arbitrary, unreasonable, anticompetitive, or otherwise outside the agency's authority. In making this claim, the dissent appears to ignore the clear statutory authority for the Commission's action, the many public comments strongly supporting the adoption of Regulation NMS, and the extensive and comprehensive rulemaking process undertaken by the Commission. As discussed below, the drafters of the Exchange Act itself repeatedly affirmed the basic principles that underlie Regulation NMS. In particular, they specifically contemplated and endorsed the Commission's authority to adopt an intermarket price protection rule.[913] In addition, the comments supporting Regulation NMS were submitted by a broad spectrum of investors, listed companies, academics, market centers, and other market participants, many of which have extensive experience and expertise regarding the inner workings of the equity markets.[914]

Moreover, Regulation NMS is the culmination of a long and open process that included the original proposals, a public hearing, a supplemental request for comment, the reproposals, eight in-depth analyses of relevant trading data, and more than 2000 public comments. The issues raised by Regulation NMS undoubtedly are multifaceted. Reaching decisions in this complex area requires an understanding of the relevant facts and of the often subtle ways in which the markets work, and the balancing of policy objectives that sometimes may not point in precisely the same direction. Perhaps not surprisingly, there continue to be differences of opinion, even after this long process, among Commissioners, investors, market participants, and the public in general concerning the most appropriate future regulatory structure for the U.S. equity markets.

In sum, the Regulation NMS rulemaking process has required the Commission to grapple with many difficult and contentious issues that have lingered unresolved for many years. The Commission has devoted a great deal of effort to studying these issues, assessing the views of all commenters, and modifying its proposals to respond appropriately to their comments. Indeed, this release discusses at length our response to commenters, particularly those that disagree with the proposals. However, decisions must be made and contentious issues must be resolved so that the markets can move forward with certainty concerning their future regulatory environment and appropriately respond to fundamental economic and competitive forces. The Commission always seeks to achieve a consensus, but when positions have become entrenched after many years of study and debate, waiting for consensus can mean indefinite gridlock that ultimately could damage the competitiveness of the U.S. equity markets, both at home and internationally. The Commission believes that further delay is not warranted and that the time has come to make the difficult decisions necessary to modernize and strengthen the national market system.

A. Statutory Authority for Order Protection Rule

The dissent suggests that the Commission is exceeding its authority by attempting to impose an "optimal market structure."[915] This claim misconstrues the nature and impact of the Order Protection Rule and ignores the clear mandate provided to the Commission by Congress in Section 11A(a)(2) of the Exchange Act to facilitate the establishment of a national market system. Regulation NMS does not dictate any particular structure for the markets; rather, it establishes basic "rules-of-the-road" for all markets that will promote competition on terms that benefit investors. In particular, competition will be guided by three basic principles—price transparency, open access, and best price. As a result, all investors will be able to ascertain the best prices for NMS stocks, obtain fair and non-discriminatory access to the markets displaying such prices, and have assurance that their orders will be executed at the best prices that are immediately and automatically accessible. Within this regulatory framework of transparency, access, and best price, competitive forces will determine the optimal market structure.

1. Intermarket Price Protection Rule

The dissent cites a selected few passages from the legislative history of the 1975 Amendments[916] to the Exchange Act as support for the claim that an intermarket price protection rule is inconsistent with the Exchange Act.[917] A more complete review of the legislative history, however, makes it clear that the Order Protection Rule is squarely consistent with the policy determinations made by Congress in 1975—indeed, it may be the dissent's disagreement with those Congressional policy determinations that explains its opposition to the Order Protection Rule. In particular, the national market system is premised on promoting fair competition among individual markets, while at the same time assuring that these markets are linked together in a unified system that promotes competition among the orders of buyers and sellers in individual NMS stocks. The most succinct statement of order competition is found in the House Report on the 1975 Amendments: "Investors must be assured that they are participants in a system which maximizes the opportunities for the most willing seller to meet the most willing buyer."[918] This Congressional mandate for the national market system is not achieved when trades occur at prices inferior to the best quotations that are immediately and automatically accessible.

The dissent appears to focus on the NMS objective of fair competition among markets, without giving appropriate weight to the important Congressional objective of integrating markets into a system that promotes order interaction and the best execution of investor orders.[919] The House Report gives the following overview of the "goals and principles to serve as a guide" to the Commission that specifically endorses price protection for investor orders:

> Briefly stated, these embrace the principles of competition in which all buying and selling interests are able to participate and be represented. The objective is to enhance competition and to allow economic forces, interacting within a fair regulatory field, to arrive at appropriate variations of practices and services. Neither the markets themselves nor the broker-dealer participant in these markets should be forced into a single mold. Market centers should compete and evolve according to their own natural genius and all actions to compel uniformity must be measured and justified as necessary to accomplish the salient purposes of the Securities Exchange Act, assure the maintenance of fair and orderly markets and to provide price protection for the orders of investors.[920]

The establishment of a "fair regulatory field" that will "provide price protection for the orders of investors" is

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[913] *See infra*, notes 920–922 and accompanying text.

[914] *See supra*, notes 56–59 and accompanying text; *infra*, notes 939–941, 957–960, and accompanying text.

[915] Dissent, text accompanying note 27.

[916] Pub. L. No. 94–29, 89 Stat. 97 (1975).

[917] *See, e.g.*, Dissent, notes 3–5, 51–52.

[918] H.R. Rep. 94–123, 94th Cong., 1st Sess. 50 (1975) ("House Report").

[919] *See supra*, section I.B (discussion of NMS principles and objectives).

[920] House Report at 51.

precisely what the Order Protection Rule is designed to do.

Similarly, the Senate Report on the 1975 Amendments emphasizes both competition among markets and integration of those markets into a unified system:

> S. 249 would lay the foundation for a new and more competitive market system, vesting in the SEC power to eliminate all unnecessary or inappropriate burdens on competition while at the same time granting to that agency complete and effective powers to pursue the goal to centralized trading of securities in the interest of both efficiency and investor protection.[921]

By "centralized trading," the Senate Report did not mean a single market, but rather NMS rules and facilities that link the markets into a unified system to assure best execution of investor orders—the approach incorporated in Regulation NMS. For example, the Senate Report specifically addresses the importance of intermarket price protection:

> [A] limited price order is presently "protected" as to price priority on the exchange on which it is held but it is not protected in any way [with] respect to trading on another exchange or in the third market. As a consequence, a limit order for a listed security held in only one of several markets for that security need not be executed before a transaction is effected at the same price or at a price less favorable to the other party in another market. In the Committee's view this is the basic problem caused by fragmentation of the securities markets: the lack of a mechanism by which all buying and selling interest in a given security can be centralized and thus assure public investors best execution.[922]

Consequently, the Commission's challenge in meeting its NMS responsibilities is to promote both competition among markets and competition among orders, as well as to assure a regulatory structure that is workable and minimizes regulatory costs. Notably, Congress chose not to mandate any particular NMS rules in order to give the Commission greater flexibility to use its expertise in achieving NMS objectives:

> The Committee considered mandating certain minimum components of the national market system but rejected this approach. The nation's securities markets are in dynamic change and in some respects are delicate mechanisms; the sounder approach appeared to the Committee, therefore, to be to establish a statutory scheme clearly granting the Commission broad authority to oversee the implementation, operation, and regulation of the national market system and at the same time to charging it with the clear responsibility to assure that the system develops and operates in accordance with Congressionally determined goals and objectives. Section 11A(a) and 11A(c), taken together, would establish such an arrangement.[923]

Although the dissent may disagree with the policy of an intermarket price protection rule, there is no basis for the claim that Regulation NMS is at odds with the Commission's statutory mandate to facilitate the establishment of a national market system.

2. Long-Term Investors

The dissent questions the Commission's authority to give precedence to the interests of long-term investors in those limited contexts where their interests conflict with the interests of short-term traders.[924] As is discussed elsewhere in this release,[925] the interests of long-term investors and short-term traders in fair and efficient markets coincide most of the time. In those few contexts where the interests of long-term investors directly conflict with short-term trading strategies, we believe that, in implementing regulatory structure reform, the Commission has both the authority and the responsibility to further the interests of long-term investors, and that the record provides substantial support for the Commission's determination to further their interests.

As discussed above, intermarket price protection will significantly benefit the more than 84 million individual investors in the U.S. equity markets by reducing their transaction costs and thereby enhancing their long-term investment returns.[926] Price protection may, however, interfere to some extent with the extremely short-term trading strategies that can depend on millisecond response times from markets for orders taking displayed liquidity. It also may interfere with short-term trading strategies that benefit from volatile and illiquid markets. The dissent claims that the "length of time an individual owns a stock is not a relevant factor in distinguishing among groups of investors" and that the distinction between long-term investors and short-term traders is arbitrary and unreasonable.[927] But in those limited contexts where the interests of long-term investors conflict with short-term trading strategies, the conflict cannot be reconciled by stating that the NMS should benefit all investors. In particular, *failing* to adopt a price protection rule because short-term trading strategies can be dependent on millisecond response times would be unreasonable in that it would elevate such strategies over the interests of millions of long-term investors—a result that would be directly contrary to the purposes of the Exchange Act.[928]

As discussed earlier in this release,[929] the legislative history of the Exchange Act from its adoption in 1934 emphasizes the Congressional concern to protect the interests of the many average investors who are not active traders or market intermediaries, but who depend on their equity investments, whether directly in corporate stocks or indirectly through their investment in mutual funds and retirement accounts, to meet their long-term financial goals. The dissent suggests that these statements of Congressional concern for millions of average investors were no longer relevant when Congress adopted the 1975 Amendments, but the legislative history of the 1975 Amendments does not support this proposition.[930]

The dissent also argues that short-term traders often provide liquidity to the market and thereby benefit long-term investors. The Commission certainly agrees with this statement as a general matter, but believes that, in the specific context of an intermarket price protection rule, directly promoting the display of limit orders, which directly

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[921] S. Rep. No. 94–75, 94th Cong., 1st Sess. 2 (1975) ("Senate Report").

[922] Senate Report at 17.

[923] Senate Report at 8–9. *See also* H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 92 (1975) ("Conference Report") (adopting Senate approach to "provide maximum flexibility to the Commission and the securities industry in giving specific content to the general concept of the national market system").

[924] Dissent, section IV. Many short-term trading strategies are conducted by registered broker-dealers, such as specialists and market makers. Despite the dissent's repeated references in section IV to both short-term investors and market intermediaries, we do not believe the dissent means to suggest that the Commission lacks authority under the Exchange Act to give precedence to the interests of long-term investors over market intermediaries.

[925] *Supra*, section I.B.2.

[926] *See supra*, text accompanying notes 25–26 (survey finding that more than 84 million individuals representing more than 50% of American households own equity securities, directly or indirectly, and that nearly all view their equity investments as savings for the long-term).

[927] Dissent, section IV.

[928] *See, e.g.*, Exchange Act Section 11A(a)(1)(C) ("It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure," among other things, "the economically efficient execution of securities transactions" and "the practicability of brokers executing investors' orders in the best market.").

[929] *Supra*, section I.B.2.

[930] *See, e.g.*, Conference Report at 91 ("The securities markets of the United States are an important national asset. Under the system of Federal regulation established in the 1930s, these markets have flourished. They have provided a means for millions of Americans to share in the profits of our free enterprise system and have facilitated the raising of capital by new and growing businesses.").

provide liquidity to the market, rather than promoting short-term trading strategies that require millisecond response times for orders that take displayed liquidity, is the most appropriate approach to protect investors and enhance market efficiency. Many commenters agreed with this policy decision. For example, T. Rowe Price stated that "we do not believe that speed of access considerations should drive market structure issues if to do so would jeopardize legitimate market linkage initiatives. Connected markets provide the opportunity for information gathering, block trading, and improved price discovery, as well as the legitimacy of the 'last-sale' price. While speed of access and execution are crucial, there is a limit to how fast such linkages need to be in order to protect and enhance our markets."[931] Similarly, the Committee on Investment of Employee Benefit Assets, which represents 110 of the nation's largest corporate retirement funds managing $1.1 trillion on behalf of 15 million plan participants and beneficiaries, stated that "it is unclear with the advance of automation why we would need or should allow anything other than the best price requirement for investors. Our constituency is concerned with long-term growth and market stability and the ability to opt-out [of the best price requirement] could place long-term investors at a disadvantage."[932] Finally, the National Association of Investors Corporation emphasized that "[m]ake no mistake, the best price best serves investors. It is part of the value equation when buying and selling stock. Please keep in mind that individual investors are long-term investors and price is of utmost importance to them."[933] Although the dissent may disagree with the policy views of these commenters on the best means to protect investors and to promote market integrity and liquidity, it does not provide a basis for concluding that the commenters' views, which the Commission shares, are arbitrary or unreasonable.

B. Basis for Adoption of Order Protection Rule

A prior section of this release discusses at length the Commission's basis for adopting the Order Protection Rule.[934] This section responds to certain specific claims made in the dissent where the dissent appears to have misconstrued the Commission's decision-making process and conclusions, and highlights the critical policy issues on which the views expressed in the dissent simply conflict with the considered views of the Commission and many commenters.

The dissent asserts that the Commission's objectives for the Order Protection Rule have been "a moving target, morphing from the protection of limit orders, to the need to increase market depth and liquidity, to the reduction of transaction costs for long-term investors and issuers."[935] In fact, the Commission's objectives have remained consistent throughout the NMS rulemaking.[936] While certain details in the original proposal have been modified to respond appropriately to public comment, the policies underlying the Rule as proposed, reproposed, and adopted have remained the same. Indeed, the dissent seems not to appreciate that the "moving targets" it identifies—the objectives of protecting limit orders, increasing market depth and liquidity, and reducing investor transaction costs—are all quite closely inter-related. As the Commission has explained quite consistently in this release and in the proposing releases, protecting limit orders contributes to market depth, which in turn reduces investor transaction costs. In addition, the Commission has consistently emphasized that intermarket price protection will promote the best execution of investor orders and fair and orderly markets.[937]

1. Investor Protection

As discussed previously in this release,[938] the Commission believes that the Order Protection Rule is needed to strengthen the protection of investors in the U.S. equity markets. Many commenters agreed with the Commission on the need for strengthened price protection to protect investors. For example, the Consumer Federation of America believed that "the brokers" duty of best execution is simply too vague to serve as an effective deterrent to abuse. It is too vague for the broker to know with certainty that it has satisfied its best execution obligation and too vague to be enforced consistently and effectively. In fact, one of the real benefits of the proposed trade-through rule is that it has the potential to simplify compliance with best execution rules."[939] The Committee on Investment of Employee Benefit Assets also recognized the vital importance of maintaining equity markets in which all investors can participate with confidence: "[I]n light of the scandals in the securities and mutual fund industries, our first priority should be to restore investor confidence in our capital markets. To allow trading to take place outside of the best price will continue to raise questions of fairness and could diminish investor confidence."[940] Other commenters shared these concerns about the impact of trade-throughs on investor confidence in the fairness of the U.S. equity markets.[941]

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[931] T. Rowe Price Reproposal Letter at 2.

[932] Letter from Gary A. Glynn, Chairman, Committee on Investment of Employee Benefit Assets, to Jonathan G. Katz, Secretary, Commission, dated June 24, 2004 ("CIEBA Letter") at 1.

[933] Letter from Kenneth S. Janke, Chairman, National Association of Investors Corporation, to Jonathan G. Katz, Secretary, Commission, dated June 24, 2004 ("NAIC Letter") at 1.

[934] *Supra*, section II.A.

[935] Dissent, section I. The dissent asserts that the Commission has sought to reduce transaction costs for issuers. Stated more accurately, the Commission has sought to reduce transaction costs for investors, which would thereby help reduce the cost of capital for the listed companies in which they invest. *See supra*, note 15 and accompanying text.

[936] For example, the Proposing Release emphasized that one of the three overarching objectives of the proposals was to "promote greater order interaction and displayed depth," thereby reducing the price impact costs of large, institutional investors. Proposing Release, 69 FR at 11129.

[937] *Id.* at 11132.

[938] *See supra*, section II.A.1.

[939] Consumer Federation Letter at 4.

[940] CIEBA Letter at 2.

[941] *See, e.g.*, BSE Reproposal Letter at 2 ("The Exchange believes that the reproposed Trade-Through Rule is critical to the protection of customer limit orders through 'protected quotes' for all securities.* * * Minimum investor protection principles should not be bifurcated on the basis of whether a security trades in either a listed or NASDAQ environment."); Letter from James W. Vitalone, Chair, U.S. Advocacy Committee, and Linda L. Rittenhouse, CFA Institute—Advocacy, to Jonathan G. Katz, Secretary, Commission, dated Sep. 22, 2004 ("CFA Institute Letter") at 1 ("We believe that the current way of doing business has become a system permeated with trading practices that often obfuscate the manner in which best price is determined or how some limit orders are filled. Thus, we strongly support and urge reforms that will bring uniformity and transparency to the current system, ultimately leveling the playing field as much as possible among market participants. To this end, we support a trade-through rule that applies to all securities."); Letter from Lawrence E. Harris, Marshall School of Business, University of Southern California, to Jonathan G. Katz, Secretary, Commission, dated Feb. 5, 2005 ("Harris Reproposal Letter") at 7 ("The proposed trade-through rule would prevent exchanges from trading through exposed electronically accessible orders at another exchange. In principle, such rules should not be necessary because traders generally will access liquidity wherever it is cheapest. In practice, dealers, brokers, and exchanges sometimes do trade through other orders since it is generally in their self-interest to control an execution rather than share it. Accordingly, the primary benefit of the proposed trade-through regulation will be to promote investor protection."); NAIC Letter at 1 ("Having confidence that one is receiving the best price in stock transactions contributes greatly to the confidence that investors have in the fairness and integrity of the marketplace."); Phlx Reproposal Letter at 1 ("Phlx believes that intermarket protection of firm and accessible quotes is not only necessary, but should foster a more efficient marketplace, which is consistent with protecting investors and the public interest.").

The dissent, however asserts that the Trade-Through Study prepared by Commission staff to estimate trade-through rates does not substantiate investor protection concerns.[942] The dissent further suggests that the Commission has "cherry-picked" statistics that support its position, while ignoring, or even failing to disclose, statistics that do not support its position.[943] While the Commission believes that the total number of trade-throughs should not be the sole consideration in making its policy choices, an earlier section of this release discusses in detail the data demonstrating the significance of trade-through rates found in the Study,[944] and that discussion makes clear that the Commission has not ignored or failed to disclose the findings of the Trade-Through Study. Indeed, at the time the Reproposing Release was published, the Study was placed in the public file specifically to assure that all commenters had a full opportunity to evaluate its data and methodologies.

The Study used a variety of calculation methodologies that generated many different statistics on trade-through rates, but summarized its findings as follows: "Depending on the methodology applied, the overall trade-through rate ranged from 2% to 10% of trades and from 2% to 13% of share volume. Using the more conservative of these methods, we estimate that 2% to 3% of all trades and 2% to 8% of all share volume are trade-throughs."[945] The Reproposing Release explained why the Commission believed that the most relevant measure is 2.5% of total trades, representing more than 7% of total share volume, that trade through the best displayed prices. The Reproposing Release also explained the deficiency of the dissent's preferred measure—the displayed size of quotations that are traded through. This measure primarily reflects the current shortage of displayed size, which is a symptom of one of the primary problems that the Order Protection Rule is designed to address.[946] It therefore is not a useful means to assess the potential upside of strengthened price protection.

The dissent also asserts that the Trade-Through Study did not indicate "that investors are not obtaining best execution, that their orders are being unfairly treated, or that investors are otherwise suffering economic harm."[947] The Study, however, found that 2.5% of trades in Nasdaq stocks do not receive the best prices that are immediately and electronically accessible and that the average amount by which such trades miss the best prices is 2.3 cents per share.[948] In addition, Nasdaq submitted statistics with its comment letter on the reproposal indicating that the trade-through rate for dealers that internalize customer orders in Nasdaq stocks was 3.2% in 2003. The dissent attempts to minimize the seriousness of these statistics on a variety of grounds, but it concedes that the trade-through rate for customers in Nasdaq stocks was between 1% and 2% in 2004 and states that "these numbers speak for themselves" that customers are not being treated unfairly.[949]

Even if the Commission accepted the dissent's focus on a limited portion of the rulemaking record, we strongly believe that the evidence contained in this record would raise serious investor protection concerns. Because of the enormous volume of trading in the U.S. equity markets, even small percentages can translate into significant harm to investors. For example, even a 1.5% trade-through rate for customers in Nasdaq stocks in 2004 would mean that 14.3 million customer orders received a price that was inferior to an immediately and automatically accessible quotation.[950] Because of the difficulties faced by retail investors in monitoring whether their orders receive the best prices, it is likely that a great many of these customers were not aware that they in fact received an inferior price for their order.[951] We suspect that the millions of customers who received inferior prices, had they known, would believe that they had been treated unfairly.

Moreover, the dissent does not appear to take into account the practical difficulties faced by retail customers in monitoring and obtaining best execution of their orders. Such difficulties vary depending on the type of order. As discussed previously in this release,[952] retail customers who submit market and marketable limit orders seeking the best available market price generally can ascertain the best quotations at the time they submit their orders, but quotations can change rapidly, thereby making it quite difficult for customers to know whether their orders were in fact executed at the best quotations at the time of order execution.[953] In contrast, retail customers who display non-marketable limit orders at the best prices can readily see when their orders are traded through—the inferior trade prices will be disseminated in the consolidated trade stream.[954] These customers legitimately may feel that their orders have not been treated in a fair and orderly fashion. By establishing strong intermarket price protection, the Order Protection Rule will benefit investors who use both types of orders. It will promote the execution of investor market orders at the best prices on an order-by-order basis,[955] as well as protect displayed limit orders, no matter how small or large their displayed size, from trade throughs. In both contexts, the Rule will significantly enhance the protection of investors in all NMS stocks.

2. Improved Depth and Liquidity in Nasdaq Stocks

The dissent asserts that there is no evidence of a need for greater depth in Nasdaq stocks that would warrant application of the Order Protection Rule.[956] In making this assertion, the

[942] The Trade-Through Study is described in note 66 above.

[943] Dissent, section II.A.

[944] *Supra*, section II.A.1.a.ii. As discussed above, different measures of trade-through rates are relevant for assessing the extent to which the Order Protection Rule is needed to achieve the objectives of best execution of market orders, fair and orderly treatment of limit orders, and greater depth and liquidity for NMS stocks, respectively.

[945] Trade-Through Study at 1 (emphasis in original).

[946] Reproposing Release, 69 FR at 77443.

[947] Dissent, section II.A.

[948] Trade-Through Study at 3.

[949] Dissent, text following note 47.

[950] More than 955 million trades were reported in 2004 by the consolidated market data network for Nasdaq stocks.

[951] The difficulties faced by retail investors in monitoring the execution quality of their market orders are discussed further above in the text accompanying note 53.

[952] *See supra*, text accompanying note 53. *See also* J.P. Morgan Reproposal Letter at 3 ("[P]rincipal agent conflicts can lead to less than best execution, particularly for retail investors who may not have the sophistication or resources to assess the quality of the trades provided by their agents. By prohibiting the execution of orders at prices inferior to those displayed, a trade-through rule can therefore help provide protection to limit orders and further encourage their use.")

[953] *Cf.* Dissent, note 42 ("the majority fails to acknowledge that retail investors have access to consolidated information that allows them to monitor their executions").

[954] *Cf.* Dissent, note 44 (questioning the basis for the Commission's assertion that retail investors are not given a level playing field when their displayed limit orders are bypassed by large, block trades and stating that the assertion is "also inconsistent with the majority's previous assertion that investors have difficulty monitoring execution quality").

[955] *See supra*, notes 341–344 and accompanying text (duty of best execution not interpreted as requiring order-by-order routing by brokers with large volume of customer orders).

[956] Dissent, section II.B. The dissenters imply that a need for greater depth was the only basis relied on by the Commission for applying the Order Protection Rule to Nasdaq stocks. Dissent, text accompanying note 52. As discussed in the preceding section, the Commission believes that enhancing investor protection, particularly for retail

Continued

dissent does not address the views of many commenters that intermarket price protection is needed to improve depth and liquidity in all NMS stocks, including those listed on Nasdaq. For example, the Investment Company Institute, whose members account for more than 95% of all U.S. mutual fund assets, noted that "[b]y affirming the principle of price priority, a trade-through rule should encourage the display of limit orders, which in turn would improve the price discovery process and contribute to increased market depth and liquidity."[957] It therefore "strongly recommend[ed] that the Commission adopt a uniform trade-through rule that applies across all market centers and to all types of securities, including Nasdaq-listed securities."[958] Similarly, the Bank of New York stated that "[w]e agree with the Commission that a uniform trade-through rule would encourage the use of displayed limit orders and aggressive quotation. In the market for Nasdaq securities, for example, many investors are reluctant to show their full trading interest for fear of having others use that information to their detriment. A uniform trade-through rule would incentivize these investors to display their interest, knowing their order must be filled before the next-priced order. Accordingly, a well-formulated trade-through rule will promote transparency and liquidity in the national market system."[959] Many other commenters similarly believed that an intermarket price protection rule is needed to promote market depth and liquidity in all NMS stocks.[960]

In addition to not addressing the views of commenters, the dissent does not refute the significance of data analyses prepared by Commission staff to assess the views of commenters that intermarket price protection is needed to promote depth and liquidity in Nasdaq stocks. First, the dissent does not mention the staff studies that found that short-term price volatility is significantly higher in Nasdaq stocks than in NYSE stocks.[961] Excessive short-term price volatility indicates a need for greater depth and liquidity to dampen price fluctuations. Although acknowledging that the drafters of the 1975 Amendments identified "the maintenance of stable and orderly markets with maximum capacity for absorbing trading imbalances without undue price movements" as one of the "paramount" objectives for the NMS,[962] the dissent does not address the staff volatility analyses indicating the need to address price volatility in Nasdaq stocks.[963]

Second, the dissent fails to appreciate the significance of staff studies examining fill rates and other order execution quality statistics for marketable limit orders in Nasdaq stocks.[964] The dissent incorrectly interprets the Commission's evaluation of these studies as critical of the trading strategy of submitting "pinging" orders—orders with sizes greater than the displayed size of quotations.[965] The Commission's evaluation of low fill rates in Nasdaq stocks is not a criticism of pinging orders. The use of pinging orders is a valid strategy for trading stocks on electronic markets and certainly will continue after implementation of the Order Protection Rule. Indeed, an important goal of the Rule is to improve the execution quality for such orders by increasing their fill rates and, thereby, the ability of investors to trade Nasdaq stocks in larger sizes. As discussed earlier in this release,[966] the important consideration is not that fill rates in Nasdaq stocks are lower than fill rates in NYSE stocks. This difference likely is explained by broad structural differences unrelated to market efficiency. Rather, the problem is that fill rates, as well as the executed share volume, in Nasdaq stocks for orders with sizes ranging from 2,000 to 9,999 shares are very low in absolute terms (falling as low as 12% to 27%), even for many active stocks included in the Nasdaq-100 Index.[967] The Commission believes that this data supports the views of commenters that intermarket price protection is needed

investors, is a compelling reason to apply the Order Protection Rule consistently across all NMS stocks.

[957] ICI Reproposal Letter at 2.

[958] *Id.* at 3.

[959] BNY Letter at 2.

[960] *See, e.g.*, American Century Letter at 2 ("[W]e support the establishment of a uniform trade-through rule for all securities across all market centers within the National Market System."); Letter from Yakov Amihud, New York University, and Haim Mendelson, Stanford University, to Jonathan G. Katz, Secretary, Commission, dated Jan. 25, 2005 ("Amihud/Mendelson Reproposal Letter"), Attachment at 14 ("The BBO Alternative is most potent in protecting the interests of small, uninformed investors. This will induce their participation in the stock market and thus will make the market more liquid."); Capital Research Letter at 2 ("We believe providing price protection will create an incentive for buyers and sellers to display their intentions. This will generate a more accurate reflection of true supply and demand, which will enhance price discovery. We also believe that this will lead to an increased use of limit orders outside the best bid and offer which will increase depth in the market and dampen volatility. For this reason we favor a trade-through rule."); Consumer Federation Letter at 2 ("The lack of a trade-through rule in the Nasdaq market has unquestionably contributed significantly to fragmentation in that market, by allowing practices such as internalization and payment for order flow that prevent substantial pockets of orders from interacting with the broader market while leaving limit orders that set the best price unfilled * * *. [W]e believe a universal trade-through rule will not only benefit the investors who have their limit orders filled as a result, but also will benefit the market as a whole, through increased liquidity, improved price discovery, and tighter spreads."); Deutsche Bank Reproposal Letter at 1–2 ("DBSI agrees with the Commission that limit orders are critically important to our markets, and we believe that readily accessible limit orders should be protected. In our view, protection means that the first mover who commits to offer liquidity at a particular price point should be rewarded with the assurance that others in the marketplace cannot overlook that price and trade at an inferior price."); Global Electronic Trading Company Reproposal Letter at 2 ("The BBO Alternative and electronic efficiencies will have a positive impact on the economy by increasing market efficiency and, thereby, GDP."); Interactive Brokers Group Reproposal Letter at 1 ("We strongly support adoption of proposed Regulation NMS, which is a common sense and long-overdue update of the national market system rules in light of the major technological changes that have taken place in the equity markets in the last three decades."); Vanguard Reproposal Letter ("We agree with the Commission that an intermarket trade-through rule should be applied to Nasdaq stocks to strengthen price protection."); Weaver Reproposal Letter ("I also urge the commission to extend the rule to NASDAQ stocks. Clearly establishing price as the primary priority rule in markets will encourage the submission of limit orders, leading to lower execution costs for investors, and consequently lowering the cost of capital for traded firms.").

[961] The relevant studies are the Volatility Study and the Supplemental Volatility Study prepared by the Commission's Office of Economic Analysis, described in notes 143–144 above.

[962] Dissent, note 30 (quoting Senate Report on 1975 Amendments).

[963] Dissent, section II.B. The dissenters also imply that minimizing price volatility and enhancing depth and liquidity are not encompassed within the five broad objectives for the NMS specified in Exchange Act Section 11A(a)(1)(C). Dissent, text accompanying notes 30, 50–52. In fact, both minimizing price volatility and enhancing depth and liquidity are essential elements for achieving the broad objective of assuring the "economically efficient execution of securities transactions." Section 11A(a)(1)(C)(i). Both elements help reduce investor transaction costs and thereby promote efficient trading. *See* Conference Report at 91–92 ("The basic goals of the Exchange Act remain salutatory and unchallenged: To provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without under preferences or advantages among investors, *to ensure that securities can be purchased and sold at economically efficient transaction costs*, and to provide, to the maximum degree practicable, markets that are open and orderly.") (emphasis added). The implicit costs associated with the prices at which transactions are executed represent one of the most significant elements of investor transaction costs. *See supra*, text accompanying notes 300–302.

[964] The relevant studies are the Matched Pairs Study, prepared by the Commission's Office of Economic Analysis, and the S&P Index Study and the Nasdaq-100 Index Supplemental Study, prepared by the Commission's Division of Market Regulation, described in notes 114 and 137 above. The significance of marketable limit orders in the market for Nasdaq stocks is addressed at length elsewhere and will not be repeated here. *See supra*, text accompanying notes 121–123.

[965] Dissent, text accompanying notes 57–58.

[966] *Supra*, text accompanying notes 132–136.

[967] *See supra*, text accompanying notes 138–139.

to promote greater depth and liquidity across the whole range of Nasdaq stocks.

3. Effectiveness of Order Protection Rule

The dissent suggests that the Order Protection Rule will not meet its goals because some trade-throughs will continue even after implementation of the Rule. The dissent notes that the Rule contains exceptions for intermarket sweep orders, flickering quotations, trading centers that are experiencing a material delay, volume weighted average price ("VWAP") orders, and stopped orders, and questions whether, given these exceptions, the Rule will lead to a significant reduction in trade-through rates.[968]

The dissent fails to appreciate both the methodology of the staff study of trade-through rates and the operation of the Order Protection Rule. As explained at length earlier in this release,[969] the staff used a conservative methodology in the Trade-Through Study that did not include trade-throughs attributable to intermarket sweep orders, flickering quotations, and VWAP trades in its calculation of trade-through rates. Thus, given the consistency between the Study's methodology and the Rule's exceptions, the Commission believes that implementation of the Rule will lead to the elimination of the great majority of the types of trade-throughs found in the Trade-Through Study.[970]

Moreover, the exceptions in the Order Protection Rule are fully consistent with the principle of price protection. For example, to comply with the exemptions for intermarket sweep orders, VWAP orders, and stopped orders as a practical matter, market participants must trade with, rather than trade through, the displayed size of protected quotations.[971] Intermarket sweep orders must, by definition, be routed to execute against the full displayed size of protected quotations, while the dealers that execute VWAP and stopped orders typically will execute trades in the public markets to establish the positions necessary to fill the orders. In addition, the exceptions for flickering quotations and trading centers experiencing a material delay are consistent with intermarket price protection because they are designed to exclude quotations that are not truly accessible. The existence of these exceptions, therefore, will not detract from the effectiveness of the Rule in strengthening price protection.

The dissent also states that the Order Protection Rule will not increase market depth and liquidity because the Rule does not provide what the dissent views as complete protection of limit orders.[972] In particular, it points to the Commission's decision to protect only quotations that are the best bids and offers ("BBOs") of markets, and to the ability of markets to match the best prices displayed in other markets. The Commission's reasons for protecting market BBOs are discussed in detail earlier in this release.[973] The practice of price matching, by definition, does not cause investors to receive inferior prices or result in trade-throughs of displayed quotations. Most importantly, the dissent's assertion that the other approaches might have given greater protection to limit orders does not dispose of the relevant question, which is whether strengthening the current level of price protection for market BBOs will lead to greater depth and liquidity.[974]

4. Promoting Competition

The dissent claims that the Order Protection Rule will limit competition, stifle innovation, and create regulatory barriers to entry. The dissent argues that intermarket protection of the best accessible prices will "reduce markets to the lowest common denominator."[975] As discussed in an earlier section of this release, the Commission believes that markets will continue to have strong incentives to compete and innovate, particularly to be the first preference of order routers at any given price and thereby maximize their share of trading volume.[976] Liquidity providers will be able to compete on both price and size through use of the intermarket sweep order exception, which will allow them to execute immediately a large transaction at prices outside the best prices by routing orders to execute against the displayed size of better-priced quotations.[977] Finally, the Order Protection Rule will promote competition among markets by assuring new or smaller markets that, if they display the best prices, they will attract order flow, because larger, dominant markets will not be allowed to ignore their quotations. New or smaller markets also will benefit from the price transparency and open access elements of Regulation NMS, which preclude dominant markets from unreasonably restricting the availability of their market information or unfairly discriminating against competing markets by denying access to their displayed quotations.

The dissent also claims that the Order Protection Rule will create barriers to competition and regulatory barriers to entry, largely because the Rule protects quotations that are displayed by SROs registered under the Exchange Act.[978] Here, however, the dissent appears to take issue with one of the most basic elements of the Exchange Act regulatory scheme—the equity market registration requirement. Congress enacted this registration requirement in 1934 to assure that all significant equity markets have the capacity and integrity to meet their responsibilities to protect investors and promote the public interest. The Commission strongly believes that this basic registration requirement is an essential element of any effective scheme of securities regulation. Consistent with this requirement, the SROs for many years have been responsible for collecting quotations and disseminating them to the public in the consolidated quotation stream. Broker-dealers and ATSs can participate in the consolidated quotation stream by providing their quotations to an SRO. They will continue to be able to do so after implementation of the Order Protection Rule and, to the extent their quotations constitute the best bids or offers of the SRO, such quotations will be protected. Moreover, small ATSs with less than 5% of trading volume are exempted from participation in the consolidated quotation stream, thereby reducing barriers to entry for new markets.[979] But these aspects of the U.S. regulatory scheme all flow from the basic Exchange Act registration

[968] Dissent, section III.A.

[969] *Supra*, section II.A.1.a.

[970] *See supra*, notes 61–63 and accompanying text.

[971] *See supra*, notes 220–221, 249–257, and accompanying text.

[972] Dissent, section III.C.

[973] *Supra*, section II.A.5.

[974] *See, e.g., supra*, notes 56–59, 957–960, and accompanying text (commenters supporting adoption of Order Protection Rule to promote depth and liquidity).

[975] Dissent, section V.A.1.

[976] *Supra*, section II.A.4.a. *See also* Bear Stearns Reproposal Letter at 2 (Market BBO alternative "accomplishes the right balance for trade-through protection because it encourages competitive quoting behavior both within and among markets, without imposing excessive routing obligations and related costs on receiving trading centers."); CHX Reproposal Letter at 3 ("[T]he Market BBO Alternative provides an ideal balance; it recognizes the importance of preserving essential price protections, while permitting market centers to control costs and to preserve intermarket competition."); Letter Type J (Letter submitted by 548 commenters stating that protecting the best bid and offer in each market center preserves both competition among markets and competition among quotations "in a way that benefits all securities industry participants.").

[977] *See supra*, text accompanying notes 249–250.

[978] Dissent, sections V.A.3 and V.A.4.

[979] *See supra*, text accompanying notes 385–386.

requirement for significant equity markets, not Regulation NMS.

5. Scope of Order Protection Rule

The dissent argues that the scope of the Order Protection Rule has been substantially expanded beyond the reproposal without the benefit of the normal notice and comment process, and further states that the "practical effect is that market participants must exhaust liquidity in reserve prior to moving to the next price level." [980] Both of these assertions are incorrect. The scope of the Order Protection Rule has not been expanded from the reproposal, nor does the Rule, as reproposed or adopted, require market participants to route orders to execute against reserve size or any other liquidity that is not displayed. As reproposed and adopted, the Rule protects the best displayed prices of protected quotations, without regard to their sizes,[981] but provides an exception for transactions at inferior prices if intermarket sweep orders simultaneously are routed to execute against the "full displayed size" of the protected quotations.[982] Therefore, the removal of references to size in the definition of quotation has no effect on the operation of the Rule as adopted.

Market participants will not be required to route oversized orders in an attempt to execute against reserve size, as the dissenters claim. While a technical correction to a reproposed Regulation NMS definition has been made, it does not raise a notice and comment issue. A clause was deleted from the definition of "quotation" in reproposed Rule 600(b)(63), but this clause was not relevant to the Order Protection Rule or to any other rule in Regulation NMS, as reproposed or adopted.[983]

The dissent minimizes the role of the intermarket sweep order exception in the operation of the adopted Order Protection Rule. It states that, under the Rule as reproposed, "trading centers could route an order to a protected quotation's full displayed size and simultaneously execute an order at an inferior price," and then implies that this practice is no longer allowed under the adopted Rule.[984] But simultaneously executing orders at multiple price levels is precisely what the intermarket sweep order exception allows under the reproposed and adopted Rule. Regardless of the dissent's position, there is no indication that commenters were confused concerning the importance of the exception or operation of the Rule.[985]

6. Benefits and Costs of Order Protection Rule

The dissent states that the Commission's estimate of $321 million in annual benefits to investors from the Order Protection Rule constitutes a "mere rounding error" compared to the $18.7 trillion in total dollar value of trading in 2003.[986] However, the dissent also states that $143.8 million in *one-time* start-up costs and $22 million in annual costs to comply with the Rule, which ultimately will be paid by investors, are "very high." [987] These statements appear to be inconsistent. If more than $300 million in net annual benefits is an inconsequential amount to investors, why is less than one-half of that amount in one-time start-up costs a significant burden for investors?

In fact, of course, both of the amounts are substantial, and the dissent has used an "apples-to-oranges" comparison. The $321 million amount measures the estimated *reduction* in investor transaction costs. Even the total amount of transaction costs will always be a fraction of the total dollar volume of trading in the U.S. equity markets. Indeed, if transaction costs were ever to represent a large proportion of the total dollar volume of trading, investors would cease to trade, liquidity would dry up, and the cost of capital for listed companies would be prohibitive. All transaction costs, however, eat away at the long-term returns of investors. One of the keys to successful long-term investing is to minimize, wherever possible, transaction costs of all kinds. Even under the conservative estimate used in the Commission's cost-benefit analysis, which is based on the dissent's preferred trade-through measure—the share volume of quotations that are traded through [988]—investors would benefit over a five-year period by a total of more than $1.3 billion.[989] Moreover, this estimate is conservative because it does not include any benefits for investors that would result from improved market depth and liquidity,[990] nor does it reflect the non-monetary benefits associated with enhanced investor confidence in the fairness and orderliness of the equity markets. The

[980] Dissent, text following note 63.

[981] For example, "trade-through" is defined in adopted Rule 600(b)(77), as it was in the reproposal, solely with respect to price—"the purchase or sale of an NMS stock during regular trading hours, either as principal or agent, at a price that is lower than a protected bid or higher than a protected offer." This definition is unchanged from the reproposal.

[982] Rule 600(b)(30) defines an "intermarket sweep order" as requiring, among other things, that limit orders be "routed to execute against the full *displayed* size of any protected bid, in the case of a limit order to sell, or the full *displayed* size of any protected offer, in the case of a limit order to buy, for the NMS stock with a price that is superior to the limit price of the limit order identified as an intermarket sweep order." This definition is unchanged from the reproposal.

[983] Reproposed Rule 600(b)(63) provided that "quotations and quotation information means bids, offers and, where applicable, quotation sizes and aggregate quotation sizes." As adopted, Rule 600(b)(62) simply defines "quotation" as "a bid or an offer." The deleted language currently is found only in a definition from Exchange Act Rule 11Ac1–2(a)(5), which Rule has been entirely rewritten and redesignated as Rule 603 in Regulation NMS. *See supra*, section V.B.3.c. The new Rule does not use the terms "quotation information," "quotation sizes," or "aggregate quotation sizes," and therefore the deleted language now is obsolete. The language was inadvertently left in the definition of "quotation" in the reproposal and has been deleted as a technical correction. Its deletion does not change the substantive operation of the reproposed or adopted Order Protection Rule.

[984] Dissent, text following note 63.

[985] *See, e.g.*, Letter from Adam Cooper, Senior Managing Director and General Counsel, Citadel Investment Group, L.L.C., to Jonathan G. Katz, Secretary, Commission, dated Jan. 26, 2005 ("Citadel Reproposal Letter") at 2–3 ("The proposed intermarket sweep exception addresses most of Citadel's concerns about the Commission's initial trade-through proposal, and would have many benefits * * *. [T]his exception would increase execution speed and reliability because it would allow market participants to simultaneously and immediately sweep through multiple price levels."); SIA Reproposal Letter at 20 ("We continue to believe that an exception for intermarket sweep orders is imperative for the proper functioning of the trade-through rule and for the facilitation of various beneficial trading strategies, including smart routing and block trading. Therefore, we applaud the SEC's decision to include such an exception in its Reproposal.").

[986] Dissent, text accompanying note 41.

[987] Dissent, section V.C.

[988] *See* Dissent, text accompanying note 33; Trade-Through Study at 3 ($321 million "includes only share volume that traded through depth displayed on market center's top of book").

[989] The estimated net benefits of more than $1.3 billion over a five-year period are calculated by deducting the estimated annual costs of compliance of $22 million from the estimated annual benefits of $321 million, multiplying by five, and then deducting the estimated one-time start-up costs of $143.8 million.

[990] As discussed in section II.A.6 above, even small percentage improvements in depth and liquidity can generate enormous dollar benefits for investors in the form of reduced transaction costs because the total amount of transaction costs incurred each year by investors is so large. Such costs were conservatively estimated earlier in this release at more than $30 billion annually. *Supra*, text accompanying notes 300–305. Others have estimated such costs as being much higher. *See, e.g.*, Instinet Group Incorporated, *Eliminating Unnecessary Cost: Reducing Transaction Costs and Recapturing Value for Your Portfolio* 2 (2004) (available at *www.instinetgroup.com*) ("Transaction costs can have a significant effect on returns. Implementation shortfall in U.S. equity markets has been estimated to range from 20 basis points to as much as 2% of the principal value of transactions and orders. Taking the mid-point of this range, however, even an average of 1% per year in lost performance, before inflation and taxes, compounded over the average life of a pension liability, represents substantial foregone value. If we apply it to the $12 trillion U.S. equity market, we get approximately $120 billion lost to transaction costs every year.").

Commission believes that all of these benefits amply justify the costs of the Order Protection Rule.

7. Alternatives to Order Protection Rule

The dissent states that the Commission did not seriously consider alternatives to the Order Protection Rule.[991] It suggests that the Commission first could have adopted only access standards, and then adopted a price protection rule later if deemed necessary, or, alternatively, that the Commission could have adopted a price protection rule in stages for some markets, while waiting to evaluate its effect before applying the rule to other markets. Both of these alternatives were considered, and the Commission believed that they would have led to continued uncertainty concerning the future regulatory structure of the U.S. equity markets, and that the second alternative would have perpetuated inconsistent regulatory requirements for different NMS markets and stocks. At bottom, these alternatives simply reflect the dissenters' policy view that a price protection rule is not needed and will not be effective. Indeed, it is not clear why the dissent believes that the alternatives should have been seriously considered when they also believe that intermarket price protection in general will not be effective. It is even more difficult to understand how these alternatives could be suggested by the dissenters if they believe that the very basis of intermarket price protection is "arbitrary, unreasonable and anticompetitive." The Commission disagrees and believes that further delay in reaching final decisions on vital NMS issues could have caused significant harm to the U.S. markets.

The dissent also states that the Commission failed to consider the alternative of prohibiting only those trade-throughs that are more than three cents inferior to the best prices. A three-cent trade-through threshold is analogous to the temporary exemption from the ITS trade-through provisions that was originally granted in 2002 for trading in three exchange-traded funds.[992] These derivative securities, one of which tracks the Nasdaq-100 Index (then referred to as the "QQQ"), are highly liquid and their value is readily derived from the values of their underlying stocks. The deficiencies of the ITS trade-through provisions, which protect both automated and manual quotations, were most evident in these securities. The Commission granted the exemption to address the pressing need for regulatory action in these securities, while it continued to evaluate a more comprehensive resolution of NMS issues.

The dissent argues that the exemption led to increased competition, narrowing of spreads, and a significant reduction in trade-through rates, citing an October 2002 study of trading in the QQQs by the Commission's Office of Economic Analysis that was referenced in the Proposing Release.[993] This study, however, found that trade-through rates were extremely high both before and after the exemption was granted—48% before and 47% after. The exemption therefore essentially ratified trading activity that already was occurring.[994] Consequently, data on trading before and after the exemption provides little basis for drawing conclusions on the effect of the exemption.

Most importantly, the Commission considered and rejected a rule with a three-cent trade-through threshold because it so clearly would fail to achieve any of the primary objectives of the Order Protection Rule, including investor protection, fair and orderly markets, and increased depth and liquidity. Such a rule would allow intermediaries and markets to execute investor orders at prices significantly inferior to the best prices that are immediately and automatically accessible. In many NMS stocks, quoted spreads are as low as one penny. A three-cent trade-through on a single trade would represent a 300% increase in investor transaction costs in these stocks. In addition, allowing three-cent trade-throughs would seriously undercut the objectives of encouraging the display of limit orders. The average trade-through amount is 2.3 cents per share in Nasdaq stocks and 2.2 cents per share in NYSE stocks.[995] Consequently, a rule with a three-cent threshold would not affect the majority of trade-throughs and thereby have little beneficial effect on the incentives to display limit orders.

C. Market Data

The dissent addresses issues relating to the level of market data fees and the single consolidator model for disseminating market data. As discussed above,[996] the Commission has determined that the most appropriate forum in which to address the level of market data fees is its review of SRO structure, and it has retained the single consolidator model primarily because of its significant role in protecting investors.

D. Conclusion

The dissent concludes by stating that Regulation NMS is "far from final" and that it fears that "inevitable delays in obtaining guidance, the attendant regulatory uncertainty, and concomitant costs will harm a competitive marketplace."[997] In fact, the Commission has taken great care to craft clear and workable rules for market participants to follow. Indeed, as discussed throughout this release, a variety of changes to the rules as originally proposed have been made specifically to respond to the comments of market participants.[998] Given the wide range of participants in the securities markets, the particular means chosen by different entities to comply with the NMS rules may vary. The staff, under the purview of the Commission, will be available to work with the securities industry and the public to provide any desired guidance on implementation questions. In this regard, the NMS rules are no different from other rules that the Commission adopts, including previously-adopted NMS rules, such as those relating to limit order display and execution quality disclosure, which were widely cited by commenters as effective regulation. The Commission's experience with these other rules has demonstrated the wisdom of this approach.

XIII. Statutory Authority

Pursuant to the Exchange Act and particularly, Sections 2, 3(b), 5, 6, 11, 11A, 15, 15A, 17(a) and (b), 19, 23(a), and 36 thereof, 15 U.S.C. 78b, 78c(b), 78e, 78f, 78k–1, 78o, 78o–3, 78q(a) and (b), 78s; 78w(a), and 78mm, and Rules 11Aa3–2(b)(2) and 11Aa3–2(c)(1)

[991] Dissent, note 6.

[992] Securities Exchange Act Release No. 46428 (Aug. 28, 2002), 67 FR 56607 (Sep. 14, 2002).

[993] Dissent, note 6 (citing Proposing Release, 69 FR at 11134 n. 50).

[994] Unlike the more recent Trade-Through Study, the October 2002 study did not incorporate a three-second quotation window to address timing latency issues. The earlier study also included manual quotations disseminated by Amex and the NYSE in the QQQs. The respective findings of the two studies therefore are not comparable. The October 2002 study did not examine the effect of the exemption on the spreads paid by investors. The dissent also cites a comment letter stating that spreads narrowed in the QQQ's when they became a Nasdaq-listed security in December 2004. Dissent, note 6. Given that the three-cent trade-through threshold already allowed an extremely high percentage of trade-throughs even prior to the switch from Amex to Nasdaq listing, there is no basis to believe that the effect of the switch on spreads, if accurately stated, is related to any change in trade-through protection.

[995] Trade-Through Study, Tables 3, 10.

[996] *Supra*, section V.A.

[997] Dissent, Conclusion.

[998] *See, e.g.*, supra, text accompanying notes 191–196 (discussing rule provisions that respond to commenters' suggestions on ways to make rules workable and implementable in a fair and orderly fashion).

thereunder, 17 CFR 240.11Aa3–2(b)(2) and 17 CFR 240.11Aa3–2(c)(1), the Commission: (1) Redesignates the NMS rules under Section 11A of the Exchange Act as Regulation NMS rules; (2) adopts Rules 600, 610, 611, and 612 of Regulation NMS; (3) amends current Rules 11Aa3–1 and 11Ac1–2 under the Exchange Act and redesignates them as Rules 601 and 603 of Regulation NMS; (4) amends the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan; and (5) amends various other rules to reflect the adoption of Regulation NMS, as set forth below.

XIV. Text of Adopted Amendments to the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan

The Commission hereby amends the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan to incorporate the new net income allocation formula into each Plan, which supersedes the existing allocation formulas in those Plans, and to incorporate the new Plan governance language into each Plan.

Set forth below is the text of (1) the new allocation formula to be incorporated into each of the Plans, and (2) the new Plan governance language to be incorporated into each of the Plans.

Allocation Amendment

(#) *Allocation of Net Income.*

(a) *Annual Payment.* Notwithstanding any other provision of this Plan, each Participant eligible to receive distributable net income under the Plan shall receive an annual payment for each calendar year that is equal to the sum of the Participant's Trading Shares and Quoting Shares, as defined below, in each Eligible Security for the calendar year.

(b) *Security Income Allocation.* The Security Income Allocation for an Eligible Security shall be determined by multiplying (i) the distributable net income of the Plan for the calendar year by (ii) the Volume Percentage for such Eligible Security (the "initial allocation"), and then adding or subtracting any amounts specified in the reallocation set forth below. The Volume Percentage for an Eligible Security shall be determined by dividing (i) the square root of the dollar volume of transaction reports disseminated by the Processor in such Eligible Security during the calendar year by (ii) the sum of the square roots of the dollar volume of transaction reports disseminated by the Processor in each Eligible Security during the calendar year. If the initial allocation of distributable net income in accordance with the Volume Percentage of an Eligible Security equals an amount greater than $4.00 multiplied by the total number of qualified transaction reports in such Eligible Security during the calendar year, the excess amount shall be subtracted from the initial allocation for such Eligible Security and reallocated among all Eligible Securities in direct proportion to the dollar volume of transaction reports disseminated by the Processor in Eligible Securities during the calendar year. A transaction report with a dollar volume of $5000 or more shall constitute one qualified transaction report. A transaction report with a dollar volume of less than $5000 shall constitute a fraction of a qualified transaction report that equals the dollar volume of the transaction report divided by $5000.

(c) *Trading Share.* The Trading Share of a Participant in an Eligible Security shall be determined by multiplying (i) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (ii) the Participant's Trade Rating in the Eligible Security. A Participant's Trade Rating in an Eligible Security shall be determined by taking the average of (i) the Participant's percentage of the total dollar volume of transaction reports disseminated by the Processor in the Eligible Security during the calendar year, and (ii) the Participant's percentage of the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year.

(d) *Quoting Share.* The Quoting Share of a Participant in an Eligible Security shall be determined by multiplying (i) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (ii) the Participant's Quote Rating in the Eligible Security. A Participant's Quote Rating in an Eligible Security shall be determined by dividing (i) the sum of the Quote Credits earned by the Participant in such Eligible Security during the calendar year by (ii) the sum of the Quote Credits earned by all Participants in such Eligible Security during the calendar year. A Participant shall earn one Quote Credit for each second of time (with a minimum of one full second) multiplied by dollar value of size that an automated best bid (offer) transmitted by the Participant to the Processor during regular trading hours is equal to the price of the national best bid (offer) in the Eligible Security and does not lock or cross a previously displayed automated quotation. An automated bid (offer) shall have the meaning specified in Rule 600 of Regulation NMS of the Exchange Act for an "automated quotation." The dollar value of size of a quote shall be determined by multiplying the price of a quote by its size.

Governance Amendment

(#) *Advisory Committee.*

(a) *Formation.* Notwithstanding any other provision of this Plan, an Advisory Committee to the Plan shall be formed and shall function in accordance with the provisions set forth in this section.

(b) *Composition.* Members of the Advisory Committee shall be selected for two-year terms as follows:

(1) *Operating Committee Selections.* By affirmative vote of a majority of the Participants entitled to vote, the Operating Committee shall select at least one representative from each of the following categories to be members of the Advisory Committee: (i) a broker-dealer with a substantial retail investor customer base, (ii) a broker-dealer with a substantial institutional investor customer base, (iii) an alternative trading system, (iv) a data vendor, and (v) an investor.

(2) *Participant Selections.* Each Participant shall have the right to select one member of the Advisory Committee. A Participant shall not select any person employed by or affiliated with any Participant or its affiliates or facilities.

(c) *Function.* Members of the Advisory Committee shall have the right to submit their views to the Operating Committee on Plan matters, prior to a decision by the Operating Committee on such matters. Such matters shall include, but not be limited to, any new or modified product, fee, contract, or pilot program that is offered or used pursuant to the Plan.

(d) *Meetings and Information.* Members of the Advisory Committee shall have the right to attend all meetings of the Operating Committee and to receive any information concerning Plan matters that is distributed to the Operating Committee; provided, however, that the Operating Committee may meet in executive session if, by affirmative vote of a majority of the Participants entitled to vote, the Operating Committee determines that an item of Plan business requires confidential treatment.

XV. Text of Adopted Rules

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

17 CFR Part 201

Administrative practice and procedure, Securities.

17 CFR Parts 230 and 270

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 240, 242, and 249

Brokers, Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, Title 17, Chapter II of the Code of the Federal Regulations is amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

■ 1. The authority citation for part 200 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 77o, 77sss, 78d, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 79t, 80a–37, 80b–11, and 7202, unless otherwise noted.

* * * * *

■ 2. Section 200.30–3 is amended by:

■ a. Removing paragraphs (a)(62) and (a)(71);

■ b. Redesignating paragraphs (a)(63) through (a)(70) as paragraphs (a)(62) through (a)(69);

■ c. Redesignating paragraphs (a)(72) through (a)(82) as paragraphs (a)(70) through (a)(80);

■ d. Revising paragraphs (a)(27), (a)(28), (a)(36), (a)(37), (a)(42), (a)(49), (a)(61), and newly redesignated paragraphs (a)(68), and (a)(69); and

■ e. Adding new paragraphs (a)(81), (a)(82), and (a)(83).

■ The revisions and additions read as follows:

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(27) To approve amendments to the joint industry plan governing consolidated transaction reporting declared effective by the Commission pursuant to Rule 601 (17 CFR 242.601) or its predecessors, Rule 11Aa3–1 and Rule 17a–15, and to grant exemptions from Rule 601 pursuant to Rule 601(f) (17 CFR 242.601(f)) to exchanges trading listed securities that are designated as national market system securities until such times as a Joint Reporting Plan for such securities is filed and approved by the Commission.

(28) To grant exemptions from Rule 602 (17 CFR 242.602), pursuant to Rule 602(d) (17 CFR 242.602(d)).

* * * * *

(36) To grant exemptions from Rule 603 (17 CFR 242.603), pursuant to Rule 603(d) (17 CFR 242.603(d)).

(37) Pursuant to Rule 600 (17 CFR 242.600), to publish notice of the filing of a designation plan with respect to national market system securities, or any proposed amendment thereto, and to approve such plan or amendment.

* * * * *

(42) Under 17 CFR 242.608(e), to grant or deny exemptions from 17 CFR 242.608.

* * * * *

(49) Pursuant to section 11A(b) of the Act (15 U.S.C. 78k–1(b)) and Rule 609 thereunder (17 CFR 242.609), to publish notice of and, by order, grant under section 11A(b) of the Act and Rule 609 thereunder: Applications for registration as a securities information processor; and exemptions from that section and any rules or regulations promulgated thereunder, either conditionally or unconditionally.

* * * * *

(61) To grant exemptions from Rule 604 (17 CFR 242.604), pursuant to Rule 604(c) (17 CFR 242.604(c)).

* * * * *

(68) Pursuant to Rule 605(b) (17 CFR 242.605(b)), to grant or deny exemptions, conditionally or unconditionally, from any provision or provisions of Rule 605 (17 CFR 242.605).

(69) Pursuant to Rule 606(c) (17 CFR 242.606(c)), to grant or deny exemptions, conditionally or unconditionally, from any provision or provisions of Rule 606 (17 CFR 242.606).

* * * * *

(81) To grant or deny exemptions from Rule 610 (17 CFR 242.610), pursuant to Rule 610(e) (17 CFR 242.610(e)).

(82) To grant or deny exemptions from Rule 611 (17 CFR 242.611), pursuant to Rule 611(d) (17 CFR 242.611(d)).

(83) To grant or deny exemptions from Rule 612 (17 CFR 242.612), pursuant to Rule 612(c) (17 CFR 242.612(c)).

* * * * *

Subpart N—Commission Information Collection Requirements Under the Paperwork Reduction Act: OMB Control Numbers

■ 3. The authority citation for Subpart N continues to read as follows:

Authority: 44 U.S.C. 3506; 44 U.S.C. 3507.

■ 4. Section 200.800 is amended by revising paragraph (b) to read as follows:

§ 200.800 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) *Display.*

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.
Regulation S–X	PART 210	3235–0009
Regulation S–B	PART 228	3235–0417
Regulation S–K	PART 229	3235–0071
Rule 154	230.154	3235–0495
Rule 155	230.155	3235–0549
Rule 236	230.236	3235–0095
Rule 237	230.237	3235–0528
Regulation A	230.251 thru 230.263	3235–0286
Regulation C	230.400 thru 230.494	3235–0074
Rule 425	230.425	3235–0521
Rule 477	230.477	3235–0550
Rule 489	230.489	3235–0411
Rule 498	230.498	3235–0488
Regulation D	230.501 thru 230.506	3235–0076
Regulation E	230.601 thru 230.610a	3235–0232
Rule 604	230.604	3235–0232
Rule 605	230.605	3235–0232
Rule 609	230.609	3235–0233
Rule 701	230.701	3235–0522
Regulation S	230.901 thru 230.905	3235–0357

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.
Regulation S–T	Part 232	3235–0424
Form SB–1	239.9	3235–0423
Form SB–2	239.10	3235–0418
Form S–1	239.11	3235–0065
Form S–2	239.12	3235–0072
Form S–3	239.13	3235–0073
Form N–2	239.14	3235–0026
Form N–1A	239.15A	3235–0307
Form S–6	239.16	3235–0184
Form S–8	239.16b	3235–0066
Form N–3	239.17a	3235–0316
Form N–4	239.17b	3235–0318
Form S–11	239.18	3235–0067
Form N–14	239.23	3235–0336
Form N–5	239.24	3235–0169
Form S–4	239.25	3235–0324
Form F–1	239.31	3235–0258
Form F–2	239.32	3235–0257
Form F–3	239.33	3235–0256
Form F–4	239.34	3235–0325
Form F–6	239.36	3235–0292
Form F–7	239.37	3235–0383
Form F–8	239.38	3235–0378
Form F–9	239.39	3235–0377
Form F–10	239.40	3235–0380
Form F–80	239.41	3235–0404
Form F–X	239.42	3235–0379
Form F–N	239.43	3235–0411
Form ET	239.62	3235–0329
Form ID	239.63	3235–0328
Form SE	239.64	3235–0327
Form TH	239.65	3235–0425
Form 1–A	239.90	3235–0286
Form 2–A	239.91	3235–0286
Form 144	239.144	3235–0101
Form 1–E	239.200	3235–0232
Form CB	239.800	3235–0518
Rule 6a–1	240.6a–1	3235–0017
Rule 6a–3	240.6a–3	3235–0021
Rule 6a–4	240.6a–4	3235–0554
Rule 6h–1	240.6h–1	3235–0555
Rule 8c–1	240.8c–1	3235–0514
Rule 9b–1	240.9b–1	3235–0480
Rule 10a–1	240.10a–1	3235–0475
Rule 10b–10	240.10b–10	3235–0444
Rule 10b–17	240.10b–17	3235–0476
Rule 10b–18	240.10b–18	3235–0474
Rule 10A–1	240.10A–1	3235–0468
Rule 11a1–1(T)	240.11a1–1(T)	3235–0478
Rule 12a–5	240.12a–5	3235–0079
Regulation 12B	240.12b–1 thru 240.12b–36	3235–0062
Rule 12d1–3	240.12d1–3	3235–0109
Rule 12d2–1	240.12d2–1	3235–0081
Rule 12d2–2	240.12d2–2	3235–0080
Rule 12f–1	240.12f–1	3235–0128
Rule 13a–16	240.13a–16	3235–0116
Regulation 13D/G	240.13d–1 thru 240.13d–7	3235–0145
Schedule 13D	240.13d–101	3235–0145
Schedule 13G	240.13d–102	3235–0145
Rule 13e–1	240.13e–1	3235–0305
Rule 13e–3	240.13e–3	3235–0007
Schedule 13E–3	240.13e–100	3235–0007
Schedule 13e–4F	240.13e–101	3235–0375
Regulation 14A	240.14a–1 thru 240.14a–12	3235–0059
Schedule 14A	240.14a–101	3235–0059
Regulation 14C	240.14c–1	3235–0057
Schedule 14C	240.14c–101	3235–0057
Regulation 14D	240.14d–1 thru 240.14d–9	3235–0102
Schedule TO	240.14d–100	3235–0515
Schedule 14D–1	240.14d–101	3235–0102
Schedule 14D–9	240.14d–101	3235–0102
Schedule 14D–1F	240.14d–102	3235–0376
Schedule 14D–9F	240.14d–103	3235–0382

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.
Regulation 14E	240.14e–1 thru 240.14e–2	3235–0102
Rule 14f–1	240.14f–1	3235–0108
Rule 15a–4	240.15a–4	3235–0010
Rule 15a–6	240.15a–6	3235–0371
Rule 15b1–1	240.15b1–1	3235–0012
Rule 15b6–1(a)	240.15b6–1(a)	3235–0018
Rule 15c1–5	240.15c1–5	3235–0471
Rule 15c1–6	240.15c1–6	3235–0472
Rule 15c1–7	240.15c1–7	3235–0134
Rule 15c2–1	240.15c2–1	3235–0485
Rule 15c2–5	240.15c2–5	3235–0198
Rule 15c2–7	240.15c2–7	3235–0479
Rule 15c2–8	240.15c2–8	3235–0481
Rule 15c2–11	240.15c2–11	3235–0202
Rule 15c2–12	240.15c2–12	3235–0372
Rule 15c3–1	240.15c3–1	3235–0200
Rule 15c3–1(c)(13)	240.15c3–1(c)(13)	3235–0499
Appendix F to Rule 15c3–1	240.15c3–1f	3235–0496
Rule 15c3–3	240.15c3–3	3235–0078
Rule 15c3–4	240.15c3–4	3235–0497
Rule 15d–16	240.15d–16	3235–0116
Rule 15g–2	240.15g–2	3235–0434
Rule 15g–3	240.15g–3	3235–0392
Rule 15g–4	240.15g–4	3235–0393
Rule 15g–5	240.15g–5	3235–0394
Rule 15g–6	240.15g–6	3235–0395
Rule 15g–9	240.15g–9	3235–0385
Rule 15Aj–1	240.15Aj–1	3235–0044
Rule 15Ba2–1	240.15Ba2–1	3235–0083
Rule 15Ba2–5	240.15Ba2–5	3235–0088
Rule 15Bc3–1	240.15Bc3–1	3235–0087
Rule 17a–1	240.17a–1	3235–0208
Rule 17a–2	240.17a–2	3235–0201
Rule 17a–3	240.17a–3	3235–0033
Rule 17a–3(a)(16)	240.17a–3(a)(16)	3235–0508
Rule 17a–4	240.17a–4	3235–0279
Rule 17a–4(b)(10)	240.17a–4(b)(10)	3235–0506
Rule 17a–5	240.17a–5	3235–0123
Rule 17a–5(c)	240.17a–5(c)	3235–0199
Rule 17a–6	240.17a–6	3235–0489
Rule 17a–7	240.17a–7	3235–0131
Rule 17a–8	240.17a–8	3235–0092
Rule 17a–9T	240.17a–9T	3235–0524
Rule 17a–10	240.17a–10	3235–0122
Rule 17a–11	240.17a–11	3235–0085
Rule 17a–12	240.17a–12	3235–0498
Rule 17a–13	240.17a–13	3235–0035
Rule 17a–19	240.17a–19	3235–0133
Rule 17a–22	240.17a–22	3235–0196
Rule 17a–25	240.17a–25	3235–0540
Rule 17f–1(b)	240.17f–1(b)	3235–0032
Rule 17f–1(c)	240.17f–1(c)	3235–0037
Rule 17f–1(g)	240.17f–1(g)	3235–0290
Rule 17f–2(a)	240.17f–2(a)	3235–0034
Rule 17f–2(c)	240.17f–2(c)	3235–0029
Rule 17f–2(d)	240.17f–2(d)	3235–0028
Rule 17f–2(e)	240.17f–2(e)	3235–0031
Rule 17f–5	240.17f–5	3235–0269
Rule 17h–1T	240.17h–1T	3235–0410
Rule 17h–2T	240.17h–2T	3235–0410
Rule 17Ab2–1	240.17Ab2–1(a)	3235–0195
Rule 17Ac2–1	240.17Ac2–1	3235–0084
Rule 17Ad–2(c), (d), and (h)	240.17Ad–2(c), (d) and (h)	3235–0130
Rule 17Ad–3(b)	240.17Ad–3(b)	3235–0473
Rule 17Ad–4(b) and (c)	240.17Ad–4(b) and (c)	3235–0341
Rule 17Ad–6	240.17Ad–6	3235–0291
Rule 17Ad–7	240.17Ad–7	3235–0291
Rule 17Ad–10	240.17Ad–10	3235–0273
Rule 17Ad–11	240.17Ad–11	3235–0274
Rule 17Ad–13	240.17Ad–13	3235–0275
Rule 17Ad–15	240.17Ad–15	3235–0409
Rule 17Ad–16	240.17Ad–16	3235–0413
Rule 17Ad–17	240.17Ad–17	3235–0469

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.
Rule 19b–1	240.19b–1	3235–0354
Rule 19b–4	240.19b–4	3235–0045
Rule 19b–4(e)	240.19b–4(e)	3235–0504
Rule 19b–5	240.19b–5	3235–0507
Rule 19b–7	240.19b–7	3235–0553
Rule 19d–1	240.19d–1(b) thru 240.19d–1(i)	3235–0206
Rule 19d–2	240.19d–2	3235–0205
Rule 19d–3	240.19d–3	3235–0204
Rule 19h–1	240.19h–1(a), (c) thru (e), and (g)	3235–0259
Rule 24b–1	240.24b–1	3235–0194
Rule 101	242.101	3235–0464
Rule 102	242.102	3235–0467
Rule 103	242.103	3235–0466
Rule 104	242.104	3235–0465
Rule 301	242.301	3235–0509
Rule 302	242.302	3235–0510
Rule 303	242.303	3235–0505
Rule 604	242.604	3235–0462
Rule 605	242.605	3235–0542
Rule 606	242.606	3235–0541
Rule 607	242.607	3235–0435
Rule 608	242.608	3235–0500
Rule 609	242.609	3235–0043
Rule 611	242.611	3235–0600
Regulation S–P	Part 248	3235–0537
Form 1	249.1	3235–0017
Form 1–N	249.10	3235–0554
Form 25	249.25	3235–0080
Form 26	249.26	3235–0079
Form 3	249.103	3235–0104
Form 4	249.104	3235–0287
Form 5	249.105	3235–0362
Form 8–A	249.208a	3235–0056
Form 10	249.210	3235–0064
Form 10–SB	249.210b	3235–0419
Form 18	249.218	3235–0121
Form 20–F	249.220f	3235–0288
Form 40–F	249.240f	3235–0381
Form 6–K	249.306	3235–0116
Form 8–K	249.308	3235–0060
Form 10–Q	249.308a	3235–0070
Form 10–QSB	249.308b	3235–0416
Form 10–K	249.310	3235–0063
Form 10–KSB	249.310b	3235–0420
Form 11–K	249.311	3235–0082
Form 18–K	249.318	3235–0120
Form 12B–25	249.322	3235–0058
Form 15	249.323	3235–0167
Form 13F	249.325	3235–0006
Form SE	249.444	3235–0327
Form ET	249.445	3235–0329
Form ID	249.446	3235–0328
Form DF	249.448	3235–0482
Form BD	249.501	3235–0012
Form BDW	249.501a	3235–0018
Form BD–N	249.501b	3235–0556
Form X–17A–5	249.617	3235–0123
Form X–17A–19	249.635	3235–0133
Form ATS	249.637	3235–0509
Form ATS–R	249.638	3235–0509
Form X–15AJ–1	249.802	3235–0044
Form X–15AJ–2	249.803	3235–0044
Form 19b–4	249.819	3235–0045
Form 19b–4(e)	249.820	3235–0504
Form Pilot	249.821	3235–0507
Form SIP	249.1001	3235–0043
Form MSD	249.1100	3235–0083
Form MSDW	249.1110	3235–0087
Form X–17F–1A	249.1200	3235–0037
Form TA–1	249b.100	3235–0084
Form TA–W	249b.101	3235–0151
Form TA–2	249b.102	3235–0337
Form CA–1	249b.200	3235–0195

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.
Rule 1(a)	250.1(a)	3235–0170
Rule 1(b)	250.1(b)	3235–0170
Rule 1(c)	250.1(c)	3235–0164
Rule 2	250.2	3235–0161
Rule 3	250.3	3235–0160
Rule 7	250.7	3235–0165
Rule 7(d)	250.7(d)	3235–0165
Rule 20(b)	250.20(b)	3235–0125
Rule 20(c)	250.20(c)	3235–0125
Rule 20(d)	250.20(d)	3235–0163
Rule 23	250.23	3235–0125
Rule 24	250.24	3235–0126
Rule 26	250.26	3235–0183
Rule 29	250.29	3235–0149
Rule 44	250.44	3235–0147
Rule 45	250.45	3235–0154
Rule 47(b)	250.47(b)	3235–0163
Rule 52	250.52	3235–0369
Form 53	250.53	3235–0426
Rule 54	250.54	3235–0427
Rule 57(a)	250.57(a)	3235–0428
Rule 57(b)	250.57(b)	3235–0429
Rule 58	250.58	3235–0457
Rule 62	250.62	3235–0152
Rule 71(a)	250.71(a)	3235–0173
Rule 72	250.72	3235–0149
Rule 83	250.83	3235–0181
Rule 87	250.87	3235–0552
Rule 88	250.88	3235–0182
Rule 93	250.93	3235–0153
Rule 94	250.94	3235–0153
Rule 95	250.95	3235–0162
Rule 100(a)	250.100(a)	3235–0125
Uniform System of Accounts for Mutual Service Companies and Subsidiary Service Companies, Public Utility Holding Company Act of 1935.	Part 256	3235–0153
Preservation and Destruction of Records of Registered Public Utility Holding Companies and of Mutual and Subsidiary Service Companies.	Part 257	3235–0306
Form U5A	259.5a	3235–0170
Form U5B	259.5b	3235–0170
Form U5S	259.5s	3235–0164
Form U–1	259.101	3235–0125
Form U–13–1	259 113	3235–0182
Form U–6B–2	259.206	3235–0163
Form U–57	259.207	3235–0428
Form U–9C–3	259.208	3235–0457
Form U–12(I)–A	259.212a	3235–0173
Form U–12(I)–B	259.212b	3235–0173
Form U–13E–1	259.213	3235–0162
Form U–R–1	259.221	3235–0152
Form U–13–60	259.313	3235–0153
Form U–3A–2	259.402	3235–0161
Form U–3A3–1	259.403	3235–0160
Form U–7D	259.404	3235–0165
Form U–33–S	259.405	3235–0429
Form ET	259.601	3235–0329
Form ID	259.602	3235–0328
Form SE	259.603	3235–0327
Rule 7a–15 thru 7a–37	260.7a–15 thru 260.7a–37	3235–0132
Form T–1	269.1	3235–0110
Form T–2	269.2	3235–0111
Form T–3	269.3	3235–0105
Form T–4	269.4	3235–0107
Form ET	269.6	3235–0329
Form ID	269.7	3235–0328
Form SE	269.8	3235–0327
Form T–6	269.9	3235–0391
Rule 0–1	270.0–1	3235–0531
Rule 2a–7	270.2a–7	3235–0268
Rule 2a19–1	270.2a19–1	3235–0332
Rule 3a–4	270.3a–4	3235–0459
Rule 6c–7	270.6c–7	3235–0276

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.
Rule 6e–2	270.6e–2	3235–0177
Rule 7d–1	270.7d–1	3235–0311
Rule 7d–2	270.7d–2	3235–0527
Section 8(b) of the Investment Company Act of 1940	270.8b–1 thru 270.8b–32	3235–0176
Rule 10f–3	270.10f–3	3235–0226
Rule 11a–2	270.11a–2	3235–0272
Rule 11a–3	270.11a–3	3235–0358
Rule 12b–1	270.12b–1	3235–0212
Rule 17a–7	270.17a–7	3235–0214
Rule 17a–8	270.17a–8	3235–0235
Rule 17e–1	270.17e–1	3235–0217
Rule 17f–1	270.17f–1	3235–0222
Rule 17f–2	270.17f–2	3235–0223
Rule 17f–4	270.17f–4	3235–0225
Rule 17f–6	270.17f–6	3235–0447
Rule 17f–7	270.17f–7	3235–0529
Rule 17g–1(g)	270.17g–1(g)	3235–0213
Rule 17j–1	270.17j–1	3235–0224
Rule 18f–1	270.18f–1	3235–0211
Rule 18f–3	270.18f–3	3235–0441
Rule 19a–1	270.19a–1	3235–0216
Rule 20a–1	270.20a–1	3235–0158
Rule 22d–1	270.22d–1	3235–0310
Rule 23c–1	270.23c–1	3235–0260
Rule 23c–3	270.23c–3	3235–0422
Rule 27e–1	270.27e–1	3235–0545
Rule 30b2–1	270.30b2–1	3235–0220
Rule 30d–2	270.30d–2	3235–0494
Rule 30e–1	270.30e–1	3235–0025
Rule 31a–1	270.31a–1	3235–0178
Rule 31a–2	270.31a–2	3235–0179
Rule 32a–4	270.32a–4	3235–0530
Rule 34b–1	270.34b–1	3235–0346
Rule 35d–1	270.35d–1	3235–0548
Form N–5	274.5	3235–0169
Form N–8A	274.10	3235–0175
Form N–2	274.11a–1	3235–0026
Form N–3	274.11b	3235–0316
Form N–4	274.11c	3235–0318
Form N–8B–2	274.12	3235–0186
Form N–6F	274.15	3235–0238
Form 24F–2	274.24	3235–0456
Form N–18F–1	274.51	3235–0211
Form N–54A	274.53	3235–0237
Form N–54C	274.54	3235–0236
Form N–SAR	274.101	3235–0330
Form N–27E–1	274.127e–1	3235–0545
Form N–27F–1	274.127f–1	3235–0546
Form N–17D–1	274.200	3235–0229
Form N–23C–1	274.201	3235–0230
Form N–8F	274.218	3235–0157
Form N–17F–1	274.219	3235–0359
Form N–17F–2	274.220	3235–0360
Form N–23c–3	274.221	3235–0422
Form ET	274.401	3235–0329
Form ID	274.402	3235–0328
Form SE	274.403	3235–0327
Rule 0–2	275.0–2	3235–0240
Rule 203–3	275.203–3	3235–0538
Rule 204–2	275.204–2	3235–0278
Rule 204–3	275.204–3	3235–0047
Rule 206(3)–2	275.206(3)–2	3235–0243
Rule 206(4)–2	275.206(4)–2	3235–0241
Rule 206(4)–3	275.206(4)–3	3235–0242
Rule 206(4)–4	275.206(4)–4	3235–0345
Form ADV	279.1	3235–0049
Schedule I to Form ADV	279.1	3235–0490
Form ADV–W	279.2	3235–0313
Form ADV–H	379.3	3235–0538
Form 4–R	279.4	3235–0240
Form 5–R	279.5	3235–0240
Form 6–R	279.6	3235–0240
Form 7–R	279.7	3235–0240

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.
Form ADV–E	279.8	3235–0361

PART 201—RULES OF PRACTICE

Subpart D—Rules of Practice

■ 5. The authority citation for part 201, subpart D, continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77h–1, 77j, 77s, 77u, 78c(b), 78d–1, 78d–2, 78*l*, 78m, 78n, 78*o*(d), 78*o*–3, 78s, 78u–2, 78u–3, 78v, 78w, 79c, 79s, 79t, 79z–5a, 77sss, 77ttt, 80a–8, 80a–9, 80a–37, 80a–38, 80a–39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, 80b–12, 7202, 7215, and 7217.

■ 6. Section 201.101 is amended by revising paragraphs (a)(9)(vi) and (a)(9)(vii) to read as follows:

§ 201.101 Definitions.

(a) * * *

(9) * * *

(vi) By the filing, pursuant to § 242.601 of this chapter, of an application for review of an action or failure to act in connection with the implementation or operation of any effective transaction reporting plan; or

(vii) By the filing, pursuant to § 242.608 of this chapter, of an application for review of an action taken or failure to act in connection with the implementation or operation of any effective national market system plan; or

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 7. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 8. Section 230.144 is amended by:

■ a. Removing the authority citation following § 230.144; and

■ b. Revising paragraph (e)(1)(iii).

The revision reads as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(e) * * *

(1) * * *

(iii) The average weekly volume of trading in such securities reported pursuant to an *effective transaction reporting plan* or an *effective national market system plan* as those terms are defined in § 242.600 of this chapter during the four-week period specified in paragraph (e)(1)(ii) of this section.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 9. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 10. Section 240.0–10 is amended by revising paragraph (e)(1) to read as follows:

§ 240.0–10 Small entities under the Securities Exchange Act for purposes of the Regulatory Flexibility Act.

* * * * *

(e) * * *

(1) Has been exempted from the reporting requirements of § 242.601 of this chapter; and

* * * * *

■ 11. Section 240.3a51–1 is amended by revising the introductory text of paragraphs (a) and (e) to read as follows:

§ 240.3a51–1 Definition of "penny stock."

* * * * *

(a) That is an NMS stock, as defined in § 242.600 of this chapter:

* * * * *

(e) That is registered, or approved for registration upon notice of issuance, on a national securities exchange that makes transaction reports available pursuant to § 242.601 of this chapter, provided that:

* * * * *

■ 12. Section 240.3b–16 is amended by revising paragraph (d) to read as follows:

§ 240.3b–16 Definitions of terms used in Section 3(a)(1) of the Act.

* * * * *

(d) For the purposes of this section, the terms *bid* and *offer* shall have the same meaning as under § 242.600 of this chapter.

* * * * *

■ 13. Section 240.10a–1 is amended by revising paragraphs (a)(1), (e)(5)(ii) and (e)(11) to read as follows:

§ 240.10a–1 Short sales.

(a)(1)(i) No person shall, for his own account or for the account of any other person, effect a short sale of any security registered on, or admitted to unlisted trading privileges on, a national securities exchange, if trades in such securities are reported pursuant to an "effective transaction reporting plan" as defined in § 242.600 of this chapter and information as to such trades is made available in accordance with such plan on a real-time basis to vendors of market transaction information:

(A) Below the price at which the last sale thereof, regular way, was reported pursuant to an effective transaction reporting plan; or

(B) At such price unless such price is above the next proceeding different price at which a sale of such security, regular way, was reported pursuant to an effective transaction reporting plan.

(ii) The provisions of paragraph (a)(1)(i) of this section hereof shall not apply to transactions by any person in Nasdaq securities as defined in § 242.600 of this chapter, except for those Nasdaq securities for which transaction reports are collected, processed, and made available pursuant to the plan originally submitted to the Commission pursuant to § 240.17a–15 (subsequently amended and redesignated as § 240.11Aa3–1 and subsequently redesignated as § 242.601 of this chapter), which plan was declared effective as of May 17, 1974.

* * * * *

(e) * * *

(5) * * *

(ii) Effected at a price equal to the most recent offer communicated for the security by such registered specialist, registered exchange market maker or third market maker to an exchange or a national securities association ("association") pursuant to § 242.602 of this chapter, if such offer, when communicated, was equal to or above the last sale, regular way, reported for such security pursuant to an effective transaction reporting plan:

Provided, however, That any exchange, by rule, may prohibit its registered specialist and registered exchange market makers from availing themselves of the exemption afforded by this paragraph (e)(5) if that exchange determines that such action is necessary or appropriate in its market in the

public interest or for the protection of investors;

* * * * *

(11) Any sale of a security covered by paragraph (a) of this section (except a sale to a stabilizing bid complying with § 242.104 of this chapter) by any broker or dealer, for his own account or for the account of any other person, effected at a price equal to the most recent offer communicated by such broker or dealer to an exchange or association pursuant to § 242.602 of this chapter in an amount less than or equal to the quotation size associated with such offer, if such offer, when communicated, was:

(i) Above the price at which the last sale, regular way, for such security was reported pursuant to an effective transaction reporting plan; or

(ii) At such last sale price, if such last sale price is above the next preceding different price at which a sale of such security, regular way, was reported pursuant to an effective transaction reporting plan.

* * * * *

■ 14. Section 240.10b–10 is amended by:

■ a. Revising paragraphs (a)(2)(i)(C), (a)(2)(ii)(B) and (d)(7);

■ b. Removing paragraph (d)(8); and

■ c. Redesignating paragraphs (d)(9) and (d)(10) as paragraphs (d)(8) and (d)(9).

The revisions read as follows:

§ 240.10b–10 Confirmation of transactions.

* * * * *

(a) * * *

(2) * * *

(i) * * *

(C) For a transaction in any NMS stock as defined in § 242.600 of this chapter or a security authorized for quotation on an automated interdealer quotation system that has the characteristics set forth in section 17B of the Act (15 U.S.C. 78q–2), a statement whether payment for order flow is received by the broker or dealer for transactions in such securities and the fact that the source and nature of the compensation received in connection with the particular transaction will be furnished upon written request of the customer; *provided, however,* that brokers or dealers that do not receive payment for order flow in connection with any transaction have no disclosure obligations under this paragraph; and

* * * * *

(ii) * * *

(B) In the case of any other transaction in an NMS stock as defined by § 242.600 of this chapter, or an equity security that is traded on a national securities exchange and that is subject to last sale reporting, the reported trade price, the price to the customer in the transaction, and the difference, if any, between the reported trade price and the price to the customer.

* * * * *

(d) * * *

(7) *NMS stock* shall have the meaning provided in § 242.600 of this chapter.

* * * * *

■ 15. Section 240.10b–18 is amended by revising paragraph (a)(6) to read as follows:

§ 240.10b–18 Purchases of certain equity securities by the issuer and others.

* * * * *

(a) * * *

(6) *Consolidated system* means a consolidated transaction or quotation reporting system that collects and publicly disseminates on a current and continuous basis transaction or quotation information in common equity securities pursuant to an effective transaction reporting plan or an effective national market system plan (as those terms are defined in § 242.600 of this chapter).

* * * * *

§ 240.11Aa2–1 through 240.11Ac1–6 [Removed]

■ 16. The undesignated center heading preceding § 240.11Aa2–1 is removed; and §§ 240.11Aa2–1 through 240.11Ac1–6 are removed.

■ 17. Section 240.12a–7 is amended by revising the introductory text of paragraph (a)(2) to read as follows:

§ 240.12a–7 Exemption of stock contained in standardized market baskets from section 12(a) of the Act.

(a) * * *

(2) The stock is an NMS stock as defined in § 242.600 of this chapter and is either:

* * * * *

■ 18. Section 240.12f–1 is amended by:

■ a. Removing the authority citation following the section;

■ b. Removing "and" at the end of paragraph (a)(3); and

■ c. Revising paragraph (a)(4).

■ The revision reads as follows:

§ 240.12f–1 Applications for permission to reinstate unlisted trading privileges.

(a) * * *

(4) Whether transaction information concerning such security is reported pursuant to an effective transaction reporting plan contemplated by § 242.601 of this chapter;

* * * * *

■ 19. Section 240.12f–2 is amended by revising paragraph (a) to read as follows:

§ 240.12f–2 Extending unlisted trading privileges to a security that is the subject of an initial public offering.

(a) *General provision.* A national securities exchange may extend unlisted trading privileges to a subject security when at least one transaction in the subject security has been effected on the national securities exchange upon which the security is listed and the transaction has been reported pursuant to an effective transaction reporting plan, as defined in § 242.600 of this chapter.

* * * * *

■ 20. Section 240.15b9–1 is amended by:

■ a. Removing the authority citation following the section; and

■ b. Revising paragraph (c).

■ The revision reads as follows:

§ 240.15b9–1 Exemption for certain exchange members.

* * * * *

(c) For purposes of this section, the term *Intermarket Trading System* shall mean the intermarket communications linkage operated jointly by certain self-regulatory organizations pursuant to a plan filed with, and approved by, the Commission pursuant to § 242.608 of this chapter.

■ 21. Section 240.15c2–11 is amended by revising paragraph (f)(5) to read as follows:

§ 240.15c2–11 Initiation or resumption of quotations without specified information.

* * * * *

(f) * * *

(5) The publication or submission of a quotation respecting a Nasdaq security (as defined in § 242.600 of this chapter), and such security's listing is not suspended, terminated, or prohibited.

* * * * *

■ 22. Section 240.19c–3 is amended by revising paragraph (b)(6) to read as follows:

§ 240.19c–3 Governing off-board trading by members of national securities exchanges.

* * * * *

(b) * * *

(6) The term *effective transaction reporting plan* shall mean any plan approved by the Commission pursuant to § 242.601 of this chapter for collecting, processing, and making available transaction reports with respect to transactions in an equity security or class of equity securities.

■ 23. Section 240.19c–4 is amended by revising paragraph (e)(6) to read as follows:

§ 240.19c–4 Governing certain listing or authorization determinations by national securities exchanges and associations.

* * * * *

(e) * * *

(6) The term *exchange* shall mean a national securities exchange, registered as such with the Securities and Exchange Commission pursuant to section 6 of the Act (15 U.S.C. 78f), which makes transaction reports available pursuant to § 242.601 of this chapter; and

* * * * *

■ 24. Section 240.31 is amended by revising paragraph (a)(11)(v) to read as follows:

§ 240.31 Section 31 transaction fees.

(a) * * *

(11) * * *

(v) Any sale of a security that is executed outside the United States and is not reported, or required to be reported, to a transaction reporting association as defined in § 242.600 of this chapter and any approved plan filed thereunder;

* * * * *

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 25. The authority citation for part 242 continues to read as follow:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 26. The part heading for part 242 is revised as set forth above.

■ 27. Section 242.100 is amended by revising the definition for "electronic communications network" and "Nasdaq" found in paragraph (b) to read as follows:

§ 242.100 Preliminary note; definitions.

* * * * *

* * * * *

(b) * * *

Electronic communications network has the meaning provided in § 242.600.

* * * * *

Nasdaq means the electronic dealer quotation system owned and operated by The Nasdaq Stock Market, Inc.

* * * * *

■ 28. Section 242.300 is amended by:

■ a. Revising paragraphs (g) and (h);

■ b. Removing paragraphs (i) and (j); and

■ c. Redesignating paragraphs (k), (l), and (m) as paragraphs (i), (j), and (k).

■ The revisions read as follows:

§ 242.300 Definitions.

* * * * *

(g) *NMS stock* shall have the meaning provided in § 242.600; *provided, however,* that a debt or convertible debt security shall not be deemed an NMS stock for purposes of this Regulation ATS.

(h) *Effective transaction reporting plan* shall have the meaning provided in § 242.600.

* * * * *

■ 29. Section 242.301 is amended by revising paragraphs (b)(3), (b)(5), and (b)(6) to read as follows:

§ 242.301 Requirements for alternative trading systems.

* * * * *

(b) * * *

(3) *Order display and execution access.* (i) An alternative trading system shall comply with the requirements set forth in paragraph (b)(3)(ii) of this section, with respect to any NMS stock in which the alternative trading system:

(A) Displays subscriber orders to any person (other than alternative trading system employees); and

(B) During at least 4 of the preceding 6 calendar months, had an average daily trading volume of 5 percent or more of the aggregate average daily share volume for such NMS stock as reported by an effective transaction reporting plan.

(ii) Such alternative trading system shall provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price for such NMS stock, displayed to more than one person in the alternative trading system, for inclusion in the quotation data made available by the national securities exchange or national securities association to vendors pursuant to § 242.602.

(iii) With respect to any order displayed pursuant to paragraph (b)(3)(ii) of this section, an alternative trading system shall provide to any broker-dealer that has access to the national securities exchange or national securities association to which the alternative trading system provides the prices and sizes of displayed orders pursuant to paragraph (b)(3)(ii) of this section, the ability to effect a transaction with such orders that is:

(A) Equivalent to the ability of such broker-dealer to effect a transaction with other orders displayed on the exchange or by the association; and

(B) At the price of the highest priced buy order or lowest priced sell order displayed for the lesser of the cumulative size of such priced orders entered therein at such price, or the size of the execution sought by such broker-dealer.

* * * * *

(5) *Fair access.* (i) An alternative trading system shall comply with the requirements in paragraph (b)(5)(ii) of this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

(A) With respect to any NMS stock, 5 percent or more of the average daily volume in that security reported by an effective transaction reporting plan;

(B) With respect to an equity security that is not an NMS stock and for which transactions are reported to a self-regulatory organization, 5 percent or more of the average daily trading volume in that security as calculated by the self-regulatory organization to which such transactions are reported;

(C) With respect to municipal securities, 5 percent or more of the average daily volume traded in the United States;

(D) With respect to investment grade corporate debt, 5 percent or more of the average daily volume traded in the United States; or

(E) With respect to non-investment grade corporate debt, 5 percent or more of the average daily volume traded in the United States.

(ii) An alternative trading system shall:

(A) Establish written standards for granting access to trading on its system;

(B) Not unreasonably prohibit or limit any person in respect to access to services offered by such alternative trading system by applying the standards established under paragraph (b)(5)(ii)(A) of this section in an unfair or discriminatory manner;

(C) Make and keep records of:

(*1*) All grants of access including, for all subscribers, the reasons for granting such access; and

(*2*) All denials or limitations of access and reasons, for each applicant, for denying or limiting access; and

(D) Report the information required on Form ATS–R (§ 249.638 of this chapter) regarding grants, denials, and limitations of access.

(iii) Notwithstanding paragraph (b)(5)(i) of this section, an alternative trading system shall not be required to comply with the requirements in paragraph (b)(5)(ii) of this section, if such alternative trading system:

(A) Matches customer orders for a security with other customer orders;

(B) Such customers' orders are not displayed to any person, other than employees of the alternative trading system; and

(C) Such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

(6) *Capacity, integrity, and security of automated systems.* (i) The alternative trading system shall comply with the requirements in paragraph (b)(6)(ii) of this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

(A) With respect to any NMS stock, 20 percent or more of the average daily volume reported by an effective transaction reporting plan;

(B) With respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, 20 percent or more of the average daily volume as calculated by the self-regulatory organization to which such transactions are reported;

(C) With respect to municipal securities, 20 percent or more of the average daily volume traded in the United States;

(D) With respect to investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States; or

(E) With respect to non-investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States.

(ii) With respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, the alternative trading system shall:

(A) Establish reasonable current and future capacity estimates;

(B) Conduct periodic capacity stress tests of critical systems to determine such system's ability to process transactions in an accurate, timely, and efficient manner;

(C) Develop and implement reasonable procedures to review and keep current its system development and testing methodology;

(D) Review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters;

(E) Establish adequate contingency and disaster recovery plans;

(F) On an annual basis, perform an independent review, in accordance with established audit procedures and standards, of such alternative trading system's controls for ensuring that paragraphs (b)(6)(ii)(A) through (E) of this section are met, and conduct a review by senior management of a report containing the recommendations and conclusions of the independent review; and

(G) Promptly notify the Commission staff of material systems outages and significant systems changes.

(iii) Notwithstanding paragraph (b)(6)(i) of this section, an alternative trading system shall not be required to comply with the requirements in paragraph (b)(6)(ii) of this section, if such alternative trading system:

(A) Matches customer orders for a security with other customer orders;

(B) Such customers' orders are not displayed to any person, other than employees of the alternative trading system; and

(C) Such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

* * * * *

■ 30. Part 242 is amended by adding Regulation NMS, §§ 242.600 through 242.612, to read as follows:

Regulation NMS—Regulation of the National Market System

Sec.

Regulation NMS—Regulation of the National Market System

§ 242.600 NMS security designation and definitions.

(a) The term *national market system security* as used in section 11A(a)(2) of the Act (15 U.S.C. 78k–1(a)(2)) shall mean any NMS security as defined in paragraph (b) of this section.

(b) For purposes of Regulation NMS (§§ 242.600 through 242.612), the following definitions shall apply:

(1) *Aggregate quotation size* means the sum of the quotation sizes of all responsible brokers or dealers who have communicated on any national securities exchange bids or offers for an NMS security at the same price.

(2) *Alternative trading system* has the meaning provided in § 242.300(a).

(3) *Automated quotation* means a quotation displayed by a trading center that:

(i) Permits an incoming order to be marked as immediate-or-cancel;

(ii) Immediately and automatically executes an order marked as immediate-or-cancel against the displayed quotation up to its full size;

(iii) Immediately and automatically cancels any unexecuted portion of an order marked as immediate-or-cancel without routing the order elsewhere;

(iv) Immediately and automatically transmits a response to the sender of an order marked as immediate-or-cancel indicating the action taken with respect to such order; and

(v) Immediately and automatically displays information that updates the displayed quotation to reflect any change to its material terms.

(4) *Automated trading center* means a trading center that:

(i) Has implemented such systems, procedures, and rules as are necessary to render it capable of displaying quotations that meet the requirements for an automated quotation set forth in paragraph (b)(3) of this section;

(ii) Identifies all quotations other than automated quotations as manual quotations;

(iii) Immediately identifies its quotations as manual quotations whenever it has reason to believe that it is not capable of displaying automated quotations; and

(iv) Has adopted reasonable standards limiting when its quotations change from automated quotations to manual quotations, and vice versa, to specifically defined circumstances that promote fair and efficient access to its automated quotations and are consistent with the maintenance of fair and orderly markets.

(5) *Average effective spread* means the share-weighted average of effective spreads for order executions calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the national best bid and national best offer at the time of order receipt and, for sell orders, as double the amount of difference between the midpoint of the national best bid and national best offer at the time of order receipt and the execution price.

(6) *Average realized spread* means the share-weighted average of realized spreads for order executions calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the national best bid and national best offer five minutes

after the time of order execution and, for sell orders, as double the amount of difference between the midpoint of the national best bid and national best offer five minutes after the time of order execution and the execution price; *provided, however,* that the midpoint of the final national best bid and national best offer disseminated for regular trading hours shall be used to calculate a realized spread if it is disseminated less than five minutes after the time of order execution.

(7) *Best bid and best offer* mean the highest priced bid and the lowest priced offer.

(8) *Bid* or *offer* means the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as either principal or agent, but shall not include indications of interest.

(9) *Block size with respect to* an order means it is:

(i) Of at least 10,000 shares; or

(ii) For a quantity of stock having a market value of at least $200,000.

(10) *Categorized by order size* means dividing orders into separate categories for sizes from 100 to 499 shares, from 500 to 1999 shares, from 2000 to 4999 shares, and 5000 or greater shares.

(11) *Categorized by order type* means dividing orders into separate categories for market orders, marketable limit orders, inside-the-quote limit orders, at-the-quote limit orders, and near-the-quote limit orders.

(12) *Categorized by security* means dividing orders into separate categories for each NMS stock that is included in a report.

(13) *Consolidated display* means:

(i) The prices, sizes, and market identifications of the national best bid and national best offer for a security; and

(ii) Consolidated last sale information for a security.

(14) *Consolidated last sale information* means the price, volume, and market identification of the most recent transaction report for a security that is disseminated pursuant to an effective national market system plan.

(15) *Covered order* means any market order or any limit order (including immediate-or-cancel orders) received by a market center during regular trading hours at a time when a national best bid and national best offer is being disseminated, and, if executed, is executed during regular trading hours, but shall exclude any order for which the customer requests special handling for execution, including, but not limited to, orders to be executed at a market opening price or a market closing price, orders submitted with stop prices, orders to be executed only at their full size, orders to be executed on a particular type of tick or bid, orders submitted on a "not held" basis, orders for other than regular settlement, and orders to be executed at prices unrelated to the market price of the security at the time of execution.

(16) *Customer* means any person that is not a broker or dealer.

(17) *Customer limit order* means an order to buy or sell an NMS stock at a specified price that is not for the account of either a broker or dealer; *provided, however,* that the term *customer limit* order shall include an order transmitted by a broker or dealer on behalf of a customer.

(18) *Customer order* means an order to buy or sell an NMS security that is not for the account of a broker or dealer, but shall not include any order for a quantity of a security having a market value of at least $50,000 for an NMS security that is an option contract and a market value of at least $200,000 for any other NMS security.

(19) *Directed order* means a customer order that the customer specifically instructed the broker or dealer to route to a particular venue for execution.

(20) *Dynamic market monitoring device* means any service provided by a vendor on an interrogation device or other display that:

(i) Permits real-time monitoring, on a dynamic basis, of transaction reports, last sale data, or quotations with respect to a particular security; and

(ii) Displays the most recent transaction report, last sale data, or quotation with respect to that security until such report, data, or quotation has been superseded or supplemented by the display of a new transaction report, last sale data, or quotation reflecting the next reported transaction or quotation in that security.

(21) *Effective national market system plan* means any national market system plan approved by the Commission (either temporarily or on a permanent basis) pursuant to § 242.608.

(22) *Effective transaction reporting plan* means any transaction reporting plan approved by the Commission pursuant to § 242.601.

(23) *Electronic communications network* means, for the purposes of § 242.602(b)(5), any electronic system that widely disseminates to third parties orders entered therein by an exchange market maker or OTC market maker, and permits such orders to be executed against in whole or in part; except that the term *electronic communications network* shall not include:

(i) Any system that crosses multiple orders at one or more specified times at a single price set by the system (by algorithm or by any derivative pricing mechanism) and does not allow orders to be crossed or executed against directly by participants outside of such times; or

(ii) Any system operated by, or on behalf of, an OTC market maker or exchange market maker that executes customer orders primarily against the account of such market maker as principal, other than riskless principal.

(24) *Exchange market maker* means any member of a national securities exchange that is registered as a specialist or market maker pursuant to the rules of such exchange.

(25) *Exchange-traded security* means any NMS security or class of NMS securities listed and registered, or admitted to unlisted trading privileges, on a national securities exchange; *provided, however,* that securities not listed on any national securities exchange that are traded pursuant to unlisted trading privileges are excluded.

(26) *Executed at the quote* means, for buy orders, execution at a price equal to the national best offer at the time of order receipt and, for sell orders, execution at a price equal to the national best bid at the time of order receipt.

(27) *Executed outside the quote* means, for buy orders, execution at a price higher than the national best offer at the time of order receipt and, for sell orders, execution at a price lower than the national best bid at the time of order receipt.

(28) *Executed with price improvement* means, for buy orders, execution at a price lower than the national best offer at the time of order receipt and, for sell orders, execution at a price higher than the national best bid at the time of order receipt.

(29) *Inside-the-quote limit order, at-the-quote limit order,* and *near-the-quote limit order* mean non-marketable buy orders with limit prices that are, respectively, higher than, equal to, and lower by $0.10 or less than the national best bid at the time of order receipt, and non-marketable sell orders with limit prices that are, respectively, lower than, equal to, and higher by $0.10 or less than the national best offer at the time of order receipt.

(30) *Intermarket sweep order* means a limit order for an NMS stock that meets the following requirements:

(i) When routed to a trading center, the limit order is identified as an intermarket sweep order; and

(ii) Simultaneously with the routing of the limit order identified as an intermarket sweep order, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of any protected bid, in the case of a limit order to sell, or the full displayed size of any protected offer, in the case of a limit order to buy, for the NMS stock with a price that is superior to the limit price of the limit order identified as an intermarket sweep order. These additional routed orders also must be marked as intermarket sweep orders.

(31) *Interrogation device* means any securities information retrieval system capable of displaying transaction reports, last sale data, or quotations upon inquiry, on a current basis on a terminal or other device.

(32) *Joint self-regulatory organization* plan means a plan as to which two or more self-regulatory organizations, acting jointly, are sponsors.

(33) *Last sale data* means any price or volume data associated with a transaction.

(34) *Listed equity security* means any equity security listed and registered, or admitted to unlisted trading privileges, on a national securities exchange.

(35) *Listed option* means any option traded on a registered national securities exchange or automated facility of a national securities association.

(36) *Make publicly available* means posting on an Internet Web site that is free and readily accessible to the public, furnishing a written copy to customers on request without charge, and notifying customers at least annually in writing that a written copy will be furnished on request.

(37) *Manual quotation* means any quotation other than an automated quotation.

(38) *Market center* means any exchange market maker, OTC market maker, alternative trading system, national securities exchange, or national securities association.

(39) *Marketable limit order* means any buy order with a limit price equal to or greater than the national best offer at the time of order receipt, or any sell order with a limit price equal to or less than the national best bid at the time of order receipt.

(40) *Moving ticker* means any continuous real-time moving display of transaction reports or last sale data (other than a dynamic market monitoring device) provided on an interrogation or other display device.

(41) *Nasdaq security* means any registered security listed on The Nasdaq Stock Market, Inc.

(42) *National best bid and national best offer* means, with respect to quotations for an NMS security, the best bid and best offer for such security that are calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan; *provided*, that in the event two or more market centers transmit to the plan processor pursuant to such plan identical bids or offers for an NMS security, the best bid or best offer (as the case may be) shall be determined by ranking all such identical bids or offers (as the case may be) first by size (giving the highest ranking to the bid or offer associated with the largest size), and then by time (giving the highest ranking to the bid or offer received first in time).

(43) *National market system plan* means any joint self-regulatory organization plan in connection with:

(i) The planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or

(ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and their members with any section of this Regulation NMS and part 240, subpart A of this chapter promulgated pursuant to section 11A of the Act (15 U.S.C. 78k–1).

(44) *National securities association* means any association of brokers and dealers registered pursuant to section 15A of the Act (15 U.S.C. 78o-3).

(45) *National securities exchange* means any exchange registered pursuant to section 6 of the Act (15 U.S.C. 78f).

(46) *NMS security* means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.

(47) *NMS stock* means any NMS security other than an option.

(48) *Non-directed order* means any customer order other than a directed order.

(49) *Odd-lot* means an order for the purchase or sale of an NMS stock in an amount less than a round lot.

(50) *Options class* means all of the put option or call option series overlying a security, as defined in section 3(a)(10) of the Act (15 U.S.C. 78c(a)(10)).

(51) *Options series* means the contracts in an options class that have the same unit of trade, expiration date, and exercise price, and other terms or conditions.

(52) *OTC market maker* means any dealer that holds itself out as being willing to buy from and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size.

(53) *Participants*, when used in connection with a national market system plan, means any self-regulatory organization which has agreed to act in accordance with the terms of the plan but which is not a signatory of such plan.

(54) *Payment for order flow* has the meaning provided in § 240.10b–10 of this chapter.

(55) *Plan processor* means any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan.

(56) *Profit-sharing relationship* means any ownership or other type of affiliation under which the broker or dealer, directly or indirectly, may share in any profits that may be derived from the execution of non-directed orders.

(57) *Protected bid* or *protected offer* means a quotation in an NMS stock that:

(i) Is displayed by an automated trading center;

(ii) Is disseminated pursuant to an effective national market system plan; and

(iii) Is an automated quotation that is the best bid or best offer of a national securities exchange, the best bid or best offer of The Nasdaq Stock Market, Inc., or the best bid or best offer of a national securities association other than the best bid or best offer of The Nasdaq Stock Market, Inc.

(58) *Protected quotation* means a protected bid or a protected offer.

(59) *Published aggregate quotation size* means the aggregate quotation size calculated by a national securities exchange and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to a responsible broker or dealer.

(60) *Published bid and published offer* means the bid or offer of a responsible broker or dealer for an NMS security communicated by it to its national securities exchange or association pursuant to § 242.602 and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to such responsible broker or dealer.

(61) *Published quotation size* means the quotation size of a responsible

broker or dealer communicated by it to its national securities exchange or association pursuant to § 242.602 and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to such responsible broker or dealer.

(62) *Quotation* means a bid or an offer.

(63) *Quotation size*, when used with respect to a responsible broker's or dealer's bid or offer for an NMS security, means:

(i) The number of shares (or units of trading) of that security which such responsible broker or dealer has specified, for purposes of dissemination to vendors, that it is willing to buy at the bid price or sell at the offer price comprising its bid or offer, as either principal or agent; or

(ii) In the event such responsible broker or dealer has not so specified, a normal unit of trading for that NMS security.

(64) *Regular trading hours* means the time between 9:30 a.m. and 4:00 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to § 242.605(a)(2).

(65) *Responsible broker or dealer* means:

(i) When used with respect to bids or offers communicated on a national securities exchange, any member of such national securities exchange who communicates to another member on such national securities exchange, at the location (or locations) or through the facility or facilities designated by such national securities exchange for trading in an NMS security a bid or offer for such NMS security, as either principal or agent; *provided, however*, that, in the event two or more members of a national securities exchange have communicated on or through such national securities exchange bids or offers for an NMS security at the same price, each such member shall be considered a *responsible broker or dealer* for that bid or offer, subject to the rules of priority and precedence then in effect on that national securities exchange; and further provided, that for a bid or offer which is transmitted from one member of a national securities exchange to another member who undertakes to represent such bid or offer on such national securities exchange as agent, only the last member who undertakes to represent such bid or offer as agent shall be considered the *responsible broker or dealer* for that bid or offer; and

(ii) When used with respect to bids and offers communicated by a member of an association to a broker or dealer or a customer, the member communicating the bid or offer (regardless of whether such bid or offer is for its own account or on behalf of another person).

(66) *Revised bid or offer* means a market maker's bid or offer which supersedes its published bid or published offer.

(67) *Revised quotation size* means a market maker's quotation size which supersedes its published quotation size.

(68) *Self-regulatory organization* means any national securities exchange or national securities association.

(69) *Specified persons*, when used in connection with any notification required to be provided pursuant to § 242.602(a)(3) and any election (or withdrawal thereof) permitted under § 242.602(a)(5), means:

(i) Each vendor;

(ii) Each plan processor; and

(iii) The processor for the Options Price Reporting Authority (in the case of a notification for a subject security which is a class of securities underlying options admitted to trading on any national securities exchange).

(70) *Sponsor*, when used in connection with a national market system plan, means any self-regulatory organization which is a signatory to such plan and has agreed to act in accordance with the terms of the plan.

(71) *SRO display-only facility* means a facility operated by or on behalf of a national securities exchange or national securities association that displays quotations in a security, but does not execute orders against such quotations or present orders to members for execution.

(72) *SRO trading facility* means a facility operated by or on behalf of a national securities exchange or a national securities association that executes orders in a security or presents orders to members for execution.

(73) *Subject security* means:

(i) With respect to a national securities exchange:

(A) Any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and

(B) Any other NMS security for which such exchange has in effect an election, pursuant to § 242.602(a)(5)(i), to collect, process, and make available to a vendor bids, offers, quotation sizes, and aggregate quotation sizes communicated on such exchange; and

(ii) With respect to a member of a national securities association:

(A) Any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and

(B) Any other NMS security for which such member acts in the capacity of an OTC market maker and has in effect an election, pursuant to § 242.602(a)(5)(ii), to communicate to its association bids, offers, and quotation sizes for the purpose of making such bids, offers, and quotation sizes available to a vendor.

(74) *Time of order execution* means the time (to the second) that an order was executed at any venue.

(75) *Time of order receipt* means the time (to the second) that an order was received by a market center for execution.

(76) *Time of the transaction* has the meaning provided in § 240.10b–10 of this chapter.

(77) *Trade-through* means the purchase or sale of an NMS stock during regular trading hours, either as principal or agent, at a price that is lower than a protected bid or higher than a protected offer.

(78) *Trading center* means a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

(79) *Trading rotation* means, with respect to an options class, the time period on a national securities exchange during which:

(i) Opening, re-opening, or closing transactions in options series in such options class are not yet completed; and

(ii) Continuous trading has not yet commenced or has not yet ended for the day in options series in such options class.

(80) *Transaction report* means a report containing the price and volume associated with a transaction involving the purchase or sale of one or more round lots of a security.

(81) *Transaction reporting association* means any person authorized to implement or administer any transaction reporting plan on behalf of persons acting jointly under § 242.601(a).

(82) *Transaction reporting plan* means any plan for collecting, processing, making available or disseminating transaction reports with respect to transactions in securities filed with the Commission pursuant to, and meeting the requirements of, § 242.601.

(83) *Vendor* means any securities information processor engaged in the business of disseminating transaction reports, last sale data, or quotations with respect to NMS securities to brokers, dealers, or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker, or interrogation device.

§ 242.601 Dissemination of transaction reports and last sale data with respect to transactions in NMS stocks.

(a) *Filing and effectiveness of transaction reporting plans.* (1) Every national securities exchange shall file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed through its facilities, and every national securities association shall file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed by its members otherwise than on a national securities exchange.

(2) Any transaction reporting plan, or any amendment thereto, filed pursuant to this section shall be filed with the Commission, and considered for approval, in accordance with the procedures set forth in § 242.608(a) and (b). Any such plan, or amendment thereto, shall specify, at a minimum:

(i) The listed equity and Nasdaq securities or classes of such securities for which transaction reports shall be required by the plan;

(ii) Reporting requirements with respect to transactions in listed equity securities and Nasdaq securities, for any broker or dealer subject to the plan;

(iii) The manner of collecting, processing, sequencing, making available and disseminating transaction reports and last sale data reported pursuant to such plan;

(iv) The manner in which such transaction reports reported pursuant to such plan are to be consolidated with transaction reports from national securities exchanges and national securities associations reported pursuant to any other effective transaction reporting plan;

(v) The applicable standards and methods which will be utilized to ensure promptness of reporting, and accuracy and completeness of transaction reports;

(vi) Any rules or procedures which may be adopted to ensure that transaction reports or last sale data will not be disseminated in a fraudulent or manipulative manner;

(vii) Specific terms of access to transaction reports made available or disseminated pursuant to the plan; and

(viii) That transaction reports or last sale data made available to any vendor for display on an interrogation device identify the marketplace where each transaction was executed.

(3) No transaction reporting plan filed pursuant to this section, or any amendment to an effective transaction reporting plan, shall become effective unless approved by the Commission or otherwise permitted in accordance with the procedures set forth in § 242.608.

(b) *Prohibitions and reporting requirements.* (1) No broker or dealer may execute any transaction in, or induce or attempt to induce the purchase or sale of, any NMS stock:

(i) On or through the facilities of a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed on or through such exchange facilities; or

(ii) Otherwise than on a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed otherwise than on a national securities exchange by such broker or dealer.

(2) Every broker or dealer who is a member of a national securities exchange or national securities association shall promptly transmit to the exchange or association of which it is a member all information required by any effective transaction reporting plan filed by such exchange or association (either individually or jointly with other exchanges and/or associations).

(c) *Retransmission of transaction reports or last sale data.* Notwithstanding any provision of any effective transaction reporting plan, no national securities exchange or national securities association may, either individually or jointly, by rule, stated policy or practice, transaction reporting plan or otherwise, prohibit, condition or otherwise limit, directly or indirectly, the ability of any vendor to retransmit, for display in moving tickers, transaction reports or last sale data made available pursuant to any effective transaction reporting plan; *provided, however,* that a national securities exchange or national securities association may, by means of an effective transaction reporting plan, condition such retransmission upon appropriate undertakings to ensure that any charges for the distribution of transaction reports or last sale data in moving tickers permitted by paragraph (d) of this section are collected.

(d) *Charges.* Nothing in this section shall preclude any national securities exchange or national securities association, separately or jointly, pursuant to the terms of an effective transaction reporting plan, from imposing reasonable, uniform charges (irrespective of geographic location) for distribution of transaction reports or last sale data.

(e) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective transaction reporting plan in accordance with the provisions of § 242.608(d).

(f) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any national securities exchange, national securities association, broker, dealer, or specified security if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to, and perfection of the mechanisms of, a national market system.

§ 242.602 Dissemination of quotations in NMS securities.

(a) *Dissemination requirements for national securities exchanges and national securities associations.* (1) Every national securities exchange and national securities association shall establish and maintain procedures and mechanisms for collecting bids, offers, quotation sizes, and aggregate quotation sizes from responsible brokers or dealers who are members of such exchange or association, processing such bids, offers, and sizes, and making such bids, offers, and sizes available to vendors, as follows:

(i) Each national securities exchange shall at all times such exchange is open for trading, collect, process, and make available to vendors the best bid, the best offer, and aggregate quotation sizes for each subject security listed or admitted to unlisted trading privileges which is communicated on any national securities exchange by any responsible broker or dealer, but shall not include:

(A) Any bid or offer executed immediately after communication and any bid or offer communicated by a responsible broker or dealer other than an exchange market maker which is cancelled or withdrawn if not executed immediately after communication; and

(B) Any bid or offer communicated during a period when trading in that security has been suspended or halted,

or prior to the commencement of trading in that security on any trading day, on that exchange.

(ii) Each national securities association shall, at all times that last sale information with respect to NMS securities is reported pursuant to an effective transaction reporting plan, collect, process, and make available to vendors the best bid, best offer, and quotation sizes communicated otherwise than on an exchange by each member of such association acting in the capacity of an OTC market maker for each subject security and the identity of that member (excluding any bid or offer executed immediately after communication), except during any period when over-the-counter trading in that security has been suspended.

(2) Each national securities exchange shall, with respect to each published bid and published offer representing a bid or offer of a member for a subject security, establish and maintain procedures for ascertaining and disclosing to other members of that exchange, upon presentation of orders sought to be executed by them in reliance upon paragraph (b)(2) of this section, the identity of the responsible broker or dealer who made such bid or offer and the quotation size associated with it.

(3)(i) If, at any time a national securities exchange is open for trading, such exchange determines, pursuant to rules approved by the Commission pursuant to section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)), that the level of trading activities or the existence of unusual market conditions is such that the exchange is incapable of collecting, processing, and making available to vendors the data for a subject security required to be made available pursuant to paragraph (a)(1) of this section in a manner that accurately reflects the current state of the market on such exchange, such exchange shall immediately notify all specified persons of that determination. Upon such notification, responsible brokers or dealers that are members of that exchange shall be relieved of their obligation under paragraphs (b)(2) and (c)(3) of this section and such exchange shall be relieved of its obligations under paragraphs (a)(1) and (2) of this section for that security; *provided, however*, that such exchange will continue, to the maximum extent practicable under the circumstances, to collect, process, and make available to vendors data for that security in accordance with paragraph (a)(1) of this section.

(ii) During any period a national securities exchange, or any responsible broker or dealer that is a member of that exchange, is relieved of any obligation imposed by this section for any subject security by virtue of a notification made pursuant to paragraph (a)(3)(i) of this section, such exchange shall monitor the activity or conditions which formed the basis for such notification and shall immediately renotify all specified persons when that exchange is once again capable of collecting, processing, and making available to vendors the data for that security required to be made available pursuant to paragraph (a)(1) of this section in a manner that accurately reflects the current state of the market on such exchange. Upon such renotification, any exchange or responsible broker or dealer which had been relieved of any obligation imposed by this section as a consequence of the prior notification shall again be subject to such obligation.

(4) Nothing in this section shall preclude any national securities exchange or national securities association from making available to vendors indications of interest or bids and offers for a subject security at any time such exchange or association is not required to do so pursuant to paragraph (a)(1) of this section.

(5)(i) Any national securities exchange may make an election for purposes of the definition of *subject security* in § 242.600(b)(73) for any NMS security, by collecting, processing, and making available bids, offers, quotation sizes, and aggregate quotation sizes in that security; except that for any NMS security previously listed or admitted to unlisted trading privileges on only one exchange and not traded by any OTC market maker, such election shall be made by notifying all specified persons, and shall be effective at the opening of trading on the business day following notification.

(ii) Any member of a national securities association acting in the capacity of an OTC market maker may make an election for purposes of the definition of *subject security* in § 242.600(b)(73) for any NMS security, by communicating to its association bids, offers, and quotation sizes in that security; except that for any other NMS security listed or admitted to unlisted trading privileges on only one exchange and not traded by any other OTC market maker, such election shall be made by notifying its association and all specified persons, and shall be effective at the opening of trading on the business day following notification.

(iii) The election of a national securities exchange or member of a national securities association for any NMS security pursuant to this paragraph (a)(5) shall cease to be in effect if such exchange or member ceases to make available or communicate bids, offers, and quotation sizes in such security.

(b) *Obligations of responsible brokers and dealers.* (1) Each responsible broker or dealer shall promptly communicate to its national securities exchange or national securities association, pursuant to the procedures established by that exchange or association, its best bids, best offers, and quotation sizes for any subject security.

(2) Subject to the provisions of paragraph (b)(3) of this section, each responsible broker or dealer shall be obligated to execute any order to buy or sell a subject security, other than an odd-lot order, presented to it by another broker or dealer, or any other person belonging to a category of persons with whom such responsible broker or dealer customarily deals, at a price at least as favorable to such buyer or seller as the responsible broker's or dealer's published bid or published offer (exclusive of any commission, commission equivalent or differential customarily charged by such responsible broker or dealer in connection with execution of any such order) in any amount up to its published quotation size.

(3)(i) No responsible broker or dealer shall be obligated to execute a transaction for any subject security as provided in paragraph (b)(2) of this section to purchase or sell that subject security in an amount greater than such revised quotation size if:

(A) Prior to the presentation of an order for the purchase or sale of a subject security, a responsible broker or dealer has communicated to its exchange or association, pursuant to paragraph (b)(1) of this section, a revised quotation size; or

(B) At the time an order for the purchase or sale of a subject security is presented, a responsible broker or dealer is in the process of effecting a transaction in such subject security, and immediately after the completion of such transaction, it communicates to its exchange or association a revised quotation size, such responsible broker or dealer shall not be obligated by paragraph (b)(2) of this section to purchase or sell that subject security in an amount greater than such revised quotation size.

(ii) No responsible broker or dealer shall be obligated to execute a transaction for any subject security as provided in paragraph (b)(2) of this section if:

(A) Before the order sought to be executed is presented, such responsible broker or dealer has communicated to

its exchange or association pursuant to paragraph (b)(1) of this section, a revised bid or offer; or

(B) At the time the order sought to be executed is presented, such responsible broker or dealer is in the process of effecting a transaction in such subject security, and, immediately after the completion of such transaction, such responsible broker or dealer communicates to its exchange or association pursuant to paragraph (b)(1) of this section, a revised bid or offer; *provided, however,* that such responsible broker or dealer shall nonetheless be obligated to execute any such order in such subject security as provided in paragraph (b)(2) of this section at its revised bid or offer in any amount up to its published quotation size or revised quotation size.

(4) Subject to the provisions of paragraph (a)(4) of this section:

(i) No national securities exchange or OTC market maker may make available, disseminate or otherwise communicate to any vendor, directly or indirectly, for display on a terminal or other display device any bid, offer, quotation size, or aggregate quotation size for any NMS security which is not a subject security with respect to such exchange or OTC market maker; and

(ii) No vendor may disseminate or display on a terminal or other display device any bid, offer, quotation size, or aggregate quotation size from any national securities exchange or OTC market maker for any NMS security which is not a subject security with respect to such exchange or OTC market maker.

(5)(i) Entry of any priced order for an NMS security by an exchange market maker or OTC market maker in that security into an electronic communications network that widely disseminates such order shall be deemed to be:

(A) A bid or offer under this section, to be communicated to the market maker's exchange or association pursuant to this paragraph (b) for at least the minimum quotation size that is required by the rules of the market maker's exchange or association if the priced order is for the account of a market maker, or the actual size of the order up to the minimum quotation size required if the priced order is for the account of a customer; and

(B) A communication of a bid or offer to a vendor for display on a display device for purposes of paragraph (b)(4) of this section.

(ii) An exchange market maker or OTC market maker that has entered a priced order for an NMS security into an electronic communications network that widely disseminates such order shall be deemed to be in compliance with paragraph (b)(5)(i)(A) of this section if the electronic communications network:

(A)(*1*) Provides to a national securities exchange or national securities association (or an exclusive processor acting on behalf of one or more exchanges or associations) the prices and sizes of the orders at the highest buy price and the lowest sell price for such security entered in, and widely disseminated by, the electronic communications network by exchange market makers and OTC market makers for the NMS security, and such prices and sizes are included in the quotation data made available by such exchange, association, or exclusive processor to vendors pursuant to this section; and

(*2*) Provides, to any broker or dealer, the ability to effect a transaction with a priced order widely disseminated by the electronic communications network entered therein by an exchange market maker or OTC market maker that is:

(*i*) Equivalent to the ability of any broker or dealer to effect a transaction with an exchange market maker or OTC market maker pursuant to the rules of the national securities exchange or national securities association to which the electronic communications network supplies such bids and offers; and

(*ii*) At the price of the highest priced buy order or lowest priced sell order, or better, for the lesser of the cumulative size of such priced orders entered therein by exchange market makers or OTC market makers at such price, or the size of the execution sought by the broker or dealer, for such security; or

(B) Is an alternative trading system that:

(*1*) Displays orders and provides the ability to effect transactions with such orders under § 242.301(b)(3); and

(*2*) Otherwise is in compliance with Regulation ATS (§ 242.300 through § 242.303).

(c) *Transactions in listed options.* (1) A national securities exchange or national securities association:

(i) Shall not be required, under paragraph (a) of this section, to collect from responsible brokers or dealers who are members of such exchange or association, or to make available to vendors, the quotation sizes and aggregate quotation sizes for listed options, if such exchange or association establishes by rule and periodically publishes the quotation size for which such responsible brokers or dealers are obligated to execute an order to buy or sell an options series that is a subject security at its published bid or offer under paragraph (b)(2) of this section;

(ii) May establish by rule and periodically publish a quotation size, which shall not be for less than one contract, for which responsible brokers or dealers who are members of such exchange or association are obligated under paragraph (b)(2) of this section to execute an order to buy or sell a listed option for the account of a broker or dealer that is in an amount different from the quotation size for which it is obligated to execute an order for the account of a customer; and

(iii) May establish and maintain procedures and mechanisms for collecting from responsible brokers and dealers who are members of such exchange or association, and making available to vendors, the quotation sizes and aggregate quotation sizes in listed options for which such responsible broker or dealer will be obligated under paragraph (b)(2) of this section to execute an order from a customer to buy or sell a listed option and establish by rule and periodically publish the size, which shall not be less than one contract, for which such responsible brokers or dealers are obligated to execute an order for the account of a broker or dealer.

(2) If, pursuant to paragraph (c)(1) of this section, the rules of a national securities exchange or national securities association do not require its members to communicate to it their quotation sizes for listed options, a responsible broker or dealer that is a member of such exchange or association shall:

(i) Be relieved of its obligations under paragraph (b)(1) of this section to communicate to such exchange or association its quotation sizes for any listed option; and

(ii) Comply with its obligations under paragraph (b)(2) of this section by executing any order to buy or sell a listed option, in an amount up to the size established by such exchange's or association's rules under paragraph (c)(1) of this section.

(3) *Thirty second response.* Each responsible broker or dealer, within thirty seconds of receiving an order to buy or sell a listed option in an amount greater than the quotation size established by a national securities exchange's or national securities association's rules pursuant to paragraph (c)(1) of this section, or its published quotation size must:

(i) Execute the entire order; or

(ii)(A) Execute that portion of the order equal to at least:

(*1*) The quotation size established by a national securities exchange's or national securities association's rules, pursuant to paragraph (c)(1) of this

section, to the extent that such exchange or association does not collect and make available to vendors quotation size and aggregate quotation size under paragraph (a) of this section; or

(2) Its published quotation size; and

(B) Revise its bid or offer.

(4) Notwithstanding paragraph (c)(3) of this section, no responsible broker or dealer shall be obligated to execute a transaction for any listed option as provided in paragraph (b)(2) of this section if:

(i) Any of the circumstances in paragraph (b)(3) of this section exist; or

(ii) The order for the purchase or sale of a listed option is presented during a trading rotation in that listed option.

(d) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any responsible broker or dealer, electronic communications network, national securities exchange, or national securities association if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.

§ 242.603 Distribution, consolidation, and display of information with respect to quotations for and transactions in NMS stocks.

(a) *Distribution of information.* (1) Any exclusive processor, or any broker or dealer with respect to information for which it is the exclusive source, that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor shall do so on terms that are fair and reasonable.

(2) Any national securities exchange, national securities association, broker, or dealer that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor, broker, dealer, or other persons shall do so on terms that are not unreasonably discriminatory.

(b) *Consolidation of information.* Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.

(c) *Display of information.* (1) No securities information processor, broker, or dealer shall provide, in a context in which a trading or order-routing decision can be implemented, a display of any information with respect to quotations for or transactions in an NMS stock without also providing, in an equivalent manner, a consolidated display for such stock.

(2) The provisions of paragraph (c)(1) of this section shall not apply to a display of information on the trading floor or through the facilities of a national securities exchange or to a display in connection with the operation of a market linkage system implemented in accordance with an effective national market system plan.

(d) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, or item of information, or any class or classes of persons, securities, or items of information, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.604 Display of customer limit orders.

(a) *Specialists and OTC market makers.* For all NMS stocks:

(1) Each member of a national securities exchange that is registered by that exchange as a specialist, or is authorized by that exchange to perform functions substantially similar to that of a specialist, shall publish immediately a bid or offer that reflects:

(i) The price and the full size of each customer limit order held by the specialist that is at a price that would improve the bid or offer of such specialist in such security; and

(ii) The full size of each customer limit order held by the specialist that:

(A) Is priced equal to the bid or offer of such specialist for such security;

(B) Is priced equal to the national best bid or national best offer; and

(C) Represents more than a *de minimis* change in relation to the size associated with the specialist's bid or offer.

(2) Each registered broker or dealer that acts as an OTC market maker shall publish immediately a bid or offer that reflects:

(i) The price and the full size of each customer limit order held by the OTC market maker that is at a price that would improve the bid or offer of such OTC market maker in such security; and

(ii) The full size of each customer limit order held by the OTC market maker that:

(A) Is priced equal to the bid or offer of such OTC market maker for such security;

(B) Is priced equal to the national best bid or national best offer; and

(C) Represents more than a *de minimis* change in relation to the size associated with the OTC market maker's bid or offer.

(b) *Exceptions.* The requirements in paragraph (a) of this section shall not apply to any customer limit order:

(1) That is executed upon receipt of the order.

(2) That is placed by a customer who expressly requests, either at the time that the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders, that the order not be displayed.

(3) That is an odd-lot order.

(4) That is a block size order, unless a customer placing such order requests that the order be displayed.

(5) That is delivered immediately upon receipt to a national securities exchange or national securities association-sponsored system, or an electronic communications network that complies with the requirements of § 242.602(b)(5)(ii) with respect to that order.

(6) That is delivered immediately upon receipt to another exchange member or OTC market maker that complies with the requirements of this section with respect to that order.

(7) That is an "all or none" order.

(c) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any responsible broker or dealer, electronic communications network, national securities exchange, or national securities association if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.

§ 242.605 Disclosure of order execution information.

Preliminary Note: Section 242.605 requires market centers to make available standardized, monthly reports of statistical information concerning their order executions. This information is presented in accordance with uniform standards that are based on broad assumptions about order execution and routing practices. The information will provide a starting point to promote visibility and competition on the part of market centers and broker-dealers, particularly on the factors of execution price and speed. The disclosures required by this section do not encompass all of the factors that may be important to investors in evaluating the order routing services of a broker-dealer. In addition, any particular market center's statistics will encompass

varying types of orders routed by different broker-dealers on behalf of customers with a wide range of objectives. Accordingly, the statistical information required by this section alone does not create a reliable basis to address whether any particular broker-dealer failed to obtain the most favorable terms reasonably available under the circumstances for customer orders.

(a) *Monthly electronic reports by market centers.* (1) Every market center shall make available for each calendar month, in accordance with the procedures established pursuant to paragraph (a)(2) of this section, a report on the covered orders in NMS stocks that it received for execution from any person. Such report shall be in electronic form; shall be categorized by security, order type, and order size; and shall include the following columns of information:

(i) For market orders, marketable limit orders, inside-the-quote limit orders, at-the-quote limit orders, and near-the-quote limit orders:

(A) The number of covered orders;

(B) The cumulative number of shares of covered orders;

(C) The cumulative number of shares of covered orders cancelled prior to execution;

(D) The cumulative number of shares of covered orders executed at the receiving market center;

(E) The cumulative number of shares of covered orders executed at any other venue;

(F) The cumulative number of shares of covered orders executed from 0 to 9 seconds after the time of order receipt;

(G) The cumulative number of shares of covered orders executed from 10 to 29 seconds after the time of order receipt;

(H) The cumulative number of shares of covered orders executed from 30 seconds to 59 seconds after the time of order receipt;

(I) The cumulative number of shares of covered orders executed from 60 seconds to 299 seconds after the time of order receipt;

(J) The cumulative number of shares of covered orders executed from 5 minutes to 30 minutes after the time of order receipt; and

(K) The average realized spread for executions of covered orders; and

(ii) For market orders and marketable limit orders:

(A) The average effective spread for executions of covered orders;

(B) The cumulative number of shares of covered orders executed with price improvement;

(C) For shares executed with price improvement, the share-weighted average amount per share that prices were improved;

(D) For shares executed with price improvement, the share-weighted average period from the time of order receipt to the time of order execution;

(E) The cumulative number of shares of covered orders executed at the quote;

(F) For shares executed at the quote, the share-weighted average period from the time of order receipt to the time of order execution;

(G) The cumulative number of shares of covered orders executed outside the quote;

(H) For shares executed outside the quote, the share-weighted average amount per share that prices were outside the quote; and

(I) For shares executed outside the quote, the share-weighted average period from the time of order receipt to the time of order execution.

(2) Every national securities exchange on which NMS stocks are traded and each national securities association shall act jointly in establishing procedures for market centers to follow in making available to the public the reports required by paragraph (a)(1) of this section in a uniform, readily accessible, and usable electronic form. In the event there is no effective national market system plan establishing such procedures, market centers shall prepare their reports in a consistent, usable, and machine-readable electronic format, and make such reports available for downloading from an Internet Web site that is free and readily accessible to the public.

(3) A market center shall make available the report required by paragraph (a)(1) of this section within one month after the end of the month addressed in the report.

(b) *Exemptions.* The Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.606 Disclosure of order routing information.

(a) *Quarterly report on order routing.* (1) Every broker or dealer shall make publicly available for each calendar quarter a report on its routing of non-directed orders in NMS securities during that quarter. For NMS stocks, such report shall be divided into three separate sections for securities that are listed on the New York Stock Exchange, Inc., securities that are qualified for inclusion in The Nasdaq Stock Market, Inc., and securities that are listed on the American Stock Exchange LLC or any other national securities exchange. Such report also shall include a separate section for NMS securities that are option contracts. Each of the four sections in a report shall include the following information:

(i) The percentage of total customer orders for the section that were non-directed orders, and the percentages of total non-directed orders for the section that were market orders, limit orders, and other orders;

(ii) The identity of the ten venues to which the largest number of total non-directed orders for the section were routed for execution and of any venue to which five percent or more of non-directed orders were routed for execution, the percentage of total non-directed orders for the section routed to the venue, and the percentages of total non-directed market orders, total non-directed limit orders, and total non-directed other orders for the section that were routed to the venue; and

(iii) A discussion of the material aspects of the broker's or dealer's relationship with each venue identified pursuant to paragraph (a)(1)(ii) of this section, including a description of any arrangement for payment for order flow and any profit-sharing relationship.

(2) A broker or dealer shall make the report required by paragraph (a)(1) of this section publicly available within one month after the end of the quarter addressed in the report.

(b) *Customer requests for information on order routing.* (1) Every broker or dealer shall, on request of a customer, disclose to its customer the identity of the venue to which the customer's orders were routed for execution in the six months prior to the request, whether the orders were directed orders or non-directed orders, and the time of the transactions, if any, that resulted from such orders.

(2) A broker or dealer shall notify customers in writing at least annually of the availability on request of the information specified in paragraph (b)(1) of this section.

(c) *Exemptions.* The Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.607 Customer account statements.

(a) No broker or dealer acting as agent for a customer may effect any transaction in, induce or attempt to induce the purchase or sale of, or direct orders for purchase or sale of, any NMS stock or a security authorized for quotation on an automated inter-dealer quotation system that has the characteristics set forth in section 17B of the Act (15 U.S.C. 78q–2), unless such broker or dealer informs such customer, in writing, upon opening a new account and on an annual basis thereafter, of the following:

(1) The broker's or dealer's policies regarding receipt of payment for order flow from any broker or dealer, national securities exchange, national securities association, or exchange member to which it routes customers' orders for execution, including a statement as to whether any payment for order flow is received for routing customer orders and a detailed description of the nature of the compensation received; and

(2) The broker's or dealer's policies for determining where to route customer orders that are the subject of payment for order flow absent specific instructions from customers, including a description of the extent to which orders can be executed at prices superior to the national best bid and national best offer.

(b) *Exemptions.* The Commission, upon request or upon its own motion, may exempt by rule or by order, any broker or dealer or any class of brokers or dealers, security or class of securities from the requirements of paragraph (a) of this section with respect to any transaction or class of transactions, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the pubic interest and the protection of investors.

§ 242.608 Filing and amendment of national market system plans.

(a) *Filing of national market system plans and amendments thereto.* (1) Any two or more self-regulatory organizations, acting jointly, may file a national market system plan or may propose an amendment to an effective national market system plan ("proposed amendment") by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (a)(4) and (5) of this section.

(2) The Commission may propose amendments to any effective national market system plan by publishing the text thereof, together with a statement of the purpose of such amendment, in accordance with the provisions of paragraph (b) of this section.

(3) Self-regulatory organizations are authorized to act jointly in:

(i) Planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan;

(ii) Preparing and filing a national market system plan or any amendment thereto; or

(iii) Implementing or administering an effective national market system plan.

(4) Every national market system plan filed pursuant to this section, or any amendment thereto, shall be accompanied by:

(i) Copies of all governing or constituent documents relating to any person (other than a self-regulatory organization) authorized to implement or administer such plan on behalf of its sponsors; and

(ii) To the extent applicable:

(A) A detailed description of the manner in which the plan or amendment, and any facility or procedure contemplated by the plan or amendment, will be implemented;

(B) A listing of all significant phases of development and implementation (including any pilot phase) contemplated by the plan or amendment, together with the projected date of completion of each phase;

(C) An analysis of the impact on competition of implementation of the plan or amendment or of any facility contemplated by the plan or amendment;

(D) A description of any written understandings or agreements between or among plan sponsors or participants relating to interpretations of the plan or conditions for becoming a sponsor or participant in the plan; and

(E) In the case of a proposed amendment, a statement that such amendment has been approved by the sponsors in accordance with the terms of the plan.

(5) Every national market system plan, or any amendment thereto, filed pursuant to this section shall include a description of the manner in which any facility contemplated by the plan or amendment will be operated. Such description shall include, to the extent applicable:

(i) The terms and conditions under which brokers, dealers, and/or self-regulatory organizations will be granted or denied access (including specific procedures and standards governing the granting or denial of access);

(ii) The method by which any fees or charges collected on behalf of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment will be determined and imposed (including any provision for distribution of any net proceeds from such fees or charges to the sponsors and/or participants) and the amount of such fees or charges;

(iii) The method by which, and the frequency with which, the performance of any person acting as plan processor with respect to the implementation and/or operation of the plan will be evaluated; and

(iv) The method by which disputes arising in connection with the operation of the plan will be resolved.

(6) In connection with the selection of any person to act as plan processor with respect to any facility contemplated by a national market system plan (including renewal of any contract for any person to so act), the sponsors shall file with the Commission a statement identifying the person selected, describing the material terms under which such person is to serve as plan processor, and indicating the solicitation efforts, if any, for alternative plan processors, the alternatives considered and the reasons for selection of such person.

(7) Any national market system plan (or any amendment thereto) which is intended by the sponsors to satisfy a plan filing requirement contained in any other section of this Regulation NMS and part 240, subpart A of this chapter shall, in addition to compliance with this section, also comply with the requirements of such other section.

(b) *Effectiveness of national market system plans.* (1) The Commission shall publish notice of the filing of any national market system plan, or any proposed amendment to any effective national market system plan (including any amendment initiated by the Commission), together with the terms of substance of the filing or a description of the subjects and issues involved, and shall provide interested persons an opportunity to submit written comments. No national market system plan, or any amendment thereto, shall become effective unless approved by the Commission or otherwise permitted in accordance with paragraph (b)(3) of this section.

(2) Within 120 days of the date of publication of notice of filing of a national market system plan or an amendment to an effective national market system plan, or within such longer period as the Commission may designate up to 180 days of such date if it finds such longer period to be appropriate and publishes its reasons

for so finding or as to which the sponsors consent, the Commission shall approve such plan or amendment, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act. Approval of a national market system plan, or an amendment to an effective national market system plan (other than an amendment initiated by the Commission), shall be by order. Promulgation of an amendment to an effective national market system plan initiated by the Commission shall be by rule.

(3) A proposed amendment may be put into effect upon filing with the Commission if designated by the sponsors as:

(i) Establishing or changing a fee or other charge collected on behalf of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment (including changes in any provision with respect to distribution of any net proceeds from such fees or other charges to the sponsors and/or participants);

(ii) Concerned solely with the administration of the plan, or involving the governing or constituent documents relating to any person (other than a self-regulatory organization) authorized to implement or administer such plan on behalf of its sponsors; or

(iii) Involving solely technical or ministerial matters. At any time within 60 days of the filing of any such amendment, the Commission may summarily abrogate the amendment and require that such amendment be refiled in accordance with paragraph (a)(1) of this section and reviewed in accordance with paragraph (b)(2) of this section, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

(4) Notwithstanding the provisions of paragraph (b)(1) of this section, a proposed amendment may be put into effect summarily upon publication of notice of such amendment, on a temporary basis not to exceed 120 days, if the Commission finds that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

(5) Any plan (or amendment thereto) in connection with:

(i) The planning, development, operation, or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or

(ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and/or their members of any section of this Regulation NMS (§§242.600 through 242.612) and part 240, subpart A of this chapter promulgated pursuant to section 11A of the Act (15 U.S.C. 78k–1), approved by the Commission pursuant to section 11A of the Act (or pursuant to any rule or regulation thereunder) prior to the effective date of this section (either temporarily or permanently) shall be deemed to have been filed and approved pursuant to this section and no additional filing need be made by the sponsors with respect to such plan or amendment; *provided, however,* that all terms and conditions associated with any such approval (including time limitations) shall continue to be applicable; *provided, further,* that any amendment to such plan filed with or approved by the Commission on or after the effective date of this section shall be subject to the provisions of, and considered in accordance with the procedures specified in, this section.

(c) *Compliance with terms of national market system plans.* Each self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant. Each self-regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members.

(d) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective national market system plan as follows:

(1) Any action taken or failure to act by any person in connection with an effective national market system plan (other than a prohibition or limitation of access reviewable by the Commission pursuant to section 11A(b)(5) or section 19(d) of the Act (15 U.S.C. 78k–1(b)(5) or 78s(d))) shall be subject to review by the Commission, on its own motion or upon application by any person aggrieved thereby (including, but not limited to, self-regulatory organizations, brokers, dealers, issuers, and vendors), filed not later than 30 days after notice of such action or failure to act or within such longer period as the Commission may determine.

(2) Application to the Commission for review, or the institution of review by the Commission on its own motion, shall not operate as a stay of any such action unless the Commission determines otherwise, after notice and opportunity for hearing on the question of a stay (which hearing may consist only of affidavits or oral arguments).

(3) In any proceedings for review, if the Commission, after appropriate notice and opportunity for hearing (which hearing may consist solely of consideration of the record of any proceedings conducted in connection with such action or failure to act and an opportunity for the presentation of reasons supporting or opposing such action or failure to act) and upon consideration of such other data, views, and arguments as it deems relevant, finds that the action or failure to act is in accordance with the applicable provisions of such plan and that the applicable provisions are, and were, applied in a manner consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets, and the removal of impediments to, and the perfection of the mechanisms of a national market system, the Commission, by order, shall dismiss the proceeding. If the Commission does not make any such finding, or if it finds that such action or failure to act imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, the Commission, by order, shall set aside such action and/or require such action with respect to the matter reviewed as the Commission deems necessary or appropriate in the public interest, for the protection of investors, and the maintenance of fair and orderly markets, or to remove impediments to, and perfect the mechanisms of, a national market system.

(e) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

§ 242.609 Registration of securities information processors: form of application and amendments.

(a) An application for the registration of a securities information processor shall be filed on Form SIP (§ 249.1001 of this chapter) in accordance with the instructions contained therein.

(b) If any information reported in items 1–13 or item 21 of Form SIP or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the securities information processor shall promptly file an amendment on Form SIP correcting such information.

(c) The Commission, upon its own motion or upon application by any securities information processor, may conditionally or unconditionally exempt any securities information processor from any provision of the rules or regulations adopted under section 11A(b) of the Act (15 U.S.C. 78k–1(b)).

(d) Every amendment filed pursuant to this section shall constitute a "report" within the meaning of sections 17(a), 18(a) and 32(a) of the Act (15 U.S.C. 78q(a), 78r(a), and 78ff(a)).

§ 242.610 Access to quotations.

(a) *Quotations of SRO trading facility.* A national securities exchange or national securities association shall not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access through a member of the national securities exchange or national securities association to the quotations in an NMS stock displayed through its SRO trading facility.

(b) *Quotations of SRO display-only facility.* (1) Any trading center that displays quotations in an NMS stock through an SRO display-only facility shall provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities in that stock.

(2) Any trading center that displays quotations in an NMS stock through an SRO display-only facility shall not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations through a member, subscriber, or customer of the trading center.

(c) *Fees for access to quotations.* A trading center shall not impose, nor permit to be imposed, any fee or fees for the execution of an order against a protected quotation of the trading center or against any other quotation of the trading center that is the best bid or best offer of a national securities exchange, the best bid or best offer of The Nasdaq Stock Market, Inc., or the best bid or best offer of a national securities association other than the best bid or best offer of The Nasdaq Stock Market, Inc. in an NMS stock that exceed or accumulate to more than the following limits:

(1) If the price of a protected quotation or other quotation is $1.00 or more, the fee or fees cannot exceed or accumulate to more than $0.003 per share; or

(2) If the price of a protected quotation or other quotation is less than $1.00, the fee or fees cannot exceed or accumulate to more than 0.3% of the quotation price per share.

(d) *Locking or crossing quotations.* Each national securities exchange and national securities association shall establish, maintain, and enforce written rules that:

(1) Require its members reasonably to avoid:

(i) Displaying quotations that lock or cross any protected quotation in an NMS stock; and

(ii) Displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan;

(2) Are reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock; and

(3) Prohibit its members from engaging in a pattern or practice of displaying quotations that lock or cross any protected quotation in an NMS stock, or of displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan, other than displaying quotations that lock or cross any protected or other quotation as permitted by an exception contained in its rules established pursuant to paragraph (d)(1) of this section.

(e) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, quotations, orders, or fees, or any class or classes of persons, securities, quotations, orders, or fees, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.611 Order protection rule.

(a) *Reasonable policies and procedures.* (1) A trading center shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations in NMS stocks that do not fall within an exception set forth in paragraph (b) of this section and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception.

(2) A trading center shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (a)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(b) *Exceptions.* (1) The transaction that constituted the trade-through was effected when the trading center displaying the protected quotation that was traded through was experiencing a failure, material delay, or malfunction of its systems or equipment.

(2) The transaction that constituted the trade-through was not a "regular way" contract.

(3) The transaction that constituted the trade-through was a single-priced opening, reopening, or closing transaction by the trading center.

(4) The transaction that constituted the trade-through was executed at a time when a protected bid was priced higher than a protected offer in the NMS stock.

(5) The transaction that constituted the trade-through was the execution of an order identified as an intermarket sweep order.

(6) The transaction that constituted the trade-through was effected by a trading center that simultaneously routed an intermarket sweep order to execute against the full displayed size of any protected quotation in the NMS stock that was traded through.

(7) The transaction that constituted the trade-through was the execution of an order at a price that was not based, directly or indirectly, on the quoted price of the NMS stock at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made.

(8) The trading center displaying the protected quotation that was traded through had displayed, within one second prior to execution of the transaction that constituted the trade-through, a best bid or best offer, as applicable, for the NMS stock with a price that was equal or inferior to the price of the trade-through transaction.

(9) The transaction that constituted the trade-through was the execution by a trading center of an order for which, at the time of receipt of the order, the trading center had guaranteed an execution at no worse than a specified price (a "stopped order"), where:

(i) The stopped order was for the account of a customer;

(ii) The customer agreed to the specified price on an order-by-order basis; and

(iii) The price of the trade-through transaction was, for a stopped buy order, lower than the national best bid in the NMS stock at the time of execution or, for a stopped sell order, higher than the national best offer in the NMS stock at the time of execution.

(c) *Intermarket sweep orders.* The trading center, broker, or dealer responsible for the routing of an intermarket sweep order shall take reasonable steps to establish that such order meets the requirements set forth in § 242.600(b)(30).

(d) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, transaction, quotation, or order, or any class or classes of persons, securities, quotations, or orders, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.612 Minimum pricing increment.

(a) No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.01 if that bid or offer, order, or indication of interest is priced equal to or greater than $1.00 per share.

(b) No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.0001 if that bid or offer, order, or indication of interest is priced less than $1.00 per share.

(c) The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, quotation, or order, or any class or classes of persons, securities, quotations, or orders, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 31. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 32. Section 249.1001 is revised to read as follows:

§ 249.1001 Form SIP, for application for registration as a securities information processor or to amend such an application or registration.

This form shall be used for application for registration as a securities information processor, pursuant to section 11A(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1(b)) and § 242.609 of this chapter, or to amend such an application or registration.

■ 33. Form SIP (referenced in § 249.1001) is amended by revising Instruction 6 of General Instructions for Preparing and Filing Form SIP to read as follows:

Note: The text of Form SIP does not and this amendment will not appear in the Code of Federal Regulations.

FORM SIP

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General Instructions for Preparing and Filing Form SIP

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6. Rule 609(b) of Regulation NMS requires that if any information contained in items 1 through 13 or item 21 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment must be filed promptly on Form SIP correcting such information.

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PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 34. The authority citation for part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

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■ 35. Section 270.17a–7 is amended by revising paragraph (b)(1) to read as follows:

§ 270.17a–7 Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof.

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(b) * * *

(1) If the security is an "NMS stock" as that term is defined in 17 CFR 242.600, the last sale price with respect to such security reported in the consolidated transaction reporting system ("consolidated system") or the average of the highest current independent bid and lowest current independent offer for such security (reported pursuant to 17 CFR 242.602) if there are no reported transactions in the consolidated system that day; or

* * * * *

Dated: June 9, 2005.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Adoption of Regulation NMS

Introduction

As a result of our strong disagreement with the majority's adoption of Regulation NMS,[1] we write jointly to make clear the reasons for our dissent. We support Regulation NMS" overarching goal of enhancing the efficiency of our markets. We do not believe, however, that Regulation NMS will achieve this goal, and we are concerned about its detrimental impact on competition and innovation. In our view, Regulation NMS is at odds with Congress' goal, expressed in the Securities Acts Amendments of 1975 ("1975 Act Amendments"),[2] of protecting competition within the national market system.[3] In analyzing

[1] Securities Exchange Act Release No. 51808 (June 9, 2005) ("Adopting Release"). Regulation NMS is composed of four substantive rules: A requirement that markets provide fair and non-discriminatory access to quotations, a prohibition on the display of quotations in pricing increments of less than a penny, amendments to the formulas currently used to allocate market data revenues to self-regulatory organizations ("SROs") under joint industry plans, and a trade-through rule applicable to both the listed and the Nasdaq markets. In the Adopting Release, the trade-through rule is renamed the "order protection rule." Adopting Release at note 2. This is a misnomer. An order displayed at the best price is not necessarily protected because it can be matched or an execution can occur at an inferior price by using an exception to the rule.

[2] Pub. L. 94–29, 89 Stat. 97 (1975).

[3] As the Senate Banking Committee stated in its report on the bill that ultimately became the 1975 Act Amendments:

> [T]he Commission's responsibility [is] to balance the perceived anti-competitive effects of the regulatory policy or decision at issue against the purposes of the Exchange Act that would be advanced thereby and the costs of doing so. Competition would not thereby become paramount to the great purposes of the Exchange Act, but the need for and effectiveness of regulatory actions in achieving those purposes would have to be weighed against any detrimental impact on competition.

Senate Committee on Banking, Housing and Urban Affairs, S. Rep. No. 94–75, 94th Cong., 1st Sess. (1975) ("Senate Report"), at 13–14. *See also* House Committee on Interstate and Foreign Commerce, H.R. Rep. 94–123, 94th Cong., 1st Sess. (1975), at 47 ("in the economic areas affecting the securities industry, competition, rather than regulation, should be the guiding force") (quoting

Regulation NMS and voting to dissent from its adoption, we have been guided by Congress' clear preference that competitive forces, rather than unnecessary regulation, guide the development of the national market system.[4] With the adoption of Regulation NMS, the majority's arbitrary notions and unfounded assumptions about how markets and investors should interact have taken unwarranted precedence over the interplay of competitive forces within the marketplace.[5] We believe that Regulation NMS turns back Commission policy regarding competition and innovation and sets up roadblocks for our markets.

The majority's statutory interpretations and policy changes are arbitrary, unreasonable and anticompetitive. They are not supported by substantial evidence that, notwithstanding their anti-competitive effect, they are necessary or appropriate to further the purposes of the Exchange Act. The impetus for the Commission's efforts to modernize the securities markets was the outdated Intermarket Trading System ("ITS") trade-through rule that impeded the ability of electronic trading centers to compete against floor-based exchanges in the listed market. It is ironic that the end result of this lengthy process is the imposition of even more complex trade-through restrictions, not only on the New York Stock Exchange, Inc. ("NYSE"), but on Nasdaq, a market in which competition is already robust.

We believe the wiser and more practical approach to improving the efficiency of U.S. markets for all investors would have been to improve access to quotations, enhance connectivity among markets and market participants, clarify the broker's duty of best execution, and reduce barriers to competition. In our view, these steps would improve market efficiency without exposing our markets to unforeseen consequences, redundant regulatory oversight and the concomitant compliance costs that will ultimately be borne by investors.[6]

For purposes of our dissent, we will focus principally on the trade-through rule. The issues raised in our dissent reflect the same concerns we made public at the open Commission meeting on April 6, 2005, at which we dissented from the adoption of Regulation NMS. Our specific concerns are set forth below.

I. The Majority Mischaracterizes the Trade-Through Rule as Needed To Increase Market Depth

One of the original catalysts for Regulation NMS was the need to address market inefficiencies caused by the antiquated ITS trade-through rule. The Commission's policy objectives for the trade-through rule have expanded, however, far beyond a cure for integrating automated and manual markets. During the rulemaking, rationales offered for the trade-through rule have been a moving target, morphing from the protection of limit orders, to the need to increase market depth and liquidity, to the reduction of transaction costs for long-term investors and issuers.

In February 2004, the Commission proposed a uniform trade-through rule as part of Regulation NMS, with the stated goals of encouraging limit orders and aggressive quoting.[7] The proposed rule contained two major exceptions. The first exception provided an "opt-out" from the trade-through rule for informed customers,[8] and the second permitted an automated order execution facility to trade through the quotations of non-automated markets.[9] The opt-out proposal was intended to provide investors with flexibility in choosing where to route their orders and in determining whether their orders should trade-through better-priced quotes.[10] The automated market exception was intended to resolve problems of integrating automated and manual markets under the ITS trade-through rule by protecting only the quotations of automated markets.[11]

Commenters on the Proposing and Supplemental Releases were split on the need for a trade-through rule to promote fair and efficient markets.[12] The floor-based exchanges and many institutional investors supported a trade-through rule and opposed an opt-out.[13] Electronic

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Securities Industry Study, Report of the Subcomm. on Commerce and Finance of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 92–1519, 92d Cong., 2d Sess. (1972), at 1).

[4] *See, e.g.*, H.R. Rep. No. 94–229, 94th Cong., 1st Sess. (1975) ("Conference Report"), at 92 ("It is the intent of the [House and Senate] conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.").

[5] *See, e.g.*, Senate Report, *supra* note , at 12 ("This is not to suggest that under S. 249 the SEC would have either the responsibility or the power to operate as an "economic czar" for the development of a national market system.") (citations omitted).

[6] Given the uncertainty about the impact of the trade-through rule and the clear determination of the majority to pursue its chosen policy direction, we believe that it would have been prudent for the majority to have considered alternatives that would have permitted the Commission to gain more experience with the rule before requiring its implementation on all markets. One alternative would have been to implement access standards first, and adopt a trade-through rule only if deemed necessary after access and connectivity had been improved. Another alternative would have been to phase in the implementation of the trade-through rule in successive stages, allowing for sufficient time between stages to permit the Commission to evaluate the impact of the rule before full implementation across all markets. Yet another alternative would have been to extend the *de minimis* pilot approved in August 2002 for certain exchange-traded funds. *See* Securities Exchange Act Release No. 46428 (Aug. 28, 2002), 67 FR 56607 (Sept. 4, 2002). The exemption, which the Commission extended twice, led to increased competition, narrowing of spreads, and a reduction in trade-through rates. *See* Securities Exchange Act Release No. 49325 (Feb. 26, 2004), 69 FR 11126 (Mar. 9, 2004) ("Proposing Release"), at 11134 note 50 (citing October 2002 Analysis of QQQ Trading Before and After De Minimis, Memorandum from the Commission's Office of Economic Analysis to the File (Feb. 24, 2004) (available at: *http://www.sec.gov/rules/proposed/s71004/oeamemo022404.pdf*)). See also Comment Letter of C. Thomas Richardson, Managing Director, Citigroup Global Markets, Inc. (Jan. 26, 2005) ("Citigroup Reproposal Comment Letter"), at 2–3 (noting, with respect to trading in QQQQs: "In its first six weeks of trading as a Nasdaq-listed product, the average consolidated effective spread on trades executed dropped by 34%, despite the lack of any trade-through protection. In addition, quoted spreads did not widen, but, in fact, decreased approximately 15% as measured by the average consolidated spread. What is so significant about this comparison is that before the QQQQs began trading in Nasdaq's electronic market, a $0.03 *de minimis* exception to the Trade-Through Rule existed already and had narrowed spreads significantly.") (citing economic research provided by NASDAQ). However, no such alternatives were given serious consideration.

[7] *See* Proposing Release, *supra* note 6, at Section III.B.2 ("Intermarket Price Protection").

[8] *See* Proposing Release, *supra* note 6, at Section III.D.1 ("Opt-Out Orders").

[9] *See* Proposing Release, *supra* note 6, at Section III.D.2 ("Automated Order Execution Facility Exception").

[10] The opt-out exception "strives to preserve the usual customers' expectation of having their orders executed at the best displayed price, but allows a choice for those investors whose trading strategies may benefit from an immediate execution priced outside the national best bid and offer ('NBBO')." Proposing Release, *supra* note 6, at 11138. "Large traders may also want the ability to execute a block immediately at a price outside the quotes, to avoid parceling the block out over time in a series of transactions that could cause the market to move to an inferior price." *Id.*

[11] *See generally* Proposing Release, *supra* note 6, at Sections III.B.2. ("Intermarket Price Protection") and III.D.2 ("Automated Order Execution Facility Exception"). In May 2004, the Commission solicited comment on whether individual automated quotations, rather than automated markets, should receive protection under the trade-through rule. Securities Exchange Act Release No. 49749 (May 20, 2004), 69 FR 30142 (May 26, 2004) ("Supplemental Release").

[12] *See* Adopting Release, *supra* note 1, at Section II.A.1 ("Need for Intermarket Trade-Through Rule").

[13] *See, e.g.*, Comment Letter of Darla C. Stuckey, Corporate Secretary of the New York Stock Exchange, Inc. (July 2, 2004); Comment Letter of David Humphreville, President, Specialist Association (June 30, 2004); Comment Letter of Kenneth J. Polcari, President, Organization of Independent Floor Brokers (May 12, 2004); Comment Letter of Ari Burstein, Associate Counsel,

Continued

markets, online retail broker-dealers, and Nasdaq market makers were generally opposed to a trade-through rule,[14] although there was some support for a rule, provided that it included an opt-out.[15] Numerous commenters particularly opposed extending the trade-through rule to Nasdaq.[16]

In December 2004, the Commission voted to repropose Regulation NMS, over Commissioner Atkins' dissent.[17] In the Reproposing Release, the Commission's prior emphasis on encouraging aggressive quoting was dropped, and concern about market depth became more prominent.[18] The Commission noted that many commenters opposing a trade-through rule, particularly on Nasdaq, had pointed to Nasdaq's efficient functioning without a trade-through rule.[19] In response to these comments regarding Nasdaq's market quality, the Commission's Office of Economic Analysis ("OEA") was asked to conduct a study of trade-through rates on several markets.[20] The Division of Market Regulation also prepared an analysis of comparative execution quality statistics between Nasdaq and NYSE stocks.[21]

The divide among commenters on the need for a trade-through rule continued in response to the Reproposing Release. However, commenters who had originally opposed the rule as well as those whose support for a trade-through rule had been conditioned on a general opt-out provision, which was dropped from the reproposal, were united in their opposition to the reproposed rule.[22] They noted fallacies in the Commission's rationale for protecting limit orders and pointed to flaws in the OEA Study.[23] They also stated that the Commission had significantly underestimated the costs of implementation.[24]

Over our dissent, the majority voted to adopt Regulation NMS on April 6, 2005, approving a trade-through rule protecting quotations at the "top of book." The rule contains several exceptions, but does not include a general opt-out provision.[25] In the Adopting Release, the goal of trade-through regulation is recast once again.

Investment Company Institute (June 30, 2004); George U. Sauter, Managing Director, The Vanguard Group, Inc. (July 14, 2004).

[14] *See, e.g.*, Comment Letter of John H. Bluher, Executive Vice President and General Counsel, Knight Trading Group (July 2, 2004) ("Knight Proposal Comment Letter"); Comment Letter of Edward S. Knight, Executive Vice President and General Counsel, Nasdaq Stock Market, Inc. (July 2, 2004) ("Nasdaq Proposal Comment Letter"); Comment Letter of Eric D. Roiter, Senior Vice President and General Counsel, Fidelity Management & Research Co. (June 22, 2004), at 3–6; Comment Letter of Huw Jenkins, Managing Director, UBS Securities LLC (July 2, 2004) ("UBS Proposal Comment Letter"), at 3; Comment Letter of Kenneth Griffin, President and Chief Executive Officer, Citadel Investment Group, LLC (July 9, 2004) ("Citadel Proposal Comment Letter"); Comment Letter of Ellen L. S. Koplow, Executive Vice President and General Counsel, Ameritrade, Inc. (June 30, 2004), at 2–4; Comment Letter of Carrie E. Dwyer, General Counsel and Executive Vice President, Charles Schwab & Co., Inc. (June 30, 2004) ("Schwab Proposal Comment Letter"), at 13–16; Comment Letter of Kim Bang, President and Chief Executive Officer, Bloomberg Tradebook LLC (June 30, 2004), at 2 and 9–14.

[15] *See, e.g.*, Comment Letter of Thomas N. McManus, Managing Director and Counsel, Morgan Stanley & Co., Inc. (Aug. 19, 2004); Comment Letter of Edward J. Nicoll, Instinet Group Inc. (June 30, 2004).

[16] *See, e.g.*, Comment Letter of Kevin O'Hara, General Counsel, Archipelago Holdings, Inc. (Sept. 24, 2004); Nasdaq Proposal Comment Letter, *supra* note 14; UBS Proposal Comment Letter, *supra* note 14, at 4; Citadel Proposal Comment Letter, *supra* note 14, at 6; Schwab Proposal Comment Letter, *supra* note 14, at 13 and 16; Knight Proposal Comment Letter, *supra* note 14.

[17] Securities Exchange Act Release No. 50870 (Dec. 16, 2004), 69 FR 77424 (Dec. 27, 2004) ("Reproposing Release"). The staff had recommended a final rule, including a trade-through rule covering full depth of book, which was scheduled for a Commission vote on December 15, 2004, without seeking further comment from the public. When details of the staff's final recommendation for a trade-through rule became public, however, the ensuing outcry led the Commission instead to repropose the rule. Leaving no doubt that there would be a trade-through rule in the final rule, the Commission solicited comment on whether the trade-through rule should apply to the "top of book" or to a voluntary "depth of book." At the December 15, 2004 open meeting at which Regulation NMS was reproposed, Commissioner Glassman urged commenters not to accept the inevitability of a trade-through rule. She asked for comment on the need for any trade-through rule, not just whether the rule should offer "top of book" or "depth of book" protection. SEC Open Meeting on Regulation NMS (Dec. 15, 2004) (webcast available at: *http://www.sec.gov/news/openmeetings.shtml.*).

[18] *Compare* Proposing Release, *supra* note 6, 69 FR at 11134 *with* Reproposing Release, *supra* note 6, 69 FR at 77426.

[19] Reproposing Release, *supra* note 17, 69 FR at 77427–28.

[20] Analysis of Trade-throughs in Nasdaq and NYSE Issues, Memorandum from the Commission's Office of Economic Analysis to the File (Dec. 15, 2004) ("OEA Study") (available at: *http://www.sec.gov/spotlight/regnms/analysis121504.pdf*). As one commenter noted, the Proposing Release's "complete lack of economic analysis supporting the trade-through provisions" was surprising. Comment Letter of W. Hardy Callcott (May 6, 2004), at 6.

[21] Comparative Analysis of Rule 11Ac1–5 Statistics by S&P Index, Memorandum to File from the Commission's Division of Market Regulation (Dec. 15, 2004) ("Market Regulation Study") (available at: *http://www.sec.gov/rules/proposed/s71004/mrmemo121504.pdf*).

[22] *See, e.g.*, Comment Letter of Thomas N. McManus, Managing Director and Counsel, Morgan Stanley (Feb. 7, 2005) ("Morgan Stanley Reproposal Comment Letter"), at 5; Comment Letter of Bruce C. Turner, Managing Director, CIBC World Markets Corp. (Feb. 4, 2005) ("CIBC Reproposal Comment Letter"); Comment Letter of Michael J. Lynch, Managing Director, Merrill Lynch, Pierce, Fenner & Smith Inc. (Feb. 4, 2005) ("Merrill Lynch Reproposal Comment Letter"); Comment Letter of Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable (Feb. 4, 2005); Comment Letter of David Baker, Global Head of Cash Trading and Global Head of Portfolio Trading, Deutsche Bank Securities Inc. (Feb. 3, 2005) ("Deutsche Bank Reproposal Comment Letter"); Comment Letter of Jeffrey T. Brown, Senior Vice President, Charles Schwab (Feb. 1, 2005) ("Schwab Reproposal Comment Letter"); Comment Letter of James T. Brett, Managing Director, J.P. Morgan Securities, Inc. (Jan. 28, 2005) ("J.P. Morgan Reproposal Comment Letter"); Comment Letter of Stewart P. Greene, Chief Counsel, Securities Law, Teachers Insurance and Annuity Assoc. of America, College Retirement Equities Fund (Jan. 27, 2005) ("TIAA CREF Reproposal Comment Letter"); Citigroup Reproposal Comment Letter, *supra* note 6; Comment Letter of Minder Cheng, Managing Director, Barclays Global Investors (Jan. 26, 2005) ("Barclays Reproposal Comment Letter"); Edward S. Knight, Executive Vice President and General Counsel, Nasdaq Stock Market, Inc. (Jan. 26, 2005) ("Nasdaq Reproposal Comment Letter"); Comment Letter of Adam Cooper, Senior Managing Director and General Counsel, Citadel Investment Group, L.L.C. (Jan. 26. 2005); Comment Letter of Phylis M. Esposito, Executive Vice President and Chief Strategy Officer, Ameritrade, Inc. (Jan. 26, 2005) ("Ameritrade Reproposal Comment Letter"); Comment Letter of Steve Swanson, CEO & President, Automated Trading Desk, LLC (Jan. 26, 2005) ("Automated Trading Desk Reproposal Comment Letter"); Comment Letter of the Competitive Enterprise Institute (Jan. 26, 2005); Comment Letter of Edward J. Nicoll, Chief Executive Officer, Instinet Group Inc. (Jan. 26, 2005) ("Instinet Reproposal Comment Letter"); Comment Letter of Kevin J.P. O'Hara, Chief Administrative Officer & General Counsel, Archipelago Holdings, Inc. (Jan. 26, 2005) ("Archipelago Reproposal Comment Letter"); Comment Letter of Eric D. Roiter, Senior Vice President and General Counsel, Fidelity Management & Research Co. (Jan. 26, 2005) ("Fidelity Reproposal Comment Letter"); Comment Letter of Daniel Coleman, Managing Director, Head of Equities for the Americas, UBS Securities LLC (Jan. 25, 2005) ("UBS Reproposal Comment Letter"); Comment Letter of Thomas M. Joyce, CEO and President, Knight Trading Group, Inc. (Jan. 25, 2005) ("Knight Trading Reproposal Comment Letter"); Comment Letter of Kim Bang, Bloomberg L.P. (Jan. 25, 2005).

[23] *See, e.g.*, Fidelity Reproposal Comment Letter, *supra* note 22, at 7–8 ("We caution that the Commission's analysis, particularly as set forth in the OEA's study * * * is open to serious question and likely rests on serious methodological flaws. * * * Our own preliminary review of the OEA's study suggests that trade-throughs of displayed superior orders equal to or greater in size than the incoming "trading-through" order may amount to only 0.4% of Nasdaq volume, and perhaps only 0.22% pf NYSE share volume * * *."); Nasdaq Reproposal Comment Letter, supra note 22, Exhibit 1, at 5; Instinet Reproposal Comment Letter, *supra* note 22, at 6; Comment Letter of Kevin J.P. O'Hara, Chief Administrative Officer & General Counsel, Archipelago Reproposal Comment Letter, *supra* note 22, at 6; UBS Reproposal Comment Letter, *supra* note 22, at 4 ("[T]he OEA Study is based upon several improper assumptions, and thus results in a fundamentally flawed analysis."). *See generally* Robert Battalio and Robert Jennings, *Analysis of the Re-proposing Release of Reg NMS and the OEA's Trade-through Study* (Mar. 28, 2005) ("Battalio-Jennings Study") (attachment to Comment Letter of Eric D. Roiter, Senior Vice President and General Counsel, Fidelity Management & Research Co. (Mar. 28, 2005)).

[24] *See, e.g.*, Deutsche Bank Reproposal Comment Letter, *supra* note 22, at 4–5.

[25] See Adopting Release, *supra* note 1, at text following note 236. *See* generally Adopting Release, *supra* note 1, at Section II.A.4 ("Elimination of Proposed Opt-Out Exception").

Now, the goal is increasing market depth and liquidity in order to minimize the impact of large orders, while decreasing transitory volatility and transaction costs for the benefit of long-term investors and issuers.[26]

II. The Majority Has Failed To Demonstrate the Trade-Through Rule Is Warranted

The Proposing Release set forth three broad objectives for a review of market structure: equalizing regulation of markets, updating antiquated rules and promoting greater order interaction.[27] Adopted Regulation NMS moves beyond these objectives to establish goals for a trade-through rule that allow the majority to construct its own view of optimal market structure. The majority focuses on two types of so-called market structure "problems" that it claims would be addressed by a trade-through rule: investor protection concerns evidenced by trade-through rates on Nasdaq and NYSE[28] and a lack of displayed depth on Nasdaq.[29] Neither "problem" has been substantiated. However, the majority has contrived "problems" in the Nasdaq market that conform with Congressional goals for the development of a national market system in order to advance its own market structure solutions.[30] To achieve this result, the majority portrays successful market-driven innovations as intractable market structure problems that can only be solved by government intervention.

A. The OEA Study Did Not Substantiate Investor Protection Concerns.

The majority has failed to establish that current trade-through rates indicate a significant investor protection problem. The majority has cherry-picked statistics from the results of the OEA Study that appear to justify the adoption of a trade-through rule, while ignoring data that call the need for the rule into question. We do not believe that current minimal trade-through rates indicate that investors are not obtaining best execution, that their orders are being unfairly treated, or that investors are otherwise suffering economic harm.

The Reproposing and Adopting Releases interpret the OEA Study as establishing a seemingly high rate of trade-throughs. The Reproposing Release claimed that 7.9% and 7.2% of the total share volume on Nasdaq and the NYSE, respectively, were traded through.[31] The Reproposing Release failed to point out, however, that these trade-through rates were calculated, not on the basis of a quotation's displayed size, but on the size of the order. Thus, an order executed at an inferior price was considered to have been traded-through at its full size even if the order was for a larger number of shares than were available in the market.[32]

The Adopting Release cites the same figures, but acknowledges that the trade-through rates for total share volume on Nasdaq and the NYSE drop dramatically from 7.9% and 7.2%, respectively, to 1.9% and 1.2%, when executions are measured against the displayed number of shares available.[33] This disclosure was made only after commenters faulted the Commission for its selective use of statistics.[34]

Similarly, the majority relies on the NYSE's 7.2% trade-through rate to attempt to show a reduction in trade-through rates hoped to be achieved from the new rule, which does not include the block size or 100 share exceptions contained in the ITS trade-through rule.[35] Significantly, the Adopting Release admits that, after eliminating the effects of both of the ITS exceptions, the NYSE trade-through rate for total share volume is actually 2.3%.[36] Given the majority's concession that the NYSE trade-through rate is 1.2% when measured against displayed size,[37] its emphasis on a possible reduction in trade-throughs to 2.3% is disingenuous. The majority's selective interpretation of the OEA Study to justify the need for a trade-through rule is unreasonable and calls into question the basis of the rule.

An additional finding of the OEA Study was that the majority of trade-throughs occurred within a penny or two of a better bid or offer,[38] at an estimated total cost in 2003 of $321 million.[39] These statistics overstate the agency/principal conflict because the OEA Study was not limited to investors owed a duty of best execution.[40] Furthermore, $321 million is a mere rounding error compared to the dollar value of trading on both markets which totaled approximately $16.8 trillion in 2003.[41] As a percent of the total dollar value of trading, the $321 million cost savings represents less than 1/100th of one percent. These percentages do not indicate a significant problem with trade-throughs or best execution.[42]

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[26] *See generally* Adopting Release, supra note 1, at Section I.B.2 ("Serving the Interests of Long-Term Investors and Listed Companies") and text accompanying note 15.

[27] Proposing Release, *supra* note 6, 69 FR at 11128–29.

[28] *See* Adopting Release, *supra* note 1, at text accompanying notes 104 and 105.

[29] *See* Adopting Release, *supra* note 1, at text accompanying note 108.

[30] There are two paramount objectives in the development of a national market system. First, the maintenance of stable and orderly markets with maximum capacity for absorbing trading imbalances without undue price movements. And second, the centralization of all buying and selling interest so that each investor will have the opportunity for the best possible execution of his order, regardless of where in the system it originates.

Senate Report, *supra* note 3, at 7.

[31] Reproposing Release, *supra* note 17, 69 FR at 77433. The OEA Study suggests that the 7.9% and 7.2% trade-through rates cited above would be "useful in assessing the potential benefits of increased limit order display and liquidity that the proposed rule intends to promote," but the majority views the statistic as evidence of significant trade-throughs. OEA Study, *supra* note 20, at 1–2.

[32] To illustrate, suppose a broker received a 10,000 share customer order to buy and a 3,000 share offer is displayed in the market at a price of $10. Under the OEA Study's methodology, executing any portion of the remaining 7,000 shares above $10 would be considered a trade-through, regardless of the fact that only 3,000 shares were offered for sale in the market. OEA acknowledged that this was a very conservative approach with the practical effect of overstating the trade-through rates. *See* OEA Study, *supra* note 20, at 2.

[33] *See* Adopting Release, *supra* note 1, at text accompanying note 68. *See also* OEA Study, *supra* note 20, at text following note 3.

[34] *See, e.g., supra* note 23 (citing comment letters).

[35] *See* Adopting Release, *supra* note 1, at text accompanying note 71.

[36] *See* Adopting Release, *supra* note 1, at text accompanying note 71.

[37] *See* OEA Study, *supra* note 20, at 2.

[38] OEA Study, *supra* note 20, at Tables 3 and 10.

[39] OEA Study, *supra* note 20, at note 5 and accompanying text.

[40] The OEA Study used data from TAQ and Nastraq, neither of which distinguishes among different types of investors. *See* OEA Study, *supra* note 20, at 1.

[41] *See NYSE Reported Share And Dollar Volume, 2003*, NYSE Fact Book Online (available at: *http://www.nysedoto.com/factbook/viewer_edition.osp?mode=table&key=2923&category=3)* (reporting $9.7 trillion in share trading on the NYSE in 2003); *see also* World Federation of Exchanges, Annual Report (2004) (available at: *http://www.world-exchanges.org/WFE/home.osp?menu=315&document=2174)* (reporting $7.1 trillion in share trading on Nasdaq in 2003).

[42] The majority asserts that: [g]iven the large number of trades that fail to obtain the best displayed prices (*e.g.*, approximately 1 in 40 trades for both Nasdaq and NYSE stocks), the Commission is concerned that many of the investors that ultimately received the inferior price in these trades may not be aware that their orders did not, in fact, obtain the best price.

Adopting Release, *supra* note 1, at text following note 150. The majority claims that: investors (and particularly retail investors) often may have difficulty monitoring whether their orders receive the best available prices, given the rapid movement of quotations in many NMS stocks. The Commission believes that furthering the interests of these investors in obtaining best execution on an order-by-order basis is a vitally important objective that warrants adoption of the Order Protection Rule.

Adopting Release, *supra* note 1, at text following note 105. The majority fails to acknowledge that retail investors have access to consolidated information that allows them to monitor their executions. In fact, the majority argues for a single consolidator by noting investors need reliable consolidated information to monitor their executions. The majority states that "[t]he great

Continued

Nor do we believe that the trade-through rates establish that investors' orders are being treated unfairly. The Reproposing and Adopting Releases cited statistics from the OEA Study indicating that in 2003, approximately 2.5% of all trades on Nasdaq and the NYSE traded-through the market.[43] Notwithstanding these minimal trade-through rates, the majority found the rates "significant," with customer orders being "routinely" traded-through.[44] Commenters identified possible flaws in the OEA Study, suggesting that trade-through rates were lower than OEA's estimate.[45] They also stated that, while the OEA Study was based on 2003 data, data from 2004 reflected a decrease in trade-throughs on Nasdaq to 1.5% due to increased order routing, reduction in internalization rates, and consolidation.[46] The majority's 2.5% trade-through rate is also overstated because it includes trades other than trades for retail customer accounts, including trades for institutions, sophisticated investors and intermediaries.[47]

Based on the record before us, it appears that the trade-through rate on Nasdaq during 2004 was between 1% and 2%. It follows, therefore, that between 98% and 99% of all trades on both markets did *not* trade-through better-priced bids or offers. Given that the hypothetical cost of trade-throughs is less than 1/100th of 1%, the evidence does not indicate that investors' orders are treated unfairly.

In sum, we believe that the numbers speak for themselves. The minimal trade-through results reflected in the OEA Study do not support the conclusion that trade-throughs are a significant problem—certainly not one that justifies regulatory intervention on the scale of Regulation NMS.

B. There Is No Evidence of a Lack of Depth on Nasdaq.

Over the past eight years, the Nasdaq market has developed into a completely automated market that meets the objectives of Section 11A of the Exchange Act.[48] It provides economically efficient executions for investors, provides fair competition and equal access for all investors, provides depth of book information with respect to all quotations and transactions in securities, and allows investors to enter orders directly into the market without participating with a dealer. The Nasdaq market is connected by private linkages that allow both brokers and investors to execute transactions at the best price in the market they choose.[49] This has all been accomplished in the absence of a trade-through rule.

Congress did not mandate that the Commission go beyond the goals of Section 11A to design its own view of optimal market structure, yet this is what the majority seeks to accomplish.[50] The majority has offered no substantive basis for extending the trade-through rule to the Nasdaq market.[51] To justify imposing the rule on Nasdaq, particularly in light of the minimal trade-through rates reflected in the OEA Study, the majority attempts to establish a lack of market depth. Defining Nasdaq's "problem" as a lack of depth is critical for justifying the rule's extension to Nasdaq because increasing market depth was one of Congress' goals for the national market system.[52] The majority relies on a staff study of comparative execution quality conducted by the lawyers in the Division of Market Regulation (not the economists in OEA),[53] anecdotal evidence, hypothetical cost savings and conjecture specifically related to low fill rates to attempt to show that, in addition to the investor protection problem, the Nasdaq market suffers from a lack of market depth. This is surprising, given the view of many commenters that the large number of limit orders in Nasdaq stocks signifies that sufficient incentives exist for the placement of such orders and that low fill rates do not represent a market weakness or cause investor harm.[54] We do not believe that there were complaints about a lack of depth in the Nasdaq market in the Commission's roundtables on market structure or the comment letters. In fact, many broker-dealers representing retail investors and institutions objected to extending the trade-through rule to Nasdaq.[55]

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strength of the current model is that it benefits investors, particularly retail investors, by enabling them to assess prices and evaluate the best execution of their orders by obtaining data from a single source that is highly reliable and comprehensive." *See* Adopting Release, *supra* note 1, at text following note 565. In addition, the NASD and the SEC monitor brokers for compliance with their best execution obligations.

[43] *See* Reproposing Release, *supra* note 17, 69 FR at 77433; Adopting Release, *supra* note 1, at text accompanying note 102.

[44] *See* Reproposing Release, *supra* note 17, 69 FR at 77428. The majority states that "the order protection rule will promote a more level playing field for retail investors that currently see their smaller displayed orders bypassed by block trades." Adopting Release, *supra* note 1, at text following note 84. We question the majority's basis for asserting that retail investors are not on the same playing field as other investors. The statement is also inconsistent with the majority's previous assertion that investors have difficulty monitoring whether their orders receive best execution. *See supra* note 42.

[45] *See, e.g.*, Fidelity Reproposal Comment Letter, *supra* note 22, at 8; Nasdaq Reproposal Comment Letter, *supra* note 22, at 5; Archipelago Reproposal Comment Letter, *supra* note 22, at 6; UBS Reproposal Comment Letter, *supra* note 22, at 4.

[46] *See, e.g.*, Nasdaq Reproposal Comment Letter, *supra* note 22. The majority unreasonably credits impending regulation for the decrease in internalization rates in the Nasdaq market, rather than increased market efficiency. *See* Adopting Release, *supra* note 1, at text preceding note 80.

[47] It is important to note, however, that the OEA Study did not distinguish among different investor classes. Thus, the majority would have no basis for determining how many orders that traded through the market were owed a duty of best execution nor how many investors were unable to monitor their executions.

[48] 15 U.S.C. 78k–1. Section 11A(a)(1)(C) provides that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure":

(i) Economically efficient execution of securities transactions;

(ii) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;

(iii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in, securities;

(iv) the practicability of brokers executing investors' orders in the best market; and

(v) an opportunity * * * for investors' orders to be executed without the participation of a dealer.

[49] In the Adopting Release the majority notes approvingly:

(w]ith respect to Nasdaq stocks, connectivity among many trading centers already is established through private linkages. Routing out to other trading centers when necessary to obtain the best prices for Nasdaq stocks is an integral part of the business plan of many trading centers, even when not affirmatively required by best execution responsibilities or by Commission rule.

Adopting Release, *supra* note 1, at text following note 290.

[50] "[T]he fundamental goals of a national market system *must* include (1) providing an investor or his broker with the *ability* to be able to determine, at any given time, where a particular transaction can be effected at the most favorable price and (2) creating an incentive for multiple market makers to deal in depth on a continuous basis." Senate Report, *supra* note 3, at 12 (emphasis added).

[51] The Proposing Release, referring to a "disparity" of regulation on the listed and Nasdaq markets, simply asserted the need for a uniform trade-through rule. No rationale for why uniformity was important was offered. *See* Proposing Release, *supra* note 6, at Section II.A ("Promote Equal Regulation of Market Centers"), 69 FR at 11128–29. We would note that if uniformity of treatment were a valid goal, having no trade-through rule would accomplish this. In any event, uniformity was not a Congressional objective for the national market system:

This is not to say that it is the goal of the legislation to ignore or eliminate distinctions between exchange markets and over-the-counter markets or other inherent differences or variations in components of a national market system. Some present distinctions may tend to disappear in a national market system, but it is not the intention of the bill to force all markets for all securities into a single mold.

Senate Report, *supra* note 3, at 7.

[52] *See* Senate Report, *supra* note 3, at 7.

[53] Market Regulation Study, *supra* note 21.

[54] *See, e.g.*, Instinet Reproposal Comment Letter, *supra* note 22.

[55] *See, e.g.*, Schwab Reproposal Comment Letter, *supra* note 22; Ameritrade Reproposal Comment Letter, *supra* note 22, at 4; Comment Letter of Lou Klobuchar Jr., President and Chief Brokerage

In the Reproposing Release, Nasdaq's small average displayed share size and low fill rate for large marketable limit orders was characterized as evidencing a lack of displayed depth, a purported defect in its market structure that a trade-through rule on Nasdaq would address.[56] In the Adopting Release, the majority argues that the relatively low share volume of traded-through quotations evidences a shortage of quoted depth.[57] The Adopting Release concedes, however, that Nasdaq's low fill rate is attributable to market participants' liquidity probing activities, otherwise known as "pinging." Generally speaking, institutional investors seeking liquidity may "ping" or search for non-displayed limit orders in the Nasdaq market by sending electronic marketable limit orders for a number of shares greater than a market's displayed size.[58] If there is liquidity in reserve, institutional investors will receive an execution for a number of shares greater than the displayed size. If there is no liquidity in reserve, orders will receive a partial execution or be left unfilled, contributing to the purported low fill rate on Nasdaq. "Pinging" provides investors with an efficient and economical method for searching for liquidity on an anonymous basis. The practice is the electronic version of the search for liquidity on manual markets through the auction market system, without the possibility of information leakage that may create market impact costs for investors. It is a fundamental trait of any market that the knowledge of additional trading interest will likely affect prices. Yet the majority views this market-based solution for searching for liquidity as evidence of a regulatory "problem" with Nasdaq's market structure that a trade-through rule must address.[59]

We believe that Nasdaq's low fill rate is evidence that investors are actively seeking liquidity in an efficient manner. Unless the majority forces all liquidity to be displayed in the market, investors will naturally continue to search for hidden liquidity to meet their demand. The Adopting Release appears to suggest that Nasdaq participants should change their aggressive order pricing behavior and instead expose their orders by providing latent displayed liquidity.[60] In our view, however, the rule will not be successful in significantly modifying market participant behavior.[61] There are legitimate reasons why market participants may not want to display their orders. For instance, concerns about market impact will still act to prevent market participants from displaying the full size of their orders, even with a trade-through rule.[62]

In one respect, the majority is correct that the trade-through rule, as modified after its adoption on April 6, 2005, will alter market participant behavior. By amending the rule text to remove the reference to "size" from the definition of quotation, the majority has substantially altered the scope of protected liquidity. We do not believe a change of this magnitude to a major rule should be made without the benefit of the Commission's usual notice and comment process. In our view, this change is not merely a technical amendment, but rather cuts to the heart of how the rule will operate.

The trade-through rule requires trading centers to establish and maintain written policies and procedures designed to prevent trade-throughs of protected quotations unless they fall within an applicable exception.[63] Prior to the amendment, the plain text of the definition of quotation clearly included both price and size. Therefore, trading centers could route an order to a protected quotation's full displayed size and simultaneously execute an order at an inferior price. This was consistent with the policy goal of increasing displayed size. Under the amended formulation, however, the critical component of size has been eliminated, thus expanding the scope of liquidity falling under the protected quotation umbrella. Thus, under the new definition of quotation, trading centers cannot trade-through a protected quotation's price, regardless of available liquidity, without an exception. The practical effect is that market participants must exhaust liquidity in reserve prior to moving to the next price level. Ironically, this seems to provide more incentive to maintain liquidity in reserve, rather than to display it publicly, a result that would be contrary to the majority's stated goals.

III. Regulation NMS Will Not Achieve Its Goals

The majority asserts that a uniform trade-through rule will promote market efficiency. By encouraging the display of limit orders, it argues, the rule will increase liquidity and displayed depth and lower transaction costs for long-term investors and issuers. At the same time, the majority asserts that the rule will enhance best execution obligations. We firmly believe, however, that the hoped-for benefits of the trade-through rule will not materialize.

A. A Trade-Through Rule Is Not Needed as a Backstop to Best Execution

The majority believes that the trade-through rule will further the objectives of the Exchange Act by providing a "backstop" to a broker's best execution obligations and that it will "materially reduce the trade-through rates in both the market for Nasdaq stocks and the market for exchange-listed stocks."[64] Its only response to arguments that current trade-through rates do not justify the need for regulatory action is to assert that the trade-through rates found in the OEA Study are not insignificant and to assert that the total number of trade-throughs is not the sole consideration in

Officer, E*TRADE Financial (June 30, 2004); Fidelity Reproposal Comment Letter, *supra* note 22.

[56] "Thus, low fill rates demonstrate that the total displayed and reserve liquidity available for Nasdaq stocks at any particular trading center typically is small compared to the demand for liquidity at the inside prices." Adopting Release, *supra* note 1, at text following note 132.

[57] "[T]he share volume of quotations that currently are traded-through is a symptom of the problem that the Order Protection Rule is designed to address "a shortage of quoted depth * * *." Adopting Release, *supra* note 1, at text accompanying note 108.

[58] *See* Adopting Release, *supra* note 1, at text preceding note 132.

[59] The majority states that the trade-through rule will increase displayed liquidity and "promote market efficiency by reducing the uncertainty and costs associated with the need for market participants to "ping" electronic markets for liquidity that is held in reserve." Adopting Release, *supra* note 1, at text following note 132.

[60] The majority states "the Rule strengthens the incentive for the *voluntary* display of a greater proportion of latent trading interest by assuring that, when such interest is displayed, it is protected against most trade-throughs." Adopting Release, *supra* note 1, at preceding note 152.

[61] As we have previously noted, the 2–8% range for lower and upper limits of potential benefits of increased market depth assumes that demand will create its own supply. *See supra* text accompanying notes 32 and 33. There is no basis for OEA's assumption.

[62] J.P. Morgan Reproposal Comment Letter, *supra* note 22, at 4 ("For any particular trade, multiple factors may bear on the quality of execution, including speed, certainty of execution, liquidity and depth, opportunities for price improvement, anonymity, error rates, and the quality of a trading center's program of self-regulation. These factors all relate to costs that are not captured by quoted prices, such as market access and transactional fees, market impact costs, costs of broken or erroneous trades, and indirect costs such as market data costs.").

[63] New Rule 611 states:

(a) *Reasonable policies and procedures.*

(1) A trading center shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations in NMS stocks that do not fall within an exception set forth in paragraph (b) of this section and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception.

[64] *See* Adopting Release, *supra* note 1, at text preceding note 63. Furthermore, the NASD and the Commission's Office of Compliance, Inspections and Examinations routinely monitor execution quality and whether brokers are fulfilling their best execution obligations.

evaluating the need for the trade-through rule.[65]

As stated above, we find these assertions unreasonable given the majority's failure to establish a significant trade-through problem as well as its acknowledgement that trade-throughs will continue to occur following the rule's adoption. We note that the Adopting Release does not contain an estimate of the reduction in trade-throughs. Moreover, consistent with the objectives of Section 11A, the Nasdaq market provides investors with the ability to determine where they can obtain the best price *and* provides linkages that allow them to obtain the best price available. Given the negative consequences of the rule, which we discuss below, we believe that any potential reduction in the already low rate of trade-throughs will be minimal, at best, and will be outweighed by the costs of the rule. Moreover, the majority's "one size fits all" approach to best execution will prevent many investors from obtaining the best execution for themselves and their fiduciaries.[66]

B. Some Trade-Throughs Will Continue

The final rule requires trading centers to establish, maintain and enforce written policies and procedures to prevent trade-throughs, but it does not prohibit trade-throughs. The rule contains numerous exceptions for, among others, intermarket sweeps, self-help, flickering quotes, volume weighted average priced ("VWAP") trades, and stopped orders,[67] which means that trade-throughs will not be eliminated. In addition, commenters have suggested that there will be trade-throughs, even with a trade-through rule.[68] The minimal rate of trade-throughs in the current environment and the undoubted existence of trade-throughs even after the rule's implementation call into question the likelihood that the rule will reduce trade-throughs to any significant degree.

C. The Trade-Through Rule Will Not Augment Market Depth Because It Provides Only Incomplete Protection of Limit Orders

The majority states that the protection of limit orders, the foundation of market pricing, is one of its most important goals for market structure.[69] This goal may be worthy, but Regulation NMS will not achieve it because the adopted trade-through rule does not protect all limit orders. Under the voluntary "depth of book" alternative proposed in the Reproposing Release, trade-through protection would have been given to *all* quotations that a trading center voluntarily transmitted to a securities information processor ("SIP"), not just its best bid or offer. We recognize that the full depth of book alternative would create its own set of problems, particularly with respect to its implications for centralization, technological complications and the size of the market data revenue pie. It would also have been the death knell for floor-based exchange trading. However, the majority's professed commitment to protecting limit orders is difficult to reconcile given its rejection of the full depth of book alternative.[70]

The final rule claims to protect a market's best bid or offer ("BBO"), but since market participants can match a trading center's BBO, rather than route orders to it, the rule does not actually protect limit orders at each market's BBO. The Adopting Release acknowledges that the BBO trade-through rule will not draw out every limit order, but asserts that it will provide investors with the appropriate incentives to post additional limit orders.[71] This assertion is highly questionable. Given its decision to protect limit orders only at the top-of-book, the permissibility of internalization, and the numerous exceptions to the trade-through rule, the majority cannot credibly argue that the protection of limit orders is a high priority.[72]

The majority is careful to characterize the trade-through rule's objective of increasing market depth as "modest," translating into a hypothetical $755 million in cost savings in 2003 for long-term investors.[73] This amount is based upon a hypothetical 5% improvement in depth and liquidity or an average reduction of 1.87 basis points in price impact and liquidity search costs.[74] The majority provides no basis, however, for positing a 5% improvement in depth and liquidity, except to characterize it as the "current share volume of trade-through transactions that does not interact with displayed liquidity."[75] Although it is apparently intended to show an order of magnitude, there is no basis for the 5% estimate.

Further, the majority fails to provide an estimate of the expected reductions in trade-throughs or indicate specifically how the new displayed depth will be generated. It speculates that "greater displayed liquidity will at least lower the search costs associated with trying to find liquidity,"[76] and goes on to make unfounded assumptions claiming that "[i]ncreased liquidity, in turn, could lead market participants to interact more often with displayed orders, which would lead to greater use of limit orders, and thus begin the cycle again."[77] The majority fails to address how internalization, free-riding or market impact costs will factor into the display of additional

[65] *See* Adopting Release, *supra* note 1, at text following note 102.

[66] *See, e.g.*, J.P. Morgan Reproposal Comment Letter, *supra* note 22, at 6 ("To disenfranchise institutional investors for whom best execution frequently diverges from best posted quotes by limiting their strategies for managing risk would be to create a burden that is both unfairly distributed and disproportionate to the limited benefits of trade-through protection.").

[67] Rule 611(b).

[68] *See, e.g.*, UBS Reproposal Comment Letter, *supra* note 22, at 5; Comment Letter of Reg NMS Study Group (May 23, 2004), at 4 ("Accidental trade-throughs may be common in a market with fleeting quotes and limit orders that persist for only a second or two, making it difficult to effectively identify and sanction deliberate trade-throughs."); Comment Letter of David Cummings, Chief Executive Officer of Tradebot Systems, Inc. (Jan. 26, 2005) ("Tradebot Reproposal Comment Letter"), at 1.

[69] *See* Adopting Release, *supra* note 1, at text following note 29.

[70] Commenters saw through this false claim. *See, e.g.*, Morgan Stanley Reproposal Comment Letter, *supra* note 22, at 4 ("[W]e cannot agree with the SEC's view that the single most important objective of the SEC's trade-through rule alternatives is the protection of limit orders, as the only effective way to accomplish that objective would be to impose market-wide price/time priority * * *."); Comment Letter of George U. Sauter, Managing Director, The Vanguard Group, Inc. (Jan. 27, 2005) ("Vanguard Reproposal Comment Letter"), at 4 ("If one believes that the trade-through rule is important for the protection of investors, which we do, there is no logical reason why price protection should not be extended to all displayed liquidity. In fact, protection for just the BBO actually codifies trade-throughs."); Ameritrade Reproposal Comment Letter, *supra* note 22, at 5 ("The Market BBO Alternative would protect only the best priced limit orders, while all other limit orders are unprotected and can be traded through with impunity.").

[71] *See* Adopting Release, *supra* note 1, at text following note 110.

[72] The trade-through rule will only apply during normal trading hours. Thus, market participants might game the system and avoid the trade-through rule by shifting liquidity to after-hours trading sessions.

[73] *See* Adopting Release, *supra* note 1, at 303. The majority explains:

> The Rule is designed to increase the perceived benefits of order display, against which the negatives are balanced. As a result, the market participant that currently displays only 500 shares of its 50,000-share trading interest might be willing to display 1000 shares. The collective effect of many market participants reaching the same conclusion would be a material increase in the total displayed depth in the market, thereby improving the transparency of price discovery and reducing investor transaction costs.

Adopting Release, *supra* note 1, at text following note 110.

[74] *See* Adopting Release, *supra* note 1, at text following note 303.

[75] *See* Adopting Release, *supra* note 1, at text following note 303.

[76] *See* Adopting Release, *supra* note 1, at text following note 160.

[77] *See* Adopting Release, *supra* note 1, at text following note 160.

limit orders. Instead, it provides only a theoretical response to an extremely complex question.

IV. The Majority's Distinction Between Long-Term and Short-Term Investors is Arbitrary and Unreasonable

Essential to the majority's argument that a trade-through rule is necessary to augment market depth is its decision to favor the interests of long-term investors and issuers for purposes of market structure design.[78] The majority interprets Section 11A of the Exchange Act as requiring the Commission to facilitate the national market system—not for the protection of "investors," but for the protection of "long-term investors."[79] We find the majority's parsing of the term "investor" arbitrary and unreasonable. In our view, all investors are entitled to efficient executions and access to the best markets. This is not the case, however, under Regulation NMS.[80]

The majority characterizes short-term investors, or traders, as holding securities for a matter of seconds, minutes or hours.[81] It concedes that short-term investors provide valuable liquidity to long-term investors,[82] yet acknowledges that the rule may harm short-term investors and market intermediaries.[83] What the majority fails to recognize is that, by harming short term investors, the rule may also negatively affect long-term investors who may face increased spreads and decreased liquidity. Liquidity provided by short-term investors narrows spreads and gives long-term investors better executions. Because short-term investors are willing to take risks that strengthen the marketplace and benefit long-term investors, Congress clearly could not have intended for short-term investors to be harmed through the Commission's facilitation of the national market system. In fact, Congress prioritized the removal of barriers to competition to increase the participation of market makers and increase the competitive trading of securities.[84]

The majority also fails to take into account that long-term and short-term investors are not mutually exclusive groups. Investors can be long-term and short-term investors at the same time or they may be a long-term investor one moment and, for a variety of reasons, become a short-term investor the next. The overlapping nature of these undefined categories highlights the arbitrary nature of the majority's distinction. The length of time an individual owns a stock or intends to own a stock at any particular moment is not a relevant factor in distinguishing among groups of investors.

The majority claims that the trade-through rule ensures that investors get the best price. We have indicated above why we believe this claim significantly overstates the problem the rule is intended to address. By making price the sole criterion for determining how and where orders will be executed, the trade-through rule also restricts investor choice and ability to obtain best execution. As one commenter explained:

> Indeed, based on years of empirical evidence and substantial quantitative research into the components of transaction costs, it is our strong belief that price is just one element in overall execution quality. Institutional traders often need to trade off price for liquidity, speed of execution, likelihood of completion, and other attributes. We believe investors should have the choice over where to execute their orders, considering these other attributes, and that regulatory reform should continue to encourage market centers to compete in all these dimensions of execution quality.[85]

The majority claims that the limitation on investor choice inherent in the trade-through rule is in the public interest and is needed to protect retail and long-term investors that may be harmed by trade-throughs. Before restricting investors' ability to obtain the best execution in a manner that satisfies their investment needs, the majority should be required not only to show current harm, but to demonstrate the benefits provided by the trade-through rule.[86]

The majority's distinction between the interests of long- and short-term investors simply provides a way for it to attempt to justify its policy choices, without any basis in fact, and it sets a dangerous precedent. Once codified, the concept may leach into other rulemakings and alter the basic ownership principles governing the market. Clearly, the interests of long- and short-term investors are inextricably linked. In the words of the Proposing Release: "A fair and efficient national market system must serve the interests of both types of investors."[87] In the absence of Regulation NMS, fair and efficient markets would develop to provide economically efficient execution of securities transactions for all investors, not just those favored by the Commission.[88]

V. The Rule Will Have Negative Repercussions

We believe that, not only will the trade-through rule not achieve its purported benefits, it will have negative unintended consequences. The complexity of the rule structure invites exploitation that may create unforeseen

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[78] *See* Adopting Release, *supra* note 1, at Section I.B.2 ("Serving the Interests of Long-Term Investors and Listed Companies"). In the 1975 Act Amendments, Congress did not exhibit such favoritism:

> The purpose of this title is to insure that our Nation's capital markets continue to be the best in existence * * * by establishing a framework for a national market systems in which all qualified persons throughout our country may be linked together electronically so that they may compete and may bring to the marketplace their capital so as to make for broader, deeper and more liquid capital markets.

H.R. Rep. No. 94–123, *supra* note 3, at 90.

[79] *See* Adopting Release, *supra* note 1, at text preceding note 15; *see generally* Adopting Release, *supra* note 1, at Section I.B.2 ("Serving the Interests of Long-Term Investors and Listed Companies"). The majority cites the legislative history of the adoption of the Exchange Act in 1934 to support this position, but that history is not relevant. *See* Adopting Release, *supra* note 1, at text accompanying notes 20 and 23. The term "investor" as interpreted by the Commission was contained in Section 11A of the 1975 Act Amendments directing the Commission to facilitate the national market system. The legislation did not include a definition of the term.

[80] The Adopting Release does not credit commenters' claim that a trade-through rule is not needed on the Nasdaq market because that market is efficient. *See* Adopting Release, *supra* note 1, at text preceding note 61. The majority unreasonably views this claim as suspect "when market efficiency is examined from the perspective of transaction costs of long-term investors, as opposed to short-term traders." Adopting Release, *supra* note 1, at text following note 63.

[81] *See* Adopting Release, *supra* note 1, at note 22 and accompanying text.

[82] *See* Adopting Release, *supra* note 1, at text following note 19.

[83] *See* Adopting Release, *supra* note 1, at text following note 22.

[84] One of the fundamental purposes underlying the national market system contemplated by S. 249 is to enhance the competitive structure of the securities markets in order to foster the risk-taking function of market makers and thereby to provide free market incentives to active participation in the flow of orders. The competitive structure and incentives to participation thus provided should supplement, and ultimately may be able to replace, most affirmative requirements to deal imposed by regulation.

Senate Report, *supra* note 3, at 14. The trade-through rule creates comparable barriers to off-board trading restrictions, which were among the barriers Congress sought to remove.

[85] Barclays Reproposal Comment Letter, *supra* note 22, at 2–3.

[86] *See* Senate Report, *supra* note 3, at 12 ("In other words, in the national market system, investors should be able to obtain the best execution of their orders and be assured that because of open competition among market makers the total market for each security is as liquid and orderly as the characteristics of that security warrant.").

[87] Reproposing Release, *supra* note 17, 69 FR at 77439.

[88] The majority is selective in its reliance on the long- and short-term investor distinction. In rejecting the proposed opt-out, the majority claims that advocates of the opt-out "have failed to consider the interests of *all* investors—both those who submit marketable orders and those who submit limit orders." Adopting Release, *supra* note 1, at text following note 247.

market distortions. Commenters indicated that the BBO trade-through rule may introduce market inefficiencies, competitive barriers, and unnecessary costs, while stifling innovation.

Market participants and academics warned the Commission of unintended consequences,[89] including: (i) Decreased price discovery and quantity discovery,[90] (ii) increased gaming opportunities,[91] (iii) the lowest common denominator problem,[92] (iv) increased market fragmentation,[93] and (v) increased volatility.[94] The lack of consensus about the likely impact of Regulation NMS among industry participants, academics and investors provides further evidence of the risks attendant to the rule's implementation. Our concerns about these negative consequences are aggravated by the rule's questionable enforceability.[95]

A. The Rule Will Limit Competition and Stifle Innovation

The majority speaks continually of the importance of encouraging two types of competition—competition among orders and competition among markets, and believes that the trade-through rule promotes competition on both scores. We find no mention of different types of competition in the language of Section 11A, the source of the Commission's authority in this area, and we believe the rule is anti-competitive.

1. Competition Among Markets

In adopting the trade-through rule, the majority has opted for government-controlled competition over competitive market forces to determine the appropriate market structure. Section 11A plainly states, however, that a national market system should foster competition among broker-dealers and among markets. Today, broker-dealers, electronic communications networks ("ECNs") and SROs compete in the Nasdaq market on the basis of technology, execution quality and cost. Competition among market makers increased significantly following the Commission's adoption of Rule 11Ac1–5, which required market centers to publish execution quality statistics.[96] This information permitted brokers to make more informed order routing decisions, consistent with their best execution obligations. At the same time, overall execution quality for retail customers improved as competition among executing broker-dealers on the basis of execution quality became a means of attracting retail order flow. Likewise, competition between markets and ECNs drove technological innovation as a means of attracting orders and liquidity to their markets.

Under the trade-through rule, competition among market makers may decrease. Given the rule's sole focus on price, incentives to improve execution quality above and beyond the trade-through rule's mandated execution methodology may be reduced. Further, by limiting order routing decisions to the price of protected quotations, the trade-through rule sacrifices competition among SROs and ECNs, which will have a negative impact on innovation. Instead of allowing markets to compete for order flow, the trade-through rule forces order flow to the SRO markets. The majority believes that competitive pressures will continue to drive change since orders may still be internalized, and priority for routing decisions can be made when SROs are displaying the same price. We believe, however, that the trade-through rule will restrict competitive forces and reduce markets to the lowest common denominator by dampening the incentives for markets to compete on the basis of improved technology and services and reduced costs. With the government managing all aspects of the competition, it is difficult to credit the majority's claim that the trade-through rule promotes competition. In our view, the trade-through rule limits competition among markets.

Market share may well shift following implementation of the trade-through rule, but not because the rule promotes competition. To the extent that we observe shifting market share, it will be attributable to limit orders being redistributed among protected SRO quotations. Market participants may game the system by distributing orders to what might normally be their second-choice market, so that their orders will be protected as top-of-book at the second-choice market. To the extent that investors spread orders among the various SROs to obtain as much top-of-book protection as possible, any resulting shift in market share would occur, not as a result of increased market competition, but as a result of the Commission's attempt to engineer market structure by imposing a trade-through rule.[97]

[89] *See, e.g.*, Comment Letter of Marc E. Lackritz, President, Securities Industry Assoc. (Feb 1, 2005) ("SIA Reproposal Comment Letter"), at 10; Comment Letter of James A. Duncan, Chairman, and John C. Giesea, President and Chief Executive Officer, Security Traders Assoc. (Jan. 19, 2005); J.P. Morgan Reproposal Comment Letter, *supra* note 22, at 7; Paul L. Davis and Robert A. Schwartz, Report, Comments on SEC Reg NMS (Jan. 26, 2005) (attachment to TIAA CREF Reproposal Comment Letter, *supra* note 22), at 7; Battalio-Jennings Study, *supra* note 34, at 5 ("[T]he proposed trade-through rule may have negative unintended consequences."); Comment Letter of James J. Angel, Assoc. Professor of Finance, McDonough School of Business, Georgetown University (Jan. 25, 2005) ("Angel Reproposal Comment Letter"), at 1.

[90] *See, e.g.*, TIAA CREF Reproposal Comment Letter, *supra* note 22, at 2 (expressing concern that "both of the proposed trade-through rules will compromise" price and quantity discovery).

[91] *See, e.g.*, J.P. Morgan Reproposal Comment Letter, *supra* note 22, at 11.

[92] *See, e.g.*, Instinet Reproposal Comment Letter, *supra* note 22, at 17; Merrill Lynch Reproposal Comment Letter, *supra* note 22, at 5.

[93] *See, e.g.*, J.P. Morgan Reproposal Comment Letter, *supra* note 22, at 10 ("[T]he incentive structure created by the Top of Book Alternative could also lead to increased market fragmentation despite the SEC's intent to the contrary."); Citigroup Reproposal Comment Letter, *supra* note 6, at 5 (explaining that the top of the book alternative "could cause market participants to choose market centers for execution that are more likely to have less liquidity and order flow so that the market participant's order has a greater probability of being at the top of the book (best bid/offer) and therefore receiving increased protection. * * * Ultimately, we feel this could result in increased fragmentation with each broker-dealer's order flow being dispersed throughout the eleven protected market centers."); Tradebot Reproposal Comment Letter, *supra* note 68, at 2 ("It is not widely understood yet, but I think a trade through rule with automated quotes would * * * increas[e] market fragmentation. * * *").

[94] *See, e.g.*, J.P. Morgan Reproposal Comment Letter, *supra* note 22, at 6 ("A trade-through rule that essentially forces investors to perform sweeps is likely to increase volatility in the marketplace, particularly for relatively illiquid securities."); Vanguard Reproposal Comment Letter, *supra* note 70, at 4 ("The BBO alternative would produce greater volatility, as some executions would occur at inferior prices."); Automated Trading Desk Reproposal Comment Letter, *supra* note 22, at 3 ("The proposed rule will create added market volatility due to behavioral changes by block positioners. * * *").

[95] OEA, in its study on trade-throughs, remarked on the complexity of identifying actual trade-throughs, a necessary predicate to the enforcement of the rule. OEA Study, *supra* note 20, at 1 ("While trade-through identification seems straightforward, in practice it is complicated by quickly changing quotes, system time lags, data limitations, and imperfect access to markets."). *See also* UBS Reproposal Comment Letter, *supra* note 22, at 5 ("[E]nforceability will be unachievable (correctly noted by the OEA Study) due to the inability to accurately identify when, due to quotation changes, system imperfections and data discrepancies, a trade-through has even occurred."); Morgan Stanley Reproposal Comment Letter, *supra* note 22, at 14 ("In order to monitor and enforce a trade-through rule, it is essential that the Commission promulgate standards for an intermarket clock. The existing clock synchronization standards, which differ by market, combined with penny trading increments, would render it virtually impossible to effectively monitor compliance with the proposed trade-through rule.").

[96] *See* Securities Exchange Act Release No. 43590 (Nov. 17, 2000), 65 FR 43590 (Dec. 1, 2000).

[97] *See, e.g.*, J.P. Morgan Reproposal Comment Letter, *supra* note 22, at 10 ("The result likely would be that market participants would engage in an economically inefficient competition to develop costly computer systems that route and re-route limit orders to various markets based on the probability of achieving trade-through protection."); Citigroup Reproposal Comment Letter, *supra* note 6, at 5 ("[T]his type of market regulation may serve to support certain market centers that otherwise

2. Competition Among Orders

The majority believes that by protecting limit orders, that is, restricting pricing decisions, it will create the appropriate incentives for investors to display more of their interest to buy or sell, which will decrease volatility and implicit transaction costs. However, the trade-through rule restricts competition among orders by requiring a government-mandated method of trading. Disfavoring short-term investors could upset the market's liquidity equilibrium and decrease competition among orders because "short-term" investors provide much needed liquidity to the market through their willingness to buy and sell stock.[98]

Unrestricted market and order competition in the Nasdaq market has achieved several objectives under Section 11A, including increased direct order interaction, reduced execution costs and improved execution quality for all investors. In the absence of any valid justification for extending the trade-through rule to Nasdaq, the majority is forced to argue that Nasdaq's vigorous order competition reflects a weakness in market depth and liquidity that requires a trade-through rule. As discussed above, the use of electronic methods of price and size discovery on Nasdaq is evidence of a healthy, competitive market, not evidence of structural weakness.[99]

By adopting a trade-through rule, the majority has shown itself willing to sacrifice competition among markets to attempt to increase competition among orders. If increasing order competition were its goal, however, then the majority should have afforded full protection of limit orders by imposing price-time priority. It is questionable how order competition will increase under a rule that applies a price priority structure that is rife with exceptions. The negligible protection afforded to limit orders under the trade-through rule simply does not square with the degree of increased order competition that the majority hopes will materialize. If anything, the rule's compromised approach favoring long-term investors may decrease liquidity, and thus decrease order competition.

3. Barriers to Competition

The trade-through rule creates barriers to competition.[100] We are concerned that these "regulatory restraints" will prevent new competitors from entering the market and place unnecessary burdens on existing trading centers.[101] Under the rule, only SRO quotations are protected. Through the SRO registration process, the Commission controls the number of SROs in the national market system. This barrier to entry will likely increase if the Commission adopts proposed regulations that would place restrictions on SRO ownership and substantially increase regulatory burdens pertaining to SRO governance, reporting and recordkeeping requirements.[102]

The Commission's involvement in implementing the access and automated market provisions of Regulation NMS will create additional barriers to entry. The access provisions require that the Commission approve the application of each new participant in the NASD's Automated Display Facility ("ADF"), outline the requirements of "substantially equivalent" access, and determine whether trading centers engage in unfairly discriminatory practices. The Commission will also be involved in determining which markets comply with the definition of an automated market, involving the Commission in highly technical and subjective judgments, which may neither be fair nor expedient.

We see troubling parallels between the barriers to entry that we foresee under the trade-through rule and the barriers to entry created by the Commission's criteria for recognition of credit rating agencies as nationally recognized statistical rating organizations ("NRSROs").[103] The delay in obtaining a no-action letter from the SEC staff by applicants for NRSRO status, a process that often takes several years, has raised barriers to entry for credit rating agencies. We are concerned that bureaucratic delay may create similar barriers to entry for market participants seeking to register as an SRO, new ADF participants and SROs seeking to make changes to their market operations.[104]

4. Stifling Innovation

Innovation may be another casualty of the trade-through rule. Decreased competition and increased regulatory barriers create an environment that stifles innovation, depriving investors of the benefits of innovation, including efficiencies and cost savings. Unfortunately, as we saw in the listed market, where technology was antiquated and price discovery hampered, it is difficult to determine whether a regulatory regime impedes innovation until a marketplace is competitively disadvantaged.

By requiring the Commission or its staff to approve changes to an SRO's market operations, Regulation NMS essentially codifies current technologies and methods of trading through the exceptions to the trade-through rule and controls future innovation.[105] Bureaucratic delay creates a competitive barrier that may impede the future development of trading and order routing systems. In other words, the future development of efficient and effective methods of committing capital and pricing securities may be inhibited.

What we find disturbing about the majority's policy determinations in Regulation NMS is that they are contrary to prior Commission statements regarding the importance of fostering innovation and competition. In Regulation ATS, for example, the Commission designed a regulatory framework for alternative trading systems ("ATSs") that "encourage[d] market innovation while ensuring basic

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may be incapable of competing because of poor technology and inferior execution.").

[98] *See supra* Section IV.

[99] *See supra* Section II.B.

[100] *See, e.g.*, SIA Reproposal Comment Letter, *supra* note 89, at 9 ("[T]he SEC's two Alternatives err too far in the direction of ensuring intermarket interactions, thereby threatening intermarket competition, discouraging innovation, and limiting investor choice. As a result, we are concerned that the TOB and DOB Alternatives ultimately may cause significant harm to investors and imperil the preeminence of the U.S. markets. Specifically, we believe that the TOB and DOB Alternatives will drive the markets toward one uniform market model. Indeed, both proposals push the markets toward intermarket competition that is based solely on displayed price * * * [B]oth Alternatives raise the specter of competition-stifling, micro-management of market structure by the government."); J.P. Morgan Reproposal Comment Letter, *supra* note 22, at 7 ("However, such incentives would likely be stronger the greater the extent of the regulatory license provided by the trade-through rule."); TIAA CREF Reproposal Comment Letter, *supra* note 22, at 8–9 and 11; Citigroup Reproposal Comment Letter, *supra* note 6, at 2 and 5; Comment Letter of Daniel M. Clifton, Executive Director, American Shareholders Assoc. (Jan. 26, 2005), at 2; Comment Letter of J. Greg Mills, Managing Director, Head of Global Equity Trading, RBC Capital Markets Corp. (Jan. 26, 2005) ("RBC Reproposal Comment Letter"), at 3; Instinet Reproposal Comment Letter, *supra* note 22, at 5; Archipelago Reproposal Comment Letter, *supra* note 22, at 9; UBS Reproposal Comment Letter, *supra* note 22, at 3.

[101] *See* Senate Report, *supra* note 3, at 13 ("Unfortunately, because of excessive and unnecessary regulatory restraints, competition in the securities industry has not been as vigorous and as effective in advancing the public interest as it could be.").

[102] Securities Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71126 (Dec. 8, 2004).

[103] Securities Exchange Act Release No. 51572 (Apr. 19, 2005), 70 FR 21306 (Apr. 25, 2005).

[104] Nasdaq's application for exchange registration has been pending since March 15, 2001. Securities Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001).

[105] Schwab Reproposal Comment Letter, *supra* note 22, at 2 ("A centralized routing algorithm stifles innovation of new mechanisms for handling order."); Archipelago Reproposal Comment letter, *supra* note 22, at 5; Angel Reproposal Comment Letter, *supra* note 89, at 2.

investor protections." [106] To help reduce competitive impediments to innovation by SROs, the Commission approved a temporary exemption permitting SROs to operate new trading systems without filing for approval under certain circumstances.[107]

Likewise, in the order approving Nasdaq's SuperMontage, the Commission acknowledged that "competition and innovation are essential to the health of the securities markets. Indeed, competition is one of the hallmarks of the national market system." [108] It stated that the regulatory structure was designed to "provide all market centers with structural flexibility in order to enhance competition between market centers, while promoting market fairness, efficiency, and transparency." [109] In analyzing the competitive issues involved in approving SuperMontage, the Commission stressed that:

> Nasdaq and traditional exchanges must have the flexibility to rethink their structures to permit appropriate responses to the rapidly changing marketplace. Congress instructed the Commission to seek to "enhance competition and to allow economic forces, interacting with a fair regulatory field, to arrive at appropriate variation in practices and services." [110]

The Commission found SuperMontage consistent with the goals of promoting "price discovery, best execution, liquidity, and market innovation, while continuing to preserve competition among market centers." [111] Under this policy guidance, the markets automated and real competition emerged, due in large part to the explosive growth of the ECNs, which have been the greatest catalyst for increased competition and technological advances in the Nasdaq market. Under the trade-through rule, ECNs will be able to compete only if they display quotations through an SRO and offer substantially equivalent access. Moreover, the fact that dominant markets can match BBOs undercuts the majority's argument that competition among markets will increase.

Unfortunately, the majority fails to use past experience as a guide. In adopting the trade-through rule, the majority has reversed Commission policy, opting for government-controlled competition, a failure under ITS, instead of unfettered competition, the more successful approach over time as evidenced by the Nasdaq market. The Nasdaq market has developed into an efficient, automated and highly competitive marketplace. Competition among markets trading Nasdaq securities has fulfilled the objectives of Section 11A by creating a fully automated and connected marketplace, decreasing execution costs, and increasing market data distribution. Efficiencies born of competition have benefited investors and issuers alike. The majority's adoption of the trade-through rule assists one market to step forward, while forcing other markets to take two giant steps backward.

B. Additional Regulation Is Needed to Address Problems Created by the Trade-Through Rule

To have its trade-through rule, the majority has been compelled to engage in rulemaking that otherwise would have been unnecessary. The Commission has historically analyzed a broker's best execution obligation on the basis of several factors, including execution price, speed of execution, the size of the order, the trading characteristics of the security involved, the availability of accurate information affecting choices as to the most favorable market center for execution and the availability of technological aids to process such information, and the cost and difficulty associated with achieving an execution in a particular market center.[112] One of the consequences of limiting investor choice to the sole criterion of price is that the Commission must ensure that markets have comparable access to these prices. This has required the Commission to adopt a cap on access fees so that market participants are not held hostage by outlier markets displaying the best price, but charging excessive access fees.

As noted above, Regulation NMS will also require Commission involvement in implementation of access standards and approval for new ADF participants. Key standards under trade-through exceptions, including standards for automatic execution, will also require determinations by the Commission and its staff, many involving interpretation of subjective standards. The end result is a highly regulated and micromanaged market that limits competition and innovation. As one commenter observed:

> [T]he rule will require lots of filings from SROs, and years of intense fighting over details. It is likely that the Commission staff will end up making numerous important decisions on the important micro-details of market structure with lots of unintended consequences that will take decades to understand and fix.[113]

Indeed, the majority concedes that a trade-through rule may "lessen the competitive discipline" because brokers will not be able to avoid markets that do not provide quality execution services.[114] The majority would replace this competitive discipline with increased regulatory oversight. The Commission now must screen new entrants' ability to meet access requirements and standards for automatic execution through the SRO registration process or the 19b-4 approval process for new ADF participants. The majority notes that the self-regulatory function will also be important in monitoring compliance with all Exchange Act and SRO rules, including compliance with the trade-through rule.[115] Finally, the Adopting Release notes that "[e]ffective implementation of the Order Protection Rule also will depend on the Commission's taking any action that is necessary and appropriate to address trading centers that fail to meet fully their regulatory requirements." [116] This would include taking enforcement actions against trading centers that fail to meet regulatory requirements.

Instead of relying on competitive forces to discipline market access and execution services, Regulation NMS establishes a regulatory back-up plan for outlier SROs. We believe the better approach would have been to clarify best execution guidance, outlining the appropriate balancing of factors when routing orders. In any event, the trade-through rule, which does not provide protection to manual quotes, complicates the best execution analysis because manual quotations may not be disregarded. Furthermore, guidance on best execution will still be needed to assist brokers in fulfilling their

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[106] Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, at 70847 (Dec. 22, 1998).

[107] *Id.* The Commission stated that the pilot was "to provide registered exchanges and national securities associations with a greater opportunity to compete with alternative trading systems registered as broker-dealers and with foreign markets." *Id.* at note 29.

[108] Securities Exchange Act Release No. 43863 (Jan. 19, 2001), 66 FR 8020, at 8049 (Jan. 26, 2001).

[109] *Id.* at 8052.

[110] *Id.* at note 471 and accompanying text (citing Senate Report, *supra* note 3).

[111] *Id.* at 8055.

[112] Newton v. Merrill Lynch, 135 F.3d 266, 270 n.2 (3d Cir. 1998)(citing Securities Exchange Act Release No. 33026 (Oct. 6, 1993), 58 FR 52934 (Oct. 13, 1993).

[113] Angel Reproposal Comment Letter, *supra* note 89, at 2.

[114] *See* Adopting Release, *supra* note 1, at text following note 243.

[115] *See* Adopting Release, *supra* note 1, at text following note 244.

[116] Adopting Release, *supra* note 1, at text following note 244.

obligations for assessing the depth of book and manual quotations.[117]

C. Implementation Will Be Costly

The majority's cost-benefit analysis underestimates the costs associated with implementation and compliance, while overestimating the benefits. Even by the majority's own estimation, the benefits of Regulation NMS will likely be modest. But these modest benefits will come at a very high price. Some of the costs of Regulation NMS will be measured in terms of the dollars it will cost trading centers to modify their policies and procedures and internal systems and monitor compliance with the trade-through rule on an ongoing basis.[118] The cost-benefit analysis estimates start-up costs at $143.8 million, with average annual ongoing costs of approximately $22 million.[119] Market participants will also experience significant costs in terms of the time and effort they will spend negotiating with our staff on the numerous interpretive issues and in explaining to our examination staff that apparent trade-through violations are not really violations.[120] Thus, even if there are no trade-throughs, there will still be a burden on trading centers to prove the absence of trade-throughs.[121]

VI. Market Data Reforms Do Not Address the Real Problem

While the discussion above focuses on the trade-through rule, we also believe there are serious problems with the market data reforms included in Regulation NMS. The availability of market data is critical because market data provides transparency within the market and allows investors to evaluate the quality of their executions. Regulation NMS does not address the larger issues surrounding market data, and the majority has indicated that these issues will be addressed in a different forum.

We have concerns about the market data reforms in Regulation NMS, even though they are limited, and a particular concern with respect to the codification of the single consolidator model. By entrenching the single consolidator model, the majority grants a monopoly for the consolidation of market data, which erects another barrier to encouraging competitive solutions for market data consolidation. We intend to advocate a reconsideration of this decision by our colleagues when the Commission considers the market data issue in general.

We are also concerned about the majority's failure to address the level of market data fees. The size of market data revenues and lack of accountability for the use of these revenues by the SROs creates market distortions and inefficient allocation of resources.[122] By continuing to fail to address the reasonableness of the rates charged by the markets, the majority sidesteps serious questions about whether government-sponsored monopolies should be allowed to charge excessive rents to cross-subsidize other functional costs, and if so, how they should be held accountable for the appropriate use of such funds. What is needed is a heightened sense of accountability for the use of market data revenues and an incentive for the exchanges to increase efficiencies.

Supporters of the current pricing schedule indicate that the extra revenues are needed to fund the regulatory functions performed by exchanges. Even with the current high levels of market data fees, our enforcement docket does not demonstrate that higher funding has led to effective regulatory oversight by SROs.[123] Critics contend that the exchanges charge an excessive rate for

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[117] *See, e.g.*, SIA Reproposal Comment Letter, *supra* note 89, at 15 ("[W]e are concerned that broker-dealers will be required, as a business and legal matter, to take account of the full depth-of-book as well as manual quotes in providing best execution to their customers. Although the SEC states only that best execution standards will not change, the SEC will have changed the entire market structure, which would appear to necessitate a re-evaluation of best execution standards. * * * [W]e are concerned that broker-dealers will be held liable by customers and regulatory examiners, far beyond the requirements of the trade-through rule, to a best execution standard based on manual quotes."); Comment Letter of Bernard L. Madoff and Peter B. Madoff, Bernard L. Madoff Investment Securities LLC (Feb. 3, 2005), at 5 ("[W]e urge that the Commission clarify its position by providing specific guidance as to the interplay between the trade-through and the best execution requirement."); RBC Reproposal Comment Letter, supra note 100, at 4; Merrill Lynch Reproposal Comment Letter, *supra*-note 22, at 6; UBS Reproposal Comment Letter, *supra* note 22, at 2.

[118] *See, e.g.*, Deutsche Bank Reproposal Comment Letter, *supra* note 22, at 5 ("In sum, we are concerned that the adoption of Regulation NMS, unless carefully crafted with sensitivity to practical implementation difficulties and expenses, holds the potential to force upon broker-dealers complex challenges and burdensome costs, the scale of which may not be fully appreciated by the Commission."); SIA Reproposal Comment Letter, *supra* note 89, at 11; Citigroup Reproposal Comment Letter, *supra* note 6, at 2; Knight Trading Reproposal Comment Letter, *supra* note 22, at 5.

[119] *See* Adopting Release, *supra* note 1, at text following note 782.

[120] As UBS explained, the difficulties associated with inspecting for violations of the rule are likely to result in a shifting of the burden to firms to prove that they did not violate the rule:

> [W]e foresee a process, not unlike many current "sweep" regulatory actions in which the SEC (or a SRO) will provide each firm with a list containing hundreds of "exceptions" for which the regulatory surveillance systems have detected a potential trade-through violation. In following current examination practice, a firm will be given an opportunity to demonstrate to the regulator why it believes that it did not trade through the best posted price (thus the firm will be deemed guilty of these violations unless it can satisfactorily demonstrate its innocence). Due to exceptions to the rule, technological limitations, and latency in delivery and receipt of market updates and quotations, there will be a substantial number of "false positives" that would have to be disproved. The likely end result of this review will be a justifiable reason for 98% of the exceptions, but firms such as UBS would, most likely, receive a regulatory sanction for their inability to demonstrate guilt or innocence for the remaining 2%.

UBS Reproposal Comment Letter, *supra* note 22, at 5. *See also* CIBC Reproposal Comment Letter, *supra* note 22, at 4 ("It will result in wasted resources sifting through market data to eliminate false trade-throughs, and trade-throughs for economically insignificant sums. We also believe that this task will be inordinately expensive, both in terms of the hard dollars required to build systems and pay for market data to do surveillance and the lost opportunity cost of resources that could be spent investigating execution quality in less liquid stocks.").

[121] One commenter cautioned against underestimating costs. *See* Deutsche Bank Reproposal Comment Letter, *supra* note 22, at 4 ("[W]hat in principle may appear to be a rather straightforward measure, most assuredly involves significant changes to a broker-dealer's trading, technology, operations, supervisory and compliance platforms. * * * In our experience to date with Regulation SHO, which was a fairly incremental initiative that built upon existing SRO rules and adopted a fraction of the original Commission proposal, our costs (represented by hundreds of collective hours * * *) have been real and significant."

[122] *See, e.g.*, Hearing on Proposed Regulation NMS Before the Securities and Exchange Commission (Apr. 21, 2004) ("Regulation NMS Hearings"), at 223–24 (testimony of Robert Greifeld, President and Chief Executive Officer, Nasdaq Stock Market) ("Currently that cost [of market data] for professional investors is around $20. * * * There was no great wisdom in that number, and we look at the number today, that number is too high. * * * With the current structure, then, data is not provided at a low enough cost and it [creates] unintended results and distortions in our market. The market centers today are the beneficiaries of that excessive rent * * *."); Regulation NMS Hearings, at 229 (testimony of Jeffrey T. Brown, General Counsel, Schwab Soundview Capital Markets) ("[L]ast year, the market data cartels took in $424 million in revenue and had expenses of $38 million. * * * [T]hat's a profit margin of over a thousand percent. * * * [T]hat excess revenue manifests itself in the types of practices that you're concerned with, * * * tape shredding, market data rebates, excessive pay to executives. And there's clearly a link * * * between market data revenue and these practices.").

[123] *See, e.g.*, Securities Exchange Act Release No. 51163 (Feb. 9, 2005) (Report of Investigation pursuant to Section 21(a) of the Securities Exchange Act of 1934 relating to violations by MarketXT, an NASD member, and registered broker-dealer, which were not adequately addressed by Nasdaq, as overseen by its parent, NASD); Securities Exchange Act Release No. 51524 (Apr. 12, 2005) and SEC Press Release 2005–53 (April 12, 2005) (instituting and simultaneously settling an enforcement action against the NYSE, finding that the NYSE, "over the course of nearly four years, failed to police specialists, who engaged in widespread and unlawful proprietary trading on the floor of the NYSE").

consolidating and distributing market data. They note that the relative opaqueness of the market data pricing process inhibits public scrutiny on the current cost of consolidated market information.

It is difficult to argue that, in an era of heightened disclosure requirements, a virtual public utility should not be required to openly justify and account for the use of public funds. Moreover, having chosen to maintain the current single processor system, the majority, if it is to accomplish its mission of promoting transparency and protecting investors, while allowing competition to flourish, must accept the responsibility for scrutinizing rates charged for market data and monitoring the heavy hand of monopoly power.[124]

Conclusion

We do not believe that Regulation NMS is the appropriate policy choice. Instead of facilitating a national market system in which technology, competition and innovation will produce benefits for all investors, Regulation NMS saddles the marketplace with anachronistic regulation that reduces investor choice and raises investor costs. In the name of investor protection and uniformity, the majority has opted for greater regulation rather than competition to facilitate what it perceives to be fair treatment of customer orders and deep and liquid markets. However, the majority has failed to establish evidence of investor protection concerns, and the goal of uniformity could have been achieved by having no trade-through rule.

Since the Commission voted on Regulation NMS, mergers have been announced between the NYSE and Archipelago and between Nasdaq and The Instinet Group.[125] The timing of these announcements so soon after the adoption of the rule has led some to credit Regulation NMS with enhancing competition and equalizing regulation among markets. We believe the timing can be more accurately explained by the markets' simple desire for closure with respect to Regulation NMS. Intensifying competitive pressures, combined with the Commission's focus on market structure, created an environment in which the markets' strategic business plans likely could not be finalized until the regulatory risk was resolved. In the end, it was not so much the substance of Regulation NMS that was important, but the fact that the regulation was final.

Unfortunately for the marketplace, this version of Regulation NMS that the majority has adopted is far from final. Imprecise definitions, the acknowledged need for future interpretations that the majority has seen fit to delegate to an opaque process of staff guidance, and uncertainty regarding future examination and enforcement standards combine to produce a regulatory framework that will keep market participants guessing and seeking clarification from our staff. From our experience with analogous situations, we fear that the inevitable delays in obtaining guidance, the attendant regulatory uncertainty, and concomitant costs will harm a competitive marketplace.

Far from enhancing competition, we believe that Regulation NMS will have anticompetitive effects. Increasing consolidation in the securities industry as a result of the proposed mergers and the increased barriers to entry created by the trade-through rule magnify our concerns about the competitive impact of Regulation NMS going forward.

For the reasons stated above, we respectfully dissent.

Dated: June 9, 2005.

Cynthia A. Glassman,

Commissioner.

Paul S. Atkins,

Commissioner.

[FR Doc. 05–11802 Filed 6–28–05; 8:45 am]

BILLING CODE 8010–01–P

[124] The Senate bill required SIPs which act as exclusive processors to register with the Commission and provided the Commission with the authority to require the registration of other categories of SIPs. The reference to exclusive processors did not constitute a mandate for a single securities information processor at any stage in the processing of quotation or transactional data, but merely recognized that where SROs utilize an exclusive processor, that processor takes on certain of the characteristics of a public utility and should be regulated accordingly.

Conference Report, *supra* note 4, at 93.

[125] *See, e.g.*, Aaron Lucchetti et al., *NYSE to Acquire Electronic Trader and Go Public*, Wall St. J., Apr. 21, 2005, at A1; Aaron Lucchetti, *Nasdaq Chief Plays Hardball in Instinet Deal*, Wall St. J., Apr. 25, 2005, at C1.

Federal Register

Wednesday,
June 29, 2005

Part III

Department of Housing and Urban Development

Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs to Consumers: Notice of Meetings—RESPA Reform Roundtables; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5000–N–01]

Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs to Consumers: Notice of Meetings—RESPA Reform Roundtables

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice advises the public of three informal meetings (roundtables) that HUD intends to hold during the months of July and August 2005, at HUD Headquarters with representatives of the industry (which includes lenders, mortgage brokers, real estate brokers and agents, title companies, appraisers, and other settlement service providers), consumers, and other interested parties. During this same period, HUD will co-sponsor with the Small Business Administration three small business roundtables in the cities of Los Angeles, Chicago, and Fort Worth. The purpose of the roundtables is to listen to individual views, allow participants to exchange views, and gather information on possible changes to HUD's RESPA regulations. HUD has announced its commitment to propose changes that will update, simplify, and improve the disclosure requirements for mortgage settlement costs and help control these costs for consumers.

FOR FURTHER INFORMATION CONTACT: Ivy Jackson, Director, Office of RESPA and Interstate Land Sales, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 9158, Washington, DC 20410–8000, telephone (202) 708–0502 (this is not a toll-free number) or Paul S. Ceja, Assistant General Counsel for GSE/RESPA, or Rhonda L. Daniels, Senior Attorney-Advisor, GSE/RESPA Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 9262, Washington, DC 20410–0500, telephone (202) 708–3137. Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

HUD published a proposed rule on July 29, 2002 (67 FR 49134), entitled "RESPA: Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers." In response to considerable public comment from the industry, as well as from consumers, other Federal agencies, and members of Congress, the Secretary of HUD withdrew this rule in early 2004. With the withdrawal of the rule, the Secretary committed HUD to engage in further information gathering on obtaining mortgages and settlement costs, and outreach to Congress, potentially affected members of the industry, consumers, and other Federal agencies before proposing changes to HUD's RESPA regulations.

HUD's Outreach Process

HUD has begun the process of outreach to Congress and other Federal agencies, and this notice advises of HUD's outreach to consumers, potentially affected members of the industry, and other interested parties. Commencing in July 2005, HUD intends to hold three roundtables at HUD Headquarters. These roundtables will be held on July 14, July 28, and August 18, 2005. In an effort to produce a meaningful and productive exchange of various and different views on RESPA reform, participation in the roundtables is by invitation. In selecting participants for the roundtables, HUD strived to achieve a cross-section of representatives of industry and consumer organizations and other interested parties that offered an analysis of HUD's 2002 RESPA reform proposals or offered alternative reform proposals for HUD's consideration.

The purpose of the roundtables is to offer a forum for a meaningful exchange of views, comments, and suggestions from all the participants. HUD is interested in having the participants share not only with HUD, but also with the other participants, their individual views about possible changes to RESPA regulations arising from HUD's 2002 RESPA reform proposals. HUD is also interested in eliciting information about changes in the home settlement process that have occurred since HUD issued its proposed rule in 2002, and which HUD should consider as it develops proposals for RESPA reform.

Key issues on which HUD intends to elicit the views, comments, suggestions, and perspectives of the participants include the following:

- What changes, if any, should be made to HUD's Good Faith Estimate form to make it more helpful to consumers and the industry?
- How should loan originator compensation be disclosed on the Good Faith Estimate?
- What may be the impact on consumers of a mortgage package that includes an interest rate guarantee and a fixed price for settlement costs?
- How can subpackaging be designed to maximize competition without creating undue complexity for consumers?
- Should Home Ownership and Equity Protection Act (HOEPA) loans be eligible for packaging?
- Should there be an opportunity to cure and/or provide remedies for errors or violations of mortgage packaging or Good Faith Estimate requirements?

In addition to roundtables with industry and consumers, HUD also intends to hold, with the assistance of the Small Business Administration, three small business roundtables to discuss how small businesses may be affected by changes to HUD's RESPA regulations. These roundtables will be held on the following dates and at the following locations: July 21, 2005, Los Angeles, California; August 4, 2005, Chicago, Illinois; and August 11, 2005, Fort Worth, Texas.

In addition to HUD's outreach to businesses (including small businesses), consumers, and other interested members of the public through the roundtables, HUD encourages the industry and consumer organizations to continue this important dialogue, independent of HUD, by holding industry and consumer forums on RESPA reform. HUD believes that its effort to determine meaningful RESPA reform proposals will benefit from the information and views exchanged not only at HUD-sponsored meetings on this subject, but also by meetings, roundtables, or forums sponsored by industry or consumers.

The dates and times of HUD's RESPA reform roundtables are posted on HUD's Web site at *http://www.hud.gov/respareform* along with other information about the roundtables.

Dated: June 24, 2005.

Brian D. Montgomery,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 05–12860 Filed 6–28–05; 8:45 am]

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The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html.* Some laws may not yet be available.

H.R. 1760/P.L. 109–15
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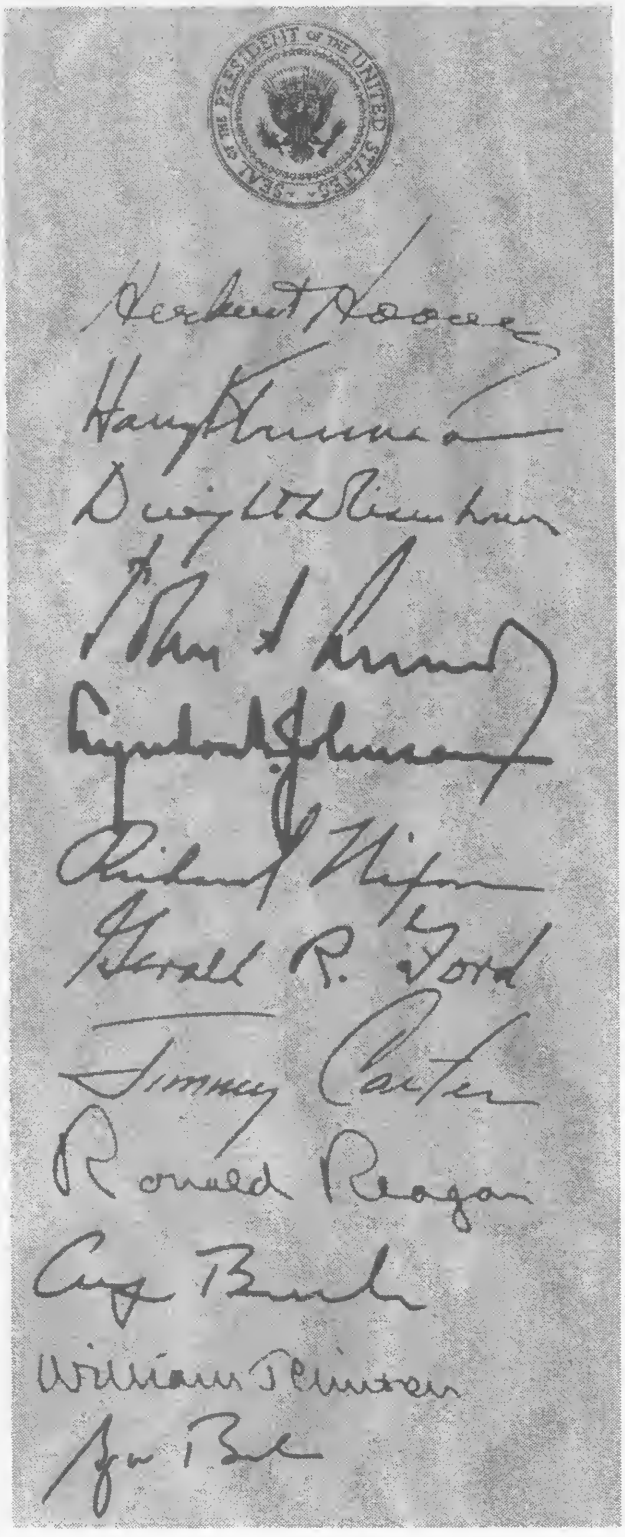

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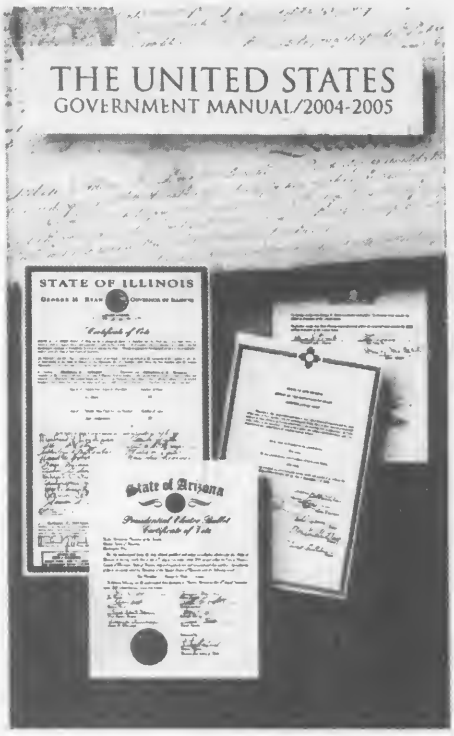

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