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Reader Aids
Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

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Presidential Documents

Title 3—

The President

Proclamation 7160 of December 17, 1998

Wright Brothers Day, 1998

By the President of the United States of America

A Proclamation

On a December morning 95 years ago, over the windswept sands of Kitty Hawk, North Carolina, Orville and Wilbur Wright turned humanity's age-old dream of powered flight into reality. The two brothers, bicycle mechanics by trade and visionaries by nature, had worked painstakingly for years to construct the first power-driven craft that was heavier than air and capable of controlled, sustained flight. After persevering through many trials and discouraging setbacks, they made their fourth trip to Kitty Hawk in 1903 and, on December 17, with Orville at the controls and Wilbur running alongside, their airplane took flight and took us into a new era. The achievement of the Wright brothers was not only a great personal success and a vindication of years of creative effort and methodical experimentation—it was also a feat of historic significance for the future of humankind.

Almost a century later, the same passion and power of imagination that spurred the Wright brothers are fueling the dreams of a new generation of Americans. From John Glenn's second historic space flight to the construction of the International Space Station, we continue to open new frontiers and expand our horizons. Just as the Wright brothers' inventions and achievements created a new industry and revolutionized transportation, commerce, and communication, today's missions into space hold great promise for the development of new technologies and industries to benefit all humanity and strengthen our hopes for lasting peace and prosperity for nations across the globe.

This November, I was pleased to sign into law the Centennial of Flight Commemoration Act, which establishes a commission to coordinate the celebration in 2003 of the 100th anniversary of the Wright brothers' first flight. The commission's activities will raise public awareness of the enormous contributions of the Wright brothers to human progress; remind the world of the triumph of American ingenuity, inventiveness, and diligence in developing new technologies; and inspire all Americans to recognize that the daring, creativity, and spirit of adventure reflected in the achievement of the Wright brothers will be crucial to the success of our Nation in the 21st century.

The Congress, by a joint resolution approved December 17, 1963 (77 Stat. 402; 36 U.S.C. 169), has designated December 17 of each year as "Wright Brothers Day" and has authorized and requested the President to issue annually a proclamation inviting the people of the United States to observe that day with appropriate ceremonies and activities.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, do hereby proclaim December 17, 1998, as Wright Brothers Day.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of December, in the year of our Lord nineteen hundred and ninety-eight, and of the Independence of the United States of America the two hundred and twenty-third.

[FR Doc. 98–34033
Filed 12–21–98; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Executive Order 13109 of December 17, 1998

Half-Day Closing of Executive Departments and Agencies of the Federal Government on Thursday, December 24, 1998

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. All executive departments and agencies of the Federal Government shall be closed and their employees excused from duty for the last half of the scheduled workday on Christmas Eve, December 24, 1998, except as provided in section 2 below.

Sec. 2. The heads of executive departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must remain on duty for the full scheduled workday on December 24, 1998, for reasons of national security or defense or for other essential public reasons.

Sec. 3. Thursday, December 24, 1998, shall be considered as falling within the scope of Executive Order 11582 and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States.

Sec. 4. This order shall apply to executive departments and agencies of the Federal Government only and is not intended to direct or otherwise implicate departments or agencies of State or local governments.

THE WHITE HOUSE,
December 17, 1998.

[FR Doc. 98–34034
Filed 12–21–98; 8:45 am]
Billing code 3195–01–P

Rules and Regulations

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–56–AD; Amendment 39–10948; AD 98–26–08]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 Series Airplanes, and C–9 (Military) Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 series airplanes, and C–9 (military) airplanes, that requires a one-time visual inspection to determine if all corners of the doorjamb of the forward service door have been previously modified. The action also requires various repetitive inspections to detect cracks of the fuselage skin and doubler at all corners of the doorjamb of the forward service door, and to detect cracks on the skin adjacent to the modification; and various follow-on actions. This amendment is prompted by reports of fatigue cracks found in the fuselage skin and doubler at the corners of the doorjamb of the forward service door. The actions specified by this AD are intended to detect and correct such fatigue cracking, which could result in rapid decompression of the fuselage and consequent reduced structural integrity of the airplane.

DATES: Effective January 26, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 26, 1999.

ADDRESSES: The service information referenced in this AD may be obtained from The Boeing Company, Douglas Products Division, P.O. Box 1771, Long Beach, California 90846–1771, Attention: Business Unit Manager, Contract Data Management, C1–255 (35–22). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Wahib Mina, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 627–5324; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 series airplanes, and C–9 (military) airplanes, was published in the **Federal Register** on August 12, 1997 (62 FR 43128). That action proposed to require a one-time visual inspection to determine if all corners of the doorjamb of the forward service door have been previously modified. The action also proposed to require various repetitive inspections to detect cracks of the fuselage skin and doubler at all corners of the doorjamb of the forward service door, and to detect cracks on the skin adjacent to the modification; and various follow-on actions.

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

Request to Allow Designated Engineering Representative (DER) Approval of Certain Repairs

One commenter requests that the proposed AD be revised to allow approval of repairs not addressed in the cited service bulletins by a McDonnell Douglas designated engineering representative (DER), instead of the Manager of the Los Angeles Aircraft Certification Office (ACO). The commenter states that this provision would result in a more efficient and expeditious repair approval process.

The FAA does not concur. While DER's are authorized to determine whether a design or repair method complies with a specific requirement, they are not currently authorized to make the discretionary determination as to what the applicable requirement is. However, the FAA has issued a notice (N 8110.72, dated March 30, 1998), that provides guidance for delegating authority to certain type certificate holder structural DER's to approve alternative methods of compliance for AD-required repairs and modifications of individual airplanes. The FAA is currently working with Boeing, Long Beach Division (BLBD), to develop the implementation process for delegation of approval of alternative methods of compliance in accordance with that notice. Once this process is implemented, approval authority for alternative methods of compliance can be delegated without revising the AD.

Request to Revise Requirements of Proposed AD

One commenter requests that paragraph (e) of the proposed AD be revised to read as follows:

(e) If the visual inspection required by paragraph (a) of this AD reveals that the corners of the forward service door doorjamb have been modified by FAA-approved repairs other than those specified by the DC–9 Structural Repair Manual (SRM) or Service Rework Drawing, prior to further flight, accomplish an initial low frequency eddy current (LFEC) inspection of the fuselage skin adjacent to the repair.

(e)(i) If no crack is detected, within (6) months after the initial LFEC inspection, repair in accordance with a method approved by the Manager, Los Angeles ACO.

(e)(ii) If any crack is detected, prior to further flight, repair in accordance with a method approved by the Manager, Los Angeles ACO.

This commenter states that, as paragraph (e) of the proposed AD is currently worded, it will cause an unnecessary operational impact since FAA-approved non-standard SRM or Service Rework Drawing repairs are known to exist in this area of the doorjamb. The commenter contends that obtaining approval for such repairs from the Los Angeles ACO, prior to further flight, will be time consuming and will

result in an unwarranted extended ground time for the airplane.

The FAA does not concur with the commenter's request to revise paragraph (e) of the AD. The FAA in conjunction with McDonnell Douglas has conducted further analysis of this issue. The FAA has determined that, for forward service door doorjambs that are found to be modified previously but not in accordance with the DC–9 SRM or Service Rework Drawing, an initial LFEC inspection of the fuselage skin adjacent to those existing repairs will not detect any cracking under the repairs. Because cracking under the repairs could grow rapidly once it emerges from under the repairs, the FAA does not consider that an acceptable level of safety can be assured simply by determining that cracking has not yet emerged from under the repairs. In light of these findings, no change to the final rule is necessary.

Request To Increase Repetitive Inspection Interval

One commenter requests that the repetitive inspection interval specified by paragraph (b)(1)(i)(A) of the proposed AD be increased from 3,225 landings to 3,575 landings. The commenter states that such an increase of the inspection interval would allow affected airplanes to be inspected during major scheduled maintenance checks, and would reduce the number of line airplanes that would be taken out of service as a result of any findings during the inspection.

The FAA does not concur that the repetitive inspection interval should be increased. The operator provided no technical justification for revising the repetitive inspection interval as requested. Fatigue cracking of the fuselage skin and doubler at the corners of the doorjamb of the forward service door is an identified safety issue, and the FAA has determined that the repetitive inspection interval, as proposed, is warranted, based on the effectiveness of the inspection procedure to detect cracking. The FAA considered not only those safety issues in developing an appropriate repetitive inspection interval for this action, but the recommendations of the manufacturer and the practical aspect of accomplishing the required inspection within an interval of time that parallels normal scheduled maintenance for the majority of affected operators. In light of these factors, the FAA has determined that the inspection interval of 3,225 landings, as proposed, is appropriate.

Request to Revise DC–9 Supplemental Inspection Document (SID)

One commenter requests that, prior to issuance of the final rule, the DC–9 SID be revised to incorporate the actions required by this AD. The commenter states that such a revision will eliminate confusion between the DC–9 SID and the AD. The FAA does not concur. The actions required by this AD are necessary to detect and correct the identified unsafe condition. After issuance of the final rule, the manufacturer may revise the DC–9 SID.

Explanation of Changes Made to the Final Rule

The FAA has revised the final rule to include a new paragraph (f). This new paragraph states that accomplishment of the inspection requirements of this AD constitutes terminating action for inspections of Principal Structural Element (PSE) 53.09.033 (reference McDonnell Douglas Model DC–9 Supplemental Inspection Document) required by AD 96–13–03, amendment 39–9671 (61 FR 31009, June 19, 1996). Since this new paragraph is being added, the FAA has removed "NOTE 4," which is no longer necessary.

The FAA notes that an editorial change is necessary to clarify the intent of paragraph (b) of the proposed rule. The first sentence in that paragraph refers to the corners of the "upper cargo doorjamb." The intent of that sentence is to determine if the visual inspection reveals that the corners of the doorjamb of the forward service door have not been modified, not the "upper cargo doorjamb." The FAA has revised the final rule to specify this clarification.

Conclusion

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

Cost Impact

There are approximately 823 McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 series airplanes, and C–9 (military) airplanes of the affected design in the worldwide fleet. The FAA estimates that 575 airplanes of U.S. registry will be affected by this AD.

It will take approximately 1 work hour per airplane to accomplish the required visual inspection, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the visual inspection required by this AD on U.S. operators is estimated to be $34,500, or $60 per airplane.

Should an operator be required to accomplish the HFEC, LFEC, or x-ray inspection, it will take approximately 1 work hour per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be $60 per airplane, per inspection cycle.

Should an operator be required to accomplish the modification, it will take approximately 30 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Required parts will cost approximately $1,256, $1,420, $5,804, or $6,113 per airplane, depending on the service kit purchased. Based on these figures, the cost impact of the modification required by this AD on U.S. operators is estimated to be $3,056, $3,220, $7,604, or $7,913 per airplane, respectively.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98–26–08 MCDONNELL DOUGLAS: Amendment 39–10948. Docket 97–NM–56–AD.

Applicability: Model DC–9–10, –20, –30, –40, and –50 series airplanes, and C–9 (military) airplanes; as listed in McDonnell Douglas Service Bulletin DC9–53–279, Revision 01, dated May 6, 1997; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracking in the fuselage skin or doubler at the corners of the doorjamb of the forward service door, which could result in rapid decompression of the fuselage and consequent reduced structural integrity of the airplane, accomplish the following:

Note 2: Where there are differences between the service bulletin and the AD, the AD prevails.

Note 3: The words "repair" and "modify/modification" in this AD and the referenced service bulletin are used interchangeably.

(a) Prior to the accumulation of 50,000 total landings, or within 3,225 landings after the effective date of this AD, whichever occurs later, perform a one-time visual inspection to determine if the corners of the doorjamb of the forward service door have been modified prior to the effective date of this AD.

(b) *Group 1.* If the visual inspection required by paragraph (a) of this AD reveals that the corners of the doorjamb of the forward service door *have not been modified*, prior to further flight, perform a low frequency eddy current (LFEC) or x-ray inspection to detect cracks of the fuselage skin and doubler at all corners of the doorjamb of the forward service door, in accordance with McDonnell Douglas Service Bulletin DC9–53–279, dated December 10, 1996, or Revision 01, dated May 6, 1996.

(1) Condition 1. If no crack is detected during any inspection required by paragraph (b) of this AD, accomplish either paragraph (b)(1)(i) or (b)(1)(ii) of this AD.

(i) *Option 1.* Repeat the inspections as follows until paragraph (b)(1)(ii) of this AD is accomplished:

(A) If the immediately preceding inspection was conducted using LFEC techniques, conduct the next inspection within 3,225 landings.

(B) If the immediately preceding inspection was conducted using x-ray techniques, conduct the next inspection within 3,075 landings.

(ii) *Option 2.* Prior to further flight, modify the corners of the doorjamb of the forward service door in accordance with the service bulletin; this modification constitutes terminating action for the repetitive inspection requirements of paragraph (b)(1)(i) of this AD. Prior to the accumulation of 28,000 landings after accomplishment of the modification, perform a high frequency eddy current (HFEC) inspection to detect cracks on the skin adjacent to the modification, in accordance with the service bulletin. Within 20,000 landings after accomplishment of the HFEC inspection, perform an eddy current inspection to detect cracks in the subject area, in accordance with the service bulletin.

(A) If no crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (b)(1)(ii) of this AD, repeat the eddy current inspection thereafter at intervals not to exceed 20,000 landings.

(B) If any crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (b)(1)(ii) of this AD, repair it in accordance with a method approved by the Manager, Los Angeles ACO.

(2) Condition 2. If any crack is found during any inspection required by paragraph (b) of this AD and the crack is 2 inches or less in length: Prior to further flight, modify it in accordance with the service bulletin. Prior to the accumulation of 28,000 landings after accomplishment of the modification, perform a HFEC inspection to detect cracks on the skin adjacent to the modification, in accordance with the service bulletin. Within 20,000 landings after accomplishment of the HFEC inspection, perform an eddy current inspection to detect cracks in the subject area, in accordance with the service bulletin.

(i) If no crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (b)(2) of this AD, repeat the eddy current inspection thereafter at intervals not to exceed 20,000 landings.

(ii) If any crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (b)(2) of this AD, repair it in accordance with a method approved by the Manager, Los Angeles ACO.

(3) Condition 3. If any crack is found during any inspection required by this paragraph and the crack is greater than 2 inches in length: Prior to further flight, repair it in accordance with a method approved by the Manager, Los Angeles ACO.

(c) *Group 2, Condition 1.* If the visual inspection required by paragraph (a) of this AD reveals that the corners of the doorjamb of the forward service door *have been modified* in accordance with the DC–9 Structural Repair Manual (SRM) (using a steel doubler), accomplish either paragraph (c)(1) or (c)(2) of this AD in accordance with McDonnell Douglas Service Bulletin DC9–53–279, dated December 10, 1996, or Revision 01, dated May 6, 1997.

(1) *Option 1.* Prior to the accumulation of 6,000 landings after the effective date of this AD, perform a HFEC inspection to detect cracks on the skin adjacent to the modification in accordance with the service bulletin. Within 3,000 landings after accomplishment of the HFEC inspection, perform an eddy current inspection to detect cracks in the subject area, in accordance with the service bulletin.

(i) If no crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (c)(1) of this AD, repeat the eddy current inspection thereafter at intervals not to exceed 3,000 landings.

(ii) If any crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (c)(1) of this AD, repair it in accordance with a method approved by the Manager, Los Angeles ACO.

(2) *Option 2.* Prior to further flight, modify the corners of the doorjamb of the forward service door in accordance with the service bulletin. Prior to the accumulation of 28,000 landings after accomplishment of the modification, perform a HFEC inspection to detect cracks on the skin adjacent to the modification, in accordance with the service bulletin. Within 20,000 landings after accomplishment of the HFEC inspection, perform an eddy current inspection to detect cracks in the subject area, in accordance with the service bulletin.

(i) If no crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (c)(2) of this AD, repeat the eddy current inspection thereafter at intervals not to exceed 20,000 landings.

(ii) If any crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (c)(2) of this AD, repair it in accordance with a method approved by the Manager, Los Angeles ACO.

(d) *Group 2, Condition 2.* If the visual inspection required by paragraph (a) of this AD reveals that the corners of the doorjamb of the forward service door *have been modified* in accordance with DC–9 SRM or Service Rework Drawing (using an aluminum doubler), prior to the accumulation of 28,000 landings since accomplishment of the modification, or within 3,225 landings after the effective date of this AD, whichever occurs later, perform a HFEC inspection to detect cracks on the skin adjacent to the

modification, in accordance with McDonnell Douglas Service Bulletin DC9–53–279, dated December 10, 1996, or Revision 01, dated May 6, 1997. Within 20,000 landings after accomplishment of the HFEC inspection, perform an eddy current inspection to detect cracks in the subject area, in accordance with the service bulletin.

(1) If no crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (d) of this AD, repeat the eddy current inspection thereafter at intervals not to exceed 20,000 landings.

(2) If any crack is detected on the skin adjacent to the modification during any eddy current inspection required by paragraph (d) of this AD, repair it in accordance with a method approved by the Manager, Los Angeles ACO.

(e) *Group 2, Condition 3.* If the visual inspection required by paragraph (a) of this AD reveals that the corners of the doorjamb of the forward service door *have been modified*, but not in accordance with the DC–9 SRM or Service Rework Drawing, prior to further flight, repair it in accordance with a method approved by the Manager, Los Angeles ACO.

(f) Accomplishment of the actions required by this AD constitutes terminating action for inspections of Principal Structural Element (PSE) 53.09.033 (reference McDonnell Douglas Model DC–9 Supplemental Inspection Document) required by AD 96–13–03, amendment 39–9671 (61 FR 31009).

(g) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

(h) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(i) Except as provided in paragraphs (a), (b)(1)(ii)(B), (b)(2)(ii), (b)(3), (c)(1)(ii), (c)(2)(ii), (d)(2), and (e) of this AD, the actions shall be done in accordance with McDonnell Douglas Service Bulletin DC9–53–279, dated December 10, 1996, and Revision 01, dated May 6, 1997. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from The Boeing Company, Douglas Products Division, P.O. Box 1771, Long Beach, California 90846–1771, Attention: Business Unit Manager, Contract Data Management, C1–255 (35–22). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(j) This amendment becomes effective on January 26, 1999.

Issued in Renton, Washington, on December 11, 1998.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–33388 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–153–AD; Amendment 39–10959; AD 98–26–16]

RIN 2120–AA64

Airworthiness Directives; Raytheon Aircraft Company Models 1900, 1900C, and 1900D Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain Raytheon Aircraft Company (Raytheon) Models 1900, 1900C, and 1900D airplanes. This AD requires modifying the emergency exit doors and installing interior and exterior placards on each of the emergency exit doors. Difficulty in opening the emergency exit doors prompted this action. The actions specified by this AD are intended to prevent passengers and crew from not being able to open the emergency exit doors during an airplane emergency, which could result in passenger and crew injuries.

DATES: Effective February 5, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 5, 1999.

ADDRESSES: Service information that applies to this AD may be obtained from the Raytheon Aircraft Company, P.O. Box 85, Wichita, Kansas 67201–0085. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–153–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Steven E. Potter, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Mid-Continent Airport, Wichita, Kansas 67209; telephone: (316) 946–4124; facsimile: (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Raytheon Models 1900, 1900C, and 1900D airplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 13, 1998 (63 FR 43336). The NPRM proposed to require modifying the emergency exit doors and installing placards on the emergency exit doors within the clear view of the passengers and crew. Accomplishment of the proposed action as specified in the NPRM would be in accordance with Raytheon Mandatory Service Bulletin No. 2740, Revision 1, Issued: April, 1997; Revised: June, 1997.

The NPRM was the result of reports of difficulty in opening the emergency exit doors.

Interested persons have been afforded an opportunity to participate in the making of this amendment. The FAA received one comment on the NPRM, which supports the proposed AD.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Cost Impact

The FAA estimates that 527 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 12 workhours per airplane to accomplish this action, and that the average labor rate is approximately $60 an hour. Parts cost approximately $1,200 per airplane. Based on these figures, the total cost impact of this AD on U.S. operators is estimated to be $1,011,840, or $1,920 per airplane.

The manufacturer has informed the FAA that 94 of the affected airplanes are already in compliance with this action. Therefore, the estimated total cost impact will be reduced by approximately $180,480 from $1,011,840, to $831,360.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

98–26–16 Raytheon Aircraft Company: Amendment 39–10959; Docket No. 97–CE–153–D.

Applicability: The following model and serial number airplanes, certificated in any category:

Model	Serial Numbers
1900	UA–2 and UA–3;
1900C	UB–1 through UB–74, and UC–1 through UC–174;
1900C (C–12J).	UD–1 through UD–6;
1900D	UE–1 through UE–271.

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

Compliance: Required within the next 600 hours time-in-service (TIS) after the effective date of this AD, unless already accomplished.

To help prevent passengers and crew from not being able to open the emergency exit doors during an airplane emergency, which could result in passenger and crew injuries, accomplish the following:

(a) Modify the airplane emergency exit doors by removing and replacing door mechanism pushrods, trimming the existing turnbuckle clevises, and re-rigging the emergency exit doors, in accordance with Part I of the Accomplishment Instructions section in Raytheon Aircraft (Raytheon) Mandatory Service Bulletin (MSB) No. 2740, Revision 1, Issued: April, 1997; Revised: June, 1997.

(b) Install placards on the interior and exterior of the emergency exit doors in accordance with Part II and Part III of the Accomplishment Instructions section in Raytheon MSB No. 2740, Revision 1, Issued: April, 1997; Revised: June, 1997.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Wichita ACO.

(e) The modification and installation required by this AD shall be done in accordance with Raytheon Aircraft Mandatory Service Bulletin No. 2740, Revision 1, Issued: April, 1997; Revised: June, 1997. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the Raytheon Aircraft Corporation, P.O. Box 85, Wichita, Kansas 67201–0085. Copies may be inspected at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(f) This amendment becomes effective on February 5, 1999.

Issued in Kansas City, Missouri, on December 15, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certificatian Service.

[FR Doc. 98–33694 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–358–AD; Amendment 39–10952; AD 98–25–51]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310 and A300–600 Series Airplanes Equipped with Pratt & Whitney JT9D–7R4 or 4000 Series Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting Airworthiness Directive (AD) T98–25–51 that was sent previously to all known U.S. owners and operators of certain Airbus Model A310 and A300–600 airplanes by individual telegrams. This AD requires deactivation of both thrust reversers and a revision of the Airplane Flight Manual (AFM) to ensure that safe and appropriate performance is achieved during certain takeoff conditions. This action is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by this AD are intended to prevent inflight deployment of a thrust reverser, which could result in reduced controllability of the airplane.

DATES: Effective December 28, 1998, to all persons except those persons to whom it was made immediately effective by telegraphic AD T98–25–51, issued on December 2, 1998, which contained the requirements of this amendment.

The incorporation by reference of certain publications listed in the regulations is approved by the Director

of the Federal Register as of December 28, 1998.

Comments for inclusion in the Rules Docket must be received on or before January 21, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–358–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The applicable service information may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Greg Rutar, Airframe/Airworthiness Branch, ANM–115, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: On December 2, 1998, the FAA issued telegraphic AD T98–25–51, which is applicable to certain Airbus Model A310 and A300–600 series airplanes equipped with Pratt & Whitney JT9D–7R4 or PW4000 series engines.

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that it received a report indicating that the thrust reverser of engine number 1 on an Airbus Model A300–600 series airplane deployed during climb. At the time of the deployment, the engine was at climb power and the indicated air speed was at approximately 240 knots. The corresponding engine was set to idle power automatically. The auto restow function was activated automatically by the aircraft system logic leading to the thrust reverser being stowed away. Investigation revealed that the pressure regulator shut-off valve was defective. However, a defective pressure regulator shut-off valve is not enough to cause deployment of the thrust reverser, unless another failure occurs at the same time. Airbus is continuing further analysis and investigation to determine the cause of the thrust reverser deployment.

Inflight deployment of a thrust reverser, if not prevented, could result in reduced controllability of the airplane.

Explanation of Relevant Service Information

Airbus has issued All Operators Telex (AOT) 78–08, dated November 30, 1998, which describes procedures for deactivation of both thrust reversers. The DGAC classified that AOT as mandatory and issued French airworthiness directive T98–477–273(B), dated November 30, 1998, in order to assure the continued airworthiness of these airplanes in France.

That French airworthiness directive also contains a note recommending certain operational performance penalties be applied as specified in Airbus Flight Operations Telex (FOT) 999.0124/98, dated November 30, 1998, for airplanes on which the thrust reversers are deactivated.

FAA's Conclusions

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. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of the Requirements of the Rule

Since the unsafe condition described is likely to exist or develop on other airplanes of the same type design registered in the United States, the FAA issued telegraphic AD T98–25–51 to prevent inflight deployment of a thrust reverser, which could result in reduced controllability of the airplane. The AD requires deactivation of both thrust reversers, in accordance with the AOT described previously.

Additionally, the AD requires a revision of the FAA-approved airplane flight manual (AFM), in order to ensure that safe and appropriate performance is achieved during certain takeoff conditions for airplanes on which both thrust reversers have been deactivated. This AD requires a revision of the AFM to require performance penalties for those certain takeoff conditions.

Interim Action

The requirements of this AD are considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

Since it was found that immediate corrective action was required, notice and opportunity for prior public comment thereon were impracticable and contrary to the public interest, and good cause existed to make the AD effective immediately by individual telegrams issued on December 2, 1998, to all known U.S. owners and operators of certain Airbus Model A310 and A300–600 series airplanes equipped with Pratt & Whitney JT9D–7R4 or PW4000 series engines. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to section 39.13 of the Federal Aviation Regulations (14 CFR 39.13) to make it effective as to all persons.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 98–NM–358–AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98–25–51 Airbus Industrie: Amendment 39–10952. Docket 98–NM–358–AD.

Applicability: Model A310 and A300–600 series airplanes equipped with Pratt & Whitney JT9D–7R4 or PW4000 series engines; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent inflight deployment of a thrust reverser, which could result in reduced controllability of the airplane; accomplish the following:

(a) Within the next 4 flight cycles after the effective date of this AD, deactivate both thrust reversers in accordance with Airbus All Operators Telex (AOT) 78–08, dated November 30, 1998.

(b) Within the next 4 flight cycles after the effective date of this AD, revise the Limitations Section of the FAA-approved Airplane Flight Manual (AFM) to include the following:

The takeoff performance on wet and contaminated runways with thrust reversers deactivated shall be determined in accordance with Airbus Flight Operations Telex (FOT) 999.0124/98, dated November 30, 1998, as follows:

For takeoff on wet runways, use performance data in accordance with paragraph 4.1 of the FOT.

For takeoff on contaminated runways, use performance data in accordance with paragraph 4.2 of the FOT.

[**Note:** This supersedes any relief provided by the Master Minimum Equipment List (MMEL).]

Note 2: The "FCOM" referenced in Airbus Flight Operations Telex (FOT) 999.0124/98, dated November 30, 1998, is Airbus Industrie Flight Crew Operating Manual (FCOM), Revision 27 for Airbus Model A310 series airplanes and Revision 22 for A300–600 series airplanes. [The revision number is indicated on the List of Effective Pages (LEP) of the FCOM.]

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) The deactivation of both thrust reversers shall be done in accordance with Airbus All Operators Telex (AOT) 78–08, dated November 30, 1998. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 4: The subject of this AD is addressed in French airworthiness directive T98–477–273 (B), dated November 30, 1998.

(f) This amendment becomes effective on December 28, 1998, to all persons except those persons to whom it was made immediately effective by telegraphic AD T98–25–51, issued on December 2, 1998, which contained the requirements of this amendment.

Issued in Renton, Washington, on December 15, 1998.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–33693 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–361–AD; Amendment 39–10956; AD 98–25–53]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B4–600R and A300 F4–600R Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting airworthiness directive (AD) T98–25–53 that was sent to all known U.S. owners and operators of all Airbus Model A300 B4–600R and A300 F4–600R series airplanes by individual telegrams. This AD requires a one-time visual inspection for damage of the center fuel pumps and fuel pump canisters, and replacement of damaged fuel pumps and fuel pump canisters with new or serviceable parts. This action is prompted by reports of damaged center tank fuel pump canisters and damaged center tank fuel pumps. The actions specified by this AD are intended to detect damage to the fuel pump and fuel pump canister, which could result in loss of flame trap

capability and could provide a fuel ignition source in the center fuel tank.

DATES: Effective December 28, 1998, to all persons except those persons to whom it was made immediately effective by telegraphic AD T98–25–53, issued on December 4, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 28, 1998.

Comments for inclusion in the Rules Docket must be received on or before January 21, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–361–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Lirio Liu, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1594; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: On December 4, 1998, the FAA issued telegraphic airworthiness directive (AD) T98–25–53, which is applicable to all Airbus Model A300 B4–600R and A300 F4–600R series airplanes. The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, advises that it has received three reports of damaged center tank fuel pump canisters and damaged center tank fuel pumps. Investigation revealed that the pump canister legs cracked due to fatigue. In one instance, this led to the separation of the upper part of the pump canister from its lower part attached at the center tank bottom wall. Fatigue cracking was also found at the base of the fuel pump diffuser housing. This condition, if not corrected, could result in loss of flame trap capability and could provide a fuel ignition source in the center tank.

Explanation of Relevant Service Information

Airbus has issued All Operators Telex (AOT) 28–09, dated November 28, 1998, which describes procedures for a one-time visual inspection for damage of the center fuel pumps and fuel pump canisters, and replacement of damaged fuel pumps and fuel pump canisters with new or serviceable parts. Damage of the fuel pumps or fuel pump canisters may include, but is not limited to, fretting, cracking of the pump diffuser, or separation of the pump canister from its attachment. The DGAC classified this AOT as mandatory and issued French telegraphic airworthiness directive T98–476–272(B), dated November 30, 1998, in order to assure the continued airworthiness of these airplanes in France.

FAA's Conclusions

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. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the FAA issued telegraphic AD T98–25–53 to detect damage to the fuel pump and fuel pump canister, which could result in loss of flame trap capability and could provide a fuel ignition source in the center tank. This AD requires a one-time visual inspection for damage of the center fuel pumps and fuel pump canisters, and replacement of damaged fuel pumps and fuel pump canisters with new or serviceable parts. These actions are required to be accomplished in accordance with the AOT described previously.

This AD also requires that operators submit a report of inspection findings, positive or negative, to Airbus.

This AD is considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

Since it was found that immediate corrective action was required, notice and opportunity for prior public comment thereon was impracticable and contrary to the public interest, and good cause existed to make the AD effective immediately by telegrams issued on December 4, 1998, to all known owners and operators of all Airbus A300 B4–600R and A300 F4–600R series airplanes. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to section 39.13 of the Federal Aviation Regulations (14 CFR 39.13) to make it effective to all persons.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 98–NM–361–AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism

implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98–25–53 Airbus Industrie: Amendment 39–10956. Docket 98–NM–361–AD.

Applicability: All Model A300 B4–600R and A300 F4–600R series airplanes; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To detect damage to the fuel pump and fuel pump canister, which could result in loss of flame trap capability and could provide a fuel ignition source in the center tank, accomplish the following:

(a) Perform a one-time visual inspection for damage of the center fuel pumps and fuel pump canisters, in accordance with Airbus All Operators Telex (AOT) 28–09, dated November 28, 1998. Perform the inspection at the time specified in paragraph (a)(1), (a)(2), (a)(3), or (a)(4) of this AD, as applicable.

(1) For airplanes that have accumulated 20,000 or more total hours time-in-service as of the effective date of this AD: Inspect within 10 flight cycles after the effective date of this AD.

(2) For airplanes that have accumulated 12,000 or more total hours time-in-service, but less than 20,000 total hours time-in-service, as of the effective date of this AD: Inspect within 100 hours time-in-service after the effective date of this AD.

(3) For airplanes that have accumulated 4,500 or more total hours time-in-service, but less than 12,000 total hours time-in-service as of the effective date of this AD: Inspect within 500 hours time-in-service after the effective date of this AD.

(4) For airplanes that have accumulated less than 4,500 total hours time-in-service as of the effective date of this AD: Inspect prior to the accumulation of 4,500 total hours time-in-service, or within 500 hours time-in-service after the effective date of this AD, whichever occurs later.

(b) If any damage is detected during the inspection required by paragraph (a) of this AD, prior to further flight, replace the damaged fuel pump or fuel pump canister with a new or serviceable part in accordance with Airbus All Operators Telex (AOT) 28–09, dated November 28, 1998.

(c) Within 5 days after accomplishing the inspection required by this AD or within 5 days after the effective date of this AD, whichever occurs later: Report inspection findings, positive or negative, to Airbus, Mr. F. Poveda, AI/SE–E31, Sita Code TLSBW7X, fax number +33/(0)5.61.93.32.73. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2120–0056.

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

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

(f) The inspection and replacement shall be done in accordance with Airbus All Operators Telex (AOT) 28–09, dated November 28, 1998. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in French telegraphic airworthiness directive T98–476–272(B), dated November 30, 1998.

(g) This amendment becomes effective on December 28, 1998, to all persons except those persons to whom it was made immediately effective by telegraphic AD T98–25–53, issued on December 4, 1998.

Issued in Renton, Washington, on December 15, 1998.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–33692 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–CE–75–AD; Amendment 39–10960; AD 98–26–17]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Jetstream Model 3201 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all British Aerospace Jetstream Model 3201 airplanes. This AD requires accomplishing both a routine visual inspection and either a detailed visual inspection or x-ray inspection of the main landing gear (MLG) bay auxiliary spar booms for cracks or fuel leaks on both the left and right sides of the airplane. This AD also requires obtaining and incorporating repair procedures for the MLG bay auxiliary spar where fuel leaks or cracks are found. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the United Kingdom. The actions specified by this

AD are intended to prevent wing failure caused by cracks or fuel leaks in the area of the MLG bay auxiliary spar booms, which could result in loss of control of the airplane.

DATES: Effective February 5, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 5, 1999.

ADDRESSES: Service information that applies to this AD may be obtained from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 479888; facsimile: (01292) 479703. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–75–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. S.M. Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426–6932; facsimile: (816) 426–2169.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all British Aerospace Jetstream Model 3201 airplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on October 13, 1998 (63 FR 54635). The NPRM proposed to require accomplishing both a routine visual inspection and either a detailed visual inspection or x-ray inspection of the MLG bay auxiliary spar booms for cracks or fuel leaks on both the left and right sides of the airplane. The NPRM proposed to also require obtaining and incorporating repair procedures for the MLG bay auxiliary spar where fuel leaks or cracks are found. Accomplishment of the proposed actions as specified in the NPRM would be required in accordance with British Aerospace Jetstream Alert Service Bulletin 57–A–JA 980441, ORIGINAL ISSUE: April 28, 1998, REVISION NO. 1: July 7, 1998.

The NPRM was the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the United Kingdom.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Compliance Time of This AD

Although the cracks on the MLG bay auxiliary spar booms could occur as a result of repetitive airplane operation, the FAA believes that the residual stresses in the component are originating from a manufacturing fault during the machining/heat treatment stages. The cracks could exist, but not be noticed, after just a few hours of airplane operation. The stress incurred during flight operations or temperature changes could then cause rapid crack growth. In order to assure that even very small cracks in the MLG bay auxiliary spar booms do not go undetected, the FAA is utilizing a compliance based on calendar time.

Cost Impact

The FAA estimates that 124 airplanes in the U.S. registry will be affected by this AD.

Accomplishing the routine visual inspection required in this AD will take approximately 1 workhour per airplane, at an average labor rate of approximately $60 an hour. Based on these figures, the total cost impact of the routine visual inspection on U.S. operators is estimated to be $7,440, or $60 per airplane.

Accomplishing the detailed visual inspection required in this AD will take approximately 16 workhours per airplane, at an average labor rate of $60 per hour. Accomplishing the x-ray inspection required in this AD will take approximately 12 workhours per airplane, at an average labor rate of approximately $60 an hour. Based on these figures, the total cost impact of the detailed inspection on U.S. operators is estimated to be $119,040, or $960 per airplane, and $89,280, or $720 per airplane for the x-ray inspection.

These figures only take into account the costs of inspections and do not take into account the costs for repairing any MLG bay auxiliary spar boom where fuel leaks or cracks are found during the inspections.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

98–26–17 British Aerospace: Amendment 39–10960; Docket No. 98–CE–75–AD.

Applicability: Jetstream Model 3201 airplanes, all serial numbers, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For

airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (d) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated in the body of this AD, unless already accomplished.

To prevent wing failure caused by cracks or fuel leaks in the area of the main landing gear (MLG) bay auxiliary spar booms, which could result in loss of control of the airplane, accomplish the following:

(a) Within the next 45 calendar days after the effective date of this AD, accomplish the following:

(1) Perform a routine visual inspection of the MLG bay auxiliary spar booms for cracks or fuel leaks on both the left and right sides of the airplane. Accomplish this inspection in accordance with Part 1 of the Accomplishment Instructions section of British Aerospace Jetstream Alert Service Bulletin 57–A–JA 980441, Original Issue: April 28, 1998, Revision No. 1: July 7, 1998.

(2) Perform either a detailed visual inspection or x-ray inspection of the MLG bay auxiliary spar booms for cracks or fuel leaks on both the left and right sides of the airplane. Accomplish this inspection in accordance with Part 2 of the Accomplishment Instructions section of British Aerospace Jetstream Alert Service Bulletin 57–A–JA 980441, Original Issue: April 28, 1998, Revision No. 1: July 7, 1998.

(b) If cracks or leaks are found during any inspection required by paragraphs (a)(1) and (a)(2) of this AD, prior to further flight, accomplish the following:

(1) Obtain repair instructions from the manufacturer through the FAA, Small Airplane Directorate, at the address specified in paragraph (d) of this AD; and

(2) Incorporate these repair instructions.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, Aircraft Certification Service, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(e) Questions or technical information related to British Aerospace Jetstream Alert Service Bulletin 57–A–JA 980441, Original Issue: April 28, 1998, Revision No. 1: July 7, 1998, should be directed to British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 479888; facsimile: (01292) 479703. This service information may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(f) The inspections required by this AD shall be done in accordance with British Aerospace Jetstream Alert Service Bulletin 57–A–JA 980441, Original Issue: April 28, 1998, Revision No. 1: July 7, 1998. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland. Copies may be inspected at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in British AD 001–04–98, dated May 7, 1998.

(g) This amendment becomes effective on February 5, 1999.

Issued in Kansas City, Missouri, on December 15, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–33689 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 29418; Amdt. No. 413]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

EFFECTIVE DATE: 0901 UTC, January 28, 1999.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK. 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK. 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days. The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current.

It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC, on December 11, 1998.

Richard O. Gordon,

Acting Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC,

1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44719, 44721.

2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES AND CHANGE OVER POINTS

[Amendment 413 Effective Date, January 28, 1999]

From	To	MEA
§ 95.1001 Direct Routes—U.S.		
§ 95 Puerto Rico Routes A300 Is Amended to Read In Part		
DORADO, PR NDB	RAYAS, OA	6000
RAYAS, OA	KIKER, OA FIX	#6000
#NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.		
A516 is Amended to Read In Part		
MILOK, OA FIX	RAYAS, OA FIX	#9000
#MEA IS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE.		
#NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.		
RAYAS, OA FIX	ANNER, OA FIX	#9000
#MEA IS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE.		
#NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.		
ANNER, OA FIX	PORQE, PR	#9000
#MEA IS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE.		
#NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.		
*PORQE, VI FIX	**DANDE, VI FIX	6000
*8000—MRA		
**3500—MRA		
*DANDE, VI FIX	SAINT MAARTEN, NA VOR/DME	2500
*3500—MRA		
A555 I Amended to Read In Part		
ST CROIX, VI VOR/DME	*PORQE, VI FIX	6000
*8000—MRA		
*PORQE, VI FIX	ILURI, OA FIX	#12000
*8000—MRA		
#MEA iS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE.		
#NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.		
G449 Is Amended to Read In Part		
DORADO, PR NDB	HENLI, PR FIX	#6000
#NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.		
HENLI, PR FIX	ANNER, OA	#6000
#NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.		
ANNER, OA	ANADA, PR	#6000
#NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.		
G633 is Amended to Read in Part		
ST CROIX, VI VOR/DME	TANZY, VI FIX	2400
TANZY, VI FIX	*DANDE, VI FIX	3100
*3500—MRA		
*DANDE, VI FIX	GABAR, VI FIX	3500

REVISIONS TO IFR ALTITUDES AND CHANGE OVER POINTS—Continued

[Amendment 413 Effective Date, January 28, 1999]

From	To	MEA
*3500—MRA		
GABAR, VI FIX	GOLDEN ROCK, VI NDB	6000
GOLDEN ROCK, VI NDB	COOLIDGE, BI VOR/DME	6000
Route 1 is Amended to Delete		
ARECA, PR FIX	MAYAGUEZ, PR VOR/DME	2700
Route 2 is Amended by Adding		
FAJAR, PR FIX	TOURO, PR FIX	2000
TOURO, PR FIX	MALIE, VI FIX	2000
Route 3 is Amended to Read in Part		
SAN JUAN, PR VORTAC	*JAAWS, PR FIX	3000
*7000—MRA		
*JAAWS, PR FIX	UTAHS, PR FIX	12000
#*7000—MRA		
Route 4 is Amended to Read in part		
BORINQUEN, PR VORTAC	JOSHE, PR FIX	6000
JOSHE, PR FIX	MIGHT, PR FIX	6000
MIGHT, PR FIX	TUUNA, PR FIX	6000
TUUNA, PR FIX	VEDAS, PR FIX	5000
VEDAS, PR FIX	SNOOZ, VI FIX	4000
Route 6 is Amended to Read in Part		
PALCO, VI FIX	CHAKA, PR FIX	3000
BEANO, PR FIX	*ROBLE, PR FIX	6000
*6000—MRA		
ROBLE, PR FIX	*IDAHO, PR FIX	15000
*15000—MRA		
Route 7 is Amended to Read in Part		
GESSO, PR FIX	TUUNA, PR FIX	9000
TUUNA, PR FIX	SANLO, PR FIX	4000
SANLO, PR FIX	SAN JUAN, PR VORTAC	4000
SAN JUAN, PR VORTAC	SAALR, PR FIX	3000
SAALR, PR FIX	PLING, PR FIX	12000
Route 8 is Amended to Delete		
ARECA, PR FIX	*PONCE, PR VOR/DME	16000
*13000—MCA PONCE VOR/DME, W BND		
Route 9 is Amended to Read in Part		
*DAKES, PR FIX	PONCE, PR VOR/DME	6000
*9000—MRA		
*CARIB, PR FIX	VERMO, PR FIX	12000
*2500—MRA		
Route 10 is Amended by Adding		
PONCE, PR VOR/DME	JOSHE, PR FIX	6000
JOSHE, PR FIX	VARNA, PR FIX	6000
VARNA, PR FIX	SAN JUAN, PR VORTAC	3700
Route 10 is Amended to Read in Part		
ALASK, PR FIX	PONCE, PR VOR/DME	6000
Route 11 is Amended to Delete		
PONCE, PR VOR/DME	SENDS, PR FIX	5000
SENDS, PR FIX	*VARNA, PR FIX	**5000

REVISIONS TO IFR ALTITUDES AND CHANGE OVER POINTS—Continued

[Amendment 413 Effective Date, January 28, 1999]

From	To	MEA
*5000—MCA VARNA FIX, SW BND **4300—MCA VARNA, PR FIX	SAN JUAN, PR VORTAC	3700
§ 95 1 Atlantic Routes R507 Is Amended to Read In Part		
UTAHS, PR FIX *24000—MRA CONCH, OA FIX #NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED. SAPPO, OA FIX #NAVIGATION EQUIPMENT OTHER THAN LF OR VHF REQUIRED.	*CONCH, OA FIX SAPPO, OA FIX GRAND TURK, BI NDB	24000 #24000 #10000
R888 Is Amended to Read in Part		
MODUX, VI	ST CROIX, VI VOR/DME	14000
§ 95.6003 VOR Federal Airway 3 Is Amended to Read In Part		
HARVY, VA FIX *9000—MRA NUTTS, VA FIX	*NUTTS, VA FIX FLAT ROCK, VA VORTAC	6000 6000
§ 95.6014 VOR Federal Airway 14 Is Amended to Read In Part		
DUNKIRK, NY VORTAC	BUFFALO, NY VOR/DME	3000
§ 95.6038 VOR Federal Airway 38 Is Amended to Read In Part		
CEROL, VA FIX *6000—MRA **5100—MOCA MITER, VA FIX *3400—MOCA	*MITER, VA FIX GORDONSVILLE, VA VORTAC	**6000 *6000
§ 95.6072 VOR Federal Airway 72 is Amended to Read in Part		
TIDIOUTE, PA VORTAC *3500—MCA EXALL, PA FIX *3500—MOCA OXFOR, NY FIX ROCKDALE, NY VOR/DME ALBANY, NY VORTAC *3000—MOCA #HALB R–067 UNUSABLE. USE CAM R–248.	BRADFORD, PA VOR/DME ELMIRA, NY VOR/DME ROCKDALE, NY VOR/DME ALBANY, NY VORTAC CAMBRIDGE, NY VOR/DME	*4000 *4000 4000 4000 #*4000
§ 95.6084 VOR Federal Airway 84 Is Amended to Read in Part		
U.S. CANADIAN BORDER	BUFFALO, NY VOR/DME	6000
§ 95.6119 VOR Federal Airway 119 Is Amended to Read in part		
BURST, NY FIX	GENESEO, NY VOR/DME	3600
§ 95.6145 VOR Federal Airway 145 Is Amended to Read In Part		
UTICA, NY VORTAC *2800—MOCA WATERTOWN, NY VORTAC *1600—MOCA	WEEPY, NY FIX U.S. CANADIAN BORDER	*3400 *3000
§ 95.6203 VOR Federal Airway 203 Is Amended to Read In part		
SARANAC LAKE, NY VOR/DME *4400—MOCA	MASSENA, NY VORTAC	*5000
§ 95.6241 VOR Federal Airway 241 Is Amended to Read In part		
WIREGRASS, AL VORTAC	*ABIDE, AL FIX	2000

REVISIONS TO IFR ALTITUDES AND CHANGE OVER POINTS—Continued

[Amendment 413 Effective Date, January 28, 1999]

From	To	MEA
*2500—MRA ABIDE, AL FIX	EUFAULA, AL VORTAC	2000
§ 95.6243 VOR Federal Airway 243 is Amended to Read in Part		
RENRO, KY FIX *2100—MOCA	HUNTINGBURG, IN VOR/DME	*4500
§ 95.6541 VOR Federal Airway 541 is Amended to Read in Part		
GADSDEN, AL VOR/DME	HOBBI, AL FIX	*3600

From	To	MEA	MAA
§ 95.7042 Jet route No. 42 is Amended to Read in part			
NASHVILLE, TN VORTAC FOUNT, KY FIX	FOUNT, KY FIX TONIO, KY FIX	18000 20000	45000 35000
§ 95.7146 Jet Route No. 146 is Amended to Read in Part			
ALLENTOWN, PA VORTAC #FJC R–104 UNUSABLE. US JFK R–287.	KENNEDY, NY VOR/DME	#18000	45000

From	To	Changeover points	
		Distance	From
§ 95.8003 VOR Federal Airways Changeover Points Airway Segment V–203 is Amended by Adding			
SARANAC LAKE, NY VOR/DME	MASSENA, NY VORTAC	11	SARANAC LAKE.

[FR Doc. 98–33441 Filed 12–21–98; 8:45 am]
BILLING CODE 4910–13–M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Codification of Guidance Policy on Hazardous Liquids in Consumer Products

AGENCY: Consumer Product Safety Commission.

ACTION: Final policy statement.

SUMMARY: The Commission codifies a statement, issued previously and published in the **Federal Register**, that provides guidance for manufacturers, importers, distributors, and retailers of consumer products that are filled with a liquid, usually to help provide some type of visual effect. Examples of such products are paperweights containing snow scenes or boats, and some keychains and pens. To protect children and other persons from toxic effects of exposure to these liquids, the Commission recommends that manufacturers of such products not fill the products with hazardous liquids. Further, the Commission recommends that, before purchasing liquid-filled products for resale, importers, distributors, and retailers obtain assurances from the manufacturers that the products do not contain hazardous liquids.

DATES: This codification is effective December 22, 1998. This policy has been applicable since May 13, 1998.

FOR FURTHER INFORMATION CONTACT: Frank Krivda, Office of Compliance, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 504–0400, ext. 1372.

SUPPLEMENTARY INFORMATION: On May 28, 1998, the Commission published in the **Federal Register** the text of a document that provides guidance for manufacturers, importers, distributors, and retailers of consumer products that may contain hazardous liquids. 63 FR 29182. To protect children and other persons from the toxic effects of exposure to these chemicals, the Commission recommends that manufacturers of such products refrain from filling the products with hazardous liquids. Further, the Commission recommends that, before purchasing such products for resale, importers, distributors, and retailers obtain assurances from manufacturers that liquid-filled children's products do not contain hazardous liquid chemicals.

In order to make this policy more accessible to interested parties, the Commission is codifying the policy as 16 CFR 1500.231.

Since this is a statement of policy and an interpretative rule, neither a general notice of proposed rulemaking nor a delayed effective date is required. 5 U.S.C. 553(d)(2). A delayed effective date is not required for the additional reason that this policy is not a substantive rule. 5 U.S.C. 553(d)(3). Accordingly, this codification will become effective immediately upon its publication in the **Federal Register**.

List of Subjects in 16 CFR Part 1500

Consumer protection, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, Reporting and recordkeeping requirements, and Toys.

For the reasons given above, the Commission amends 16 CFR Part 1500 as follows:

PART 1500—[AMENDED]

1. The authority citation for part 1500 continues to read as follows:

Authority: 15 U.S.C. 1261–1278.

2. A new § 1500.231 is added, to read as follows:

§ 1500.231 Guidance for hazardous liquid chemicals in children's products.

(a) *Summary.* The U.S. Consumer Product Safety Commission issues this guidance to manufacturers, importers, distributors, and retailers to protect children from exposure to hazardous chemicals found in liquid-filled children's products, such as rolling balls, bubble watches, necklaces, pens, paperweights, keychains, liquid timers, and mazes.[1] The Commission identifies the major factors that it considers when evaluating liquid-filled children's products that contain hazardous chemicals, and informs the public of its experience with exposure to these hazardous chemicals to children. To reduce the risk of exposure to hazardous chemicals, such as mercury, ethylene glycol, diethylene glycol, methanol, methylene chloride, petroleum distillates, toluene, xylene, and related chemicals, the Commission requests manufacturers to eliminate the use of such chemicals in children's products. The Commission also recommends that, before purchasing products for resale, importers, distributors, and retailers obtain assurances from manufacturers that liquid-filled children's products do not contain hazardous liquid chemicals.

(b) *Hazard.* During reasonably foreseeable handling or use of liquid-filled children's products, hazardous chemicals may become accessible to young children in a manner that places children at risk. Young children are exposed to the chemicals from directly mouthing them or from handling such objects and subsequent hand-to-mouth or hand-to-eye activity. The specific type and frequency of behavior that a child exposed to a product will exhibit depends on the age of the child and the characteristics and pattern of use of the product. The adverse health effects of these chemicals to children include chemical poisoning from ingestion of the chemicals, pneumonia from aspiration of the chemicals into the lungs, and skin and eye irritation from exposure to the chemicals. The chemicals may also be combustible.

(c) *Guidance.* (1) Under the Federal Hazardous Substances Act (FHSA), products that are toxic or irritants and that may cause substantial injury or illness under reasonably foreseeable conditions of handling or use, including reasonably foreseeable ingestion by children, are "hazardous substances." 15 U.S.C. 1261(f)(1). A product that is not intended for children, but that creates a risk of substantial injury or illness because it contains hazardous chemicals, requires precautionary labeling under the Act. 15 U.S.C. 1261(p). A toy or other article intended for use by children that contains an accessible and harmful amount of a hazardous chemical is banned. 15 U.S.C. 1261(q)(1)(A). In evaluating the potential hazard associated with children's products that contain hazardous chemicals, the Commission's staff considers certain factors on a case-by-case basis, including: the total amount of the hazardous chemical in a product, the accessibility of the hazardous chemicals to children, the risk presented by that accessibility, the age and foreseeable behavior of the children exposed to the product, and the marketing, patterns of use, and life cycle of the product.

(2) The Commission's staff has identified a number of liquid-filled children's products, such as rolling balls, bubble watches, necklaces, pens, paperweights, maze toys, liquid timers, and keychains, that contain hazardous chemicals. In several of these cases, the staff determined that these products violated the FHSA because they presented a risk of chemical poisoning and/or chemical pneumonia from aspiration. This determination resulted in recalls or in the replacement of those products with substitutes, as well as in agreements with the manufacturers to discontinue the use of hazardous chemicals in liquid-filled children's products in future production. The Commission believes that these hazardous substances pose a risk to young children and, consequently, manufacturers should not have included them in the product design or manufacturing process.

(3) Therefore, the Commission considers the use of hazardous chemicals in children's products such as those described above to be ill-advised and encourages manufacturers to avoid using them in such products. Further, the Commission recommends that, before purchasing such products for resale, importers, distributors, and retailers obtain assurances from the manufacturers that liquid-filled children's products do not contain hazardous liquid chemicals.

[1] This guidance is not a rule. It is intended to highlight certain obligations under the Federal Hazardous Substances Act. Companies should read that Act and the accompanying regulations in this part for more detailed information.

Dated: December 17, 1998.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 98–33865 Filed 12–21–98; 8:45 am]

BILLING CODE 6355–01–U

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Codification of Guidance Policy on Lead in Consumer Products

AGENCY: Consumer Product Safety Commission.

ACTION: Final policy statement.

SUMMARY: The Commission codifies a policy statement, previously approved by the Commission and published in the **Federal Register**, that provides guidance for manufacturers, importers, distributors, and retailers of consumer products that may contain harmful amounts of the element lead. To protect children and other persons from the toxic effects of exposure to lead, the Commission recommends that such persons obtain sufficient tests and analyses to ensure that their products do not contain harmful levels of lead.

DATES: This codification is effective December 22, 1998. This policy has been applicable since December 24, 1997.

FOR FURTHER INFORMATION CONTACT: Mary Toro, Office of Compliance, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 504–0608, ext. 1378.

SUPPLEMENTARY INFORMATION: On January 22, 1998, the Commission published in the **Federal Register** the text of a document that provides guidance for manufacturers, importers, distributors, and retailers of consumer products that may contain harmful amounts of the element lead. 63 FR 3310. To protect children and other persons from the toxic effects of exposure to lead, the Commission recommends that such persons obtain sufficient tests and analyses to ensure that their products do not contain harmful levels of lead.

In order to make this policy more accessible to interested parties, the Commission is codifying the policy as 16 CFR 1500.230.

Since this is a statement of policy and interpretative rule, neither a general notice of proposed rulemaking or a delayed effective date is required. 5 U.S.C. 553(d)(2). A delayed effective date is not required for the additional reason that this policy is not a

substantive rule. 5 U.S.C. 553(d)(3). Accordingly, this codification will become effective immediately upon its publication in the **Federal Register.**

List of Subjects in 16 CFR Part 1500

Consumer protection, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, Reporting and recordkeeping requirements, and Toys.

For the reasons given above, the Commission amends 16 CFR part 1500 as follows:

PART 1500—[AMENDED]

1. The authority citation for part 1500 continues to read as follows:

Authority: 15 U.S.C. 1261–1278.

2. A new § 1500.230 is added, to read as follows:

§ 1500.230 Guidance for lead (Pb) in consumer products.

(a) *Summary.* (1) The U.S. Consumer Product Safety Commission issues this guidance to manufacturers, importers, distributors, and retailers to protect children from hazardous exposure to lead in consumer products.[1] The Commission identifies the major factors that it considers when evaluating products that contain lead, and informs the public of its experience with products that have exposed children to potentially hazardous amounts of lead.

(2) To reduce the risk of hazardous exposure to lead, the Commission requests manufacturers to eliminate the use of lead that may be accessible to children from products used in or around households, schools, or in recreation. The Commission also recommends that, before purchasing products for resale, importers, distributors, and retailers obtain assurances from manufacturers that those products do not contain lead that may be accessible to children.

(b) *Hazard.* Young children are most commonly exposed to lead in consumer products from the direct mouthing of objects, or from handling such objects and subsequent hand-to-mouth activity. The specific type and frequency of behavior that a child exposed to a product will exhibit depends on the age of the child and the characteristics and pattern of use of the product. The adverse health effects of lead poisoning in children are well-documented and may have long-lasting or permanent consequences. These effects include neurological damage, delayed mental and physical development, attention and learning deficiencies, and hearing problems. Because lead accumulates in the body, even exposures to small amounts of lead can contribute to the overall level of lead in the blood and to the subsequent risk of adverse health effects. Therefore, any unnecessary exposure of children to lead should be avoided. The scientific community generally recognizes a level of 10 micrograms of lead per deciliter of blood as a threshold level of concern with respect to lead poisoning. To avoid exceeding that level, young children should not chronically ingest more than 15 micrograms of lead per day from consumer products.

(c) *Guidance.* (1) Under the Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1261(f)(1), household products that expose children to hazardous quantities of lead under reasonably foreseeable conditions of handling or use are "hazardous substances." A household product that is not intended for children but which creates such a risk of injury because it contains lead requires precautionary labeling under the Act. 15 U.S.C. 1261(p). A toy or other article intended for use by children which contains a hazardous amount of lead that is accessible for children to ingest is a banned hazardous substance. 15 U.S.C. 1261(q)(1)(B). In evaluating the potential hazard associated with products that contain lead, the Commission staff considers these major factors on a case-by-case basis: the total amount of lead contained in a product, the bioavailability of the lead, the accessibility of the lead to children, the age and foreseeable behavior of the children exposed to the product, the foreseeable duration of the exposure, and the marketing, patterns of use, and life cycle of the product.

(2) Paint and similar surface coatings containing lead have historically been the most commonly-recognized sources of lead poisoning among the products within the Commission's jurisdiction. The Commission has, by regulation, banned paint and other similar surface coatings that contain more than 0.06% lead ("lead-containing paint"), toys and other articles intended for use by children that bear lead-containing paint, and furniture articles for consumer use that bear lead-containing paint. 16 CFR Part 1303. In recent years, however, the Commission staff has identified a number of disparate products—some intended for use by children and others simply used in or around the household or in recreation—that presented a risk of lead poisoning from sources other than paint. These products included vinyl miniblinds, crayons, figurines used as game pieces, and children's jewelry.

(3) In several of these cases, the staff's determination that the products presented a risk of lead poisoning resulted in recalls or in the replacement of those products with substitutes, in addition to an agreement to discontinue the use of lead in future production. The Commission believes that, had the manufacturers of these lead-containing products acted with prudence and foresight before introducing the products into commerce, they would not have used lead at all. This in turn would have eliminated both the risk to young children and the costs and other consequences associated with the corrective actions.

(4) The Commission urges manufacturers to eliminate lead in consumer products to avoid similar occurrences in the future. However, to avoid the possibility of a Commission enforcement action, a manufacturer who believes it necessary to use lead in a consumer product should perform the requisite analysis before distribution to determine whether the exposure to lead causes the product to be a "hazardous substance." If the product is a hazardous substance and is also a children's product, it is banned. If it is a hazardous household substance but is not intended for use by children, it requires precautionary labeling. This same type of analysis also should be performed on materials substituted for lead.

(5) The Commission also notes that, under the FHSA, any firm that purchases a product for resale is responsible for determining whether that product contains lead and, if so, whether it is a "hazardous substance." The Commission, therefore, recommends that, prior to the acquisition or distribution of such products, importers, distributors, and retailers obtain information and data, such as analyses of chemical composition or accessibility, relevant to this determination from manufacturers, or have such evaluations conducted themselves.

Dated: December 17, 1998.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 98–33866 Filed 12–21–98; 8:45 am]

BILLING CODE 6355–01–U

[1] This guidance is not a rule. It is intended to highlight certain obligations under the Federal Hazardous Substances Act. Companies should read that Act and the accompanying regulations in this part for more detailed information.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 5

Delegations of Authority and Organization; Center for Veterinary Medicine

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the delegations of authority with respect to animal drugs to incorporate provisions for feed mill licensing in accordance with the Animal Drug Availability Act (ADAA) of 1996. The ADAA amended some sections of the Federal Food, Drug, and Cosmetic Act (the act) to require a single facility license for the manufacturer of medicated feeds containing approved new animal drugs, rather than multiple medicated feed applications for each feed mill, as previously required by the act. This notice also updates position and component titles and associated delegations of authority within the Center for Veterinary Medicine (CVM) as a result of organizational restructuring.

EFFECTIVE DATE: December 22, 1998.

FOR FURTHER INFORMATION CONTACT:
Richard L. Arkin, Center for Veterinary Medicine, Food and Drug Administration, 7600 Standish Pl., Rockville, MD 20855, 301–827–0141, or
Loretta W. Davis, Division of Management Systems and Policy (HFA–340), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4809.

SUPPLEMENTARY INFORMATION: FDA is amending the delegations of authority in subpart B of part 5 (21 CFR part 5) in order to revise §§ 5.83 and 5.84 to include additional authorities with regard to the approval of the medicated feed mill license applications. The ADAA (Pub. L. 104–250) amended section 512(a) and (m) of the act (21 U.S.C. 360b(a) and (m)). Moreover, this final rule reflects specific organizational, position, and title revisions within CVM due to organizational restructuring of specific components.

Further redelegation of the authorities delegated is not authorized at this time. Authority delegated to a position may be exercised by a person officially designated to serve in such position in an acting capacity or on a temporary basis.

List of Subjects in 21 CFR Part 5

Authority delegations (Government agencies), Imports, Organization and functions (Government agencies).

Therefore, under the Federal Food, Drug. and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 5 is amended as follows:

PART 5—DELEGATIONS OF AUTHORITY AND ORGANIZATION

1. The authority citation for 21 CFR part 5 continues to read as follows:

Authority: 5 U.S.C. 504, 552, App. 2; 7 U.S.C. 138a, 2271; 15 U.S.C. 638, 1261–1282, 3701–3711a; 15 U.S.C. 1451–1461; 21 U.S.C. 41–50, 61–63, 141–149, 321–394, 467f, 679(b), 801–886, 1031–1309; 35 U.S.C. 156; 42 U.S.C. 241, 242, 242a, 242l, 242n, 243, 262, 263, 264, 265, 300u–300u–5, 300aa–1; 1395y, 3246b, 4332, 4831(a), 10007–10008; E.O. 11921, 41 FR 24294, 3 CFR, 1977 Comp., p. 124–131; E.O. 12591, 52 FR 13414, 3 CFR, 1988 Comp., p. 220–223.

2. Section 5.83 is amended by revising the section heading, paragraphs (c)(1) and (c)(2), and paragraph (d) to read as follows:

§ 5.83 Approval of new animal drug applications, medicated feed mill license applications and their supplements.

* * * * *

(c) * * *

(1) The Director, Division of Human Food Safety, Office of New Animal Drug Evaluation, CVM.

(2) The Director, Division of Epidemiology and Surveillance, Office of Surveillance and Compliance, CVM.

(d) The following officials are authorized to perform all the functions of the Commissioner of Food and Drugs with regard to the approval of medicated feed mill license applications for the manufacture of animal feeds containing new animal drugs pursuant to section 512(m) of the act, as amended by the Animal Drug Availability Act of 1996 (Pub. L. 104–250):

(1) The Director and Deputy Director, CVM.

(2) The Director, Division of Animal Feeds, Office of Surveillance and Compliance, CVM.

(3) The Leader, Medicated Feeds Team, Division of Animal Feeds, Office of Surveillance and Compliance, CVM.

(4) The Medicated Feeds Specialist, Medicated Feeds Team, Division of Animal Feeds, Office of Surveillance and Compliance, CVM.

3. Section 5.84 is amended by revising the section heading and paragraphs (a)(1) and (a)(3) to read as follows:

§ 5.84 Issuance of notices, proposals, and orders relating to new animal drugs and medicated feed mill license applications.

(a) * * *

(1) Issue notices of opportunity for a hearing on proposals to refuse approval or to withdraw approval of new animal drug applications, and supplements thereto, for drugs for animal use and proposals to refuse approval or to revoke approval of medicated feed mill license applications, and supplements thereto, submitted pursuant to section 512(m) of the Federal Food, Drug, and Cosmetic Act, as amended by the Animal Drug Availability Act of 1996 (Pub. L. 104–250).

* * * * *

(3) Issue proposals and orders to revoke and amend regulations for new animal drugs for animal use and medicated feed mill licenses, corresponding to said act on such applications.

* * * * *

Dated: December 14, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–33830 Filed 12–21–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 658

RIN 2125–AE47

Truck Size and Weight; Technical Corrections

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule; technical corrections.

SUMMARY: This document amends truck size and weight regulations by changing the definition of automobile transporters to include those transporting towed vehicles and truck camper units and extending the Interstate System axle weight exemption for public transit buses to October 1, 2003, as provided by the Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105–178, 112 Stat. 107. Five additional technical corrections are also being made, to add Alligator Alley (I–75) to the National Network (NN) listing in Florida; clarify that a State's grandfathered weight limits for divisible vehicles or loads on the Interstate System are permanently vested; clarify that the length of cargo carrying units subject to the freeze in the Intermodal Surface Transportation Efficiency Act of

1991 (ISTEA), Pub. L. 102–240, 105 Stat. 1914, are measured from the front of the first unit to the rear of the last; clarify that the prohibition against an overall length limit on truck tractor-semitrailers or truck tractor-semitrailer-trailer combinations is not affected by grandfathered semitrailer lengths or kingpin settings; and correct the routes available under the ISTEA freeze in Utah for truck-trailer-trailer combinations.

DATES: The effective date for this rule is December 22, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Klimek, Office of Motor Carrier Information Analysis, (202) 366–2212 or Mr. Charles Medalen, Office of the Chief Counsel, (202) 366–1354, Federal Highway Administration, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users can access all comments received by the U.S. DOT Dockets, Room PL–401, by using the universal resource locator (URL): http://dms.dot.gov. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the **Federal Register**'s home page at: http://www.nara.gov/fedreg and the Government Printing Office's database at: http://www.access.gpo.gov/nara.

Automobile Transporters

Prior to the signing of TEA–21 on June 9, 1998, the definition of an automobile transporter in 23 CFR 658.5 read as follows:

Any vehicle combination designed and used specifically for the transport of assembled (capable of being driven) highway vehicles.

Section 4005 of TEA–21 amended 49 U.S.C. 31111(a) by adding a new paragraph (1) which defined "automobile transporter" as follows:

(1) AUTOMOBILE TRANSPORTER.—The term "automobile transporter" means any vehicle combination designed and used specifically for the transport of assembled highway vehicles, including truck camper units.

The deletion of the parenthetical phrase, "capable of being driven" from the definition indicates that the purpose was to include vehicles that could not be driven, that is, were not self-propelled. However, they must still be finished vehicles capable of operating on highways, which means, among other things, equipped with wheels. This would include trailers designed to be towed by power units at highway speeds. The one exception to this is a truck camper unit, which the Conference Report on TEA–21 [H.R. Conf. Rep. No. 105–550, at 488 (1998)] explained as follows:

The conference adopts the Senate provision. The conference notes that the phrase "truck camper units" is defined in the ANSI A119.2/NFPA 501C standard on recreational vehicles as "a portable unit constructed to provide temporary living quarters for recreational, travel, or camping use, consisting of a roof, floor, and sides, designed to be loaded onto and unloaded from the bed of a pickup truck" (1996 edition).

This describes a wheel-less unit designed to be loaded on the bed of a pickup truck before it can operate on a highway. Other wheel-less units would have to meet this same definition in order for the transporting unit to be considered an automobile transporter.

Vehicles transporting wrecked automobiles or vehicles used solely to compete in motorsport competition events may not be considered automobile transporters. Wrecked automobiles are those that are either not operable, or if operable to some extent, could not operate safely on the highways. Vehicles used solely to compete in motorsport competition events are those that could not legally operate on the highways. In addition, vehicles transporting incomplete vehicles, such as "glider kits" (which basically consist of a chassis), that require the addition of further components in order to operate on highways may not be considered automobile transporters.

Public Transit Buses

Section 1212(c) in TEA–21 amended Section 1023(h)(1) of the Intermodal Surface Transportation Efficiency Act of 1991 (23 U.S.C. 127 note) by extending the Interstate System axle weight exemption for public transit buses to October 1, 2003. Provisions in 23 CFR 658.17(k) are changed accordingly.

National Network—Florida

The listing for the National Network in Florida in appendix A to 23 CFR 658 contains a "Note" reading as follows:

I–75—Alligator Alley/FL 84 (Toll) between Golden Gate and US 27 Andytown is a designated part of the Interstate System but is unsigned and not available until constructed to current Interstate standards.

The Florida Division Office of the Federal Highway Administration has verified that Alligator Alley is now complete and has been constructed to Interstate standards. Appendix A is amended accordingly by eliminating the "Note."

Measurement of Cargo-Carrying Length

Section 4006 of the ISTEA amended section 411 of the Surface Transportation Assistance Act of 1982 (STAA) by adding subsection (j)(7) [now codified at 49 U.S.C. 31112(a)(1)], reading as follows:

CARGO CARRYING UNIT DEFINED.—As used in this subsection, "cargo carrying unit" means any portion of a commercial motor vehicle combination (other than the truck tractor) used for the carrying of cargo, including a trailer, semitrailer, or the cargo carrying section of a single unit truck.

This definition was carried forward into 23 CFR 658.5. However, its significance is found in Sec. 411(j)(1) which froze the length of the cargo carrying units of vehicles with two or more such units to not more than what was in actual, lawful operation in a State on June 1, 1991 [now 49 U.S.C. 31112(b)]. The current definition has been interpreted by some to mean that the length of each cargo carrying unit is to be measured separately and added together to get a total length. However, Sec. 411(j)(3) [49 U.S.C. 31112(a)(2)] provided as follows:

MEASUREMENT OF LENGTH.—For purposes of this subsection, the length of the cargo carrying units of a commercial motor vehicle combination is the length measured from the front of the first cargo carrying unit to the rear of the last cargo carrying unit.

In order to clarify how the cargo carrying units are to be measured to determine their allowable length under the ISTEA freeze, the definition of cargo carrying unit in 23 CFR 658.5 is amended by adding a sentence at the end specifying that they are to be measured from the front of the first unit to the rear of the last, including the hitch(es) between the units.

Grandfathered Semitrailer Lengths

Regulations in 23 CFR 658.13(b)(3) read as follows:

Except as noted in paragraphs (c)(1) and (2) of this section, no State shall impose an overall length limitation on commercial vehicles operating in truck tractor-semitrailer or truck tractor-

semitrailer-trailer combinations (emphasis added).

Paragraphs (c) (1) and (2) relate to the requirement that States must allow the use of grandfathered length semitrailers. The underlined provision suggests that there is some exception to the prohibition against an overall length on truck tractor-semitrailer and truck tractor-semitrailer-trailer combinations depending on the grandfathered length. It is deleted in order to clarify that the ban on overall length limits has nothing to do with grandfathered semitrailer lengths.

Grandfathered Weight Limits

Some States have asked whether they would lose their maximum grandfathered weight limits on the Interstate System by adopting lower weight limits. No, they would not. Grandfathered weights are vested on the date specified by Congress and are not affected by subsequent State action. In order to clarify this, a sentence is added at the end of 23 CFR 658.17(i) reading as follows:

Grandfathered weight limits are vested on the date specified by Congress and remain available to a State even if it chooses to adopt a lower weight limit for some period of time.

ISTEA Freeze—Utah

The maximum cargo carrying length of commercial motor vehicles under the ISTEA freeze is shown in appendix C to 23 CFR 658. The routes for truck-trailer-trailer combinations in Utah are shown as "Same as the UT–TT2 *combination with a cargo-carrying length greater than 85 feet"* (emphasis added). This fails to provide routing information for truck-trailer-trailer combinations with a cargo-carrying length of less than 85 feet. Information previously filed by the State shows that the routing for truck-trailer-trailer combinations is the same in all cases as for UT–TT2s (truck tractor and 2 trailing units). The text for "Routes" is revised to reflect this.

Rulemaking Analyses and Notices

The Administrative Procedure Act allows agencies engaged in rulemaking to dispense with prior notice to the public when the agency for good reason finds that such procedure is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b). The FHWA has determined that providing prior notice on this action is unnecessary because it merely amends regulations to incorporate statutory requirements and makes several technical corrections to 23 CFR part 658. This document also contains several interpretations and general statements of policy that are not subject to notice and comment under the Administrative Procedure Act. For the reasons set forth here, the FHWA has determined that it has good cause under 5 U.S.C. 553(d)(3) to make the rule effective upon publication in the **Federal Register.**

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is not a significant regulatory action within the meaning of E.O. 12866 nor is it considered significant within the meaning of the U.S. Department of Transportation regulatory policies and procedures. The changes reflect statutory requirements and make several technical corrections. It is anticipated that the economic impact of this rulemaking will be minimal. Therefore, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities. Most of these rules simply preserve the status quo. Many of the changes benefit truckers, albeit without significant economic consequences, by removing restrictions on their operations or correcting errors that could have led them to inadvertently violate Federal standards. For these reasons, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

This rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rulemaking relates to the Federal-aid Highway Program which is a financial assistance program in which State, local, or tribal governments have authority to adjust their program in accordance with changes made in the program by the Federal government, and thus is excluded from the definition of Federal mandate under the Unfunded Mandates Reform Act of 1995.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this proceeding does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The statutes underlying this rule—primarily the ISTEA and TEA–21—specify the Department's role. None of the changes preempts any significant State activity or authority.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This action does not add or expand a collection of information requirement for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 658

Grants programs—transportation, Highways and roads, Motor carrier—size and weight.

Issued on: December 10, 1998.

Kenneth R. Wykle,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA amends 23 CFR part 658, as set forth below:

PART 658—TRUCK SIZE AND WEIGHT, ROUTE DESIGNATIONS— LENGTH, WIDTH AND WEIGHT LIMITATIONS

1. The authority citation for 23 CFR part 658 is revised to read as follows:

Authority: 23 U.S.C. 127 and 315; 49 U.S.C. 31111–31114; 49 CFR 1.48.

2. In § 658.5, the definitions of "Automobile Transporters" and "Cargo-carrying unit" are revised to read as follows:

§ 658.5 Definitions.

Automobile transporters. Any vehicle combination designed and used specifically for the transport of

assembled highway vehicles, including truck camper units.

* * * * *

Cargo-carrying unit. As used in this part, cargo-carrying unit means any portion of a commercial motor vehicle (CMV) combination (other than a truck tractor) used for the carrying of cargo, including a trailer, semitrailer, or the cargo-carrying section of a single-unit truck. The length of the cargo carrying units of a CMV with two or more such units is measured from the front of the first unit to the rear of the last [including the hitch(es) between the units].

* * * * *

3. In § 658.13, paragraph (b)(3) is revised to read as follows:

§ 658.13 Length.

* * * * *

(b) * * *

(3) No State shall impose an overall length limitation on commercial vehicles operating in truck tractor-semitrailer or truck tractor-semitrailer-trailer combinations.

* * * * *

4. In § 658.17, paragraphs (i) and (k) are revised to read as follows:

§ 658.17 Weight.

* * * * *

(i) The provisions of paragraphs (b), (c), and (d) of this section shall not apply to single-, or tandem-axle weights, or gross weights legally authorized under State law on July 1, 1956. The group of axles requirement established in this section shall not apply to vehicles legally grandfathered under State groups of axles tables or formulas on January 4, 1975. Grandfathered weight limits are vested on the date specified by Congress and remain available to a State even if it chooses to adopt a lower weight limit for a time.

* * * * *

(k) Any vehicle which is regularly and exclusively used as an intrastate public agency transit passenger bus is excluded from the axle weight limits in paragraphs (c) through (e) of this section until October 1, 2003.

* * * * *

Appendix A to Part 658 [Amended]

5. Appendix A to part 658 is amended for the State of Florida by removing the note at the end of the listing for that State.

Appenix C to Part 658 [Amended]

6. Appendix C to part 658 is amended in the listing for the State of Utah for the combination "Truck-trailer-trailer" under the heading of "ROUTES" by removing the phrase, "combination with a cargo carrying length greater than 85 feet."

[FR Doc. 98–33760 Filed 12–21–98; 8:45 am]
BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 08–98–018]

RIN 2115–AE46

Special Local Regulations; Eighth Coast Guard District Annual Marine Events

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is revising Table 1, its list of annual marine events that occur within the Eighth Coast Guard District. This action is being taken to ensure the safety of life and property during each event, while avoiding the necessity of publishing a separate temporary regulation each year for each event. Table 1 reflects the approximate dates and locations of each annual recurring marine event.

DATES: This final rule will become effective February 22, 1999.

FOR FURTHER INFORMATION CONTACT: Project Attorney, Lieutenant Commander Jim Wilson at Commander (dl), Eighth Coast Guard District, 501 Magazine Street, New Orleans, LA 70130–3396, (504) 589–6188.

SUPPLEMENTARY INFORMATION:

Regulatory History

A notice of proposed rulemaking (NPRM) was published on Tuesday, June 16, 1998, (63 FR 32774) in the **Federal Register** proposing to revise Table 1 to 33 CFR 100.801, the list of annual marine events that occur within the Eighth Coast Guard District. That proposal also noted the revision would include the territories previously encompassed by the Second Coast Guard District as a result of the Eighth Coast Guard District's absorption of the Second Coast Guard District. The Coast Guard received no comments on the proposed rulemaking. A public hearing was not requested and one was not held.

Background and Purpose

This rulemaking updates the existing list of anticipated annual marine events in the Eighth Coast Guard District. This revision also reflects the Eighth Coast Guard District's absorption of the territories previously encompassed by the Second Coast Guard District. It does so by deleting 33 CFR § 100.201, the list of annual marine events in the old Second Coast Guard District, and by expanding 33 CFR § 100.801 to include both territories.

Regulatory Evaluation

This rule is not a significant regulator action under section 3(f) of Executive Order 12866 and did not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It has not been reviewed by the Office of Management and Budget under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979).

The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT was unnecessary. The economic impact is not significant because this rule serves only to update an already existing list of marine events and does not change the process for reviewing such occurrences.

Small Entities

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

The segment of the listed waterways regulated is the minimum necessary to assure the safety of life and property on or adjacent to navigable waters. These regulations are relatively brief in duration and will only affect marine traffic. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

No information is collected under this rule. This rule complies with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

Federalism Implications

The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications

to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard is revising its list of recurring marine events. The listing itself will not affect the environment. When an event application is received, the Coast Guard will conduct an environmental analysis for the event. Under figure 2-1 paragraph (34)(h) of Coast Guard Commandant Instruction M16475.1C, this revision is categorically excluded from further environmental documentation.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and record keeping requirements, Waterways.

Final Regulations

In consideration of the foregoing, the Coast Guard is amending Part 100 of Title 33, Code of Federal Regulations, as follows:

PART 100—[AMENDED]

1. The authority citation for Part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46; and 33 CFR 100.35.

§ 100.201 [Removed]

2. Remove § 100.201.

3. § 100.801 is amended by revising Table 1 to read as follows:

§ 100.801 Annual Marine Events In the Eighth Coast Guard District.

* * * * *

TABLE 1 of § 100.801

Group Upper Mississippi River:
- Fair St. Louis
  - Sponsor: Fair St. Louis Committee
  - Date: 3 Days—1st Week in July
  - Regulated Area: Upper Mississippi River miles 179.2–180.0, St. Louis, MO
- Fourth of July River Front Blast
  - Sponsor: Alton Exposition Commission
  - Date: 1 Day—1st Week in July
  - Regulated Area: River Front Park, Upper Mississippi River miles 202.5–203.5, Alton, IL
- Busch Beer Drag Boat Classic
  - Sponsor: St. Louis Drag Boat Association
  - Date: 2 Days—1st or 2nd Week of September
  - Regulated Area: Kaskaskia River miles 28.0–29.0, New Athens, IL
- The Great Steamboat Race
  - Sponsor: Delta Queen Steamboat Company
  - Date: 1 Day—4th of July
  - Regulated Area: Upper Mississippi River miles 173.6–179.2, St. Louis, MO
- Riverfest Power Boat Grand Prix
  - Sponsor: Twin City Power Boat Association
  - Date: 1 Day—2nd Saturday in June
  - Regulated Area: Upper Mississippi River miles 980.0–981.0, Little Falls, MN
- Oak Ridge Sprints—Rowing Race
  - Sponsor: Oak Ridge (Tennessee) Rowing Association
  - Date: 3 Days—3rd Weekend in July
  - Regulated Area: Clinch River miles 49.8–51.1, Anderson County, TN
- W.A.M.S.O. Ball Fireworks
  - Sponsor: St. Paul Parks and Recreation
  - Date: 1 Day—1st or 2nd Saturday in June
  - Regulated Area: Upper Mississippi River miles 839.1–839.7, St. Paul, MN
- Winona Downtown Arts & River Festival
  - Sponsor: Winona Downtown Cooperative
  - Date: 2 Days—2nd or 3rd Weekend in June
  - Regulated Area: Upper Mississippi River miles 725.0–726.0, Winona, MN
- La Crosse Riverfest
  - Sponsor: Riverfest Inc.
  - Date: 5 Days—Last Week of June or 1st Week of July
  - Regulated Area: Upper Mississippi River miles 698.0–699.0, La Crosse, WI
- Steamboat Days
  - Sponsor: Winona Area Jaycees
  - Date: 3 Days—1st Weekend in July
  - Regulated Area: Upper Mississippi River miles 725.0–726.0, Winona, MN
- Independence Day Celebration
  - Sponsor: Marquette American Legion
  - Date: 2 Days—1st Week in July
  - Regulated Area: Upper Mississippi River miles 634.5–634.7, Marquette, IA
- City of Redwing 4th of July Fireworks
  - Sponsor: City of Redwing
  - Date: 1 Day—4th of July
  - Regulated Area: Upper Mississippi River miles 790.0–791.0, Red Wing, MN
- City of Minneapolis 4th of July Fireworks
  - Sponsor: City of Minneapolis
  - Date: 1 Day—4th of July
  - Regulated Area: Upper Mississippi River miles 854.7–855.8, Minneapolis, MN
- Celebrate the Bridge Regatta
  - Sponsor: Minneapolis Rowing Club
  - Date: 1 Day—2nd or 3rd Saturday in July
  - Regulated Area: Upper Mississippi River miles 849.8–850.4, Minneapolis, MN

TABLE 1 of § 100.801—Continued

Hastings Rivertown Days
Sponsor: Hastings Chamber of Commerce
Date: 3 Days—3rd Weekend in July
Regulated Area: Upper Mississippi River miles 813.0–815.2, Hastings, MN
Lumberjack Days Festival
Sponsor: St. Croix Events and/or City of Stillwater
Date: 4 Days—3rd or 4th Weekend in July
Regulated Area: Lower St. Croix River miles 22.9–23.5, Stillwater, MN
Minneapolis Aquatennial
Sponsor: Minneapolis Aquatennial Association
Date: 9 Days—3rd Weekend through 4th Weekend in July
Regulated Area: Upper Mississippi River miles 854.7–856.2, Minneapolis, MN
Big Splash Festival
Sponsor: City of Prairie du Chien and Lentzkow Racing
Date: 4 Days—3rd Weekend of July
Regulated Area: Upper Mississippi River miles 634.5–636.0, Prairie du Chien, WI
River City Days
Sponsor: Red Wing Chamber of Commerce
Date: 2 Days—1st or 2nd Weekend in August
Regulated Area: Upper Mississippi River miles 790.0–792.0, Red Wing, MN
RiverFeast
Sponsor: Capital City Partnership d.b.a. RiverFeast
Date: 1 Day—3rd or 4th Saturday in July
Regulated Area: Upper Mississippi River miles 839.0–839.8, St. Paul, MN
Riverboat Days
Sponsor: City of Yankton, Twin City Power Boat Association, WNAX Radio
Date: 3 Days—3rd Weekend in August
Regulated Area: Missouri River miles 805.0–806.0, Yankton, SD
Labor Day Celebration
Sponsor: City of McGregor Chamber of Commerce
Date: 4 Days—Last Weekend in August
Regulated Area: Upper Mississippi River miles 633.0–634.0, McGregor, IA
Minnesota Orchestra on the Mississippi Fireworks Show
Sponsor: City of St. Paul Parks and Recreation
Date: 1 Day—1st or 2nd Saturday in September
Regulated Area: Upper Mississippi River miles 839.1–839.7, St. Paul, MN
Group Ohio Valley:
TRRA Scholastic Spring
Sponsor: Three Rivers Rowing Association, Pittsburgh, PA
Date: 1 Day—1st Sunday in May
Regulated Area: Allegheny River miles 2.0–4.0, Pittsburgh, PA
Albert Gallatin Regatta
Sponsor: Point Marion (Pennsylvania) Rotary Club
Date: 2 Days—Saturday & Sunday of Memorial Day Weekend
Regulated Area: Monongahela River miles 89.9–90.8, Point Marion, PA
Blessing of The Fleet
Sponsor: Pittsburgh Safe Boating Committee
Date: 1 Day—2nd or 3rd Sunday in June
Regulated Area: Allegheny River miles 0.0–0.2, Pittsburgh, PA
Saint Brendan Cup Rowing Race
Sponsor: Pittsburgh Irish Rowing Club
Date: 1 Day—2nd or 3rd Saturday in June
Regulated Area: Ohio River miles 7.0–9.0, Pittsburgh, PA
Lottie McAlice Rowing Race
Sponsor: Three Rivers Rowing Association, Pittsburgh, PA
Date: 2 Days—Saturday & Sunday Near July 15
Regulated Area: Allegheny River miles 2.0–3.0, Pittsburgh, PA
Oakmont Regatta
Sponsor: Oakmont Yacht Club, Oakmont, PA
Date: 2 Days—Last Saturday and Sunday in July
Regulated Area: Allegheny River miles 11.8–12.3, Oakmont, PA
City of Pittsburgh Light Up Night Fireworks
Sponsor: Citiparks
Date: 1 Day–1st Friday in November
Regulated Area: Ohio River miles 0.0–0.2, Pittsburgh, PA
City of Pittsburgh July 4th Celebration
Sponsor: Citiparks
Date: 1 Day—4th of July
Regulated Area: Ohio River miles 0.0–0.2, Pittsburgh, PA
EZ Challenge Speedboat Race
Sponsor: APR Events Group, New Martinsville, WV
Date: 2 Days—Saturday & Sunday on or about 4th of July
Regulated Area: Ohio River miles 77.0–78.0, Brooke County, WV
Steubenville (Ohio) Regatta Rumble On The River
Sponsor: Steubenville Regatta And Racing Association, Inc.

TABLE 1 of § 100.801—Continued

Date: 3 Days—Friday, Saturday & Sunday nearest August 15
Regulated Area: Ohio River miles 65.0–67.0, Jefferson County, OH
Pittsburgh Three Rivers Regatta
Sponsor: Pittsburgh Three Rivers Regatta, Inc.
Date: 7 Days—End of July or Beginning of August
Regulated Area: One mile around point at confluence of Allegheny River miles 0.0–0.1, Monongahela River miles 0.0–0.1, and Ohio River miles 0.0–0.1, Pittsburgh, PA
Armstrong County (Pennsylvania) Regatta
Sponsor: Three Rivers Outboard Racing Association
Date: 2 Days—Saturday & Sunday nearest August 15
Regulated Area: Allegheny River miles 43.8–45.7, Armstrong County, PA
Beaver County Riverfest
Sponsor: Beaver County Chamber of Commerce, Beaver, PA
Date: 3 Days—Friday, Saturday & Sunday nearest August 15
Regulated Area: Ohio River miles 25.1–25.8, Beaver River miles 0.1–0.3, Beaver County, PA
Head of The Ohio
Sponsor: Pittsburgh Mercy Foundation
Date: 1 Day—1st Saturday in October
Regulated Area: Allegheny River miles 0.0–3.3, Pittsburgh, PA
River Heritage Days Regatta And Powerboat Races
Sponsor: River Heritage Days Committee
Date: 2 Days—Saturday & Sunday—2nd or 3rd Weekend in June
Regulated Area: Ohio River miles 127.6–128.5, New Martinsville, WV
Point Pleasant Sternwheel Regatta
Sponsor: City of Point Pleasant
Date: 3 Days—Last Weekend in June
Regulated Area: Ohio River miles 260.0–261.0, Kanawha River miles 0.0–0.5, Point Pleasant, WV
St. Albans Riverfest
Sponsor: St. Albans Riverfest, Inc.
Date: 2 Days—1st Weekend in July
Regulated Area: Kanawha River miles 46.0–47.0, St. Albans, WV
Summer Motion Festival Tri-State Fireworks
Sponsor: Tri-State Fair and Regatta Committee
Date: 1 Day—4th of July
Regulated Area: Ohio River miles 322.4–322.6, Ashland, KY
Parkersburg Homecoming Festival
Sponsor: Parkersburg Homecoming Festival
Date: 2 Days—3rd Weekend in August
Regulated Area: Ohio River miles 184.0–185.0, Parkersburg, WV
Charleston Sternwheel Regatta
Sponsor: Charleston Festival Commission
Date: 4 Days—The 2 Weekends before Labor Day
Regulated Area: Kanawha River miles 57.0–59.0, Charleston, WV
Ohio River Sternwheel Festival
Sponsor: Ohio River Sternwheel Festival Commission
Date: 2 Days—1st or 2nd Weekend in September
Regulated Area: Ohio River miles 170.0–180.0, Marietta, OH
Thunder Over Louisville
Sponsor: Thunder Over Louisville
Date: 1 Day—3rd Saturday in April
Regulated Area: Ohio River miles 602.0–605.00, Louisville, KY
Kentucky Derby Festival Great Steamboat Race
Sponsor: Kentucky Derby Festival/Belle of Louisville Operating Board
Date: 1 Day—Last Week in April or First Week in May
Regulated Area: Ohio River 597.0–604.0, Louisville, KY
Thunder On The Ohio
Sponsor: Evansville Freedom Festival
Date: 3 Days—Last Weekend in June
Regulated Area: Ohio River miles 792.0–793.0, Evansville, KY
Augusta Sternwheel Days
Sponsor: City of Augusta/Sternwheel Days Committee
Date: 1 Day—Last Saturday in June
Regulated Area: Ohio River miles 426.0–429.0, Augusta, KY
Indiana Governor's Cap
Sponsor: Madison Regatta Inc.
Date: 3 Days—1st Weekend in July
Regulated Area: Ohio River miles 557.0–558.0, Madison, KY
Kentucky Drag Boat Association Inc.: Drag Boat Races
Sponsor: Kentucky Drag Boat Association Inc.
Date: 3 Days—End of August
Regulated Area: Green River miles 70.0–71.5, Livermore, KY
WEBN/Toyota Fireworks
Sponsor: WEBN
Date: 1 Day—Sunday before Labor Day

TABLE 1 of § 100.801—Continued

Regulated Area: Ohio River 469.2–470.5, Cincinnati, OH
Ducks On The Ohio
Sponsor: Goodwill Industries, Inc.
Date: 1 Day—2nd or 3rd Weekend in September
Regulated Area: Ohio River miles 792.0–793.0, Evansville, KY
Head of Licking Regatta
Sponsor: Kendle, Cincinnati Rowing Club, City of Newport
Date: 1 Day—Last Saturday in September
Regulated Area: Licking River miles 0.0–3.5, Newport, KY
Fleur De Lis Regatta
Sponsor: City of Louisville, KY
Date: 2 Days—Last Weekend in September
Regulated Area: Ohio River miles 602.0–604.0, Louisville, KY,
Eskimo Escapades—Water Ski Race
Sponsor: Skiers of Knoxville, TN
Date: 1 Day—2nd Saturday in January
Regulated Area: Tennessee River miles 648.0–649.0, Knoxville, TN
Tom White Invitational—Rowing
Sponsor: Oak Ridge (Tennessee) Rowing Association
Date: 1 Day—2nd or 3rd Saturday in March
Regulated Area: Clinch River miles 49.8–51.1, Anderson County, TN
Oak Ridge Scholastics—Rowing Shells
Sponsor: Oak Ridge (Tennessee) Rowing Association
Date: 1 Day—4th Saturday in April
Regulated Area: Clinch River miles 49.8–50.8, Anderson County, TN
Blessing of the Fleet—Parade of Boats
Sponsor: Jonathan Aurora Action Committee, Aurora, KY
Date: 1 Day—2nd or 3rd Weekend in May
Regulated Area: Tennessee River miles 42.0–43.0, Aurora, KY
Annual Boat Review—Marine Parade
Sponsor: Chattanooga Marine Trade Association
Date: 1 Day—1st Saturday in May
Regulated Area: Tennessee River miles 471.0–478.0, Hamilton County, TN
Festival On The Lake—Rowing Race
Sponsor: Oak Ridge (Tennessee) Rowing Association
Date: 2 Days—4th Weekend in June
Regulated Area: Clinch River miles 50.3–50.8, Anderson Country, TN
Riverbend Festival—Concerts and Fireworks
Sponsor: Friends of the Festival, Chattanooga, TN
Date: 4 Days—1st & 2nd Weekend in June
Regulated Area: Tennessee River miles 463.4–464.5, Chattanooga, TN
Annual Superman Celebration—Fireworks
Sponsor: Metro Chamber, Metropolis, IL
Date: 1 Day—2nd Saturday in June
Regulated Area: Ohio River miles 942.0–943.0, Metropolis, IL
Chattanooga Dam Triathlon—Lake Swim
Sponsor: Chattanooga Track Club
Date: 1 Day—4th Sunday in June
Regulated Area: Tennessee River miles 471.0–471.5, Chattanooga, TN
Fitness System's Lock Triathlon—Lake Swim
Sponsor: Greater Knoxville Triathlon Club
Date: 1 Day—4th Weekend in July
Regulated Area: Clinch River Miles 22.0–23.0, Loudon County, TN
Paducah Summer Festival—Fireworks
Sponsor: Paducah Promotions
Date: 1 Day—4th Weekend In July
Regulated Area: Ohio River miles 934.0–935.0, Paducah, KY
Independence Day Celebration—Fireworks
Sponsor: Paducah Parks Department
Date: 1 Day—4th of July
Regulated Area: Ohio River miles 935.5–936.0, Paducah, KY
Rocketman Triathlon—Lake Swim
Sponsor: Spring City Triathlon, Huntsville, AL
Date: 1 Day—2nd or 3rd Saturday in July
Regulated Area: Tennessee River miles 324.0–324.5, Madison County, TN
Independence Day Celebration—Boat Parade and Fireworks
Sponsor: Metropolitan Board of Parks and Recreation, Nashville, TN
Date: 1 Day—4th of July
Regulated Area: Cumberland River miles 190.0–191.0, Nashville, TN
4th of July Celebration—Fireworks
Sponsor: Players Riverboat Casino, Metropolis, IL
Date: 1 Day—3rd or 4th of July
Regulated Area: Ohio River miles 943.0–944.0, Metropolis, IL
My 102 Booms Day—Fireworks
Sponsor: WMYU Radio, Knoxville, TN

TABLE 1 of § 100.801—Continued

Date: 1 Day—1st Weekend in September
Regulated Area: Tennessee River miles 645.0–649.0, Knoxville, TN
Fall Color Cruise—Marine Parade
Sponsor: Alhambra Shrine, Chattanooga, TN
Date: 2 Day—3rd and 4th Saturdays in October
Regulated Area: Tennessee River miles 425.0–471.0, Chattanooga, TN
Chattanooga Head Race—Rowing Race
Sponsor: Look Out Rowing Club
Date: 1 Day—2nd Saturday in October
Regulated Area: Tennessee River miles 464.0–467.0, Chattanooga, TN
Head of Tennessee Regatta
Sponsor: Knoxville Rowing Association
Date: 1 Day—2nd Saturday in October
Regulated Area: Tennessee River miles 641.5–645.0, Knoxville, TN
Christmas on the River—Marine Parade
Sponsor: Chattanooga Downtown Partnership
Date: 1 Day—Last Weekend in November or 1st Weekend in December
Regulated Area: Tennessee River miles 464.0–469.0, Chattanooga, TN
Cross River Swim Paducah Summerfest
Sponsor: Paducah Tourist & Convention Commission
Date: 1 Day—3rd Saturday in July
Regulated Area: Ohio River miles 934.5–936, Paducah, KY
UT Coaches Regatta—Rowing Race
Sponsor: Oak Ridge (Tennessee) Rowing Association
Date: 1 Day—2nd or 3rd Saturday in May
Regulated Area: Clinch River miles 49.8–51.1, Anderson County, TN
Southeast Intercollegiate Rowing Championships—Rowing Race
Sponsor: Oak Ridge (Tennessee) Rowing Association
Date: 2 Days—3rd Weekend in April
Regulated Area: Clinch River miles 49.8–51.1, Anderson County, TN
NCAA Regional Championships—Rowing Race
Sponsor: Oak Ridge (Tennessee) Rowing Association
Date: 1 Day—2nd or 3rd Saturday in May
Regulated Area: Clinch River miles 49.8–51.1, Anderson County, TN
Oak Ridge Sprints—Rowing Race
Sponsor: Oak Ridge (Tennessee) Rowing Association
Date: 3 Days—3rd Weekend in July
Regulated Area: Clinch River miles 49.8–51.1, Anderson County, TN
Group Lower Mississippi River:
Memphis in May Canoe & Kayak Race
Sponsor: Outdoors, Inc.
Date: 1 Day—1st or 2nd Saturday in May
Regulated Area: Lower Mississippi River miles 735.5–738.5, Memphis, TN
Duckin' Down the River Rubber Duck Race
Sponsor: Young Women's Community Guild
Date: 1 Day—1st or 2nd Saturday in May
Regulated Area: Arkansas River miles 308.2–308.6, Fort Smith, AR
Memphis in May Sunset Symphony Fireworks Display
Sponsor: Memphis in May International Festival, Inc.
Date: 1 Day—Saturday before Memorial Day
Regulated Area: Lower Mississippi River miles 735.0–736.0, Memphis, TN
Riverfest, Little Rock Arkansas
Sponsor: Riverfest, Inc.
Date: 1 Day—Sunday before Memorial Day
Regulated Area: Arkansas River miles 118.8–119.5, Main Street Bridge, Little Rock, AR
Riverfest Fireworks Display
Sponsor: Old Fort Riverfest Committee
Date: 1 Day—2nd or 3rd Saturday in June
Regulated Area: Arkansas River miles 297.0–298.0, Fort Smith, AR
Star Spangled Celebration
Sponsor: WMC Stations
Date: 1 Day—4th of July
Regulated Area: Lower Mississippi River miles 735.5–736.5, Mud Island, Memphis, TN
Pops on the River Fireworks Display
Sponsor: Arkansas Democrat-Gazette
Date: 1 Day—4th of July
Regulated Area: Arkansas River miles 118.8–119.5, Main Street Bridge, Little Rock, AR
Meat on the River Barbecue Cook-Off Fireworks Display
Sponsor: Meat on the Mississippi
Date: 1 Day—1st Friday or Saturday in August
Regulated Area: Lower Mississippi River miles 847.0–849.0, Caruthersville, MO
Budweiser/Jesse Brent Memorial Boat Racing Association
Sponsor: Budweiser/Jesse Brent Memorial Boat Racing Association
Date: 1 Day—Sunday before Labor Day

TABLE 1 of § 100.801—Continued

Regulated Area: Lake Ferguson, Lower Mississippi River miles 522.0–537.0, Greenville, MS
Arkansas National Drag Boat Association
Sponsor: Mid-South Drag Boat Association
Date: 2 Days—Saturday and Sunday before Labor Day
Regulated Area: Lake Langhofer, Arkansas River miles 71.0–71.5, Pine Bluff, AR
Group Mobile:
Air Sea Rescue
Sponsor: Gulf Coast Shows
Date: 1st or 2nd Weekend in February
Regulated Area: Mobile River ½ mile up river and ½ mile down river from the Mobile Convention Center, Mobile, AL
Annual Labor Day Fireworks
Sponsor: City of Destin, FL
Date: Day of or Day before Labor Day
Regulated Area: Destin Pass Between and Including Buoys 8 & 9, Destin, FL
Bass Tournament Weight-In
Sponsor: Gulf Coast Shows
Date: 2 Days—3rd or 4th Weekend in February
Regulated Area: Mobile River ½ mile upriver and ½ mile down river from the Mobile Convention Center, Mobile, AL
Blessing of the Fleet—Biloxi, MS
Sponsor: St. Michael's Catholic Church
Date: 1 Day—1st or 2nd Sunday in May
Regulated Area: Entire Biloxi Channel, Biloxi, MS
Blessing of the Fleet—Bayou La Batre, AL
Sponsor: St. Margaret Church
Date: 1 Day—2nd or 3rd Sunday in May
Regulated Area: Entire Bayou La Batre, Bayou La Batre, AL
Flag Day Parade
Sponsor: Warrior River Boating Association
Date: 1 Day—July 5th
Regulated Area: Warrior River Bankhead Lake River miles 368.4–386.4, Cottondale AL
Independence Day Fireworks, Destin, FL
Sponsor: City of Destin
Date: 1 Day—4th of July
Regulated Area: Destin Eastpass between and including Buoys 8 & 9, Destin, FL
Independence Day Fireworks, Gulf Shores, AL
Sponsor: City of Gulf Shores
Date: 1 Day—4th of July
Regulated Area: 500 yard radius around fireworks platform adjacent to Main Pavilion at Gulf Shore Public Beach, Gulf Shores, AL
Independence Day Fireworks, Panama City, FL
Sponsor: US Navy MWR NSWCCSS CP21
Date: 1 Day—4th of July
Regulated Area: 500 yard radius around fireworks platform adjacent to Hathaway Bridge in St. Andrews Bay, Panama City, FL
Water Ski Demonstrations
Sponsor: Gulf Coast Shows
Date: 2 Days—3rd or 4th Weekend in February
Regulated Area: Mobile River ½ mile upriver and ½ mile down river from the Mobile Convention Center, Mobile, AL
Independence Day Fireworks, Niceville & Valparaiso, FL
Sponsor: Niceville-Valparaiso Bay Chamber of Commerce
Date: 1 Day—4th of July
Regulated Area: Entire Boggy Bayou, Valparaiso, FL
Christmas Afloat, Tuscaloosa, AL
Sponsor: Christmas Afloat, Inc.
Date: 1 Day—2nd or 3rd Weekend in December
Regulated Area: Warrior River miles 338.0–341.0, Tuscaloosa County, AL
Group New Orleans:
The Blessing of the Fleet and Fireworks Display, Morgan City, LA
Sponsor: LA Shrimp and Petroleum Festival and Fair Assoc., Inc.
Date: 1 Day—Sunday of Labor Day Weekend
Regulated Area: Berwick Bay From Junction of the Lower Atchafalaya River at Morgan City, LA to Berwick Locks Buoy 1 (LLNR 18445)
July Fourth Fireworks Display
Sponsor: City of Morgan City, LA
Date: 1 Day—4th of July
Regulated Area: Gulf Intracoastal Waterway Between mile Markers 95 and 97 and North to Railroad Bridge, Morgan City, LA
Blessing of The Fleet
Sponsor: Our Lady of Prompt Succor Catholic Church, Golden Meadow, LA
Date: 1 Day—2nd Saturday in May
Regulated Area: Bayou Lafourche in Downtown Golden Meadow, LA, area
Annual Patterson Pirogue Race, Patterson, LA
Sponsor: Rotary Club of Patterson
Date: 1 Day—4th of July
Regulated Area: Lower Atchafalaya River—Jennings Bridge to 1 mile South of Jennings Bridge, Patterson, LA
USS KIDD Star Spangled Celebration, Baton Rouge, LA
Sponsor: USS KIDD and Nautical Center

TABLE 1 of § 100.801—Continued

Date: 1 Day—4th of July
Regulated Area: Lower Mississippi River miles 229.4–229.6, Baton Rouge, LA
Uncle Sam Jam Fireworks, Alexandria, LA
Sponsor: Champion Broadcasting of Alexandria
Date: 1 Day—4th of July
Regulated Area: Red River, Alexandria, LA
Monroe Jaycees Fireworks, Monroe, LA
Sponsor: Monroe Jaycees
Date: 1 Day—4th of July
Regulated Area: Ouachita River at the Parish Court House, Monroe, LA
Boomtown Casino Fireworks, Harvey, LA
Sponsor: Boomtown Casino
Date: 1 Day—4th of July
Regulated Area: Harvey Canal, Harvey, LA
Kenner Fireworks, Kenner, LA
Sponsor: City of Kenner
Date: 1 Day—4th of July
Regulated Area: 500 yard radius around fireworks platform in Lake Pontchartrain at Williams Blvd., Kenner, LA
Bally's Casino Fireworks, New Orleans, LA
Sponsor: Bally's Casino
Date: 1 Day—4th of July
Regulated Area: 500 yard radius around fireworks platform in Lake Pontchartrain, ¼ miles North of Bally's Casino, New Orleans, LA
Riverfront Marketing Fireworks, New Orleans, LA
Sponsor: Riverfront Marketing Group
Date: 1 Day—4th of July
Regulated Area: 500 yard radius around fireworks platform adjacent to Woldenburg Park in Mississippi River, New Orleans, LA
Riverfront Marketing Fireworks, New Orleans, LA
Sponsor: Jax Brewery
Date: 1 Day—December 31
Regulated Area: 500 yard radius around fireworks platform in Mississippi River adjacent to Woldenburg Park, New Orleans, LA
Riverfront Marketing Fireworks, New Orleans, LA
Sponsor: Riverfront Marketing Group
Date: 1 Day—Lundi Gras Day
Regulated Area: 500 yard radius around fireworks platform in Mississippi River adjacent to Algiers Point, New Orleans, LA
Annual Hogdown Fireworks, Mandeville, LA
Sponsor: Mr. R.C. Lunn
Date: 1 Day—4th of July
Regulated Area: 500 yard radius around fireworks platform adjacent to intersection of Tangipahoa River and Lake Pontchartrain, Mandeville, LA
Group Galveston:
Neches River Festival, Beaumont, TX
Sponsor: Neches River Festival, Inc.
Date: 2 Days—3rd Weekend in April
Regulated Area: Neches River from Collier's Ferry Landing to Lawson's Crossing at the end of Pine St., Beaumont, TX
Contraband Days Fireworks Display, Lake Charles, LA
Sponsor: Contraband Days Festivities, Inc.
Date: 1 Day—1st Saturday of May
Regulated Area: 500 foot radius from the fireworks barge in Lake Charles anchored at approximate position 30°13′54″N 093°13′42″W, Lake Charles, LA
Neches River 4th of July Celebration, Beaumont, TX
Sponsor: City of Beaumont
Date: 1 Day—4th of July
Regulated Area: River Front Park, Beaumont, TX—All waters of the Neches River, bank to bank, from the Trinity Industries Dry Dock to the northeast corner of the Port of Beaumont's dock No. 5
Christmas on the Neches River, Port Neches Park
Sponsor: Port Neches Chamber of Commerce
Date: 1 Day—1st Saturday in December
Regulated Area: Waters adjacent to Neches River Front Park, Port Neches, TX
Clear Lake Fireworks Display, Clear Lake, Houston, TX
Sponsor: Clear Lake Chamber of Commerce
Date: 1 Day—4th of July
Regulated Area: Rectangle extending 500 feet East, 500 feet West; 1000 feet North, and 1000 feet South around fireworks barge at Light #19 on Clear Lake, Houston, TX
Sylvan Beach Fireworks Display, Sylvan Beach, Houston, TX
Sponsor: City of LaPorte
Date: 1 Day—Last of June or Early July
Regulated Area: Rectangle Extending 250 feet East, 250 feet West; 1000 feet North, and 1000 feet South, around fireworks barge at Sylvan Beach, Houston, TX
Group Corpus Christi:
Bayfest Fireworks Display
Sponsor: Bayfest, Inc.
Date: 2 Days—3rd Friday & Saturday in September
Regulated Area: Bayfront, All Waters inside Corpus Christi Marina Levee, Corpus Christi Bay, TX
Great Tugboat Challenge
Sponsor: Bayfest, Inc.

TABLE 1 of § 100.801—Continued

	Date: 2 Days—3rd Friday & Saturday in September
	Regulated Area: Bayfront, All Waters inside Corpus Christi Marina Levee, Corpus Christi Bay, TX
Buccaneer Days Fireworks Display	
	Sponsor: Buccaneer Commission, Inc.
	Date: 1 Day—Last Friday in April or First Friday in May
	Regulated Area: Bayfront, All Waters inside Corpus Christi Marina Levee, Corpus Christi Bay, TX
Corpus Christi 4th of July Fireworks Display	
	Sponsor: City of Corpus Christi
	Date: 1 Day—4th of July
	Regulated Area: Bayfront, All Waters inside Corpus Christi Marina Levee, Corpus Christi Bay, TX
Harbor Lights	
	Sponsor: City of Corpus Christi
	Date: 1 Day—1st Saturday in December
	Regulated Area: Bayfront, All Waters inside Corpus Christi Marina Levee, Corpus Christi Bay, TX

Dated: December 7, 1998.

Paul J. Pluta,

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

[FR Doc. 98–33849 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–15–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD01–97–098]

RIN 2115–AE47

Drawbridge Operation Regulations: Taunton River, MA

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the operating rules for the Brightman Street Bridge, mile 1.8, over the Taunton River between Somerset and Fall River, Massachusetts

This final rule requires one hour's advance notice during the winter months at night and two hours' on Christmas and New Year's day. This change to the regulations will remove the requirement to crew the bridge because there have been few requests to open the bridge during the above time periods.

DATES: This final rule is effective January 21, 1999.

ADDRESSES: Documents as indicated in this preamble are available for inspection or copying at the First Coast Guard District Office, 408 Atlantic Avenue, Boston, Ma. 02110–3350, between 7 a.m. and 2 p.m., Monday through Friday, except Federal holidays. The telephone number is (617) 223–8364.

FOR FURTHER INFORMATION CONTACT: John W. McDonald, Project Officer, First Coast Guard District, (617) 223–8364.

SUPPLEMENTARY INFORMATION: .

Regulatory History

The Coast Guard published a notice of proposed rulemaking entitled Drawbridge Operation Regulations; Taunton River, MA., in the **Federal Register** (63 FR 27241) on May 18, 1998. The Coast Guard received three comment letters in response to the notice of proposed rulemaking. A public hearing was requested. The Coast Guard did not hold a public hearing because the Coast Guard determined that an opportunity for oral comments would not aid in this rulemaking. All the comments were the same. The bridge-opening logs did not support the claims in the comment letters. The logs showed very few openings historically during the times the bridge will be in a one-hour advance-notice status, and no new information was submitted to justify a need to have the bridge crewed at all times. The record clearly indicated that there were only a few openings at night in the winter months.

Background

The Brightman Street Bridge has a vertical clearance at mean high water (MHW) of 27 feet and at mean low water (MLW) of 31 feet. The bridge is presently required to open on signal at all times. The bridge owner, Massachusetts Highway Department (MHD), requested that the Coast Guard consider a change to the operating regulations for the Brightman Street Bridge to require one hour's advance notice for openings from November 1 through March 31, between 6 p.m. and 6 a.m., and two hours' from 6 p.m. to midnight on December 24th, all day on December 25th, and all day on January 1st.

The bridge-opening logs for the Brightman Street Bridge documented openings November 1st through March 31st, 6 p.m. to 6 a.m., as follows: 1995–1996, 11 openings; 1996–1997, 15 openings; and 1997–1998, 20 openings. The Coast Guard believes that it is reasonable to allow this bridge to operate on one-hour's advance notice during the three days because there have been so few requests to open the bridge during them. The advance notice requirement for December 24th and 25th and January 1st has been granted each year by the Coast Guard as a result of a written request from the bridge owner. There have been no requests to open the bridge on those days according to the bridge-opening logs. This final rule will make the holiday advance-notice requirement for these three days a permanent part of the bridge operating regulations and will also change the regulations to relieve the bridge owner of the present requirement to crew the bridge during the winter months at night November 1st through March 31st from 6 p.m. to 6 a.m. daily.

Discussion of Comments and Changes

The Coast Guard received two comment letters in response to the notice of proposed rulemaking during the comment period. Both comment letters opposed the advance notice requirement during the winter months at night. The letters were from an attorney representing Shaws Boat Yard and Somerset Marina, Inc. The letters were identical in content. The letters requested a public hearing to discuss the proposed regulations, claiming that 65% to 75% of all hauling and launching of vessels at their facilities occur at night, November through March from 6 p.m. to 6 a.m. daily. The marinas indicated concern that they could lose business as a result of the bridge being placed on one hour's advance notice for openings during the winter months at night. They believe that the mariners would not be willing to provide the required one hour's notice for bridge openings. The bridge-opening logs for the last three years do not support this claim. The Coast Guard reached a decision for this final rule based upon the factual log data.

The bridge owner will be required by this final rule to open the bridge no longer than one hour after notice is given to open the bridge from November 1st through March 31st from 6 p.m. to 6 a.m. daily. The bridge log data from the last three years, 1995–1996, 1996–1997, and 1997–1998, November through March, indicate eleven (11), fifteen (15), and twenty (20) openings respectively. The total number of days November through March is one hundred fifty-one (151) days. Eleven, fifteen and twenty bridge openings during the last three years does not support the need to require a drawtender to be present at the bridge at all times. The mariners are not being prevented from using the bridge but are just being asked to provide one hour's advance notice for bridge openings during this time period.

A third letter was received from the marinas after the comment period closed proposing an alternative schedule. The proposal would require the on call period to begin on November 20th and end March 15th instead of November 1st to March 31st. The marinas claimed that they needed openings during this time period. The Coast Guard reviewed this alternative proposal in an effort to balance the needs of both the mariners and the bridge owner. The logs indicated 4 openings last winter during the evening from November 1st to November 20th and no openings in the evening from March 15th to March 31st. The log data simply did not show a need to crew the bridge the extra month this alternate proposal would require considering that a drawtender will be required, by this rule, to be at the bridge within an hour after notice is given for an opening.

In light of the data reviewed, the Coast Guard believes that the request to require one hour's notice during the winter night time hours is reasonable. The mariners can still pass through the bridge at all times so long as they provide this notice. No hearing was held, and no changes have been made to this rule.

Regulatory Evaluation

This final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It has not been reviewed by the Office of Management and Budget under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this final rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. This conclusion is based on the fact that bridges must operate in accordance with the needs of navigation while providing for the reasonable needs of land transportation. This final rule adopts the operating hours which the Coast Guard believes to be appropriate because there have been so few requests to open the bridge during the time period the bridge will be on an advance notice status. The proposed advance notice requirements should still provide for the current needs of navigation and allow the bridge owner to not crew the bridge during periods when there are few requests to open the bridge. The Coast Guard believes this final rule achieves the requirement of balancing the needs of navigation and the needs of vehicular transportation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard considered whether this final rule will have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations less than 50,000. Therefore, for the reasons discussed in the Regulatory Evaluation section above, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

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

Federalism

The Coast Guard has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this final rule and concluded that, under Figure 2–1, paragraph 32(e), of Commandant Instruction M16475.1C, this final rule is categorically excluded from further environmental documentation because promulgation of changes to drawbridge regulations have been found to not have a significant effect on the environment. A written "Categorical Exclusion Determination" is not required for this final rule.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. Section 117.619 is revised to read as follows:

§ 117.619 Taunton River.

(a) The owners of the Brightman Street and Bristol County bridges shall provide and keep in good legible condition clearance gauges for each draw with figures not less than twelve inches high, designed, installed, and maintained according to the provisions of § 118.160 of this chapter.

(b) The draw of the Brightman Street Bridge, mile 1.8, between Somerset and Fall River shall open on signal; except that from November 1 through March 31, between 6 p.m. and 6 a.m. daily, the draw shall open if at least one hour's advance notice is given and that, from 6 p.m. to midnight on December 24th and all day on December 25th and January 1st, the draw shall open on signal if at least two hours' notice is given. Please give all notice by calling the number posted at the bridge.

(c) The Bristol County Bridge, mile 10.3, shall open on signal if at least twenty-four hours' notice is given by calling the number posted at the bridge.

Dated: December 10, 1998.

R.M. Larrabee,

Rear Admiral, U.S. Coast Guard Commander, First Coast Guard District.

[FR Doc. 98–33848 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–15–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TN–197–1–9834a; FRL–6205–1]

Approval and Promulgation of Revisions to the Tennessee State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving revisions to Paragraph 1200–3–18–.83(1) of the Tennessee State Implementation Plan (SIP). The revisions address how to determine the efficiency of Volatile Organic Compound (VOC) capture systems.

DATES: This direct final rule is effective on February 22, 1999 without further notice, unless EPA receives adverse comment by January 21, 1999. If EPA receives adverse comments, we will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: You should address comments on this action to Michele Notarianni at the EPA, Region 4 Air, Pesticides, and Toxics Management Division, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303.

Copies of documents related to this action are available for the public to review during normal business hours at the locations below. If you would like to review these documents, please make an appointment with the appropriate office at least 24 hours before the visiting day. Reference file TN 197. The Region 4 office may have additional documents not available at the other locations.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

Environmental Protection Agency, Region 4 Air, Pesticides, and Toxics Management Division, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303–3104. Michele Notarianni, (404) 562–9031.

Tennessee Department of Environment and Conservation, Division of Air Pollution Control, L & C Annex, 9th Floor, 401 Church Street, Nashville, Tennessee 37243–1531. Phone number: (615) 532–0554.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni at (404) 562–9031.

SUPPLEMENTARY INFORMATION:

I. Background

EPA is approving revisions to Paragraph 1200–3–18–.83(1) of the Tennessee SIP. These revisions are as follows.

- Change the primary reference source for capture efficiency test requirements and specifications to EPA's *Capture Efficiency Testing Guidance* dated January 9, 1995;
- Specify where to access EPA's guidance document; and
- Require EPA's approval for alternate methods or procedures other than those specified in EPA's guidance in addition to the approval of the Technical Secretary of Tennessee's Air Pollution Control Board.

The State of Tennessee must make this rule change to gain approval of Tennessee's VOC regulations to meet requirements under Section 182(b)(2) of the Clean Air Act. Section 182(b)(2) requires states to submit rule revisions requiring implementation of reasonably available control technology (RACT) for certain VOC sources. (These requirements are commonly referenced as "VOC RACT Catch-Ups.") The State of Tennessee submitted the revisions to its air pollution control regulations through the Tennessee Air Pollution Control Board on May 8, 1997, after holding a public hearing on September 17, 1996, and securing Board approval.

II. Analysis of State's Submittal

EPA is approving the State of Tennessee's rule revisions because the revisions correct the references to capture efficiency test requirements and specifications to meet the final EPA requirements, making these requirements fully approvable.

III. Final Action

EPA is approving the aforementioned changes to the SIP. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective February 22, 1999 without further notice unless the Agency receives relevant adverse comments by January 21, 1999.

If the EPA receives such comments, then EPA will publish a notice withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Only parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on February 22, 1999 and no further action will be taken on the proposed rule.

IV. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, entitled "Regulatory Planning and Review."

B. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria,

the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.*, v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

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

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 22, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone.

Dated: November 3, 1998.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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

PART 52—[AMENDED]

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

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

Subpart RR—Tennessee

2. Section 52.2220, is amended by adding paragraph (c)(163) to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

(163) Revisions to the Tennessee Air Pollution Control Regulations submitted on May 8, 1997.

(i) Incorporation by reference.

Paragraph (1) of Rule 1200–3–18-.83 TEST METHODS AND COMPLIANCE PROCEDURES· EMISSION CAPTURE AND DESTRUCTION OR REMOVAL EFFICIENCY AND MONITORING REQUIREMENTS effective on April 15, 1997.

(ii) Other material. None.

[FR Doc. 98–33837 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region VII Docket No. 056–1056a; FRL–6206–1]

Approval and Promulgation of Implementation Plans; Missouri; Designation of Areas For Air Quality Planning Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve certain portions of the Missouri construction permits rule as an amendment to the Missouri State Implementation Plan (SIP). These revisions make minor corrections to the "Construction Permits Required" rule to increase readability and correct typographical and punctuation errors.

DATES: This direct final rule is effective on February 22, 1999 without further notice, unless the EPA receives adverse comment by January 21, 1999. If adverse comment is received, the EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Comments may be addressed to Kim Johnson, Environmental Protection Agency, Air Planning and Development Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101.

Copies of the state submittal(s) are available at the following addresses for inspection during normal business hours: Environmental Protection Agency, Air Planning and Development Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101; and the Environmental Protection Agency, Air and Radiation Docket and Information Center, Air Docket (6102), 401 M Street, SW, Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kim Johnson at (913) 551–7975.

SUPPLEMENTARY INFORMATION:

What Is a SIP?

Section 110 of the Clean Air Act (CAA) requires states to develop air pollution regulations and control strategies to ensure that state air quality meets the national ambient air quality standards established by the EPA. These ambient standards are established under section 109 of the CAA, and they currently address six criteria pollutants. These pollutants are: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide.

Each state must submit these regulations and control strategies to the EPA for approval and incorporation into the Federally enforceable SIP.

Currently each state has a Federally approved SIP which protects air quality primarily by addressing air pollution at its point of origin. These SIPs can be extensive, containing state regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

What Is the Federal Approval Process for a SIP?

In order for state regulations to be incorporated into the Federally enforceable SIP, states must formally adopt the regulations and control strategies consistent with state and Federal requirements. This process generally includes a public notice, public hearing, public comment period, and a formal adoption by a state-authorized rulemaking body.

Once a state rule, regulation, or control strategy is adopted, the state submits it to the EPA for inclusion into the SIP. The EPA must provide public notice and seek additional public comment regarding the proposed Federal action on the state submission. If adverse comments are received, they must be addressed prior to any final Federal action by the EPA.

All state regulations and supporting information approved by the EPA under section 110 of the CAA are incorporated into the Federally approved SIP. Records of such SIP actions are maintained in the Code of Federal Regulations (CFR) at Title 40, Part 52 entitled "Approval and Promulgation of Implementation Plans." The actual state regulations which are approved are not reproduced in their entirety in the CFR but are "incorporated by reference," which means that the EPA has approved a given state regulation with a specific effective date.

What Does Federal Approval of a State Regulation Mean to me?

Enforcement of the state regulation before and after it is incorporated into the Federally approved SIP is primarily a state responsibility. However, after the regulation is Federally approved, the EPA is authorized to take enforcement action against violators. Citizens are also offered legal recourse to address violators as described in the CAA.

What is Being Addressed in this Notice?

The revision to Rule 10 CSR 10–6.060, "Construction Permits Required," makes minor changes to the existing rule to increase readability, correct typographical and punctuation errors, and maintain consistency with the Federal regulations. For example, changing "annual geometric mean" to "annual arithmetic mean" when referring to the total suspended particulate matter makes this rule consistent with the Federal regulations.

What Is not Being Addressed in This Notice?

The revision also adds a Section (9) to the rule which implements 112(g) requirements of the 1990 CAA Amendments. Section 112(g) of the CAA requires states to develop "case-by-case" maximum achievable control technology (MACT) standards if the EPA has not issued a MACT standard for that particular type of hazardous air pollutant source. These "case-by-case" standards apply to industries that are major sources of hazardous air pollutants and plan to construct or reconstruct before a standard is set.

We will not act on Section (9) in this action because it is a part of the Section 112 Air Toxics Program and not a part of the Section 110 Criteria Pollutant Program.

What Action Is the EPA Taking?

The EPA is processing this action as a direct final because the revisions make minor corrections to the existing rule which are noncontroversial. Therefore, we do not anticipate any adverse comments.

Conclusion

Final Action

The EPA is taking final action to approve, as an amendment to the SIP, the revision to Rule 10 CSR 10–6.060, "Construction Permits Required," submitted by the state of Missouri on May 28, 1998, except Section (9).

The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, the EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective February 22, 1999 without further notice unless the Agency receives adverse comments by January 21, 1999.

If the EPA receives such comments, then the EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a

subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on February 22, 1999, and no further action will be taken on the proposed rule.

Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, entitled "Regulatory Planning and Review."

B. Executive Order 12875

Under E.O. 12875, the EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or the EPA consults with those governments. If the EPA complies by consulting, E.O. 12875 requires the EPA to provide to the OMB a description of the extent of the EPA's prior consultation with representatives of affected state, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 12875 requires the EPA to develop an effective process permitting elected officials and other representatives of state, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that the EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under E.O. 13084, the EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, E.O. 13084 requires the EPA to provide to the OMB, in a separately identified section of the preamble to the rule, a description of the extent of the EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, E.O. 13084 requires the EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and Subchapter I, Part D of the CAA do not create any new requirements but simply approve requirements that the state is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids the EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.*, v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act") signed into law on March 22, 1995, the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to state, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under section 205, the EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves preexisting requirements under state or local law and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The 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 U.S. Comptroller General prior to publication of the rule in the **Federal Register**. This

rule is not a "major rule" as defined by 5 U.S.C. 804(2).

H. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 22, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 2, 1998.

William Rice,

Acting Regional Administrator, Region VII.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart AA—Missouri

2. Section 52.1320 is amended by adding paragraph (c)(110) to read as follows:

§ 52.1320 Identification of plan.

* * * * *

(c) * * *

(110) On May 28, 1998, the Missouri Department of Natural Resources submitted revisions to the construction permits rule.

(i) Incorporation by reference.

(A) Missouri Rule 10 CSR 10–6.060, "Construction Permits Required," except Section (9), effective April 30, 1998.

[FR Doc. 98–33835 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD068–3037; FRL–6202–6]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Control of Volatile Organic Compound From Sources That Store and Handle JP–4 Jet Fuel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maryland. This revision establishes and requires volatile organic compound (VOC) emission control requirements for sources that store or handle JP–4 jet fuel. The intended effect of this action is to approve revisions to COMAR 26.11.13 into the Maryland SIP in accordance with the Clean Air Act.

EFFECTIVE DATE: This final rule is effective on January 21, 1999.

ADDRESSES: Comments may be mailed to David L. Arnold, Chief, Ozone and Mobile Sources Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; and the Maryland Department of the Environment, 2500 Broening Highway, Baltimore, Maryland 21224.

FOR FURTHER INFORMATION CONTACT: Kristeen Gaffney at (215) 814–2092, or by e-mail at gaffney.kristeen@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: On August 26, 1998, EPA published a direct final rule [63 FR 45397] approving Maryland's revisions to COMAR 26.11.13, "Control of Gasoline and Volatile Organic Compound Storage and Handling." The formal SIP revision was submitted by Maryland on March 31, 1998. In the August 26, 1998 direct final rulemaking, EPA stated that if adverse comments were received on the final approval within 30 days of its publication, EPA would publish a document announcing the withdrawal of its direct final rulemaking action. Because EPA received adverse comments on the direct final rulemaking within the prescribed comment period, EPA withdrew the August 26, 1998 final rulemaking action on Maryland's revisions to COMAR 26.11.13. This withdrawal document appeared in the **Federal Register** on October 9, 1998 [63 FR 54355]. A companion proposed rulemaking notice to approve Maryland's revisions to COMAR 26.11.13 was published in the Proposed Rules section of the August 28, 1998 **Federal Register** [63 FR 45443].

Response to Comments

EPA received two letters commenting on the August 26, 1998 direct final rulemaking from Boeing and the Air Transportation Association of America. The letters requested that EPA further clarify the intent of Maryland's regulation and whether Maryland's regulation could be construed to apply to the commercial airline industry. The following discussion summarizes and responds to the comments received.

Comment: Is it the EPA's intent that this regulation apply to all jet fuel storage and handling systems in Maryland, or only those that handle JP–4?

Response: The Technical Support Document (TSD) submitted in support of Maryland's SIP revision request suggests that COMAR 26.11.13 is intended to apply to military installations that handle JP–4 jet fuel. According to the State, "the purpose of the amendments to COMAR 26.11.13 is to establish reasonably available control technology (RACT) requirements for the storage and handling of JP–4, a jet fuel and volatile organic compound (VOC)." The State's TSD goes on to state that "JP–4 is used as a fuel primarily in military aircraft." Under the section entitled "Affected Industry in Maryland", the TSD notes that the following facilities in Maryland store and handle jet fuels: Andrews Air Force Base, Patuxent Naval Air Station and Steuart Petroleum.

COMAR 26.11.13 does not define the term "jet fuel" per se, but does define "gasoline" as follows: "Gasoline means a petroleum distillate or alcohol, or their mixtures, having a true vapor pressure within the range of 1.5 to 11 pounds per square inch absolute (psia) (10.3 to 75.6 kilonewton/square meter) that is used as fuel for internal combustion engines *or aircraft* [emphasis added]." According to the Maryland Department of Environment, JP°4 jet fuel has a vapor pressure of 1.6 psia at 70oF, and therefore, is defined as a gasoline under the regulation and subject to the rule's

provisions. By its intent, Maryland's regulation is not meant to apply to other jet fuels, whether for commercial or military use.

Comment: EPA's proposed approval mistakenly intimates that JP–4 includes all jet fuel. In so doing, it has effectively misstated the purpose of the amended Maryland regulation noting for example, without qualification, that the SIP revision is intended "to establish VOC emission control requirements on sources that store and handle jet fuel." The approval should be clarified to recognize the distinction in the regulation between JP–4 and those jet fuels which were not intended to be the subject of the SIP revision because they do not possess volatility properties similar to gasoline.

Response: In the SIP submittal, both Maryland's cover letter and TSD that accompanied the revisions to COMAR 26.11.13 state that the amendments establish RACT requirements for the storage and handling of JP–4, a jet fuel. EPA agrees that the statement referenced by the commenter may have been misleading by implying that this regulation applies to jet fuels other than JP–4. EPA agrees with the commenter that jet fuels that do not possess the volatility properties as defined in Maryland's definition of "gasoline" are not intended to be subject to the regulation.

Comment: Clarification is requested that this rule does not apply to other jet fuels, specifically, JP–8, JET–A, JET–A1 and other commercially used jet fuels.

Response: According to information supplied by the commenters, the referenced commercial jet fuels do not have vapor pressure properties that fall within the range of vapor pressure defined in Maryland's definition of "gasoline." Based on this information, these fuels would not be subject to the provisions of COMAR 26.11.13. Furthermore, Maryland's TSD clearly states that this regulation applies to the storage and handling of JP–4 and not to JP–8. Other specific jet fuels are not mentioned in Maryland's TSD as being subject to the regulation.

Other specific requirements of Maryland's SIP revision and the rationale for EPA's proposed action are explained in the August 26, 1998 direct final rulemaking and will not be restated here.

Final Action

EPA is approving the revisions to COMAR 26.11.13 into the Maryland SIP.

Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from review under E.O. 12866, entitled "Regulatory Planning and Review."

B. Executive Order 12875

Under E.O. 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If EPA complies by consulting, E.O. requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected state, local, and tribal governments, the nature of their concerns, copies of written communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 12875 requires EPA to develop an effective process permitting elected officials and other representatives of state, local, and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates." Today's rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13045

E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that the EPA determines (1) is "economically significant," as defined under E.O. 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to E.O. 13045 because it is not an economically significant regulatory action as defined by E.O. 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

D. Executive Order 13084

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on

such grounds. *Union Electric Co.* v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

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

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this approval of revisions to COMAR 26.11.13 must be filed in the United States Court of Appeals for the appropriate circuit by February 22, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Ozone, Reporting and recordkeeping requirements.

Dated: December 7, 1998.

Thomas C. Voltaggio,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

2. Section 52.1070 is amended by adding paragraph (c)(130) to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

(130) Revisions to the Maryland State Implementation Plan submitted on March 31, 1998 by the Maryland Department of the Environment.

(i) Incorporation by reference.

(A) Letter of March 31, 1998 from the Maryland Department of the Environment transmitting revisions to Maryland's air quality regulation COMAR 26.11.13, pertaining to the control of VOC emissions from sources that store and handle JP–4 jet fuel adopted by the Secretary of the Environment on March 28, 1997 and effective August 11, 1997.

(B) Revisions to COMAR 26.11.13.01(B)(4) the definition of "gasoline."

(ii) Additional Material: Remainder of March 31, 1998 Maryland State submittal pertaining to COMAR 26.11.13 control of VOCs from sources that store and handle JP–4 jet fuel.

* * * * *

[FR Doc. 98–33841 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AL–9822; FRL–6204–8]

Approval and Promulgation of Air Quality Implementation Plans; Revised Format of Materials Being Incorporated by Reference for Alabama

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of administrative change.

SUMMARY: EPA is revising the format of 40 CFR part 52 for materials submitted by the State of Alabama that are incorporated by reference (IBR) into the State implementation plan (SIP). The regulations affected by this format change have all been previously submitted by the State agency and approved by EPA.

This format revision will affect the "Identification of plan" sections of 40 CFR part 52, as well as the format of the SIP materials that will be available for public inspection at the Office of the Federal Register (OFR), the Air and Radiation Docket and Information Center located in Waterside Mall, Washington, DC, and the Regional Office. The sections of 40 CFR part 52 pertaining to provisions promulgated by EPA or State-submitted materials not subject to IBR review remain unchanged.

EFFECTIVE DATE: This is effective December 22, 1998.

ADDRESSES: SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations:

Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, GA 30303;

Office of Air and Radiation, Docket and Information Center (Air Docket), EPA, 401 M Street, SW, Room M1500, Washington, DC 20460; and

Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Richard Schutt, Regional SIP Coordinator at the above Region 4 address or at (404) 562–9033.

SUPPLEMENTARY INFORMATION: The supplementary information is organized in the following order:

The format of the new Identification of Plan Section.
When a SIP revision become federally enforceable.
The historical record of SIP revision approvals.
What EPA is doing in this action.
How this document complies with the Federal Administrative Requirements for rulemaking.

What is a SIP?

Each state has a SIP containing the control measures and strategies used to attain and maintain the national ambient air quality standards (NAAQS). The SIP is extensive, containing such elements as air pollution control regulations, emission inventories, monitoring network, attainment demonstrations, and enforcement mechanisms.

How EPA Enforces SIPs

Each state must formally adopt the control measures and strategies in the SIP after the public has had an opportunity to comment on them and then submit the SIP to EPA.

Once these control measures and strategies are approved by EPA, after notice and comment, they are incorporated into the federally approved SIP and are identified in part 52 (Approval and Promulgation of Implementation Plans), Title 40 of the Code of Federal Regulations (40 CFR part 52). The actual state regulations approved by EPA are not reproduced in their entirety in 40 CFR part 52, but are "incorporated by reference," which means that EPA has approved a given State regulation with a specific effective date. This format allows both EPA and the public to know which measures are contained in a given SIP and insures that the State is enforcing the regulations. It also allows EPA and the public to take enforcement action, should a State not enforce its SIP-approved regulations.

How the State and EPA Updates the SIP

The SIP is a living document which the State can revise as necessary to address the unique air pollution problems in the State. Therefore, EPA from time to time must take action on SIP revisions containing new and/or revised regulations as being part of the SIP. On May 22, 1997 (62 FR 27968), EPA revised the procedures for incorporating by reference Federally-approved SIPs, as a result of consultations between EPA and OFR.

EPA began the process of developing:

1. A revised SIP document for each state that would be incorporated by reference under the provisions of 1 CFR part 51;
2. A revised mechanism for announcing EPA approval of revisions to an applicable SIP and updating both the IBR document and the CFR;
3. A revised format of the "Identification of plan" sections for each applicable subpart to reflect these revised IBR procedures.

The description of the revised SIP document, IBR procedures and "Identification of plan" format are discussed in further detail in the May 22, 1997, **Federal Register** document.

How EPA Compiles the SIPs

The Federally-approved regulations and source specific permits (entirely or portions of), submitted by each state agency have been compiled by EPA into a "SIP Compilation." The SIP Compilation contains the updated regulations and source specific permits approved by EPA through previous rule making actions in the **Federal Register**. The compilations are contained in 3-ring binders and will be updated, primarily on an annual basis.

How EPA Organizes the SIP Compilation

Each compilation contains two parts. Part 1 contains the regulations and Part 2 contains the source specific requirements that have been approved as part of the SIP. Each part has a table of contents identifying each regulation or each source specific permit. The table of contents in the compilation corresponds to the table of contents published in 40 CFR part 52 for these states. The Regional EPA Offices have the primary responsibility for ensuring accuracy and updating the compilations.

Where you can Find a Copy of the SIP Compilation

The Region 4 EPA Office developed and will maintain the compilation for Alabama. A copy of the full text of each State's current compilation will also be maintained at the Office of Federal Register and EPA's Air Docket and Information Center. The format of the new Identification of Plan Section.

In order to better serve the public, EPA revised the organization of the "Identification of plan" section and included additional information to clarify the enforceable elements of the SIP.

The revised Identification of plan section contains five subsections:

(a) Purpose and scope
(b) Incorporation by reference
(c) EPA approved regulations
(d) EPA approved source specific permits
(e) EPA approved nonregulatory provisions such as transportation control measures, statutory provisions, control strategies, monitoring networks, etc.

When a SIP Revision Becomes Federally Enforceable

All revisions to the applicable SIP become federally enforceable as of the effective date of the revisions to paragraphs (c), (d), or (e) of the applicable identification of plan found in each subpart of 40 CFR part 52.

The Historical Record of SIP Revision Approvals

To facilitate enforcement of previously approved SIP provisions and provide a smooth transition to the new SIP processing system, EPA retains the original Identification of Plan section, previously appearing in the CFR as the first or second section of part 52 for each state subpart. After an initial two year period, EPA will review its experience with the new system and enforceability of previously approved SIP measures, and will decide whether or not to retain the Identification of plan appendices for some further period.

What EPA is Doing in This Action

Today's rule constitutes a "housekeeping" exercise to ensure that all revisions to the State programs that have occurred are accurately reflected in 40 CFR part 52. State SIP revisions are controlled by EPA regulations at 40 CFR part 51. When EPA receives a formal SIP revision request, the Agency must publish the proposed revision in the **Federal Register** and provide for public comment before approval.

EPA has determined that today's rule falls under the "good cause" exemption in section 553(b)(3)(B) of the Administrative Procedures Act (APA) which, upon finding "good cause," authorizes agencies to dispense with public participation and section 553(d)(3) which allows an agency to make a rule effective immediately (thereby avoiding the 30-day delayed effective date otherwise provided for in the APA). Today's rule simply codifies provisions which are already in effect as a matter of law in Federal and approved State programs.

Under section 553 of the APA, an agency may find good cause where procedures are "impractical, unnecessary, or contrary to the public interest." Public comment is "unnecessary" and "contrary to the public interest" since the codification only reflects existing law. Immediate notice in the CFR benefits the public by removing outdated citations.

How This Document Complies With the Federal Administrative Requirements for Rulemaking

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from review under Executive Order (E.O.) 12866, entitled Regulatory Planning and Review.

B. Executive Order 12875

Under E.O. 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, E.O. 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13084

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, E.O. 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, E.O. 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

D. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.*, v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

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

H. Petitions for Judicial Review

EPA has also determined that the provisions of section 307(b)(1) of the Clean Air Act pertaining to petitions for judicial review are not applicable to this action. Prior EPA rulemaking actions for each individual component of the

Alabama compilation has previously afforded interested parties the opportunity to file a petition for judicial review in the United States Court of Appeals for the appropriate circuit within 60 days of such rulemaking action. Thus, EPA sees no need in this action to reopen the 60-day period for filing such petitions for judicial review.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: September 21, 1998.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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

PART 52—[AMENDED]

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

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

Subpart B—Alabama

2. Section 52.50 is redesignated as § 52.69 in subpart B and the heading and paragraph (a) are revised to read as follows:

§ 52.69 Original identification of plan section.

(a) This section identifies the original "Air Implementation Plan for the State of Alabama" and all revisions submitted by Alabama that were federally approved prior to December 1, 1998.

* * * * *

3. A new § 52.50 is added to read as follows:

§ 52.50 Identification of plan.

(a) Purpose and scope. This section sets forth the applicable State implementation plan for Delaware under section 110 of the Clean Air Act, 42 U.S.C. 7401, and 40 CFR part 51 to meet national ambient air quality standards.

(b) Incorporation by reference.

(1) Material listed in paragraphs (c) and (d) of this section with an EPA approval date prior to December 1, 1998, was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the **Federal Register.** Entries in paragraphs (c) and (d) of this section with EPA approval dates after December 1, 1998, will be incorporated by reference in the next update to the SIP compilation.

(2) EPA Region 4 certifies that the rules/regulations provided by EPA in the SIP compilation at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated State rules/regulations which have been approved as part of the State implementation plan as of December 1, 1998.

(3) Copies of the materials incorporated by reference may be inspected at the Region 4 EPA Office at 61 Forsyth Street, SW., Atlanta, GA 30303; the Office of Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.; or at the EPA, Air and Radiation Docket and Information Center, Air Docket (6102), 401 M Street, SW., Washington, DC. 20460.

(c) EPA approved regulations.

EPA APPROVED ALABAMA REGULATIONS FOR ALABAMA

State citation	Title subject	Adoption rate	EPA approval date	Federal Register notice
Chapter No. 335–3–1	General Provisions			
Section 335–3–1–.01	Purpose	6/22/89	03/19/90	55 FR 10062.
Section 335–3–1–.02	Definitions	02/17/98	09/14/98	63 FR 49006.
Section 335–3–1–.03	Ambient Air Quality Standards	06/22/89	03/19/90	55 FR 10062.
Section 335–3–1–.04	Monitoring, Records, Reporting	10/15/96	06/06/97	62 FR 30091.
Section 335–3–1–.05	Sampling and Test Methods	06/22/89	03/19/90	55 FR 10062.
Section 335–3–1–.06	Compliance Schedule	10/15/96	06/06/97	62 FR 30991.
Section 335–3–1–.07	Maintenance and Malfunctioning of Equipment; Reporting.	10/15/89	03/19/90	55 FR 10062.
Section 335–3–1–.08	Prohibition of Air Pollution	10/15/96	06/06/97	62 FR 30991.
Section 335–3–1–.09	Variances	10/15/96	06/06/97	62 FR 30991.
Section 335–3–1–.10	Circumvention	06/22/89	03/19/90	55 FR 10062.
Section 335–3–1–.11	Severability	10/15/96	06/06/97	62 FR 30991.
Section 335–3–1–.12	Bubble Provision	06/22/89	03/19/90	55 FR 10062.
Chapter 335–3–2	Air Pollution Emergency			
Section 335–3–2–.01	Air Pollution Emergency	06/22/89	03/19/90	55 FR 10062.
Section 335–3–2–.02	Episode Criteria	10/15/96	06/06/97	62 FR 30991.
Section 335–3–2–.03	Special Episode Criteria	06/22/89	03/19/90	55 FR 10062.
Section 335–3–2–.04	Emission Reduction Plans	06/22/72	05/31/72	62 FR 30991.
Section 335–3–2–.05	Two Contaminant Episode	06/22/89	03/19/90	55 FR 10062.
Section 335–3–2–.06	General Episodes	06/22/89	03/19/90	55 FR 10062.
Section 335–3–2–.07	Local Episodes	06/22/89	03/19/90	55 FR 10062.
Section 335–3–2–.08	Other Sources	10/15/96	06/06/97	62 FR 30991.
Section 335–3–2–.09	Other Authority Not Affected	06/22/89	03/19/90	55 FR 10062.
Chapter 335–3–3	Control of Open Burning and Incineration			
Section 335–3–3–.01	Open Burning	08/19/97	01/07/98	63 FR 674.
Section 335–3–3–.02	Incinerators	06/22/89	05/19/90	55 FR 10062.
Section 335–3–3–.03	Incineration of Wood, Peanut, and Cotton Ginning Wastes.	06/22/89	03/19/90	55 FR 10062.
Chapter 335–3–4	Control of Particulate Emissions			
Section 335–3–4–.01	Visible Emissions	10/15/96	06/06/97	62 FR 30991.
Section 335–3–4–.02	Fugitive Dust and Fugitive Emissions	10/15/96	06/06/97	62 FR 30991.
Section 335–3–4–.03	Fuel Burning Equipment	10/15/96	06/06/97	62 FR 30991.

EPA APPROVED ALABAMA REGULATIONS FOR ALABAMA—Continued

State citation	Title subject	Adoption rate	EPA approval date	Federal Register notice
Section 335–3–4–.04	Process Industries—General	10/15/96	06/06/97	62 FR 30991.
Section 335–3–4–.05	Small Foundry Cupola	06/22/89	03/19/90	55 FR 10062.
Section 335–3–4–.06	Cotton Gins	06/22/89	03/19/90	55 FR 10062.
Section 335–3–4–.07	Kraft Pulp Mills	10/15/96	06/06/97	62 FR 30991.
Section 335–3–4–.08	Wood Waste Boilers	10/15/96	06/06/97	62 FR 30991.
Section 335–3–4–.09	Coke Ovens	10/15/96	06/06/97	62 FR 30991.
Section 335–3–4–.10	Primary Aluminum Plants	06/22/89	03/19/90	55 FR 10062.
Section 335–3–4–.11	Cement Plants	10/15/96	06/06/97	62 FR 30991.
Section 335–3–4–.12	Xylene Oxidation Process	06/22/89	03/19/90	55 FR 10062.
Section 335–3–4–.13	Sintering Plants	06/22/89	03/19/90	55 FR 10062.
Section 335–3–4–.14	Grain Elevators	10/15/96	06/06/97	62 FR 30991.
Section 335–3–4–.15	Secondary Lead Smelters	10/15/96	06/06/97	55 FR 30991.
Section 335–3–4–.17	Steel Mills located in Etowah County	10/15/96	06/06/97	55 FR 30991.
Chapter 335–3–5	Control of Sulfur Compound Emissions			
Section 335–3–5–.01	Fuel Combustions	10/15/97	06/06/97	55 FR 30991.
Section 335–3–5–.02	Sulfuric Acid Plants	10/15/96	06/06/97	55 FR 30991.
Section 335–3–5–.03	Petroleum Production	10/15/96	06/06/97	55 FR 30991.
Section 335–3–5–.04	Kraft Pulp Mills	06/22/89	03/19/90	55 FR 10062.
Section 335–3–5–.05	Process Industries—General	06/22/89	03/19/90	55 FR 10062.
Chapter 335–3–6	Control of Organic Emissions			
Section 335–3–6–.01	Applicability	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.02	VOC Water Separation	06/22/90	03/19/90	55 FR 10062.
Section 335–3–6–.03	Loading and Storage of VOC	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.04	Fixed-Roof Petroleum Liquid Storage Vessels	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.05	Bulk Gasoline Plants	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.06	Gasoline Terminals	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.07	Gasoline Dispensing Facilities—Stage I	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.08	Petroleum Refinery Sources	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.09	Pumps and Compressors	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.10	Ethylene Producing Plants	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.11	Surface Coating	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.12	Solvent Metal Cleaning	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.13	Cutback Asphalt	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.14	Petition for Alternative Controls	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.15	Compliance Schedules	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.16	Test Methods and Procedures	08/19/97	01/07/98.	63 FR 674.
Section 335–3–6–.17	Manufacture of Pneumatic Rubber Tires	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.18	Manufacture of Synthesized Pharmaceutical Products.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.19	Reserved	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.20	Leaks from Gasoline Tank Trucks and Vapor Collection.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.21	Leaks from Petroleum Refinery Equipment	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.22	Graphic Arts	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.23	Petroleum Liquid Storage in External Floating Roof Tanks.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.24	Applicability	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.25	VOC Water Separation	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.26	Loading and Storage of VOC	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.27	Fixed-Roof Petroleum Liquid Storage Vessels	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.28	Bulk Gasoline Plants	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.29	Gasoline Terminals	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.30	Gasoline Dispensing Facilities—Stage I	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.31	Petroleum Refinery Sources	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.32	Surface Coating	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.33	Solvent Metal Cleaning	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.34	Cutback Asphalt	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.35	Petition for Alternative Controls	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.36	Compliances Schedules	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.37	Test Methods and Procedures	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.38	Manufacture of Pneumatic Tires	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.39	Manufacture of Synthesized Pharmaceutical Products.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.40	Reserved.			
Section 335–3–6–.41	Leaks from Gasoline Tank Trucks and Vapor Collection Systems.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.42	Leaks from Petroleum Refinery Equipment	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.43	Graphic Arts	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.44	Petroleum Liquid Storage in External Floating Roof Tanks.	10/15/96	06/06/97	62 FR 30991.

EPA APPROVED ALABAMA REGULATIONS FOR ALABAMA—Continued

State citation	Title subject	Adoption rate	EPA approval date	Federal Register notice
Section 335–3–6–.45	Large Petroleum Dry Cleaners	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.46	Aerospace Assembly and Component and Component Coatings Operations.	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.47	Leaks from Coke by-Product Recovery Plant Equipment.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.48	Emissions from Coke by-Product Recovery Plant Coke Oven Gas Bleeder.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.49	Manufacture of Laminated Countertops	06/22/89	03/19/90	55 FR 10062.
Section 335–3–6–.50	Paint Manufacture	10/15/96	06/06/97	62 FR 30991.
Section 335–3–6–.51	Gasoline Dispensing Facilities—Stage II Control.			
Section 335–3–6–.52	Seasonal Afterburner Shutdown—VOC Control Only.			
Chapter 335–3–7	Carbon Monoxide Emissions			
Section 335–3–7–.01	Metals Productions	06/22/89	03/19/90	55 FR 10062.
Section 335–3–7–.02	Petroleum Processes	06/22/89	03/19/90	55 FR 10062.
Chapter 335–3–8	Nitrogen Oxides Emissions			
Section 335–3–8–.01	New Combustion Sources	06/22/89	03/19/90	55 FR 10062.
Section 335–3–8–.02	Nitric Acid Manufacturing	10/15/96	06/06/97	62 FR 30991.
Chapter 335–3–9	Control of Emissions from Motor Vehicles			
Section 335–3–9–.01	Visible Emission Restriction for Motor Vehicles	10/15/96	06/06/97	62 FR 30991.
Section 335–3–9–.01	Ignition System and Engine Speed	06/22/89	03/19/90	55 FR 10062.
Section 335–3–9–.02	Crankcase Ventilation System	06/22/89	03/19/90	55 FR 10062.
Section 335–3–9–.04	Exhaust Emission Control Systems	06/22/89	03/19/90	55 FR 10062.
Section 335–3–9–.05	Evaporative Loss Control Systems	06/22/89	03/19/90	55 FR 10062.
Section 335–3–9–.06	Other Prohibited Acts	06/22/89	03/19/90	55 FR 10062.
Section 335–3–9–.07	Effective Date	10/15/96	06/06/97	62 FR 30991
Chapter 335–3–12–.01	Continuous Monitoring Requirements for Existing Sources			
Section 335–3–12–.01	General	06/22/89	03/19/90	55 FR 10062.
Section 335–3–12–.02	Emission Monitoring and Reporting Requirements.	02/17/98	09/14/98	63 FR 49005.
Section 335–3–12–.03	Monitoring System Malfunction	06/22/89	03/19/90	55 FR 10062.
Section 335–3–12–.04	Alternate Monitoring and Reporting Requirements.	06/22/89	03/19/90	55 FR 10062.
Section 335–3–12–.05	Exemptions and Extensions	06/22/89	03/19/90	55 FR 10062.
Chapter 335–3–13	Control of Fluoride Emissions			
Section 335–3–13–.01	General	10/15/96	06/06/97	62 FR 30991.
Section 335–3–13–.02	Superphosphoric Acid Plants	10/15/96	06/06/97	62 FR 30991.
Section 335–3–13–.03	Diammonium Phosphate Plants	10/15/96	06/06/97	62 FR 30991.
Section 335–3–13–.04	Triple Superphosphate Plants	10/15/96	06/06/97	62 FR 30991.
Section 335–3–13–.05	Granular Triple Superphosphate Storage Facilities.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–13–.06	Wet Process Phosphoric Acid Plants	10/15/96	06/06/97	62 FR 30991.
Chapter 335–3–3–14	Permits			
Section 335–3–14–.01	General Provisions	02/17/98	09/14/98	63 FR 49005.
Section 335–3–14–.02	Permit Procedure	10/15/96	06/06/97	62 FR 30991.
Section 335–3–14–.03	Standards for Granting Permits	10/15/96	06/06/97	62 FR 30991.
Section 335–3–14–.04	Air Permits Authorizing Construction in Clean Air Areas (Prevention of Significant Deterioration) (PSD).	10/15/96	06/06/97	62 FR 30991.
Section 335–3–14–.05	Air Permits Authorizing Construction in or near Nonattainment Areas.	02/17/98	09/14/98	63 FR 49005.
Chapter 335–3–15	Synthetic Minor Operating Permits			
Section 335–3–15–.01	Definitions	10/15/96	06/06/97	62 FR 30991.
Section 335–3–15–.02	General Provisions	10/15/96	06/06/97	62 FR 30991.
Section 335–3–15–.03	Applicability	11/23/93	10/20/94	59 FR 52916.
Section 335–3–15–.04	Synthetic Minor Operating Permit Requirements.	10/15/96	06/06/97	62 FR 30991.
Section 335–3–15–.05	Public Participation	10/15/96	06/06/97	62 FR 30991.
Appendices				
Appendix 11.2	Emissions Statements	11/13/92	11/13/92	59 FR 39684.
Appendix 11.1	Small Business Stationary Source Technical and Environmental Assistance Program.	11/13/92	11/13/92	59 FR 54388.

EPA APPROVED ALABAMA REGULATIONS FOR ALABAMA—Continued

State citation	Title subject	Adoption rate	EPA approval date	Federal Register notice
Appendix F	Maintenance Plan for the Leeds Area	9/28/93	9/28/93	01/06/95.

(d) EPA-approved State Source specific requirements.

EPA-APPROVED ALABAMA SOURCE-SPECIFIC REQUIREMENTS

Name of source	Permit number	State effective date	EPA approval date	Comments
None.				

(e) [Reserved]

[FR Doc. 98–33842 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60, 61, and 63

[FRL–6200–5]

Standards of Performance for New Stationary Sources (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP); Delegation of Authority to the States of Iowa; Kansas; Missouri; Nebraska; Lincoln-Lancaster County, Nebraska; and City of Omaha, Nebraska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Delegation of authority.

SUMMARY: The states of Iowa, Kansas, Missouri, Nebraska, and the local agencies of Lincoln-Lancaster County, Nebraska, and city of Omaha, Nebraska, have submitted updated regulations for delegation of the EPA authority for implementation and enforcement of NSPS and NESHAP. The submissions cover new EPA standards and, in some instances, revisions to standards previously delegated. The EPA's review of the pertinent regulations shows that they contain adequate and effective procedures for the implementation and enforcement of these Federal standards. This notice informs the public of delegations to the above-mentioned agencies.

DATES: The dates of delegation can be found in the **SUPPLEMENTARY INFORMATION** section of this document.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following location: Environmental Protection Agency, Region 7, Air Planning and Development Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101.

Effective immediately, all notifications, applications, reports, and other correspondence required pursuant to the newly delegated standards and revisions identified in this document should be submitted to the Region VII office, and, with respect to sources located in the jurisdictions identified in this notice, to the following addresses:

Iowa Department of Natural Resources, Air Quality Bureau, 7900 Hickman Road, Urbandale, Iowa 50322.

Kansas Department of Health and Environment, Bureau of Air Quality and Radiation, Building 283, Forbes Field, Topeka, Kansas 66620.

Missouri Department of Natural Resources, Air Pollution Control Program, Jefferson State Office Building, P.O. Box 176, Jefferson City, Missouri 65102.

Nebraska Department of Environmental Quality, Air and Waste Management Division, P.O. Box 98922, Statehouse Station, Lincoln, Nebraska 68509.

Lincoln-Lancaster County Air Pollution Control Agency, Division of Environmental Health, 3140 "N" Street, Lincoln, Nebraska 68510.

City of Omaha, Public Works Department, Air Quality Control Division, 5600 South 10th Street, Omaha, Nebraska 68510.

FOR FURTHER INFORMATION CONTACT: Wayne Kaiser, Environmental Protection Agency, Air Planning and Development Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101, (913) 551–7603.

SUPPLEMENTARY INFORMATION:

The supplementary information is organized in the following order:

Summary of this Action

• What does this document do?

The EPA is providing notice that it is delegating authority for implementation and enforcement of the Federal standards shown in the tables below to the state and local air agencies in Region VII. This delegation notice updates the delegation tables most recently published at 40 FR 32033, June 12, 1997.

• What is the authority for delegation?

1. Section 111(c)(1) of the Clean Air Act (CAA) authorizes the EPA to delegate authority to any state agency which submits adequate regulatory procedures for implementation and enforcement of the NSPS program. The NSPS standards are codified at 40 CFR Part 60.

2. Section 112(l) of the CAA and 40 CFR Part 63, subpart E, authorizes the EPA to delegate authority to any state or local agency which submits adequate regulatory procedures for implementation and enforcement of emission standards for hazardous air pollutants. The hazardous air pollutant standards are codified at 40 CFR Parts 61 and 63, respectively.

• What does delegation accomplish?

Delegation confers primary responsibility for implementation and enforcement of the listed standards to the respective state and local air agencies. However, the EPA also retains the authority to enforce the standards if it so desires.

• What is being delegated?

Tables I, II, and III below list the delegated standards. The first date in each block is the publication date of the CFR which contains the standard. The second date is the most recent effective date of the state agency rule for which the EPA is providing or updating the delegation.

What is not being delegated?

1. The EPA regulations effective after the first date specified in each block

have not been delegated, and authority for implementation of these regulations is retained solely by the EPA.

2. In some cases, the standards themselves specify that specific provisions are not delegable. You should review the standard for this information.

3. In some cases, the agency rules do not adopt the Federal standard in its entirety. Each agency rule (available from the respective agency) should be consulted for specific information.

4. In some cases, existing delegation agreements between the EPA and the agencies limit the scope of the delegated standards. Copies of delegation agreements are available from the state agencies, or from this office.

5. With respect to 40 CFR Part 63, subpart A, General Provisions (see Table III), the EPA has determined that §§ 63.6(g), 63.6(h)(9), 63.7(e)(2)(ii) and (f), 63.8(f), and 63.10(f) cannot be delegated. Additional information is contained in an EPA memorandum titled "Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies" from John Seitz, Director, Office of Air Quality Planning and Standards, dated July 10, 1998.

- List of Delegation Tables

TABLE I.—DELEGATION OF AUTHORITY—PART 60 NSPS—REGION VII

Subpart	Source category	State of Iowa	State of Kansas	State of Missouri	State of Nebraska
A	General Provisions	06/29/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
D	Fossil-Fuel Fired Steam Generators for Which Construction is Commenced After August 17, 1971.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Da	Electric Utility Steam Generating Units for Which Construction is Commenced After September 18, 1978.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Db	Industrial-Commercial-Institutional Steam Generating Units	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Dc	Small Industrial-Commercial-Institutional Steam Generating Units	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
E	Incinerators	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Ea	Municipal Waste Combustors Constructed after December 20, 1989, and on or before September 20, 1994..	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/96	09/07/97
Eb	Municipal Waste Combustors for Which Construction is Commenced after September 20, 1994.		07/01/96		07/01/96
			06/06/97		09/07/97
Ec	Hospital/medical/infectious Waste Incinerators for Which Construction Commenced after June 20, 1996.				
F	Portland Cement Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
G	Nitric Acid Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
H	Sulfuric Acid Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
I	Asphaltic Concrete Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
J	Petroleum Refineries	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
K	Storage Vessels for Petroleum Liquid for Which Construction, Reconstruction, or Modification Commenced After June 11, 1973, and Prior to May 19, 1978.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Ka	Storage Vessels for Petroleum Liquid for Which Construction, Reconstruction, or Modification Commenced After May 18, 1978, and Prior to July 23, 1984.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Kb	Volatile Organic Liquid Storage Vessels for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
L	Secondary Lead Smelters	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
M	Brass & Bronze Production Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
N	Basic Oxygen Process Furnaces for Which Construction is Commenced After June 11, 1973.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Na	Basic Oxygen Process Steelmaking Facilities for Which Construction is Commenced After January 20, 1983.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
O	Sewage Treatment Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
P	Primary Copper Smelters	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Q	Primary Zinc Smelters	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
R	Primary Lead Smelters	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
S	Primary Aluminum Reduction Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
T	Wet Process Phosphoric Acid Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
U	Superphosphoric Acid Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97

TABLE I.—DELEGATION OF AUTHORITY—PART 60 NSPS—REGION VII—Continued

Subpart	Source category	State of Iowa	State of Kansas	State of Missouri	State of Nebraska
V	Diammonium Phosphate Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
W	Triple Superphosphate Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
X	Granular Triple Superphosphate Storage Facilities	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Y	Coal Preparation Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
Z	Ferroalloy Production Facilities	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
AA	Steel Plant Electric Arc Furnaces Constructed After October 21, 1974, and on or Before August 17, 1983.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
AAa	Steel Plant Electric Arc Furnaces & Argon-Oxygen Decarburization Vessels Constructed After August 7, 1983.	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
BB	Kraft Pulp Mills	06/12/97	07/01/96	07/01/96	
		06/29/98	06/06/97	02/28/98	
CC	Glass Manufacturing Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
DD	Grain Elevators	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
EE	Surface Coating of Metal Furniture	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
GG	Stationary Gas Turbines	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
HH	Lime Manufacturing Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
KK	Lead-Acid Battery Manufacturing Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
LL	Metallic Mineral Processing Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
MM	Auto & Light-Duty Truck Surface Coating Operations	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
NN	Phosphate Rock Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
PP	Ammonium Sulfate Manufacture	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
QQ	Graphic Arts Industry: Publication Rotogravure Printing	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
RR	Pressure Sensitive Tape & Label Surface Coating Operations	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
SS	Industrial Surface Coating: Large Appliances	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
TT	Metal Coil Surface Coating	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
UU	Asphalt Processing & Asphalt Roofing Manufacture	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
VV	SOCMI Equipment Leaks (VOC)	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
WW	Beverage Can Surface Coating Industry	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
XX	Bulk Gasoline Terminals	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
AAA	New Residential Wood Heaters	08/31/93	07/01/96	07/01/96	
		06/29/98	06/06/97	02/28/98	
BBB	Rubber Tire Manufacturing Industry	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
DDD	Polymer Manufacturing Industry (VOC)	06/12/97	07/01/96		
		06/29/98	06/06/97		
FFF	Flexible Vinyl and Urethane Coating and Printing	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
GGG	Equipment Leaks of VOC in Petroleum Refineries	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
HHH	Synthetic Fiber Production Facilities	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
III	SOCMI AIR Oxidation Unit Processes	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
JJJ	Petroleum Dry Cleaners	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97
KKK	VOC Leaks from Onshore Natural Gas Processing Plants	06/12/97	07/01/96	07/01/96	07/01/92
		06/29/98	06/06/97	02/28/98	09/07/97

TABLE I.—DELEGATION OF AUTHORITY—PART 60 NSPS—REGION VII—Continued

Subpart	Source category	State of Iowa	State of Kansas	State of Missouri	State of Nebraska
LLL	Onshore Natural Gas Processing: SO_2 Emissions	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97
NNN	VOC Emissions from SOCMI Distillation Operations	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97
OOO	Nonmetallic Mineral Processing Plants	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97
PPP	Wool Fiberglass Insulation Manufacturing Plants	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97
QQQ	VOC Emissions from Petroleum Refinery Wastewater Systems	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97
RRR	VOC Emissions from SOCMI Reactor Processes	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	
SSS	Magnetic Tape Coating Facilities	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97
TTT	Surface Coating of Plastic Parts for Business Machines	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97
UUU	Calciners & Dryers in Mineral Industries	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	09/28/92 09/07/97
VVV	Polymeric Coating of Supporting Substrates Facilities	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97
WWW	New Municipal Solid Waste Landfills Accepting Waste On or After May 30, 1991.	06/12/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/96 09/07/97

TABLE II.—DELEGATION OF AUTHORITY—PART 61 NESHAP—REGION VII

Sub-part	Source category	State of Iowa	State of Kansas	State of Missouri	State of Nebraska	Lincoln-Lancaster County	City of Omaha
A	General Provisions	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
B	Radon Emissions from Underground Uranium Mines.		07/01/96 06/06/97				
C	Beryllium	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
D	Beryllium Rocket Motor Firing	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
E	Mercury	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
F	Vinyl Chloride	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
J	Equipment Leaks (Fugitive Emission Sources) of Benzene.	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
L	Benzene Emissions from Coke By-Product Recovery Plants.	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
M	Asbestos	10/14/97 06/29/98	07/01/96 06/06/97	07/01/88 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
N	Inorganic Arsenic Emissions from Glass Manufacturing Plants.	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
O	Inorganic Arsenic Emissions from Primary Copper Smelters.	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
P	Inorganic Arsenic Emissions from Arsenic Trioxide and Metallic Arsenic Production Facilities.	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
Q	Radon Emissions from Department of Energy Facilities.		07/01/96 06/06/97				
R	Radon Emissions from Phosphogypsum Stacks.		07/01/96 06/06/97				
T	Radon Emissions from the Disposal of Uranium Mill Tailings.		07/01/96 06/06/97				
V	Equipment Leaks (Fugitive Emission Sources).	10/14/97 06/29/98	07/01/96 06/06/97	07/01/96 02/28/98	07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
W	Radon Emissions from Operating Mill Tailings.		07/01/96 06/06/97				
Y	Benzene Emissions from Benzene Storage Vessels.	10/14/97 06/29/98	07/01/96 06/06/97		07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95
BB	Benzene Emissions from Benzene Transfer Operations.	10/14/97 06/29/98	07/01/96 06/06/97		07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95

TABLE II.—DELEGATION OF AUTHORITY—PART 61 NESHAP—REGION VII—Continued

Sub-part	Source category	State of Iowa	State of Kansas	State of Missouri	State of Nebraska	Lincoln-Lancaster County	City of Omaha
FF	Benzene Waste Operations	10/14/97 06/29/98	07/01/96 06/06/97		07/01/92 09/07/97	07/01/92 05/16/95	07/01/92 05/29/95

TABLE III.—DELEGATION OF AUTHORITY—PART 63 NESHAP—REGION VII

Sub-part	Source category	State of Iowa	State of Kansas	State of Missouri	State of Nebraska	Lincoln-Lancaster County	City of Omaha
A	General Provisions	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98		07/01/97 08/11/98	
B	Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Section 112(j).	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98			
D	Compliance Extensions for Early Reductions of Hazardous Air Pollutants.	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	12/29/92 09/07/97	07/01/97 08/11/98	12/29/92 11/17/95
F	Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry.	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98		07/01/97 08/11/98	
G	Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater.	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98		07/01/97 08/11/98	
H	Organic Hazardous Air Pollutants for Equipment Leaks.	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98		07/01/97 08/11/98	
I	Organic Hazardous Air Pollutants for Certain Processes Subject to the Negotiated Regulation for Equipment Leaks.	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98		07/01/97 08/11/98	
L	Coke Oven Batteries	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98			
M	Perchloroethylene Emissions from Dry Cleaning Facilities.	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	07/01/96 09/07/97	07/01/97 08/11/98	07/01/96 04/01/98
N	Chromium Emissions from Hard and Decorative Chromium Electroplating Anodizing Tanks.	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	07/01/96 09/07/97	07/01/97 08/11/98	07/01/96 04/01/98
O	Ethylene Oxide Sterilization Facilities	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98		07/01/97 08/11/98	
Q	Industrial Process Cooling Towers	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	07/01/96 09/07/97	07/01/97 08/11/98	07/01/96 04/01/98
R	Gasoline Distribution Facilities	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	07/01/96 09/07/97	07/01/97 08/11/98	07/01/96 04/01/98
S	Pulp and Paper Non-Combustion.						
T	Halogenated Solvent Cleaning	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	07/01/96 09/07/97	07/01/97 08/11/98	07/01/96 04/01/98
U	Polymers and Resins Group I	08/11/97 06/29/98				07/01/97 08/11/98	
W	Epoxy Resins and Non-Nylon Polyamides Production.	08/11/97 06/29/98	07/01/96 06/06/97			07/01/97 08/11/98	
X	Secondary Lead Smelting	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	07/01/96 09/07/97	07/01/97 08/11/98	07/01/96 04/01/98
Y	Marine Tank Vessel Loading Operations	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98			
CC	Petroleum Refineries	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98		07/81/97 08/11/98	
DD	Off-Site Waste Operations	08/11/97 06/29/98	07/01/96 06/06/97			07/01/97 08/11/98	
EE	Magnetic Tape Manufacturing	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98		07/01/97 08/11/98	
GG	Aerospace Manufacturing and Rework Facilities.	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	07/01/96 09/07/97	07/01/97 08/11/98	07/01/96 04/01/98
II	Shipbuilding and Ship Repair	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98			
JJ	Wood Furniture Manufacturing Operations	08/11/97 06/29/98	07/01/96 06/06/97	12/31/96 02/28/98	07/01/96 09/07/97	07/01/98 08/11/98	07/01/96 04/01/98
KK	Printing and Publishing Industry	08/11/97 06/29/98	07/01/96 06/06/97			07/01/97 08/11/98	
LL	Primary Aluminum Production.						
EEE	Hazardous Waste Combustors.						

TABLE III.—DELEGATION OF AUTHORITY—PART 63 NESHAP—REGION VII—Continued

Subpart	Source category	State of Iowa	State of Kansas	State of Missouri	State of Nebraska	Lincoln-Lancaster County	City of Omaha
GGG	Pharmaceutical Production.						
JJJ	Polymers and Resins Group IV	08/11/97 06/29/98				07/01/97 08/11/98	

• Summary of this action:

After a review of the submissions, the Regional Administrator determined that delegation was appropriate for the source categories with the conditions set forth in the original NSPS and NESHAP delegation agreements, and the limitations in all applicable regulations, including 40 CFR Parts 60, 61, and 63.

You should refer to the applicable agreements and regulations referenced above to determine specific provisions which are not delegated.

All sources subject to the requirements of 40 CFR Parts 60, 61, and 63 are also subject to the equivalent requirements of the above-mentioned state or local agencies.

The EPA's review of the pertinent regulations shows that they contain adequate and effective procedures for the implementation and enforcement of these Federal standards. This notice informs the public of delegations to the above mentioned agencies.

Administrative statement:

A. Executive Order (E.O.) 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866, entitled "Regulatory Planning and Review."

B. E.O. 12875: Enhancing the Intergovernmental Partnership

Under E.O. 12875, the EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by those governments, or the EPA consults with those governments. If the EPA complies by consulting, E.O. 12875 requires the EPA to provide to OMB a description of the extent of the EPA's prior consultation with representatives of affected state, local, and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 12875 requires the EPA to develop an effective process permitting elected officials and other representatives of state, local, and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates." Today's rule does not create a mandate on state, local, or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. E.O. 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that the EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks which may have a disproportionate effect on children.

D. E.O. 13084: Consultation and Coordination with Indian Tribal Governments

Under E.O. 13084, the EPA may not issue a regulation that is not required by statute. that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or the EPA consults with those governments. If the EPA complies by consulting, E.O. 13084 requires the EPA to provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of the EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, E.O. 13084 requires the EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because State Implementation Plan (SIP) approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements but simply approve requirements that the state is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids the EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.*, v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, the EPA

must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to state, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under section 205, the EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves preexisting requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

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

H. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 22, 1999. 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).)

Authority: This document is issued under the authority of sections 101, 110, 112, and 301 of the CAA, as amended (42 U.S.C. 7401, 7410, 7412, and 7601).

Dated: December 2, 1998.

William Rice,

Acting Regional Administrator, Region VII.

[FR Doc. 98–33840 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[FRL–6196–4]

Control of Air Pollution From Motor Vehicles and New Motor Vehicle Engines; Modification of Federal On-board Diagnostic Regulations for Light-Duty Vehicles and Light-Duty Trucks; Extension of Acceptance of California OBD II Requirements

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Today's action finalizes modifications to the federal on-board diagnostics regulations, including: harmonizing the emission levels above which a component or system is considered malfunctioning (i.e., the malfunction thresholds) with those of the California Air Resources Board (CARB) OBD II requirements; mandating that EPA OBD systems fully evaluate the entire emission control system, including the evaporative emission control system; indefinitely extending the allowance of deficiencies for federal OBD vehicles; indefinitely extending the allowance of optional compliance with the California OBD II requirements for federal OBD certification while also updating the allowed version of those California OBD II regulations to the most recently published version; providing flexibility to alternate fueled vehicles through the 2004 model year rather than providing flexibility only through the 1998 model year; updating the incorporation by reference of several recommended practices developed by the Society of Automotive Engineers (SAE) to incorporate recently published versions, while also incorporating by reference standardization protocol developed by the International Organization for Standardization (ISO). OBD systems in general provide substantial ozone benefits.

EFFECTIVE DATE: This action becomes effective January 21, 1999.

ADDRESSES: Materials relevant to this rulemaking are contained in Docket No. A–96–32. The docket is located at The Air Docket, 401 M. Street, SW., Washington, DC 20460, and may be viewed in room M1500 between 8:00 a.m. and 5:30 p.m., Monday through Friday. The telephone number is (202) 260–7548 and the facsimile number is (202) 260–4400. A reasonable fee may be charged by EPA for copying docket material.

FOR FURTHER INFORMATION CONTACT: Holly Pugliese, Vehicle Programs and Compliance Division, U.S. Environmental Protection Agency, 2000 Traverwood, Ann Arbor, Michigan 48105, Telephone 734–214–4288, or Internet e-mail at "pugliese.holly@epamail.epa.gov."

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially regulated by this action are those which manufacturer new motor vehicles and engines. Regulated categories include:

Category	Examples of regulated entities
Industry	New motor vehicle and engine manufacturers.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your product is regulated by this action, you should carefully examine the applicability criteria in § 86.099–17 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular product, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Table of Contents

I. Electronic Availability

Electronic copies of the preamble and regulatory text of this final rulemaking are available via the Internet on the Office of Mobile Sources (OMS) Home Page (http://www.epa.gov/OMSWWW/). Users can find OBD related information and documents through the following path once they have accessed the OMS Home Page: "Automobiles," "I/M & OBD," "On-Board Diagnostics Files."

II. Introduction and Background

On February 19, 1993 pursuant to Clean Air Act section 202(m), 42 U.S.C. 7521(m), the EPA published a final rulemaking (58 FR 9468) requiring manufacturers of light-duty vehicles (LDVs) and light-duty trucks (LDTs) to install on-board diagnostic (OBD) systems on such vehicles beginning with the 1994 model year. The regulations promulgated in that final rulemaking require manufacturers to install OBD systems that monitor emission control components for any malfunction or deterioration causing exceedance of certain emission thresholds. The regulations also require that the driver be notified of the need for repair via a dashboard light when the diagnostic system has detected a problem.

On May 28, 1997, the EPA published a notice of proposed rulemaking (62 FR 28932) that proposed changes to the federal OBD requirements. Those proposed changes would be implemented beginning with the 1999 model year. The proposed revisions included: harmonizing the emission levels above which a component or system is considered malfunctioning (i.e., the malfunction thresholds) with those of the California Air Resources Board (CARB) OBD II requirements; mandating that federal OBD systems fully evaluate the entire emission control system, including the evaporative emission control system; indefinitely extending the allowance of deficiencies for federal OBD vehicles; indefinitely extending the allowance of optional compliance with the California OBD II requirements for federal OBD certification while also updating the version of those California OBD II regulations to which manufacturers may certify to the most recently revised version; providing flexibility for alternate fueled vehicles through the 2004 model year rather than providing flexibility only through the 1998 model year; updating the incorporation by reference of several recommended practices developed by the Society of Automotive Engineers (SAE) to incorporate recently published versions, while also incorporating by reference two standardization protocols developed by the International Organization for Standardization (ISO). Today's action will finalize these and other proposed changes along with other minor changes as discussed below.

III. Requirements of the Final Rule

Following are the provisions promulgated by this final rulemaking. A complete discussion of the comments received on the proposed regulations and the Agency's response to those comments can be found in section IV—Discussion of Comments and Issues.

A. Federal OBD Malfunction Thresholds and Monitoring Requirements

Beginning in the 1999 model year, OBD systems on spark-ignition LDVs and LDTs must be able to detect and alert the driver of the following emission-related malfunctions or deterioration as evaluated over the original Federal Test Procedure (FTP; i.e., not including the Supplemental FTP): [1, 2]

(1) Catalyst deterioration or malfunction before it results in an increase in NMHC [3] emissions equal to or greater than 1.5 times the NMHC standard, as compared to the NMHC emission level measured using a representative 4000 mile catalyst system.

(2) Engine misfire before it results in an exhaust emission exceedance of 1.5 times the applicable standard for NMHC, CO or NO_X.

(3) Oxygen sensor deterioration or malfunction before it results in an exhaust emission exceedance of 1.5 times the applicable standard for NMHC, CO or NO_X.

(4) Any vapor leak in the evaporative and/or refueling system (excluding the tubing and connections between the purge valve and the intake manifold) greater than or equal in magnitude to a leak caused by a 0.040 inch diameter orifice; any absence of evaporative purge air flow from the complete evaporative emission control system. On vehicles with fuel tank capacity greater than 25 gallons, the Administrator shall revise the size of the orifice to the feasibility limit, based on test data, if the most reliable monitoring method available cannot reliably detect a system leak equal to a 0.040 inch diameter orifice.

(5) Any deterioration or malfunction occurring in a powertrain system or component directly intended to control emissions, including but not necessarily limited to, the exhaust gas recirculation (EGR) system, if equipped, the secondary air system, if equipped, and the fuel control system, singularly resulting in exhaust emissions exceeding 1.5 times the applicable emission standard for NMHC, CO or NO_X. For vehicles equipped with a secondary air system, a functional check, as described in paragraph (b)(6), may satisfy the requirements of this paragraph provided the manufacturer can demonstrate that deterioration of the flow distribution system is unlikely. This demonstration is subject to Administrator approval and, if the demonstration and associated functional check are approved, the diagnostic system shall indicate a malfunction when some degree of secondary airflow is not detectable in the exhaust system during the check.

(6) Any other deterioration or malfunction occurring in an electronic emission-related powertrain system or component not otherwise described above that either provides input to or receives commands from the on-board computer and has a measurable impact on emissions; monitoring of components required by this paragraph shall be satisfied by employing electrical circuit continuity checks and, wherever feasible, rationality checks for

[1] The text presented here does not constitute regulatory text. The final regulatory text can be viewed immediately following this preamble.

[2] Note that, while malfunction thresholds are based on FTP emissions, this does not mean that OBD monitors need operate only during the FTP. All OBD monitors that operate during the FTP should operate in a similar manner during non-FTP conditions. The prohibition against defeat devices in § 86.094–16 applies to these rules.

[3] As a point of clarification, Tier 1 federal emissions standards are expressed in terms of NMHC. Therefore, in order to remain consistent, all references to HC will be referred to as NMHC.

computer input components (input values within manufacturer specified ranges), and functionality checks for computer output components (proper functional response to computer commands); malfunctions are defined as a failure of the system or component to meet the electrical circuit continuity checks or the rationality or functionality checks.

For compression-ignition engines, paragraph 1 above would apply only when the catalyst is needed for NMHC control, and paragraphs 2,3, and 4 above would not apply.

Upon detection of a malfunction, the malfunction indicator light (MIL) is to be illuminated and a fault code stored no later than the end of the next driving cycle during which monitoring occurs provided the malfunction is again detected. The only exception to this would be if, upon Administrator approval, a manufacturer is allowed to use a diagnostic strategy that employs statistical algorithms for malfunction determination (e.g., Exponentially Weighted Moving Averages (EWMA)). The Administrator considers such strategies beneficial for some monitors because they reduce the danger of illuminating the MIL falsely since more monitoring events are used in making pass/fail decisions. However, the Administrator will only approve such strategies provided the number of trips required for a valid malfunction determination is not excessive (e.g., six or seven monitoring events). Manufacturers are required to determine the appropriate operating conditions for diagnostic system monitoring with the limitation that monitoring conditions are encountered at least once during the first engine start portion of the applicable Federal Test Procedure (FTP) or a similar test cycle as approved by the Administrator. This is not meant to suggest that monitors be designed to operate only under FTP conditions, as such a design would not encompass the complete operating range required for OBD malfunction detection.

B. Similar Operating Conditions Window

The Agency is finalizing a revision to the engine operating conditions window associated with extinguishing the MIL for engine misfire and fuel system malfunctions. The federal OBD regulations will require that, upon MIL illumination and diagnostic trouble code storage associated with engine misfire or fuel system malfunctions, the manufacturer is allowed to extinguish the MIL provided the same malfunction is not again detected during three subsequent sequential trips during which engine speed is within 375 rpm, engine load is within 20 percent, and the engine's warm-up status is the same as that under which the malfunction was first detected, and no new malfunctions have been detected.

C. Extension for Acceptance of California OBD II as Satisfying Federal OBD

The Agency is finalizing a provision allowing optional compliance with the current California OBD II requirements, excluding the California OBD II anti-tampering requirements, as satisfying federal OBD. The current California OBD II requirements are in CARB Mail-Out #97–24 (EPA Air Docket A–96–32, Document IV–H–01, December 9, 1997). Manufacturers choosing the California OBD II demonstration option need not comply with portions of that regulation pertaining to vehicles certified under the Low Emission Vehicle Program as those standards are not federal standards. Additionally, manufacturers choosing the California OBD II demonstration option need not comply with section (b)(4.2.2), which requires evaporative system leak detection of a 0.02 inch diameter orifice and represents a level of stringency beyond that ever appropriately considered for federal OBD compliance. The Agency is finalizing a provision that will require evaporative leak detection of a 0.04 inch diameter orifice, with some flexibility afforded to vehicles with a fuel tank capacity greater than 25 gallons (see Sections III.A.4 and IV.B.2.d). Lastly, manufacturers choosing the California OBD II demonstration option need not comply with section (d), which contains the anti-tampering provisions of the California regulations.

D. Deficiency Provisions

Today's action finalizes a provision to extend the current flexibility provisions (i.e., "deficiency provisions") contained in § 86.094–17(i) indefinitely, rather than being eliminated beyond the 1999 model year. This will allow the Administrator to accept an OBD system as compliant even though specific requirements are not fully met. This provision neither constitutes a waiver from federal OBD requirements, nor does it allow compliance without meeting the minimum requirements of the CAA (i.e., oxygen sensor monitor, catalyst monitor, and standardization features).

E. Provisions for Alternate Fueled Vehicles

EPA is finalizing a flexibility provision for alternate fuel vehicles that will apply through the 2004 model year. Such vehicles will be expected to comply fully with the OBD requirements proposed today during gasoline operation (if applicable), and during alternate fuel operation except where it is technologically infeasible to do so. Any manufacturer wishing to utilize this flexibility provision must demonstrate technological infeasibility concerns to EPA well in advance of certification.

F. Applicability

Today's finalized provisions to federal OBD malfunction thresholds, monitoring requirements, deficiency provisions, alternate fuel provisions, and the recommended practices incorporated by reference apply to all 1999 and later model year light-duty vehicles and light-duty trucks for which emission standards are in place or are subsequently developed and promulgated by EPA.

G. Update of Materials Incorporated by Reference

Today's action finalizes the incorporation by reference of ISO 9141–2 February 1994, "Road vehicles—Diagnostic systems—Part 2: CARB requirements for interchange of digital information," as an acceptable protocol for standardized on-board to off-board communications. This standardized procedure was proposed in September 24, 1991 (56 FR 48272), but could not be adopted in the February 1993 final rule because the ISO document was not yet finalized. ISO 9141–2 has since been finalized and is incorporated by reference in today's final regulatory language.

Today's action also finalizes the incorporation by reference of updated versions of the SAE procedures referenced in the current OBD regulation. These SAE documents are J1850, J1979, J2012, J1962, J1877 and J1892.

The incorporation by reference of these documents was approved by the Director of the Federal Register in a letter dated December 15, 1997. A copy of this letter may be found in the docket for this rulemaking (A–96–32, IV–H–02).

H. Certification Provisions

The certification provisions associated with OBD, contained in § 86.099–30, are today revised to reflect the proposed changes to the OBD malfunction thresholds and monitoring requirements.

IV. Discussion of Comments and Issues

A. Federal OBD Malfunction Thresholds

1. Summary of Proposal

EPA proposed to substitute its current approach for OBD malfunction thresholds for an approach consistent with the malfunction thresholds in the California OBD II regulations. Specifically, EPA proposed to revise the federal OBD malfunction thresholds such that they be based not on baseline emissions, but rather the emissions standards themselves. The proposed revisions would require identification of malfunctions of powertrain systems or components when emissions exceed 1.5 times the applicable federal standard.

For catalyst deterioration or malfunction, the proposed revisions would require identification when emissions exceed 1.5 times the NMHC standard as compared to the NMHC emission level measured using a representative 4000 mile catalyst system. For example, a vehicle with 4000 mile emissions of 0.10 g/mi NMHC would have a catalyst malfunction threshold of 0.475 g/mi NMHC [(1.5) × (0.25 g/mi NMHC) + 0.10 g/mi NMHC = 0.475 g/mi NMHC].

For evaporative leak detection, the proposal eliminated the 30 g/test emission threshold and instead requires detection of any hole equivalent to, or greater in size than, one with a 0.04 inch diameter.

2. Summary of Comments

All the comments specifically referring to the proposed modifications to the federal OBD malfunction thresholds were supportive. One comment also recommended that the Agency incorporate a provision that would allow for a two year carryover of systems that are fully compliant with the current EPA OBD thresholds. This commenter has chosen to certify most of its light-duty fleet to the EPA thresholds since the 1996 model year, rather than choosing the California OBD II compliance option. The commenter goes on to state that their OBD compliance plans have already been made under the assumption that the EPA thresholds would remain a viable compliance option and to require compliance with the thresholds finalized today would be overly burdensome while providing no environmental benefit.

3. Response to Comments

The Agency concurs with the comments received and will finalize changes to the malfunction thresholds as follows. The finalized regulations will require identification of misfires and malfunction of oxygen sensors and all other powertrain systems or components directly intended to control emissions (e.g., evaporative purge control, EGR, secondary air system, fuel control system) when emissions exceed the specified emission threshold of 1.5 times the applicable federal emission standard. For evaporative systems, leak detection will be required for any hole equivalent to, or greater in size than, one with a 0.04 inch diameter. For catalyst deterioration, the threshold is an increase of 1.5 times the applicable standard compared to emissions from a representative catalyst run for 4000 miles. Additionally, as stated in the NPRM, the Agency is concerned about penalizing OEMs or small volume manufacturers who had proactively set out to meet the EPA OBD requirements and the Agency agrees that it would be overly burdensome to require manufacturers to redesign systems that are already in production. Therefore, the Agency will finalize a provision that will allow for a two year carryover period for systems that are fully compliant with the current EPA OBD regulations contained in § 86.098–17, paragraphs (a) through (i).

B. Expanded Federal OBD Monitoring Requirements

1. Summary of Proposal

The proposal outlined requirements for monitoring of emission-related powertrain components that provide information to and receive commands from the on-board computer whose malfunction may impact emissions or may impair the ability of the OBD system to perform its job (e.g. throttle position sensor, coolant temperature sensor, vehicle speed sensor, etc.). These components must be monitored, at a minimum, for electrical circuit continuity checks, and effective rationality and/or functionality checks. Deterioration or malfunction of these components will be identified when a component fails the circuit continuity check or the rationality or functionality check.

In contrast, the original EPA OBD requirements left the monitoring of many of these components to the discretion of the manufacturer. Should the manufacturer determine that any such components were not likely to malfunction, or upon their malfunction they would not cause exceedance of the emission thresholds, then such components need not be monitored. The proposed change was that this optional monitoring approach be eliminated and be replaced with mandatory monitoring requirements.

2. Summary of Comments

There were several comments regarding specific proposed changes to the monitoring requirements.

(a) Regarding secondary air system monitoring requirements, the Agency proposed that this system be monitored for deterioration or malfunction at 1.5 times the applicable standard. The American Automobile Manufacturers Association (AAMA) recommended that only a functionality check is feasible for this system rather than the proposed emissions based monitor. Manufacturers have already invested in an monitoring strategy which conducts a functional check of the secondary air system. AAMA argues that in order to implement an emissions based monitor to meet the proposed federal requirements, manufacturers would have to add costly hardware that will likely result in no additional air quality benefits. AAMA suggests that only a functional check be required with administrator approval.

(b) Regarding the proposed functionality and rationality check provisions for electronic powertrain component monitors, AAMA recommended that EPA require functionality and rationality checks only when they are feasible. The comment argues that, while manufacturers have successfully implemented rationality and/or functionality checks on many of the comprehensive components, they have found that for some components such as the intake air temperature sensor, monitoring for functionality and/or rationality would require development and implementation of complex monitoring strategies that, in the end, result in no additional air quality benefit.

(c) Regarding catalyst damage misfire monitoring requirements, AAMA recommended that EPA not require continuous MIL illumination following catalyst damage misfire until it is detected on two consecutive driving cycles or the next driving cycle in which similar conditions are encountered. AAMA is concerned that the current provisions for catalyst damage misfire detection may result in detection of infrequent misfires that are not related to any hardware malfunction. Such misfires are typically the result of water in the gasoline or water vapor in the fuel systems. As a result, no repair can be made because the problem is not the result of a hardware of software malfunction.

(d) Regarding evaporative system monitoring, AAMA recommended that, for reasons of technological feasibility,

EPA should allow a larger orifice threshold for evaporative system monitors on vehicles with fuel tank capacity greater that 25 gallons. AAMA states that, on fuel tanks with a capacity of greater than 25 gallons, it is not possible to reliably detect such small leaks. The comment argues that the larger vapor volume possible with large volume tanks results in very small pressure changes associated with a 0.04 inch hole. Such small pressure changes cannot be reliably detected using existing leak detection strategies. As a result, these smaller pressure changes are more difficult to detect under typical driving conditions on vehicles with large fuel tank capacity.

(e) Power take-off units are used to provide power from a vehicle's engine to an auxiliary device such as a snow plow blade. Regarding OBD detection during operation of power take-off units, AAMA recommended allowing disablement of certain diagnostics during power take-off unit operation. The comment states that many diagnostics cannot function reliably during power take-off operation due to the unpredictable load that is applied under these operations, which results in a high risk of false MIL illumination. The comment argues that, due to small volumes of such vehicles and/or infrequent operation of power take-off mode, this disablement will have little or no impact on air quality.

(f) Associated with the provision allowing the use of statistical algorithms, AAMA recommended replacing the term "monitoring event" with the term "driving cycle" for purposes of clarity and consistency. The comment argues that the Agency's definition of "monitoring event" is unclear and recommends using CARB's definition of "driving cycle" for consistency.

(g) The Agency proposed regulatory language that would require OBD systems to detect and identify any deterioration or malfunction occurring in a powertrain system or component directly intended to control emissions. A comment was received from AAMA specifically referring to the positive crankcase ventilation (PCV) system as being an emission related component for which no cost effective monitoring strategies currently exist. Further, the comment states that since the proposed requirement is effective with the 1999 MY, manufacturers will not have sufficient lead time to both develop cost effective monitoring strategies, and implement those strategies on new vehicles. AAMA recommends finalizing a provision similar to one found in the California OBD II regulations that would allow manufacturers to design a robust PCV system in lieu of monitoring. AAMA also recommends allowing sufficient leadtime for manufacturers, consistent with the CARB OBD II requirements, to implement necessary changes to the PCV system.

3. Response to Comments

(a) The Agency agrees that there may be technological feasibility issues in requiring detection of deterioration of secondary air systems at 1.5 times the standard. Therefore, the Agency will finalize a provision allowing an optional functional check of the secondary air system in lieu of the emission based monitor, with Administrator approval. The Agency believes that such a provision will have no adverse impact on air quality and will still result in implementation of the most technologically effective secondary air system monitors.

(b) The Agency agrees with commenters that there are some feasibility issues with rationality and functionality checks for certain electronic powertrain components. To address this concern, the Agency will finalize a provision mandating rationality and functionality checks unless the manufacturer can demonstrate technological infeasibility. Upon receiving Administrator approval of that demonstration, applicable monitoring requirements may be waived.

(c) The Agency agrees with the commenter's concerns that the current provisions for detection and identification of catalyst damaging misfire may increase the likelihood of unserviceable MIL illuminations. The Agency will finalize a provision to allow for continuous MIL illumination for catalyst damage misfire only after it is detected on two consecutive driving cycles or the next driving cycle under which similar conditions are encountered.

(d) The Agency agrees with the concerns of AAMA that the proposed requirements for evaporative system leak detection may not be feasible for fuel tanks with a capacity of greater than 25 gallons. The Agency will finalize a provision to allow a larger orifice threshold for evaporative system leak detection for fuel tanks with a capacity greater than 25 gallons. Manufacturers wishing to utilize this flexibility must obtain Administrator approval prior to certification.

(e) The Agency agrees with commenters that vehicles equipped with power take-off units may not be able to have fully functioning OBD systems during power take-off unit operation. The Agency is finalizing a provision to allow for the disablement of the OBD system during, and only during, power take-off operation.

(f) The Agency agrees with commenters that there may be some confusion with the definitions of "driving cycle" and "monitoring event" with regards to the use of statistical algorithms for MIL illumination. To avoid confusion with terminology used in the CARB OBD II regulations, the Agency will replace the term "monitoring event" with the term "driving cycle." This is consistent with the Agency's intent behind the term "monitoring event" so the change has no impact on OBD requirements other than to eliminate potential confusion.

(g) The Agency agrees with comments associated with monitoring of PCV systems. The Agency will finalize a provision that will allow manufacturers to design and implement robust PCV systems in lieu of monitoring those systems. With regards to appropriate leadtime, the Agency will allow for appropriate leadtime to implement necessary changes to the PCV system but will expect such changes to progress as rapidly as is practical.

C. Extension for Acceptance of California OBD II as Satisfying Federal OBD.

1. Summary of Proposal

EPA proposed to extend indefinitely the existing provision allowing optional compliance with the California OBD II requirements, excluding the California OBD II anti-tampering provisions and the 0.02 inch evaporative leak detection provision, as satisfying federal OBD. Currently, this compliance option, which is used by most manufacturers, ends with the 1998 model year. The proposal sought to eliminate that 1998 model year restriction, making the California OBD II compliance option applicable indefinitely. EPA also proposed to update the version of California OBD II allowed for optional federal OBD compliance. The NPRM noted that the current version of CARB's regulations were contained in Mail-Out #96–34. However, EPA noted that CARB Mail-Out #96–34 was intended primarily for public comment purposes. EPA stated that it would accept the final version of the revised California OBD II regulations in its final rule if relevant portions of the final version are acceptable for federal OBD compliance demonstration. EPA published a Notice of Document Availability (63 FR 8386) on February 19, 1998 announcing that the final version of CARB's OBD II regulations (CARB Mail-Out #97–24)

had been completed and placed in the regulatory docket for this rulemaking (EPA Air Docket A–96–32, IV–H–01). EPA stated that the final CARB OBD II regulations were appropriate for federal OBD compliance and also placed in the docket a detailed analysis of the minor differences between CARB Mail-Outs #96–34 and #97–24 (EPA Air Docket A–96–32, IV–B–01). EPA provided thirty days (until March 23, 1998) for any parties to comment on Mail-Out #97–24.

The proposal stated that manufacturers choosing the California OBD II demonstration option need not comply with portions of that regulation pertaining to vehicles certified under the Low Emission Vehicle Program as those standards are not federal emission standards. The demonstration of compliance with California OBD II need only show compliance as correlated to the applicable federal emission standards, not California standards. Additionally, manufacturers choosing the California OBD II demonstration option need not comply with section (b)(4.2.2) which pertains to all vehicles regardless of emission standards. That section requires evaporative system leak detection monitoring down to a 0.02 inch diameter orifice and represents a level of stringency beyond that ever appropriately considered for federal OBD compliance. Lastly, manufacturers choosing the California OBD II demonstration option need not comply with section (d) which contains the anti-tampering provisions of the California OBD II regulations.

2. Summary of Comments

Several commenters expressed strong support for a provision to indefinitely extend the allowance of California OBD II as satisfying federal OBD. Commenters stated that this option allows flexibility and decreases the certification burdens associated with dual certification.

However, a comment from automotive aftermarket associations, primarily builders of aftermarket parts, expressed concern that the Agency is abdicating its federal emissions rulemaking and certification authority by accepting CARB OBD II as meeting federal OBD for any time period. The comment claims that EPA is inappropriately delegating its authority and violating section 177 of the Clean Air Act. This comment strongly objects to a provision that would extend the existing provision indefinitely, suggesting that, by allowing optional compliance with California OBD II requirements, EPA will ensure that such vehicles will be equipped with anti-tampering devices that are allowed under the CARB OBD II regulations. The comment goes on to suggest that simply removing the anti-tampering provision from the federal OBD regulations in effect does little, because it still permits manufacturers to install anti-tampering devices on their vehicles. The aftermarket associations represented in the comment believe that anti-tampering devices violate sections 202(m) and 207 of the Clean Air Act and that the federal OBD regulations should prohibit anti-tampering devices altogether. The comment claims that the ability to reprogram the computer is an important feature of vehicle service and repair, and that the access to reverse engineer and ability to reprogram must be made available to the automotive aftermarket.

The comment also objects to EPA's decision to extend this compliance option beyond the 1998 model year while the commenters' challenge to an earlier rule dealing with this issue is being heard by the federal court of appeals for the D.C. Circuit. Further, the comment objects to EPA's note in the proposal that EPA would use the final version of California's OBD II regulations in its final rule, if the version of the California regulations is judged appropriate. The comment states that it would not have an effective opportunity to comment on the final rule.

The comment also alleges that EPA will adopt any changes that CARB may make in the future, without allowing commenters to participate in any such rulemaking. In particular, the comment notes that California's regulations may not promote access and ease of use of OBD systems. The comment also questions whether consumers will be more satisfied with vehicles certified to the California OBD II threshold option, rather than to the federal OBD thresholds.

The aftermarket associations provided a later comment providing four alleged incidences where false MIL illumination problems were encountered in the automotive aftermarket. These incidences allegedly support their claim that tampering protection devices may prevent aftermarket service providers from installing aftermarket parts. The associations state that EPA must either prohibit anti-tampering devices that prevent parts manufacturers from reverse engineering, or must require automobile manufacturers to provide the information necessary to build the aftermarket parts.

In response to CARB's December 1996 proposed revisions to their OBD II requirements, Mr. Jack Heyler expressed concerns over the ability of independent repair shops to reprogram vehicle computers (EPA Air Docket A–96–32, Document IV–H–14). Mr. Heyler also expressed concern over the ability of automotive aftermarket to design and manufacture parts and diagnostic tools. The California Automotive Wholesalers' Association (CAWA) expressed concerns over the potential economic impact on the thousands of businesses within California's automotive aftermarket repair industry due to the lack of diagnostic and service information availability requirements under the California OBD II regulation and the anti-tampering provisions of that regulation. In a joint statement made on behalf of several aftermarket associations, the Motor Equipment Manufacturers Association (MEMA) expressed strong support of the staff recommendation to eliminate the anti-tampering requirements applicable to electronically reprogrammable vehicles with OBD II. Mr. Haluza went on to suggest that all of Section 1968.1(d) on anti-tampering provisions should be eliminated from the OBD II regulation. Further, Mr. Haluza suggested that California "must take affirmative steps to not grant certification to vehicles which contain any tampering protection which would prevent or restrict access to OBD data or system in violation of section 202 of the U.S. Clean Air Act."

AAMA provided comments supporting the extension of the California OBD II compliance option. AAMA stated that the extension would allow manufacturers to focus their energies on developing and perfecting a single OBD system, rather than diverting resources to meet two sets of OBD thresholds. In its comments, AAMA expressed its view that the aftermarket comments are not grounded on any statutory or evidentiary basis. AAMA argued that EPA is not abdicating its responsibility under the Clean Air Act or violating any section of the Act.

3. Response to Comments

The Agency will finalize a provision to allow for indefinite acceptance of the California OBD II requirements as outlined in CARB Mail-Out #97–24 as meeting federal OBD requirements. The adverse comments regarding the indefinite extension of allowing California OBD II regulations as satisfying federal OBD are focused on two main issues. The first issue regards EPA's alleged abdication of federal authority to California in the establishment of emissions regulations. The adverse comments argue that allowing manufacturers to optionally certify vehicles to the California OBD II regulations to satisfy federal OBD requirements is an abdication of federal

authority to set air quality standards. The Agency has consistently stated that allowing manufacturers to satisfy federal OBD requirements by demonstrating compliance with California OBD II requirements is simply a compliance option, not an abdication of federal authority. This option allows manufacturers to implement one OBD system nationwide that fully meets the intent of the Clean Air Act and its amendments. The Agency has clearly not abdicated its authority. EPA has followed proper regulatory procedures in considering the acceptability of the California regulations in satisfying federal OBD.

EPA has provided notice and opportunity to comment on the appropriateness of allowing compliance with California's OBD II regulations to be used as a federal compliance option, and EPA has provided its responses to any adverse comments. EPA has also followed appropriate rulemaking procedures in considering whether revisions to California OBD II regulations are appropriate for federal compliance purposes, and EPA will continue to do so if, in the future, it determines that it is appropriate to allow compliance with later revisions of California's OBD II regulations.

EPA independently reviews California OBD II regulations to determine their appropriateness. Any decision to include such regulations is premised on such regulations being consistent with and appropriate under the Clean Air Act. EPA has found that California's OBD II regulations appropriately implement the requirements of section 202(m) and that allowing compliance with such regulations as a compliance option is an appropriate policy, promoting national consistency with no loss of environmental protection. EPA notes that, in the case of certain subparts of California's OBD II regulations (e.g. California's anti-tampering regulations and California's 0.02 inch evaporative leak detection monitoring regulations) EPA has, in its discretion, decided not to require compliance with such subparts for the purposes of compliance with federal regulations. EPA also notes that, with regard to the California regulations actually included in this compliance option, the commenters have not provided any argument or evidence that such regulations are illegal or inappropriate. EPA operates its own OBD certification and compliance program and makes all determinations regarding whether vehicles may be certified as complying with federal OBD regulations.

Regarding the comment that extending the compliance option is contrary to section 177, EPA fails to see how its action has any effect on states' ability to choose to adopt California's emission standards. EPA has neither required nor forbidden states from adopting such standards. The Virginia v. EPA case referenced in the comment is inapposite, as that case dealt with EPA specifically requiring states to implement the California LEV standards, though EPA could not itself promulgate such standards under its own authority under section 202 of the Act. Unlike that case, here EPA is promulgating regulations under its own acknowledged authority to promulgate OBD regulations under section 202(m) of the Act. This final action places no obligation on states to promulgate any regulations. EPA refers to its responsive brief in MEMA v. EPA, No. 96–1397 (D.C. Cir), for further discussion (EPA Air Docket A–96–32, Document IV–H–12.)

The second major issue argued in the adverse comments regards anti-tampering devices. The adverse comments suggest that the Agency's unwillingness to promulgate provisions that prohibit auto manufacturers from installing anti-tampering devices violates the intent of section 202(m) of the Clean Air Act. The Agency believes that sections 202(m) (4) and (5) of the Act were designed to ensure that independent repair shops would be able to (1) access fault codes and other output generated by a vehicle's OBD system through a generic scanning device, (2) understand what the output means without the need of a special decoding device available only from the manufacturer, and (3) receive nonproprietary information regarding repairing OBD and emission-related malfunctions, including the information vehicle manufacturers provide to their dealers. The Agency has consistently argued that these sections of the Act were not intended to require manufacturers to give away proprietary information concerning the internal computer codes within the vehicle's computer. California's anti-tampering provisions, as well as anti-tampering measures that manufacturers voluntarily install in vehicles, protect these proprietary codes and thus do not violate the requirements of section 202(m). Moreover, such codes are not the type of information contemplated under section 202(m) (4) and (5), as they are internal to the vehicle, and are not useful for automotive repair, as opposed to the manufacture of automotive parts. The Agency has promulgated separate regulations on the availability of service information (60 FR 55521) that outline what types of information manufacturers must make available to interested parties. These regulations, among other things, require manufacturers to provide independent repair shops with the same ability to reprogram that the manufacturers provide to their own dealers. These regulations are not affected by this rulemaking. The Agency is satisfied that the existing regulations, as well as the regulations being finalized today, meet the full intent of the Clean Air Act.

Regarding whether California's OBD II regulations promote access and ease of use of OBD systems, California's OBD II regulations have always contained provisions ensuring uncontrolled access to, and ease of use of, the OBD system using generic tools. These regulations are very similar to EPA's own access regulations. Moreover, though California's OBD II regulations do not contain service information availability requirements, EPA's service information regulations are equally applicable to vehicles choosing either the California thresholds compliance option or the federal thresholds compliance option.

The D.C. Circuit recently issued its decision upholding EPA's interpretation of section 202(m)(4) and (5), as it pertained to two earlier EPA actions related to its and California's OBD regulations. *MEMA* v. *Nichols*, 142 F.3d 449 (D.C. Circuit, 1998).

Furthermore, as EPA has found on several earlier occasions, the anti-tampering provisions do not violate any of the provisions of section 207 of the Act. EPA's determination that anti-tampering provisions do not violate the Act does not contravene manufacturers' obligations to abide by section 207. Section 207(b)'s requirement that manufacturers may not invalidate a warranty based on the use of a *certified* aftermarket part is not affected by the use of anti-tampering strategies; nor is section 207(c)'s requirement that manufacturer manuals contain language indicating that service of the vehicles may be performed by any repair operation using any *certified* part. This rule does not change manufacturers' continuing obligation to provide aftermarket service providers with all information provided to dealerships regarding emission related repair, including the ability to reprogram computers.

EPA refers to its previous discussions of these issues in the Service Information Availability rule and the OBD waiver decision (61 FR 53371), as well as its responsive briefs and the decision of the court in the D.C. Circuit

case recently decided. (The Response to Comments document for the Service Information Availability rule, the Decision Document for the OBD waiver decision, and the responsive briefs have all been placed in the docket for this rulemaking, Air Docket A–96–32.)

Regarding the comments providing examples of MIL illuminations that have been encountered by the automotive aftermarket (IV–G–05), EPA does not believe these examples provide any basis for revising its proposal.

The first example is an Internet conversation from 1995 which, though difficult to decipher, appears to indicate the parties having difficulty in installing aftermarket performance parts that cause the MIL to illuminate on a particular vehicle. The second example is a February 9, 1995 correspondence from a fuel systems manufacturer to the California Air Resources Board suggesting that, if the manufacturer does not receive privileged OBD system parameters, the manufacturer will have to discontinue manufacturing and selling its systems.

Both of these examples refer to the same issue: that of the need for aftermarket parts manufacturers to build their parts to be compatible with OBD systems. There is little question that the advent of vehicle OBD systems has required some aftermarket parts manufacturers to work within tighter constraints in building their parts. Certainly, some manufacturers will need to perform more testing or do further analysis in designing their parts. However, the Agency fully believes that aftermarket parts manufacturers, who have had to continue revising their parts as vehicles have become more sophisticated, will continue to be able to build such parts in the future. The Agency believes that fully compliant systems can be designed via reverse engineering of the original equipment configuration, or more thorough testing protocols. Though manufacturer anti-tampering subprograms may make reverse engineering somewhat more difficult, reverse engineering is not impossible nor do these regulations make such activities illegal. Additionally, parts manufacturers may receive proprietary information through licensing agreements with OEMs. The Agency has discussed the latter correspondence with CARB and CARB suggests that this aftermarket parts manufacturer, without OBD system parameters, has made good progress in meeting CARB's OBD II regulations without negative impacts on their business.

In any case, these additional constraints will occur whether manufacturers comply with the federal OBD requirements (even prior to this regulatory revision) or California's OBD II requirements. There is nothing unique to California's OBD II hardware requirements that particularly disadvantages aftermarket parts manufacturers. Regarding anti-tampering mechanisms, as discussed above, these mechanisms protect information that is proprietary in nature and that is not required to be made available under section 202(m)(5). All information that is subject to section 202(m)(5) must now be made available under the Service Information Rule, which had not been promulgated at the time of these correspondences.

The next example involves a series of letters between the California Air Resources Board and an aftermarket parts manufacturer requesting data and information from that manufacturer as to how their aftermarket parts impact OBD systems in order to receive a waiver under California's aftermarket parts regulations. In their letter of response, the parts manufacturer stated that this data cannot be provided unless the parts manufacturer had access to specific OBD technical and operational data. EPA does not operate a mandatory parts certification program, so this example is not pertinent.

One final example is a letter that deals with the issue of false MIL illuminations; in particular, one associated with changing tire diameter from 16" to 19," and the other associated with installing a generator on a Class C motor home. The comment claims that these modifications did not impact emission performance in any manner, implying that the resultant MIL illumination is consequently false. In the example of changing tire diameter, it is conceivable that changing tire diameter could be interpreted by the OBD system in such a way that, for example, may alter the fueling strategy of the vehicle which in turn may cause emissions to increase. However, since no emission data were provided with the example, the implication is impossible to verify. In the example of the Class C motor home, the Agency believes that such a vehicle would be outside the scope of this rulemaking, which applies only to light-duty vehicles and light-duty trucks. As stated above, there is little question that the advent of vehicle OBD systems has required some market parts manufacturers to work within tighter constraints in building their parts. The Agency believes that fully compliant systems can be designed via reverse engineering of the original equipment configuration, or more thorough testing protocols. Additionally, parts manufacturers may receive proprietary information through licensing agreements with OEMs. In any event, as discussed above, nothing in § 202(m)(5) requires that aftermarket parts manufacturers be entitled to information for making parts. *See MEMA* v. *Nichols*, 142 F.3d at 465. Nor does section 202(m)(5) indicate that EPA should require automobile manufacturers to give away their proprietary information. In fact, § 202(m)(5) suggests the opposite, that EPA's regulations be limited by CAA restrictions on the release of trade secrets.

Another example provided by this letter suggests that false MIL illumination has occurred following installation of high-powered aftermarket sound systems. This example suggests that these amplifiers cause battery voltage to drop and that OBD system parameters would be needed by the aftermarket to avoid the false MIL. No data was supplied to support this example and it is unclear to the Agency why a properly installed sound system with the appropriate rating for the particular vehicle would draw battery voltage down so low. Further, it is difficult to understand how the availability of OBD parameters would rectify the situation given that battery voltage being drawn so low is very likely to create an excessive draw on the alternator which is likely to have adverse emission impacts; MIL illumination would seem appropriate in such a circumstance.

Regarding Mr. Heyler's concerns that information needed for repairs has not been made available to independent repair facilities under California's OBD II regulations, and that language be added to those regulations indicating that "information—which is made available to dealer-owned repair facilities—be made available to all independents on a contractual basis at a reasonable cost," EPA's Service Information regulations were promulgated for the purpose of ensuring that independent service facilities have access, at a reasonable cost, to the same information to which dealer-owned facilities have access. As of December 1, 1997, manufacturers are required to make available to independent service providers reprogramming capability for all emission-related programming events for vehicles beginning with model year 1994. Regarding Mr. Heyler's comments on the manufacture of independent parts, see the response to the aftermarket comments provided above.

Regarding CAWA's comments, EPA notes that its service information

requirements are applicable in California, as EPA made clear in its OBD waiver proceeding.

EPA notes that this rule will have no effect on the likelihood or ability of manufacturers to incorporate anti-tampering strategies; however, EPA notes that the version of the California OBD II regulations being referenced in today's rulemaking actually contain less stringent and less specific anti-tampering provisions than the version to which EPA had previously referred. This is consistent with the statement of Mr. Haluza regarding the draft regulation.

Additionally, on March 23, 1995, EPA published a direct final rulemaking (60 FR 55521) that removed any requirement for manufacturers to install anti-tampering strategies on federal vehicles, including vehicles certified under the option allowing compliance with California OBD II.

Regarding the issue of whether EPA should extend this compliance option beyond the 1998 model year while the commenters' challenge to the earlier rule is before the D.C. Circuit, the D.C. Circuit has, as noted above, issued an opinion upholding EPA's earlier actions. Regarding the comment's objection to EPA using the final version of California's regulations without opportunity to comment, on February 19, 1998, EPA published in the **Federal Register** a notice that the final California regulations were completed and available in the docket for this rulemaking. EPA provided a thirty day comment period (until March 23, 1998) to allow for comment on California's final regulations. EPA received no further comments in response to the February 19, 1998 notice.

D. Deficiency Provisions

1. Summary of Proposal

The Agency proposed to extend the current flexibility provisions (i.e. "deficiency provisions") contained in 86.094–17(i) indefinitely, rather than being eliminated beyond the 1998 model year. Additionally, the Agency clarified its policy regarding deficiencies and their carryover from one model year to the next.

2. Summary of Comments

Most comments received were in support of the indefinite extension of the deficiency provision. The Agency also received comments expressing concerns regarding a limit on the number of deficiencies that can be granted and not allowing carryover of deficiencies from one model year to the next, except where unreasonable hardware modifications would be necessary. The Agency also received comments suggesting that the complete lack of a diagnostic monitor should be allowed under the deficiency provision.

3. Response to Comments

As stated in the NPRM, the Agency believes that, despite the best attempts by manufacturers to comply with the complex OBD requirements, there will still be unanticipated instances that cannot be remedied in time to meet production schedules. Given the newness and considerable complexity of designing, producing, and installing the components and systems that make up the OBD system, manufacturers have expressed and demonstrated difficulty in complying with every aspect of the OBD requirements, and such difficulty appears likely to continue in future model years. The Agency has already, on February 17, 1998, finalized a provision to extend the EPA's allowance of deficiencies through the 1999 model year. (63 FR 7718.) In today's action, the Agency is finalizing a provision to indefinitely allow for deficiencies beyond the 1999 model year.

With regards to allowing more than one deficiency, as stated in the NPRM, EPA does not intend to certify vehicles that have more than one OBD system deficiency unless it can be demonstrated that correction of the deficiency requires hardware and/or software modifications that absolutely cannot be accomplished in the time available, as determined by the Administrator. These limitations should prevent a manufacturer from using a deficiency allowance as a means to avoid compliance or delay OBD implementation.

With regards to the carryover of deficiencies from one model year to the next, the Agency will finalize a provision to allow for the carryover of a deficiency from one model year to the next where unreasonable hardware or software modifications would otherwise be necessary to eliminate the deficiency. The Agency agrees with comments that there may be instances where deficiencies may not be discovered until late in the development process and there may not be enough time to develop software changes, new calibrations and validation testing to ensure a reliable software change.

The Agency does not intend that the deficiency provisions be used as a long term planning tool by the manufacturers, but rather as a flexibility to address last minute problems. Requests for the carryover of deficiencies must be approved by the Administrator well in advance of certification with ample demonstration by the manufacturer that correction of the deficiency requires hardware and/or software modifications that absolutely cannot be made in time to meet production schedules.

Furthermore, EPA will not accept any deficiency requests that include the complete lack of a major diagnostic monitor ("major" diagnostic monitors being those for the catalyst, oxygen sensor, engine misfire, and evaporative leaks), with the possible exception of the special provisions for alternate fueled vehicles discussed below. With regards to the allowing of deficiencies for "major" diagnostic monitors, the Agency does not have the authority to certify a vehicle that does not meet the minimum requirements of the Clean Air Act (i.e., oxygen sensor monitor, catalyst monitor, and standardization features). Given that oxygen sensor monitors and catalyst monitors are now standard equipment on gasoline-fueled vehicles, it is not arguable that such monitors cannot be installed in such vehicles. Furthermore, the Agency considers these and other major monitors to be critical aspects of a working OBD system. Without these monitors, or any subset of these monitors, the OBD system does not meet the minimum requirements that EPA believes is necessary for a viable OBD system.

E. Diagnostic Readiness Codes

1. Summary of Proposal

In the proposal, EPA provided clarification on the issue of diagnostic readiness codes, rather than proposing anything new, and requested comment on the clarification. The purpose behind the readiness code is to allow an inspection and maintenance (I/M) official to determine whether or not a vehicle has undergone sufficient operation to allow the OBD system to fully evaluate the emission control system. Readiness codes allow the I/M official to be certain that the lack of OBD diagnostic trouble codes means that the vehicle is operating cleanly, rather than perhaps being an indication that the OBD system simply had not had time to fully evaluate the vehicle. The I/M readiness codes, for those monitors that have associated I/M readiness codes, should be set to "ready" status only after sufficient vehicle operation such that the monitor has been properly exercised and a valid determination can be made as to component's or system's operational status.

2. Summary of Comments

AAMA recommended that the Agency put in place a provision that would

allow for the clearing of OBD readiness codes for affected monitors if monitoring is disabled for a number of driving cycles due to extreme operating conditions. For example, the evaporative leak detection monitor is typically disabled at temperatures below 40 °F to avoid false MILs due to freezing vapors in the fuel lines. The comment argues that it would be unfair if a vehicle failed to pass an I/M inspection because it had stayed in extreme conditions during the time between a maintenance that included disconnecting the battery (which clears I/M readiness codes) and the I/M inspection.

3. Response to Comments

The Agency agrees that there may be conditions under which certain monitors will not and should not run. In particular, the Agency is aware that evaporative system monitors, when exposed to extremely low ambient temperatures, will not be able to run because any water vapor in the fuel lines can freeze. Such freezing is not unusual, but it does make attempts at leak detection very difficult and increases the likelihood of false failure determinations. Because these readiness codes are intended to assist in Inspection and Maintenance programs, the Agency is sensitive to the possibility that consumers may bring their vehicles in for inspection with readiness codes that are set to "not ready" because a particular monitor was not able to run.

Therefore, the Agency is today finalizing a provision that will allow for readiness flags to be set to "ready" if monitoring is disabled for at least two driving cycles due to the continued presence of extreme operating conditions (such as ambient temperatures below 40 °F, or altitudes above 8000 feet). Administrator approval must be obtained in advance and shall be based on the conditions for monitoring system disablement and the number of driving cycles specified without completion of monitoring before readiness is indicated.

F. Provisions for Alternate Fuel Vehicles

1. Summary of Proposal

The Agency proposed a flexibility provision for alternate fuel vehicles through the 2004 model year. Currently, alternate fuel vehicles must fully comply with federal OBD requirements beginning in the 1999 model year. Under the proposed provision, alternate fuel vehicles must fully comply with federal OBD requirements during gasoline operation beginning in the 1999 model year. However, during alternate fuel operation, some monitors may be deactivated where technological infeasibility can be demonstrated and the Administrator has provided approval.

2. Summary of Comments

The Agency received several comments in support of the proposed alternate fuel provision through the 2004 model year. The arguments made by commenters suggest that significant technological hurdles still face the alternate fuel industry in fully complying with the federal OBD requirements. For example, the catalyst is designed for control of emissions from gasoline fuels. The auto manufacturers have generated large amounts of data on the durability of catalysts during gasoline operation. Such is not the case for catalyst durability during alternate fuel operation. As a result, it appears that no manufacturer can currently calibrate a catalyst monitor for proper malfunction detection at high mileages since so little data exists showing the emission durability after 100k miles of alternate fuel operation. Therefore, commenters recommend that more lead time be given to fully explore this and other technological hurdles still facing OBD implementation on alternate fuel vehicles.

3. Response to Comments

The Agency agrees with the commenters that technological feasibility remains an issue for OBD systems on alternate fuel vehicles. As the Agency stated in the proposal, it is supportive of the use of alternate fuel vehicles and is committed to seeing larger volumes of EPA certified alternate fueled vehicles produced and sold. Therefore, the Agency will finalize a provision to allow flexibility in the OBD monitoring requirements during alternate fuel operation. This provision is intended to provide additional leadtime for alternate fuel OBD development. The provision extends through the 2004 model year only; it requires a demonstration of technological infeasibility and Administrator approval; and, it does not apply to alternate fuel vehicles while operating on gasoline or diesel fuel (for diesel cycle engines). To clarify, this flexibility is intended to apply only during operation on an alternate fuel and even then the flexibility applies only to the extent manufacturers can show that diagnostic strategies for alternate fuel operation are technologically infeasible. Manufacturers will be required to include monitoring strategies to the extent feasible, but will not be required to include monitoring strategies the reliability of which is still doubtful for alternate fuel operation. Further, EPA will expect that vehicles designed for use on more than one fuel (i.e. flexible fuel vehicles) have fully operating OBD systems upon initial sale. Should a non-gasoline fuel then be introduced, the monitors affected by the alternate fuel could be deactivated to the extent the manufacturers can show that reliable diagnostic strategies are not feasible.

G. Update of Materials Incorporated by Reference

1. Summary of Proposal

The Agency proposed to Incorporate by Reference a series of standardized Society of Automotive Engineers (SAE) and International Standards Organization (ISO) procedures. The SAE documents are SAE J1850, SAE J1877, SAE J1892, SAE J1962, SAE J1979, and SAE J2012. The ISO documents proposed to be Incorporated by Reference were ISO 9141–2 and ISO 1423–4.

2. Summary of Comments

The Agency received no adverse comment on the Incorporation by Reference of the SAE and ISO standardized procedures. One commenter suggested the incorporation by reference of the ISO engine symbol for the malfunction indicator light (MIL) to use in place of the wording "check engine" or "service engine soon".

3. Response to Comments

The Agency will Incorporate by Reference all of the SAE and ISO standardized procedures with the exception of ISO 14230–4. This document has not been finalized by the International Standards Organization and therefore cannot be Incorporated by Reference in Agency regulations. Regarding the use of the ISO engine symbol for the malfunction indicator light, the Agency agrees with such a policy and has approved such MIL designs whenever they have been requested. To eliminate the need for the manufacturer to request Administrator approval of such MIL designs, and because the Agency believes that engine symbols are universally recognized without the need to understand the English phrases "Service Engine Soon" or "Check Engine," the final regulations contain a provision allowing use of a universally recognized engine symbol.

H. Diesel Cycle Vehicles

1. Summary of Proposal

In the regulatory language of the NPRM, the Agency incorrectly referred to sections of the regulatory language that did and did not apply to diesel cycle vehicles and trucks. The proposed regulatory language stated that § 86.099–17 paragraphs (b)(2) and (b)(3) did not apply to diesels, and that only § 86.099–30 paragraph (f)(4) did apply to diesels.

2. Summary of Comments

Comments received from AAMA suggested that there were several oversights as to which paragraphs of these sections did not apply to diesel cycle engines.

3. Response to Comments

The Agency agrees that there were oversights as to which of the paragraphs contained in the sections noted above apply to diesel cycle engines. In section § 86.099–17, paragraphs (b)(2) through (b)(4) do not apply to diesel cycle engines. In section § 86.099–30, paragraphs (f)(1) through (f)(4) do not apply to diesel cycle engines.

I. Certification Requirements

1. Summary of Proposal

The Agency did not propose any changes to the federal OBD certification requirements.

2. Summary of Comments

The Agency received comments from AAMA regarding their concern that the NPRM regulatory language does not provide opportunities for manufacturers to provide engineering reports or other information that may alleviate problems on an emission data vehicle or other test vehicle before the vehicle is produced for sale. AAMA contends that last minute OBD calibration changes are often required after the emission certification calibrations have been established and that the emission data vehicle may not contain a finalized OBD calibration. AAMA contends that this opportunity is currently allowed by the Agency for other emission related changes made by the manufacturer and should be permitted for OBD systems as well.

AAMA also expressed concern with regards to EPA inducing component faults that could potentially damage official certification vehicles. AAMA contends that such testing should be done only on development vehicles which would avoid the risk of damaging their certification vehicles while still providing the data needed by EPA.

3. Response to Comments

The Agency's running change regulations codified in 40 CFR 86.079–32, 86.079–33, and 86.079–34, allow the manufacturer to be given the opportunity to provide an engineering report or description of any follow-up actions that will alleviate any OBD concerns discovered on emissions or fuel economy data vehicles.

With regards to concerns over inducing component-damaging faults on official certification vehicles, since it is not the Agency's intent to damage such vehicles, EPA agrees to consult with the manufacturer to ensure that appropriate test vehicles are used for such purposes.

J. Comments on Cost Effectiveness and Environmental Impact

1. Summary of Proposal

In the preamble to the NPRM, the Agency stated that the proposed changes to the federal OBD program would not have an annual effect on the economy of $100 million or more, nor would they adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

With regards to environmental impact, the Agency proposed no changes that were expected to impact the originally estimated emissions reductions or air quality impact analyses finalized in the February 1993, federal OBD regulations (58 FR 9468).

2. Summary of Comments

The Agency received one unsubstantiated comment from an individual who stated that this regulation would have an effect on the economy that would exceed $100 million annually. The commenter suggests that OBD technology is changing the vehicle repair industry and forcing service facilities to adopt expensive and unreliable state-of-the art technologies that add substantial costs to the diagnosis and repair of OBD equipped vehicles. This commenter goes on to state that the proposed regulations would have minimal effect on the environment.

3. Response to Comments

Regarding the concern that OBD technology is imposing significant cost on the repair industry, the Agency's Service Information Availability regulations (60 FR 55521) require that emission related vehicle repair information and the necessary tools to access the OBD system be made available by the auto manufacturer to the service and repair industry, and that it be available at competitive prices. The Agency disagrees that the provisions being finalized today or the issues raised by the commenter will have an annual impact on the economy greater than $100 million (See Section V.—Cost Effectiveness).

Regarding comments that the proposed regulations will provide no environmental benefit to the public, the Agency does not agree. The changes proposed in the NPRM and being finalized today neither increase nor decrease the emission reductions expected from the OBD program. However, the Agency disagrees that OBD systems in general will provide no benefits. EPA provided emissions and air quality analyses in the initial federal OBD regulations (58 FR 9468, February 19, 1993) illustrating substantial emission reductions associated with OBD.

V. Cost Effectiveness

This final rulemaking alters an existing provision by revising the current federal OBD malfunction thresholds. These revisions will result in essentially equivalent stringency for the major emission control system monitors, while slightly relaxing stringency in certain cases for some more minor emission control system monitors. Because most of industry has requested that EPA harmonize emission thresholds with the California OBD II thresholds as a means to minimize resource requirements, EPA believes that the regulations being finalized today will provide cost savings by eliminating the need to incur significant recalibration and/or retesting costs and efforts associated with having two sets of OBD regulations with which to comply.

However, EPA is aware that some OEMs, particularly extremely small volume import manufacturers, may have concentrated their efforts on the unique federal OBD malfunction thresholds. EPA believes that the primary cost imposed on these particular OEMs associated with the regulations being finalized today would be for the mandatory evaporative system leak detection monitoring. These systems have been estimated by EPA to cost $18 per vehicle (58 FR 9483). The Agency estimates that the total potential additional cost of this regulation resulting from mandating the evaporative leak detection monitor will be substantially less than $20 million annually beginning in model year 2001. In addition, the Agency believes that mandating the evaporative system leak detection monitor would not increase

the total cost of the federal OBD program. The cost of this monitor was taken into consideration in the original federal OBD regulations (58 FR 9468) even though this monitor was originally optional. Additionally, extremely small volume import manufacturers that are set for compliance with the current federal OBD thresholds will be required to reevaluate their OBD calibrations and would require potential rework to comply with the thresholds finalized today. Because this recalibration effort could be resource intensive, the Agency requested comments on the level of burden and potential means of resolving this concern should it be warranted based on the burden imposed. The Agency received comments indicating that it would be appropriate to allow manufacturers that have been set for compliance with the current federal OBD thresholds to meet such thresholds for two additional years. EPA has agreed to allow this in the final rule.

The automotive aftermarket industry has argued that the provisions of the regulations being finalized today will impose heavy economic burdens on that industry. The automotive aftermarket has made claims of heavy economic burdens during development of the California OBD II regulations and the ensuing waiver process during which California requested a waiver from federal preemption for the purpose of enforcing their unique OBD program. The aftermarket has also argued that excessive costs will be incurred because the anti-tampering measures required under the California OBD II regulations will present more difficulty for the automotive aftermarket in carrying out their business of reverse engineering original equipment manufacturer (OEM) parts and designing replacement or specialty parts. However, EPA is not including CARB's anti-tampering provisions in its incorporation of California's regulations. Failure to incorporate these provisions still allows OEMs to voluntarily implement anti-tampering measures, but such is also the case under the current federal OBD regulations. Any costs associated with these anti-tampering devices are not a result of this rule, but of independent actions by manufacturers. Moreover, CARB has eliminated the anti-tampering provisions considered most egregious by the aftermarket.[4] Therefore, EPA believes that the provisions of this final rulemaking are not responsible for increased costs on the automotive aftermarket.

The costs and emission reductions associated with the federal OBD program were developed for the February 19, 1993, final rulemaking. The changes being finalized today do not affect the costs or emission reductions published as part of that rulemaking, with the possible exception of decreasing costs for larger volume manufacturers.

VI. Public Participation

The Agency held a public hearing on July 9, 1997 for public testimony on the proposed revisions. Those comments and the additional comments received during the public comment period are available in Air Docket A–96–32. The comments received on the proposed revisions are discussed and addressed in section IV. of this final rulemaking.

VII. Administration Requirements

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order.

The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or, (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This action was submitted to OMB for review pursuant to Executive Order 12866.

B. Reporting and Recordkeeping Requirements

Today's action does not impose any new information collection burden. The modifications proposed above do not change the information collection requirements submitted to and approved by OMB in association with the OBD final rulemaking (58 FR 9468, February 19, 1993; and, 59 FR 38372, July 28, 1994). The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in 40 CFR 86.084–17 under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0104 (EPA ICR No. 783.36).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Copies of the Information Collection Request (ICR) document may be obtained from Sandy Farmer, by mail at OP Regulatory Information Division; U.S. Environmental Protection Agency (2137) ; 401 St., S.W. Washington DC 20640, by email at farmer.sandy epa mail.epa.gov.or by calling (202) 260–2740. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control number s for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

C. Impact on Small Entities

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. This rule will not have a significant adverse economic impact on a substantial number of small businesses. This rulemaking will provide regulatory relief to both large and small volume automobile manufacturers by maintaining consistency with California OBD II requirements. It will not have a substantial impact on such entities. This rulemaking will not have a significant impact on businesses that manufacture, rebuild, distribute, or sell automotive parts, nor those involved in automotive service and repair, as the revisions affect only requirements on automobile manufacturers. *See United Distribution Companies* v. *FERC,* 88 F.3d 1005, 1170 (D.C. Cir. 1996).

[4] CARB Mail-Out #97–24, amendments to the California Code of Regulations section 1968.1, paragraph (d).

In the absence of this final rule, the expiration of the § 86.094–17(j) provision allowing optional demonstration of compliance with California OBD II requirements to suffice for EPA certification purposes would necessitate full vehicle manufacturer compliance with the current federal OBD requirements at § 86.094–17(a) through (h), beginning with the 1999 model year. Most manufacturers have thus far chosen to reduce their costs by producing vehicle OBD systems to California specifications, thereby avoiding the necessity of developing significantly different OBD calibrations meeting the existing federal specifications, for the non-California market. Because the final rule modifies federal requirements to capture many benefits of the California option, EPA believes that it reduces manufacturer costs over a no-action baseline for 1999 and later model years.

Further, figures provided by the U.S. Departments of Labor and Commerce show the estimated cost of vehicle changes to meet 1996 model year OBD II requirements to be less than 1% of total vehicle cost. Because these changes already incorporate increased monitoring that is required to meet California OBD II requirements and is also required by the final rule, the rule is not expected to significantly increase OBD system cost beyond the estimate given.

D. Unfunded Mandates Act

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector of $100 million or more. Under Section 205, EPA must select the most cost effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the action finalized today would not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector.

E. Submission to Congress and the Comptroller General

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

F. Applicability of Executive Order 13045: Children's Health Protection

This final rule is not subject to E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

G. Enhancing Intergovernmental Partnerships

Under Executive Order 12875, EPA may not issue a regulation that is not required by stature and that creates a mandate upon a State, local or tribal government, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by those governments or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representative of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representative of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

This rule will be implemented at the federal level and imposes compliance obligations only on private industry. The rule thus creates no mandate on State, local or tribal governments, nor does it impose any enforceable duties on these entities. Accordingly, the requirements of Executive Order 12875 do not apply to this rule.

H. Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the federal governments or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representative of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

This rule does not significantly or uniquely affect the communities of Indian tribal governments. As noted above, this rule will be implemented at the federal level and imposes compliance obligations only on private industry. Accordingly, the requirements of Executive Order 13084 do not apply to this rule.

List of Subjects in 40 CFR Part 86

Environmental protection, Administrative practice and procedure, Confidential business information, Incorporation by reference, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: November 25, 1998.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, part 86 of title 40 of the Code of Federal Regulations is amended as follows:

PART 86—CONTROL OF EMISSIONS FROM NEW AND IN-USE HIGHWAY VEHICLES AND ENGINES

1. The authority citation for part 86 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

2. Section 86.1 is amended by adding the following entries in numerical order

to the table in paragraph (b)(2) and by adding paragraph (b)(5) to read as follows:

§ 86.1 Reference materials.

* * * * *

(b) * * *

(2) * * *

Document No. and name	40 CFR part 86 reference
* * * * *	
SAE J1850, July 1995, Class B Data Communication Network Interface	86.099–17
SAE J1877, July 1994, Recommended Practice for Bar-Coded Vehicle Identification Number Label	86.095–35
SAE J1892, October 1993, Recommended Practice for Bar-Coded Vehicle Emission Configuration Label	86.095–35
SAE J1962, January 1995, Diagnostic Connector	86.099–17
SAE J1979, July 1996, E/E Diagnostic Test Modes	86.099–17
SAE J2012, July 1996, Recommended Practices for Diagnostic Trouble Code Definitions	86.099–17
* * * * *	

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(5) *ISO material.* The following table sets forth material from the International Organization of Standardization that has been incorporated by reference. The first column lists the number and name of the material. The second column lists the section(s) of this part, other than § 86.1, in which the matter is referenced. The second column is presented for information only and may not be all inclusive. Copies of these materials may be obtained from the International Organization for Standardization, Case Postale 56, CH–1211 Geneva 20, Switzerland.

Document No. and name	40 CFR part 86 reference
ISO 9141–2, February 1994, Road vehicles—Diagnostic systems Part 2	86.099–17

Subpart A—[Amended]

§ 86.094–21 [Amended]

3. Section 86.094–21 is amended by removing and reserving paragraph (i).

4. Section 86.095–35 is amended by revising paragraph (i) to read as follows:

§ 86.095–35 Labeling.

* * * * *

(i) All light-duty vehicles and light-duty trucks shall comply with SAE Recommended Practices J1877 July 1994, "Recommended Practice for Bar-Coded Vehicle Identification Number Label," and J1892 October 1993, "Recommended Practice for Bar-Coded Vehicle Emission Configuration Label." SAE J1877 and J1892 are incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from the Society of Automotive Engineers, Inc., 400 Commonwealth Drive, Warrendale, PA 15096–0001. Copies may be inspected at Docket No. A–90–35 at EPA's Air Docket (LE–131), room 1500M, 1st Floor, Waterside Mall, 401 M Street, SW., Washington, DC, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

5. Section 86.098–17 is amended by revising paragraphs (b)(2) through (j) to read as follows:

§ 86.098–17 Emission control diagnostic system for 1998 and later light-duty vehicles and light-duty trucks.

* * * * *

(b)(2) through (i) [Reserved]. For guidance see § 86.094–17.

(j) Demonstration of compliance with California OBD II requirements (Title 13 California Code Sec. 1968.1), as modified pursuant to California Mail Out #97–24 (December 9, 1997), shall satisfy the requirements of this section, except that compliance with Title 13 California Code Secs. 1968.1(b)(4.2.2), pertaining to evaporative leak detection, and 1968.1(d), pertaining to tampering protection, are not required to satisfy the requirements of this section.

6. A new § 86.099–17 is added to read as follows:

§ 86.099–17 Emission control diagnostic system for 1999 and later light-duty vehicles and light-duty trucks.

(a) All light-duty vehicles and light-duty trucks shall be equipped with an on-board diagnostic (OBD) system capable of monitoring, for each vehicle's useful life, all emission-related powertrain systems or components. All systems and components required to be monitored by these regulations shall be evaluated periodically, but no less frequently than once per Urban Dynamometer Driving Schedule as defined in Appendix I, paragraph (a), of this part, or similar trip as approved by the Administrator.

(b) *Malfunction descriptions.* The OBD system shall detect and identify malfunctions in all monitored emission-related powertrain systems or components according to the following malfunction definitions as measured and calculated in accordance with test procedures set forth in subpart B of this part, excluding those test procedures described in § 86.158–00. Paragraph (b)(1) of this section does not apply to diesel cycle light-duty vehicles or diesel cycle light-duty trucks, except where the catalyst is needed for NMHC control. Paragraphs (b)(2), (b)(3), and (b)(4) of this section do not apply to diesel cycle light-duty vehicles or diesel cycle light-duty trucks.

(1) Catalyst deterioration or malfunction before it results in an increase in NMHC emissions 1.5 times the NMHC standard, as compared to the NMHC emission level measured using a representative 4000 mile catalyst system.

(2) Engine misfire resulting in exhaust emissions exceeding 1.5 times the applicable standard for NMHC, CO or NO_x; and any misfire capable of damaging the catalytic converter.

(3) Oxygen sensor deterioration or malfunction resulting in exhaust emissions exceeding 1.5 times the applicable standard for NMHC, CO or NO_x.

(4) Any vapor leak in the evaporative and/or refueling system (excluding the tubing and connections between the purge valve and the intake manifold) greater than or equal in magnitude to a leak caused by a 0.040 inch diameter orifice; any absence of evaporative purge air flow from the complete evaporative emission control system. On vehicles with fuel tank capacity greater than 25 gallons, the Administrator may, following a request from the manufacturer, revise the size of the orifice to the smallest orifice feasible, based on test data, if the most reliable monitoring method available cannot reliably detect a system leak equal to a 0.040 inch diameter orifice.

(5) Any deterioration or malfunction occurring in a powertrain system or component directly intended to control emissions, including but not necessarily limited to, the exhaust gas recirculation (EGR) system, if equipped, the secondary air system, if equipped, and the fuel control system, singularly resulting in exhaust emissions exceeding 1.5 times the applicable emission standard for NMHC, CO or NO_x For vehicles equipped with a secondary air system, a functional check, as described in paragraph (b)(6) of this section, may satisfy the requirements of this paragraph provided the manufacturer can demonstrate that deterioration of the flow distribution system is unlikely. This demonstration

is subject to Administrator approval and, if the demonstration and associated functional check are approved, the diagnostic system shall indicate a malfunction when some degree of secondary airflow is not detectable in the exhaust system during the check. For vehicles equipped with positive crankcase ventilation (PCV), monitoring of the PCV system is not necessary provided the manufacturer can demonstrate to the Administrator's satisfaction that the PCV system is unlikely to fail.

(6) Any other deterioration or malfunction occurring in an electronic emission-related powertrain system or component not otherwise described above that either provides input to or receives commands from the on-board computer and has a measurable impact on emissions; monitoring of components required by this paragraph shall be satisfied by employing electrical circuit continuity checks and rationality checks for computer input components (input values within manufacturer specified ranges), and functionality checks for computer output components (proper functional response to computer commands) except that the Administrator may waive such a rationality or functionality check where the manufacturer has demonstrated infeasibility; malfunctions are defined as a failure of the system or component to meet the electrical circuit continuity checks or the rationality or functionality checks.

(7) Oxygen sensor or any other component deterioration or malfunction which renders that sensor or component incapable of performing its function as part of the OBD system shall be detected and identified on vehicles so equipped.

(8) Alternatively, for model years 1999 and 2000, engine families may comply with the malfunction descriptions of § 86.098–17(a) and (b) in lieu of the malfunction descriptions in paragraphs (a) and (b) of this section. This alternative is not applicable after the 2000 model year.

(c) *Malfunction indicator light.* The OBD system shall incorporate a malfunction indicator light (MIL) readily visible to the vehicle operator. When illuminated, it shall display "Check Engine," "Service Engine Soon," a universally recognizable engine symbol, or a similar phrase or symbol approved by the Administrator. A vehicle shall not be equipped with more than one general purpose malfunction indicator light for emission-related problems; separate specific purpose warning lights (e.g. brake system, fasten seat belt, oil pressure, etc.) are permitted. The use of red for the OBD-related malfunction indicator light is prohibited.

(d) *MIL illumination.* The MIL shall illuminate and remain illuminated when any of the conditions specified in paragraph (b) of this section are detected and verified, or whenever the engine control enters a default or secondary mode of operation considered abnormal for the given engine operating conditions. The MIL shall blink once per second under any period of operation during which engine misfire is occurring and catalyst damage is imminent. If such misfire is detected again during the following driving cycle (i.e., operation consisting of, at a minimum, engine start-up and engine shut-off) or the next driving cycle in which similar conditions are encountered, the MIL shall maintain a steady illumination when the misfire is not occurring and shall remain illuminated until the MIL extinguishing criteria of this section are satisfied. The MIL shall also illuminate when the vehicle's ignition is in the "key-on" position before engine starting or cranking and extinguish after engine starting if no malfunction has previously been detected. If a fuel system or engine misfire malfunction has previously been detected, the MIL may be extinguished if the malfunction does not reoccur during three subsequent sequential trips during which similar conditions are encountered (engine speed is within 375 rpm, engine load is within 20 percent, and the engine's warm-up status is the same as that under which the malfunction was first detected), and no new malfunctions have been detected. If any malfunction other than a fuel system or engine misfire malfunction has been detected, the MIL may be extinguished if the malfunction does not reoccur during three subsequent sequential trips during which the monitoring system responsible for illuminating the MIL functions without detecting the malfunction, and no new malfunctions have been detected. Upon Administrator approval, statistical MIL illumination protocols may be employed, provided they result in comparable timeliness in detecting a malfunction and evaluating system performance, i.e., three to six driving cycles would be considered acceptable.

(e) *Storing of computer codes.* The emission control diagnostic system shall record and store in computer memory diagnostic trouble codes and diagnostic readiness codes indicating the status of the emission control system. These codes shall be available through the standardized data link connector per SAE J1979 specifications incorporated by reference in paragraph (h) of this section.

(1) A diagnostic trouble code shall be stored for any detected and verified malfunction causing MIL illumination. The stored diagnostic trouble code shall identify the malfunctioning system or component as uniquely as possible. At the manufacturer's discretion, a diagnostic trouble code may be stored for conditions not causing MIL illumination. Regardless, a separate code should be stored indicating the expected MIL illumination status (i.e., MIL commanded "ON," MIL commanded "OFF").

(2) For a single misfiring cylinder, the diagnostic trouble code(s) shall uniquely identify the cylinder, unless the manufacturer submits data and/or engineering evaluations which adequately demonstrate that the misfiring cylinder cannot be reliably identified under certain operating conditions. The diagnostic trouble code shall identify multiple misfiring cylinder conditions; under multiple misfire conditions, the misfiring cylinders need not be uniquely identified if a distinct multiple misfire diagnostic trouble code is stored.

(3) The diagnostic system may erase a diagnostic trouble code if the same code is not re-registered in at least 40 engine warm-up cycles, and the malfunction indicator light is not illuminated for that code.

(4) Separate status codes, or readiness codes, shall be stored in computer memory to identify correctly functioning emission control systems and those emission control systems which require further vehicle operation to complete proper diagnostic evaluation. A readiness code need not be stored for those monitors that can be considered continuously operating monitors (e.g., misfire monitor, fuel system monitor, etc.). Readiness codes should never be set to "not ready" status upon key-on or key-off; intentional setting of readiness codes to "not ready" status via service procedures must apply to all such codes, rather than applying to individual codes. Subject to Administrator approval, if monitoring is disabled for a multiple number of driving cycles (i.e., more than one) due to the continued presence of extreme operating conditions (e.g., ambient temperatures below 40°F, or altitudes above 8000 feet), readiness for the subject monitoring system may be set to "ready" status without monitoring having been completed. Administrator approval shall be based on the conditions for monitoring system disablement, and the number of driving

cycles specified without completion of monitoring before readiness is indicated.

(f) *Available diagnostic data.* (1) Upon determination of the first malfunction of any component or system, "freeze frame" engine conditions present at the time shall be stored in computer memory. Should a subsequent fuel system or misfire malfunction occur, any previously stored freeze frame conditions shall be replaced by the fuel system or misfire conditions (whichever occurs first). Stored engine conditions shall include, but are not limited to: engine speed, open or closed loop operation, fuel system commands, coolant temperature, calculated load value, fuel pressure, vehicle speed, air flow rate, and intake manifold pressure if the information needed to determine these conditions is available to the computer. For freeze frame storage, the manufacturer shall include the most appropriate set of conditions to facilitate effective repairs. If the diagnostic trouble code causing the conditions to be stored is erased in accordance with paragraph (d) of this section, the stored engine conditions may also be erased.

(2) The following data in addition to the required freeze frame information shall be made available on demand through the serial port on the standardized data link connector, if the information is available to the on-board computer or can be determined using information available to the on-board computer: Diagnostic trouble codes, engine coolant temperature, fuel control system status (closed loop, open loop, other), fuel trim, ignition timing advance, intake air temperature, manifold air pressure, air flow rate, engine RPM, throttle position sensor output value, secondary air status (upstream, downstream, or atmosphere), calculated load value, vehicle speed, and fuel pressure. The signals shall be provided in standard units based on SAE specifications incorporated by reference in paragraph (h) of this section. Actual signals shall be clearly identified separately from default value or limp home signals.

(3) For all emission control systems for which specific on-board evaluation tests are conducted (catalyst, oxygen sensor, etc.), the results of the most recent test performed by the vehicle, and the limits to which the system is compared shall be available through the standardized data link connector per SAE J1979 specifications incorporated by reference in paragraph (h) of this section.

(4) Access to the data required to be made available under this section shall be unrestricted and shall not require any access codes or devices that are only available from the manufacturer.

(g) The emission control diagnostic system is not required to evaluate systems or components during malfunction conditions if such evaluation would result in a risk to safety or failure of systems or components. Additionally, the diagnostic system is not required to evaluate systems or components during operation of a power take-off unit such as a dump bed, snow plow blade, or aerial bucket, etc.

(h) Incorporation by reference materials. The emission control diagnostic system shall provide for standardized access and conform with the following Society of Automotive Engineers (SAE) standards and/or the following International Standards Organization (ISO) standards. The following documents are incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be inspected at Docket No. A–90–35 at EPA's Air docket (LE–131), room 1500 M, 1st Floor, Waterside Mall, 401 M Street, SW., Washington, DC, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(1) *SAE material.* Copies of these materials may be obtained from the Society of Automotive Engineers, Inc., 400 Commonwealth Drive, Warrendale, PA 15096–0001.

(i) SAE J1850 July 1995, "Class B Data Communication Network Interface," shall be used as the on-board to off-board communications protocol. All emission related messages sent to the scan tool over a J1850 data link shall use the Cyclic Redundancy Check and the three byte header, and shall not use inter-byte separation or checksums.

(ii) Basic diagnostic data (as specified in § 86.094–17(e) and (f)) shall be provided in the format and units in SAE J1979 July 1996, E/E Diagnostic Test Modes.

(iii) Diagnostic trouble codes shall be consistent with SAE J2012 July 1996, "Recommended Practices for Diagnostic Trouble Code Definitions."

(iv) The connection interface between the OBD system and test equipment and diagnostic tools shall meet the functional requirements of SAE J1962 January 1995, "Diagnostic Connector."

(2) *ISO materials.* Copies of these materials may be obtained from the International Organization for Standardization, Case Postale 56, CH–1211 Geneva 20, Switzerland.

(i) ISO 9141–2 February 1994, "Road vehicles—Diagnostic systems—Part 2: CARB requirements for interchange of digital information," may be used as an alternative to SAE J1850 as the on-board to off-board communications protocol.

(ii) [Reserved]

(i) *Deficiencies and alternate fueled vehicles.* Upon application by the manufacturer, the Administrator may accept an OBD system as compliant even though specific requirements are not fully met. Such compliances without meeting specific requirements, or deficiencies, will be granted only if compliance would be infeasible or unreasonable considering such factors as, but not limited to, technical feasibility of the given monitor, lead time and production cycles including phase-in or phase-out of engines or vehicle designs and programmed upgrades of computers, and if any unmet requirements are not carried over from the previous model year except where unreasonable hardware or software modifications would be necessary to correct the non-compliance, and the manufacturer has demonstrated an acceptable level of effort toward compliance as determined by the Administrator. Furthermore, EPA will not accept any deficiency requests that include the complete lack of a major diagnostic monitor ("major" diagnostic monitors being those for the catalyst, oxygen sensor, engine misfire, and evaporative leaks), with the possible exception of the special provisions for alternate fueled vehicles. For alternate fueled vehicles (e.g., natural gas, liquefied petroleum gas, methanol, ethanol), beginning with the model year for which alternate fuel emission standards are applicable and extending through the 2004 model year, manufacturers may request the Administrator to waive specific monitoring requirements of this section for which monitoring may not be reliable with respect to the use of the alternate fuel. At a minimum, alternate fuel vehicles shall be equipped with an OBD system meeting OBD requirements to the extent feasible as approved by the Administrator.

(j) Demonstration of compliance with California OBD II requirements (Title 13 California Code Sec. 1968.1), as modified pursuant to California Mail Out #97–24 (December 9, 1997), shall satisfy the requirements of this section, except that compliance with Title 13 California Code Secs. 1968.1(b)(4.2.2), pertaining to evaporative leak detection, and 1968.1(d), pertaining to tampering protection, are not required to satisfy the requirements of this section, and the deficiency fine provisions of 1968.1(m)(6.1) and (6.2) shall not apply.

7. A new § 86.099–30 is added to read as follows:

§ 86.099–30 Certification.

This § 86.099–30 includes text that specifies requirements that differ from § 86.094–30, § 86.095–30, § 86.096–30, or § 86.098–30. Where a paragraph in § 86.094–30, § 86.095–30, § 86.096–30, or § 86.098–30 is identical and applicable to § 86.099–30, this may be indicated by specifying the corresponding paragraph and the statement "[Reserved]. For guidance see § 86.094–30." or "[Reserved]. For guidance see § 86.095–30." or "[Reserved]. For guidance see § 86.096–30." or "[Reserved]. For guidance see § 86.098-30.".

(a)(1) and (a)(2) [Reserved]. For guidance see § 86.094–30.

(a)(3)(i)[Reserved]. For guidance see § 86.098–30.

(a)(3)(ii) and (a)(4)(ii) [Reserved]. For guidance see § 86.095–30.

(a)(4)(iii) introductory text through (a)(4)(iii)(C)[Reserved]. For guidance see § 86.094–30.

(a)(4)(iv) introductory text [Reserved]. For guidance see § 86.095–30.

(a)(4)(iv)(A) through (a)(9)[Reserved]. For guidance see § 86.094–30.

(a)(10)(i) through (a)(11)(ii)(C)[Reserved]. For guidance see § 86.098–30.

(a)(12) [Reserved]. For guidance see § 86.094–30.

(a)(13) [Reserved]. For guidance see § 86.095–30.

(a)(14) [Reserved]. For guidance see § 86.094–30.

(a)(15) through (a)(18) [Reserved]. For guidance see § 86.096–30.

(a)(19) introductory text through (a)(19)(iii) [Reserved]. For guidance see § 86.098–30.

(b)(1) introductory text through (b)(1)(i)(B) [Reserved]. For guidance see § 86.094–30.

(b)(1)(i)(C) [Reserved]. For guidance see § 86.098–30.

(b)(1)(ii) through (b)(1)(iv) [Reserved]. For guidance see § 86.094–30.

(b)(2) [Reserved]. For guidance see § 86.098–30.

(b)(3) through (b)(4)(i) [Reserved]. For guidance see § 86.094–30.

(b)(4)(ii) [Reserved]. For guidance see § 86.098–30.

(b)(4)(ii)(A) [Reserved]. For guidance see § 86.094–30.

(b)(4)(ii)(B) through (b)(4)(iv) [Reserved]. For guidance see § 86.098–30.

(b)(5) through (e) [Reserved]. For guidance see § 86.094–30.

(f) For engine families required to have an emission control diagnostic system (an OBD system), certification will not be granted if, for any test vehicle approved by the Administrator in consultation with the manufacturer, the malfunction indicator light does not illuminate under any of the following circumstances, unless the manufacturer can demonstrate that any identified OBD problems discovered during the Administrator's evaluation will be corrected on production vehicles. Only paragraphs (f)(5) and (f)(6) of this section apply to diesel cycle vehicles and diesel cycle trucks where such vehicles and trucks are so equipped.

(1) A catalyst is replaced with a deteriorated or defective catalyst, or an electronic simulation of such, resulting in an increase of 1.5 times the NMHC standard above the NMHC emission level measured using a representative 4000 mile catalyst system.

(2) An engine misfire condition is induced resulting in exhaust emissions exceeding 1.5 times the applicable standards for NMHC, CO or NO_X.

(3) Any oxygen sensor is replaced with a deteriorated or defective oxygen sensor, or an electronic simulation of such, resulting in exhaust emissions exceeding 1.5 times the applicable standard for NMHC, CO or NO_X.

(4) A vapor leak is introduced in the evaporative and/or refueling system (excluding the tubing and connections between the purge valve and the intake manifold) greater than or equal in magnitude to a leak caused by a 0.040 inch diameter orifice, or the evaporative purge air flow is blocked or otherwise eliminated from the complete evaporative emission control system.

(5) A malfunction condition is induced in any emission-related powertrain system or component, including but not necessarily limited to, the exhaust gas recirculation (EGR) system, if equipped, the secondary air system, if equipped, and the fuel control system, singularly resulting in exhaust emissions exceeding 1.5 times the applicable emission standard for NMHC, CO or NO_X.

(6) A malfunction condition is induced in an electronic emission-related powertrain system or component not otherwise described above that either provides input to or receives commands from the on-board computer resulting in a measurable impact on emissions.

[FR Doc. 98–32570 Filed 12–21–98; 8:45 am]
BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 63, No. 245
Tuesday, December 22, 1998

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. 95–CE–91–AD]

RIN 2120–AA64

Airworthiness Directives; AlliedSignal Inc. VN 411B Very High Frequency (VHF) Navigation Receivers

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); Reopening of the comment period.

SUMMARY: This document proposes to revise an earlier proposed airworthiness directive (AD) that would have required replacing certain AlliedSignal Inc. VN 411B VHF navigation receivers installed on aircraft if the receivers do not have Modification 20 incorporated. The proposed AD was the result of a report of navigation receiver interference during landing operations. The actions specified by the proposed AD are intended to prevent VHF navigation receiver interference from frequency modulation (FM) radio station broadcasts, which could cause distortion of the navigation audio and deflection of the desired flight path of the airplane during landing operations with possible loss of control of the airplane. Since issuing the NPRM, the applicable service information has been revised to incorporate additional procedures for modifying the affected navigation receivers (Modification 21). The Federal Aviation Administration (FAA) has determined that these procedures are necessary to correct the unsafe condition; that the revised service information should be incorporated into the proposed AD; and that the comment period for the proposal should be reopened and the public should have additional time to comment.

DATES: Comments must be received on or before February 15, 1999.

ADDRESSES: Submit comments in triplicate to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 95–CE–91–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from AlliedSignal, Inc. 23500 W. 105th Street, Olathe, Kansas 66051–1950. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Roger Souter, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4134, facsimile: (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this supplemental notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this supplemental notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 95–CE–91–AD." The postcard will be date stamped and returned to the commenter.

Availability of Supplemental NPRM's

Any person may obtain a copy of this supplemental NPRM by submitting a request to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 95–CE–91–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain AlliedSignal Inc. VN 411B very high frequency (VHF) navigation receivers installed in aircraft was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on June 11, 1996 (61 FR 29499). The NPRM proposed to require replacing any VHF navigation receiver that does not have Modification 20 incorporated with one where an AlliedSignal Bendix/King-owned service center has incorporated Modification 20. Accomplishment of the proposed action as specified in the NPRM would be required in accordance with Bendix/King Service Bulletin VN 411B–20, dated January 1996.

The NPRM was the result of a report of navigation receiver interference during landing operations. Modification 20 incorporates the standards, intermodulation, and desensitization that were deemed necessary to meet International Civil Aviation Organization (ICAO) compliance.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

Events Since Issuance of the NPRM

Since issuance of the NPRM, Allied Signal has informed the FAA that features of Modification 20 fail to consider spurious responses that may occur at strong FM broadcast signal levels. Based on this, Allied Signal has issued Service Bulletin No. SB VN 411B–21, dated November 1996. This service bulletin includes procedures for incorporating modifications that account for all the necessary features of Modification 20 and the features necessary to prevent spurious responses that may occur at strong FM broadcast signal levels. This is known as Modification 21.

The FAA's Determination

After examining all information related to the subject described in this document, the FAA has determined that:

—Modification 21 should be required on aircraft equipped with the affected VHF navigation receivers required to conform to ICAO standards, and that Allied Signal Service Bulletin No. SB VN 411B–21, dated November 1996, should be incorporated into the AD; and

—AD action should be taken to incorporate these changes to continue to prevent VHF navigation receiver interference from FM radio station broadcasts, which could cause distortion of the navigation audio and deflection of the desired flight path of the airplane during landing operations with possible loss of control of the airplane.

The Supplemental NPRM

Since adding the requirement of incorporating Modification 21 on the affected VHF navigation receivers proposes actions that go beyond the scope of what was already proposed, the FAA is reopening the comment period to allow the public additional time to comment on this proposed action.

Cost Impact

The FAA estimates that 19 VHF navigation receivers in the U.S. registry would be affected by the proposed AD, that it would take approximately 2 workhours per receiver to accomplish the proposed action, and that the average labor rate is approximately $60 an hour. The manufacturer is not charging the owner/operator for exchanging the navigation receiver unit and is offering 2 workhours of labor warranty credit to accomplish the proposed action. Based on these figures, the proposed AD imposes no cost impact on U.S. operators. The FAA has no way of determining if any of the affected airplanes have navigation receivers with Modification 21 incorporated.

Compliance Time of The Proposed AD

The condition specified by the proposed AD is not caused by actual hours time-in-service (TIS) of the aircraft where the affected VHF navigation receivers are installed. The need for replacing the VHF navigation receiver with one that incorporates hardware modifications has no correlation to the number of times the equipment is utilized or the age of the equipment. For this reason, the compliance time of the proposed AD is presented in calendar time instead of hours TIS.

Regulatory Impact

The regulations proposed herein would 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. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

AlliedSignal Inc.: Docket No. 95–CE–91–AD.

Applicability: The following very high frequency (VHF) navigation receivers that are installed on, but not limited to, Learjet Model 31A, Fokker Model F27–50, and British Aerospace Model ATP airplanes:

—VN 411B, BPN 3614004–4101, all serial numbers, that are currently at Modification Status 18, 19, or 20;

—VN 411B, BPN/KPN 3614004–4101/066–1101–00, all serial numbers, that are currently at Modification Status 18, 19, or 20;

—VN 411B, P/N 066–1101–00, serial numbers up to and including 4229, that are currently at Modification Status 18, 19, or 20; and

—VN 411B, P/N 066–1101-/31/40/50, serial numbers up to and including 10799, that are currently at Modification Status 19 or 20.

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

Compliance: Required as indicated in the body of this AD, unless already accomplished.

To prevent VHF navigation receiver interference from frequency modulation (FM) radio station broadcast frequencies, which could cause distortion of the navigation audio and deflection of the desired flight path of the airplane during landing operations with possible loss of control of the airplane, accomplish the following:

(a) Within the next 90 calendar days after the effective date of this AD or upon replacement or repair of any affected AlliedSignal VHF navigation receiver, whichever occurs first, remove the navigation receiver and install one where an AlliedSignal Bendix/King service center has incorporated Modification 21, in accordance with AlliedSignal Bendix/King Service Bulletin VN 411B–21, dated November 1996.

(b) As of the effective date of this AD, no person may install, on any airplane, one of the affected VHF navigation receivers that does not have Modification 21 incorporated in accordance with AlliedSignal Bendix/King Service Bulletin VN 411B–21, dated November 1996.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Wichita, Kansas 67209. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Wichita ACO.

(e) All persons affected by this directive may obtain copies of the documents referred to herein upon request to AlliedSignal, Inc.,

23500 W. 105th Street, Olathe, Kansas 66051–1950; or may examine this document at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on December 15, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–33790 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–CE–102–AD]

RIN 2120–AA64

Airworthiness Directives; British Aerospace HP137 Mk1, Jetstream Series 200, and Jetstream Models 3101 and 3201 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to all British Aerospace HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes. The proposed AD would require replacing the nose wheel steering jack seals with seals of an improved design. The proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the United Kingdom. The actions specified by the proposed AD are intended to prevent the nose landing gear steering from locking up due to deterioration of the original design nose landing gear steering jack seals, which could result in reduced or loss of control of the airplane during takeoff, landing, and taxi operations.

DATES: Comments must be received on or before January 29, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–102–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 479888; facsimile: (01292) 479703. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. S.M. Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426–6932; facsimile: (816) 426–2169.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 98–CE–102–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–102–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The Civil Airworthiness Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on all British Aerospace HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes. The CAA reports that the results of investigations into a recent incident reveals that the nose landing gear steering jack seals deteriorated. The deterioration caused particles of seal material to disperse into the selector valve.

This condition, if not detected and corrected, could cause the nose landing gear steering to lock up and result in reduced or loss of control of the airplane during takeoff, landing, and taxi operations.

Relevant Service Information

British Aerospace has issued Jetstream Service Bulletin 32–JA900942, Original Issue: October 22, 1990, Revision No. 5: September 4, 1998, which specifies replacing the nose landing gear steering jack seals with seals of an improved design. The procedures for accomplishing this replacement are included in APPH Ltd. Service Bulletin 32–51, Revision 5, dated April 1996.

The CAA classified this service bulletin as mandatory in order to assure the continued airworthiness of these airplanes in the United Kingdom. The CAA classifying a service bulletin as mandatory is the same in the United Kingdom as the FAA issuing an AD in the United States.

The FAA's Determination

These airplane models are manufactured in the United Kingdom 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 has kept the FAA informed of the situation described above.

The FAA has examined the findings of the CAA; reviewed all available information, including the service information referenced above; and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of the Provisions of the Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop in other British Aerospace HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes of the same type design registered in the United States, the FAA is proposing AD action. The proposed AD would require replacing the nose wheel steering jack seals with seals of improved design. Accomplishment of the proposed actions would be required

in accordance with the instructions in APPH Ltd. Service Bulletin 32–51, Revision 5, dated April 1996, and Jetstream Service Bulletin 32–JA900942, Original Issue: October 22, 1990, Revision No. 5: September 4, 1998.

Compliance Time of the Proposed AD

The unsafe condition referenced in the proposed AD is not a result of repetitive airplane operation. The nose wheel steering jack seals deteriorate over time due to weather and climate conditions. For this reason, the FAA has determined that a compliance based on calendar time instead of hours time-in-service (TIS) should be utilized in the proposed AD in order to assure that the unsafe condition is addressed on all airplanes in a reasonable time period.

Cost Impact

The FAA estimates that 250 airplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 12 workhours per airplane to accomplish the proposed action, and that the average labor rate is approximately $60 an hour. Parts cost approximately $220 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $235,000, or $940 per airplane.

Regulatory Impact

The regulations proposed herein would 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. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

British Aerospace: Docket No. 98–CE–102–AD.

Applicability: HP137 Mk1, Jetstream Series 200, and Jetstream Models 3101 and 3201 airplanes, all serial numbers, certificated in any category; that incorporate the following:

Steering Jack Type: 618200.

Nose Gear Type: 1873, B00A702852A, B00A703056A; or B00A703064A.

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

Compliance: Required within the next 9 calendar months after the effective date of this AD, unless already accomplished.

To prevent the nose landing gear steering from locking up due to deterioration of the original design nose landing gear steering jack seals, which could result in reduced or loss of control of the airplane during takeoff, landing, and taxi operations, accomplish the following:

(a) Replace the nose wheel steering jack seals with seals of improved design, in accordance with the instructions in APPH Ltd. Service Bulletin 32–51, Revision 5, dated April 1996, and Jetstream Service Bulletin 32–JA900942, Original Issue: October 22, 1990, Revision No. 5: September 4, 1998.

(b) As of the effective date of this AD, no person may install, on any of the affected airplanes, any landing gear steering jack seal that is not of the improved design referenced in the service information specified in paragraph (a) of this AD, or an FAA-approved equivalent.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, Aircraft Certification Service, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(e) Questions or technical information related to British Aerospace Jetstream Service Bulletin 32–JA900942, Original Issue: October 22, 1990, Revision No. 5: September 4, 1998, should be directed to British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 479888; facsimile: (01292) 479703. This service information may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Note 3: The subject of this AD is addressed in British Aerospace Jetstream Service Bulletin 32–JA900942, Original Issue: October 22, 1990, Revision No. 5: September 4, 1998. This service bulletin is classified as mandatory by the United Kingdom Civil Aviation Authority (CAA).

Issued in Kansas City, Missouri, on December 15, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–33791 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 20, 25 and 301

[REG–106177–98]

RIN 1545–AW20

Adequate Disclosure of Gifts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to changes made by the Taxpayer Relief Act of 1997 and the Internal Revenue Service Restructuring and Reform Act of 1998 regarding the valuation of prior gifts in

determining estate and gift tax liability, and the period of limitations for assessing and collecting gift tax. The proposed regulations affect individual donors and the estates of those donors. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written and electronic comments must be received by March 22, 1999. Outlines of topics to be discussed at the public hearing scheduled for Wednesday, April 28, 1999, must be received by Wednesday, April 7, 1999.

ADDRESSES: Send submissions to CC:DOM:CORP:R [REG–106177–98] room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington DC 20044. Submissions may also be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R [REG–106177–98], Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS internet site at http://www.irs.ustreas.gov/prod/tax_regs/comments.html. The public hearing will be held in room 2615, at 10 a.m., Internal Revenue Building, 1111 Constitution Avenue, NW., Washington DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, William L. Blodgett, (202) 622–3090; concerning submissions and the hearing, and/or to be placed on the building access list to attend the hearing, LaNita Van Dyke, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Introduction

This document proposes to amend the Estate and Gift Tax Regulations (26 CFR parts 20 and 25) under sections 2001 and 2504 relating to the value of prior gifts for purposes of computing the estate and gift tax. This document also proposes to amend the Procedure and Administration Regulations relating to the period for assessment and collection of gift tax under section 6501.

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Comments on the collection of information should be received by February 22, 1999. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is proposed § 301.6501(c)–1(f) of the Procedure and Administration Regulations. This information is required by statute in order to commence the period of limitations on assessment. This information will be used to identify gift tax issues relating to the reported transfers. The collection of information is mandatory. The likely respondents are individuals.

The reporting burden contained in § 301.6501–1(f) is reflected in the burden of Form 709, U.S. Gift (and Generation-Skipping Transfer) Tax Return.

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

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax information are confidential, as required by 26 U.S.C. 6103.

Background

Under the unified estate and gift tax system, a single rate schedule is applied to an individual's cumulative gifts and bequests. Gift tax is computed by determining a tax on the total of the gifts made by the donor in the current calendar year plus the gifts made in prior years (prior taxable gifts). The tax computed is then reduced by the tax that would have been payable on the prior taxable gifts. The result (after taking into account the applicable credit amount under section 2505) is the gift tax on the current gifts. Similarly, the estate tax is computed by determining a tax on the value of the decedent's taxable estate plus the value of lifetime gifts (adjusted taxable gifts) made by the decedent. The tax computed is then reduced by the gift tax that would have been payable on the adjusted taxable gifts. The result (after allowing for various credits) is the estate tax on the taxable estate.

The Statute of Limitations for Assessment of Gift Tax Under Section 6501(c)(9) of the Internal Revenue Code

Prior to the Taxpayer Relief Act of 1997 (the 1997 Act) and the Internal Revenue Service Restructuring and Reform Act of 1998 (the 1998 Act), the period for assessment of gift tax for a calendar period generally expired three years from the date a gift tax return for that period was deemed to be filed. The statute of limitation protection extended to all gifts made in a calendar period for which a return was filed, including gifts not reported on the gift tax return for the period. An exception to this general rule applied for gifts subject to the special valuation rules of sections 2701 and 2702. For gifts subject to these rules, section 6501(c)(9) extends the period of assessment indefinitely unless the gifts were disclosed on the gift tax return in a manner adequate to apprise the IRS of the nature of the transfer.

Under the 1997 and 1998 Acts, this adequate disclosure requirement was extended to all gifts, whether or not subject to section 2701 or 2702. Consequently, the period of assessment will not close for any gift made in a calendar year ending after August 5, 1997, or with respect to any increase in gift tax required under section 2701(d), that is not adequately disclosed on a gift tax return.

The proposed regulations provide a list of information that, if applicable to a transaction, must be reported on a gift tax return, or a statement attached thereto, in order for the transaction to be considered adequately disclosed to cause the period for assessment to commence. The required information must completely and accurately describe the transaction and include: the nature of the transferred property; the parties involved; the value of the transferred property; and how the value

was determined, including any discounts or adjustments used in valuing the transferred property.

Specific rules are provided in the case of transfers of entities that are not actively traded that own interests in other non-actively traded entities. Comments are requested on how these rules should be applied when the required information is not available to the donor.

In addition, the return must disclose the facts affecting the gift tax treatment of the transaction in a manner that reasonably may be expected to apprise the IRS of the nature of any potential controversy regarding the gift tax treatment of the transfer. In lieu of this statement, the taxpayer may provide a statement of any legal issue presented by the facts. Finally, the taxpayer must also provide a statement of any position taken by the taxpayer that is contrary to any temporary or final Treasury regulation or any revenue ruling. These standards are based on those currently employed under § 6662 in determining whether an item is adequately disclosed under that section, such that accuracy-related penalties will not be imposed.

The proposed regulations contain examples that illustrate adequate disclosure under these standards.

Under the proposed regulations, adequate disclosure of a transfer that is reported as a completed gift on the gift tax return will commence the running of the statute of limitations under section 6501(c)(9) even if the transfer is ultimately determined to be an incomplete gift. Thus, if the donor reports a transfer on the gift tax return as a completed gift for gift tax purposes, the period for assessing a gift tax with respect to the transfer will commence. If the IRS does not examine the transaction reported on the gift tax return prior to the expiration of the running of the statute of limitations, the transaction will be treated as a completed gift as reported on the gift tax return. If the IRS, upon examination, disagrees with the donor's characterization of the transaction, and the issue remains unresolved through the administrative process, the donor will be sent a final notice of determination and the donor will be able to seek a declaratory judgment on the matter pursuant to section 7477.

On the other hand, if a donor initially reports a transfer as an incomplete gift, even if adequately disclosed, the statute of limitations does not commence to run until the donor reports the transfer as a completed gift. The IRS would have three years from the date of filing of the subsequent gift tax return disclosing the completed gift to make any assessment with respect to the gift.

As discussed below, the 1997 and 1998 Act amendments to sections 2001 and 2504 curtail the IRS' ability to redetermine the value of a gift in computing the estate or gift tax, after the statute of limitations expires. However, the adequate disclosure requirement contained in section 6501(c)(9) is intended to afford the IRS the reasonable opportunity to identify in a timely manner and with a minimum expenditure of resources returns that present issues that merit further examination. Accordingly, the information required is intended to enable the IRS to identify issues, if any, without imposing an undue burden on taxpayers.

The proposed regulations conform the regulations to the new statutory rules for gifts made in calendar years ending after August 5, 1997, if such gift tax return is filed after the regulations are published as final regulations. In the interim period, the statutory provisions apply.

Valuation of Prior Gifts for Gift Tax Purposes

Prior to the 1997 and 1998 Acts, section 2504(c) provided that if a gift tax had been paid or assessed with respect to the calendar period in which the gift occurred and the statute of limitations on assessment for the prior gift had expired, then the value of any gift made in such calendar period could not be adjusted for purposes of determining the total amount of prior taxable gifts that the individual had made. This prohibition on adjustments applied even if a particular gift was not disclosed on the gift tax return. This rule continues to apply for gifts made prior to August 6, 1997.

Under section 2504(c) as amended by the 1997 and 1998 Acts, if a gift was adequately disclosed such that the time has expired for assessing gift tax for a preceding calendar period under section 6501, then the value of such gift made in the prior calendar period cannot be adjusted (regardless of whether or not a gift tax has been assessed or paid for a prior calendar period). Rather, the value of the gift is the value as finally determined for gift tax purposes, as defined in section 2001(f). A similar rule applies with respect to any increase in taxable gifts required under section 2701(d) (pertaining to the transfer of applicable retained interests under section 2701).

Section 2504(c) applies only to adjustments involving issues of valuation. Thus, even after the 1997 and 1998 amendments to section 2504(c), adjustments to prior taxable gifts may be made if the adjustment is not related to the valuation of the gift; e.g., the erroneous inclusion or exclusion of property for gift tax purposes. See Rev. Rul. 76–451 (1976–2 C.B. 304). This result is consistent with the legislative history to the 1997 Act which emphasizes that the statutory change imposes a prohibition on revaluing certain gifts. The House Committee report states that a gift for which the limitations period has passed cannot be revalued for purposes of determining the applicable estate tax bracket and available unified credit. H.R. Rep. No. 148, 105th Cong., 1st Sess. 359 (1997).

The proposed regulations conform the regulations to the new statutory rules for gift tax returns filed after the regulations are published as final regulations. In the interim period, the statutory provisions apply.

Valuation of Prior Gifts for Estate Tax Purposes

Prior to the enactment of the 1997 and 1998 Acts, there was no estate tax provision corresponding to section 2504(c). Therefore, even where the period of assessment expired for a calendar period, and gift tax was paid or assessed for that period, the value of any gifts made in that period could be adjusted for purposes of determining the estate tax liability. The statutory change and these proposed regulations preserve that treatment for gifts made prior to August 6, 1997.

Section 2001(f) was added by the 1997 Act and amended by the 1998 Act. Under section 2001(f) as amended, if the time has expired for assessing gift tax for a preceding calendar period under section 6501, then the value of the gift, for purposes of computing the estate tax liability, is the value of the gift as finally determined for gift tax purposes. A similar rule applies for any increase in taxable gifts required under section 2701(d). Under the statute, the value of a gift is finally determined if: the value is shown on a gift tax return and the IRS does not contest the value before the period for assessing gift tax expires; or, before the period for assessing gift tax expires, the value is specified by the IRS and the taxpayer does not contest the specified value; or, the value is determined by a court or pursuant to a settlement agreement between the taxpayer and the IRS.

As discussed above, the provision only limits the IRS' ability to make adjustments related to the value of a gift. Thus, the IRS is not precluded from making adjustments that are not related to value, such as the erroneous inclusion or exclusion of property for gift tax purposes.

The proposed regulations conform the current regulations to the statutory change for gift tax returns filed after the regulations are published as final regulations. In the interim period, the statutory provisions apply.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, 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, this notice of proposed rulemaking will be submitted to the Small Business Administration for comment on their impact on small business.

Comment and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to electronic and written comments (a signed original and eight (8) copies) that are timely submitted to the IRS. The IRS and Treasury specifically request comments on the clarity of the proposed regulations and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Wednesday, April 28, 1999, at 10 a.m. in Room 2615 of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by Wednesday, April 7, 1999.

A period of 10 minutes will be allocated to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting information. The principal author of these regulations is William L. Blodgett, Office of Assistant Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 20

Estate taxes, reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 20 is proposed to be amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

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

Par. 2. Section 20.2001–1 is revised to read as follows:

§ 20.2001–1 Valuation of adjusted taxable gifts and section 2701(d) taxable events.

(a) *Adjusted taxable gifts made prior to August 6, 1997.* For purposes of determining the value of adjusted taxable gifts as defined in section 2001(b), if the gift was made prior to August 6, 1997, the value of the gift may be adjusted at any time, even if the time within which a gift tax may be assessed has expired under section 6501. This paragraph (a) also applies to adjustments involving issues other than valuation.

(b) *Adjusted taxable gifts and section 2701(d) taxable events occurring after August 5, 1997.* For purposes of determining the value of adjusted taxable gifts as defined in section 2001(b), if, under section 6501, the time has expired within which a gift tax may be assessed under chapter 12 of the Internal Revenue Code (or under corresponding provisions of prior laws) with respect to a gift made after August 5, 1997, and during a preceding calendar period (as defined in § 25.2502–1(c)(2) of this chapter), or with respect to an increase in taxable gifts required under section 2701(d) and § 25.2701–4 of this chapter, then the value of the gift will be the value as finally determined for gift tax purposes under chapter 12 of the Internal Revenue Code. This paragraph (b) does not apply to adjustments involving issues other than valuation. See § 25.2504–1(d) of this chapter.

(c) *Finally determined.* For purposes of paragraph (a) of this section, the value of a gift is finally determined for gift tax purposes if—

(1) The value is shown on a gift tax return, or on a statement attached to the return, and the Internal RevenueService does not contest the value before the time has expired under section 6501 within which gift taxes may be assessed;

(2) The value is specified by the Internal Revenue Service before the time has expired under section 6501 within which gift taxes may be assessed on the gift and such specified value is not timely contested by the taxpayer;

(3) The value is finally determined by a court of competent jurisdiction; or

(4) The value is determined pursuant to a settlement agreement entered into between the taxpayer and the Internal Revenue Service.

(d) *Definitions.* For purposes of paragraph (b) of this section, the value is finally determined by a court of competent jurisdiction when the court enters a final decision, judgment, decree or other order passing on the valuation that is not subject to appeal. See, for example, section 7481 regarding the finality of a decision by the U.S. Tax Court. Also, for purposes of paragraph (b) of this section, a settlement agreement means any agreement entered into by the Internal Revenue Service and the taxpayer that is binding on both. The term includes a closing agreement under section 7121, a compromise under section 7122, and an agreement entered into in settlement of litigation involving a valuation issue.

(e) *Expiration of period of assessment.* For purposes of determining if the time has expired within which a tax may be assessed under chapter 12 of the Internal Revenue Code, see § 301.6501(c)–1(e) and (f) of this chapter.

(f) *Examples.* The following examples illustrate the rules of this section:

Example 1. (i) *Facts.* A owns Blackacre and B, A's child, owns Whiteacre. In 1999, A and B exchange ownership of these properties. On A's federal gift tax return, Form 709, for the 1999 calendar year, the transfer of Blackacre to B is adequately disclosed under § 301.6501(c)–1(f)(2) of this chapter. A reports the transfer as nontaxable, representing that the fair market values of Whiteacre and Blackacre, at the time of the transfer, were equal. A dies after the period of assessment for the transfer has expired.

(ii) *Application of the rule limiting adjustments to valuation issues.* The fair market values of Blackacre and Whiteacre at the time of the transfer are valuation issues. Because A filed the return adequately disclosing the transfer, the period of assessment with respect to A's transfer has expired, notwithstanding the fact that no gift tax return was required to be filed. Therefore, the Internal Revenue Service is precluded from revaluing Blackacre and Whiteacre in determining the amount of A's adjusted taxable gifts in computing A's estate tax liability.

Example 2. (i) *Facts.* In 1999, A transfers stock in a closely-held corporation to an irrevocable trust. Under the terms of the trust, the trustee has the discretion to accumulate trust net income or distribute it among A's children. At A's death, the trust is to terminate and the trust corpus is to be paid to A's surviving issue. On A's federal gift tax return, Form 709, filed for the 1999 calendar year, the transfer is adequately disclosed under § 301.6501(c)–1(f)(2) of this chapter. A claims an annual exclusion under section 2503(b) for the transfer. A dies after the period of assessment for the transfer has expired.

(ii) *Application of the rule limiting adjustments to valuation issues.* Because the period of assessment has closed on the transfer due to adequate disclosure, the Internal Revenue Service is precluded from revaluing the transferred stock for purposes of assessing gift tax. Therefore, the value of the transfer as reported on A's 1999 Federal gift tax return may not be redetermined for purposes of determining A's adjusted taxable gifts. However, the applicability of the annual exclusion to the transfer is a question of law and not of valuation. Accordingly, although the Internal Revenue Service may not assess or collect additional gift tax on the 1999 transfer (because the period of assessment has closed), the Internal Revenue Service is not precluded from challenging the annual exclusion claimed by A for purposes of determining A's adjusted taxable gifts in computing the estate tax liability.

(g) *Effective dates.* Paragraph (a) of this section applies to transfers of property by gift made prior to August 6, 1997, if the estate tax return for the donor/decedent's estate is filed after this document is published as a final regulation in the **Federal Register**. Paragraphs (b) through (f) of this section apply to transfers of property by gift made after August 5, 1997, if the gift tax return for the calendar period in which the gift is made is filed after this document is published as a final regulation in the **Federal Register**.

PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 3. The authority citation for part 25 continues to read in part as follows:

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

Par. 4. Section 25.2504–2 is revised to read as follows:

§ 25.2504–2 Valuation of certain gifts for preceding calendar periods.

(a) *Gifts made before August 6, 1997.* If the time has expired within which a tax may be assessed under chapter 12 of the Internal Revenue Code (or under corresponding provisions of prior laws) on the transfer of property by gift made during a preceding calendar period, as defined in § 25.2502–1(c)(2), the gift was made prior to August 6, 1997, and a tax has been assessed or paid for such prior calendar period, the value of the gift, for purposes of arriving at the correct amount of the taxable gifts for the preceding calendar periods (as defined under § 25.2504–1(a)), is the value used in computing the tax for the last preceding calendar period for which a tax was assessed or paid under chapter 12 of the Internal Revenue Code or the corresponding provisions of prior laws. However, this rule does not apply where no tax was paid or assessed for the prior calendar period. Furthermore, this rule does not apply to adjustments involving issues other than valuation. See § 25.2504–1(d).

(b) *Gifts made or section 2701(d) taxable events occurring after August 5, 1997.* If the time has expired under section 6501 within which a gift tax may be assessed under chapter 12 of the Internal Revenue Code (or under corresponding provisions of prior laws) on the transfer of property by gift made during a preceding calendar period, as defined in § 25.2502–1(c)(2), or with respect to an increase in taxable gifts required under section 2701(d) and § 25.2701–4, and the gift was made, or the section 2701(d) taxable event occurred, after August 5, 1997, the value of the gift or the amount of the increase in taxable gifts, for purposes of determining the correct amount of taxable gifts for the preceding calendar periods (as defined in § 25.2504–1(a)), is the value that is finally determined for gift tax purposes (within the meaning of § 20.2001–1(c) of this chapter). This rule does not apply to adjustments involving issues other than valuation. See § 25.2504–1(d). For an illustration of this rule, see the examples under § 20.2001–1(f) of this chapter. For purposes of determining if the time has expired within which a gift tax may be assessed, see § 301.6501(c)–1(e) and (f) of this chapter.

(c) *Example.* The following example illustrates the rules of paragraphs (a) and (b) of this section:

Example. (i) *Facts.* In 1996, A transfers closely-held stock to B, A's child. A timely filed a federal gift tax return reporting the 1996 transfer to B. No gift tax was assessed or paid as a result of application of A's available unified credit. In 1999, A transfers additional closely-held stock to B. A's federal gift tax return reporting the 1999 transfer is timely filed and the transfer is adequately disclosed under § 301.6501(c)–1(f)(2) of this chapter. In 2003, A transfers additional property to B and timely files a federal gift tax return reporting the gift.

(ii) *Application of the rule limiting adjustments to valuation of prior gifts.* Under section 2504(c), in determining A's 2003 gift tax liability, the value of A's 1996 gift can be adjusted for purposes of computing the value of prior taxable gifts, since that gift was made prior to August 6, 1997, and therefore, the provisions of paragraph (a) of this section apply. However, A's 1999 transfer was adequately disclosed on a timely filed gift tax return and, thus, under § 25.2504–1(b), the value of the 1999 gift by A may not be adjusted for purposes of computing the value of prior taxable gifts in determining A's 2003 gift tax liability.

(d) *Effective dates.* Paragraph (a) of this section applies to transfers of property by gift made prior to August 6, 1997. Paragraphs (b) and (c) of this section apply to transfers of property by gift made after August 5, 1997, if the gift tax return for the calendar period in which the transfer is reported is filed after this document is published as a final regulation in the **Federal Register**.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 5. The authority citation for part 301 continues to read in part as follows:

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

Par. 6. Section 301.6501(c)–1 is amended by:

1. Revising the heading to paragraph (e).
2. Adding paragraph (f).

The revision and addition reads as follows:

§ 301.6501(c)–1 Exceptions to general period of limitations on assessment and collection.

* * * * *

(e) *Gifts subject to chapter 14 of the Internal Revenue Code not adequately disclosed on the return—*

* * * * *

(f) *Gifts made after August 5, 1997, not adequately disclosed on the return—* (1) *In general.* If a transfer of property, other than a transfer described in paragraph (e) of this section, is not adequately disclosed on a gift tax return (Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return) filed for the calendar period in which the transfer occurs, then any gift tax imposed by chapter 12 of subtitle B of the Internal Revenue Code on the transfer may be assessed, or a proceeding in court for the collection of the appropriate tax may be begun without assessment, at any time.

(2) *Adequate disclosure of transfers of property reported as gifts.* A transfer will be adequately disclosed on the return only if it is reported in a manner adequate to apprise the Internal Revenue Service of the nature of the gift and the basis for the value so reported. Transfers reported on the gift tax return as transfers of property by gift will be considered adequately disclosed under this paragraph (f) only if the return provides a complete and accurate description of the transaction including—

(i) A description of the transferred property and any consideration received by the transferor;

(ii) The identity of, and relationship between, the transferor and the transferee;

(iii) A detailed description of the method used to determine the fair market value of property transferred, including any relevant financial data and a description of any discounts, such as discounts for blockage, minority or fractional interests, and lack of marketability, claimed in valuing the property. In the case of the transfer of an interest in an entity (e.g., a corporation or partnership) that is not actively traded, a description of any discount claimed in valuing the entity or any assets owned by such entity, including a statement regarding the fair market value of 100 percent of the entity (determined without regard to any discounts in valuing the entity or any assets owned by the entity), the pro rata portion of the entity subject to the transfer, and the fair market value of the transferred interest as reported on the return. If the entity that is the subject of the transfer owns an interest in another non-actively traded entity (either directly or through ownership of an entity), the information required in this paragraph (f)(2)(iii) must be provided for each entity and the assets owned by each entity;

(iv) If the property is transferred in trust, the trust's tax identification number and a brief description of the terms of the trust;

(v) Any restrictions on the transferred property that were considered in determining the fair market value of the property; and

(vi) A statement of the relevant facts affecting the gift tax treatment of the transfer that reasonably may be expected to apprise the Internal Revenue Service of the nature of any potential controversy concerning the gift tax treatment of the transfer, or in lieu of this statement, a concise description of the legal issue presented by the facts. In addition, a statement describing any position taken that is contrary to any temporary or final Treasury regulations or revenue rulings.

(3) *Adequate disclosure of non-gift completed transfers or transactions.* Completed transfers, all or a portion of which are reported as not constituting a transfer by gift (for example, a transaction in the ordinary course of business), will be considered adequately disclosed under this paragraph (f) only if the following information is provided on or attached to the return—

(i) The information required for adequate disclosure under paragraph (f)(2) of this section; and

(ii) An explanation as to why the transfer is not a transfer by gift under chapter 12 of the Internal Revenue Code.

(4) *Adequate disclosure of incomplete transfers.* Adequate disclosure of a transfer that is reported as a completed gift on the gift tax return will commence the running of the statute of limitations for assessment of gift tax on the transfer, even if the transfer is ultimately determined to be an incomplete gift for purposes of § 25.2511–2 of this chapter. For example, if an incomplete gift is reported as a completed gift on the gift tax return and is adequately disclosed, the period for assessment of the gift tax will begin running when the return is filed, as determined under section 6501(b). On the other hand, if the transfer is reported as an incomplete gift and adequately disclosed, the period for assessing a gift tax with respect to the transfer will not commence to run even if the transfer is ultimately determined to be a completed gift. In that situation, the gift tax with respect to the transfer may be assessed at any time, up until three years after the donor files a return reporting the transfer as a completed gift.

(5) *Examples.* The following examples illustrate the rules of this paragraph (f):

Example 1. (i) *Facts.* In 1999, A transfers 100 shares of common stock of XYZ Corporation to A's child. The common stock of XYZ Corporation is actively traded on a major stock exchange. For gift tax purposes, the fair market value of one share of XYZ common stock on the date of the transfer, determined in accordance with § 25.2512–2(b) of this chapter (based on the mean between the highest and lowest quoted selling prices), is $150.00. On A's federal gift tax return, Form 709, for the 1999 calendar year, A reports the gift as 100 shares of common stock of XYZ Corporation with a value for gift tax purposes of $15,000. A specifies the date of the transfer, recites that the stock is publicly traded, and identifies the stock exchange on which the stock is traded.

(ii) *Application of the adequate disclosure standard.* A has adequately disclosed the transfer. Therefore, the period of assessment for the transfer under section 6501 will run from the time the return is filed (as determined under section 6501(b)).

Example 2. (i) *Facts.* On December 30, 1999, A transferred closely-held stock to B, A's child. A determined that the value of the transferred stock, on December 30, 1999, was $9,000. A made no other transfers to B, or any other donee, during 1999. On A's federal gift tax return, Form 709, filed for the 1999 calendar year, A provides the information required under paragraph (f)(2) of this section (including the method used to determine the fair market value of the stock and a description of discounts claimed) such that the transfer is adequately disclosed. A claims an annual exclusion under section 2503(b) for the transfer.

(ii) *Application of the adequate disclosure standard.* Because the transfer was adequately disclosed under paragraph (f)(2) of this section, the period of assessment for the transfer will expire as prescribed by section 6501(b), notwithstanding that if A's valuation of the closely-held stock was correct, A was not required to file a gift tax return reporting the transfer under section 6019. After the period of assessment has expired on the transfer, the Internal Revenue Service is precluded from revaluing the transferred stock for purposes of assessing gift tax or for purposes of determining the estate tax liability. Therefore, the value of the transfer as reported on A's 1999 federal gift tax return may not be redetermined for purposes of determining A's prior taxable gifts (for gift tax purposes) or A's adjusted taxable gifts (for estate tax purposes).

Example 3. (i) *Facts.* A owns 100 percent of the common stock of X, a closely-held corporation. X does not hold an interest in any other entity that is not actively traded. In 1999, A transfers 20 percent of the X stock to B and C, A's children, in a transfer that is not subject to the special valuation rules of section 2701. The transfer is made outright with no restrictions on ownership rights, including voting rights and the right to transfer the stock. The reported value of the transferred stock incorporates the use of minority discounts and lack of marketability discounts. No other discounts were used in arriving at the fair market value of the transferred stock or any assets owned by X. A reports the transfer on a federal gift tax return, Form 709, for the 1999 calendar year. On the return, A provides a statement reporting the fair market value of 100 percent of X (before taking into account any discounts), the pro rata portion of X subject to the transfer, and the reported value of the transfer. A also attaches a statement regarding the determination of value that includes a discussion of the discounts claimed and how the discounts were determined.

(ii) *Application of the adequate disclosure standard.* A has provided sufficient information such that the transfer will be considered adequately disclosed and the period of assessment for the transfer under section 6501 will run from the time the return is filed (as determined under section 6501(b)).

Example 4. (i) *Facts.* A owns a 70 percent limited partnership interest in PS. PS owns

40 percent of the stock in X, a closely-held corporation. The assets of X include a 50 percent general partnership interest in PB. PB owns an interest in commercial real property. None of the entities (PS, X, or PB) is actively traded. In 1999, A transfers a 25 percent limited partnership interest in PS to B, A's child. On the federal gift tax return, Form 709, filed for the 1999 calendar year, A reports the transfer of the 25 percent limited partnership interest in PS and that the fair market value of 100 percent of PS is $y and that the value of 25 percent of PS is $z, reflecting marketability and minority discounts with respect to the 25 percent interest. However, A does not disclose that PS owns 40 percent of X, and that X owns 50 percent of PB and that, in arriving at the $y fair market value of 100 percent of PS, discounts were claimed in valuing PS's interest in X, X's interest in PB, and PB's interest in the commercial real property.

(ii) *Application of the adequate disclosure standard.* Because A has failed to comply with requirements of paragraph (f)(2) of this section regarding PS's interest in X, X's interest in PB, and PB's interest in the commercial real property, the transfer will not be considered adequately disclosed and the period of assessment for the transfer under section 6501 will remain open indefinitely.

(6) *Effective date.* This paragraph (f) is applicable to gifts made in calendar years ending after August 5, 1997, if the gift tax return for such calendar year is filed after this document is published as a final regulation in the **Federal Register.**

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 98–33648 Filed 12–21–98; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01–98–006]

RIN 2121–AA97

Security Zone: Dignitary Arrival/ Departure New York, NY

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish permanent security zones around the Wall Street heliport on the East River, the West 30th Street heliport on the Hudson River, and the Marine Air Terminal at La Guardia Airport on Bowery Bay, to protect the President, Vice President, and visiting heads of foreign states or foreign governments during their arrival, departure, and transits to and from the Wall Street and West 30th Street heliports, and the Marine Air Terminal. This action is necessary to protect visiting dignitaries and the Port of New York/New Jersey against terrorism, sabotage or other subversive acts and incidents of a similar nature during the dignitaries' visit to New York City. This action establishes permanent exclusion areas that are active only from shortly before the dignitaries' arrival into an area until shortly after the dignitaries' departure from that area.

DATES: Comments must be received on or before February 22, 1999.

ADDRESSES: Comments may be mailed to the Waterways Oversight Branch (CGD01–98–006), Coast Guard Activities New York, 212 Coast Guard Drive, Staten Island, New York 10305, or deliver them to room 205 at the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The Waterways Oversight Branch of Coast Guard Activities New York maintains the public docket for this rulemaking. Comments, and documents as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room 205, Coast Guard Activities New York, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade A. Kenneally. Waterways Oversight Branch, Coast Guard Activities New York (718) 354–4195.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking (CGD01–98–006) and the specific section of this document to which each comment applies, and give the reason for each comment. Please submit two copies of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose stamped, self-addressed postcards or envelopes.

The Coast Guard will consider all comments received during the comment period. It may change this proposed rule in view of the comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Waterways Oversight Branch at the address under **ADDRESSES.** The request should include the reasons why a hearing would be beneficial. If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register.**

Background and Purpose

New York City is often visited by the President and Vice President of the United States, as well as visiting heads of foreign states or foreign governments, on the average of 8 times per year. Often these visits are on short notice. The President, Vice President, and visiting heads of foreign states or foreign governments require Secret Service protection. These dignitaries arrive at John F. Kennedy, La Guardia, or Newark, New Jersey International Airports. They then transit to either the Wall Street or West 30th Street heliports or they fly directly into the Marine Air Terminal at La Guardia. Due to the sensitive nature of these visits a security zone is needed. Standard security procedures are enacted to ensure the proper level of protection to prevent sabotage or other subversive acts, accidents, or other activities of a similar nature. In the past, temporary security zones were requested by the U.S. Secret Service with limited notice for preparation by the U.S. Coast Guard and no opportunity for public comment. Establishing permanent security zones by notice and comment rulemaking gives the public the opportunity to comment on the proposed zones. The proposed regulation establishes three permanent security zones that could be activated upon request of the U.S. Secret Service pursuant to their authority under 18 U.S.C. § 3056.

The activation of a particular security zone will be announced via facsimile and marine information broadcasts.

Discussion of Proposed Rule

The three proposed security zones are as follows:

The security zone around the Wall Street heliport includes all waters of the East River within the following boundaries: East of a line drawn between approximate position 40°42′01″N 074°00′39″W (east of The Battery) to 40° 41′36″N 074°00′52″W (NAD 1983) (point north of Governors Island) and north of a line drawn from the point north of Governors Island to the southwest corner of Pier 7 North, Brooklyn; and south of a line drawn between the northeast corner of Pier 13, Manhattan, and the northwest corner of Pier 2 North, Brooklyn.

The security zone around the West 30th Street heliport includes all waters

of the Lower Hudson River south of a line drawn from the northwest corner of Pier 76 in Manhattan to a point in Weehawken, New Jersey at approximate position 40°45′52″N 074°01′01″W (NAD 1983) and north of a line drawn from the northwest corner of Pier 64, Manhattan to the northeast corner of Pier 14, Hoboken, New Jersey.

The security zone around the Marine Air Terminal, La Guardia airport includes all waters of Bowery Bay, Queens, New York, south of a line drawn from the western end of La Guardia Airport at approximate position 40°46′47″ N 073°53′05″ W (NAD 1983) to the Rikers Island Bridge at approximate position 40°46′51″ N 073°53′21″ W (NAD 1983) and east of a line drawn between that point at the Rikers Island Bridge to a point on the shore in Queens, New York, at approximate position 40°46′36″ N 073°53′31″ W (NAD 1983).

Each security zone will be activated 30 minutes before the dignitaries' arrival into the zone and remain in effect until 15 minutes after the dignitaries' departure from the zone.

The three new security zones are being proposed to ensure the Coast Guard can provide the U.S. Secret Service with the services they require to protect visiting dignitaries in a timely manner.

Regulatory Evaluation

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It has not been reviewed by the Office of Management and Budget under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979).

The Coast Guard expects the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. The Coast Guard anticipates that these security zones will be activated on an average of 8 times per year. Costs resulting from these regulations, if any, will be minor and have no significant adverse financial effect on vessel operators. Although this regulation prevents traffic from transiting through the enacted security zone, the effect of this regulation will not be significant for the following reasons: the limited duration of the security zone, the limited number of instances the zones will be activated, and the extensive notifications that will be made to the local maritime community via facsimile and marine information broadcasts. The activation of any of the three security zones will be for 45 minutes. These security zones have been narrowly tailored to impose the least impact on maritime interests yet provide the level of security deemed necessary.

Small Entities

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

For the reasons stated in the Regulatory Evaluation section above, the Coast Guard certifies under 5 U.S.C. § 605(b) that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. If, however, you think that your business or organization qualifies as a small entity and that this proposed rule will have a significant economic impact on your business or organization, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and in what way and to what degree this proposed rule will economically affect it.

Collection of Information

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

Federalism

The Coast Guard has analyzed this proposed rule under the principles and criteria contained in Executive Order 12612 and has determined that this proposed rule does not have sufficient implications for federalism to warrant the preparation of a Federalism Assessment.

Unfunded Mandates

Under the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the Coast Guard must consider whether this rule will result in an annual expenditure by State, local, and tribal governments, in the aggregate of $100 million (adjusted annually for inflation). If so, the Act requires that a reasonable number of regulatory alternatives be considered, and that from those alternatives, the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule be selected. No State, local, or tribal government will be affected by this rule, so this rule will not result in annual or aggregate costs of $100 million or more. Therefore, the Coast Guard is exempt from any further regulatory requirements under the Unfunded Mandates Act.

Environment

The Coast Guard considered the environmental impact of this proposed rule and concluded that under figure 2–1, paragraph 34(g), of Commandant Instruction M16475.1C, this proposed rule is categorically excluded from further environmental documentation. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

Proposed Regulation

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR Part 165 as follows:

PART 165—[AMENDED]

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; 49 CFR 1.46.

2. Add § 165.164 to read as follows:

§ 165.164 Security Zones; Dignitary Arrival and Departure, New York, NY.

(a) The following areas are established as security zones:

(1) *Location.* Wall Street heliport: All waters of the East River within the following boundaries: East of a line drawn between approximate position 40°42′01″N 074°00′39″W (east of The Battery) to 40°41′36″N 074°00′52″W (NAD 1983) (point north of Governors Island) and north of a line drawn from the point north of Governors Island to the southwest corner of Pier 7 North, Brooklyn; and south of a line drawn between the northeast corner of Pier 13, Manhattan, and the northwest corner of Pier 2 North, Brooklyn.

(2) *Location.* West 30th Street heliport: All waters of the Lower Hudson River south of a line drawn from the northwest corner of Pier 76 in Manhattan to a point in Weehawken, New Jersey at approximate position 40°45′52″N 074°01′01″W (NAD 1983) and north of a line from the northwest corner of Pier 64, Manhattan to the

northeast corner of Pier 14, Hoboken, New Jersey.

(3) *Location.* Marine Air Terminal, La Guardia Airport: All waters of Bowery Bay, Queens, New York, south of a line drawn from the western end of La Guardia Airport at approximate position 40°46′47″N 073°53′05″W (NAD 1983) to the Rikers Island Bridge at approximate position 40°46′51″N 073°53′21″W (NAD 1983) and east of a line drawn between the point at the Rikers Island Bridge to a point on the shore in Queens, New York, at approximate position 40°46′36″N 073°53′31″W (NAD 1983).

(4) The security zone will be activated 30 minutes before the dignitaries' arrival into the zone and remain in effect until 15 minutes after the dignitaries' departure from the zone.

(5) The activation of a particular zone will be announced by facsimile and marine information broadcasts.

(b) *Regulations.* (1) The general regulations contained in 33 CFR 165.33 apply.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on scene patrol personnel. U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a U.S. Coast Guard vessel using siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

Dated: December 9, 1998.

R.E. Bennis,

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

[FR Doc. 98–33847 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–15–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TN–197–1–9834b; FRL–6204–9]

Approval and Promulgation of Revisions to the Tennessee State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Tennessee for the purpose of establishing how to determine the efficiency of Volatile Organic Compound (VOC) capture systems. In the final rules section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to the direct final rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: To be considered, comments must be received by January 21, 1999.

ADDRESSES: You should address comments on this action to Michele Notarianni at the EPA, Region 4 Air, Pesticides, and Toxics Management Division, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303.

Copies of documents related to this action are available for the public to review during normal business hours at the locations below. If you would like to review these documents, please make an appointment with the appropriate office at least 24 hours before the visiting day. Reference file TN 197. The Region 4 office may have additional documents not available at the other locations.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

Environmental Protection Agency, Region 4 Air, Pesticides, and Toxics Management Division, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303–3104. Michele Notarianni, (404)562–9031.

Tennessee Department of Environment and Conservation, Division of Air Pollution Control, L & C Annex, 9th Floor, 401 Church Street, Nashville, TN 37243–1531. Phone number: (615) 532–0554.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni at (404) 562–9031.

SUPPLEMENTARY INFORMATION: For additional information, see the direct final rule which is published in the rules section of this **Federal Register**.

Dated: November 3, 1998.

A. Stanley Meiburg,

Regional Administrator, Region 4.

[FR Doc. 98–33838 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region VII Docket No. 056–1056b; FRL–6205–9]

Approval and Promulgation of Implementation Plans; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the state of Missouri except Section (9). This revision makes minor corrections to the "Construction Permits Required" rule to increase readability, correct typographical and punctuation errors, and maintain consistency with the Federal regulations.

In the final rules section of the **Federal Register** the EPA is approving the state's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no relevant adverse comments. A detailed rationale for the approval is set forth in the direct final rule.

If no adverse comments are received in response to the direct final rule, no further activity is contemplated. If the EPA receives relevant adverse comments, the direct final rule will be withdrawn, and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received on or before January 21, 1999.

ADDRESSES: Comments may be mailed to Kim Johnson, Environmental Protection Agency, Air Planning and Development Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101.

FOR FURTHER INFORMATION CONTACT: Kim Johnson at (913) 551–7975.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final rule which is located in the rules section of the **Federal Register**.

Dated: December 9, 1998.

Dennis Grams, P.E.,

Regional Administrator, Region VII.

[FR Doc. 98–33836 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Parts 510, 515, and 583

[Docket No. 98–28]

Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission proposes to add new regulations establishing licensing and financial responsibility requirements for ocean transportation intermediaries in accordance with the Shipping Act of 1984, as modified by the Ocean Shipping Reform Act of 1998 (the Coast Guard Authorization Act of 1998).

DATES: Submit comments on or before January 21, 1999.

ADDRESSES: Address all comments concerning this proposed rule to: Joseph C. Polking, Federal Maritime Commission, 800 North Capitol St., NW. Room 1046, Washington, DC. 20573–0001.

FOR FURTHER INFORMATION CONTACT:

Bryant L. VanBrakle, Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC. 20573–0001, (202) 523–5796.

Thomas Panebianco, General Counsel, Federal Maritime Commission, 800 North Capitol St., NW., Washington, DC 20573–0001, (202) 523–5740.

SUPPLEMENTARY INFORMATION: The Ocean Shipping Reform Act of 1998 ("OSRA"), Public Law 105–258, 112 Stat. 1902, amends the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1701 *et seq.*, in several respects relating to ocean freight forwarders and non-vessel-operating common carriers ("NVOCCs"). The Federal Maritime Commission ("FMC" or "Commission") proposes new regulations, at 46 CFR part 515, to implement changes effectuated 5740by OSRA. In addition, the proposal seeks to remove existing parts 510 and 583. Finally, under the Commission's restructuring of its rules, the new part 515 will be included in subchapter B of chapter IV, 46 CFR.

Licensing Requirements

OSRA applies the requirements of section 19 of the 1984 Act to all "ocean transportation intermediaries" ("OTIs") in the United States. An OTI means an ocean freight forwarder or an NVOCC as those terms are defined by the 1984 Act. OSRA requires that all OTIs in the United States be licensed by the Commission.

Proposed § 515.3 seeks to license those OTIs who are performing in the United States the services, or holding out to perform the services, associated with the transportation of cargo to or from the United States. The Commission has ruled that a freight forwarder must perform "traditional value added services" as defined in §§ 515.2(i) and (n)(1) to be considered a freight forwarder. *See In Re: The Impact of Modern Technology on the Customs and Practices of the Freight Forwarding Industry—Petition for Rulemaking: Order Denying Petition for Rulemaking or Declaratory Order*, 28 S.R.R. 418, 425 (1998). In addition, in determining whether a person is acting as a common carrier, and thus as an NVOCC, as defined by section 3(6) of the 1984 Act, the Commission has consistently held that no single factor determines a common carrier's status, but an essential characteristic to be evaluated is "whether he holds himself out to carry goods from whomever offered to the extent of his ability to carry." *Activities, Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62 (1965).

The legislative history of OSRA directs the Commission to determine "when foreign-based entities conducting business in the United States are to be considered persons in the United States" for purposes of the licensing requirements of section 19 of the 1984 Act. S. Rep. No. 105–61, 105th Cong., 1st Sess., at 31 (1997) ("Report"). Moreover, the Commission is directed to consider that certain foreign-based OTIs would not be licensed when establishing financial responsibility requirements for OTIs. *Id.* Thus, the language clearly contemplates that certain foreign-based OTIs engaged in the transportation of cargo to or from the United States would not be licensed but would instead be required to establish a higher amount of financial responsibility than those OTIs who are 'in the United States' for purposes of the 1984 Act.

One approach which the Commission considered and rejected would have provided: "For purposes of this part, a person is considered to be 'in the United States' if such person is incorporated in the United States or maintains a physical presence in the United States through another person, including a subsidiary, affiliate, agent or office whether such subsidiary, affiliate, agent or office is incorporated or unincorporated. Indicia of physical presence in the United States include, but are not limited to, whether the person holds a taxpayer identification number, or a state or local business license, or maintains a mailing address in the United States. For purposes of this part, the term 'agent' does not include an agent for service of process designated in accordance with § 515.24."

This definition would have required any foreign-based OTI providing OTI services to or from the United States through an agent who is physically present in the United States, regardless of the amount of service that agent is providing to the foreign-based OTI, to be licensed. Under this option, the Commission believes it would have been imposing licensing requirements to a greater degree than envisioned by OSRA (although the foreign-based OTIs who would have been licensed by the Commission under this definition would not have been required to obtain financial responsibility in the higher amount required under § 515.21(a)(4)). Because this approach would have given minimal significance to the "in the United States" limitation, it is not being proposed as a feasible option.

Rather, the proposed rule offers for comment two alternative definitions of "in the United States" for purposes of the licensing requirements of this part. The Commission recognizes that the first proposed definition is relatively broad, and the second relatively narrow. The Commission specifically requests comment on these proposed definitions, suggestions for modifications, or additional approaches which commenters may wish to offer.

Proposed definition number one provides: "For purposes of this part, a person is considered to be 'in the United States' if such person is resident in or incorporated or established under the laws of the United States. Only persons licensed under this part may furnish or contract to furnish ocean transportation intermediary services in the United States on behalf of an unlicensed ocean transportation intermediary."

This definition would require all unlicensed foreign-based OTIs who use an agent in the United States to provide OTI services to or from the United States to use only licensed OTIs as their agents. Therefore, an agent used by the unlicensed foreign-based OTI would have to be providing OTI services in its own right and obtain its own OTI license and financial responsibility. This would not, however, be a substitute for the unlicensed foreign-based OTI's financial responsibility. All unlicensed foreign-based OTIs would need to obtain financial responsibility as required under proposed § 515.21(a)(4).

The Commission recognizes that currently, many unlicensed foreign-

based OTIs use agents in the United States who provide only minimal service, such as processing bills of lading. Providing this level of service alone may not rise to the level of operating as an OTI. Therefore, under this option, these agents would need to obtain an OTI license or would be precluded from providing such services on behalf of foreign-based OTIs.

The second proposed definition of "in the United States" provides: "For purposes of this part, a person is considered to be 'in the United States' if such person is incorporated in, resident in, or established under the laws of the United States, or otherwise maintains a physical presence in the United States. Such indicia of physical presence may include, but are not limited to, whether the person holds a taxpayer identification number, a state or local business license, or maintains a mailing address in the United States."

This second option would license only those entities who are freight forwarders or NVOCCs under proposed § 515.2(n). It does not contemplate licensing those entities in the United States who are acting solely as agents for unlicensed foreign-based OTIs who provide OTI services to or from the United States. For example, entities that simply process bills of lading for an unlicensed foreign-based OTI would not be required to be licensed. In those instances where an unlicensed foreign-based OTI uses the limited services of such an agent, the unlicensed foreign-based OTI would be required to furnish the financial responsibility under proposed § 515.21(a)(4). Similarly, when a licensed OTI performs fewer services than would qualify it as an OTI under § 515.2(n) for an unlicensed foreign-based OTI, then the unlicensed foreign-based OTI would furnish the financial responsibility required under proposed § 515.21(a)(4).

In order to better assess the impact of the proposed definition, the Commission is particularly interested in receiving comment regarding entities who are operating as agents in the United States and the range of services they provide, specifically whether they are performing minimal services, such as processing bills of lading, or whether they are engaged in a full spectrum of OTI services, such as booking vessel space, preparing documentation, and soliciting cargo.

The Commission is required to issue a license to any person that it determines is qualified by experience and character to act as an OTI, including all entities in the United States formerly known as NVOCCs. The licensing requirements in 46 CFR part 510 mandate that freight forwarders possess a minimum three years of experience in freight forwarder duties in the United States, plus the necessary character to render freight forwarder services. NVOCCs are currently not required to be licensed. The proposed rule applies those licensing requirements from part 510 to proposed part 515. As a result, all OTIs must possess three years of experience providing OTI duties to be eligible for a license. To effectuate this change, the Commission offers the following guidance: all freight forwarders who have a valid license and proof of financial responsibility in effect on May 1, 1999, will continue to be licensed while the Commission issues those freight forwarders new licenses as OTIs, provided that they increase their financial responsibility as required by proposed subpart C by May 1, 1999.

NVOCCs must submit an application for a license and provide proof of their increased financial responsibility as required by proposed subpart C by April 30, 1999. Provided that such applicants have a valid tariff and proof of financial responsibility in effect on May 1, 1999, these NVOCCs will be provisionally licensed while the Commission reviews their applications to determine if they meet the character and experience requirements.

Because the new rules require that all OTIs possess three years of experience in order to qualify for a license, and because some existing NVOCCs may have less than the requisite three years, the Commission has determined that any NVOCC with a tariff and evidence of its financial responsibility in effect as of the date of publication of the proposed part 515 in the **Federal Register** will be permitted to continue operating as an NVOCC without the necessary experience. However, a person operating under this arrangement may not act as a qualifying individual for another ocean transportation intermediary until he or she has obtained the necessary three years of experience in ocean transportation intermediary services in the United States.

Exemption From Licensing Requirement

The Commission is proposing to exempt from its licensing requirements any person which exclusively transports used household goods and personal effects for the account of the Department of Defense ("DOD") or under the International Household Goods Program administered by the General Services Administration ("GSA"). These persons are currently exempt from the Commission's NVOCC financial responsibility requirements of 46 CFR part 583 and that exemption is being carried over into the proposed subpart C of part 515. These carriers are exempt from the Commission's tariff and financial responsibility requirements because they are subject to GSA requirements that they post a bond and file their rates with GSA. In addition, DOD requires that participants in its Personal Property Program be licensed by that agency. These same reasons would appear to permit the Commission to exempt these entities from the licensing requirements of proposed part 515.

Financial Responsibility Requirements

All OTIs will be required to establish their financial responsibility before performing any intermediary services in the United States. Proposed subpart C of part 515 addresses issues arising under this section. First, the bond, surety or other insurance obtained pursuant to this requirement shall be available to pay for damages suffered by ocean common carriers, shippers, and others, arising from the transportation-related activities of the covered OTI. Report at 31. As instructed by the Report, the Commission has defined transportation-related activities at proposed § 515.2(v) to include all of the freight forwarding activities enumerated in proposed § 515.2(i), as well as other specified activities. The Report specifically indicates that the bonds, or other instruments of financial responsibility, are intended to cover liabilities related to service contract obligations, as well as damages resulting from loss or conversion of cargo, from the negligence or complicity of the insured entity, or from nonperformance of services. Report at 31. The Commission's definition of transportation-related activities is not meant to be inclusive, but rather to indicate the broad spectrum of activities which OTIs may engage in, and which shall be covered by the OTIs' instruments of financial responsibility. To the extent, however, that someone who operates as an OTI also provides non-OTI services, those services would not be covered by the bond, surety or other insurance. This position is consistent with the Commission's determination in Docket No. 91–1, *Bonding of Non-vessel-operating Common Carriers*, 25 S.R.R. 1679, 1685 (1991), *modified on other grounds*, 26 S.R.R. 137 (1992), wherein the Commission stated:

> As Congress has indicated, the bond is intended to "* * * be available to pay any judgment for damages arising out of an NVOCC's activities as an ocean common carrier providing ocean transportation services." (citation omitted). To the extent

that someone who operates as an NVOCC also provides non-NVOCC services, those services would not be covered by the bond. 25 S.R.R. at 1685.

The Commission also establishes new procedures, at proposed § 515.23, for pursuing claims against OTIs. Any party may seek an order for reparation at the Commission pursuant to sections 11 or 14 of the 1984 Act. Alternatively, where a claimant seeks relief in an appropriate court, the claimant shall attempt to resolve its claim with the financial responsibility provider prior to seeking payment on any judgment it has or will obtain. The Commission believes that it does not have the authority to limit or prevent a claimant from seeking judicial access prior to pursuing a settlement with the financial responsibility provider, particularly where such restrictions could prevent claimants from filing their actions within a statute of limitations. However, in light of the Report language directing the Commission to establish an alternative process for resolving claims against the OTI's instrument of financial responsibility, the Commission believes that it may require the claimant to seek a settlement prior to enforcing any judgment it has or will obtain. Therefore, the rules provide that upon notification of the complaint, the financial responsibility provider and claimant can settle the claim with the OTI's consent, or, if the OTI fails to respond to the notice of the claim within 45 days, the financial responsibility provider and claimant can settle the claim on their own. If, however, the parties fail to reach agreement within 90 days, then the bond, surety or other insurance shall be available to pay any judgment for damages to the extent they arise from the transportation-related activities of the OTI.

Proposed § 515.23 provides that ordinarily, the financial responsibility provider shall pay the judgment within 10 days; within that time, the financial responsibility provider may inquire into the subject matter of the judgment to ensure that it is for damages covered by the instrument of financial responsibility—i.e. that it arises from transportation-related activities. Report at 31. However, the Commission is aware that there may be instances where the financial responsibility provider has a legitimate challenge to a judgment. For example, in the event that a claimant obtains a default judgment as a result of invalid service of process, or some other *procedural* defect, the financial responsibility provider may seek to vacate the judgment. To that limited extent, the Commission recognizes that the financial responsibility provider may have a genuine basis for inquiring into the validity of the judgment as well.

In proposed § 515.21, the Commission proposes to establish a range of financial responsibility requirements commensurate with the scope of the activities conducted by the different OTIs and the past fitness of OTIs in the performance of intermediary services. Report at 31–32. Thus, OTIs operating as freight forwarders in the United States will be required to establish financial responsibility in the amount of $50,000; OTIs operating as NVOCCs in the United States in the amount of $75,000; and OTIs operating as both freight forwarders and NVOCCs in the United States will be required to establish financial responsibility in the amount of $100,000. Unlicensed foreign-based entities that provide OTI services for transportation to or from the United States but are not operating "in the United States" as defined in proposed § 515.3 will be required to establish financial responsibility in the amount of $150,000. Groups or associations of OTIs will be able to provide financial responsibility for their members with the maximum aggregate amount of $3,000,000.

Proposed § 515.21 seeks to increase the amount of financial responsibility required to be provided by OTIs to more accurately reflect the diversity of activities engaged in by OTIs. The current NVOCC financial responsibility amount of $50,000 was established by the Non-Vessel-Operating Common Carrier Amendments of 1990, Pub. L. 101–595. At that time, House Merchant Marine and Fisheries Chairman Walter B. Jones commented that the $50,000 was a minimum amount, which the Commission would "have the continuing flexibility to adjust * * * as changing circumstances warrant." 136 Cong. Rec. E2210–2211 (June 28, 1990). Thus far, the Commission has not increased the amount of financial responsibility required by an NVOCC, but current circumstances warrant the increased amounts proposed here. The FMC has faced an increasing number of NVOCCs who have gone bankrupt or changed company names to avoid their responsibilities arising from transportation-related activities, thereby augmenting the importance of an adequate bond, surety or other insurance. Increasingly, injured shippers have not been made whole when seeking reparation from the instrument of financial responsibility. We note as well the diverse activities engaged in by OTIs due to the innovations and technological advances made by the shipping industry. The increased amounts proposed here will better protect the shipping public.

In addition, the Report directs the FMC to consider, when establishing the amount of financial responsibility necessary for foreign-based OTIs, that such OTIs are not "in the United States" as defined by proposed § 515.3, and, therefore, are not subject to the Commission's licensing requirements, but nonetheless provide ocean transportation intermediary services for transportation to or from the United States. Report at 31. Accordingly, the Commission has established different levels of financial responsibility requirements, increasing the amount of financial responsibility required by foreign entities, based on the high volume of judgments obtained against foreign-based NVOCCs and the extent of financial injuries to shippers that have resulted.

Proposed § 515.27 amends the means by which a common carrier can obtain proof of an NVOCC's compliance with the tariff and financial responsibility requirements of the 1984 Act. Currently, part 583 provides that a common carrier can consult a list provided by the Commission of bonded and tariffed NVOCCs. Because tariffs will no longer be filed with the Commission, the proposal provides that carriers may review a copy of the NVOCC's tariff published in accordance with part 520 of this chapter, either through the NVOCC's website or by other means established by the NVOCC. Carriers also will be able to contact the Commission to verify that an NVOCC has filed evidence of its financial responsibility. Additionally, the Commission proposes in § 515.27(d) that it will publish at its website a list of the locations of all carrier and conference tariffs, as well as a list of all OTIs who have furnished the Commission with evidence of their financial responsibility. The Commission seeks comments on this proposal. Carriers may adopt other appropriate procedures for purposes of this section, so long as such procedures are set forth in the carrier's tariff.

Duties and Responsibilities of OTIs

OSRA requires all NVOCCs to be licensed as OTIs under section 19 of the 1984 Act, and thus, as licensees, NVOCCs are subjected to the same responsibilities as ocean freight forwarders. Proposed § 515.31 incorporates many of the duties of freight forwarders from 46 CFR 510.21 and 46 CFR 510.22 and applies them to all licensees. Those duties include a freight forwarder's responsibility to its principal, as defined in proposed

§ 515.2(p); an NVOCC's responsibility to its shipper, as defined in proposed § 515.2(s); and a licensed OTI's responsibility to the Commission generally. In addition, the recordkeeping requirements of licensed freight forwarders under 46 CFR 510.24 would now be applicable to all licensees. This is reflected in proposed § 515.32.

Proposed subpart E incorporates most of the regulations of 46 CFR 510.22 and 510.23 relating to the fees and compensation paid in exchange for freight forwarding services, and adds two sections regarding in-plant arrangements and electronic data interchange. Proposed § 515.41(e) provides for the placement of a licensed freight forwarder's employee(s) on the premises of its principal as part of a package of freight forwarding services rendered to that principal. However, in order to prevent such an arrangement from being an artifice for an unlawful payment to the principal, it is required that the forwarder and principal document their in-plant arrangement by executing a special contract (not filed with the Commission) under proposed § 515.32(d). (Under current regulations at 46 CFR 510.24(d), a licensee is required to maintain a true and complete copy, or if oral, a true and complete memorandum, of every special arrangement or contract with a principal, or modification or cancellation thereof, to which it may be a party). The special contract shall identify all the details of the arrangement, including the freight forwarding services to be performed by the employee(s). This section is not intended to reach incidental visits to the principal's premises by a forwarder employee or meetings between forwarders and principals, but rather seeks to reach the forwarder employee placed on the principal's premises to perform freight forwarding services on a recurring or continuing basis or for a fixed period of time.

Further, proposed § 515.42(e) provides that a licensed freight forwarder may operate an electronic data interchange computer-based system in its forwarding business. In order to collect carrier compensation, however, the forwarder must also perform the traditional value-added services of booking, securing, or confirming space for cargo and preparing and processing shipping documents, and certify the performance of those services to the carrier.

The reporting, recordkeeping and disclosure requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB). Public burden for this collection of information is estimated at 5,164 man-hours for 4,600 OTIs. This estimate includes, as applicable, the time needed to review instructions, develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information, search existing data sources, gather and maintain the data needed, and complete and review the collection of information; and transmit or otherwise disclose the information.

Send comments regarding the burden estimates to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for the Federal Maritime Commission, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503 within 30 days of publication in the **Federal Register**.

The FMC would also like to solicit comments to: (a) 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; (b) evaluate the accuracy of the Commission's burden estimates for the proposed collection of information; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this proposed rulemaking will be summarized and/or included in the final rule and will become a matter of public record.

Initial Regulatory Flexibility Analysis

Why the Commission is Considering the New Rule

The Commission proposes to add new regulations establishing licensing and financial responsibility requirements for OTIs in accordance with the 1984 Act, as modified by OSRA and part 424 of Pub. L. 105–383 (The Coast Guard Authorization Act of 1998).

Objectives and Legal Basis for the New Rule

OSRA amends the 1984 Act in several respects relating to ocean freight forwarders and NVOCCs. The Commission proposes new regulations, at 46 CFR part 515, to implement changes effectuated by OSRA.

OSRA requires that all OTIs in the United States be licensed by the Commission. Further, all OTIs will be required to establish their financial responsibility before performing any intermediary services in the United States. The bond, surety or other insurance obtained pursuant to this requirement shall be available to pay for damages suffered by ocean common carriers, shippers, and others, arising from the transportation-related activities of the covered OTIs. Report at 31.

The Report specifically indicates that the bonds, or other instruments of financial responsibility, are intended to cover liabilities related to service contract obligations, as well as damages resulting from loss or conversion of cargo, from the negligence or complicity of the insured entity, or from nonperformance of services. The new rule proposes to establish a range of financial responsibility requirements commensurate with the scope of the activities conducted by the different OTIs and the past fitness of OTIs in the performance of intermediary duties.

Description of and Estimate of the Number of Small Entities to Which the New Rule Will Apply

To determine whether a business should be considered a small entity, the Small Business Administration ("SBA") has established statutory definitions of small businesses (13 CFR part 121, FR January 31, 1996). Businesses classified in the Standard Industrial Classification code 4731, including ocean freight forwarders and NVOCCs, are evaluated by the their annual receipts (gross annual revenues). Ocean freight forwarders and NVOCCs with less than $18.5 million in annual receipts are considered small businesses by SBA. The Commission does not have OTI revenue data readily available, but in general, is aware that a handful of OTIs handle the bulk of the intermediary cargo in the U.S. trades, while most OTIs are small operators. Without specific OTI revenue data, however, the Commission assumes that most if not all OTIs have revenues of less than $18.5 million, and are considered to be small businesses.

Projected Reporting, Record Keeping and Other Compliance Requirements of the New Rule

It is estimated that the new rule will impose, in varying degrees, a reporting burden on the entire OTI universe. The burden is calculated on the estimated amount of cost and time necessary to comply with various requirements of 46

CFR part 510. Calculated below are the estimated costs resulting from the new rule.

Cost to the Government

The additional burden to the government, *i.e.*, the Commission, as a result of the new rule is expected to be minimal. The Commission does not anticipate hiring any additional staff to administer changes occurring from the new rule, but is expected to handle the anticipated additional workload with existing Commission staff.

Cost of Filing Time

The new rule proposes changing the Commission's rules by requiring U.S.-based NVOCCs and ocean freight forwarders also operating as NVOCCs to be licensed with the FMC. It also requires foreign-based NVOCCs to establish financial responsibility. It could also involve the licensing of agents of foreign-based NVOCCs. Ocean freight forwarders operating solely as ocean freight forwarders in the U.S. export trade are already required to be licensed with the Commission under the current rules, and would therefore be unaffected by this change.

Based on a survey conducted by the Commission, it is estimated that the average hourly labor cost to file evidence of financial responsibility or complete a new license application is $41. Further, it is estimated to currently take individual ocean freight forwarders 3.5 hours to file evidence of financial responsibility and complete a new license application at an average labor cost to the respondent of $144. This cost takes into account time to gather information and complete the application form, as well as time to comply with the requirements of the rules. Since the licensing application form and financial responsibility procedures will remain substantively unchanged under the new rule, it is estimated that the additional labor cost of the new rule to each U.S.-based NVOCC will be $144 in the first year.

Based on the Commission's survey, it is estimated that it would take each foreign-based NVOCC 1.5 hours of staff time to file evidence of financial responsibility at an average labor cost to the respondent of $62 in the first year. Each ocean freight forwarder also operating as an NVOCC would require 0.5 hours per year to amend their applications and their financial responsibility at an average labor cost to the respondent of $21 in the first year.

The total additional labor cost of the new rule is expected to reach almost $255,000 in the first year. In subsequent years, since all operating NVOCCs and ocean freight forwarders also operating as NVOCCs will have financial responsibility and/or be licensed, the total labor cost for filing time is expected to decrease substantially.

Cost of Licensing Fee

The Commission's current user fees for processing a new application is $778, and $362 for an amendment. The new rule changes the current requirements by requiring U.S.-based NVOCCs to file a new application to become licensed. Further, ocean freight forwarders also operating as NVOCCs will be required to amend their licenses. However, since licensing fees do not change under the new rule, ocean freight forwarders in the U.S. export trade that are already required to be licensed with the Commission will not be affected in this regard. Further, foreign-based NVOCCs are not required to be licensed under the new rule. U.S.-based agents of foreign-based NVOCCs might be required to be licensed. Since it is presumed that most would already be licensed, the impact is expected to be *de minimis*. The total additional licensing cost to OTIs to comply with the new rule is estimated to be $1.3 million.

Cost of Increasing the Financial Responsibility Requirement

The new rule proposes raising the financial responsibility requirement for: Ocean freight forwarders operating solely as ocean freight forwarders in the U.S. export trade from $30,000 to $50,000, with $10,000 in additional coverage for each unincorporated branch office; U.S.-based NVOCCs will be required to increase their financial responsibility from $50,000 to $75,000 with $10,000 in additional coverage for each unincorporated branch office that is not already covered under an ocean freight forwarder's financial responsibility; and foreign-based NVOCCs will be required to increase their financial responsibility from $50,000 to $150,000. Entities that operate as both ocean freight forwarders and NVOCCs are presently required to have separate financial responsibility, financial responsibility in the amount of $30,000 covering their freight forwarding activity and financial responsibility in the amount of $50,000 covering their NVOCC activity. The new rule will increase their financial responsibility coverage from two totaling $80,000 to one totaling $100,000. The new rule would further require ocean freight forwarders also operating as NVOCCs to have $10,000 in additional coverage for each unincorporated branch office that is not already covered under an ocean freight forwarder's financial responsibility.

The new rule also proposes broadening the option for group financial responsibility to include ocean freight forwarders as well as NVOCCs, while raising the group financial responsibility requirement from $1 million to $3 million. There are currently three group proofs of financial responsibility on file with the Commission with a total of 166 NVOCC members. By posting group financial responsibility, it is believed that participants save on premium payments by receiving a group coverage rate. However, it is difficult to project how many ocean freight forwarders would opt for group financial responsibility as a result of the new rule. Therefore, it is not feasible to forecast the potential cost savings to the industry of modifying the group financial responsibility provision in the new rule. Instead, the Commission will assume that all OTIs will post financial responsibility at the higher individual premium rate.

For individual financial responsibility coverage, the Commission estimates that the premium for establishing financial responsibility ranges from $800 to $1,200 per year for $50,000 in financial responsibility coverage. The Commission employed an average premium cost of $1,000 per year for $50,000 in bond coverage to calculate the cost to OTIs of the proposed increases in financial responsibility coverages. In addition, the proportion of ocean freight forwarders to branch offices was applied to estimate the number of NVOCC unincorporated branch offices.

The Commission estimates that the average cost to OTIs of additional financial responsibility requirements is as follows: Ocean freight forwarders operating solely as ocean freight forwarders in the U.S. export trade will pay $887,000 more ($578 per entity) per year for financial responsibility; ocean freight forwarders also operating as NVOCCs will pay $297,000 more per year ($578 per entity); U.S.-based NVOCCs will pay $967,000 more per year ($678 per entity); and foreign-based NVOCCs will pay $1,252,000 more per year ($2,000 per entity). The total first year cost of increased financial responsibility requirements for all entities under the new rule totals $3.4 million.

In some cases, financial responsibility underwriters may require individual OTIs to provide collateral in order to secure a financial responsibility. Collateral accounts typically accrue interest at a risk-free rate until they are claimed or remitted in full to an OTI.

However, when considering the industry as a whole, funds that are set aside as collateral could be otherwise invested in higher earning assets, such as in an OTI's business operations, thereby effectively assessing a cost to OTIs. Calculating the opportunity cost of increased collateral requires specific data on individual OTI's financial and operating riskiness. However, the Commission does not have that information available. In lieu of such information, and in order to ensure that no substantial economic impact is overlooked, the Commission solicits comments concerning the effects of the cost of increased collateral and premium requirements on OTIs.

Summary of Costs

In the first year of its implementation, the additional burden of the new rule is expected to average $1,600 for each U.S.-based NVOCC, $2,062 for each foreign-based NVOCC, $961 for each ocean freight forwarder also operating as an NVOCC, and $578 for each ocean freight forwarder operating solely as an ocean freight forwarder in the U.S. export trade. The total additional first year cost as a result of the new rule is estimated to be almost $5 million.

The new rule seeks to increase the amount of financial responsibility required to be provided by OTIs to more accurately reflect the diversity of activities engaged in by OTIs. The current NVOCC financial responsibility amount of $50,000 was established by the Non-Vessel-Operating Common Carrier Amendments of 1990, Pub. L. 101–195. At that time, House Merchant Marine and Fisheries Chairman Walter B. Jones commented that the $50,000 was a minimum amount, which the Commission would "have the continuing flexibility to adjust * * * as changing circumstances warrant." 136 Cong. Rec. E2210–2211 (June 28, 1990). Thus far, the Commission has not increased the amount of financial responsibility required by an NVOCC, but current circumstances warrant the increased amounts proposed here. The Commission has pursued several investigations against NVOCCs in which the $50,000 liability amount has fallen short of the penalties assessed. The Commission has faced an increasing number of NVOCCs who have gone bankrupt or changed company names to avoid their responsibilities arising from transportation-related activities, thereby augmenting the importance of an adequate bond, surety or other insurance. Increasingly, injured shippers have not been made whole when seeking reparation from the instrument of financial responsibility. The Commission notes as well the diverse activities engaged in by OTIs due to the innovations and technological advances made by the shipping industry. The increased amounts proposed in the new rule will better protect the shipping public.

In addition, the Report directs the FMC to consider that some foreign-based OTIs are not "in the United States" as defined by proposed § 515.3, and, therefore are not subject to the Commission's licensing requirements, but do provide ocean transportation intermediary services for transportation to or from the United States, when establishing the amount of financial responsibility necessary for such OTIs. Report at 31. Accordingly, the Commission has established different levels of financial responsibility requirements, increasing the amount of financial responsibility required by foreign entities, based on the high volume of judgments obtained against foreign-based NVOCCs and the extent of financial injuries to shippers that have resulted.

The Commission cannot certify that the new rule will not have a significant economic impact on a substantial number of small entities. However, based on the above discussion, the Commission believes that the burden imposed on small ocean freight forwarders and NVOCCs as a result of the new rule is justified and necessary in light of the legislative benefit to effect these changes, and because of the benefit to the shipping public and to carriers gained by licensing and requiring financial responsibility of all OTIs.

Relevant Federal Rules That may Duplicate, Overlap, or Conflict With the New Rule

The Commission is not aware of any other federal rules that duplicate, overlap, or conflict with the new rule.

List of Subjects in 46 CFR parts 510, 515 and 583

Exports, Freight forwarders, Non-vessel-operating common carriers, Ocean transportation intermediaries, Licensing requirements, Financial responsibility requirements, Reports and recordkeeping requirements, surety bonds.

Under the authority of Pub. L. 105–258 and as discussed in the preamble, the Federal Maritime Commission proposes to amend subchapter B, chapter IV, of 46 CFR as follows:

PART 510—[REMOVED]

1. Remove Part 510

PART 583—[REMOVED]

2. Remove Part 583

3. Revise the heading of subchapter B to read as follows:

SUBCHAPTER B—REGULATIONS AFFECTING OCEAN SHIPPING IN FOREIGN COMMERCE

4. Add Part 515 as follows:

PART 515—LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES

Subpart A—General

Sec.

Subpart B—Eligibility and Procedure for Licensing

Subpart C—Financial Responsibility Requirements; Claims Against Ocean Transportation Intermediaries

Subpart D—Duties and Responsibilities of Ocean Transportation Intermediaries; Reports to Commission

Subpart E—Freight Forwarding Fees and Compensation

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716, and 1718, as amended by Pub. L. 105–258, 112 Stat. 1902, and Pub. L. 105–383, 112 Stat. 3411; 21 U.S.C. 862.

Subpart A—General

§ 515.1 Scope.

(a) This part sets forth regulations providing for the licensing as ocean transportation intermediaries of persons who wish to carry on the business of providing intermediary services, including the grounds and procedures for revocation and suspension of licenses. This part also prescribes the financial responsibility requirements and the duties and responsibilities of ocean transportation intermediaries, and regulations concerning practices of ocean transportation intermediaries with respect to common carriers.

(b) Information obtained under this part is used to determine the qualifications of ocean transportation intermediaries and their compliance with shipping statutes and regulations. Failure to follow the provisions of this part may result in denial, revocation or suspension of an ocean transportation intermediary license. Persons operating without the proper license may be subject to civil penalties not to exceed $5,500 for each such violation unless the violation is willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $27,500 for each violation; for other violations of the provisions of this part, the civil penalties range from $5,500 to $27,500 for each violation (46 U.S.C. app. 1712). Each day of a continuing violation shall constitute a separate violation.

§ 515.2 Definitions.

The terms used in this part are defined as follows:

(a) *Act* means the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998.

(b) *Beneficial interest* includes a lien or interest in or right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from the whole or any part of a shipment of cargo where such interest arises from the financing of the shipment or by operation of law, or by agreement, express or implied. The term "beneficial interest" shall not include any obligation in favor of an ocean transportation intermediary arising solely by reason of the advance of out-of-pocket expenses incurred in dispatching a shipment.

(c) *Branch office* means any office in the United States established by or maintained by or under the control of a licensee for the purpose of rendering intermediary services, which office is located at an address different from that of the licensee's designated home office. This term does not include a separately incorporated entity.

(d) *Brokerage* refers to payment by a common carrier to an ocean freight broker for the performance of services as specified in paragraph (m) of this section.

(e) *Commission* means the Federal Maritime Commission.

(f) *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, chemical parcel tanker, or by a vessel when primarily engaged in the carriage of perishable agricultural commodities.

(i) If the common carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities, and

(ii) Only with respect to those commodities.

(g) *Compensation* means payment by a common carrier to a freight forwarder for the performance of services as specified in § 515.42(c).

(h) *Freight forwarding fee* means charges billed by a freight forwarder to a shipper, consignee, seller, purchaser, or any agent thereof, for the performance of freight forwarding services.

(i) *Freight forwarding services* refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:

(1) Ordering cargo to port;

(2) Preparing and/or processing export declarations;

(3) Booking, arranging for or confirming cargo space;

(4) Preparing or processing delivery orders or dock receipts;

(5) Preparing and/or processing ocean bills of lading;

(6) Preparing or processing consular documents or arranging for their certification;

(7) Arranging for warehouse storage;

(8) Arranging for cargo insurance;

(9) Clearing shipments in accordance with United States Government export regulations;

(10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) Coordinating the movement of shipments from origin to vessel; and

(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

(j) *From the United States* means oceanborne export commerce from the United States, its territories, or possessions, to foreign countries.

(k) *Licensee* is any person licensed by the Federal Maritime Commission as an ocean transportation intermediary.

(l) *Ocean common carrier* means a vessel-operating common carrier ("VOCC").

(m) *Ocean freight broker* is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation.

(n) *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

(1) *Ocean freight forwarder* means a person that—

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier ("NVOCC")* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

(o) *Person* includes individuals, corporations, partnerships and

associations existing under or authorized by the laws of the United States or of a foreign country.

(p) *Principal,* except as used in Surety Bond Form FMC 48, Rev. and Group Bond Form FMC 69, refers to the shipper, consignee, seller, or purchaser of property, and to anyone acting on behalf of such shipper, consignee, seller, or purchaser of property, who employs the services of a licensed freight forwarder to facilitate the ocean transportation of such property.

(q) Reduced forwarding fees means charges to a principal for forwarding services that are below the licensed freight forwarder's usual charges for such services.

(r) *Shipment* means all of the cargo carried under the terms of a single bill of lading.

(s) *Shipper* means:

(1) A cargo owner;

(2) The person for whose account the ocean transportation is provided;

(3) The person to whom delivery is to be made;

(4) A shippers' association; or

(5) A non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

(t) *Small shipment* refers to a single shipment sent by one consignor to one consignee on one bill of lading which does not exceed the underlying common carrier's minimum charge rule.

(u) *Special contract* is a contract for freight forwarding services which provides for a periodic lump sum fee.

(v) *Transportation-related activities* which are covered by the bond, surety or other insurance obtained pursuant to this part, include, to the extent involved in the foreign commerce of the United States, the freight forwarding services enumerated in paragraph (i) of this section, and, in addition, may include, but are not limited to, the following:

(1) Payment of ocean freight charges;

(2) Payment of inland charges for through movements;

(3) Loss or conversion of cargo;

(4) Service contract obligations of an NVOCC, as a shipper;

(5) Obligations as an NVOCC member of a shippers' association;

(6) Cargo damage;

(7) Delay in shipment; and

(8) Breach of fiduciary responsibility.

(w) *United States* includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

§ 515.3 License; when required.

Except as otherwise provided in this part, no person in the United States may act as an ocean transportation intermediary unless that person holds a valid license issued by the Commission. A separate license is required for each branch office that is separately incorporated. (For purposes of this part, a person is considered to be "in the United States" if such person is resident in or incorporated or established under the laws of the United States. Only persons licensed under this part may furnish or contract to furnish ocean transportation intermediary services in the United States on behalf of an unlicensed ocean transportation intermediary.) or (For purposes of this part, a person is considered to be "in the United States" if such person is incorporated in, resident in, or established under the laws of the United States, or otherwise maintains a physical presence in the United States. Such indicia of physical presence may include, but are not limited to, whether the person holds a taxpayer identification number, a state or local business license, or maintains a mailing address in the United States.)

§ 515.4 License; when not required.

A license is not required in the following circumstances:

(a) *Shipper.* Any person whose primary business is the sale of merchandise may, without a license, dispatch and perform freight forwarding services on behalf of its own shipments, or on behalf of shipments or consolidated shipments of a parent, subsidiary, affiliate, or associated company. Such person shall not receive compensation from the common carrier for any services rendered in connection with such shipments.

(b) *Employee or branch office of licensed ocean transportation intermediary.* (1) An individual employee or unincorporated branch office of a licensed ocean transportation intermediary is not required to be licensed in order to act solely for such licensee, provided that such branch offices:

(i) Have been reported to the Commission in writing; and

(ii) Are covered by an increased bond in accordance with § 515.21(a)(5).

(2) Each licensed ocean transportation intermediary will be held strictly responsible for the acts or omissions of any of its employees or agents rendered in connection with the conduct of its business.

(c) *Common carrier.* A common carrier, or agent thereof, may perform ocean freight forwarding services without a license only with respect to cargo carried under such carrier's own bill of lading. Charges for such forwarding services shall be assessed in conformance with the carrier's published tariffs.

(d) *Ocean freight brokers.* An ocean freight broker is not required to be licensed to perform those services specified in § 515.2(m).

(e) *Federal military and civilian household goods.* Any person which exclusively transports used household goods and personal effects for the account of the Department of Defense, or for the account of the federal civilian executive agencies shipping under the International Household Goods Program administered by the General Services Administration, or both, is not subject to the requirements of subpart B of this part, but may be subject to other requirements, such as alternative surety bonding, imposed by the Department of Defense, or the General Services Administration.

§ 515.5 Forms and fees.

(a) *Forms.* License form FMC–18 Rev., and financial responsibility forms FMC–48, FMC–67, FMC–68, FMC–69 may be obtained from the Commission's website at www.fmc.gov, the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, or from any of the Commission's area representatives.

(b) *Fees.* All fees shall be payable by money order, certified check, cashier's check, or personal check to the "Federal Maritime Commission." Should a personal check not be honored when presented for payment, the processing of an application under this section shall be suspended until the processing fee is paid. In any instance where an application has been processed in whole or in part, the fee will not be refunded. Such fees are:

(1) Application for License as required by § 515.12(a): $778;

(2) Application for status change of license transfer as required by §§ 515.18(a) and 515.18(b): $362; and

(3) Supplementary investigation as required by § 515.25(a): $224.

Subpart B—Eligibility and Procedure for Licensing

§ 515.11 Basic requirements for licensing; eligibility.

(a) *Necessary qualifications.* To be eligible for an ocean transportation intermediary license, the applicant must demonstrate to the Commission that:

(1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean transportation intermediary activities in the United States, and the necessary character to

render ocean transportation intermediary services; and

(2) It has obtained and filed with the Commission a valid bond, proof of insurance, or other surety in conformance with § 515.21.

(3) An NVOCC with a tariff and proof of financial responsibility in effect as of December 22, 1998, may continue to operate as an NVOCC without the requisite three years experience; and will be provisionally licensed while the Commission reviews their application. Such person designated as the qualifying individual for a provisionally licensed NVOCC may not act as a qualifying individual for another ocean transportation intermediary until it has obtained the necessary three years experience in ocean transportation intermediary services in the United States.

(b) *Qualifying individual.* The following individuals must qualify the applicant for a license:

(1) *Sole proprietorship.* The applicant sole proprietor.

(2) *Partnership.* At least one of the active managing partners, but all partners must execute the application.

(3) *Corporation.* At least one of the active corporate officers.

(c) *Affiliates of intermediaries.* (1) An independently qualified applicant may be granted a separate license to carry on the business of providing ocean transportation intermediary services even though it is associated with, under common control with, or otherwise related to another ocean transportation intermediary through stock ownership or common directors or officers, if such applicant submits:

(i) A separate application and fee, and

(ii) a valid instrument of financial responsibility in the form and amount prescribed under § 515.21.

(2) The qualifying individual of one active licensee shall not also be designated contemporaneously as the qualifying individual of an applicant for another ocean transportation intermediary license.

(d) *Common carrier.* A common carrier or agent thereof which meets the requirements of this part may be licensed to dispatch shipments moving on other than such carrier's own bills of lading subject to the provisions of § 515.42(g).

§ 515.12 Application for license.

(a) *Application and forms.* Any person who wishes to obtain a license to operate as an ocean transportation intermediary shall submit, in duplicate, to the Director of the Commission's Bureau of Tariffs, Certification and Licensing, a completed application Form FMC–18 Rev. ("Application for a License as an Ocean Transportation Intermediary") accompanied by the fee required under § 515.5(b). All applications will be assigned an application number, and each applicant will be notified of the number assigned to its application. Notice of filing of such application shall be published in the **Federal Register** and shall state the name and address of the applicant and the name and address of the qualifying individual. If the applicant is a corporation or partnership, the names of the officers or partners thereof shall be published.

(b) *Rejection.* Any application which appears upon its face to be incomplete or to indicate that the applicant fails to meet the licensing requirements of the Act, or the Commission's regulations, shall be returned by certified U.S. mail or other method reasonably calculated to provide actual notice to the applicant without further processing, together with an explanation of the reason(s) for rejection, and the application fee shall be refunded in full. Persons who have had their applications returned may reapply for a license at any time thereafter by submitting a new application, together with the full application fee.

(c) *Investigation.* Each applicant shall be investigated in accordance with § 515.13.

(d) *Changes in fact.* Each applicant and each licensee shall submit to the Commission, in duplicate, an amended Form FMC–18 Rev. advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur. In the case of an application for a license, any unreported change may delay the processing and investigation of the application and may result in rejection or denial of the application. No fee is required when reporting changes to an application for initial license under this section.

§ 515.13 Investigation of applicants.

The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

(a) The accuracy of the information submitted in the application;

(b) The integrity and financial responsibility of the applicant;

(c) The character of the applicant and its qualifying individual; and

(d) The length and nature of the qualifying individual's experience in handling ocean transportation intermediary duties.

§ 515.14 Issuance and use of license.

(a) *Qualification necessary for issuance.* The Commission will issue a license if it determines, as a result of its investigation, that the applicant possesses the necessary experience and character to render ocean transportation intermediary services and has filed the required bond, insurance or other surety.

(b) *To whom issued.* The Commission will issue a license only in the name of the applicant, whether the applicant is a sole proprietorship, a partnership, or a corporation. A license issued to a sole proprietor doing business under a trade name shall be in the name of the sole proprietor, indicating the trade name under which the licensee will be conducting business. Only one license shall be issued to any applicant regardless of the number of names under which such applicant may be doing business, and except as otherwise provided in this part, such license is limited exclusively to use by the named licensee and shall not be transferred without prior Commission approval to another person.

§ 515.15 Denial of license.

If the Commission determines, as a result of its investigation, that the applicant:

(a) Does not possess the necessary experience or character to render intermediary services;

(b) Has failed to respond to any lawful inquiry of the Commission; or

(c) Has made any materially false or misleading statement to the Commission in connection with its application; then, a letter of intent to deny the application shall be sent to the applicant by certified U.S. mail or other method reasonably calculated to provide actual notice, stating the reason(s) why the Commission intends to deny the application. If the applicant submits a written request for hearing on the proposed denial within twenty (20) days after receipt of notification, such hearing shall be granted by the Commission pursuant to its rules of practice and procedure contained in part 502 of this chapter. Otherwise, denial of the application will become effective and the applicant shall be so notified by certified U.S. mail or other method reasonably calculated to provide actual notice.

§ 515.16 Revocation or suspension of license.

(a) *Grounds for revocation.* Except for the automatic revocation for termination of proof of financial responsibility under § 515.26, or as provided in § 515.25(b), a license may be revoked or

suspended after notice and an opportunity for a hearing for any of the following reasons:

(1) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;

(2) Failure to respond to any lawful order or inquiry by the Commission;

(3) Making a materially false or misleading statement to the Commission in connection with an application for a license or an amendment to an existing license;

(4) Where the Commission determines that the licensee is not qualified to render intermediary services; or

(5) Failure to honor the licensee's financial obligations to the Commission.

(b) *Notice of revocation.* The Commission shall publish in the **Federal Register** a notice of each revocation.

§ 515.17 Application after revocation or denial.

Whenever a license has been revoked or an application has been denied because the Commission has found the licensee or applicant to be not qualified to render ocean transportation intermediary services, any further application within 3 years of the Commission's notice of revocation or denial, made by such former licensee or applicant or by another applicant employing the same qualifying individual or controlled by persons on whose conduct the Commission based its determination for revocation or denial, shall be reviewed directly by the Commission.

§ 515.18 Changes in organization.

(a) The following changes in an existing licensee's organization require prior approval of the Commission, and application for such status change or license transfer shall be made on Form FMC–18 Rev., filed in duplicate with the Commission's Bureau of Tariffs, Certification and Licensing, and accompanied by the fee required under § 515.5(b)(2):

(1) Transfer of a corporate license to another person;

(2) Change in ownership of a sole proprietorship;

(3) Addition of one or more partners to a licensed partnership;

(4) Any change in the business structure of a licensee from or to a sole proprietorship, partnership, or corporation, whether or not such change involves a change in ownership;

(5) Any change in a licensee's name; or

(6) Change in the identity or status of the designated qualifying individual, except as described in paragraphs (b) and (c) of this section.

(b) Operation after death of sole proprietor: In the event the owner of a licensed sole proprietorship dies, the licensee's executor, administrator, heir(s), or assign(s) may continue operation of such proprietorship solely with respect to shipments for which the deceased sole proprietor had undertaken to act as an ocean transportation intermediary pursuant to the existing license, if the death is reported within thirty (30) days to the Commission and to all principals and shippers for whom services on such shipments are to be rendered. The acceptance or solicitation of any other shipments is expressly prohibited until a new license has been issued. Applications for a new license by the executor, administrator, heir(s), or assign(s) shall be made on Form FMC–18 Rev., and shall be accompanied by the transfer fee required under § 515.5(b)(2).

(c) Operation after retirement, resignation, or death of qualifying individual: When a partnership or corporation has been licensed on the basis of the qualifications of one or more of the partners or officers thereof, and such qualifying individual(s) no longer serve in a full-time, active capacity with the firm, the licensee shall report such change to the Commission within thirty (30) days. Within the same 30-day period, the licensee shall furnish to the Commission the name(s) and detailed intermediary experience of any other active managing partner(s) or officer(s) who may qualify the licensee. Such qualifying individual(s) must meet the applicable requirements set forth in § 515.11(a). The licensee may continue to operate as an ocean transportation intermediary while the Commission investigates the qualifications of the newly designated partner or officer.

(d) Incorporation of branch office: In the event a licensee's validly operating branch office becomes incorporated as a separate entity, the licensee may continue to operate such office pending receipt of a separate license, provided that:

(1) The separately incorporated entity applies to the Commission for its own license within ten (10) days after incorporation, and

(2) While the application is pending, the continued operation of the office is carried on as a *bona fide* branch office of the licensee, under its full control and responsibility, and not as an operation of the separately incorporated entity.

(e) Acquisition of one or more additional licensees: In the event a licensee acquires one or more additional licensees, for the purpose of merger, consolidation, or control, the acquiring licensee shall advise the Commission of such change within thirty (30) days after such change occurs by submitting in duplicate, an amended Form FMC–18, Rev. No application fee is required when reporting this change.

Subpart C—Financial Responsibility Requirements; Claims Against Ocean Transportation Intermediaries

§ 515.21 Financial responsibility requirements.

(a) *Form and amount.* Except as otherwise provided in this part, no person may operate as an ocean transportation intermediary unless that person furnishes a bond, proof of insurance, or other surety in a form and amount determined by the Commission to insure financial responsibility. The bond, insurance or other surety covers the transportation-related activities of an ocean transportation intermediary only when acting as an ocean transportation intermediary.

(1) Any person operating in the United States as an ocean freight forwarder as defined by § 515.2(n)(1) shall furnish evidence of financial responsibility in the amount of $50,000.

(2) Any person operating in the United States as an NVOCC as defined by § 515.2(n)(2) shall furnish evidence of financial responsibility in the amount of $75,000.

(3) Any person operating in the United States as both an ocean freight forwarder and an NVOCC as defined by §§ 515.2(n)(1) and (2) shall furnish evidence of financial responsibility in the amount of $100,000.

(4) Any unlicensed foreign-based entity, not operating in the United States as defined in § 515.3, providing ocean transportation intermediary services for transportation to or from the United States, shall furnish evidence of financial responsibility in the amount of $150,000. Such foreign entity will be held strictly responsible hereunder for the acts or omissions of its agent in the United States.

(5) The amount of the financial responsibility required to be furnished by any entity pursuant to paragraphs (a)(1), (a)(2) or (a)(3) of this section shall be increased by $10,000 for each of the applicant's unincorporated branch offices.

(b) *Group financial responsibility.* Where a group or association of ocean transportation intermediaries accepts liability for an ocean transportation intermediary's financial responsibility for such ocean transportation

intermediary's transportation-related activities under the Act, the group or association of ocean transportation intermediaries must file either a group supplemental coverage bond form, insurance form or guaranty form, clearly identifying each ocean transportation intermediary covered, before a covered ocean transportation intermediary may provide ocean transportation intermediary services. In such cases a group or association must establish financial responsibility in the amount required by paragraph (a) of this section for each member or $3,000,000 in aggregate.

(c) *Common trade name.* Where more than one person operates under a common trade name, separate proof of financial responsibility is required covering each corporation or person separately providing ocean transportation intermediary services.

(d) *Federal military and civilian household goods.* Any person which exclusively transports used household goods and personal effects for the account of the Department of Defense, or for the account of the federal civilian executive agencies shipping under the International Household Goods Program administered by the General Services Administration, or both, is not subject to the requirements of subpart C of this part, but may be subject to other requirements, such as alternative surety bonding, imposed by the Department of Defense, or the General Services Administration.

§ 515.22 Proof of financial responsibility.

Prior to the date it commences furnishing ocean transportation intermediary services, every ocean transportation intermediary shall establish its financial responsibility for the purpose of this part by one of the following methods:

(a) Surety bond, by filing with the Commission a valid bond on Form FMC–48. Bonds must be issued by a surety company found acceptable by the Secretary of the Treasury;

(b) Insurance, by filing with the Commission evidence of insurance on Form FMC–67. The insurance must provide coverage for damages, reparations or penalties arising from any transportation-related activities under the Act of the insured ocean transportation intermediary. This evidence of financial responsibility shall be accompanied by: In the case of a financial rating, the Insurer's financial rating on the rating organization's letterhead or designated form; in the case of insurance provided by Underwriters at Lloyd's, documentation verifying membership in Lloyd's; and in the case of insurance provided by surplus lines insurers, documentation verifying inclusion on a current "white list" issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners. The Insurer must certify that it has sufficient and acceptable assets located in the United States to cover all transportation-related liabilities of the insured ocean transportation intermediary as specified under the Act. The insurance must be placed with:

(1) An Insurer having a financial rating of Class V or higher under the Financial Size Categories of A.M. Best & Company, or equivalent from an acceptable international rating organization;

(2) Underwriters at Lloyd's; or

(3) Surplus lines insurers named on a current "white list" issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners; or

(c) Guaranty, by filing with the Commission evidence of guaranty on Form FMC–68. The guaranty must provide coverage for damages, reparations or penalties arising from any transportation-related activities under the Act of the covered ocean transportation intermediary. This evidence of financial responsibility shall be accompanied by: In the case of a financial rating, the Guarantor's financial rating on the rating organization's letterhead or designated form; in the case of a guaranty provided by Underwriters at Lloyd's, documentation verifying membership in Lloyd's; and in the case of a guaranty provided by surplus lines insurers, documentation verifying inclusion on a current "white list" issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners. The Guarantor must certify that it has sufficient and acceptable assets located in the United States to cover all transportation-related liabilities of the covered ocean transportation intermediary as specified under the Act. The guaranty must be placed with:

(1) A Guarantor having a financial rating of Class V or higher under the Financial Size Categories of A.M. Best & Company, or equivalent from an acceptable international rating organization;

(2) Underwriters at Lloyd's; or

(3) Surplus lines insurers named on a current "white list" issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners; or

(d) Evidence of financial responsibility of the type provided for in paragraphs (a), (b) and (c) of this section established through and filed with the Commission by a group or association of ocean transportation intermediaries on behalf of its members, subject to the following conditions and procedures:

(1) Each group or association of ocean transportation intermediaries shall notify the Commission of its intention to participate in such a program and furnish documentation as will demonstrate its authenticity and authority to represent its members, such as articles of incorporation, bylaws, etc.;

(2) Each group or association of ocean transportation intermediaries shall provide the Commission with a list certified by its Chief Executive Officer containing the names of those ocean transportation intermediaries to which it will provide coverage; the manner and amount of existing coverage each covered ocean transportation intermediary has; an indication that the existing coverage provided each ocean transportation intermediary is provided by a surety bond issued by a surety company found acceptable to the Secretary of the Treasury, or by insurance or guaranty issued by a firm meeting the requirements of paragraphs (b) or (c) of this section with coverage limits specified above in § 515.21; and the name, address and facsimile number of each surety, insurer or guarantor providing coverage pursuant to this section. Each group or association of ocean transportation intermediaries or its financial responsibility provider shall notify the Commission within thirty (30) days of any changes to its list;

(3) The group or association shall provide the Commission with a sample copy of each type of existing financial responsibility coverage used by member ocean transportation intermediaries;

(4) Each group or association of ocean transportation intermediaries shall be responsible for ensuring that each member's financial responsibility coverage allows for claims to be made in the United States against the Surety, Insurer or Guarantor for any judgment for damages against the ocean transportation intermediary arising from its transportation-related activities under the Act, or order for reparations issued pursuant to section 11 of the Act, or any penalty assessed against the ocean transportation intermediary pursuant to section 13 of the Act. Each group or association of ocean transportation intermediaries shall be responsible for requiring each member ocean transportation intermediary to

provide it with valid proof of financial responsibility annually;

(5) Where the group or association of ocean transportation intermediaries determines to secure on behalf of its members other forms of financial responsibility, as specified by this section, for damages, reparations or penalties not covered by a member's individual financial responsibility coverage, such additional coverage must:

(i) Allow claims to be made in the United States directly against the group or association's Surety, Insurer or Guarantor for damages against each covered member ocean transportation intermediary arising from each covered member ocean transportation intermediary's transportation-related activities under the Act, or order for reparations issued pursuant to section 11 of the Act, or any penalty assessed against each covered member ocean transportation intermediary pursuant to section 13 of the Act; and

(ii) Be for an amount up to $75,000 or $150,000, whichever is applicable, for each covered member ocean transportation intermediary up to a maximum of $3,000,000 for each group or association of ocean transportation intermediaries. In the event of a claim against a group bond, the bond must be replenished up to the original amount of coverage within 30 days payment of the claim; and

(6) The coverage provided by the group or association of ocean transportation intermediaries on behalf of its members shall be provided by:

(i) in the case of a surety bond, a surety company found acceptable to the Secretary of the Treasury and issued by such a surety company on Form FMC–69; and

(ii) in the case of insurance and guaranty, a firm having a financial rating of Class V or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization, Underwriters at Lloyd's, or surplus line insurers named on a current "white list" issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners and issued by such firms on Form FMC–67 and Form FMC–68, respectively.

(e) All forms and documents for establishing financial responsibility of ocean transportation intermediaries prescribed in this section shall be submitted to the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573. Such forms and documents must clearly identify the name; trade name, if any; and the address of each ocean transportation intermediary.

§ 515.23 Claims against an ocean transportation intermediary.

The Commission or another party may seek payment from the bond, insurance, or other surety that is obtained by an ocean transportation intermediary pursuant to this section.

(a) Payment pursuant to Commission order. If the Commission issues an order for reparation pursuant to section 11 or 14 of the Act, or assesses a penalty pursuant to section 13 of the Act, a bond, insurance, or other surety shall be available to pay such order or penalty.

(b) Payment pursuant to a claim. (1) If a party does not file a complaint with the Commission pursuant to section 11 of the Act, but otherwise seeks to pursue a claim against an ocean transportation intermediary bond, insurance or other surety for damages arising from its transportation-related activities, it shall attempt to resolve its claim with the financial responsibility provider prior to seeking payment on any judgment for damages obtained. When a claimant seeks payment under this section, it simultaneously shall notify both the financial responsibility provider and the ocean transportation intermediary of the claim by certified mail, return receipt requested. The bond, insurance, or other surety may be available to pay such claim if:

(i) the ocean transportation intermediary consents to payment, subject to review by the financial responsibility provider; or

(ii) the ocean transportation intermediary fails to respond within 45 days from the date of the notice of the claim to address the validity of the claim, and the financial responsibility provider deems the claim valid.

(2) If the parties fail to reach an agreement in accordance with paragraph (b)(1) of this section within 90 days of the date of the initial notification of the claim, the bond, insurance, or other surety shall be available to pay any judgment for damages obtained from an appropriate court. The financial responsibility provider shall pay such judgment for damages only to the extent they arise from the transportation-related activities of the ocean transportation intermediary ordinarily within 10 days, without requiring further evidence related to the validity of the claim; it may, however, inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary's transportation-related activities.

(c) The Federal Maritime Commission shall not serve as depository or distributor to third parties of bond, guaranty, or insurance funds in the event of any claim, judgment, or order for reparation.

§ 515.24 Agent for service of process.

(a) Every ocean transportation intermediary not located in the United States and every group or association of ocean transportation intermediaries not located in the United States which provides financial coverage for the financial responsibility of a member ocean transportation intermediary shall designate and maintain a person in the United States as legal agent for the receipt of judicial and administrative process, including subpoenas.

(b) If the designated legal agent cannot be served because of death, disability, or unavailability, the Secretary, Federal Maritime Commission, will be deemed to be the legal agent for service of process. Any person serving the Secretary must also send to the ocean transportation intermediary, or group or association of ocean transportation intermediaries which provide financial coverage for the financial responsibilities of a member ocean transportation intermediary, by registered mail, return receipt requested, at its address published in its tariff, a copy of each document served upon the Secretary, and shall attest to that mailing at the time service is made upon the Secretary.

(c) Service of administrative process, other than subpoenas, may be effected upon the legal agent by mailing a copy of the document to be served by certified or registered mail, return receipt requested. Administrative subpoenas shall be served in accordance with § 502.134 of this chapter.

(d) Designations of resident agent under paragraphs (a) and (b) of this section and provisions relating to service of process under paragraph (c) of this section shall be published in the ocean transportation intermediary's tariff, when required, in accordance with part 520 of this chapter.

(e) Every ocean transportation intermediary using a group or association of ocean transportation intermediaries to cover its financial responsibility requirement under § 515.21(b) shall publish the name and address of the group or association's resident agent for receipt of judicial and administrative process, including subpoenas, in its tariff, when required, in accordance with part 520 of this chapter.

§ 515.25 Filing of proof of financial responsibility.

(a) *Filing of proof of financial responsibility.* Upon notification by the Commission by certified U.S. mail or other method reasonably calculated to provide actual notice that the applicant has been approved for licensing, the applicant shall file with the Director of the Commission's Bureau of Tariffs, Certification and Licensing proof of financial responsibility in the form and amount prescribed in § 515.21. No tariff shall be published until a license is issued, if applicable, and proof of financial responsibility is provided. No license will be issued until the Commission is in receipt of valid proof of financial responsibility from the applicant. If more than six (6) months elapse between issuance of the notification of qualification and receipt of the proof of financial responsibility, the Commission may, at its discretion, undertake a supplementary investigation to determine the applicant's continued qualification, for which a fee is required under § 515.5(b)(3). Should the applicant not file the requisite proof of financial responsibility within two years of notification, the Commission will consider the application to be invalid.

(b) *Branch offices.* New proof of financial responsibility, or a rider to the existing proof of financial responsibility, increasing the amount of the bond in accordance with § 515.21(a)(5), shall be filed with the Commission prior to the date the licensee commences operation of any branch office. Failure to adhere to this requirement may result in revocation of the license.

§ 515.26 Termination of financial responsibility.

No license shall remain in effect unless valid proof of financial responsibility is maintained on file with the Commission. Upon receipt of notice of termination of such financial responsibility, the Commission shall notify the concerned licensee by certified U.S. mail or other method reasonably calculated to provide actual notice, at its last known address, that the Commission shall, without hearing or other proceeding, revoke the license as of the termination date of the financial responsibility, unless the licensee shall have submitted valid replacement proof of financial responsibility before such termination date. Replacement financial responsibility must bear an effective date no later than the termination date of the expiring financial responsibility.

§ 515.27 Proof of compliance.

(a) No common carrier may transport cargo for the account of a shipper known by the carrier to be an NVOCC unless the carrier has determined that the NVOCC has a tariff and financial responsibility as required by sections 8 and 19 of the Act.

(b) A common carrier can obtain proof of an NVOCC's compliance with the tariff and financial responsibility requirements by:

(1) Reviewing a copy of the tariff rule published by the NVOCC and in effect under part 520 of this chapter;

(2) Consulting the Commission to verify that the NVOCC has filed evidence of its financial responsibility; or

(3) Any other appropriate procedure, provided that such procedure is set forth in the carrier's tariff.

(c) A common carrier that has employed the procedure prescribed in either paragraph (b)(1) or (b)(2) of this section shall be deemed to have met its obligations under section 10(b)(11) of the Act, unless the common carrier knew that such NVOCC was not in compliance with the tariff and financial responsibility requirements.

(d) The Commission will publish at its website, www.fmc.gov, a list of the locations of all carrier and conference tariffs, and a list of ocean transportation intermediaries who have furnished the Commission with evidence of financial responsibility, current as of the last date on which the list is updated. The Commission will update this list on a periodic basis.

Appendix A to Subpart C of Part 515—Ocean Transportation Intermediary (OTI) Bond Form [Form 48]

Form FMC–48—Federal Maritime Commission

Ocean Transportation Intermediary (OTI) Bond (Section 19, Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998) ____, as Principal (hereinafter called Principal), and ____, as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the sum of $____ for the payment of which sum we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

Whereas, Principal operates as an OTI in the waterborne foreign commerce of the United States in accordance with the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998 ("1984 Act"), 46 U.S.C. app 1702, and, if necessary, has a valid tariff published pursuant to 46 CFR part 515 and 520, and pursuant to section 19 of the 1984 Act, files this bond with the Commission;

Now, Therefore, The condition of this obligation is that the penalty amount of this bond shall be available to pay any judgment or any settlement made pursuant to a claim under 46 CFR 515.23(b) for damages against the Principal arising from the Principal's transportation related activities or order for reparations issued pursuant to section 11 of the 1984 Act, 46 U.S.C. app. 1710, or any penalty assessed against the Principal pursuant to section 13 of the 1984 Act, 46 U.S.C. app. 1712.

This bond shall inure to the benefit of any and all persons who have obtained a judgment or a settlement made pursuant to a claim under 46 CFR 515.23(b) for damages against the Principal arising from its transportation related activities or order of reparation issued pursuant to section 11 of the 1984 Act, and to the benefit of the Federal Maritime Commission for any penalty assessed against the Principal pursuant to section 13 of the 1984 Act. However, the bond shall not apply to shipments of used household goods and personal effects for the account of the Department of Defense or the account of federal civilian executive agencies shipping under the International Household Goods Program administered by the General Services Administration.

The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall aggregate the penalty of this bond, and in no event shall the Surety's total obligation hereunder exceed said penalty regardless of the number of claims or claimants.

This bond is effective the __ day of ____, 19 ____, and shall continue in effect until discharged or terminated as herein provided. The Principal or the Surety may at any time terminate this bond by written notice to the Federal Maritime Commission at its office in Washington, DC. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission. The Surety shall not be liable for any transportation related activities of the Principal after the expiration of the thirty (30) day period but such termination shall not affect the liability of the Principal and Surety for any event occurring prior to the date when said termination becomes effective.

The Surety consents to be sued directly in respect of any *bona fide* claim owed by Principal for damages, reparations or penalties arising from the transportation-related activities under the 1984 Act of Principal in the event that such legal liability has not been discharged by the Principal or Surety within 10 days after a claimant has obtained a final judgment (after appeal, if any) against the Principal from a United States Federal or State Court of competent jurisdiction and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR 515.23(b), the Federal Maritime Commission, or where all parties and claimants mutually consent, from a foreign court, or where such claimant has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Principal and/or Surety pursuant to 46 CFR 515.23(b),

whereby, upon payment of the agreed sum, the Surety is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant; provided, however, that Surety's total obligation hereunder shall not exceed the amount per OTI set forth in 46 CFR 515.21 or the amount per group or association of OTIs set forth in 46 CFR 515.21.

The underwriting Surety will promptly notify the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, of any claim(s) against this bond.

Signed and sealed this __ day of ____, 19 ____.

(Please type name of signer under each signature.)

_____
Individual Principal or Partner

_____
Business Address

_____
Individual Principal or Partner

_____
Business Address

_____
Individual Principal or Partner

_____
Business Address

_____
Trade Name, If Any

_____
Corporate Principal

_____
State of Incorporation

_____
Trade Name, If Any

_____
Business Address

_____
By

_____
Title
(Affix Corporate Seal)

_____
Corporate Surety

_____
Business Address

_____
By

_____
Title
(Affix Corporate Seal)

Appendix B to Subpart C of Part 515—Ocean Transportation Intermediary (OTI) Insurance Form [Form 67]

Form FMC–67—Federal Maritime Commission

Ocean Transportation Intermediary (OTI) Insurance Form Furnished as Evidence of Financial Responsibility Under 46 U.S.C. app. 1718

This is to certify, that the [Name of Insurance Company] , (hereinafter "Insurer") of [Home Office Address of Company] has issued to [OTI or Group or Association of OTIs] (hereinafter called "insured" of [Address of OTI or Group or Association of OTIs] a policy or policies of insurance for purposes of complying with the provisions of 46 U.S.C. app. 1718 and the rules and regulations, as amended, of the Federal Maritime Commission, which provide compensation for damages, reparations or penalties arising from the transportation-related activities of Insured, and made pursuant to the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998 ("1984 Act").

Whereas, the Insured is or may become an OTI subject to the 1984 Act, 46 U.S.C. app. 1701 *et seq.*, and the rules and regulations of the Federal Maritime Commission, or is or may become a group or association of OTIs, and desires to establish financial responsibility in accordance with section 19 of the 1984 Act, files with the Commission this Insurance Form as evidence of its financial responsibility and evidence of a financial rating for the Insurer of Class V or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization on such organization's letterhead or designated form, or, in the case of insurance provided by Underwriters at Lloyd's, documentation verifying membership in Lloyd's, or, in the case of surplus lines insurers, documentation verifying inclusion on a current "white list" issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners.

Whereas, the Insurance is written to assure compliance by the Insured with section 19 of the 1984 Act, 46 U.S.C. app. 1718, and the rules and regulations of the Federal Maritime Commission relating to evidence of financial responsibility for OTIs, this Insurance shall be available to pay any judgment obtained or any settlement made pursuant to claim under 46 CFR § 515.23(b) for damages against the Insured arising from the Insured's transportation-related activities under the 1984 Act, or order for reparations issued pursuant to section 11 of the 1984 Act, 46 U.S.C. app. 1710, or any penalty assessed against the Insured pursuant to section 13 of the 1984 Act, 46 U.S.C. app. 1712; provided, however, that Insurer's obligation for a group or association of OTIs shall extend only to such damages, reparations or penalties described herein as are not covered by another insurance policy, guaranty or surety bond held by the OTI(s) against which a claim or final judgment has been brought and that Insurer's total obligation hereunder shall not exceed the amount per OTI set forth in 46 CFR 515.21 or the amount per group or association of OTIs set forth in 46 CFR 515.21 in aggregate.

Whereas, the Insurer certifies that it has sufficient and acceptable assets located in the United States to cover all liabilities of Insured herein described, this Insurance shall inure to the benefit of any and all persons who have a *bona fide* claim against the Insured pursuant to 46 CFR 515.23(b) arising from its transportation-related activities under the 1984 Act, or order of reparation issued pursuant to section 11 of the 1984 Act, and to the benefit of the Federal Maritime Commission for any penalty assessed against the Insured pursuant to section 13 of the 1984 Act.

The Insurer consents to be sued directly in respect of any *bona fide* claim owed by Insured for damages, reparations or penalties arising from the transportation-related activities under the 1984 Act, of Insured in the event that such legal liability has not been discharged by the Insured or Insurer within 10 days after a claimant has obtained a final judgment (after appeal, if any) against the Insured from a United States Federal or State Court of competent jurisdiction and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR 515.23(b), the Federal Maritime Commission, or where all parties and claimants mutually consent, from a foreign court, or where such claimant has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Insured and/or Insurer pursuant to 46 CFR 515.23(b), whereby, upon payment of the agreed sum, the Insurer is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant; provided, however, that Insurer's total obligation hereunder shall not exceed the amount per OTI set forth in 46 CFR 515.21 or the amount per group or association of OTIs set forth in 46 CFR 515.21.

The liability of the Insurer shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall aggregate the penalty of the Insurance of the amount per member OTI set forth in 46 CFR 515.21 or the amount per group or association of OTIs set forth in 46 CFR 515.21, whichever comes first, regardless of the financial responsibility or lack thereof, or the solvency or bankruptcy, of Insured.

The insurance evidenced by this undertaking shall be applicable only in relation to incidents occurring on or after the effective date and before the date termination of this undertaking becomes effective. The effective date of this undertaking shall be ____ day of ____, 19____, and shall continue in effect until discharged or terminated as herein provided. The Insured or the Insurer may at any time terminate the Insurance by filing a notice in writing with the Federal Maritime Commission at its office in Washington, DC. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission. The Insurer shall not be liable for any transportation-related activities under the 1984 Act of the Insured after the expiration of the thirty (30) day period but such termination shall not affect the liability of the Insured and Insurer for such activities occurring prior to the date when said termination becomes effective.

Insurer or Insured shall immediately give notice to the Federal Maritime Commission of all lawsuits filed, judgments rendered, and payments made under the insurance policy.

(Name of Agent) ____ domiciled in the United States, with offices located in the United States, at _____ is hereby designated as the Insurer's agent for service of process for the purposes of enforcing the Insurance certified to herein.

If more than one insurer joins in executing this document, that action constitutes joint and several liability on the part of the insurers.

The Insurer will promptly notify the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, of any claim(s) against the Insurance.

Signed and sealed this __ day of ____, 19 __.

Signature of Official signing on behalf of Insurer

Type Name and Title of signer

This Insurance Form has been filed with the Federal Maritime Commission.

Appendix C to Subpart C of Part 515—Ocean Transportation Intermediary (OTI) Guaranty Form [Form 68]

Form FMC–68—Federal Maritime Commission

Guaranty in Respect of Ocean Transportation Intermediary (OTI) Liability for Damages, Reparations or Penalties Arising from Transportation-Related Activities Under the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998

1. Whereas ____ (Name of Applicant) (Hereinafter referred to as the "Applicant") is or may become an Ocean Transportation Intermediary ("OTI") subject to the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998 ("1984 Act"), 46 U.S.C. app. 1701 *et seq.*, and the rules and regulations of the Federal Maritime Commission ("FMC"), or is or may become a group or association of OTIs, and desires to establish its financial responsibility in accordance with section 19 of the 1984 Act, then, provided that the FMC shall have accepted, as sufficient for that purpose, the Applicant's application, supported by evidence of a financial rating for the Guarantor of Class V or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization on such rating organization's letterhead or designated form, or, in the case of Guaranty provided by Underwriters at Lloyd's, documentation verifying membership in Lloyd's, or, in the case of surplus lines insurers, documentation verifying inclusion on a current "white list" issued by the Non-Admitted Insurers" Information Office of the National Association of Insurance Commissioners, the undersigned Guarantor certifies that it has sufficient and acceptable assets located in the United States to cover all transportation-related liabilities of the covered OTI as specified under the 1984 Act.

2. *Now, Therefore,* The condition of this obligation is that the penalty amount of this Guaranty shall be available to pay any judgment obtained or any settlement made pursuant to a claim under 46 CFR 515.23(b) for damages against the Applicant arising from the Applicant's transportation related activities or order for reparations issued pursuant to section 11 of the 1984 Act, 46 U.S.C. app. 1710, or any penalty assessed against the Principal pursuant to section 13 of the 1984 Act, 46 U.S.C. app. 1712.

3. The undersigned Guarantor hereby guarantees to be sued directly in respect of any *bona fide* claim owed by Applicant for damages, reparations or penalties arising from Applicant's transportation-related activities under the 1984 Act, in the event that such legal liability has not been discharged by the Applicant within 10 days after any such claimant has obtained a final judgment (after appeal, if any) against the Applicant from a United States Federal or State Court of competent jurisdiction and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR 515.23(b), the FMC, or where all parties and claimants mutually consent, from a foreign court, or where such claimant has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Applicant and/or Guarantor pursuant to 46 CFR 515.23(b), whereby, upon payment of the agreed sum, the Guarantor is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant. In the case of a guaranty covering the liability of a group or association of OTIs, Guarantor's obligation extends only to such damages, reparations or penalties described herein as are not covered by another insurance policy, guaranty or surety bond held by the OTI(s) against which a claim or final judgment has been brought.

4. The Guarantor's liability under this Guaranty in respect to any claimant shall not exceed the amount of the guaranty; and the aggregate amount of the Guarantor's liability under this Guaranty shall not exceed the amount per OTI set forth in 46 CFR 515.21 or the amount per group or association of OTIs set forth in 46 CFR 515.21 in aggregate.

5. The Guarantor's liability under this Guaranty shall attach only in respect of such activities giving rise to a cause of action against the Applicant, in respect of any of its transportation-related activities under the 1984 Act, occurring after the Guaranty has become effective, and before the expiration date of this Guaranty, which shall be the date 30 days after the date of receipt by FMC of notice in writing that either Applicant or the Guarantor has elected to terminate this Guaranty. The Guarantor and/or Applicant specifically agree to file such written notice of cancellation.

6. Guarantor shall not be liable for payments of any of the damages, reparations or penalties hereinbefore described which arise as the result of any transportation-related activities of Applicant after the cancellation of the Guaranty, as herein provided, but such cancellation shall not affect the liability of the Guarantor for the payment of any such damages, reparations or penalties prior to the date such cancellation becomes effective.

7. Guarantor shall pay, subject up to a limit of the amount per OTI set forth in 46 CFR 515.21, directly to a claimant any sum or sums which Guarantor, in good faith, determines that the Applicant has failed to pay and would be held legally liable by reason of Applicant's transportation-related activities, or its legal responsibilities under the 1984 Act and the rules and regulations of the FMC, made by Applicant while this agreement is in effect, regardless of the financial responsibility or lack thereof, or the solvency or bankruptcy, of Applicant.

8. Applicant or Guarantor shall immediately give written notice to the FMC of all lawsuits filed, judgments rendered, and payments made under the Guaranty.

9. Applicant and Guarantor agree to handle the processing and adjudication of claims by claimants under the Guaranty established herein in the United States, unless by mutual consent of all parties and claimants another country is agreed upon. Guarantor agrees to appoint an agent for service of process in the United States.

10. This Guaranty shall be governed by the laws in the State of ____ to the extent not inconsistent with the rules and regulations of the FMC.

11. This Guaranty is effective the __ day of ____, 19 __, 12:01 a.m., standard time at the address of the Guarantor as stated herein and shall continue in force until terminated as herein provided.

12. The Guarantor hereby designates as the Guarantor's legal agent for service of process domiciled in the United States _____, with offices located in the United States at _____, for the purposes of enforcing the Guaranty described herein.

(Place and Date of Execution)

(Type Name of Guarantor)

(Type Address of Guarantor)

By _____

(Signature and Title)

Appendix D to Subpart C of Part 515—Ocean Transportation Intermediary (OTI) Group Bond Form [FMC–69]

Form FMC–69—Federal Maritime Commission

Ocean Transportation Intermediary (OTI) Group Supplemental Coverage Bond Form (Section 19, Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998)

_____, as Principal (hereinafter called Principal), and _____, as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the sum of $____ for the payment of which sum we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

Whereas, (Principal) ____ operates as a group or association of OTIs in the waterborne foreign commerce of the United States and pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998 ("1984 Act"), files this bond with the Federal Maritime Commission;

Now, Therefore, the conditions of this obligation are that the penalty amount of this bond shall be available to pay any judgment obtained or any settlement made pursuant to a claim under 46 CFR 515.23(b) against the OTIs enumerated in Appendix A of this bond for damages arising from any or all of the identified OTIs' transportation-related activities under the 1984 Act, 46 U.S.C. app. 1701 *et seq.*, or order for reparations issued pursuant to section 11 of the 1984 Act, 46

U.S.C. app. 1710 or any penalty assessed pursuant to section 13 of the 1984 Act, 46 U.S.C. app. 1712 that are not covered by the identified OTIs' individual insurance policy(ies), guaranty(ies) or surety bond(s).

This bond shall inure to the benefit of any and all persons who have obtained a judgment or made a settlement pursuant to a claim under 46 CFR 515.23(b) for damages against any or all of the OTIs identified in appendix A not covered by said OTIs' insurance policy(ies), guaranty(ies) or surety bond(s) arising from said OTIs' transportation-related activities under the 1984 Act, or order for reparation issued pursuant to section 11 of the 1984 Act, and to the benefit of the Federal Maritime Commission for any penalty assessed against said OTIs pursuant to section 13 of the 1984 Act. However, the bond shall not apply to shipments of used household goods and personal effects for the account of the Department of Defense or the account of federal civilian executive agencies shipping under the International Household Goods Program administered by the General Services Administration.

The Surety consents to be sued directly in respect of any *bona fide* claim owed by any or all of the OTIs identified in Appendix A for damages, reparations or penalties arising from the transportation-related activities under the 1984 Act of the OTIs in the event that such legal liability has not been discharged by the OTIs or Surety within 10 days after a claimant has obtained a final judgment (after appeal, if any) against the OTIs from a United States Federal or State Court of competent jurisdiction and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR 515.23(b), the Federal Maritime Commission, or where all parties and claimants mutually consent, from a foreign court, or where such claimant has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the OTIs and/or Surety pursuant to 46 CFR 515.23(b), whereby, upon payment of the agreed sum, the Surety is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant.

The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall aggregate the penalty of this bond, and in no event shall the Surety's total obligation hereunder exceed the amount per member OTI set forth in 46 CFR 515.21 identified in Appendix A, or the amount per group or association of OTIs set forth in 46 CFR 515.21, regardless of the number of OTIs, claims or claimants.

This bond is effective the __ day of ____, 19 __, and shall continue in effect until discharged or terminated as herein provided. The Principal or the Surety may at any time terminate this bond by written notice to the Federal Maritime Commission at its office in Washington, DC. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission. The Surety shall not be liable for any transportation-related activities of the OTIs identified in Appendix A as covered by the Principal after the expiration of the thirty (30) day period, but such termination shall not affect the liability of the Principal and Surety for any transportation-related activity occurring prior to the date when said termination becomes effective.

The Principal or financial responsibility provider will promptly notify the underwriting Surety and the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, of any additions, deletions or changes to the OTIs enumerated in Appendix A. In the event of additions to appendix A, coverage will be effective upon receipt of such notice, in writing, by the Commission at its office in Washington, DC. In the event of deletions to Appendix A, termination of coverage for such OTI(s) shall become effective thirty (30) days after receipt of written notice by the Commission. Neither the Principal nor the Surety shall be liable for any transportation-related activities of the OTI(s) deleted from Appendix A after the expiration of the thirty (30) day period, but such termination shall not affect the liability of the Principal and Surety for any transportation-related activity of said OTI(s) occurring prior to the date when said termination becomes effective.

The underwriting Surety will promptly notify the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, of any claim(s) against this bond.

Signed and sealed this __day of ____, 19 __, (Please type name of signer under each signature).

_____
Individual Principal or Partner

_____
Business Address

_____
Individual Principal or Partner

_____
Business Address

_____
Individual Principal or Partner

_____
Business Address

_____
Trade Name, if Any

_____
Corporate Principal

_____
Place of Incorporation

_____
Trade Name, if Any

_____
Business Address (Affix Corporate Seal)

_____
By

_____
Title

_____
Principal's Agent for Service of Process (Required if Principal is not a U.S. Corporation)

_____
Agent's Address

_____
Corporate Surety

_____
Business Address (Affix Corporate Seal)

_____
By

_____
Title

Subpart D—Duties and Responsibilities of Ocean Transportation Intermediaries; Reports to Commission

§ 515.31 General duties.

(a) *License; name and number.* Each licensee shall carry on its business only under the name in which its license is issued and only under its license number as assigned by the Commission. Wherever the licensee's name appears on shipping documents, its Commission license number shall also be included.

(b) *Stationery and billing forms; notice of shipper affiliation.* (1) The name and license number of each licensee shall be permanently imprinted on the licensee's office stationery and billing forms. The Commission may temporarily waive this requirement for good cause shown if the licensee rubber stamps or types its name and Commission license number on all papers and invoices concerned with any ocean transportation intermediary forwarding transaction.

(2) When a licensee is a shipper or seller of goods in international commerce or affiliated with such an entity, the licensee shall have the option of:

(i) Identifying itself as such and/or, where applicable, listing its affiliates on its office stationery and billing forms, or

(ii) Including the following notice on such items:

This company is a shipper or seller of goods in international commerce or is affiliated with such an entity. Upon request, a general statement of its business activities and those of its affiliates, along with a written list of the names of such affiliates, will be provided.

(c) *Use of license by others; prohibition.* No licensee shall permit its license or name to be used by any person who is not a *bona fide* individual employee of the licensee. Unincorporated branch offices of the licensee may use the license number and name of the licensee if such branch offices:

(1) Have been reported to the Commission in writing; and

(2) Are covered by increased financial responsibility in accordance with § 515.21(a)(5).

(d) *Arrangements with ocean transportation intermediaries whose licenses have been revoked.* Unless prior written approval from the Commission has been obtained, no licensee shall, directly or indirectly:

(1) Agree to perform ocean transportation intermediary services on shipments as an associate, correspondent, officer, employee, agent, or sub-agent of any person whose license has been revoked or suspended pursuant to § 515.16;

(2) Assist in the furtherance of any ocean transportation intermediary business of such person;

(3) Share forwarding fees or freight compensation with any such person; or

(4) Permit any such person, directly or indirectly, to participate, through ownership or otherwise, in the control or direction of the ocean transportation intermediary business of the licensee.

(e) *Arrangements with unauthorized persons.* No licensee shall enter into an agreement or other arrangement (excluding sales agency arrangements not prohibited by law or this part) with an unlicensed person that bestows any fee, compensation, or other benefit upon the unlicensed person. When a licensee is employed to perform ocean transportation intermediary services by the agent of the person responsible for paying for such services, the licensee shall also transmit a copy of its invoice for services rendered to the person paying those charges.

(f) *False or fraudulent claims, false information.* No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning an ocean transportation intermediary transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, shipper, common carrier or other person, false information relative to any ocean transportation intermediary transaction.

(g) *Information provided to the principal or shipper.* No licensee shall withhold any information concerning an ocean transportation intermediary transaction from its principal or shipper, and each licensee shall comply with the laws of the United States and shall exercise due diligence to assure that all information provided to its principal or shipper or provided in any export declaration, bill of lading, affidavit, or other document which the licensee executes in connection with a shipment is accurate.

(h) *Errors and omissions of the principal or shipper.* A licensee who has reason to believe that its principal or shipper has not, with respect to a shipment to be handled by such licensee, complied with the laws of the United States, or has made any error or misrepresentation in, or omission from, any export declaration, bill of lading, affidavit, or other paper which the principal or shipper executes in connection with such shipment, shall advise its principal or shipper promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in any transaction involving such document until the matter is properly and lawfully resolved.

(i) *Response to requests of Commission.* Upon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its ocean transportation intermediary business, and shall respond promptly to any lawful inquiries by such representative.

(j) *Express written authority.* No licensee shall endorse or negotiate any draft, check, or warrant drawn to the order of its principal or shipper without the express written authority of such principal or shipper.

(k) *Invoices; documents available upon request.* Upon the request of its principal(s) or shipper(s), each licensee shall provide a complete breakout of its charges and a true copy of any underlying document or bill of charges pertaining to the licensee's invoice. The following notice shall appear on each invoice to a principal or shipper:

> Upon request, we shall provide a detailed breakout of the components of all charges assessed and a true copy of each pertinent document relating to these charges.

(l) *Accounting to principal or shipper.* Each licensee shall account to its principal(s) or shipper(s) for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance monies received for claims, proceeds of C.O.D. shipments, drafts, letters of credit, and any other sums due such principal(s) or shipper(s).

§ 515.32 Records required to be kept.

Each licensee shall maintain in an orderly and systematic manner, and keep current and correct, all records and books of account in connection with its ocean transportation intermediary business. These records must be kept in the United States in such manner as to enable authorized Commission personnel to readily determine the licensee's cash position, accounts receivable and accounts payable. The licensee must maintain the following records for a period of five years:

(a) *General financial data.* A current running account of all receipts and disbursements, accounts receivable and payable, and daily cash balances, supported by appropriate books of account, bank deposit slips, canceled checks, and monthly reconciliation of bank statements.

(b) *Types of services by shipment.* A separate file shall be maintained for each shipment. Each file shall include a copy of each document prepared, processed, or obtained by the licensee, including each invoice for any service arranged by the licensee and performed by others, with respect to such shipment.

(c) *Receipts and disbursements by shipment.* A record of all sums received and/or disbursed by the licensee for services rendered and out-of-pocket expenses advanced in connection with each shipment, including specific dates and amounts.

(d) *Special contracts.* A true copy, or if oral, a true and complete memorandum, of every special arrangement or contract between a licensed freight forwarder and a principal, or modification or cancellation thereof. *Bona fide* shippers shall also have access to such records upon reasonable request.

§ 515.33 Regulated Persons Index.

The Regulated Persons Index is a database containing the names, addresses, phone/fax numbers and bonding information, where applicable, of Commission-regulated entities. The database may be purchased for $84 by contacting Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573. Contact information is listed on the Commission's website at www.fmc.gov.

Subpart E—Freight Forwarding Fees and Compensation

§ 515.41 Forwarder and principal; fees.

(a) *Compensation or fee sharing.* No licensed freight forwarder shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, or purchaser, or an agent, affiliate, or employee thereof; nor with any person advancing the purchase price of the property or guaranteeing payment therefor; nor with any person having a beneficial interest in the shipment.

(b) *Receipt for cargo.* Each receipt for cargo issued by a licensed freight forwarder shall be clearly identified as "Receipt for Cargo" and be readily distinguishable from a bill of lading.

(c) *Special contracts.* To the extent that special arrangements or contracts are entered into by a licensed freight forwarder, the forwarder shall not deny equal terms to other shippers similarly situated.

(d) *Reduced forwarding fees.* No licensed freight forwarder shall render,

or offer to render, any freight forwarding service free of charge or at a reduced fee in consideration of receiving compensation from a common carrier or for any other reason. *Exception:* A licensed freight forwarder may perform freight forwarding services for recognized relief agencies or charitable organizations, which are designated as such in the tariff of the common carrier, free of charge or at reduced fees.

(e) *In-plant arrangements.* A licensed freight forwarder may place an employee or employees on the premises of its principal as part of the services rendered to such principal, provided:

(1) The in-plant forwarder arrangement is reduced to writing in the manner of a special contract under § 515.32(d), which shall identify all services provided by either party (whether or not constituting a freight forwarding service); state the amount of compensation to be received by either party for such services; set forth all details concerning the procurement, maintenance or sharing of office facilities, personnel, furnishings, equipment and supplies; describe all powers of supervision or oversight of the licensee's employee(s) to be exercised by the principal; and detail all procedures for the administration or management of in-plant arrangements between the parties; and

(2) The arrangement is not an artifice for a payment or other unlawful benefit to the principal.

§ 515.42 Forwarder and carrier; compensation.

(a) *Disclosure of principal.* The identity of the shipper must always be disclosed in the shipper identification box on the bill of lading. The licensed freight forwarder's name may appear with the name of the shipper, but the forwarder must be identified as the shipper's agent.

(b) *Certification required for compensation.* A common carrier may pay compensation to a licensed freight forwarder only pursuant to such common carrier's tariff provisions. Where a common carrier's tariff provides for the payment of compensation, such compensation shall be paid on any shipment forwarded on behalf of others where the forwarder has provided a written certification as prescribed in paragraph (c) of this section and the shipper has been disclosed on the bill of lading as provided for in paragraph (a) of this section. The common carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect. The common carrier shall retain such certification for a period of five (5) years.

(c) *Form of certification.* Where a licensed freight forwarder is entitled to compensation, the forwarder shall provide the common carrier with a signed certification which indicates that the forwarder has performed the required services that entitle it to compensation. The required certification may be placed on one copy of the relevant bill of lading, a summary statement from the forwarder, the forwarder's compensation invoice, or as an endorsement on the carrier's compensation check. Each forwarder shall retain evidence in its shipment files that the forwarder, in fact, has performed the required services enumerated on the certification. The certification shall read as follows:

The undersigned hereby certifies that neither it nor any holding company, subsidiary, affiliate, officer, director, agent or executive of the undersigned has a beneficial interest in this shipment; that it is the holder of valid FMC License No. ____, issued by the Federal Maritime Commission and has performed the following services:

(1) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space; and

(2) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

(d) *Compensation pursuant to tariff provisions.* No licensed freight forwarder, or employee thereof, shall accept compensation from a common carrier which is different from that specifically provided for in the carrier's effective tariff(s). No conference or group of common carriers shall deny in the export commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount.

(e) *Electronic data interchange.* A licensed freight forwarder may own, operate, or otherwise maintain or supervise an electronic data interchange based computer system in its forwarding business; however, the forwarder must directly perform value-added services as described in paragraph (c) of this section in order to be entitled to carrier compensation.

(f) *Compensation; services performed by underlying carrier; exemptions.* No licensed freight forwarder shall charge or collect compensation in the event the underlying common carrier, or its agent, has, at the request of such forwarder, performed any of the forwarding services set forth in § 515.2(i) unless such carrier or agent is also a licensed freight forwarder, or unless no other licensed freight forwarder is willing and able to perform such services.

(g) *Duplicative compensation.* A common carrier shall not pay compensation for the services described in paragraph (c) of this section more than once on the same shipment.

(h) *Non-vessel-operating common carriers; compensation.* (1) A licensee operating as an NVOCC and a freight forwarder, or a person related thereto, may collect compensation when, and only when, the following certification is made together with the certification required under paragraph (c) of this section:

The undersigned certifies that neither it nor any related person has issued a bill of lading or otherwise undertaken common carrier responsibility as a non-vessel-operating common carrier for the ocean transportation of the shipment covered by this bill of lading.

(2) Whenever a person acts in the capacity of an NVOCC as to any shipment, such person shall not collect compensation, nor shall any underlying ocean common carrier pay compensation to such person, for such shipment.

(i) *Compensation; beneficial interest.* A licensed freight forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 98–33554 Filed 12–21–98; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 22

[WT Docket Nos. 98–205, 96–59, GN Docket No. 93–252; FCC 98–308]

1998 Biennial Regulatory Review—Spectrum Aggregation Limits for Wireless Telecommunications Carriers

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this *Notice of Proposed Rulemaking* the Commission undertakes a comprehensive review of the 45 MHz Commercial Mobile Radio Services (CMRS) spectrum cap as part of our biennial review of the Commission's regulations. The Commission seeks comment on whether it should repeal,

modify or retain the 45 MHz spectrum cap. In addition, the Commission seeks comment on a petition, submitted by the Cellular Telecommunications Industry Association (CTIA), to forbear from enforcement of the CMRS spectrum cap pursuant to section 10 of the Communications Act of 1934, as amended. We also seek comment on whether we should retain, modify, or repeal the cellular cross-ownership rule.

DATES: Comments are due on or before January 25, 1999. Reply comments are due on or before February 10, 1999.

ADDRESSES: All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W.; TW–A325; Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: David Krech or Pieter van Leeuwen, Commercial Wireless Division, Wireless Telecommunications Bureau, (202) 418–0620.

SUPPLEMENTARY INFORMATION: This *Notice of Proposed Rulemaking* in WT Docket Nos. 98–205, 96–59, GN Docket No. 93–252, adopted November 19, 1998, and released December 10, 1998, is available for inspection and copying during normal business hours in the FCC Reference Center, Room 230, 1919 M Street N.W., Washington D.C. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington D.C. 20036 (202) 857–3800.

Synopsis of the Notice of Proposed Rulemaking:

I. Background

A. History of the CMRS Spectrum Cap

1. The CMRS spectrum cap, 47 CFR 20.6, governs the amount of CMRS spectrum that can be licensed to a single entity within a particular geographic area. Pursuant to § 20.6, a single entity may acquire attributable interests in the licenses of broadband Personal Communications Service (PCS), cellular, and Specialized Mobile Radio (SMR) services that cumulatively do not exceed 45 MHz of spectrum within the same geographic area.

2. The CMRS spectrum cap was established in Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93–252, *Third Report and Order*, 59 FR 59945 (November 21, 1994) (*CMRS Third Report and Order*). The Commission found that if licensees were to aggregate sufficient amounts of spectrum, it would be possible for them, unilaterally or in combination, to exclude efficient competitors, to reduce the quantity or quality of services provided, or to increase prices to the detriment of consumers. The Commission found that creating a cap on broadband PCS, SMR, and cellular licenses would prevent licensees from artificially withholding capacity from the market. The Commission found that a 45 MHz cap provided a minimally intrusive means for ensuring that the mobile communications marketplace remained competitive and preserved incentives for efficiency and innovation.

3. To perform a spectrum cap analysis, a threshold determination must first be made regarding whether the CMRS offerings under consideration are serving markets that substantially overlap. The Commission adopted a simple formula for this assessment: a determination of whether the overlap between geographic service areas or licensed contours contains 10 percent or more of the market's population. Assuming a 10 percent population overlap, the rule next requires a determination of whether there is common attributable ownership. For purposes of the spectrum cap, equity ownership of 20 percent or more was deemed attributable. The Commission also stated that in determining when cellular, broadband PCS and SMR licenses are held indirectly through intervening corporate entities, a multiplier would be used to determine attributable ownership levels, consistent with application of the broadcast attribution rules.

4. In Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93–252, Fourth Report and Order, 59 FR 61828 (December 2, 1994) (*CMRS Fourth Report and Order*) the Commission further clarified that certain business relationships could give rise to attributable ownership interests for purposes of the CMRS spectrum cap. First, the Commission held that resale agreements will not be considered attributable interests because resellers can neither exercise control over the spectrum on which they provide service nor reduce the amount of service provided over that spectrum. Second, the Commission found that management agreements that authorize managers of cellular, broadband PCS or SMR systems to engage in practices or activities that determine or significantly influence the nature and types of services offered, the terms on which services are offered, or the prices charged for such services, give the managers an attributable interest in that licensee. Finally, the Commission also concluded that joint marketing agreements that affect pricing or service offerings will be attributable.

5. In Amendment of parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, WT Docket No. 96–59, GN Docket No. 90–314, *Report and Order*, 61 FR 33859 (July 1, 1996) (*CMRS Spectrum Cap Report and Order*) *appeal pending sub nom. Cincinnati Bell Tel Co.* v. *FCC*, No. 96–3756 (6th Cir), *recon. (BellSouth MO&O) appeal pending sub nom. BellSouth Corporation* v. *FCC*, No. 97–1630 (D.C. Cir), the Commission reaffirmed the basic tenets of the CMRS spectrum cap and provided additional economic rationale for its use. Specifically, the Commission provided an analysis of the potential market concentrations using the Herfindahl-Hirschman Index (HHI), and found that a 45 MHz spectrum cap was necessary to prevent CMRS markets from becoming highly concentrated. The Commission found that such a spectrum cap was needed to ensure competition, and that it would adequately address concerns about anticompetitive behavior in the CMRS market.

6. In addition to reviewing the general structure of the CMRS spectrum cap, the Commission also reconsidered the ownership and geographic attribution provisions of § 20.6. In the *CMRS Spectrum Cap Report and Order*, the Commission revisited the use of a 20 percent attribution standard and found it appropriate for use in the CMRS spectrum cap. Although the Commission did not alter the 20 percent ownership attribution standard in the *CMRS Spectrum Cap Report and Order*, it did adopt a rule under which it would review requests for waiver of the attribution standard. *See* 47 CFR 20.6 Note 3. The Commission also eliminated the 40 percent attribution threshold for ownership interests held by minorities and women, but maintained it for small businesses and rural telephone companies. In considering changes to the geographic attribution standard, the Commission declined to alter the 10 percent overlap definition because it found that an overlap of 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the cellular operator is slight. In addition, the Commission expanded the divestiture provisions by allowing parties with non-controlling, attributable interests in CMRS licenses to have an attributable or controlling interest in another CMRS application that would exceed the 45 MHz spectrum cap so long as they followed our post-

licensing divestiture procedures. In the *BellSouth MO&O*, Commission held that the CMRS spectrum cap is not limited to real time, two-way switched phone service, but covers a variety of services within the definition of CMRS.

B. Pending Proceedings Regarding the CMRS Spectrum Cap

7. There are several proceedings pending before the Commission which deal with different aspects of the CMRS spectrum cap. Because the Commission intends for this proceeding to be a comprehensive re-evaluation of the CMRS spectrum cap, it plans to consolidate these outstanding issues in this proceeding. The Commission therefore incorporates into this proceeding the record of the following pending proceedings on the CMRS spectrum cap: (1) Petitions for Reconsideration of *CMRS Third Report and Order;* (2) Petitions for Reconsideration of *CMRS Fourth Report and Order;* (3) Petitions for Reconsideration of *CMRS Spectrum Cap Report and Order;* and, (4) Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services, GN Docket No. 93–252, *Third Further Notice of Proposed Rulemaking,* 60 FR 26861 (May 19, 1995). In that proceeding the Commission examined whether the CMRS spectrum cap should be extended to all cellular, SMR, and broadband PCS providers regardless of whether they are classified as Private Mobile Radio Services (PMRS) or CMRS providers.

II. Notice of Proposed Rulemaking

A. Overview

8. The Commission last reviewed the CMRS spectrum aggregation limits in 1996 in the *CMRS Spectrum Cap Report and Order.* Section 11 of the Communications Act requires that the Commission review regulations "that apply to the operation or activities of any provider of telecommunications service" and "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." 47 U.S.C. 161. In light of the mandate in section 11 and the developments in the marketplace since 1996, the Commission seeks comment in this Notice on whether to retain, modify, or repeal the CMRS spectrum cap.

B. Reassessment of the CMRS Spectrum Cap

9. Generally, the Commission believes that the spectrum cap has been useful in promoting competition in mobile voice services, given that these services were largely available from only two cellular companies in each locality prior to our broadband PCS auctions. The 45 MHz limit was originally devised as the Commission prepared for its auction of broadband PCS spectrum, in response to concerns that incumbent cellular providers had incentives to impede the development of competing networks to preserve their competitive position. Under constraints imposed by the CMRS spectrum cap, the Commission awarded broadband PCS licenses that are now, or will soon be, competing directly with these cellular providers. In many localities, significant new entry into mobile voice services has already occurred. Moreover, the Commission expects that competition will develop further as remaining broadband PCS licensees complete the initial phases of their network buildouts. The Commission believes that the aggregation limit helped to promote the likely emergence of at least three new competitors in each market. In at least several markets, mobile voice services are now being offered by seven or more competitors. The competitive evolution of these markets may be traced directly to decisions to auction additional spectrum well-suited to the provision of mobile communications, and to impose limits on the extent to which firms were permitted to aggregate spectrum in these auctions. The Commission seeks comment on this assessment that the existing spectrum aggregation limit to date may have promoted competition in mobile voice markets. The Commission seeks comment on how evidence of emerging competition should be factored into the assessment of whether the current cap should be eliminated, relaxed or redefined. In particular, what weight should these factors be given relative to HHI calculations or similar measures of concentration of ownership or control? Parties should provide discussion or analysis supporting their views. The Commission seeks comment on the following issues and how they relate to the question of whether to retain, modify, or repeal the spectrum cap: (1) what are the relevant product markets?; (2) what are the relevant geographic markets?; and, (3) what are the relevant measures of market capacity (assigned spectrum, operational spectrum, subscribers, revenues, traffic/minutes of use, etc.)?

10. The extent to which services are presently available in individual markets varies considerably. In no market have all of the licensed broadband PCS providers begun offering service, and in a number of localities, service is not yet available from any new entrant. For purposes of assessing the competitive nature of individual markets and calculating market shares, the Department of Justice's *Merger Guidelines* limit market participants to firms that currently produce or sell the relevant product and those described as "uncommitted entrants." Hence, for purposes of conducting an analysis of competition in wireless markets, the Commission seeks comment on whether to limit the assessment of market participants to only current suppliers and any other firms that have announced intentions to commence operations, declared their intentions to offer the relevant product, and will imminently begin soliciting business. Particularly in smaller towns and rural markets, cellular incumbents continue to hold competitive advantages vis-à-vis market entrants that are not very different from those existing when the cap was originally conceived and implemented. Spectrum aggregation limits may well continue to be useful to promote competition in at least certain areas. The Commission invites comment on these assessments. The Commission also solicits comment on whether to apply the CMRS spectrum cap on a market-by-market basis.

11. The Commission also believes that with respect to mobile wireless services, the spectrum cap has served the purpose of constraining undesirable erosion of existing competition through mergers or acquisitions in major markets, where competition among multiple carriers is most advanced. For cellular and SMR incumbents especially, and perhaps for the early A- and B-Block broadband PCS entrants as well, incentives exist for operational carriers to explore in-market merger options. Hence, it appears likely that the spectrum aggregation limit has been of some value in inhibiting competition-eroding spectrum consolidation. The Commission invites comment on these assessments and on the potential for consolidation of CMRS markets if the spectrum cap were relaxed or eliminated, and whether such consolidation would harm or benefit consumers. Commenters should provide empirical evidence on the harms or benefits of consolidation in CMRS markets.

12. The Commission also invites comment on whether there are existing disciplinary factors in the marketplace that may independently minimize the likelihood that any single entity would achieve an anticompetitive level of ownership of CMRS spectrum in a particular geographic area. For example,

are there dis-economies of scale that will limit the size to which firms will grow, and thus tend to ensure that the CMRS sector will assume a competitive structure even in the absence of a spectrum cap? Is it possible that capital markets will not finance attempts by individual firms to acquire spectrum in amounts or construct systems of sizes that would threaten competition? Commenters arguing that such factors lessen or eliminate the need for our current spectrum cap should, where possible, provide specific quantifiable examples of dis-economies, or of points at which various types of costs or risks associated with owning or controlling additional wireless spectrum outweigh potential benefits.

13. The Commission seeks comment on whether the convergence and substitutability of other telecommunications networks, including wireline, cable, private wireless, and satellite networks among others, should affect the application or public interest considerations underlying the spectrum cap. It is important that commenters addressing this issue supply detailed analysis, identify all underlying assumptions, and provide factual support for any projections.

14. The Commission has scheduled an auction for March 1999, that will include licenses for operation on C and F block frequencies. There are certain restrictions on the sale of entrepreneur block licenses (C and F blocks). The Commission invites comment on whether these rules are sufficient to prevent undesirable spectrum consolidation. Commenters should also provide their views on any relationship between this proceeding, including the timing of our final decision, and the successful completion of the upcoming C block auction.

15. The Commission also seeks comment on whether issues regarding economies of scope may provide a rationale for relaxing the spectrum aggregation limit. The Commission invites comment generally on the concepts of economies of scope and scale and their relationship to spectrum aggregation limits.

16. In re-assessing the CMRS spectrum cap, the Commission also seeks comment on whether there are other efficiency benefits or progress toward other public interest goals that would flow from changes in the cap that might counterbalance concerns about possible anticompetitive effects resulting from increased geographic concentration of ownership. For example, might a relaxed cap allow efficient deployment of third-generation wireless services that would be prevented under the present cap? Or, might a relaxed cap facilitate provision of fixed wireless services by CMRS firms, perhaps as universal service providers? What, if any, impact would altering the cap have on the provision of wireless services to under-served areas? Would an enforceable commitment to provide such service in high-cost or low-income areas override anticompetitive concerns?

17. *Service in rural areas.* The Commission seeks comment on whether the relative lack of competition in certain rural and other markets suggests that there is a continuing need for the CMRS spectrum cap in those areas. Commenters should address whether the cap should be retained, at least in those areas until increased competition begins to emerge. On the other hand, the cap may affect the ability of a CMRS provider to attain certain economies of scale and scope. Spectrum may be made newly available for commercial use through partitioning agreements, but the economics of offering service to these lower-density populations may nevertheless limit the extent of competitive, facilities-based entry. The Commission seeks comment on whether the existing spectrum cap may impede delivery of potentially lower-cost service to rural customers as economies of scope go unrealized. In particular, should more concentration of spectrum in rural markets be permitted, perhaps allowing for leveraging of existing facilities? The Commission seeks comment on the extent to which the current 45 MHz aggregation limit may be thwarting the realization of potential economies, and solicit evidence on the magnitude of any such savings or efficiencies in particular market settings.

18. *Advancement of competition in local markets.* The Commission seeks comment on how the spectrum cap affects wireless providers' ability to enter into and compete in markets other than mobile voice service. The Commission seeks comment on the extent to which existing networks are capable of economically supporting the delivery of wireless services other than fixed or mobile voice and paging/messaging. In particular, we invite comment on the technical and economic feasibility of offering dispatch, high-speed Internet, and other two-way data services over existing cellular, broadband PCS, and SMR network platforms. We also invite views on the extent to which any limitations on currently installed networks may be eased in the foreseeable future as newly available technologies are adopted. The Commission is especially interested in views on whether the current spectrum cap is enhancing or impeding the provision of wireless services as a competitive alternative to wireline services.

19. *Development and deployment of new technologies and services.* The Commission seeks comment on whether the spectrum cap serves as a barrier to firms that wish to offer additional services or to adopt advanced network technologies. Specifically, the Commission seeks comment on whether the current aggregation limit poses an obstacle to the introduction of more advanced network technologies. The Commission also seeks comment on whether the existing spectrum limit constitutes a significant constraint on firms' abilities to offer wireless local loop or high-speed mobile data services, either on a stand-alone basis or bundled with mobile voice services. In particular, we invite comment on the extent to which companies are able to acquire and use spectrum outside of CMRS bands to achieve these goals. The Commission also invites comment on the possible use of our waiver process to consider petitions for supplemental spectrum that may be needed to launch new wireless services.

C. Modifications and Alternatives to Existing CMRS Spectrum Cap

i. Modification of Significant Overlap Threshold

20. The CMRS spectrum cap prohibits a licensee from having more than 45 MHz of spectrum in broadband PCS, cellular or SMR services with significant overlap in a geographic area. A "significant overlap" occurs when at least ten percent of the population of the PCS licensed service area is within the cellular geographic service area and/or SMR service area(s). 47 CFR 20.6(c). Therefore, a carrier's spectrum counts toward the spectrum cap if the carrier is licensed to serve 10 percent or more of the population of the designated service area.

21. The Commission seeks comment on the effect of recent changes in CMRS markets, particularly concerning the emergence of broadband PCS carriers as competitors to cellular operators, on the rationale for a 10 percent overlap threshold. The Commission also seek comment on the public interest benefits of increasing the threshold and whether those benefits outweigh any potential for anticompetitive concentration of ownership or control of CMRS licenses.

22. The Commission seeks comment on whether a geographic overlap standard of greater than a 10 percent

overlap should be adopted. If so, what would be a more appropriate standard of geographic overlap and why. The Commission seeks comment on whether a greater overlap may facilitate anticompetitive behavior. The Commission also seeks comment on what degree of a permissible geographic overlap could promote anticompetitive conduct. In addition, the Commission seeks comment on whether we should permit carriers in high-cost and under-served markets to have a greater than 10 percent population overlap, and how we should define high-cost and under-served markets for purpose of the significant overlap threshold. The Commission also seeks comment on whether there is a need to allow a greater overlap in high-cost and under-served areas if we adopt our proposal to allow for a higher cap in rural areas. In addition, the Commission seeks comment on whether a separate geographic overlap standard for rural areas may be in the public interest by possibly encouraging a greater number of service options and better service quality. In the alternative, comment is requested on whether there is a mechanism for triggering the application of a spectrum cap in given geographic areas that might be superior to our current significant overlap standard.

ii. Modification of 45 MHz Limitation

23. The CMRS spectrum cap allows a single entity to control up to 45 MHz of broadband PCS, cellular, and SMR spectrum in a geographic area. The Commission seeks comment on whether a 45 MHz CMRS spectrum limitation is appropriate given increased competition in the CMRS marketplace. For instance, the vast majority of the broadband PCS licenses have been assigned and there are broadband PCS licensees providing service in competition with cellular carriers and each other in many markets. In particular, we seek comment on what would be an appropriate spectrum aggregation limitation in light of current and future prospects for competition in CMRS markets. Commenters should provide analytical support for any limitation that they propose.

24. Another option would be to raise the 45 MHz limitation when competition in relevant markets reaches a particular level. For example, one possible option would permit licensees to exceed the 45 MHz limit as long as a certain number of competitors would remain in a market after the assignment. The Commission seeks comment on such an option. How many competitors in a market would be sufficient to allow a licensee to exceed the 45 MHz limitation? Would the same number of competitors be required for wireless services other than mobile voice? How would the Commission identify qualifying competitors? Should facilities-based competitors be considered? Should other factors be considered in addition to the number of facilities-based carriers in a given market in determining when to lift the restriction? The Commission seeks comment on whether there should be any restraints on how much spectrum a licensee could obtain under such an option.

25. A similar option would be to allow the cap to be raised/exceeded in rural or under-served areas. The Commission seeks comment on the benefits that may be obtained by allowing licensees serving rural, high-cost areas to hold more than 45 MHz of broadband CMRS spectrum in those areas. The Commission also seeks comment on how to define those areas. One possibility would be to use rural service areas, or rural service areas (RSAs). Another option would be to use high-cost areas as defined in our universal service proceeding. The Commission seeks comment on these possible determinations of rural/under-served areas. Commenters that suggest other definitions for rural or under-served areas are requested to precisely set out their proposed definition, and explain the type and number of areas that would come within that definition.

26. The Commission also seeks comment whether the partnerships anticipated under this option would result in meaningful convergence in service quality and rates between urban and rural subscribers. Furthermore, the Commission solicits views on whether any claimed efficiencies of scope are likely to be commercially significant in magnitude for operators in rural markets. The Commission also invites comments on whether this option would discourage broadband PCS carriers from extending their digital network buildouts beyond urban and suburban centers.

iii. Modification of Ownership Attribution Thresholds

27. Under the CMRS spectrum cap, ownership interests of 20 percent or more (40 percent if held by a small business or rural telephone company), including general and limited partnership interests, voting and non-voting stock interests or any other equity interest are considered attributable. 47 CFR 20.6(d)(2). Officers and directors are attributed with their company's holdings, as are persons who manage certain operations of licensees, and licensees that enter into certain joint marketing arrangements with other licensees. 47 CFR 20.6(d)(7). Stock interests held in trust are attributable only to those who have or share the power to vote or sell the stock. 47 CFR 20.6(d)(3). Debt does not constitute an attributable interest, nor are securities affording potential future equity interests (such as warrants, options, or convertible debentures) considered attributable until they are converted or exercised. 47 CFR 20.6(d)(5). The Commission seeks comment generally on whether we should modify any or all of these attribution criteria. Commenters should provide reasoning and factual support for their positions.

28. The Commission seeks comment on whether we should modify the 20 percent ownership benchmark. Specifically, the Commission seeks comment on the effect that a 20 percent attribution standard has on the ability of CMRS providers to obtain capital, and on the public interest benefits of increasing the 20 percent attribution standard. The Commission also seeks comment on what level to set an attribution standard. Commenters proposing a different standard should provide analytical support for their proposals. The Commission seeks comment on whether we should increase the benchmark as it applies to the amount of non-voting equity interest, or interest held by a limited partner. The Commission also seeks comment on whether to continue to have a separate 40 percent attribution standard for licenses that are held by small businesses or rural telephone companies or whether this standard should also be modified.

29. The Commission also seeks comment on whether any of the other provisions in our ownership attribution criteria should be modified. Are there any situations where an entity can acquire effective control over another entity that is not adequately contemplated under our attribution standards? Alternatively, are there situations proscribed by our attribution rules that are inhibiting competition? Commenters should be as specific as possible in identifying which, if any, attribution standards should be changed and in explaining the rationale and public interest benefits that might accompany such a change in our rules. The Commission also seeks comment on the waiver test for attribution, 47 CFR 20.6 note 3, and whether the waiver test should be retained if the 20 percent attribution standard is modified.

iv. Forbearance From Enforcing the CMRS Spectrum Cap

30. On September 30, 1998, CTIA petitioned the Commission to forbear from enforcing the spectrum cap pursuant to our authority under section 10 of the Act, 47 U.S.C. 160. The Commission must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if a three-pronged test is met. Specifically, section 10 requires forbearance, notwithstanding 47 U.S.C. 332(c)(1)(A), if the Commission determines that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

31. To satisfy the first prong of section 10, CTIA relies on statements that the CMRS market is competitive. CTIA also argues that principles of antitrust law and economics provide adequate protection against the possibility of excessive concentration that the spectrum cap was designed to safeguard against. Addressing the second prong, CTIA contends that the Commission's section 310(d) authority is an appropriate vehicle for the Commission to effectuate the "ideal approach [which] is to judge spectrum combinations on a case-by-case basis taking into account all of the relevant variables bearing upon competition and efficiency, including the service area overlap, the populations in the respective service areas, and the quantity of spectrum currently allocated to and * * * sought to be acquired by the licensee." CTIA argues that the third prong is met because the public interest is better served by a case-by-case determination of permissible ownership structures. According to CTIA, rigid ownership limitations endangers innovation and efficiency and outweighs the administrative burden associated with reliance upon a case-by-case approach to market concentration issues.

32. The Commission seeks comment on the CTIA Forbearance Petition, particularly whether CTIA's arguments meet the standards of section 10 for forbearance from the spectrum cap. In regard to the third prong of the test and in connection with the above questions regarding the re-assessment of the rule under section 11, it would be useful for commenting parties to consider and comment upon: (i) the original purpose of the particular rule in question; (ii) the means by which the rule was meant to further that purpose; (iii) the state of competition in relevant markets at the time the rule was promulgated; (iv) the current state of competition as compared to that which existed at the time of the rule's adoption; (v) how any changes in competitive market conditions between the time the rule was promulgated and the present might obviate, remedy, or otherwise eliminate the concerns that originally motivated the adoption of the rule; and (vi) the ultimate effect forbearance may have on consumers.

33. If the Commission, upon review of the record, finds that the requirements set out in section 10 have been satisfied, and thus the Commission has authority to forbear from the CMRS spectrum cap, we seek comment on the advantages or disadvantages of forbearing from the cap rather than modifying, sunsetting, or eliminating it.

34. If the Commission forbears from enforcing the CMRS spectrum cap, what step the Commission should take next regarding the cap? Should the Commission, subsequently, in this or another proceeding, develop a factual record on what happened to CMRS markets without the spectrum cap to confirm that our conclusions about the need for the cap were correct?

v. Sunset CMRS Spectrum Cap

35. The Commission seeks comment on the public interest benefits of establishing a sunset date for the CMRS spectrum aggregation limit in all or some markets. In particular, what market conditions that should be present before sunsetting the cap. The Commission also seeks comment on when these market conditions are likely to be generally present. The Commission also seeks comment on whether a date certain should be set for elimination of the spectrum aggregation limit, or if instead, the Commission should review the continuing need for such a restriction at a pre-set date, e.g., as part of the next biennial review process.

36. One alternative to a uniform date for sunsetting the CMRS spectrum aggregation limit in all or some markets, would be to sunset the cap in selected markets based on the competitive concerns in the particular markets in question. The Commission seeks comment on whether it would be in the public interest to sunset the CMRS spectrum cap on a market-by-market basis, and if so, what criteria should be considered in determining whether to sunset the cap in a particular market. One approach may be to sunset the cap when a certain number of competitors are present in a market. The Commission seeks comment on this approach and what level of competition should exist before we sunset the cap in a particular market.

37. Another option would be to review certain types of proposed transactions involving the aggregation of CMRS spectrum under our section 310(d). Under this approach, any transfers in connection with a merger or acquisition where both parties have directly competing operational wireless services in the same geographic market, would no longer be prohibited under the spectrum cap. Instead, parties to these transactions involving a combination of more than 45 MHz would be obligated to affirmatively demonstrate that the transaction is in the public interest. This would generally include a competitive analysis to evaluate whether the interests of consumers in relevant markets are threatened. All other transactions, including those involving overlapping licenses but where build-out is not complete and service is not operational, would continue to be subject to compliance with the CMRS spectrum cap. The Commission seeks comment on this approach.

vi. Eliminate CMRS Spectrum Cap

38. The Commission seeks comment on whether elimination of the CMRS spectrum cap, and reliance on case-by-case determinations of ownership issues pursuant to section 310(d) of the Communications Act, 47 U.S.C. 310(d), would serve the public interest. Commenters should provide facts and detailed analysis supporting their position. The Commission also seeks comment on the likelihood that anticompetitive behavior would result from elimination of the cap, and request that commenters identify what type of anticompetitive behavior is likely and establish causality between elimination of the cap and that behavior.

39. The Commission seeks comment, including empirical evidence, whether CMRS markets are sufficiently competitive to allow for removal of the CMRS spectrum cap. Commenters should address any significant changes in CMRS markets and telecommunications markets in general that would directly support elimination of the CMRS spectrum cap. The

Commission also seeks comment regarding the administrative burden that would presumably be placed on the Commission's limited resources by reviewing ownership issues on a case-by-case basis.

40. The Commission invites comment on the extent to which other Federal and state authorities, given their resources and broad responsibilities, would be able to effectively monitor the competitive effects of smaller mergers and corporate acquisitions. The Commission also seeks comment on the ability that Federal and state authorities have under antitrust laws to protect competition in cases where competition may not yet be adequately developed.

D. Cellular Cross-Interest Rule

41. Section 22.942 of the Commission's rules prohibits any person from having a direct or indirect ownership interest in licenses for both cellular channel block in overlapping cellular geographic service areas (CGSAs). 47 CFR 22.942. Given the changes in mobile voice markets, and the fact that many markets no longer comprise primarily cellular duopolies, as in 1991 when the rule was adopted, the Commission seeks comment on whether to retain, modify, or repeal § 22.942.

42. The Commission seeks comment on whether the CMRS spectrum cap provides sufficient protection from anticompetitive behavior by cellular licenses in the same market. Commenters should also address whether we should eliminate the cellular cross-ownership rule if we decide to eliminate the CMRS spectrum cap.

43. Where the structure of these markets has not changed significantly, the Commission seeks comment on whether the original purpose of the rule may still be served by its application. Namely, where cellular licensees are still the predominant providers of mobile voice services, is the cellular cross-interest rule may still be necessary to guarantee the competitive nature of the cellular industry and to foster the development of competing systems? The Commission seeks comment on whether to modify the cellular cross-ownership rule so that it does not apply in certain circumstances. One possibility would be to have the rule apply only in markets where there are a limited number of competitors to the cellular providers. The Commission seeks comment on what would be an appropriate threshold for determining in which markets the rule would not apply. The Commission seeks comment on the potential effects of such an application of the cellular cross-ownership rule.

44. The Commission also seeks comment on whether we should relax the current attribution rules related to this rule. For example, should an entity that controls the cellular A block be allowed to have some interest in the cellular B block in the same market? Further, should the current limit on what a non-controlling interest holder may have in each cellular license in a given market be relaxed? Commenters are asked to address the competitive and public interest implications of their proposals.

III. Conclusion

45. In this *Notice of Proposed Rulemaking*, the Commission seeks comment on whether the present CMRS spectrum cap furthers the public interest and encourages competition, consistent with spirit of the Communications Act. The Commission also seeks comment on whether to retain, forbear from, eliminate, or modify the present cap. In particular, the Commission seeks comment on the petition filed by CTIA requesting forbearance from applying the CMRS spectrum cap. The Commission also seeks comment on whether we should retain, modify, or repeal the cellular cross-interest rule.

IV. Procedural Matters and Ordering Clauses

A. Regulatory Flexibility Analysis

46. As required by the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. 603, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the rules proposed in the Notice of Proposed Rulemaking (Notice) in WT Docket No. 98–205. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Notice and IRFA (or summaries thereof) will be published in the **Federal Register**.

i. *Need for, and objectives of, the proposed rules:*

47. As part of its biennial regulatory review, pursuant to section 11 of the Communications Act, 47 U.S.C. 161, the Commission solicits comment on whether we should retain, modify, or eliminate the commercial mobile radio service (CMRS) spectrum cap, 47 CFR 20.6. In this *Notice of Proposed Rulemaking (Notice)*, the Commission also seeks comment on the petition to forbear from enforcement of the CMRS spectrum cap filed by the Cellular Telecommunications Industry Association on September 30, 1998. The discussion in the *Notice* is focused on whether to retain, modify, eliminate or forbear from enforcing the spectrum cap by looking at the competitive changes in the CMRS market, reexamining the goals that the spectrum cap was initially designed to achieve, and seeking comment on whether there are less restrictive measures, or additional public interest goals we should consider in determining whether to eliminate or modify the spectrum aggregation limits. Additionally, the Commission seeks comment on how our analysis may differ in the context of markets with many wireless competitors, as opposed to markets, for example, in rural or high-cost areas, where few or no broadband Personal Communications Service (PCS) providers may have initiated service, and whether we should consider the rule on a market-by-market basis. The *Notice* sets forth several different possible modifications or alterations to the cap and seeks comments on them, as well as other options that commenters may suggest. Specific issues raised for comment include: (1) expanding the allowable amount of geographic overlap between a licensee's various broadband CMRS holdings; (2) increasing the amount of spectrum that a single entity may hold beyond 45 MHz; (3) altering the ownership attribution rules associated with the spectrum cap; (4) forbearing from enforcement of the CMRS spectrum cap pursuant to our authority under section 10 of the Communications Act, 47 U.S.C. 160; (5) establishment of a sunset for the CMRS spectrum cap; and, (6) elimination the CMRS spectrum cap and reliance on a case-by-case analysis of the potential competitive effects of a proposed spectrum holding pursuant to section 310(d) of the Communications Act, 47 U.S.C. 310(d). The Commission also solicits comment on whether we should retain, modify, or repeal the cellular cross-ownership rule, 47 CFR 22.942.

ii. *Legal basis:*

48. The proposed action is authorized under sections 1, 4(i), 10, 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 160, 161, 303(g) and 303(r).

iii. *Description and estimate of the number of small entities to which rules will apply:*

49. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules. 5 U.S.C. 603(b)(3), 604(a)(3). The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." 5 U.S.C. 601(6). A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. 601(4). Nationwide, there are 275,801 small organizations. "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000." 5 U.S.C. 601(5). As of 1992, there were 85,006 such jurisdictions in the United States.

50. In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act. 5 U.S.C. 601(3). 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) meets any additional criteria established by the Small Business Administration (SBA). 15 U.S.C. 632.

51. The Notice could result in rule changes that, if adopted, would affect all small businesses that currently are or may become licensees of the broadband PCS, cellular and/or specialized mobile radio (SMR) services. To assist the Commission in analyzing the total number of affected small entities, commenters are requested to provide estimates of the number of small entities that may be affected by any rule changes resulting from the Notice. The Commission estimates the following number of small entities may be affected by the proposed rule changes:

52. *Cellular Radiotelephone Service.* The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. 13 CFR 121.20. The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 1000 or more employees. The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, is the most recent information available. This document shows that only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. The Commission assumes, for purposes this IRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. In addition, the Commission notes that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Service (PCS) licensees in one group. According to the data released in November 1997, there are 804 companies reporting that they engage in cellular or PCS service. It seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees; however, the Commission is unable at this time to estimate with greater precision the number of cellular service carriers qualifying as small business concerns under the SBA's definition. For purposes of this IRFA, the Commission estimates that there are fewer than 804 small cellular service carriers.

53. *Broadband PCS.* The broadband PCS spectrum is divided into six frequency blocks designated A through F. The Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. This definition of "small entity" in the context of broadband PCS auctions has been approved by the SBA. The Commission has auctioned broadband PCS licenses in blocks A through F. Of the qualified bidders in the C and F block auctions, all were entrepreneurs. Entrepreneurs was defined for these auctions as entities, together with affiliates, having gross revenues of less than $125 million and total assets of less than $500 million at the time the FCC Form 175 application was filed. Ninety bidders, including C block auction winners, won 493 C block licenses and 88 bidders won 491 F block licenses. For purposes of this IRFA, the Commission assumes that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees, are small entities.

54. *Specialized Mobile Radio (SMR).* The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than $15 million in each of the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA. 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 of this IRFA 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 900 MHz SMR band, and recently completed an auction for geographic area 800 MHz SMR licenses. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. There were 10 winning bidders who qualified as small entities in the 800 MHz auction.

iv. *Description of reporting, record keeping and other compliance requirements:*

55. The Notice proposes no additional reporting, record keeping or other compliance measures.

v. *Steps taken to minimize the significant economic impact on small entities, and significant alternatives considered:*

56. The CMRS spectrum cap was established in 1994 in the *CMRS Third Report and Order*, and was reaffirmed in the *CMRS Spectrum Cap Report and Order*. Since that time, there have been several developments that have significantly affected CMRS markets. Through this notice the Commission, as part of the Commission's biennial regulatory review pursuant to section 11 of the Act, seeks to develop a record regarding whether the CMRS spectrum cap continues to make regulatory and economic sense in the current and foreseeable wireless telecommunications markets. Likewise, the Commission seeks comment on whether there continue to be a need for the cellular cross-interest rule. We request comment on whether retention, modification, elimination or forbearance from enforcement of the CMRS

spectrum cap is appropriate with respect to small business that are licensees of the broadband PCS, cellular and/or SMR services. We also request comment on whether retention, modification or elimination of the cellular cross-interest rule is appropriate with respect to small businesses that are cellular licensees.

vi. *Federal rules which overlap, duplicate, or conflict with these proposed rules:*

None.

B. Ex Parte Rules—Permit-But-Disclose Proceedings

58. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 CFR 1.1201, 1203, and 1.1206(a).

C. Comment Dates

59. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before *January 25, 1999,* and reply comments on or before *February 10, 1999.* Comments and reply comments should be filed in WT Docket No. 98–205. 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 24,121 (1998).

60. 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. Comments and reply comments should be filed in WT Docket No. 98–205. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

61. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W.; TW-A325; Washington, D.C. 20554.

62. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Room 700, 2100 M Street, N.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (Docket No.98–205), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy—Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

D. Initial Paperwork Reduction Act of 1995 Analysis

63. This Notice of Proposed Rulemaking does not contain a proposed information collection.

E. Ordering Clauses

64. It ordered that, pursuant to the authority of sections 1, 4(i), 10, 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 160, 161, 303(g), and 303(r), this *Notice of Proposed Rulemaking* is hereby *adopted.*

65. *It is further ordered* that the Commission's Office of Public Affairs, Reference Operations Division, *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.

List of Subject in 47 CFR Parts 20 and 22

Communications common carriers.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98–33775 Filed 12–21–98; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 193

[Docket No. RSPA–97–3002; Notice 2]

RIN 2137–AD11

Pipeline Safety: Incorporation of Standard NFPA 59A in the Liquefied Natural Gas Regulations

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to replace substantive portions of siting, design, construction, equipment and fire protection provisions of Liquefied Natural Gas (LNG) regulations and incorporate by reference the American National Standards Institute (ANSI), National Fire Protection Association (NFPA) Standard 59A (1996 edition), titled "Standards for the Production, Storage and Handling of Liquefied Natural Gas (LNG)". This document proposes to amend remaining LNG regulations including some operation and maintenance requirements. These proposed changes are intended to enable operators to utilize current technology, materials, and practices, thereby reducing costs and enhancing economic growth. These changes will eliminate unnecessary or burdensome requirements while maintaining current levels of safety. The proposed rule is consistent with the President's goals of regulatory reinvention and improvement of customer service.

DATES: Interested persons are invited to submit comments on this notice of proposed rulemaking (NPRM) by March 22, 1999. Late filed comments will be considered to the extent practicable.

ADDRESSES: Written comments on the subject of this document must be submitted in duplicate to the Dockets Facility, U.S. Department of Transportation, 400 Seventh Street, SW, Plaza 401, Washington, DC 20590–0001. Comments should identify the docket and document number stated in the heading of this document. Alternatively, comments may be submitted via e-mail to "ops.comments@rspa.dot.gov." The docket facility is open from 9:00 a.m. to 5:00 p.m., Monday through Friday, except holidays. All comments received will be electronically scanned into the docket and will be accessible at http://dms.dot.gov. General information about the RSPA/Office of Pipeline Safety programs can be reviewed by accessing OPS's homepage at http://ops.dot.gov.

FOR FURTHER INFORMATION CONTACT: Mike Israni, (202) 366–4571, or by e-mail: mike.israni@rspa.dot.gov, regarding the subject matter of this proposed rule, or the Dockets Facility (202) 366–9329, for copies of this document or other material in the docket.

SUPPLEMENTARY INFORMATION:

I. Background

On August 26, 1996, the NFPA petitioned RSPA, requesting that the substantive portions of 49 CFR Part 193 be replaced with ANSI/NFPA 59A (1996 edition), titled "Standards for the Production, Storage and Handling of Liquefied Natural Gas (LNG)". The petition specifically recommends removing the Subparts on siting, design, construction, equipment and fire protection, and instead referencing chapters 1 through 9 of the ANSI/NFPA 59A (1996 edition). The petition recommends retaining the Subparts on operation, maintenance, personnel qualification and training, and security, with some minor changes.

The existing Federal safety standards for LNG facilities were developed as a result of the Pipeline Safety Act of 1979, now re-codified in 49 United States Code Section 60103. In 1979, Congress determined that the public would be better served if the US Department Of Transportation (DOT) developed its own standards for the LNG industry. Prior to July 1, 1976, no Federal standards for LNG facilities existed. The existing standard, specifically dealing with the LNG industry that is associated with the pipeline facilities, was issued as a Final Rule on February 11, 1980 [45 FR 9203] and now appears at 49 CFR Part 193. Between July 1, 1976 and February 11, 1980, LNG facilities were required to follow ANSI/NFPA 59A (1972 edition) and Part 192.

In 1974, the Office of Pipeline Safety (OPS) hired Arthur D. Little consulting firm (ADL) to conduct a study on safety information on LNG facilities. The ADL produced a report titled "Technology and Current Practices for Processing, Transferring, and Storing Liquefied Natural Gas," which included a comparative analysis of national, state, local, industrial, and professional society codes, standards, practices and regulations relating to LNG facilities. The study identified and analyzed many areas of public concern about the operation of LNG facilities. It also addressed many practices and functions where precautions were needed to protect persons and property. The study found that ANSI/NFPA 59A was the basis for practically all national, state, and local codes for LNG facilities. Therefore, OPS used the ANSI/NFPA 59A, in part, as a basis for existing Federal standards.

A report issued on July 31, 1978, by the General Accounting Office titled "Liquefied Energy Gases" highlighted some of the safety concerns in the transportation and storage of LNG. Foremost among those were: (1) protection of persons and property near an LNG facility from thermal radiation caused by ignition of a major spill of LNG, (2) protection of persons and property near an LNG facility from dispersion and delayed ignition of a natural gas cloud arising from a major spill of LNG, and (3) reduction of the potential for a catastrophic spill of LNG.

OPS identified many deficiencies in the pre-1980 LNG standards which needed to be corrected to reduce the potential for a major spill of LNG and provide an acceptable level of safety. Because of the difference in format and the need for regulatory language to facilitate enforcement, a few sections of ANSI/NFPA 59A were restated for their adoption in Part 193.

There have been significant changes in the ANSI/NFPA 59A since 1980. Because ANSI/NFPA 59A is revised on a regular basis, and because that revision process includes input from a wide variety of experts and a broad representation of interests, the 1996 edition of the ANSI/NFPA 59A includes the latest developments in LNG facility design and safety. Many of these developments have not been incorporated into Part 193, and therefore, Part 193 lags behind the ANSI/NFPA 59A (1996 edition). The format and language of the ANSI/NFPA 59A has also changed significantly, over the years, to facilitate enforcement.

The NFPA provides the following justification in support of its petition:

1. Adopting ANSI/NFPA 59A by reference will further the long standing federal policy in favor of adoption and use by federal agencies of privately developed voluntary consensus standards. The Office of Management and Budget Circular A–119, issued in 1982, later updated on October 16, 1993, establishes that policy in the interests of greater economy and efficiency.

2. The adoption and use of a voluntary consensus standard such as ANSI/NFPA 59A offers substantial benefits. It provides an effective means for government to draw on the energies and talents of private citizens to produce timely, high quality standards. Members of the 59A technical committee are regulators from DOT, Federal Energy Regulatory Commission, Coast Guard, and state, insurance interests, special experts, operators, contractors and fire department personnel. This ensures the input of a wide variety of experts and interests.

3. The method used to update the regulations through the availability of a regular revision cycle produces new editions of ANSI/NFPA 59A every three to five years.

4. The ANSI/NFPA 59A (1996 edition) includes the latest developments in LNG facility design and safety. Many of these developments have not been incorporated into 49 CFR Part 193 as it currently exists. The following are some of those significant provisions in the ANSI/NFPA 59A (1996 edition) which either are not addressed or are inadequately addressed in the existing Part 193:

—Provisions that provide alternate siting criteria for American Society of Mechanical Engineers (ASME) containers that are equipped with product retention valves meeting ANSI/NFPA 59A. Such valves have already been used in the propane industry for two, or more decades, and have considerably reduced the frequency of incidents in propane facilities.

—ANSI/NFPA 59A continually reexamines with each review cycle criteria for a seismic investigation and criteria to design and construct seismically capable structures. Current seismic criteria in ANSI/NFPA 59A reflects state-of-the art design, unlike the 20 year old requirements currently in Part 193.

—ANSI/NFPA 59A incorporated requirements that better specify the load bearing insulation under LNG tanks. These new provisions include additional temperature monitoring requirements that will assure the long term integrity of the load bearing insulation.

—New enhanced welding requirements in ANSI/NFPA 59A are more inclusive (e.g. weld examination requirements were strengthened to improve reliability) and the language is more comprehensible than that in Part 193.

—Requirements for soil heating in the ANSI/NFPA 59A were expanded to include replaceable temperature sensors to protect them from conditions which could cause failure, such as corrosion and moisture penetration.

—New text, in ANSI/NFPA 59A, clearly describes the requirements associated with sealing an electrical conduit to prevent the migration of gas past a seal. This amendment was the result of a serious incident in which pressurized gas migrated past a seal

and entered an area containing a source of ignition.

OPS has been very active in incorporating by reference voluntary consensus standards in its regulations. OPS participates on various voluntary committees to jointly develop consensus standards, including the ANSI/NFPA 59A technical committee for many years. The existing Part 193 references some provisions of ANSI/NFPA 59A in eight different locations. Recent amendments to the LNG regulations [(February 25, 1997; 62 FR 8402) and (August 1, 1997; 62 FR 41311)] have brought Part 193 closer to ANSI/NFPA 59A. Unlike older editions of the ANSI/NFPA 59A, text in the current standard is in a regulatory format making it more suitable for adoption. Most of the amendments regarding design, siting, construction and equipment in 49 U.S.C. 60103 have been incorporated in the ANSI/NFPA 59A.

Adoption of ANSI/NFPA 59A in Part 193 will maintain current levels of safety and allow industry flexibility in applying latest technology. Based on the above discussion factors and taking into account potential benefits to Federal and State regulators, the LNG industry, and most of all, to public safety, RSPA decided to consider the possible adoption of ANSI/NFPA 59A into Part 193.

On November 19, 1997, and May 5, 1998, RSPA briefed the Technical Pipeline Safety Standards Committee (TPSSC) on the NFPA petition and progress of the proposed rule. On April 29, 1997, RSPA and NFPA staff briefed the National Association of Pipeline Safety Regulators (NAPSR) on the same subject. In November 1997, NAPSR formed an LNG Part 193 review committee to provide recommendations on which requirements of Part 193 should be retained. On February 17–18, and April 21–22, 1998, RSPA held meetings with the NAPSR LNG Part 193 committee to receive their input on changes to current regulations.

On March 31, 1998, RSPA held a meeting of representatives of the LNG industry, State and local governments, and the public to gather information on experiences with the current Federal LNG safety regulations, and with the ANSI/NFPA 59A, and to solicit comments and suggestions. On April 22, 1998, RSPA had a joint meeting with NFPA, American Gas Association (AGA) and the NAPSR LNG review committee to discuss technical differences between Part 193 and ANSI/NFPA 59A. On May 22, 1998, RSPA briefed NAPSR on the input provided by the NAPSR LNG review committee and the status on this proposed rule.

II. Proposed Rule

Reference to ANSI/NFPA 59A (1996 edition) is proposed for Subparts B through E with some exceptions, rather than current requirements of Part 193, because ANSI/NFPA 59A covers the same subjects and reflects current technology and practice. RSPA is retaining those requirements in Subparts B through E where ANSI/NFPA 59A does not adequately address an issue. RSPA proposes to amend 49 CFR Part 193 by revising Subparts A through J as set forth below.

Subpart A—General

Section 193.2001 Scope of Part

This section has been revised to include reference to ANSI/NFPA 59A in paragraph (a) as follows:

(a) This part and Chapters 1–9 of ANSI/NFPA 59A (1996 edition) prescribe safety standards for LNG facilities used in the transportation of gas by pipeline that is subject to the pipeline safety laws (49 U.S.C. 60101 et seq.) and Part 192 of this chapter. In the event of a conflict, the requirements of this part prevail.

No changes have been made to paragraph (b).

Section 193.2003 Semisolid Facilities

Semisolid facilities have never been built and it appears unlikely any will be built. Therefore, RSPA proposes to delete this section.

Section 193.2005 Applicability

A new paragraph (a) stating new or amended standards in this proposed rule would not apply to existing Part 193 regulated LNG facilities or LNG facilities under construction before these standards become effective, has been added. Subsequent paragraphs have been renumbered with minor corrections.

Section 193.2007 Definitions

Although many terms are adequately defined in ANSI/NFPA 59A, many identical definitions have been retained in Part 193 for application in Subparts where ANSI/NFPA 59A does not apply. However, RSPA proposes to make some changes to current definitions for clarification as shown below.

Reference to underground caverns has been deleted from the text since it has not been proven practical to store LNG in an underground cavern.

Reference to semisolid or solidifying LNG has been deleted throughout the text, since no semisolid facilities exist and none are planned.

Sections 193.2009 through 193.2017 have been retained. These Sections relate to Rules of regulatory construction, Reporting, Incorporation by reference, and Plans and procedures.

Section 193.2019 Mobile and Temporary LNG Facilities

This section is retained. Although it already references ANSI/NFPA 59A for mobile LNG facilities, there is an additional requirement in the current regulations, which requires that the State where the mobile LNG facility is to be located must be provided with at least two weeks advance notice.

Subpart B—Siting Requirements

RSPA proposes to delete siting requirements in this Subpart and replace them by referencing ANSI/NFPA 59A, with the following exceptions:

Section 193.2051 Scope

This paragraph would be retained with some revised language as it clearly prescribes which LNG facilities need siting. ANSI/NFPA 59A does not specify where siting is needed, and therefore, may cause misinterpretation.

Section 193.2057 Thermal Radiation Protection

Paragraphs (a), (b)(1), (b)(2), (b)(3), (b)(5), (c) and (d) have been retained. There are some differences between the thermal exclusion zone requirements in ANSI/NFPA 59A and Part 193. ANSI/NFPA 59A does not take into consideration the wind speed and ambient temperature which occur 95% of the time as defined in the Paragraphs (b)(2) and (b)(3). Paragraph (b)(4) is deleted because differences between the thermal exclusion zone distances predicted for pure methane and those for LNG with a higher heating value are not significant and will have no bearing on safety.

The method of calculating the exclusion distances for levels of radiant exposure as described in paragraph (c) of the current regulations is being changed from the model "LNGFIRE I" to "LNGFIRE III". This improved "Windows" version of the computer model "LNGFIRE III" for calculating exclusion distances corrects small errors that appeared in the earlier "DOS" version of the "LNGFIRE I" model and is available from the Gas Research Institute.

Reference to flux correlation factor "f" and its numerical values in the offsite target table in paragraph (d) has been deleted. Also, in the same table under item 6 the phrase "if closer to (P)" has

been deleted. Both terms have no use under the current regulations.

Section 193.2059 Flammable Vapor-gas Dispersion Protection

Paragraphs (a) and (b) have been retained. Paragraphs (c) and (d) have been revised, and Paragraph (e)—Planned vapor control has been deleted. One important difference between the two codes is that the lower flammable concentration limit at the outer boundary of the flammable vapor cloud is 2.5% for Part 193 and 5% for ANSI/NFPA 59A. Another difference involves design spill duration. Part 193 requires a minimum 10 minute spill, whereas NFPA 59A does not have a minimum spill time requirement. Other changes made in the section are: (1) the atmospheric temperature to be used in the model has been changed from 0° C (32° F) to a more realistic 80° F (27° C); (2) dispersion coordinates y and z have been deleted because they are no longer required in running the DEGADIS model; (3) the elevation for contour (receptor) output H has been specified as 0.5 meters; and (4) a reference height of 10 meters is specified for measuring wind speed. Specifying the above parameters will produce more accurate DEGADIS model results.

Section 193.2061 Seismic Investigation and Design Forces

This section has been replaced in its entirety and instead ANSI/NFPA 59A will be referenced. The seismic criteria in Part 193 are 20 years old, whereas the requirements in ANSI/NFPA 59A reflect current technology. Part 193 requires a seismic evaluation of an LNG facility if it is located at a site in Zone 2, 3 or 4 of the Seismic Risk Map of the U.S., whereas ANSI/NFPA 59A requires seismic evaluation for all LNG facilities. In addition, ANSI/NFPA 59A requires two levels of ground motions, safe shutdown earthquake (SSE) and operating basis earthquake (OBE). The Federal Energy Regulatory Commission (FERC) also has similar requirements as ANSI/NFPA 59A. Part 193 provides no specific performance basis, whereas, ANSI/NFPA 59A does; one for SSE and another for OBE.

Section 193.2063 Flooding

This section has been retained. ANSI/NFPA 59A does not address flooding.

Section 193.2067 Wind Forces

This section is retained with changes. ANSI/NFPA 59A does not take into consideration uncertainties associated with high winds such as hurricanes. RSPA believes LNG storage tanks must be designed to withstand high wind speeds. However, the 200 mph wind speed design in the current rule is excessive and has been changed to 150 mph. Most hurricane wind speeds, according to a study by one expert, are less than 150 mph.

Section 193.2069 Other Severe Weather and Natural Conditions

This section is retained because it covers conditions such as avalanches or mud slides that are not addressed in ANSI/NFPA 59A. Paragraph (a) has been revised.

Section 193.2071 Adjacent Activities

Paragraph (a) has no meaning. Paragraph (b) addresses offsite facilities and is not discussed in ANSI/NFPA 59A. Therefore, paragraph (b) is retained and paragraph (a) is deleted.

Subpart C—Design

Section 193.2101 Scope

This section has been revised to include reference to ANSI/NFPA 59A.

Section 193.2119 Records

This item is retained. Part 193 requires test data to be retained even after the item is retested. Some valuable information on the history of an item could be lost if this part 193 requirement was deleted.

Section 193.2125 Automatic Shutoff Valves

This requirement is retained because it requires avoidance of fluid hammer, and because Part 193 has a better definition of the term 'fail-safe'.

Section 193.2149 Impoundment Required

Except for paragraph (e) this section is retained because it requires impounding areas along transfer piping and around parking areas for loaded LNG trucks. Paragraph (e) would be deleted because it refers to NFPA 30 which does not cover flammable liquefied gases—such as those used as refrigerants at LNG plants.

Section 193.2155 Structural Requirements

Paragraph (a) of this section contains more detailed requirements than ANSI/NFPA 59A, therefore is retained. Paragraph (b) is deleted due to ambiguities regarding what is implied by a "credible release of the tank contents." Paragraph (c) is revised to prohibit location of LNG storage tanks within a horizontal distance of one mile from the ends or ¼ mile from the nearest point of the runway, whichever is longer. For the height of the structures in the vicinity of an airport, operators must review Federal Aviation Administration requirements in 14 CFR 1.1.

Section 193.2159 Floors

This section is retained. Reference to classes of impounding systems has been deleted and 'covered impoundment' are exempted from this requirement. No equivalent is found in ANSI/NFPA 59A. Paragraphs (a) and (b) have been revised and paragraph (c) and (d) have been deleted.

Section 193.2161 Dikes, General

Paragraph (a) is retained because it prohibits any penetration through dike walls. RSPA believes seals around pipes may deteriorate and not prevent LNG from leaking past dikes required in ANSI/NFPA 59A. Part of the sentence in Paragraph (b) is deleted as it is no longer relevant.

Section 193.2167 Covered Systems

This section is retained. There are some existing facilities with this system.

Section 193.2171 Sump Basins

This requirement is retained by substituting the term 'covered' for 'Class 1'.

Section 193.2173 Water Removal

Existing paragraphs (a) and (b) in this section are revised. ANSI/NFPA 59A allows water to be removed from impounding areas by natural drainage through penetrations in the impounding area floors or dike. This section requires water removal by sump pumps and specifies what pump capacities are required. A strict application of this section could cause some operators to install very large capacity pumps to handle precipitation that is expected to occur only once every ten years. The intent of the regulation is to keep impounding areas as free of standing water as is practical. The probability of these two events: LNG in the impoundment area and heavy rainfall occurring concurrently is very small. It is anticipated that allowing operators to remove the water at 25% of the rate currently stated would have little affect on public safety. Therefore, this section is modified accordingly.

Section 193.2175 Shared Impoundment

This section is retained. The requirement to prevent low temperature or fire exposure resulting from leakage from any one of the tanks served causing any other storage tank to leak is not prohibited in ANSI/NFPA 59A.

Section 193.2179 Impoundment Capacity: General

Paragraph (b) in this section is revised to require adequate capacity where displacement could occur when water or snow enters the impoundment system.

Section 193.2181 Impoundment Capacity: LNG Storage Tanks

This section is revised to require a minimum volumetric holding capacity of the impoundment area of: (a) 110 percent of the LNG tank's maximum liquid capacity for an impoundment area serving a single tank; or (b) 100 percent of all tanks or 110 percent of the largest tank's maximum liquid capacity, whichever is greater, for an impoundment area serving more than one tank. If the dike is designed to account for a surge in the event of catastrophic failure, then the impoundment capacity may be reduced to 100 percent in lieu of 110 percent.

Section 193.2183 Impoundment Capacity: Equipment and Transfer Systems

This section is revised for clarification. The phrase 'but not less than 10 minutes' is added at the end of (b). This inconsistency was causing confusion among operators.

Section 193.2185 Impoundment Capacity: Parking Area, Portable Containers

This section is retained because it is not addressed in the ANSI/NFPA 59A.

Section 193.2187 General

This section is retained because it is not addressed in the ANSI/NFPA 59A.

Section 193.2191 Stratification

This section is retained because it requires operators to provide means for mitigating the potential for a rollover. All of the wording after "rollover and over pressure" is deleted because LNG plant designers are familiar with rollover prevention methods. ANSI/NFPA 59A has no similar requirement.

Section 193.2205 Frost Heave

Only part of this requirement is retained because it requires continuous monitoring of tank foundation systems; ANSI/NFPA 59A only requires periodic checking. Other portions are addressed more effectively in ANSI/NFPA 59A.

Section 193.2207 Insulation

It is important to retain paragraph (a) because the application of insulation to the outer shell of an LNG storage tank could cause the temperature of the outer shell to fall so low that the metal could become brittle. Paragraph (b) has been deleted as it is covered in ANSI/NFPA 59A.

Section 193.2209 Instrumentation for LNG Storage Tanks

This section is retained as it is not adequately covered in ANSI/NFPA 59A. Also, ANSI/NFPA 59A does not require any recorders, which RSPA believes are essential for continuous monitoring. RSPA believes electronic data collection is equivalent to recorders. Item (6) in the table of paragraph (a) is deleted because it lacks technical justification. Paragraph (c) is unnecessary, and is therefore deleted.

Subpart D—Construction

Section 193.2303 Construction Acceptance and Section 193.2304 Corrosion Control Overview are retained. No equivalent appears in ANSI/NFPA 59A.

Section 193.2305 Procedures

This section is retained to provide safety during construction, operation and maintenance of the LNG facility.

Section 193.2307 Inspection

Paragraph (b) is deleted, but paragraphs (a) and (c) are retained because no equivalent requirements in ANSI/NFPA 59A.

Sections 193.2309 and 193.2311 are retained because there are no equivalent requirements in ANSI/NFPA 59A.

Section 193.2315 Piping Connections would be amended by retaining paragraphs (b) and (c) and deleting all other paragraphs.

Section 193.2317 Retesting is retained. ANSI/NFPA 59A addresses retesting on tanks only.

Section 193.2321 Nondestructive Tests

Paragraph (a) is retained with an exception for liquid drain and vapor vent piping that operate at less than 20% of SMYS. A new paragraph (b) has been added which states that liquid drain and vapor vent piping that operate at less than 20% of SMYS is not required to be nondestructively tested provided it has been visually inspected in accordance with the ASME B31.3. Paragraph (e) is renamed as paragraph (c) with a minor correction to the ASME reference. Radiographic testing of the butt welds in metal shells of storage tanks was incorrectly referenced to ASME Section IX, in lieu of Section VIII Division 1. One hundred percent (100%) radiographic examination on tanks less than 70,000 gallons is essential for cryogenic liquids, therefore, retained. The remaining paragraphs are deleted.

Sections 193.2325 and 193.2329 are retained because no equivalent requirements exist in ANSI/NFPA 59A.

Subpart E—Equipment

Sections 193.2407, 193.2409 and 193.2413 addressing operational control, shutoff valves and combustion air intakes are amended to retain paragraphs 193.2407(a), 193.2409(b) and 193.2413(a). These requirements are not covered in the NFPA standards. The remaining paragraphs in the preceding sections will be deleted.

Sections 193.2417 through 193.2421 addressing liquefaction equipment are retained. No similar requirements appear in ANSI/NFPA 59A.

In §§ 193.2427 through 193.2445 on Control Systems, requirements not addressed in ANSI/NFPA 59A are retained, the remaining sentences are deleted. Paragraph (a) in Section 193.2427—General is deleted as not needed under the current rule. In Section 193.2429—Relief valves first sentence of paragraph (a), and paragraphs (c)(2), (e), and (f) are retained, the remaining requirements are deleted. Section 193.2431—Vents is deleted. Paragraph (a)(1) in Section 193.2433—Sensing devices is retained, and paragraphs (a)(2) and (b) are deleted. Section 193.2435—Warning devices is retained because it covers all sensing devices; ANSI/NFPA 59A covers only fire protection sensors. Paragraphs (a)(1) and (a)(2) in section 193.2437—Pumps an compressor control are retained as these requirements cover all pumps and compressors. Except for a small clarification in (a)(1), Section 193.2439 on emergency shutdown control systems is retained as it requires automatic shutdown in case of major process upset, a leak, or a fire. Section 193.2441—Control center is retained. Requirement in Section 193.2443–Fail-safe control is enforceable unlike ANSI/NFPA 59A's, therefore, it is retained. Section 193.2445—Sources of power is retained, as it is not addressed in the ANSI/NFPA 59A.

Subpart F—Operations

This subpart is retained.

Section 193.2521 Operating Records

This section is modified to include how long different types of records must be kept.

Subpart G—Maintenance

This subpart is retained with the following changes:

Section 193.2609 Support Systems

An inspection time frame is added.

Section 193.2611 Fire Protection is retained with an additional important requirement from the ANSI/NFPA 59A that operators will be required to have a maintenance program for all plant fire protection equipment.

Section 193.2619 Control Systems is retained with a minor change in the paragraph (c). Internal shutoff valves have been included along with other control system components to be inspected and tested yearly.

Section 193.2639 Maintenance Records

In addition to requirements in this section a reference to ANSI/NFPA 59A is added.

Subpart H—Personnel qualification and training, is retained.

Subpart I—Fire Protection

Except for the following sections, RSPA proposes to replace this entire subpart by referencing ANSI/NFPA 59A Chapters 2 and 9.

Section 193.2801 Scope is retained with some revised language.

In Section 193.2807 Smoking, paragraph (c) about 'No Smoking' signs is retained, and paragraphs (a) and (b) are deleted.

Section 193.2813 Storage of Flammable Fluids is retained. These requirements are broader in scope than similar requirements in ANSI/NFPA 59A.

Section 193.2817 Fire Equipment

Certain requirements in this section are modified to retain important safety features not adequately addressed in ANSI/NFPA 59A. This section is revised to include only one paragraph.

Section 193.2819 Gas Detection

This section is modified to retain only the most important requirements by deleting paragraphs (a), (c) and (f). Existing paragraphs (b), (d) and (e) have renumbered as (a) (b) and (c).

Section 193.2821 Fire Detection

In addition to the current requirement for an audible alarm in the area of fire detection, reference to ANSI/NFPA 59A has been added. All other requirements have been deleted.

Subpart J—Security

This subpart is retained.

Appendix A to Part 193 is retained.

RSPA believes the proposed rule improves public safety and is better for the LNG industry because the revised requirements incorporate current technology and state-of-the-art safety standards.

III. Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

The Department of Transportation (DOT) does not consider this action to be a significant regulatory action under section 3(f) of Executive Order 12866 (58 FR 51735; October 4,1993). Therefore, it was not received by the office of Management and Budget. This proposal is not significant under DOT's regulatory policies and procedures (44 FR 11034: February 26, 1979).

This proposal would amend 49 CFR 193 by replacing substantive sections of the current regulation with ANSI/NFPA Standard 59A, titled "Standard for the Production, Storage and Handling of Liquefied National Gas (LNG)". The purpose of this adoption is to enable operators to utilize current technology, materials, and practices, thereby reducing costs and enhancing national growth. This change to Part 193 will eliminate unnecessary and burdensome requirements. Further the adoption of industry standards is consistent with the President's goals of regulatory reinvention and improvement of customer service to the American people. Adoption of industry standards also meets the goals of OMB's Budget Circular A–119, "Federal Participation in the Development and Use of Voluntary Standards," promoting adoption of voluntary consensus standards wherever possible.

The NFPA has a standing committee which regularly reviews ANSI/NFPA 59A. RSPA has a representative on this committee, and RSPA sought the committee's input in several discussions concerning the adoption of ANSI/NFPA 59A into Part 193. Members of the ANSI/NFPA 59A technical committee include: RSPA, Federal Energy Regulatory Commission, Coast Guard, State governments, insurance interests, contractors, and fire departments. Representation by this group ensures that essentially all interests involved in LNG safety issues have been represented in this standard. The NFPA has over 67,000 individual members and includes over 100 national trade and professional groups. Its goal as an organization is to reduce the burden of fire on the quality of life by advocating scientifically based consensus codes and standards, research, and education for fire safety issues.

As mentioned above, there should be little to no cost to the industry to adopt these regulations as LNG operators are already well aware of these standards and they are already being implemented by the industry. In fact adoption of this proposal should actually reduce the costs to industry as the main purpose of this proposal is to allow the adoption of newer technology that was not anticipated when the earlier LNG regulations were promulgated. Because this proposal does not represent any new burden to the industry and in fact will reduce costs, RSPA believes that a regulatory evaluation of this proposal is unnecessary. Furthermore, this proposed adoption meets the guidelines of Federal Government policy discussed above while reducing the administrative burdens on industry and allowing for the use of the latest technology and practices.

Regulatory Flexibility Act

As discussed above, RSPA is proposing the revision of part 193 by replacing substantive portions of this subpart with the adoption of consensus industry standards developed by the NFPA. These safety standards are well known and have been implemented by operators of LNG facilities throughout the United Sates. The replacement of portions of Part 193 with the ANSI/NFPA 59A standard should in fact reduce costs of the present regulations to LNG operators (including any small operators) and allow the use of more current technologies as mentioned in the previous section of this preamble. Nonetheless, RSPA is particularly interested in receiving comments from any small business operators believing otherwise. Based on the discussion above that show that this proposal will reduce the costs of the present LNG regulations, while allowing for use of the latest technology, I certify pursuant to Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605) that the action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612

This rule will not have substantial direct effects on states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 12612 (52 FR 41685; October 30, 1987), RSPA has determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 13084

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments").

Because this rule would not significantly or uniquely affect the communities of the Indian tribal governments, the funding and consultation requirements of this Executive Order do not apply.

Paperwork Reduction Act

This rule does not substantially modify the paperwork burden on LNG industry. OPS does not believe that LNG industry will have any additional paperwork burden because of this proposed adoption of ANSI/NFPA 59A, and therefore no separate paperwork submission is required.

Unfunded Mandates

This rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

National Environmental Policy Act

RSPA has analyzed this action for purposes of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and has determined that this action would not significantly affect the quality of the human environment. An Environmental Assessment and a Finding of No Significant Impact are in the docket.

Impact on Business Processes and Computer Systems

Many computers that use two digits to keep track of dates will, on January 1, 2000, recognize "double zero" not as 2000 but as 1900. This glitch, the Year 2000 problem, could cause computers to stop running or to start generating erroneous data. The Year 2000 problem poses a threat to the global economy in which Americans live and work. With the help of the President's Council on Year 2000 Conversion, Federal agencies are reaching out to increase awareness of the problem and to offer support. We do not want to impose new requirements that would mandate business process changes when the resources necessary to implement those requirements would otherwise be applied to the Year 2000 problem.

This NPRM does not propose business process changes or require modifications to computer systems. Because this NPRM apparently does not affect organizations' ability to respond to the Year 2000 problem, we do not intend to delay the effectiveness of the proposed requirements in this NPRM.

List of Subjects in 49 CFR Part 193

Construction, Design, Equipment, Fire protection, Incorporation by reference, Liquefied natural gas, Maintenance, Operation, Pipeline safety, Reporting and recordkeeping, and Siting requirements.

Accordingly, RSPA proposes to amend 49 CFR 193 as follows:

PART 193—[AMENDED]

1. The authority citation for part 193 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60103, 60111, 60118 and 49 CFR 1.53.

Subpart A—General

2. In § 193.2001 paragraph (a) would be revised to read as follows:

§ 193.2001 Scope of part.

(a) This part and Chapters 1–9 of ANSI/NFPA 59A (1996 edition) prescribe safety standards for LNG facilities used in the transportation of gas by pipeline that is subject to the pipeline safety laws (49 U.S.C. 60101 *et seq.*) and part 192 of this chapter. In the event of a conflict, the requirements of this part prevail.

* * * * *

§ 193.2003 [Removed and Reserved]

3. Section 193.2003 would be removed and reserved.

4. Section 193.2005 would be amended by adding a new paragraph (a) and by redesignating existing paragraphs (a), (b) and (c) as paragraphs (b), (c) and (d) respectively. Newly designated paragraphs (b) through (d) would be revised as follows:

§ 193.2005 Applicability.

(a) New or amended standards referred to in this part do not apply to existing [Part 193 regulated] LNG facilities or LNG facilities under construction before [effective date of the final rule].

(b) Standards issued between February 11, 1980, and [effective date of the final rule] in this part governing the siting, design, installation, or construction of an LNG facility and related personnel qualification and training do not apply to LNG facilities for which application for approval of the siting, construction, or operation was filed before March 1, 1978, with the Department of Energy (or any predecessor organization of that Department) or the appropriate State or local agency in the case of any facility not subject to the jurisdiction of the Department of Energy under the Natural Gas Act (not including any facility the construction of which began after November 29, 1979, not pursuant to such an approval).

(c) If an LNG facility listed in paragraph (a) of this section is replaced, relocated or significantly altered after February 11, 1980, the replacement, relocated facility must comply with the applicable requirements of this part governing, siting, design, installation, and construction, except that:

(1) The siting requirements apply only to LNG storage tanks that are significantly altered by increasing the original storage capacity or relocated, not pursuant to an application for approval filed as provided by paragraph (b) of this section before March 1, 1978; and

(2) To the extent compliance with the design, installation, and construction requirements would make the replaced, relocated, or altered facility incompatible with the other facilities or would otherwise be impractical, the replaced relocated, or significantly altered facility may be designed, installed, or constructed in accordance with the original specifications for the facility, or in a manner that the Administrator finds acceptable.

(d) The siting, design, installation and construction of an LNG facility under construction before February 11, 1980, or that is listed in paragraph (b) of this section (except a facility under construction before July 1,1976) must meet the applicable requirements of ANSI/NFPA 59A (1972 edition) and part 192 standards of this chapter or the application requirements of this part, except that no part 192 standard issued after March 1, 1978, applies to an LNG facility listed in paragraph (b) of this section.

5. Section 193.2007 would be amended by removing terms "including an underground cavern" from definition of Storage tank, "or solidifying" from definition of LNG facility, and "or semisolid" from definitions of Liquefied natural gas or LNG, Vaporization, and Vaporizer.

Subpart B—Siting Requirements

6. Section 193.2051 is revised to read as follows:

§ 193.2051 Scope.

This subpart and ANSI/NFPA 59A (1996 edition) prescribe siting requirements for the following LNG facilities: Containers and their impounding systems, transfer systems and their impounding systems, emergency shutdown control systems, fire control systems, and associated foundations, support systems, and

normal or auxiliary power facilities necessary to maintain safety.

§ 193.2055 [Removed and Reserved]

7. Section 193.2055 is removed and reserved.

8. Section 193.2057 would be amended by removing paragraph (b)(4) and redesignating paragraph (b)(5) as (b)(4), and revising newly designated paragraph (b)(4), paragraphs (c)(1) and (d) to read as follows:

§ 193.2057 Thermal radiation protection.

* * * * *

(b) * * *

(4) The height of the flame base should be that of any dike or containment in relation to the horizontal reference plane. The height of the target shall be in relation to the same reference plane.

(c) * * *

(1) The method of calculating the exclusion distance for levels of radiant exposure listed in paragraph (d) of this section shall be the method described in the Gas Research Institute's (GRI) report GRI–0176, which is also available as the "LNGFIRE III" computer program produced by GRI.

* * * * *

(d) Limiting values for incident radiant flux on offsite targets. The maximum incident radiant flux at an offsite target from burning of a total spill in an impounding space must be limited to the distances in paragraph (c) of this section using the following values of "Incident flux':

Offsite target	Incident flux Btu/ft² hour
(1) Outdoor areas occupied by 20 or more persons during normal use, such as beaches, playgrounds, outdoor theaters, other recreation areas or other places of public assembly	1,600
(2) Buildings that are used for residences, or occupied by 20 or more persons during normal use.	4,000
(3) Buildings made of cellulosic materials or that are not fire resistant or do not provide durable shielding from thermal radiation that:	
(i) Have exceptional value, or contain objects of exceptional value based on historic uniqueness identified in Federal, State, or local registers;	
(ii) Contain explosive, flammable, or toxic materials in hazardous quantities; or	
(iii) Could result in additional hazard if exposed to high levels of thermal radiation	4,000
(4) Structures that are fire resistant and provide durable shielding from thermal radiation that have the characteristics described in paragraphs (3)(i) through (3)(iii) above	6,700
(5) Public streets, highways, and mainlines of railroads	6,700
(6) Other structures, or the right-of-way line of the facility	10,000

9. Paragraph (a) in § 193.2059 would be amended by removing the phrase "paragraph (e) of". Paragraphs (c)(2) through (c)(4) and (d)(1) introductory text, (d)(1)(i) and (d)(2) would be revised and paragraph (e) would be removed to read as follows:

§ 193.2059 Flammable vapor-gas dispersion protection.

* * * * *

(c) * * *

(2) Dispersion conditions are a combination of those which result in longer predicted downwind dispersion distances than other weather conditions to the site at least 90 percent of the time, based on U.S. Government weather data, or as an alternative where the model used gives longer distances at lower wind speeds, Atmospheric Stability (Pasquill Class) F, wind speed = 4.5 miles per hour (2.01 meters/sec) at reference height of 10 meters, relative humidity equals 50.0 percent, and atmospheric temperature = 80° F(27° C).

(3) The elevation for contour (receptor) output H = 0.5 meters.

(4) A surface roughness factor of 0.03 meters shall be used. Higher values for the roughness factor may be used if it can be shown that the terrain both upwind and downwind of the vapor cloud has dense vegetation and that the vapor cloud height is more than ten times the height of the obstacles encountered by the vapor cloud.

(d) * * *

(1) Vaporization results from the spill caused by an assumed rupture of a single transfer pipe (or multiple pipes designed to deliver the same flow) which has the greatest overall flow capacity, discharging at the maximum potential capacity, in accordance with the following conditions:

(i) The rate of vaporization is not less than the sum of flash vaporization and vaporization from boiling by heat transfer from contact surfaces during the time necessary for spill detection, instrument response, and automatic shutdown by the emergency shutdown system but, not less than 10 minutes plus, in case of impounding systems for LNG storage tanks with side or bottom penetration, the time necessary for the liquid level in the tank to reach a level of penetration or equilibrate with the liquid impounded. In the case of storage tanks with an internal shutoff valve, the time necessary for spill detection and response of not less than one (1) hour must be used.

* * * * *

(2) If surfaces are insulated, the insulation must be designed, installed, and maintained so that it will retain its performance characteristics under spill conditions.

§ 193.2061 [Removed and Reserved]

10. Section 193.2061 is removed and reserved.

§ 193.2065 [Removed and Reserved]

11. Section 193.2065 is removed and reserved.

12. Section 193.2067 would be amended by revising paragraphs (b)(2) introductory text and (b)(2)(i) to read as follows:

§ 193.2067 Wind forces

* * * * *

(b) * * *

(2) For all other LNG facilities:

(i) An assumed sustained wind velocity of not less than 150 miles per hour, unless the Administrator finds a lower velocity is justified by adequate supportive data; or

* * * * *

13. Section 193.2069 would be amended by revising paragraph (a) to read as follows:

§ 193.2069 Other severe weather and natural conditions.

(a) In addition to the requirements of seismic investigation, flooding, soil characteristics, and wind forces, each operator shall determine from historical records and engineering studies the worst effect of other weather and natural conditions which may predictably occur at an LNG facility site.

* * * * *

14. Section 193.2071 would be revised to read as follows:

§ 193.2071 Adjacent activities.

An LNG facility must not be located where present or projected offsite activities would be reasonably expected to adversely affect the operation of any of its safety control systems, cause failure of the facility, or cause the facility to fail to meet the requirements of this part.

§ 193.2073 [Removed and Reserved]

15. Section 193.2073 would be removed and reserved.

Subpart C—Design

16. Section 193.2101 would be revised to read as follows:

§ 193.2101 Scope.

This subpart and ANSI/NFPA 59A (1996 edition) prescribe requirements for the selection and qualification of materials for components, and for the design and installation or construction of components and buildings, including separate requirements for impounding systems, LNG storage tanks, and transfer systems.

§§ 193.2103—193.2119 [Removed and Reserved]

17. Sections 193.2103 through 193.2119 would be removed and reserved.

§§ 193.2121—193.2123 [Removed and Reserved]

18. Sections 193.2121 through 193.2123 would be removed and reserved.

§§ 193.2127—193.2147 [Removed and Reserved]

19. Sections 193.2127 through 193.2147 would be removed and reserved.

§ 193.2149 [Amended]

20. Section 193.2149 would be amended by removing paragraph (c).

§§ 193.2151 and 193.2153 [Removed and Reserved]

21. Sections 193.2151 and 193.2153 would be removed and reserved.

22. Section 193.2155 would be amended by removing paragraph (b), redsignating paragraph (c) as paragraph (b), and revising paragraph (a) introductory text and newly designated paragraph (b) to read as follows:

§ 193.2155 Structural requirements.

(a) The structural parts of an impoundment system must be designed and constructed to prevent impairment of the system's performance reliability and structural integrity as a result of the following:

* * * * *

(b) An LNG storage tank must not be located within a horizontal distance of one mile (1.6 km) from the ends, or ¼ mile (0.4 km) from the nearest point of a runway, whichever is longer. For the height of structures in the vicinity of an airport, operators must also review Federal Aviation Administration requirements in 14 CFR Section 1.1.

§ 193.2157 [Removed and Reserved]

23. Section 193.2157 would be removed and reserved.

24. Section 193.2159 would be revised to read as follows:

§ 193.2159 Floors.

(a) Except for covered impoundment systems, floors of impounding systems must, to the extent feasible—

(1) Slope away from the component or item impounded and to a sump basin installed under § 193.2171.

(2) Slope away from the nearest adjacent component;

(3) Drain surface waters from the floors at rates specified in § 193.2173.

(b) Penetration of floors of an impounding system for piping or any other purpose is prohibited.

25. Section 193.2161 would revised to read as follows:

§ 193.2161 Dikes, general.

(a) Penetration in dikes to accommodate piping or any other purpose is prohibited.

(b) An outer wall of a component served by an impounding system may not be used as a dike except for a concrete wall.

§§ 193.2163, 193.2165 and 193.2169 [Removed and reserved]

26. Sections 193.2163, 193.2165 and 193.2169 would be removed and reserved.

27. Section 193.2171 would be revised to read as follows:

§ 193.2171 Sump basins.

Except for covered impounding systems, a sump basin must be located in each impounding system for collection of water.

28. Section 193.2173 would be amended by revising paragraphs (a) and (b) to read as follows:

§ 193.2173 Water removal.

(a) Except for covered systems, impounding systems must have sump pumps and piping running over the dike to remove water collecting in the sump basin.

(b) The water removal system must have adequate capacity to remove water at a rate equal to 25% of the maximum predictable collection rate from a storm of 10-year frequency and 1-hour duration, and other natural causes. For rainfall amounts, operators must use the "Rainfall Frequency Atlas of the United States" published by the National Weather Service of the U.S. Department of Commerce.

* * * * *

29. Section 193.2179 would be amended by revising paragraph (b) to read as follows:

§ 193.2179 Impoundment capacity: general.

* * * * *

(b) Where applicable, displacement which could occur when water or snow enters the impounding system.

30. Section 193.2181 would be revised to read as follows:

§ 193.2181 Impoundment capacity: LNG storage tanks.

Each impounding system serving an LNG storage tank must have a minimum volumetric liquid impoundment capacity of:

(a) 110 percent of the LNG tank's maximum liquid capacity for an impoundment serving a single tank;

(b) 100 percent of all tanks or 110 percent of the largest tank's maximum liquid capacity, whichever is greater, for the impoundment serving more than one tank; or

(c) If the dike is designed to account for a surge in the event of catastrophic failure, then the impoundment capacity may be reduced to 100 percent in lieu of 110 percent.

31. Section 193.2183 would be amended by revising paragraph (b) to read as follows:

§ 193.2183 Impoundment capacity: equipment and transfer systems.

* * * * *

(b) The maximum volume of liquid which could discharge into the impounding space from any single failure of equipment or piping during the time period necessary for spill detection, instrument response, and sequenced shutdown by the automatic shutdown system under § 193.2439, but not less than 10 minutes.

§ 193.2189 [Removed and Reserved]

32. Section 193.2189 would be removed and reserved.

33. Section 193.2191 would be revised to read as follows:

§ 193.2191 Stratification.

LNG storage tanks with a capacity of 200,000 gallons or more must be equipped with means to mitigate a potential for rollover.

§§ 193.2193–193.2203 [Removed and Reserved]

34. Sections 193.2193–193.2203 would be removed and reserved.

35. Sections 193.2205 and 193.2207 are revised to read as follows:

§ 193.2205 Frost heave.

If the protection provided for LNG storage tank foundations from frost heave includes heating the foundation area, an instrumentation and alarm system must be provided to warn of any malfunction of the heating system.

§ 193.2207 Insulation.

Insulation on the outside of the outer shell of an LNG storage tank may not be used to maintain stored LNG at an operating temperature during normal operation.

36. Section 193.2209 would be amended by removing item (6) in the columns titled "Condition" and "Instrumentation" from the table in paragraph (a). Paragraph (c) in the same section would be removed.

§ 193.2211–193.2233 [Removed and Reserved]

37. Sections 193.2211 through 193.2233 would be removed and reserved.

Subpart D—Construction

38. Section 193.2301 would be revised to read as follows:

§ 193.2301 Scope.

This subpart and ANSI/NFPA 59A (1996 edition) prescribes the requirements for the construction or installation of components.

39. Section 193.2307 would be amended by removing paragraph (b), and redesignating paragraph (c) as (b).

§ 193.2313 [Removed and Reserved]

40. Section 193.2313 would be removed and reserved.

41. Section 193.2315 would be amended by removing paragraphs (a), (d), (e) and (f) and by redesignating paragraphs (b) and (c) as new paragraphs (a) and (b), respectively.

§ 193.2319 [Removed and Reserved]

42. Section 193.2319 would be removed and reserved.

43. Section 193.2321 would be revised to read as follows:

§ 193.2321 Nondestructive tests.

(a) Except as required in paragraph (b) of this section the following percentages, as shown in the table below, of each day's circumferentially welded pipe joints for hazardous fluid piping, selected at random, must be nondestructively tested over the entire circumference to reveal any defects which could adversely affect the integrity of a weld or pipe:

Weld type	Cryogenic piping	Other	Test method
Butt welds more than 2 inches in nominal size	100	30	Radiographic or ultrasonic
Butt welds 2 inches or less in nominal size	100	30	Radiographic, ultrasonic, liquid penetrant or magnetic particle.
Fillet and socket welds	100	30	Liquid penetrant or magnetic particle.

(b) Liquid drain and vapor vent piping with an operating pressure that produces a hoop stress of less than 20 percent specified minimum yield stress does not need to be nondestructively tested, provided it has been inspected visually in accordance with ASME B31.3, Chemical Plant and Petroleum refinery Piping, 344.2.

(c) The butt welds in metal shells of storage tanks with internal design pressure above 15 psig must be radiographically tested in accordance with the ASME Boiler and Pressure Vessel Code (Section VIII Division 1), except that hydraulic load bearing shells with curved surfaces that are subject to cryogenic temperatures, 100 percent of both longitudinal (or latitudinal) welds must be radiographically tested.

§§ 193.2323 and 193.2327 [Removed and Reserved]

44. Sections 193.2323 and 193.2327 would be removed and reserved.

Subpart E—Equipment

45. Section 193.2401 would be revised to read as follows:

§ 193.2401 Scope.

This subpart and ANSI/NFPA 59A (1996 edition) prescribe requirements for the design, fabrication, and installation of vaporization equipment, liquefaction equipment, and control systems.

§§ 193.2403 and 193.2405 [Removed and Reserved]

46. Sections 193.2403 and 193.2405 would be removed and reserved.

§ 193.2407 [Amended]

47. Section 193.2407 would be amended by removing paragraph (b).

§ 193.2409 [Amended]

48. Section 193.2409 would be amended by removing paragraphs (a) and (c), and redesignating existing paragraph (b) as paragraph (a).

§ 193.2411 [Removed and Reserved]

49. Section 193.2411 would be removed and reserved.

§ 193.2413 [Amended]

50. Section 193.2413 would be amended by removing paragraph (b).

§ 193.2415 [Removed and Reserved]

51. Section 193.2415 would be removed and reserved.

§ 193.2423 [Removed and Reserved]

52. Section 193.2423 would be removed and reserved.

§ 193.2427 [Amended]

53. Section 193.2427 would be amended by removing paragraph (a), and by redesignating existing paragraphs (b), (c), and (d) as paragraphs (a), (b), and (c) respectively.

54. Section 193.2429 would be revised to read as follows:

§ 193.2429 Relief devices.

(a) Each component containing a hazardous fluid must be equipped with a system of automatic relief devices which will release the contained fluid at a rate sufficient to prevent pressures from exceeding 110 percent of the maximum allowable working pressure.

(b) In addition to the control system required by paragraph (a) of this section, a manual means must be provided to relieve pressure or a vacuum of the component in an emergency.

(c) The means for adjusting the set point pressure of all adjustable relief devices must be sealed.

(d) Relief devices which are installed to limit minimum or maximum pressure may not be used to handle boiloff and flash gases during normal operation.

§ 193.2431 [Removed and Reserved]

55. Section 193.2431 would be removed and reserved.

56. Section 193.2433 would be revised to read as follows:

§ 193.2433 Sensing devices.

Each operator shall determine the appropriate location for and install sensing devices as necessary to monitor the operation of components to detect a

malfunction which could cause a hazardous condition if permitted to continue.

§ 193.2437 [Amended]

57. Section 193.2437 would be amended by removing paragraphs (a)(3) and (a)(4), and by removing and reserving paragraph(b). In paragraph (a)(2) the semicolon would be removed and period added in its place.

58. Section 193.2439 would be amended by revising paragraph (a)(1) to read as follows:

§ 193.2439 Emergency shutdown control systems.

(a) * * *

(1) Temperatures of the component exceed the maximum and minimum design limits.

* * * * *

Subpart F—Operation

59. Section 193.2521 in Subpart F would be revised to read as follows:

§ 193.2521 Operating records.

(a) Each operator shall maintain a record of the results of each inspection, test, and investigation required by this subpart and ANSI/NFPA 59A (1996 edition). Such records must be kept for a period of not less than 5 years.

(b) Data collected from section 193.2209 must be maintained for not less than one year.

Subpart G—Maintenance

60. Section 193.2609 in Subpart G would be revised to read as follows:

§ 193.2609 Support systems.

Each support system or foundation of each component must be inspected annually, not to exceed 15 months, for any detrimental change that could impair support.

61. Section 193.2611 in Subpart G would be amended by redesignating existing paragraphs (a) and (b) as new paragraphs (b) and (c) respectively, and by adding a new paragraph (a) to read as follows:

§ 193.2611 Fire protection.

(a) Facility operators shall prepare and implement a maintenance program for all plant fire protection equipment.

* * * * *

62. Section 193.2619 in Subpart G would be amended by revising paragraph (c) introductory text to read as follows:

§ 193.2619 Control systems.

* * * * *

(c) Control systems in service, but not normally in operation (such as relief valves and automatic shutdown devices), and internal shutoff valves must be inspected and tested once each calender year, not exceeding 15 months, with the following exceptions:

* * * * *

63. Section 193.2639 in Subpart G would be amended by revising paragraph (a) to read as follows:

§ 193.2639 Maintenance records.

(a) Each operator shall keep a record at each LNG plant of the date and type of each maintenance activity performed on each component to meet the requirements of this part and ANSI/NFPA 59A, including periodic tests and inspections, for a period of not less than five years.

* * * * *

Subpart I—Fire Protection

64. Section 193.2801 would be revised to read as follows:

§ 193.2801 Scope.

This subpart and ANSI/NFPA 59A (1996 edition) prescribe requirements for fire prevention and fire control at LNG plants. However, the requirements do not apply to existing LNG plants that do not contain LNG.

§§ 193.2803 and 193.2805 [Removed and Reserved]

65. Sections 193.2803 and 2805 would be removed and reserved.

66. Section 193.2807 would be revised to read as follows:

§ 193.2807 Smoking.

In addition to the requirements related to smoking in ANSI/NFPA 59A (1996 edition), each operator shall display signs marked with the words "NO SMOKING" in prominent places in areas where smoking is prohibited.

§§ 193.2809, 193.2811 and 193.2815 [Removed and Reserved]

67. Sections 193.2809, 193.2811 and 193.2815 would be removed and reserved.

68. Section 193.2817 would be revised to read as follows:

§ 193.2817 Fire equipment.

Each operator shall provide and maintain fire control equipment and supplies in accordance with the applicable requirements of ANSI/NFPA 59A to protect or cool components that could fail due to heat exposure from fires. Protection or cooling must be provided for critical components as long as the heat exposure exists.

§ 193.2819 [Amended]

69. Section 193.2819 would be amended by removing paragraphs (a), (c) and (f), and by redesignating existing paragraphs (b), (d) and (e) as paragraphs (a), (b), and (c), respectively.

70. Section 193.2821 would be revised to read as follows:

§ 193.2821 Fire detection.

In addition to the requirements in ANSI/NFPA 59A (1996 edition) each operator shall provide an audible alarm in the area of fire detection.

Issued in Washington, DC on December 16, 1998.

Richard B. Felder,

Associate Administrator for Pipeline Safety.

[FR Doc. 98–33757 Filed 12–21–98; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF31

Endangered and Threatened Wildlife and Plants: Proposed Threatened Status for the Plant Yermo xanthocephalus

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service proposes to list the plant *Yermo xanthocephalus* (desert yellowhead) as a threatened species pursuant to the Endangered Species Act of 1973, as amended. *Yermo xanthocephalus* is a recently described Wyoming endemic known only from the south end of Cedar Rim on the summit of Beaver Rim in southern Fremont County, Wyoming. It is known from a single population occupying an area of less than two hectares (ha) (five acres (ac)) of suitable habitat. In 1998 this population contained an estimated 15,000 plants and existed entirely on Federal lands. Surface disturbances associated with oil and gas development, compaction by vehicles, trampling by livestock, and randomly occurring, catastrophic events threaten the existing population.

DATES: Comments from all interested parties must be received by February 22, 1999. Public hearing requests must be received by February 5, 1999.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, Wyoming Field Office, U.S. Fish and Wildlife Service, 4000 Airport Parkway, Cheyenne, Wyoming 82001. Comments and materials received will be available for public inspection, by appointment,

during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mike Long, Field Supervisor, Wyoming Field Office (see **ADDRESSES** section), telephone (307) 772–2374, extension 34; facsimile (307) 772–2358.

SUPPLEMENTARY INFORMATION:

Background

Yermo xanthocephalus was discovered by Wyoming botanist Robert Dorn while conducting field work in the Beaver Rim area of central Wyoming in 1990. Dorn discovered a small population of an unusual species of Composite (Asteraceae). Dorn's closer examination revealed that the species was unknown to science and represented a new genus. Dorn (1991) named his discovery *Y. xanthocephalus*, or literally "desert yellowhead."

Y. xanthocephalus is a tap-rooted, glabrous (hairless) perennial herb with leafy stems to 30 centimeters (cm) (12 inches (in)) high. The leathery leaves are alternate, lance-shaped to oval, 4–25 cm (1.5–10 in) long and often folded along the midvein. Leaf edges are smooth or toothed. Flower heads are many (25–180) and crowded at the top of the stem. Each head contains four to six yellow disk flowers (ray flowers are absent) surrounded by five yellow, keeled involucre (whorled) bracts (small leaves beneath the flower). The pappus (the outer whorl of flowering parts) consists of many white bristles.

The species is restricted to shallow deflation hollows in outcrops of Miocene sandstones of the Split Rock Formation (Van Houten 1964). These wind-excavated hollows accumulate drifting snow and may be more mesic (moist) than surrounding areas. The vegetation of these sites is typically sparse, consisting primarily of low-cushion plants and scattered clumps of Indian ricegrass (*Stipa hymenoides*).

Dorn observed approximately 500 plants within 1 ha (2.5 ac) in 1990 on Federal surface managed by the Bureau of Land Management (BLM). Surveys conducted since 1990 by Richard Scott, Professor of Biology at Central Wyoming College in Riverton, have failed to locate additional populations on outcrops of the White River, Wagon Bed, and Wind River formations in the Beaver Rim area. The plant population has increased from 500 in 1990 to an estimated 15,000 plants in 1998, possibly in response to higher than normal precipitation (R. Scott, Central Wyoming College, pers. comm., 1998).

Previous Federal Action

In the plant notice of review published on September 30, 1993 (58 FR 51144), we designated *Y. xanthocephalus* a Category 2 species for potential listing under the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*). At that time, Category 2 species were those for which data in our possession indicated listing was possibly appropriate, but for which substantial data on biological vulnerability and threats were not currently known or on file to support a proposed rule. On February 28, 1996, we published a Notice of Review in the **Federal Register** (61 FR 7596) that discontinued the designation of Category 2 species as candidates, and this species was upgraded to candidate status at that time. A candidate is a species for which we possess substantial information on biological vulnerability and threats to support preparation of a listing proposal.

Processing of this proposal is a Tier 2 activity under the current listing priority guidance (63 FR 25502, May 8, 1998). Tier 1 actions are emergency listings. Tier 2 actions include processing final decisions on proposed listings; resolving the conservation status of candidate species; processing administrative findings on petitions; and delisting or reclassifying actions.

On November 24, 1997, we received a petition from the Biodiversity Legal Foundation and Biodiversity Associates alleging that *Y. xanthocephalus* warranted emergency listing. On December 22, 1997, we notified the petitioners that emergency listing was not appropriate because BLM regulations provided some conservation measures for the species, and current exploratory oil and gas activities near the known occupied habitat of *Y. xanthocephalus* were being coordinated with our staff in the Wyoming Field Office. In addition, we notified the petitioners that petitions for candidate species are considered second petitions, because candidate species are species for which we have already decided that listing is warranted. Therefore, no 90-day finding was required for Biodiversity Legal Foundation's petition.

Summary of Factors Affecting the Species

Section 4 of the Act and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal lists. A species may be determined endangered or threatened due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Y. xanthocephalus* (desert yellowhead) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range:

The entire known range of *Y. xanthocephalus* consists of an area of less than two ha (five ac) in southern Fremont County, Wyoming. Surveys conducted since 1990 have failed to find additional populations, although there are a number of sites with similar soils, drainage and plant associations in the area. The plant is easily recognized during its summer flowering season, so it seems likely that surveys would have found additional populations if they exist. Therefore, the species is vulnerable to extinction from even small-scale habitat degradation due to its small population size and limited geographic range.

The known population is threatened by surface disturbances associated with recreation, oil and gas development, mineral extraction, trampling by livestock, and soil compaction by vehicles (Fertig 1995). Recreational off-road vehicle use presents a threat to *Y. xanthocephalus* through the crushing of plants and compaction or erosion of soil. This threat is greatest in the spring and summer when plants are in flower or heavy with fruit. No physical barriers prevent vehicle use in the immediate area of the *Y. xanthocephalus* population. The known population is several miles from Wyoming State Highway 135 and other maintained roads. In 1996, Highway 135 had an estimated daily traffic of 360 vehicles (Wyoming Department of Transportation 1996). A two-track, four-wheel drive trail leading to an abandoned oil well bisects the population, and is open to hunters or other recreationists using four-wheel drive trucks and other smaller all-terrain vehicles (ATVs). The most common activities that attract users to the area are hunting, rock collecting and searching for human artifacts (such as arrowheads). The population is a few miles north of the Sweetwater Crossing on the Oregon-California Trail, which is a popular tourist attraction. There has been no significant surface disturbance caused by vehicles during the past four years that the site has been under study (R. Scott, pers. comm., 1998). The BLM Resource Management Plan limits vehicle use to existing roads (including established two-tracks), but the potential for habitat and plant destruction by ATV's remains a threat.

Oil and gas development also threaten the known population. In 1997, BLM leased for oil and gas development a 1,160 ac tract (designated WYW140702) that encompasses the *Y. xanthocephalus* population. An adjacent lease (WYW138846) consisting of 2,080 ac was purchased by the same operator in May 1996. Both leases are for a 10-year period, and no specific lease stipulations were included to protect the plant. Construction of well pads, access roads, and pipelines through occupied habitat would result in direct destruction or crushing of plants and soil compaction and erosion. The 1920 Mineral Leasing Act promotes maximum recovery of Federal mineral resources. However, the 1987 Amendments to the Mineral Leasing Act (30 U.S.C. 226(g)) require lessees to have an approved operating plan that protects surface resources prior to submitting Applications for Permission to Drill. The BLM regulations provide that species that are candidates for listing under the Endangered Species Act be afforded protection.

The current lessee is aware that the plant exists in the area, and has been very cooperative with BLM staff. The current drilling plan proposes exploration in locations that should not pose a threat to *Y. xanthocephalus*, but the current operator is free to sell its leases to other companies that could revise the drilling plan. An existing two-track road leading to an abandoned oil well currently bisects the only population of *Y. xanthocephalus*. Redrilling of abandoned wells in search of producing formations that may have been previously overlooked is a common technique used during oil and gas exploration. Permits to drill can be conditioned by BLM to provide some protection to the plant. However, a greater level of protection would be afforded by stipulations contained directly in the leases, and such stipulations to protect the plant cannot be added to the leases until renewal in 2007.

Although the current oil and gas exploratory wells pose no threat to *Y. xanthocephalus*, the discovery of an oil and/or gas pool on the lease areas would precipitate field developments that would introduce new threats to the plant and its habitat. In-field development could involve up to eight wells per section, depending on the characteristics of the producing formations. This intensified drilling activity would result in a new network of additional roads and well pads, and more human intrusion into what is now a remote area.

Seismic explorations for oil and gas producing formations also present a threat to *Y. xanthocephalus* and its habitat through use of explosives, direct trampling, and soil compaction. However, these activities were carried out in the lease area during the early 1990s, so a permit application for further exploration is not likely. In addition, seismic explorations on BLM surface now require environmental analysis prior to permitting, and BLM will protect occupied *Y. xanthocephalus* habitat from damage if a request for further exploration is received (J. Kelly, BLM, pers. comm., 1998).

The known *Y. xanthocephalus* population is located in BLM's Lander Resource Area, which is rich in locatable mineral resources, such as gold, copper, and uranium. Private parties can stake a mining claim and extract locatable minerals in accordance with the 1872 General Mining Law, and such activity could jeopardize the known population of *Y. xanthocephalus*. Zeolites, a locatable mineral with properties useful in water softening, manufacturing of catalysts, and pollution control, are found in the Beaver Rim area. The mineral also may have marketability for use in processes to remove radioactive products from radioactive wastes (Bureau of Land Management 1986). The BLM's authority to regulate mineral claims under the 1872 General Mining Law is limited, although mining activities in areas with five or more acres of surface disturbance of unpatented BLM land are required to have an approved operating plan under 43 CFR 3809. Although the staking of locatable mineral claims on or near the plant's habitat is not likely, official withdrawal of the area from locatable mineral claims would remove this threat.

Livestock grazing may also present a threat to *Y. xanthocephalus* habitat, which is within an existing grazing allotment. Livestock trampling of plants does occur, primarily because the *Y. xanthocephalus* area is a travel corridor between pastures (Fertig 1995). There are no existing barriers to prevent livestock access to the habitat. Fencing of the area would protect the plants from this threat, but also would probably result in a change in the associated plant community in the habitat. This change could result in unanticipated adverse impacts to the survival of *Y. xanthocephalus*.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Y. xanthocephalus is vulnerable to over-collecting conducted for scientific or educational purposes because of its small extant population size and habitat. The leaves of *Y. xanthocephalus* contain a chemical that produces a mild numbing sensation in the human mouth when even tiny portions are tasted (R. Scott, pers. comm., 1998). This could indicate potential medicinal qualities that could prove attractive to pharmaceutical companies, but the potential for this to be a threat to the existing population is currently unknown.

C. Disease or Predation

Cattle graze in the immediate vicinity of occupied *Y. xanthocephalus* habitat, but observation on the site indicate that the plant is not palatable to grazers. Tracks reveal that domestic and wild animals grazing the area spit out *Y. xanthocephalus* leaves and flowers after tasting (R. Scott, pers. comm., 1998). Predation of *Y. xanthocephalus* fruit by insects does occur, but it is unknown whether or not the extent of current predation differs from historical levels. Thus, the degree of threat that this factor poses to the species is unknown.

D. The Inadequacy of Existing Regulatory Mechanisms

The State of Wyoming has no endangered species act or other laws to provide protection to plant species. The current BLM Lander Resource Management Plan (RMP), which covers the known population of *Y. xanthocephalus*, was approved in 1987, three years prior to the species' discovery. Therefore, the plan does not specifically mention the species. The RMP protects special status plant species in general across the entire Resource Area, and provides no-surface-occupancy restrictions for threatened and endangered species impacted by oil and gas development. As *Y. xanthocephalus* is not currently listed, and no specific stipulations were included with the current oil and gas leases, attempts by BLM to restrict activities by imposing conditions during the application to drill stage are appealable by the operator.

E. Other Natural or Manmade Factors Affecting its Continued Existence

Species with small population size and restricted distribution are vulnerable to extinction by natural processes and human disturbance (Levin et al. 1996). Random events causing population fluctuations or

population extirpations become a serious concern when the number of individuals or the geographic distribution of the species is very limited. A single human-caused or natural environmental disturbance could destroy the entire population of *Y. xanthocephalus*.

This species occupies an area of less than five acres, and while the total number of plants known to exist has increased from 500 when it was discovered in 1990 to an estimated 15,000 in 1998, this increase may be due to higher than normal precipitation during recent years. The establishment of this species is episodic and dependent on suitable spring and summer moisture conditions (Fertig 1995). Seed set in 1990 was characterized as "almost nil" due to destruction of achenes (fruits) by insects and drought (Dorn 1991). A series of drought years could result in a severe reduction in population size and eventual extinction.

The species was described by Fertig (1995) as a "classic 'K' selected species characterized by a long-lived perennial growth form, adaptation to severe habitats, and low annual reproductive output." This low reproductive output makes the species increasingly vulnerable to extinction due to chance events as population size declines, because it is unlikely that the species will exhibit a high rate of population growth, even if environmental conditions improved after such an event.

In addition to the above factors, threats to *Y. xanthocephalus* are increased when people use the occupied area for recreational purposes. For example, erosion or trampling of plants is possible due to hikers or off-road vehicle use. The species occurs on relatively barren sites with less than 25 percent total vegetative cover, and may be intolerant of competition (Fertig 1995). Competition from plants not native to the area would pose a greater threat than competition from species with which *Y. xanthocephalus* has evolved. Non-native plants that might outcompete *Y. xanthocephalus* could be introduced to the area if their seeds are carried in on the footwear or clothing of recreationists.

An additional threat that affects *Y. xanthocephalus* is that posed by its small population size. Populations of plants that remain very small for several generations or that have gone through a past episode of rapid population decline may lose much of their previous genetic variability (Godt et al. 1996). When a population's genetic variability falls to low levels, its long term persistence may be jeopardized because its ability to respond to changing environmental conditions is reduced. In addition, the potential for inbreeding depression increases, which means that fertility rates and survival rates of offspring may decrease. Although environmental and demographic factors usually supersede genetic factors in threatening species viability, inbreeding depression and the low genetic diversity may enhance the probability of extinction of rare plant species (Levin et al. 1996).

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Y. xanthocephalus* in determining to issue this proposed rule. Federal listing under authority of the Act is the best mechanism currently available to ensure protection to *Y. xanthocephalus* on public lands throughout its limited range. Although the population has increased in recent years, the future existence of the species is still threatened by potential oil and gas in-field development and by its extremely limited habitat and population size. Therefore, based on this evaluation, the preferred action is to list *Y. xanthocephalus* as a threatened species, which would provide BLM with a strong legal obligation to ensure adequate protective measures in the operating plans for the existing oil and gas leases. While not in immediate danger of extinction, *Y. xanthocephalus* is likely to become an endangered species in the foreseeable future if the threats to the habitat are realized and if present threats posed by small population size and limited geographic range continue to exist. We have determined that threatened status would provide adequate protection from the described threats. As the species occurs only on Federal surface, a classification as endangered, if warranted, would provide no additional level of protection.

Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection and; (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Service regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist—(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species. We find that designation of critical habitat is not prudent because it would provide no additional benefit to the species beyond that conferred by listing it as threatened and because it may increase the danger of collection to the species. The reasons for this conclusion, including the factors considered in weighing the benefits against the risks of designation, are provided below.

Critical habitat receives consideration under section 7 of the Act with regard to actions carried out, authorized, or funded by the a Federal agency (see Available Conservation Measures section). As such, designation of critical habitat may affect activities on Federal lands and may affect activities on non-Federal lands where such a Federal nexus exists. Under section 7 of the Act, Federal agencies are required to ensure that their actions do not jeopardize the continued existence of a species or result in destruction or adverse modification of critical habitat. However, both jeopardizing the continued existence of a species and adverse modification of critical habitat have similar standards and thus similar thresholds for violation of section 7 of the Act. In fact, biological opinions that conclude that a Federal agency action is likely to adversely modify critical habitat but not jeopardize the species for which the critical habitat has been designated are extremely rare. Given the extremely limited range of *Y. xanthocephalus*, it is likely that any case of adverse modification of its habitat would also constitute jeopardy for the taxon.

The designation of critical habitat for the purpose of informing Federal agencies of the location of occupied *Y. xanthocephalus* habitat is not necessary because the BLM currently permits the surveys and monitoring of the only extant population. However, vandalism and unauthorized collection of *Y.*

xanthocephalus could be a significant threat to the species' survival and recovery, because of the plant's rarity and the fact that it is a monotypic genus. Critical habitat designation would require publication of the legal description of the five ac habitat site in the Federal Register, providing information to encourage collectors. The species has generated little interest in the botanical community, so collecting of specimens is currently not a threat. However, the plant may have some medicinal qualities that could elicit the interest of collectors in the future. Therefore, publication of its exact location could result in adverse effects to the species in the future.

The Service acknowledges that critical habitat designation, in some situations, may provide some value to the species by identifying areas important for species conservation and calling attention to those areas in special need of protection. Critical habitat designation of unoccupied habitat may also benefit these species by alerting permitting agencies to potential sites for reintroduction and allowing them the opportunity to evaluate proposals that may affect those areas. However, in this case, the one site where this species exists is well known by the BLM, and it is not known to have previously existed on any other sites. If future management actions include unoccupied habitat, any benefit provided by designation of such habitat as critical would be conferred more effectively and efficiently through the current coordination process.

Taking of listed plants is regulated under section 9 of the Act only in cases of (1) removal and reduction to possession of federally listed plants from lands under Federal jurisdiction, or their malicious damage or destruction on such lands; and (2) removal, cutting, digging-up, or damaging or destroying in knowing violation of any State law or regulation, including State criminal trespass law. Designation of critical habitat provides no additional benefits or protection from potential take beyond those that this species would receive by virtue of its listing as threatened and likely would increase the degree of threat from collection, vandalism, or other human activities. Protection of *Y. xanthocephalus* will be most effectively addressed through the recovery process under section 4 and the consultation process under section 7 of the Act, and the current interagency coordination processes.

Given all of the above considerations, we find that the designation of critical habitat for *Y. xanthocephalus* is not prudent because the minimal benefits of such designation would be far outweighed by the increase of threats from over collection or other human activities. Critical habitat designation would provide no additional benefit to the species beyond that conferred under sections 7 and 9 of the Act by listing.

Available Conservation Measures

Conservation measures provided to a species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, local and private agencies, groups and individuals. The Act provides for possible land acquisition, cooperation with the States, and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities impacting listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer informally with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us.

Thus, the Act will require BLM to evaluate potential impacts to *Y. xanthocephalus* that may result from activities it authorizes or permits, such as oil and gas development, grazing, and recreational use. The BLM's regulations require protection of candidate species on lands managed by the agency. However, no special land management designations or conservation agreements currently exist to provide special protections for *Y. xanthocephalus*. Section 43 U.S.C. 1712(c)(3) allows BLM to protect tracts as Areas of Critical Environmental Concern (ACEC) to protect surface resources, including candidate, proposed, or listed species. The habitat for this plant could be considered for ACEC designation. The BLM has expressed interest in entering into a Candidate Conservation Agreement with us. The BLM has provided us with a draft of such a potential Agreement which outlines management, inventory, and monitoring actions to be taken to ensure the conservation of this species.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all threatened plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.71, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Section 4(d) of the Act allows for the provision of such protection to threatened species through regulation. This protection may apply to this species in the future if regulations are promulgated. Seeds from cultivated specimens of threatened plants are exempt from these prohibitions provided that their containers are marked "Of Cultivated Origin." Certain exceptions to the prohibitions apply to agents of the Service and State conservation agencies.

The Act and 50 CFR 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving threatened plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. For threatened plants, permits also are available for botanical or horticultural exhibition, educational purposes, or special purposes consistent with the purposes of the Act. It is anticipated that few trade permits would ever be sought or issued because the species is not in cultivation or common in the wild. Requests for copies of the regulations regarding listed species and inquiries about prohibitions and permits may be addressed to U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver,

Colorado 80225 (telephone (303) 236–7400, Facsimile (303) 236–0027).

We adopted a policy on July 1, 1994, (59 FR 34272) to identify to the maximum extent practicable at the time a species is proposed for listing those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range. We believe that based upon the best available information, the actions listed below would not result in a violation of section 9 provided these activities are carried out in accordance with existing regulation and permit requirements:

(1) Activities authorized, funded, or carried out by Federal agencies (e.g., grazing management, agricultural conversions, range management, rodent control, mineral development, road construction, human recreation, pesticide application, controlled burns) and construction/maintenance of facilities (e.g., fences, power lines, pipelines, utility lines) when such activity is conducted according to any reasonable and prudent measures given by the Service in a consultation conducted under section 7 of the Act;

(2) Casual, dispersed human activities on foot (e.g., bird watching, sightseeing, photography, and hiking.)

The actions listed below may potentially result in a violation of section 9; however, possible violations are not limited to these actions alone:

(1) Unauthorized collecting of the species on Federal Lands;

(2) The unauthorized incidental destruction of *Y. xanthocephalus* habitat on Federal surface land (e.g., conversion of habitat to cropland, road construction, water development, range management, mineral development, and off-highway vehicle use);

(3) Unauthorized application of herbicides in violation of label restrictions;

(4) Unauthorized land use activities that would significantly modify the species' habitat;

(5) Interstate or foreign commerce and import/export without previously obtaining an appropriate permit. Permits to conduct activities are available for purposes of scientific research and enhance of propagation or survival of the species.

Questions regarding whether specific activities, such as changes in land use, will constitute a violation of section 9 should be directed to the Wyoming Field Office (see **ADDRESSES** section).

Public Comments Solicited

We intend that any final action resulting from this proposal be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or other interested party concerning this proposed rule are now solicited.

Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to *Y. xanthocephalus;*

(2) The location of any additional sites that contain *Y. xanthocephalus;*

(3) Additional information concerning *Y. xanthocephalus* distribution, population size and/or population trend;

(4) Information regarding current or planned land uses, and their possible beneficial or negative impact to *Y. xanthocephalus* or its habitat (e.g., agricultural conversion, oil and gas development, land exchanges, range management, habitat conservation plans, conservation easements);

(5) Biological or physical elements that best describe *Y. xanthocephalus* habitat that could be important for the conservation of the species;

(6) Alternative land use practices that will reduce or eliminate the take of *Y. xanthocephalus*;

(7) Other management strategies that will conserve the species throughout its range.

Final promulgation of the regulations on this species will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this proposal.

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and addressed to the Wyoming Field Office (see **ADDRESSES** section).

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the "Supplementary Information" section of the preamble helpful in understanding the rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, room 7229, 1849 C Street, NW, Washington, DC 20240. You may also e-mail the comments to this address: Exsec@ios.doi.gov.

Required Determinations

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared concerning regulations adopted pursuant to section 4(a) of the Act of 1973, as amended. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

This rule does not contain any new collections of information, other than those associated with permits, already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018–0094. 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 additional information concerning permit and associated requirements for threatened species, see 50 CFR 17.32.

References Cited

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Godt, M. J. W., B. R. Johnson, and J. L. Hamrick. 1996. Genetic diversity and population size in four rare southern Appalachian plant species. Conservation Biology 10:796–805.

Levin, D. A., J. Francisco-Ortega, and R. K. Jansen. 1996. Hybridization and the extinction of rare plant species. Conservation Biology 10:10–16.
Love, J.D. 1961. Geological Survey Bulletin 112: Split Rock Formation (Miocene) and moonstone Formation (Pliocene) in central Wyoming. Contributions to General Geology. 1–I. United States Government Printing Office,. Washington, D.C.
Van Houten, F.B. 1964. Tertiary Geology of the Beaver Rim Area Fremont and Natrona counties, Wyoming: Geological Survey Bulletin 1164. United States Government Printing Office, Washington, D.C.
Wyoming Transportation Planning Program. 1996 Vehicle Miles. Wyoming Department of Transportation, Cheyenne, Wyoming.

Author. The primary author of this proposed rule is Chuck Davis, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225, (303) 236–7400, extension 235.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulations Promulgation

Accordingly, the Service proposes to amend 50 CFR Part 17, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.12(h) by adding the following, in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
*	*	*	*	*	*	*
ASTERACEAE—COMPOSITE FAMILY						
*	*	*	*	*	*	*
Yermo xanthocephalus	Desert yellowhead	U.S.A. (WY)	T	NA	NA	
*	*	*	*	*	*	*

Dated: December 7, 1998.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 98–33857 Filed 12–21–98; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 63, No. 245
Tuesday, December 22, 1998

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Oregon Province Interagency Executive Committee (PIEC) Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Southwest Oregon PIEC Advisory Committee will meet on January 5, 1999 in Grants Pass, Oregon at the Josephine County Fairgrounds, 1451 Fairgrounds Road. The meeting will begin at 9:00 a.m. and continue until 4:30 p.m. Agenda items to be covered include: (1) local issues presentation by management representatives of the Siskiyou National Forest; (2) Public comment; (3) Applegate Adaptive Management Area Guide; and (4) Discussion by Advisory Committee members about content of Province Advisory Committee meetings.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Chuck Anderson, Province Advisory Committee Coordinator, USDA, Forest Service, Rogue River National Forest, 333 W. 8th Street, Medford, Oregon 97501, phone (541) 858–2322.

Dated: December 15, 1998.

Charles J. Anderson,

Acting Designated Federal Official.

[FR Doc. 98–33820 Filed 12–21–98; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Submission For OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Economic Analysis.

Title: Annual Survey of Foreign Direct Investment in the United States.

Form Number(s): BE–15(LF), BE–15(SF), BE–15 Supplement C.

Agency Approval Number: 0608–0034.

Type of Request: Reinstatement, with change, of a previously approved collection for which approval has expired.

Burden: 128,000 hours.

Number of Respondents: 4,975.

Avg Hours Per Response: 26 hours.

Needs and Uses: The annual survey collects enterprise-level data on the financial and operating characteristics of U.S. companies that are foreign-owned. Data from the survey are used to derive universe estimates covering all foreign-owned U.S. companies. The data are needed to measure the economic significance of, and monitor changes in, foreign direct investment in the United States, and to analyze its effect on the U.S. economy. They will also be used in formulating, and assessing the impact of, U.S. policy on foreign direct investment.

Affected Public: Businesses or other for-profit institutions.

Frequency: Annually (except years in which a BE–12 benchmark survey is taken).

Respondent's Obligation: Mandatory.

Legal Authority: Title 22 U.S.C., Sections 3101–3108, as amended.

OMB Desk Officer: Paul Bugg, (202) 395–3093.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482–3272, Department of Commerce, Room 5327, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Paul Bugg, OMB Desk Officer, Room 10201, New Executive Office Building, Washington, DC 20503.

Dated: December 15, 1998.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 98–33768 Filed 12–21–98; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Export Administration (BXA).

Title: Statement by Ultimate Consignee and Purchaser

Agency Form Number: BXA–711.

OMB Approval Number: 0694–0021.

Type of Request: Extension of a currently approved collection of information.

Burden: 4,022 hours.

Average Time Per Response: 31 minutes per response.

Number of Respondents: 7,785 respondents.

Needs and Uses: The Form BXA–711 or letter puts the importer on notice of the special nature of the goods and receive a commitment against illegal disposition. In order to effectively control commodities, BXA must have sufficient information regarding the end-use and end-user of the U.S. origin commodities to be exported. The information will assist the licensing officer in making the proper decision on whether to approve or reject the application for the license.

Affected Public: Individuals, businesses or other for-profit institutions.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: David Rostker, (202)–395–7340.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482–3272, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

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, Room 10202, New Executive Office Building, Washington, DC 20230.

Dated: December 17, 1998.

Madeleine Clayton,

Management Analyst, Office of the Chief Financial Officer.

[FR Doc. 98–33802 Filed 12–21–98; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act of 1995, Pub. L. 104–13.

Bureau: International Trade Administration.

Title: Export Trading Companies Contact Facilitation Service.

Agency Form Number: ITA 4094P.

OMB Number: 0625–0120.

Type of Request: Regular Submission.

Burden: 4,750 hours.

Number of Respondents: 9,500.

Avg. Hours Per Response: 30 minutes.

Needs and Uses: The Contact Facilitation Service (CFS) is designed to put producers together with exporters. Many U.S. firms have never exported because of a fear of the risks involved in exporting and a lack of knowledge of the international marketplace. New-to-export firms need the assistance of firms offering export trade services. One of the purposes of the Export Trading Company (ETC) Act of 1982 is to increase United States exports of goods and services by encouraging more efficient provision of export trade services to U.S. producers and suppliers. Section 104 of the Act directs Commerce to provide a service to facilitate contact between producers of exportable goods and services and firms offering export trade services.

The International Trade Administration (ITA) maintains a database of U.S. manufacturers, export trading and management companies, wholesalers/distributors, and international service firms. The CFS is designed to help promote exports and enable U.S. producers to locate ETCs and export services providers. Companies registered in the database are also listed in annual editions of the *U.S. Department of Commerce—U.S. Exporters' Yellow Pages*™ (formerly known as The Export Yellow Pages) which are distributed throughout the United States and worldwide. Without the information collected by the form, the CFS and *U.S. Department of Commerce—U.S. Exporters' Yellow Pages*™ would be unreliable and ineffective, because users of this kind of information need the current information about the listed companies.

Affected Public: Businesses or other for-profit, not-for-profit institutions, state, local or tribal Governments.

Frequency: On Occasion.

Respondent's Obligation: Required to obtain or retain a benefit, voluntary.

OMB Desk Officer: David Rostker, (202) 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, Departmental Forms Clearance Officer, (202) 482–3272, Department of Commerce, Room 5327, 14th and Constitution, NW, Washington, DC 20230. Written comments and recommendations for the proposed information collection should be sent to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503 within 30 days of the publication of this notice in the Federal Register.

Dated: December 17, 1998.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 98–33803 Filed 12–21–98; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Current Industrial Reports Surveys—WAVE III (Mandatory and Voluntary Submissions)

ACTION: Proposed Collection; Comment Request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before February 22, 1999.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to: Kenneth Hansen, Chief of Manufactured Durables Branch, (301) 457–4755, Bureau of the Census, Manufacturing and Construction Division, Room 2207, Building #4, Washington, DC 20233 or: Robert Reinard, Acting Chief of Manufactured Nondurables Branch, (301) 457–4637, Bureau of the Census, Manufacturing and Construction Division, Room 2208, Building #4, Washington, DC 20233.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts a series of monthly, quarterly, and annual surveys as part of the Current Industrial Reports (CIR) program. The CIR surveys deal mainly with the quantity and value of shipments of particular products and occasionally with data on production and inventories; unfilled orders, receipts, stocks and consumption; and comparative data on domestic production, exports, and imports of the products they cover. These surveys provide continuing and timely national statistical data on manufacturing. The results of these surveys are used extensively by individual firms, trade associations, and market analysts in planning or recommending marketing and legislative strategies.

The CIR program includes both mandatory and voluntary surveys. Typically the monthly and quarterly surveys are conducted on a voluntary basis. Those companies that choose not to respond to the voluntary surveys are required to submit a mandatory annual counterpart. The annual counterpart collects annual data from those firms not participating in the more frequent collection.

In 1998, the Census Bureau converted the Current Industrial Reports (CIR) survey form names to reflect the switch from the old U.S. Standard Industrial Classification (SIC) system to the new North American Industry Classification System (NAICS). For example, the M37G under the old SIC system will convert to M336G under the NAICS.

Due to the large number of surveys in the CIR program, for clearance purposes we group the surveys into three Waves. The mandatory and voluntary surveys in each Wave are separately submitted. Thus, a total of six clearances cover all of the surveys in the CIR program. One Wave is submitted for reclearance each year. This year the Census Bureau plans to submit mandatory and voluntary surveys of Wave III for clearance. The surveys in Wave III are as follows:

Mandatory Surveys

MQ313T—Broadwoven Fabrics (Gray)
MA315D—Gloves and Mittens

MA327E—Consumer, Scientific, Technical, and Industrial Glassware
MA333D—Construction Machinery
MA333F—Mining Machinery
MA333J—Selected Pollution Control Equipment
MA334P—Communication Equipment

Voluntary Surveys

- M336G—Civil Aicraft & Aircraft Engines
- MQ313D—Consumption on Woolen System and Worsted Combing
- These voluntary surveys have mandatory annual counterparts.

II. Method of Collection

The Census Bureau will use mail out/mail back survey forms to collect data. We ask respondents to return monthly report forms within 10 days, quarterly report forms within 15 days, and annual report forms within 30 days of the initial mailing. Telephone calls and/or letters encouraging participation will be mailed to respondents that have not responded by the designated time.

III. Data

OMB Number: 0607–0476—Mandatory Surveys; 0607–0776—Voluntary & Annual Counterparts Surveys.

Form Number: Set Chart Above.

Type of Review: Regular Review.

Affected Public: Businesses, Other for Profit, or Organizations.

Estimated Number of Respondents: Mandatory Surveys—3,793; Voluntary & Annual Counterparts Surveys—913 Total—4,706.

Estimated Time Per Response: Mandatory Surveys—.89 hrs. avg.; Voluntary & Annual Counterparts Surveys—1.64 hrs. avg.

Estimated Total Annual Burden: Mandatory Surveys—2,644 hours; Voluntary & Annual Counterparts Surveys—484 hours Total—3,128 hours.

Estimated Total Annual Cost: The estimated cost to respondents for all the CIR reports in Wave III for fiscal year 2000 is $41,415.

Respondent's Obligation: The CIR program includes both mandatory and voluntary surveys.

Legal Authority: Title 13, United States Code, Sections 81, 131, 182, 224, and 225.

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 shall 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, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 16, 1998.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 98–33769 Filed 12–21–98; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Informal Caregiver Survey (ICS) Component of the 1999 Long Term Care Survey (LTC)

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before February 22, 1999.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Sarah Higgins, Bureau of the Census, FOB 3, Room 3356, Washington, DC 20233–8400, (301) 457–3801.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Bureau of the Census plans to conduct the Informal Caregivers Survey (ICS) as a component of the Long Term Care Survey (LTC) which collects information on the health and functional status of the elderly population in the United States. The purpose of the ICS is to collect information on the persons who provide help to respondents identified as impaired by the LTC. The Census Bureau last conducted the ICS as a component of the 1989 LTC. It was not conducted in conjunction with the 1994 LTC. Sponsorship for the ICS component comes from Duke University using funds received in a grant from the Office of the Assistant Secretary for Planning and Evaluation, the U.S. Department of Health and Human Services and the National Institute on Aging.

Duke University will use the data to obtain information about the experiences of people who care for relatives and friends. The ICS will obtain information on how older Americans and their helpers are coping with health problems and the money problems that go with them. The survey will seek to obtain information on how it is possible for some of the nation's elderly to remain in their homes while others cannot, and how caregivers are coping with this challenge.

Sample Overview

The LTC survey consists of a screener interview and, potentially, a community or institutional interview. The community interview is given to respondents who live in their own home while the institutional interview is conducted for respondents who are living in nursing facilities. During the community interview, we collect information on the people who provide help or assistance to the LTC respondent. For the ICS sample, we will select the caregiver, if any, who has provided the LTC respondent with the most help during the week prior to the interview. The sample of caregivers is restricted to unpaid helpers or family members. We will attempt to select a caregiver for every LTC respondent. We, however, will select only one caregiver per respondent.

Survey Process

The Census Bureau's field representatives (FRs) will attempt to conduct the ICS immediately after completing the community interview. If the caregiver is not present the interview will be conducted by phone or personal visit, if necessary. All data is transmitted to the Census Bureau where it is reviewed.

After review, the Census Bureau stores the survey data on a microdata file and delivers the file to Duke University. Duke analyzes the data and makes its findings known to NIA.

II. Method of Collection

The ICS will be conducted by both personal visits and telephone interviews

using computer-assisted (laptop) interviewing. An advance letter will be provided to each caregiver at the time of the interview.

III. Data

OMB Number: 0607–0778 (expires 6/30/01).

Form Number: There are no forms. We conduct all interviewing on laptop computers.

Type of Review: Regular.

Affected Public: Individuals.

Estimated Number of ICS Respondents: We expect to ask 3,200 informal caregivers to participate in the ICS.

Estimated ICS Interview Length: We estimate that the ICS interview will take 30 minutes.

Estimated Total Annual Burden Hours: The ICS will increase the burden of the LTC by 1600 hours.

Estimated Total Annual Cost: We do not expect respondents to incur any cost other than that of their time to respond.

Respondent's Obligation: Voluntary.

Legal Authority: Title 42, United States Code, Section 285e–1, and Title 15 United States Code, Section 1525 authorize this survey.

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 shall 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, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 16, 1998.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 98–33770 Filed 12–21–98; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Proposed Collection; Comment Request

Title: Scientific Research, Exempted Fishing, and Exempted Activity Submissions.

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposal to renew Office of Management and Budget (OMB) clearance for this information collection. OMB clearance is required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before February 22, 1999.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to: William D. Chappell, National Marine Fisheries Service, NOAA, 1315 East-West Highway, Room 13461, Silver Spring, MD 20910; telephone 301–713–2341.

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a renewal of an information collection reflecting regulatory requirements governing scientific research activity, exempted fishing, and exempted educational activities under the Magnuson-Stevens Fishery Conservation and Management Act (50 CFR §§ 600.512 and 600.745). Eligible and prospective researchers may submit a scientific research plan to the National Marine Fisheries Service (NMFS). NMFS will issue a letter of acknowledgment that may establish a presumption that the applicant's activity is research and exempt from Magnuson-Stevens Act regulations. The information collection also includes standard requirements for persons applying for exempted fishing permits and exempted educational activities. Reports may be required on exempted fishing and exempted educational activities. Reports from scientific research activities are voluntary.

II. Method of Collection

This information is collected by an applicant's submission of documentation as specified in the regulations. A researcher desiring to obtain a letter of acknowledgment of research for a scientific research vessel must submit a request and scientific research plan to the appropriate NMFS Regional Administrator. Applicants for an exempted fishing permit or exempted educational activity authorization must submit applications to the Regional Administrator that contain the information specified in the regulations. Reports are submitted to NMFS.

III. Data

OMB Number: 0648–0309.

Form Number: None.

Type of Review: Regular Submission.

Affected Public: Business or other for-profit; Not-for-profit institutions; Federal Government; and State, Local, or Tribal Governments.

Estimated Number of Respondents: 269.

Estimated Time Per Response: 1 hour.

Estimated Total Annual Burden Hours: 269.

Estimated Total Annual Cost to Public: $0 (no capital expenditures).

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 shall 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, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 15, 1998.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 98–33797 Filed 12–21–98; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Petition Requesting a Ban of Polyvinyl Chloride (PVC) In All Toys and Other Products Intended for Children 5 Years of Age and Under

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Commission has received a petition under the Federal Hazardous Substances Act (FHSA) (Petition No. HP 99–1) from the National Environmental Trust and 11 other organizations. The petition asks the Commission to ban the use of polyvinyl chloride (PVC) in toys and other products intended for the use of children age 5 and under. The Commission solicits written comments concerning the petition from all interested parties.

DATES: Comments on the petition should be received in the Office of the Secretary by February 22, 1999.

ADDRESSES: Comments on the petition should be mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, telephone (301) 504–0800, or delivered to the Office of the Secretary, Consumer Product Safety Commission, room 502, 4330 East-West Highway, Bethesda Maryland 20814. Comments may also be filed by telefacsimile to (301) 504–0127 or by email to cpsc-os@cpsc.gov. Comments should be captioned "Petition HP 99–1—PVC Children's Articles." Copies of the petition are available by writing or calling the Office of the Secretary.

FOR FURTHER INFORMATION CONTACT: Rockelle Hammond, Docket Control and Communications Specialist, Consumer Product Safety Commission, Washington, DC 20207; telephone: (301) 504–0800 ext. 1232.

SUPPLEMENTARY INFORMATION: The Commission has docketed correspondence from the National Environmental Trust and 11 other organizations as a petition under the Federal Hazardous Substances Act (FHSA) (Petition No. HP 99–1). The petition requests that the CPSC (1) "[i]nstitute an immediate ban on polyvinyl chloride (PVC) in all toys and other products intended for children five years of age and under" and (2) "[i]ssue a national advisory on the health risks that have been associated with soft plastic vinyl (PVC) toys to inform parents and consumers about the risks associated with PVC toys currently in stores and homes." These requests result from the petitioners' concerns about health risks from phthalates (especially DINP), lead, and cadmium that can be in PVC.

The Commission solicits comments on the issues raised by the petition, particularly on the extent to which children might be exposed to the identified hazards. The requested "national advisory" would not require rulemaking to implement. Therefore, that request technically is not part of the docketed petition. Nevertheless, the Commission solicits comment on this request also.

Comments to CPSC should be mailed, preferably in five copies, to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207–0001, or delivered to the Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East-West Highway, Bethesda, Maryland; telephone (301) 504–0800. Comments may also be filed by telefacsimile to (301) 504–0127 or by email to cpsc-os@cpsc.gov. Comments should be captioned "Petition HP 99–1—PVC Children's Articles."

Interested parties may obtain a copy of the petition from the CPSC's website at http://www.cpsc.gov or by writing or calling the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–0800. A copy of the petition is available for inspection from 8:30 a.m. to 5 p.m., Monday through Friday, in the Commission's Public Reading Room, room 502, 4330 East-West Highway, Bethesda, Maryland 20814.

Dated: December 16, 1998.

Sadye E. Dunn,

Secretary of the Commission.

[FR Doc. 98–33864 Filed 12–21–98; 8:45 am]

BILLING CODE 6355–01–U

DEPARTMENT OF EDUCATION

[CFDA No.: 84.037]

Office of Postsecondary Education

AGENCY: Department of Education.

ACTION: Notice of availability of the Federal Perkins Loan and National Direct Student Loan Programs Directory of Designated Low-Income Schools for Teacher Cancellation Benefits for the 1998–99 School Year.

SUMMARY: The Secretary of Education (the Secretary) announces that the 1998–99 Federal Perkins Loan and National Direct Student Loan Programs Directory of Designated Low-Income Schools (The Directory) is now available on the Department of Education's (the Department) Web site. Under the Federal Perkins Loan and National Direct Student Loan programs, a borrower may have repayment of his or her loan deferred and a portion of his or her loan canceled if the borrower teaches full-time for a complete academic year in a designated elementary or secondary school having a high concentration of students from low-income families. In the 1998–99 Directory, the Secretary lists, on a State-by-State and Territory-by-Territory basis, the schools in which a borrower may teach during the 1998–99 school year to qualify for deferment and cancellation benefits.

DATES: The Directory is currently available at the Department's Web site.

ADDRESSES: Information concerning specific schools listed in the Directory may be obtained from Chrisetta Nelson, Systems Administration Branch, Campus-Based Programs Systems Division, Office of Student Financial Assistance Programs, U.S. Department of Education, 400 Maryland Avenue, S.W., (Portals Building, Room 6200), Washington, D.C. 20202–5447, Telephone (202) 708–7738. Information concerning deferment and cancellation of a National Director Federal Perkins loan may be obtained from Sylvia Ross or Gail McLarnon, Program Specialists, Campus-Based Loan Programs Section, Loans Branch, Policy Development Division, Office of Student Financial Assistance Programs, U.S. Department of Education, 400 Maryland Avenue, S.W., (Regional Office Building 3, Room 3045), Washington, D.C. 20202–5447, Telephone (202) 708–8242. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Directories are also available in an electronic format at (1) each institution of higher education participating in the Federal Perkins Loan Program, (2) each of the fifty-seven (57) State and Territory Departments of Education, (3) each of the major Federal Perkins Loan billing services, and (4) the U.S. Department of Education, including its regional offices.

Individuals with disabilities may obtain this notice in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION: The Secretary selects schools that qualify a borrower for deferment and cancellation benefits under the procedures contained in the Federal Perkins Loan program

regulation in 34 CFR 674.53, 674.54 and 674.55.

The Secretary has determined that, for the 1998–99 academic year, full-time teaching in the schools set forth in the 1998–99 Directory qualifies a borrower for deferment and cancellation benefits.

The Secretary is providing the Directory to each institution participating in the Federal Perkins Loan Program in an electronic format only. Borrowers and other interested parties may check the website or their lending institution, the appropriate State or Territory Department of Education, regional office of the Department of Education, or the Office of Student Financial Assistance Programs of the Department of Education concerning the identity of qualifying schools for the 1998–99 academic year. The Office of Student Financial Assistance Programs retains, on a permanent basis, copies of past Directories.

Electronic Access to the Notice

Anyone may view this notice, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (pdf) on the World Wide Web at either of the following sites:

http://ocfo.ed.gov/fedreg.htm
http://www.ed.gov/news.html

To use the pdf you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the pdf, call the U.S. Government Printing Office toll free at 1–888–293–6498.

Dated: December 15, 1998.

Gerard A. Russomano,

Acting Chief Operating Officer, Office of Student Financial Assistance Programs.

[FR Doc. 98–33829; Filed 12–21–98; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Office of Science (Formerly Office of Energy Research); Office of Science Financial Assistance Program Notice 99–07 Energy Biosciences

AGENCY: Department of Energy (DOE).

ACTION: Notice inviting grant preapplications.

SUMMARY: The Office of Basic Energy Sciences of the Office of Science (SC), U.S. Department of Energy (DOE) invites preapplications from potential applicants for research funding in the Energy Biosciences program area. The intent in asking for a preapplication is to save the time and effort of applicants in preparing and submitting a formal project application that may be inappropriate for the program. The preapplication should consist of a two- to three-page concept paper on the research contemplated for an application to the Energy Biosciences program. The concept paper should focus on the scientific objectives and significance of the planned research, and include an outline of the approaches planned, and any other information relating to the planned research. No budget information or biographical data need be included; nor is an institutional endorsement necessary. The preapplication gives us the opportunity to advise potential applicants on the suitability of their research ideas to the mission of the DOE Energy Biosciences program. A response indicating the appropriateness of submitting a formal application will be sent from the Division of Energy Biosciences office in time to allow for an adequate preparation period for a formal application.

DATES: For timely consideration, all preapplications should be received by March 3, 1999. However, earlier submissions will be gladly accepted.

A response to timely preapplications will be communicated by April 16, 1999. The deadline for receipt of formal applications is June 16, 1999.

ADDRESSES: Preapplications referencing Program Notice 99–07 should be forwarded to: U. S. Department of Energy, Office of Basic Energy Sciences, SC–17, Division of Energy Biosciences, 19901 Germantown Road, Germantown, MD 20874–1290, Attn: Program Notice 99–07. Fax submissions are acceptable (Fax Number (301) 903–1003).

FOR FURTHER INFORMATION CONTACT: Ms. Pat Snyder, Division of Energy Biosciences, Office of Basic Energy Sciences, SC–17, 19901 Germantown Road, Germantown, MD 20874–1290, telephone (301) 903–2873; E-mail pat.snyder@oer.doe.gov.

SUPPLEMENTARY INFORMATION: Potential applicants should submit a brief preapplication which consists of two to three pages of narrative describing research objectives. These will be reviewed relative to the scope and the research needs of the Energy Biosciences program. The Energy Biosciences program has the mission of generating *fundamental* biological information about plants and non-medical related microorganisms that can provide support for future energy related biotechnologies. The objective is to pursue *basic* biochemical, genetic and physiological investigations that may contribute towards providing alternate fuels, petroleum replacement products, energy conservation measures as well as other technologies such as phytoremediation related to DOE programs. Areas of interest include bioenergetic systems, including photosynthesis; control of plant growth and development, including metabolic, genetic, and hormonal and ambient factor regulation, metabolic diversity, ion uptake, transport and accumulation, stress physiology and adaptation; genetic transmission and expression; plant-microbial interactions, plant cell wall structure and function; lignocellulose degradative mechanisms; mechanisms of fermentations, genetics of neglected microorganisms, energetics and membrane phenomena; thermophily (molecular basis of high temperature tolerance); microbial interactions; and one-carbon metabolism, which is the basis of biotransformations such as methanogenesis. The objective is to discern and understand basic mechanisms and principles.

Funds are expected to be available for new grant awards in FY 2000. The magnitude of these funds available and the number of awards which can be made will depend on the budget process. The awards made during FY 1998 averaged close to $100,000 per year, mostly for a three-year duration. The principal purpose in using preapplications at this time is to reduce the expenditure of time and effort of all parties. Information about development and submission of applications, eligibility, limitations, evaluations and selection processes, and other policies and procedures may be found in the 10 CFR Part 605 and the Application Guide for the Office of Science Financial Assistance Program. Electronic access to SC's Financial Assistance Guide is possible via the Internet using the following Web Site address: http://www.er.doe.gov/production/grants/grants.html.

The Catalog of Federal Domestic Assistance number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR Part 605.

Issued in Washington, DC, on December 9, 1998.

John R. Clark,

Associate Director of Science for Resource Management.

[FR Doc. 98–33859 Filed 12–21–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science; Office of Science Financial Assistance Program Notice 99–03; Environmental Meteorology Program—Vertical Transport and Mixing

AGENCY: U.S. Department of Energy.

ACTION: Notice inviting research grant applications.

SUMMARY: The Office of Biological and Environmental Research (OBER) of the Office of Science (SC), U.S. Department of Energy (DOE), hereby announces its interest in receiving applications for the Environmental Meteorology Program (EMP), Vertical Transport and Mixing (VTMX) Science Team. The research program supports the Department's Global Change Research Program, the U.S. Global Change Research Program, and the Administration's goals to understand the meteorological processes associated with air quality and climate change.

DATES: Formal applications in response to this notice must be received by 4:30 p.m., E.S.T., March 12, 1999, to be accepted for merit review and to permit timely consideration for award in fiscal year 1999. Applicants are urged to review abstracts of proposals from DOE laboratory scientists that have been tentatively selected for funding as well as the draft EMP–VTMX Science Plan at http://www.pnl.gov/VTMX. The draft science plan is already posted on the web site. The abstracts should be posted there by February 12, 1999.

Applications that are collaborative with or complementary to DOE laboratory proposals are strongly encouraged.

ADDRESSES: Formal applications referencing Program Notice 99–03 should be sent to: U.S. Department of Energy, Office of Science, Grants and Contracts Division, SC–64, 19901 Germantown Road, Germantown, MD 20874–1290, ATTN: Program Notice 99–03. This address must also be used when submitting applications by U.S. Postal Service Express Mail or any other commercial overnight delivery service, or when hand-carried by the applicant. An original and seven copies of the application must be submitted; however, applicants are requested not to submit multiple application copies using more than one delivery or mail service.

FOR FURTHER INFORMATION CONTACT: Peter Lunn, Environmental Sciences Division, SC–74, Office of Biological and Environmental Research, Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290, telephone: (301) 903–4819, E-mail: peter.lunn@oer.doe.gov, fax: (301) 903–8519. The full text of Program Notice 99–03 is available via the Internet using the following web site address: http://www.er.doe.gov/production/grants/fr99__03.html.

SUPPLEMENTARY INFORMATION: The scope of the research to be supported under this notice is the investigation of atmospheric vertical transport and mixing processes. The geographic focus for this research will be on urban areas affected by nearby elevated terrain, with an emphasis on studies of stably stratified conditions, periods with weak or intermittent turbulence, and morning and evening transition periods.

Background

The measurement and modeling of vertical transport and mixing processes in the lowest few kilometers of the atmosphere are problems of fundamental importance for which a fully satisfactory treatment has yet to be achieved. Important aspects of air quality modeling and weather forecasting are adversely affected by our inability to describe these processes adequately. Although a general theoretical understanding of many of the physical phenomena relevant to vertical transport and mixing processes exists, that understanding is incomplete, the representation of various phenomena in models is often poor, and the data needed to test those models are lacking. The upward and downward movements of air parcels in stable and residual layers of the atmosphere and the interactions between adjacent layers are particularly difficult processes to characterize, and significant difficulties also exist in describing the behavior of the atmosphere during morning and evening transition periods. Complications due to heterogeneous land surfaces and complex terrain further compromise our ability to treat vertical transport and mixing processes properly.

The goals of the program are to increase our understanding of the mechanisms responsible for vertical transport and mixing; to improve our ability to measure quantities required for this understanding; and to develop improved treatments of vertical transport and mixing for use in conceptual and numerical models.

Although progress in these areas would be useful in a wide variety of circumstances, there is particular interest in realizing these objectives for urban regions affected by adjacent elevated terrain (e.g., urban basins or valleys). Moreover, although a complete characterization of the diurnal cycle of vertical transport and mixing may require consideration of fully developed mid-afternoon convective conditions, the emphasis in this program will be on vertical transport and mixing processes in stably stratified conditions, in conditions of weak or intermittent turbulence, and during morning and evening transition periods.

It is anticipated that a significant component of this program will revolve around observations and data analyses from field measurement programs in urban basins or valleys conducted approximately every second or third year. The initial field experiment will most likely occur during the fall of 2000 or the winter of 2001, and likely candidate sites include Salt Lake City and Phoenix; a final determination of dates and location will be made late in the summer of 1999.

Horizontal scales of interest are on the order of two hundred kilometers or less. Vertical scales will depend on the height of the daytime mixed layer and the elevation of any nearby terrain and will generally be on the order of a few kilometers or less. It is realized, of course, that processes involving larger scales may have to be taken into account for a full understanding of smaller-scale ones.

Categories

The EMP–VTMX Program consist of four categories. Prospective investigators should explicitly specify what category or categories are addressed by the proposed research. Individuals or groups intending to participate in field experiments should describe what measurements they intend to make and what instruments will be used to make them. Those intending to analyze data from one or more instruments or who will use data in numerical or conceptual modeling should specify what data are required for their purposes.

Category 1. Analysis of Existing Data Sets

There are a large number of existing data sets collected in previous field campaigns that may be useful in the study of vertical transport and mixing processes. Analyses or other use of these data may directly contribute to the realization of the program's goals, and they may also help to identify processes to be studied in future field experiments and in the design of those experiments.

Category 2. Field Experiments

Experiments designed explicitly to investigate selected vertical transport or exchange mechanisms will be conducted every two to three years during this program. Measurements will

include observations of surface meteorological conditions; vertical profiles of wind velocity, temperature, and humidity; turbulence; tracer concentrations; and other quantities that may be relevant to the study of vertical transport or exchange. Measurements, and subsequent analysis of the data, in one or more of these areas is encouraged. Novel approaches for obtaining and interpreting remote sensing data, combining results from a variety of instrument platforms, and relating these data to quantities that can be calculated in numerical models are also areas of research encouraged in this program.

It is not anticipated that this research program will support significant efforts in instrument development per se. However, to the extent that the use of a specific instrument might provide crucial measurements for field experiments, or that these experiments might provide an opportunity to test instrument technologies developed under other programs, support for such activities will be considered.

Category 3. Improvement and Applications of Numerical and Conceptual Modeling Approaches

Parameterizations of vertical transport or exchange are often based on assumptions about turbulence that are not applicable in all circumstances or on results of simulations that have been "tuned" to match a particular data set.

In many cases the choice of parameter values is left to the individual investigator. Numerical models are particularly prone to failure as the atmosphere becomes more stable and in areas where topographic and thermal forcing are all significant. New conceptual or numerical approaches may then be required to effect significant improvements in model performance. There is a need not only for further developments in numerical and conceptual modeling but also for more systematic testing and evaluation of the parameterizations and assumptions in these models. Whenever possible, such testing should be based on data and not simply on model vs. model comparisons.

Category 4. Development and Application of Tracer Technology

Tracers are expected to be an important tool in the study of vertical transport and mixing in field measurement programs. Tracers can either be naturally occurring, such as ozone, aerosols, or radon, or material released in a controlled manner specifically to study transport and diffusion. Tracer releases may be required from multiple point sources in an urban area or from areas surrounding a city. If released from a city, point, line, and area sources may be necessary. Sampling in both vertical and horizontal directions is desired, with time resolution ranging from hours down to minutes or less. It is expected that successful applicants in this area will play an active role in the design and execution of major field campaigns carried out in this program.

Programmatic Issues

Collaboration among funded investigators will be strongly encouraged in the EMP–VTMX Program. Scientists from non-DOE laboratories/universities are encouraged to explore potential areas of collaboration with scientists from one or more of the DOE laboratories by reviewing the abstracts of proposals from the DOE laboratory scientists that have been tentatively selected for funding. The abstracts will be posted on the DOE EMP–VTMX Website, http://www.pnl.gov/VTMX, approximately February 12, 1999, five weeks after the closing date of the Lab announcement. It is for this reason that the submission dates for DOE and non-DOE scientists are staggered. Alternatively, non-DOE participants may identify gaps in the required research that are not covered by DOE laboratory approved proposals. Note that while independent investigations are anticipated in this program, it is important to keep the programmatic scope (vertical transport and mixing), geographic focus (urban basins or valleys), and areas of emphasis (stable conditions, conditions of weak or intermittent turbulence, and morning and evening transition periods) in mind when proposing and pursuing a course of investigation. Many of the principal research activities of this program will be associated with major field measurement campaigns and with the subsequent analysis of the data collected in them. In addition, efforts will be made to encourage scientists funded by other agencies to participate in field experiments and to share data and results with researchers in this program. An annual meeting of program participants and other interested parties is anticipated, and investigators funded under this program should plan to attend.

Science Issues

Given the programmatic considerations described above, examples of scientific questions that may be addressed in the EMP are:

- What are the fundamental processes that control vertical transport for stable and transition boundary layers?
- What measurements are required to identify and quantify these processes and how can they be made?
- How can momentum, heat, and moisture fluxes be modeled and predicted in a stratified atmosphere with multiple layers?
- What improvements in numerical simulations and forecasts of vertical transport and mixing during stable and transition periods are feasible and how can they be implemented?
- What formulations are most appropriate for the description of vertical diffusion in stable air? For example, how rapidly will an elevated layer of pollutants mix towards the ground in a stable pool trapped within a basin, and how can that mixing be modeled?
- How do pollutants move through residual layers above a stable or convective surface layer and to what extent can pollutants penetrate stable and residual layers aloft?
- What is the sensitivity of current local weather forecast and dispersion model predictions to variations in the treatment of vertical diffusivity and turbulence? What limits our ability to forecast vertical transport in current numerical prediction models?
- How well can remote and in situ sensors measure winds, temperature, turbulence, and pollutants in the lowest few kilometers of the atmosphere? What improvements are needed and practical?
- How do traveling weather systems remove stable stagnant air out of a basin, and under what conditions do these removal mechanisms fail?
- What are the effects of the thermal and roughness properties of urban areas on the vertical structure of the boundary layer?
- What is the nature of the interaction of terrain-induced flows (e.g., drainage winds at night, upslope winds during the day, and waves) with cold air pools in basins, and how do such flows affect the formation and erosion of those pools and the dispersion of pollutants in them?

Supplementary Funding

In years in which major field campaigns are carried out, some modest supplementary funding may be available to offset the increased costs associated with field work. Prospective investigators who anticipate the need for additional support in those circumstances should request in their application the level of additional funding desired and describe the reasons for the request.

EMP field campaigns may also include the use of the DOE G–1 Research Aircraft Facility.

Educational Opportunities

Opportunities exist for the financial support of undergraduate and graduate students wishing to participate in this program through the Department of Energy's Global Change Education Program. Information can be obtained at http://www.atmos.anl.gov/GCEP/ on the Internet.

Program Funding

It is anticipated that up to $1 million in first-year funding will be available for multiple awards to be made in FY 1999 in the categories described above, contingent upon availability of appropriated funds. Applicants may request project support up to four years, with out-year support contingent on availability of appropriated funds, progress of the research, and programmatic needs. The number of awards and range of funding will depend on the number of applications received and selected for award. Annual budgets are expected to range from $60,000 to $200,000 in total costs. Awards are expected to be made in the summer of 1999.

Applications

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria listed in descending order of importance as codified at 10 CFR 605.10(d):

1. Scientific and/or Technical Merit of the Project,
2. Appropriateness of the Proposed Method or Approach,
3. Competency of Applicant's Personnel and Adequacy of Proposed Resources,
4. Reasonableness and Appropriateness of the Proposed Budget.

The evaluation will include program policy factors such as the relevance of the proposed research to the terms of the announcement and an agency's programmatic needs. Note, that external peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers will often be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution.

Information about the development and submission of applications, eligibility, limitations, evaluation, selection process, and other policies and procedures may be found in 10 CFR Part 605, and in the Application Guide for the Office of Energy Research Financial Assistance Program. Electronic access to the Guide and required forms is made available via the World Wide Web at http://www.er.doe.gov/production/grants/grants.html. The research project description must be 15 pages or less, exclusive of attachments and must contain an abstract or summary of the proposed research. On the SC grant face page, form DOE F 4650.2, in block 15, also provide the PI's phone number, fax number, and E-mail address. Attachments include curriculum vitae, a listing of all current and pending federal support, and letters of intent when collaborations are part of the proposed research.

Although the required original and seven copies of the application must be submitted, researchers are asked to submit an electronic version of their abstract of the proposed research in ASCII format and their E-mail address to the Program Director for Atmospheric Sciences, Peter Lunn, by E-mail to peter.lunn@oer.doe.gov. Curriculum vitae should be submitted in a form similar to that of NIH or NSF (two to three pages), see for example: http://www.nsf.gov:80/bfa/cpo/gpg/fkit.htm#forms-9.

The Catalog of Federal Domestic Assistance Number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR Part 605.

Issued in Washington, DC, on December 11, 1998.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 98–33858 Filed 12–21–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Golden Field Office; PV Balance of System Reliability Analysis

AGENCY: Golden Field Office, DOE.

ACTION: Notice. PV Balance of System Reliability Analysis: Supplemental Announcement (05) to the Broad Based Solicitation for Submission of Financial Assistance Applications Involving Research, Development, and Demonstration for Renewable Energy and Energy Efficiency Technologies, DE–PS36–99GO10383.

SUMMARY: The Photovoltaic (PV) Division of the Department of Energy's (DOE) Office of Energy Efficiency and Renewable Energy (EERE) is supporting the issuance of this Supplemental Announcement to EERE's Broad Based Solicitation for Submission of Financial Assistance Applications Involving Research, Development and Demonstration, DE–PS36–99GO10383, dated November 9, 1998. Under the Supplemental Announcement, DOE is soliciting applications to analyze the U.S. Navy's Power Electronic Building Block (PEBB) technology to determine if it is a viable option for PV applications and, if so, establish a set of recommendations how to transfer this technology to the PV industry. Proposals are requested to conduct an assessment and analysis of power integrated circuits/ PEBB devices for PV Balance of System (BOS) applications. The work will include assessments of the applicability, availability, and compatibility of the power integrated circuits to insure that the devices developed in the PEBB program may also be suited for BOS PV power conditioner applications with minimal modifications. Awards under this Supplemental Announcement will be Grants with a term of up to 12 months. Subject to funding availability, the total DOE funding available under this Supplemental Announcement will be $75,000.

All information regarding the Supplemental Announcement will be posted on the DOE Golden Field Office Home page at the address identified below.

DATES: DOE expects to issue the Supplemental Announcement the week of December 7, 1998. The closing date of the Supplemental Announcement is January 15, 1999.

ADDRESSES: The Supplemental Announcement will be posted on the DOE Golden Field Office Home Page at http://www.eren.doe.gov/golden/solicit.htm. It is DOE's intention not to issue hard copies of the Supplemental Announcement.

FOR FURTHER INFORMATION CONTACT: John Motz, Contract Specialist, at 303–275–4737, e-mail john__motz@nrel.gov, or Doug Hooker, Project Officer, at 303–275–4780, e-mail doug__hooker@nrel.gov.

Issued in Golden, Colorado, on December 9, 1998.

Dated: December 14, 1998.

John W. Meeker,

Chief, Procurement, Golden Field Office.

Dated: December 14, 1998.

John K. Lewis,

Procurement Analyst.

[FR Doc. 98–33861 Filed 12–21–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Golden Field Office; Innovative Technologies for Conversion of Biomass to Transportation Fuels

AGENCY: Golden Field Office, DOE.

ACTION: Notice. Innovative Technologies for Conversion of Biomass to Transportation Fuels: Supplemental Announcement (02) to the Broad Based Solicitation for Submission of Financial Assistance Applications Involving Research, Development, and Demonstration for Renewable Energy and Energy Efficiency Technologies, DE–PS36–99GO10383.

SUMMARY: The Office of Fuels Development of the Department of Energy's (DOE) Office of Energy Efficiency and Renewable Energy (EERE) is supporting the issuance of this Supplemental Announcement to EERE's Broad Based Solicitation for Submission of Financial Assistance Applications Involving Research, Development and Demonstration, DE–PS36–99GO10383, dated November 9, 1998. Under the Supplemental Announcement, DOE is soliciting applications to support innovative technologies that will increase the efficiency or lower the cost of producing and converting biomass to transportation fuels. The Office of Fuels Development formulates, executes, and coordinates a balanced and customer-focused national program of research, development, and demonstration of technologies for the production of transportation fuels from biomass. The biomass resources considered include agricultural residues, forestry wastes, and crops grown specifically for energy applications. Proposals are sought in areas of innovative research and development of the following: Plants capable of high biomass yields; systems for culture, harvests, and handling of these high yielding plants; enzymes and fermentation organisms for the production of ethanol from biomass; approaches for converting cellulosic biomass to ethanol. Awards under this Supplemental Announcement will be Cooperative Agreements with a term of up to 12 months. Subject to funding availability, it is anticipated the total DOE funding available under this Supplemental Announcement will be $600,000, with individual awards not to exceed $150,000 of DOE funding. A minimum Cost Share of 20% of the total project cost is required under this Supplemental Announcement.

All information regarding the Supplemental Announcement will be posted on the DOE Golden Field Office Home page at the address identified below.

DATES: DOE expects to issue the Supplemental Announcement the week of December 7, 1998. The closing date of the Supplemental Announcement is January 29, 1999.

ADDRESSES: The Supplemental Announcement will be posted on the DOE Golden Field Office Home Page at http://www.eren.doe.gov/golden/solicit.htm. It is DOE's intention not to issue hard copies of the Supplemental Announcement.

FOR FURTHER INFORMATION CONTACT: John Motz, Contract Specialist, at 303–275–4737, e-mail john__motz@nrel.gov, or Doug Hooker, Project Officer, at 303–275–4780, e-mail doug__hooker@nrel.gov.

Issued in Golden, Colorado, on December 9, 1998.

Dated: December 14, 1998.

John W. Meeker,

Dated: December 14, 1998.

John K. Lewis,

Procurement Analyst.

Chief, Procurement Golden Field Office.

[FR Doc. 98–33862 Filed 12–21–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–95–001]

CNG Transmission Corporation; Notice of Compliance Tariff Filing

December 16, 1998.

Take notice that on December 10, 1998, CNG Transmission Corporation (CNG), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheet:

First Revised Sheet No. 142A
First Revised Sheet No. 153A
First Revised Sheet No. 162A
First Revised Sheet No. 173A

CNG requests an effective date of November 23, 1998 for its proposed tariff sheet.

CNG states that the purpose of this filing is to with the Letter Order by designating a revision number for sheets held for future use that CNG submitted in the instant docket on October 20, 1998.

CNG states that copies of its filing have been mailed to parties to the captioned proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33787 Filed 12–17–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–111–000]

Columbia Gas Transmission Corporation; Notice of Request Under Blanket Authorization

December 16, 1998.

Take notice that on December 10, 1998, Columbia Gas Transmission Corporation (Columbia), 12801 Fair Lake Parkway, Fairfax, Virginia, 22030, filed in Docket No. CP99–111–000 a request pursuant to Sections 157.205 and 157.216(b) of the Commission's Regulations, for permission and approval to abandon about 0.13 mile of 2-inch pipeline and a point of delivery to Columbia Gas of Pennsylvania, Inc., in Bedford County, Pennsylvania, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for

authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33781 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–181–000]

Dauphin Island Gathering Partners; Notice of Proposed Changes in FERC Gas Tariff

December 16, 1998.

Take notice that on December 11, 1998, Dauphin Island Gathering Partners (DIGP) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the tariff sheets listed on Appendix A to this filing to become effective January 10, 1999.

DIGP states that this filing is for the purpose of proposing tariff sheets that clarify existing provisions or provide shippers additional flexibility.

DIGP states that copies of this filing are being served on all affected customers.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33789 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–108–000]

Koch Gateway Pipeline Company; Notice of Request Under Blanket Authorization

December 16, 1998.

Take notice that on December 10, 1998, Koch Gateway Pipeline Company (Koch Gateway), P.O. Box 1478, Houston, Texas 77251–1478, filed in Docket No. CP99–108–000 a request pursuant to Sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.216) for authorization to abandon by removal certain delivery facilities located in Marion County, Mississippi, under Koch Gateway's blanket certificate issued in Docket No. CP82–430, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Koch Gateway proposes to abandon by removal a 2-inch tap, meter station and approximately 15 feet of 2-inch pipeline that served the Tylertown City Gate (Tylertown) on behalf of Walthall Natural Gas Company (Walthall), a local distribution company, in Marion County, Mississippi. Koch Gateway states that the proposed facilities were originally moved at the request of the Mississippi Department of Transportation (MDOT) to accommodate the expansion of the Mississippi State Highway 98. Koch Gateway states that it performed this activity as part of a miscellaneous rearrangement under Section 157.208(a)(1) of the Commission's regulations. Koch Gateway states that the MDOT also requested Walthall to move its distribution line; however, Walthall determined that the relocation of its distribution line was not a feasible option and requested Koch Gateway not to reinstall the related tap and meter station. Koch Gateway states that Walthall concurs with the proposed abandonment and has converted to Southern Natural Gas Company to provide its natural gas supplies in serving Tylertown.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33782 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–106–000]

NE Hub Partners, L.P. Complainant v. CNG Transmission Corporation Respondent; Notice of Complaint and Petition for investigation

December 16, 1998.

Take notice that on December 8, 1998, NE Hub Partners, L.P. (NE Hub), 16420 Park Ten Place, Suite 420, Houston, Texas 77084, filed in Docket No. CP99–106–000, a complaint and petition for investigation pursuant to Rule 206 of the Commission's Rules of Practice and Procedure, against CNG Transmission Corporation (CNG), alleging that CNG has constructed a storage well without Commission authorization, all as more fully set forth in the complaint on file with the Commission and open to public inspection.

NE Hub asks that the Commission order CNG to cease and desist from further work on a well, TW–605, at CNG's Tioga storage reservoir in Northern Pennsylvania. NE Hub alleges that CNG drilled TW–605 with the intent of using the well for storage operations. NE Hub states, among other things, that it believes CNG does not possess and has not sought or obtained, authority from the Commission to drill or complete this storage well. Moreover, NE Hub alleges that CNG has improperly and incorrectly characterized this well as an observation well in pleadings filed with the Commission. NE Hub also request that the Commission take the additional actions described in the complaint.

Any person desiring to be heard or make a protest with reference to NE Hub's complaint should file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington D.C. 20426, a motion to intervene or protest

in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions, together with the answer of Respondent to the Complaint, should be filed on or before January 15, 1999. Any person desiring to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. Answers to the complaint are also due on or before January 15, 1999.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33779 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP93–197–004]

Southern California Gas Company; Notice of Report of Refunds

December 16, 1998.

Take notice that on November 24, 1998, Southern California Gas Company (SoCalGas) tendered for filing its Report of Refunds at Docket No. RP93–197–003.

SoCalGas states that the report of refunds reflects the refunds to interstate shippers (who are not also end-use customers of SoCalGas) of all amounts collected through the Wheeler Ridge interconnection charge for the July 13, 1993 through December 31, 1993 period plus interest calculated pursuant to the Commission's regulations.

SoCalGas states that the refunds were distributed on November 24, 1998. SoCalGas states that the refunds totaled $1,889,994.85 inclusive of interest.

SoCalGas states that copies of the filing were served upon all of interstate shippers eligible for refund and the California Public Utilities Commission. SoCalGas further states that each customer received its pertinent detail when refunds were distributed.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before December 22, 1998. 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. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33785 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–107–000]

Tennessee Gas Pipeline Company; Notice of Application to Abandon

December 16, 1998.

Take notice that on December 8, 1998, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252–2511 filed under Section 7(b) of the Natural Gas Act for authority to abandon, temporary facilities. Specifically, Tennessee seeks authority to remove and sell as scrap 200-feet of 2-inch line installed to assist producers during rehabilitation of Tennessee's Line 100–1 in Liberty County, Texas.

Any person desiring to be heard or make any protest with reference to said application should on or before January 6, 1999, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20406, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the Protesters parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rule's.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required, or if the Commission on its own review of the matter finds that permission and approval of the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervent is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Tennessee to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33780 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP–174–001]

Williams Gas Pipelines Central, Inc.; Notice of Compliance Filing

December 16, 1998.

Take notice that on December 11, 1998, Williams Gas Pipelines Central, Inc. (Williams), tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, with the proposed effective date of January 1, 1999:

Second Revised Sheet No. 38
First Revised Sheet No. 39

Williams states that this filing is being made pursuant to Section 375.307(e)(4) of the Commission's Rules and Regulations. On December 1, 1998, Williams made a filing to recover through an alternate mechanism any GSR costs not recovered through the mechanism set forth in Article 14.2 of its tariff. By Commission letter order issued December 10, 1998, Williams was directed to correct the pagniation of Sheet Nos. 38 and 39. The instant filing is being made to comply with the order.

Williams states that a copy of its filing was served on all of Williams' jurisdictional customers and interested state commissions.

Any person desiring to protect this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public

inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33788 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–102–000]

Wyoming Interstate Company, Ltd.; Notice of Application

December 16, 1998.

Take notice that on December 3, 1998, Wyoming Interstate Company, Ltd. (WIC), Post Office Box 1087, Colorado Springs, Colorado 80944, filed in Docket No. CP99–102–000, an application pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Regulations, for a certificate of public convenience and necessity authorizing WIC to construct and operate the proposed Medicine Bow Lateral, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, WIC states that the Medicine Bow Lateral will consist of 143 miles of 24-inch diameter pipeline extending from two proposed interconnects with non-jurisdictional facilities in Converse County, Wyoming to an interconnect with WIC's existing mainline approximately seven and one half miles west of the existing Cheyenne Compressor Station in Weld County, Colorado. In addition, WIC proposes to construct the 7,200 horsepower Medicine Bow Compressor Station in the vicinity of the two receipt points.

WIC states that the Medicine Bow Lateral will allow for the firm transportation of up to 260,000 dth per day of new gas supplies from the Powder River Basin to WIC's mainline. WIC estimates that the proposed facilities will cost $80,429,200.

Any person desiring to be heard or making any protest with reference to said application should on or before January 6, 1999 file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. The Commission's rules require that protestors provide copies of their protests to the party or person to whom the protests are directed. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

A person obtaining intervenor status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents issued by the Commission, filed by the applicant, or filed by all other intervenors. An intervenor can file for rehearing of any Commission order and can petition for court review of any such order. However, an intervrnor must serve copies of comments or any other filing it makes with the Commission to every other intervenor in the proceeding, as well as filing an original and 14 copies with the Commission.

A person does not have to intervene, however, in order to have comments considered. A person, instead, may submit two copies of such comments to the Secretary of the Commission. Commenters will be placed on the Commission's environmental mailing list, will receive copies of environmental documents, and will be able to participate in meetings associated with the Commission's environmental review process. Commenters will not be required to serve copies of filed documents on all other parties. However, commenters will not receive copies of all documents filed by other parties or issued by the Commission, and will not have the right to seek rehearing or appeal the Commission's final order to a Federal court.

The Commission will consider all comments and concerns equally, whether filed by commenters or those requesting intervenor status.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 7 and 15 of the NGA and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for WIC to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33778 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–403–002]

Young Gas Storage Company, Ltd.; Notice of Proposed Changes In FERC Gas Tarifff

December 16, 1998.

Take notice that on December 11, 1998, Young Gas Storage Company, Ltd. (Young), tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, Substitute Original Sheet No. 80B, Substitute Original Sheet No. 80C and Substitute Original Sheet No. 119H to be effective November 2, 1998.

Young states it has been pointed out that it made certain minor errors in its compliance filing filed November 23, 1998 in Docket No. RP98–403. Young is filing substitute tariff sheets to correct these errors.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr,

Acting Secretary.

[FR Doc. 98–33786 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99–89–000, et al.]

Niagara Mohawk Power Corporation, et al.; Electric Rate and Corporate Regulation Filings

December 14, 1998.

Take notice that the following filings have been made with the Commission:

1. Niagara Mohawk Power Corporation

[Docket No. ER99–89–000]

Take notice that on December 9, 1998, Niagara Mohawk Power Corporation (Niagara Mohawk), tendered for filing a Notice of Withdrawal of Filing applicable to the unexecuted Service Agreement it filed on October 8, 1998 on behalf of the City of Watertown under its proposed Scheduling and Balancing Services Tariff. The Service Agreement was filed on behalf of the City of Watertown as a result of a clerical error. The City of Watertown does not currently take service under Niagara Mohawk's Open Access Transmission Tariff.

Copies of the filing were served upon all intervenors in Docket No. ER98–4635–000 (the Scheduling and Balancing Tariff proceeding), including the City of Watertown and the New York Public Service Commission.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

2. Sierra Pacific Power Company

[Docket No. ER99–862–000]

Take notice that on December 9, 1998, Sierra Pacific Power Company (Sierra), tendered for filing Service Agreements (Service Agreements) with Statoil Energy Trading, Inc., for both Short-Term Firm and Non-Firm Point-to-Point Transmission Service under Sierra's Open Access Transmission Tariff (Tariff).

Sierra filed the executed Service Agreements with the Commission in compliance with Sections 13.4 and 14.4 of the Tariff and applicable Commission Regulations. Sierra also submitted revised Sheet No. 148 (Attachment E) to the Tariff, which is an updated list of all current subscribers.

Sierra requests waiver of the Commission's notice requirements to permit and effective date of December 11, 1998, for Attachment E, and to allow the Service Agreements to become effective according to their terms.

Copies of this filing were served upon the Public Service Commission of Nevada, the Public Utilities Commission of California and all interested parties.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

3. Public Service Company of New Mexico

[Docket No. ER99–863–000]

Take notice that on December 9, 1998, Public Service Company of New Mexico (PNM), tendered for filing an executed service agreement, for electric power and energy sales at negotiated rates under the terms of PNM's Power and Energy Sales Tariff, with Los Alamos County (dated November 13, 1998).

PNM's filing is available for public inspection at its offices in Albuquerque, New Mexico.

Copies of the filing have been sent to Los Alamos County and to the New Mexico Public Utility Commission.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

4. Arizona Public Service Company

[Docket No. ER99–864–000]

Take notice that on December 9, 1998, Arizona Public Service Company (APS), tendered for filing Umbrella Service Agreement to provide Firm Point-to-Point Transmission Service to Enron Power Marketing Inc., (Enron) under APS' Open Access Transmission Tariff.

A copy of this filing has been served on Enron and the Arizona Corporation Commission.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

5. Kansas City Power & Light Company

[Docket No. ER99–865–000]

Take notice that on December 9, 1998, Kansas City Power & Light Company (KCPL), tendered for filing a Service Agreement dated November 11, 1998, between KCPL and Energy Transfer Group, L.L.C. This Agreement provides for the rates and charges for Short-term Firm Transmission Service. In its filing, KCPL states that the rates included in the above-mentioned Service Agreement are KCPL's rates and charges in the compliance filing to FERC Order No. 888–A in Docket No. OA97–636–000.

KCPL proposes an effective date of December 1, 1998 and requests a waiver of the Commission's notice requirement to allow the requested effective date.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

6. Kansas City Power & Light Company

[Docket No. ER99–866–000]

Take notice that on December 9, 1998, Kansas City Power & Light Company (KCPL), tendered for filing a Service Agreement dated November 11, 1998, between KCPL and Energy Transfer Group, L.L.C. This Agreement provides for the rates and charges for Non-Firm Transmission Service. In its filing, KCPL states that the rates included in the above-mentioned Service Agreement are KCPL's rates and charges in the compliance filing to FERC Order 888–A in Docket No. OA97–636.

KCPL proposes an effective date of December 1, 1998, and requests waiver of the Commission's notice requirement.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

7. Western Resources, Inc.

[Docket No. ER99–867–000]

Take notice that on December 9, 1998, Western Resources, Inc. (Western Resources), tendered for filing agreements between Western Resources and Columbia Energy Power Marketing Corporation. Western Resources states that the purpose of the agreement is to permit the customer to take service under Western Resources' market-based power sales tariff on file with the Commission.

The agreement is proposed to become effective November 13, 1998.

Copies of the filing were served upon Columbia Energy Power Marketing Corporation and the Kansas Corporation Commission.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

8. Carolina Power & Light Company

[Docket No. ER99–868–000]

Take notice that on December 9, 1998, Carolina Power & Light Company (CP&L), tendered for filing an executed Service Agreement with Associated Electric Cooperative, Inc., under the provisions of CP&L's Market-Based Rates Tariff, FERC Electric Tariff No. 4. This Service Agreement supersedes the un-executed Agreement originally filed in Docket No. ER98–3385–000 and approved effective May 18, 1998.

Copies of the filing were served upon the North Carolina Utilities Commission and the South Carolina Public Service Commission.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

9. Blackstone Valley Electric Company

[Docket No. ER99–869–000]

Take notice that on December 9, 1998, Blackstone Valley Electric Company (Blackstone), tendered for filing an executed Related Facilities Agreement between itself and Millennium Power Partners, L.P., (Millennium). The Related Facilities Agreement is to establish the requirements, terms and conditions for Blackstone to complete transmission upgrades which will enable Millennium to operate in parallel with the Eastern Utilities Associates electrical system.

Blackstone requests that the agreement be allowed to become effective in 60 days.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

10. SEMCO Energy Services, Inc.

[Docket No. ER99–870–000]

Take notice that on December 9, 1998, SEMCO Energy Services, Inc. (SEMCO), tendered for filing a Notice of Cancellation of its FERC Electric Rate Schedule No. 1.

SEMCO requests that the Commission act in an expedited manner and accept the notice of cancellation by no later than December 30, 1998.

Comment date: December 29, 1998, in accordance with Standard Paragraph E at the end of this notice.

11. Nevada Power Company

[Docket No. FA97–14–001]

Take notice that on December 23, 1997, Nevada Power Company, tendered for filing its refund report in the above referenced docket.

Comment date: December 30, 1998, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection.

David P. Boergers,

Secretary.

[FR Doc. 98–33810 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER96–2580–009, et al.]

NUI Corp.-NUI Energy Brokers, et al.; Electric Rate and Corporate Regulation Filings

December 11, 1998.

Take notice that the following filings have been made with the Commission:

1. NUI Corp.-NUI Energy Brokers

[Docket No. ER96–2580–009]

Take notice that on December 9, 1998, the above-mentioned power marketer filed quarterly reports with the Commission in the above-mentioned proceeding for information only. This filing is available for public inspection and copying in the Public Reference Room or on the internet under Records Information Management System (RIMS) for viewing and downloading.

2. Business Discount Plan, Inc.

[Docket No. ER99–581–000]

Take notice that on December 7, 1998, Business Discount Plan, Inc., tendered for filing an amendment to its November 12, 1998, Petition for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority filed in the above-referenced docket.

Comment date: December 28, 1998, in accordance with Standard Paragraph E at the end of this notice.

3. Virginia Electric and Power Company

[Docket No. ER99–857–000]

Take notice that on December 8, 1998, Virginia Electric and Power Company (Virginia Power), tendered for filing a Service Agreement for Firm Point-to-Point Transmission Service with TransAlta Energy Marketing (U.S.) Inc., under the Open Access Transmission Tariff to Eligible Purchasers dated July 14, 1997. Under the tendered Service Agreement, Virginia Power will provide firm point-to-point service to the Transmission Customer under the rates, terms and conditions of the Open Access Transmission Tariff.

Virginia Power requests an effective date of December 8, 1998, the date of filing the Service Agreement.

Copies of the filing were served upon TransAlta Energy Marketing (U.S.) Inc., the Virginia State Corporation Commission and the North Carolina Utilities Commission.

Comment date: December 28, 1998, in accordance with Standard Paragraph E at the end of this notice.

4. Virginia Electric and Power Company

[Docket No. ER99–858–000]

Take notice that on December 8, 1998, Virginia Electric and Power Company (Virginia Power), tendered for filing a Service Agreement for Firm Point-to-Point Transmission Service with Duke Energy Trading and Marketing L.L.C., under the Open Access Transmission Tariff to Eligible Purchasers dated July 14, 1997. Under the tendered Service Agreement, Virginia Power will provide firm point-to-point service to the Transmission Customer under the rates, terms and conditions of the Open Access Transmission Tariff.

Virginia Power requests an effective date of December 8, 1998, the date of filing the Service Agreement.

Copies of the filing were served upon Duke Energy Trading and Marketing L.L.C., the Virginia State Corporation Commission and the North Carolina Utilities Commission.

Comment date: December 28, 1998, in accordance with Standard Paragraph E at the end of this notice.

5. Virginia Electric and Power Company

[Docket No. ER99–859–000]

Take notice that on December 8, 1998, Virginia Electric and Power Company (Virginia Power), tendered for filing a Service Agreement for Non-Firm Point-to-Point Transmission Service with TransAlta Energy Marketing (U.S.) Inc., under the Open Access Transmission Tariff to Eligible Purchasers dated July 14, 1997. Under the tendered Service Agreement, Virginia Power will provide non-firm point-to-point service to the Transmission Customers under the rates, terms and conditions of the Open Access Transmission Tariff.

Virginia Power requests an effective date of December 8, 1998, the date of filing the Service Agreement.

Copies of the filing were served upon TransAlta Energy Marketing (U.S.) Inc., the Virginia State Corporation Commission and the North Carolina Utilities Commission.

Comment date: December 28, 1998, in accordance with Standard Paragraph E at the end of this notice.

6. FirstEnergy System

[Docket No. ER99–860–000]

Take notice that on December 8, 1998, FirstEnergy System filed a Service Agreement to provide Non-Firm Point-to-Point Transmission Service for El Paso Power Services Company, (the Transmission Customer). Services are being provided under the FirstEnergy System Open Access Transmission Tariff submitted for filing by the Federal Energy Regulatory Commission in Docket No. ER97–412–000.

The proposed effective date under this Service Agreement is November 20, 1998.

Comment date: December 28, 1998, in accordance with Standard Paragraph E at the end of this notice.

7. American Electric Power Service Corporation

[Docket No. ER99–861–000]

Take notice that on December 8, 1998, the American Electric Power Service Corporation (AEPSC), tendered for filing service agreements under the Wholesale Market Tariff of the AEP Operating Companies (Power Sales Tariff). The Power Sales Tariff was accepted for filing effective October 10, 1997 and has been designated AEP Operating Companies' FERC Electric Tariff Original Volume No. 5. AEPSC respectfully requests waiver of notice to permit the service agreements to be made effective for service as specified in the submittal letter to the Commission with this filing.

A copy of the filing was served upon the Parties and the State Utility Regulatory Commissions of Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia and West Virginia.

Comment date: December 28, 1998, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection.

David P. Boergers,

Secretary.

[FR Doc. 98–33811 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Amendment of Recreation Plan

December 16, 1998.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of Recreation Plan.

b. *Project No:* 2459–076.

c. *Date Filed:* November 30, 1998.

d. *Applicant:* West Penn Power Company.

e. *Name of Project:* Lake Lynn Project.

f. *Project location:* Cheat River in Monongalia County, West Virginia and Fayette County, Pennsylvania.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Charles Simons, West Penn Power Company, 800 Cabin Hill Drive, Greensburg, PA 15601–1689, (724) 838–6397.

i. *FERC Contact:* Patti Pakkala, (202) 219–0025.

j. *Comment Date:* January 28, 1999.

k. *Description of Project:* West Penn Power Company, licensee for the Lake Lynn Project, FERC No. 2459, has filed a request to amend the project's recreation plan. The recreation plan, previously approved by the Commission on April 11, 1997, included a provision for a 4.5-mile-long, 12-foot-wide hiking/biking trail between the project powerhouse and Cheat Haven Peninsula. The amendment application requests Commission approval to narrow the width of the trail from 12 to 4 feet for the section of trail between Manning's Run and the peninsula (3.1 miles). With the reduction in width, the amendment application further proposes to remove the "biking" designation from the 3.1 miles of trail between Manning's Run and the Cheat Haven Peninsula.

In addition to the above, the amendment application indicates the licensee has offered to provide $175,000 in funding, to the West Virginia Department of Natural Resources, for improvements to a hiking trail in the Snake Hill Wildlife Management Area. This proposal is intended to provide more shoreline access to project waters.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C1. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33783 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Non-Project Use of Project Lands Application for Commercial/ Residential Marinas

December 16, 1998.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Non-Project Use of Project Lands Applications for Commercial/Residential Marinas.

b. *Project Nos:* 2503–046 and –047.

c. *Date Filed:* October 30 and November 2, 1998, respectively.

d. *Applicant:* Duke Power Company.

e. *Name of Project:* Keowee and Jocassee Project.

f. *Project location:* Lake Keowee, Seneca Township, Oconee County, South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. E. M. Oakley, Duke Power Company, P.O. Box 1006, EC 12V, Charlotte, NC 28201–1006, (704) 382–5778.

i. *FERC Contact:* Patti Pakkala, (202) 219–0025.

j. *Comment Date:* January 28, 1999.

k. *Description of Project:* Duke Power Company, licensee for the Keowee and Jocassee Project, FERC No. 2503, has filed two separate applications for approval of a "non-project use of project lands." The applications are more specifically for two commercial/ residential marinas on Lake Keowee. The first application, project no. 2503–046, is for a lease to Beacon Shores Homeowners Association, Inc., for a four dock, 32-slip facility occupying 1.229 acres within the bed of Lake Keowee. The second application, project no. 2503–047, is for a lease to Waterford Homeowners Association, Inc., for a four dock, 46-slip facility occupying 1.338 acres within the bed of Lake Keowee. Parties commenting on these applications should specify the project number for the application to which their comments apply.

1. This notice also consists of the following standard paragraphs: B, C1, and D2.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements for Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C1. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–33784 Filed 12–21–98; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6206–9]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Maximum Achievable Control Technology Standards Development Under Title III (Section 112) of the Clean Air Act Regulatory Development Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: Maximum Achievable Control Technology Standards Development Under Title III (section 112) of the Clean Air Act Regulatory Development Program, EPA ICR Number 1602.03, OMB Control Number 2060–0239, expiration February 28, 1999. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 21, 1999.

FOR FURTHER INFORMATION CONTACT: Contact Sandy Farmer at EPA by phone at (202) 260–2740, by email at farmer.sandy@epamail.epa.gov, or download off the Internet at http://www.epa.gov/icr and refer to EPA ICR No. 1602.03.

SUPPLEMENTARY INFORMATION:

Title: Maximum Achievable Control Technology Standards Development Under Title III (section 112) of the Clean Air Act Regulatory Development Program, EPA ICR Number 1602.03 OMB Control Number 2060–0239. This is a request for extension of a currently approved information collection.

Abstract: Depending on the number of facilities in an individual source category, respondents would be required to complete one of two surveys. In those source categories with 400 or fewer facilities, respondents would complete a survey for MACT standards development. This survey is designed to obtain facility-specific information on process types, emissions, controls, and factors affecting costs to ensure that the EPA Office of Air Quality Planning and Standards has sufficient information to make subcategory distinctions and MACT floor decisions for each National Emission Standard for Hazardous Air Pollutants (NESHAP). In those source categories with more than 400 facilities, respondents would complete a screening survey. EPA would use the results of the screening survey to develop a survey design for a separate source category information collection request for clearance to send the MACT standards development survey to the appropriate facilities as determined by the survey design. The EPA is also asking the respondent to provide corporate, facility and product level sales information. This information is necessary to perform a small business analysis to meet the requirements of the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. The EPA considers the sales information to be readily available to the respondent; therefore, the burden

hours estimated for each respondent has not been changed. The agency's authority to gather information is presented in section 114 of the Clean Air Act, as amended (42 U.S.C. 7414). If any information is submitted to EPA for which a claim of confidentiality is made, the information will be safeguarded according to EPA policies set forth in Title 40, chapter I, part 2, subpart B—Confidentiality of Business Information (see 40 CFR part 2). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Ch. 15. The **Federal Register** document required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on June 2, 1998 (63 FR 29987). The EPA received one letter with comments.

Burden Statement: The average annual reporting burden for 805 facilities estimated to receive the MACT standards development survey is 68,425 hours and 17,000 hours for the 2,000 facilities estimated to receive the screening survey. The estimated burden hours per response is 85 hours for the MACT standards development survey and 8.5 hours for the screening survey. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Source categories as listed by EPA for development of NESHAP under section 112(d), Amended Clean Air Act.

Estimated Number of Respondents: 2,805 (805 (MACT Standards); 2,000 (Screening Study)).

Frequency of Response: Initial.

Estimated Total Annual Hour Burden: 85,425 hours (68,425 MACT, 17,000 Screening Study).

Estimated Total Annualized Cost Burden: 0.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the following addresses. Please refer to EPA ICR No. 1602.03 and OMB Control No. 2060–0239 in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, OP, Regulatory Information Division (2137), 401 M Street, SW, Washington, DC 20460.

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503.

Dated: December 16, 1998.

Joseph Retzer,

Director, Regulatory Information Division.

[FR Doc. 98–33843 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6206–8

Agency Information Collection Activities: Submission for OMB Review; Comment Request; EPA Worker Protection Standard for Hazardous Waste Operations and Emergency Response

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval: EPA Worker Protection Standard for Hazardous Waste Operations and Emergency Response, EPA ICR 1426.05, OMB Control #2050–0105, expiration January 31, 1999. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes actual data collection instrument.

DATES: Comments must be submitted on or before January 21, 1999.

FOR FURTHER INFORMATION CONTACT: Contact Sandy Farmer at EPA by phone at (202) 260–2740, by E-mail at farmer.sandy@epa.gov, or download off the Internet at http://www.epa.gov/icr and refer to EPA ICR No. 1426.05.

SUPPLEMENTARY INFORMATION:

Title: EPA Worker Protection Standard for Hazardous Waste Operations and Emergency Response, OMB Control #2050–0105, EPA ICR #1426.05, expiration January 31, 1999. This is a request for an extension of a currently approved collection.

Abstract: Section 126(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) require EPA to set worker protection standards for State and local employees engaged in hazardous waste operations and emergency response in the 27 States that do not have Occupational Safety and Health Administration approved State plans. The EPA coverage, required to be identical to the OSHA standards, extends to three categories of employees: those in clean-ups at uncontrolled hazardous waste sites, including corrective actions at Treatment, Storage and Disposal (TSD) facilities regulated under the Resource Conservation and Recovery Act (RCRA); employees working at routine hazardous waste operations at RCRA TSD facilities; and employees involved in emergency response operations without regard to location. This ICR renews the existing mandatory recordkeeping collection of ongoing activities including monitoring of any potential employee exposure at uncontrolled hazardous waste site, maintaining records of employee training, refresher training, medical exams, and reviewing emergency response plans. An agency may not conduct or sponsor, and a person is required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are displayed in 40 CFR part 9 and 48 CFR Chapter 15. The **Federal Register** document required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on August 7, 1998 (63 FR 42396). No comments were received.

Burden Statement: The annual public reporting and recordkeeping burden for this collection is estimated to average 10.64 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able

to respond to a collection of information; search data sources; and complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: State and local employers of persons engaged in hazardous waste operations and emergency response in states without an OSHA approved State plan.

Estimated Number of Respondents: 24,000.

Frequency of Response: On-going records maintenance.

Estimated Total Annual Hour Burden: 255,427 hours.

Estimated Total Annualized Cost Burden: 0.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the following addresses. Please refer to EPA ICR No. 1426.05 and OMB Control No. 2050–0105 in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, Regulatory Information Division (2137), 401 M Street, SW, Washington, DC 20460; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, D.C. 20503.

Dated: December 16, 1998.

Joseph Retzer,

Director, Regulatory Information Division.

[FR Doc. 98–33844 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6206–7]

Nutrient Enrichment Focus Team Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Nutrient Enrichment Focus Team Meeting.

SUMMARY: The Gulf of Mexico Program will hold its Nutrient Enrichment Focus Team Meeting.

DATES: The meeting will be held on January 26 and 27, 1999.

ADDRESSES: The meeting site will be the River House Conference Facility, Stennis Space Center, MS, telephone: (228) 688–7618.

FOR FURTHER INFORMATION CONTACT: James D. Giattina, Director, Gulf of Mexico Program Office, Building 1103, Room 202, Stennis Space Center, MS 39529–6000 at (228) 688–1172.

SUPPLEMENTARY INFORMATION: The meeting is from 8:30 a.m. until 5:00 p.m. on January 26, and from 8:30 a.m. until 12:00 p.m. on January 27. Agenda items will include: Roll Call, Selection of Focus Team Co-Chairs, Presentations on Projects and Proposals, and Regional Criteria Strategy Development Meeting Summaries.

The meeting is open to the public.

Bryon O. Griffith,

Deputy Director, Gulf of Mexico Program Office.

[FR Doc. 98–33845 Filed 12–21–98; 8:45 am]

BILLING CODE: 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6207–1]

Science Advisory Board (SAB) Executive Committee (EC); Notification of Public Advisory Committee Meeting

Pursuant to the Federal Advisory Committee Act, Pub. L. 92–463, notice is hereby given that the Science Advisory Board's (SAB) Executive Committee, will conduct a public teleconference meeting on Friday, January 15, 1999, between the hours of 11 am and 1 pm, Eastern Time.

The meeting will be coordinated through a conference call connection in Room 3709 of the Waterside Mall, U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460. The public is welcome to attend the meeting physically or through a telephonic link. Additional instructions about how to participate in the conference call can be obtained by calling Ms. Priscilla Tillery-Gadson or Ms. Betty Fortune at (202) 260–4126 (tillery.priscilla@epa.gov or fortune.betty@epa.gov) by January 8, 1999.

In this meeting, the Executive Committee plans to review drafts from several of its standing Committees. These anticipated drafts include: 1. Environmental Economics Advisory Committee (EEAC): Commentary on the Pollution Abatement and Control Expenditures (PACE) Survey; 2. Environmental Engineering Committee (EEC): (a) Report from the Quality Management Subcommittee, and (b) Leachability: The Need for Review of Current Agency Procedures; 3. Integrated Human Exposure Committee (IHEC): Advisory on Agency Plans for the National Human Exposure Assessment Survey (NHEXAS); 4. Radiation Advisory Committee (RAC): Report from the Uncertainties in Radiation Risk Subcommittee. Please check with SAB staff prior to the meeting to determine if any changes in the anticipated reports has been made.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning the meeting or wishing to submit comments should contact Dr. Donald G. Barnes, Designated Federal Officer for the Executive Committee, Science Advisory Board (1400), U.S. Environmental Protection Agency, Washington, DC 20460; telephone (202) 260–4126; FAX (202) 260–9232; and via E-Mail at: barnes.don@epa.gov. Copies of the relevant documents are available from the same source. Draft documents will also be available on the SAB Website (http://www.epa.gov/sab) at least one week prior to the meeting.

Dated: December 17, 1998.

Donald G. Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 98–33839 Filed 12–21–98; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of subsection (e)(2) of the "Government in the Sunshine Act" (5 U.S.C. 552b(e)(2), notice is hereby given that art its open meeting held at 9:06 a.m. on Friday, December 18, 1998, the Corporation's Board of Directors determined, on motion of Vice Chairman Andrew C. Hove, Jr., seconded by Director Ellen S. Seidman (Director, Office of Thrift Supervision), concurred in by Director John D. Hawke, Jr. (Comptroller of the Currency), and Chairman Donna Tanoue, that Corporation business required the withdrawal from the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matter:

Memorandum re: 1998 Alternative Dispute Resolution Annual Report to the Board.

The Board further determined, by the same majority vote, that no notice earlier than December 15, 1998, of the change in the subject matter of the meeting was practicable.

Dated: December 18, 1998.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 98–34052 Filed 12–18–98; 3:36 pm]

BILLING CODE 6714–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 9:28 a.m. on Friday, December 18, 1998, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to the Corporation's corporate, supervisory, and resolution activities.

In calling the meeting, the Board determined, on motion of Vice Chairman Andrew C. Hove, Jr., seconded by Director Ellen S. Seidman (Director, Office of Thrift Supervision), concurred in by Director John D. Hawke, Jr. (Comptroller of the Currency), and Chairman Donna Tanoue, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 550 17th Street, N.W., Washington, D.C.

Dated: December 18, 1998.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 98–34053 Filed 12–18–98; 3:36 pm]

BILLING CODE 6714–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency has submitted the following proposed information collection to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

Title: Flood Mitigation Assistance—Flood Mitigation Plan.

Type of Information Collection: Reinstatement, with change of a previously approved collection for which approval has expired.

OMB Number: 3067–0271.

Abstract: A State and communities must have a FEMA approved plan before awarding project grant assistance to a community or State applicant. The planning requirement is to encourage communities and States to evaluate the flood hazard in their jurisdiction and devise a feasible strategy to reduce the impacts of flood hazards.

Affected Public: State, Local or Tribal Government.

Number of Respondents: 616.

Estimated Time per Respondent: Development of New Flood Mitigation Plans: 440 hours. Modify, refine Flood Mitigation Plans from Existing Plans: 40 hours. Update Existing Flood Mitigation Plans and Forward to the State: 200 hours. State Reviews, Evaluations, and Coordinating Flood Mitigation Plans and forward to FEMA for Approval: 40 hours.

Estimated Total Annual Burden Hours: 116,624.

Frequency of Response: On Occasion.

Comments

Interested persons are invited to submit written comments on the proposed information collection to Victoria Wassmer, Desk Officer for the Federal Emergency Management Agency, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 within 30 days of the date of this notice.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Muriel B. Anderson, FEMA Information Collections Officer, Federal Emergency Management Agency, 500 C Street, SW, Room 311, Washington, DC 20472. Telephone number (202) 646–2625. FAX number (202) 646–3524 or email muriel.anderson@fema.gov.

Dated: December 11, 1998.

Muriel B. Anderson,

Acting Director, Program Services Division, Operations Support Directorate.

[FR Doc. 98–33805 Filed 12–21–98; 8:45 am]

BILLING CODE 6718–01–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency has submitted the following proposed information collection to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

Title: Claims of Federal Personnel for Personal Property Loss or Damage.

Type of Information Collection: Extension of a currently approved collection.

OMB Number: 3067–0167.

Abstract: 31 U.S.C 3721 requires employees of the Federal Emergency Management Agency (FEMA) who file a claim with the agency for the loss or damage to personal property to substantiate their claims as a condition of payment by the agency. FEMA personnel provide information to make claims against FEMA for personal property damage incident to their service. The Agency's substantiation requirements are set forth in 44 CFR 11.76. The information provided by personnel is used by FEMA to determine the appropriate disposition and payment of claims.

Affected Public: Federal Government.

Number of Respondents: 7.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 7.

Frequency of Response: On occasion.

Comments

Interested persons are invited to submit written comments on the proposed information collection to Victoria Wassmer, Desk Officer for the Federal Emergency Management Agency, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 within 30 days of the date of this notice.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Muriel B. Anderson, FEMA Information Collections Officer, Federal Emergency Management Agency, 500 C Street, SW, Room 316, Washington, DC 20472. Telephone number (202) 646–2625. FAX number (202) 646–3524. Email address Muriel.anderson@FEMA.gov.

Dated: December 11, 1998.

Muriel B. Anderson,

Acting Director, Program Services Division, Operations Support Directorate.

[FR Doc. 98–33806 Filed 12–21–98; 8:45 am]

BILLING CODE 6718–01–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency has submitted the following proposed information collection to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

Title: Crisis Counseling Assistance and Training Program.

Type of Information Collection: Reinstatement, with change of a previously approved collection for which approval has expired.

OMB Number: 3067–0166.

Abstract: Information collected under the Crisis Counseling Assistance and Training Program will be used by FEMA to award grants to States to provide crisis counseling services. The information is collected in several forms: applications, quarterly reports, and financial reports.

The immediate services application is by letter which includes: a short description of the State or private mental health agency, their existing resources, and a justification for federal assistance; the geographical area of the disaster where services will be provided; a brief plan of services indicating how the disaster victims and emergency responders mental health needs will be met; a budget governments will commit, the number of staff and their salaries, the funding levels for different agencies if more than one are involved, and the estimate of the Federal assistance requested.

The regular program using the SF 424, Application for Federal Assistance, requires information similar to, but more comprehensive than, the immediate services application including: an estimate of the number of people affected by the disaster needing crisis counseling assistance; how the estimate was determined; the extent of physical, psychological, and social problems observed; the types of mental health problems encountered by the victims and other relevant information; the length of time needed for those affected; and a detailed plan of services.

The plan of services should include: a time-phase implementation plan and a time schedule for the hiring and training of staff and the services to be provided; a description of the types of services that will be offered and the length of time they will be available; a description of the training program; a description of the facilities to be used and a detailed budget.

Quarterly and final progress reports in narrative form and financial reports using SF 269 are required.

Affected Public: State, Local or Tribal Government.

Number of Respondents: 28.

Estimated Time per Respondent: 308.

Estimated Total Annual Burden Hours: 4896.

Frequency of Response: Quarterly.

Comments

Interested persons are invited to submit written comments on the proposed information collection to the Desk Officer for the Federal Emergency Management Agency, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 within 30 days of the date of this notice.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Muriel B. Anderson, FEMA Information Collections Officer, Federal Emergency Management Agency, 500 C Street, SW, Room 316, Washington, DC 20472. Telephone number (202) 646–2625, FAX number (202) 646–3524 or email address muriel.anderson@fema.gov.

Dated: December 11, 1998.

Muriel B. Anderson,

Acting Director, Program Services Division, Operations Support Directorate.

[FR Doc 98–33807 Filed 12–21–98; 8:45 am]

BILLING CODE 6718–01–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

Open Meeting, Technical Mapping Advisory Council

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice of teleconference meeting.

SUMMARY: In accordance with § 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. 1, the Federal Emergency Management Agency gives notice that the following meeting will be held:

Name: Technical Mapping Advisory Council.

Date of Meeting: January 5, 1999.

Place: The FEMA Conference Operator in Washington, DC will initiate the teleconference. Individuals interested in participating should call 1–800–320–4330 at the time of the teleconference. Callers will be prompted for the conference code, #16, and then connected through to the teleconference.

Time: 1:00 p.m. to 3:00 p.m., EST.

Proposed agenda:

1. Call to order.
2. Announcements.
3. Finalize 1998 Annual Report.
3. Discuss agenda for March meeting.
4. Adjournment.

Status: This meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Michael K. Buckley, P.E., Federal Emergency Management Agency, 500 C Street SW., room 421, Washington, DC 20472, telephone (202) 646–2756 or by facsimile at (202) 646–4596.

SUPPLEMENTARY INFORMATION: Minutes of the meeting will be prepared and will be available upon request 30 days after they have been approved by the next Technical Mapping Advisory Council meeting in March 1998.

Craig S. Wingo,

Deputy Associate Director for Mitigation.

[FR Doc. 98–33804 Filed 12–21–98; 8:45 am]

BILLING CODE 6718–04–P

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984.

Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, NW, Room 962. Interested parties may submit comment 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.: 224–201009–001.

Title: Houston Mediterranean Shipping Terminal Agreement.

Parties: Port of Houston Authority of Harris County, Texas Mediterranean Shipping Co.

Synopsis: The agreement amendment changes the termination date of the agreement to February 28, 1999.

Dated: December 17, 1998.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 98–33801 Filed 12–21–98; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License; Applicants

Notice is hereby given that the following applicants have field with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, DC 20573.

Smith & Johnson Int'l Logistic Services, Inc., 868 Elston Street, Rahway, NJ 07065, Officers: Emilio Manrique-De-Lara, President, Ondina Fernandez, Secretary.

G.A.R. International Corporation, 3315 Commerce Parkway, Miramar, FL 33025, Officers: Nicholas Gallinaro, CEO, Stephen P. Gallinaro, CFO.

World Air Logistic Co., 14918 S. Figueroa Street, Gardena, GA 90248, Officer: Ki Suck Chae, Vice President.

Ambyth Shipping & Trading, Inc. d/b/a, Intermodal Cargo Forwarding, 1026 Cabras Highway, Suite 205, Piti, Guam 96925, Officers: Gregory R. David, Director, Alfred K.Y. Law, Director.

Airborne Freight Corporation d/b/a, Airborne Express, 3101 Western Avenue, Seattle, WA 98111–0662, Officer: Charles M. Ogle, Asst. Vice President.

Cargoplus, Inc., 8333 Wessex Drive, Pennsauken, NJ 08109, Officers: Nick Pita, President, Arturo Vigal, Vice President.

Barrett Trade Service, L.L.C., 7321 S.W. 123 Street, Miami, FL 33156, Officer: Anderson D. Barrett, President.

Dated: December 16, 1998.

Joseph C. Polking,

Secretary.

[FR Doc. 98–33771 Filed 12–21–98; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Agency information collection activities: Proposed collection; comment request

AGENCY: Board of Governors of the Federal Reserve System

SUMMARY: *Background.* On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collections of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the OMB 83-Is and supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Request for comment on information collection proposals.

The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collections, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before [insert date 60 days from publication in the Federal Register].

ADDRESSES: Comments, which should refer to the OMB control number or agency form number, should be addressed to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551, or delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments received may be inspected in room M-P-500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.14 of the Board's Rules Regarding Availability of Information, 12 CFR 261.14(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed form and instructions, the Paperwork Reduction Act Submission (OMB 83-I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Mary M. McLaughlin, Chief, Financial Reports Section (202-452-3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact Diane Jenkins (202-452-3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal to approve under OMB delegated authority the extension for three years, without revision, of the following report:

1. *Report title*: Report of Net Debit Cap
   Agency form number: FR 2226
   OMB control number: 7100-0217
   Frequency: annual
   Reporters: depository institutions, Edge and agreement corporations, U.S. branches and agencies of foreign banks
   Annual reporting hours: 2,160
   Estimated average hours per response: 1.0
   Number of respondents: 2,160
   Small businesses are not affected.
   General description of report: This information collection is mandatory (12 U.S.C. 248(i), 248-l, and 464) and is

given confidential treatment (5 U.S.C. 552 (b)(4)).

Abstract: The Federal Reserve's payment system risk reduction policy relies in part on the efforts of individual institutions to identify, control, and reduce their exposure. Institutions that incur daylight overdrafts in their Federal Reserve accounts and wish to establish a capacity for overdrafts greater than that afforded by an exempt cap, or that use interaffiliate transfer arrangements, submit the FR 2226 resolutions.

Proposal to approve under OMB delegated authority the extension for three years, with minor revision, of the following reports:

1. Report title: Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks
Agency form number: FR 2225
OMB control number: 7100-0216
Frequency: annual
Reporters: foreign banks with U.S. branches or agencies
Annual reporting hours: 50
Estimated average hours per response: 1.0
Number of respondents: 50
Small businesses are not affected.
General description of report: This information collection is voluntary (12 U.S.C. 248(i), 248-l, and 464) and is not given confidential treatment.
Abstract: This report was implemented in March 1986 as part of the procedures used to administer the Federal Reserve's Payments System Risk Policy. Foreign banks with U.S. branches or agencies have the option of filing the FR 2225 to provide the Federal Reserve with their parent bank's worldwide capital figure. A percentage of this figure is used in place of publicly available data to calculate the bank's daylight overdraft limit. Because the FR 2225 data are based on the capital of the worldwide bank, not just its United States offices, foreign banks seeking to maximize their daylight overdraft limit may find it advantageous to file the FR 2225.

Currently the FR 2225 data are treated as confidential. Because much of the data reported by respondents is publicly available, however, the Federal Reserve has determined upon review that it does not have the authority to treat all reports filed as confidential. The Federal Reserve proposes to change the confidentiality statement on the form to a question to provide respondents an opportunity to request confidentiality treatment for any portion of the report.

2. Report titles: Registration Statement for Persons Who Extend Credit Secured by Margin Stock (Other than Banks, Brokers, or Dealers);
Deregistration Statement for Persons Registered Pursuant to Regulation U;
Statement of Purpose for an Extension of Credit Secured by Margin Stock by a Person Subject to Registration Under Regulation U;
Annual Report;
Statement of Purpose for an Extension of Credit by a Creditor;
Statement of Purpose for an Extension of Credit Secured by Margin Stock
Agency form numbers: FR G-1, FR G-2, FR G-3, FR G-4, FR T-4, FR U-1
OMB control numbers:
7100-0011: FR G-1, FR G-2, FR G-4
7100-0018: FR G-3
7100-0019: FR T-4
7100-0115: FR U-1
Frequency:
FR G-1, FR G-2, FR G-3, FR T-4, FR U-1: on occasion
FR G-4: annual
Reporters: individuals and businesses
Annual reporting hours: 1,688 reporting; 254,032 recordkeeping
Estimated average hours per response:
FR G-1: 2.5
FR G-2: 15 minutes
FR G-3: 10 minutes
FR G-4: 2.0
FR T-4: 10 minutes
FR U-1: 10 minutes
Number of respondents:
FR G-1: 96
FR G-2: 71
FR G-3: 810
FR G-4: 715
FR T-4: 125
FR U-1: 6,971
Small businesses are affected.
General description of reports: This information collection is mandatory (FR G-1, FR G-3, FR G-4, FR T-4, FR U-1) or required to obtain a benefit (FR G-2) (15 U.S.C. 78g and 78w). The information in the FR G-1 and FR G-4 is given confidential treatment (5 U.S.C. 552 (b)(4)). The FR G-2 does not contain confidential information. The FR G-3, FR T-4, and FR U-1 are not submitted to the Federal Reserve and, as such, no issue of confidentiality arises.
Abstract: The Securities Exchange Act of 1934 authorizes the Federal Reserve to regulate securities credit issued by banks, brokers and dealers, and other lenders. The purpose statements, FR U-1, FR T-4, and FR G-3, are recordkeeping requirements for banks, brokers and dealers, and other lenders, respectively, to document the purpose of their loans secured by margin stock. Other lenders also must register and deregister with the Federal Reserve using the FR G-1 and FR G-2, respectively, and must file an annual report (FR G-4). The Federal Reserve uses the data to identify lenders subject to Regulation U (which now incorporates Regulation G), to verify compliance with Regulations T, U, and X, and to monitor margin credit.

The proposed revisions would update the reports for recent modifications in the applicable regulations. The Federal Reserve amended Regulations G, T, U, and X effective April 1, 1998, to reflect changes in the Federal Reserve's statutory authority made by the National Securities Markets Improvement Act of 1996. None of the modifications result in substantive changes in the information collections.

Board of Governors of the Federal Reserve System, December 16, 1998.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 98–33846 Filed 12–21–98; 8:45AM]
Billing Code 6210–01–F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 15, 1999.

A. Federal Reserve Bank of San Francisco (Maria Villanueva, Manager of Analytical Support, Consumer

Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. Humboldt Bancorp, Eureka, California; to acquire 100 percent of the voting shares of Capitol Valley Bank, Roseville, California.

2. Business Bank Corporation, Las Vegas, Nevada; to become a bank holding company by acquiring 100 percent of the voting shares of Las Vegas Business Bank, Las Vegas, Nevada.

Board of Governors of the Federal Reserve System, December 16, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–33759 Filed 12-21-98; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 15, 1999.

A. Federal Reserve Bank of Cleveland (Paul Kaboth, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. Fifth Third Bancorp, Cincinnati, Ohio; to acquire Enterprise Federal Bancorp, Inc., West Chester, Ohio, and thereby indirectly acquire Enterprise Federal Savings Bank, West Chester, Ohio, and thereby engage in the operation of a savings association, pursuant to § 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, December 16, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–33758 Filed 12–21–98; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of a Cooperative Agreement With The Hispaic-Serving Health Professions Schools

The Office of Minority Health (OMH), Office of Public Health and Science, announces that is will enter into an umbrella cooperative agreement with The Hispanic-Serving Health Professions Schools (HSHPS). This cooperative agreement is an umbrella cooperative agreement and will establish the broad programmatic framework in which specific projects can be supported by various agencies during the project period.

The purpose of this cooperative agreement is to assist the HSHPS to foster cooperation and collaboration among Hispanic-serving health professions schools and to assist the member institutions in expanding and enhancing their educational and research opportunities with the ultimate goal of improving the health status of minorities and disadvantaged people. The OMH will provide consultation, including administrative and technical assistance as needed, for the execution and evaluation of all aspects of this cooperative agreement. OMH will also participate and/or collaborate with the awardee in any workshops or training sessions to exchange current information, opinions, and research findings during this agreement.

Authorizing Legislation

This cooperative agreement is authorized under Section 1707(e)(1) of the Public Health Service Act, as amended.

Background

Assistance will be provided only to the HSHPS. No other applications are solicited. The HSHPS is the only organization uniquely qualified to administer this cooperative agreement because it has:

1. Developed a national organization of health professions schools with established track records in recruiting and retaining Hispanic students and faculty, and significant enrollments of Hispanic students;

2. Developed a comprehensive database related to teaching and related activities of all member institutions;

3. Developed a comprehensive inventory of recruitment activities targeting Hispanic students, including partnerships with local school districts, colleges and universities, and physician organizations established at the member institutions; and

4. Assessed the current education, research and disease prevention and health promotion activities for medical students and residents at its member institutions.

Through the collective efforts of its member institutions, the HSHPS has demonstrated the ability to work with academic institutions, government health agencies, and the private sector on mutual education, service and research endeavors; and the leadership necessary to attract minority health profesisonals into health professions careers.

This cooperative agreement will be awarded in FY 1999 and a 12-month budget period within a project period of five-years. Depending upon the types of projects and availability of funds, it is anticipated that this cooperative agreement will receive approximately $100,000. Continuation awards within the project period will made on the basis of satisfactory progress and the availability of funds.

Where To Obtain Additional Information

If you are interested in obtaining information regarding this project, contact Ms. Mimi Chafin, Division of Program Operations, Office of Minority Health, 5515 Security Lane, Suite 1000, Rockville, Maryland 20852 or telephone (301) 594–0769.

The Catalogue of Federal Domestic Assistance number is 93.004.

Dated: November 25, 1998.

Clay E. Simpson, Jr.,

Deputy Assistant Secretary for Minority Health.

[FR Doc. 98–33809 Filed 12–21–98; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of a Cooperative Agreement With the Latino Council on Alcohol and Tobacco

The Office of Minority Health (OMH), Office of Public Health and Science,

(OPHS) announces that it will enter into an umbrella cooperative agreement with the Latino Council on Alcohol and Tobacco (LCAT), a national organization whose mission is to combat alcohol and tobacco problems and their underlying causes in Latino communities. This cooperative agreement is an umbrella cooperative agreement and will establish the broad programmatic framework in which specific projects can be supported by various agencies during the project period.

The purpose of this cooperative agreement is to assist the LCAT in reducing the harm caused by alcohol and tobacco in the Latino community by producing and disseminating information to organizations on the use, trends and preventive measures regarding alcohol and tobacco use in the Latino community.

The OMH will provide technical assistance and oversight as necessary for the implementation, conduct, and assessment of the project activities. On an as-needed basis, OMH will assist in arranging consultation from other government agencies and non-governmental agencies.

Authorizing Legislation

This cooperative agreement is authorized under Section 1707(e)(1) of the Public Health Service Act, as amended.

Background

Assistance will be provided only to LCAT. No other applications are being solicited under this announcement. The LCAT is uniquely qualified to accomplish the objectives of this cooperative agreement because it has the following combination of factors.

- Worked extensively to strengthen Latino networks at the national and local levels to combat alcohol and tobacco use.
- Developed a national database of experts and service providers.
- Developed a national agenda for addressing the pervasive targeting of Latino communities by alcohol and tobacco marketers.
- Has previous experience in working with minority colleges and universities in developing programs to improve education for minorities.

This cooperative agreement will be awarded for a 12-month budget period within a project period of five years. Depending upon the types of projects and availability of funds, it is anticipated that this cooperative agreement will receive approximately $50,000 to $100,000. Continuation awards within the project period will be made on the basis of satisfactory progress and the availability of funds.

The Catalog of Federal Domestic Assistance Number for this cooperative agreement is 93.004.

Where To Obtain Additional Information

If you are interested in obtaining additional information regarding this project, contact Ms. Cynthia Amis, Office of Minority Health, 5515 Security Lane, Suite 1000, Rockville, Maryland 20852 or telephone (301) 594–0769.

Dated: December 11, 1998.

Clay E. Simpson, Jr.,

Deputy Assistant Secretary for Minority Health.

[FR Doc. 98–33808 Filed 12–21–98; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Workgroup on the National Health Information Infrastructure.

Time and Date: 9:00 a.m.–5:30 p.m., January 6, 1999, 9:00 a.m.–11:30 p.m., January 7, 1999.

Place: Room 405A, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, DC 20201.

Status: Open.

Purpose: At this meeting the Workgroup on the National Health Information Infrastructure will review a draft of its charge, discuss work plans, begin to develop a matrix of health information infrastructure activities at the Department, and attend to other business as required.

Notice: In the interest of security, the Department has instituted stringent procedures for entrance to the Hubert H. Humphrey building by non-government employees. Thus, persons without a government identification card will need to have the guard call for an escort to the meeting.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Mary Jo Deering, Lead Staff Person for the NCVHS Workgroup on the National Health Information Infrastructure, Office of the Assistant Secretary for Public Health and Science, DHHS, Room 738G, Humphrey Building, 200 Independence Avenue, SW, Washington, DC 20201, telephone (202) 260–2652, or Marjorie S. Greenberg, Executive Secretary, NCVHS, NCHS, CDC, Room 1100, Presidential Building, 6525 Belcrest Road, Hyattsville, Maryland 20782, telephone (301) 436–7050. Information also is available on the NCVHS home page of the HHS website: *http://aspe.os.dhhs.gov/ncvhs*, where an agenda for the meeting will be posted when available.

Dated: December 4, 1998.

James Scanlon,

Director, Division of Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 98–33776 Filed 12–21–98; 8:45 am]

BILLING CODE 4151–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Executive Subcommittee.

Time And Date: 1:00 a.m.–5:00 p.m., January 7, 1999.

Place: Room 405A, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, DC 20201.

Status: Open.

Purpose: At this meeting the Executive Subcommittee will be planning the work of the National Committee on Vital and Health Statistics, developing agendas for upcoming meetings of the full Committee, and attending to other business as required.

Notice: In the interest of security, the Department has instituted stringent procedures for entrance to the Hubert H. Humphrey Building by non-government employees. Thus, persons without a government identification card will need to have the guard call for an escort to the meeting.

Contact Person For More Information: Substantive program information as well as summaries and a roster of committee members may be obtained from James Scanlon, NCVHS Executive Staff Director, Office of the Assistant Secretary for Planning and Evaluation, DHHS, Room 440–D. Humphrey Building, 200 Independence Avenue SW, Washington, DC 20201, telephone (202) 690–7100, or Majorie S. Greenberg, Executive Secretary, NCVHS, NCHS, CDC, Room 1100 Presidential Building, 6525 Belcrest Road, Hyattsville, Maryland 20782, telephone (301) 436–7050. Information also is available on the NCVHS home page of the HHS website: *http://aspe.os.dhhs.gov/ncvhs*, where an agenda for the meeting will be posted when available.

Dated: December 14, 1998.

James Scanlon,

Director, Division of Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 98–33777 Filed 12–21–98; 8:45 am]

BILLING CODE 4151–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Project:

Title: Child Care and Development Fund Tribal Plan Preprint.

OMB No.: New.

Description: The Child Care and Development Fund Plan Preprint serves as the agreement between the grantee (Indian Tribe or tribal organization) and the Federal government as to how the Block Grant programs will be operated. The plans provide 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). The Tribal Plan Preprint (ACF Form 118A) is currently approved through 5/31/00 under the Plan Preprint approval for both State and Indian Tribes (OMB Approval Number 0970–0114). Since the tribal plan preprint must be revised to reflect the CCDF amended regulations (published 7/24/98 at 63 FR 39936–39998), it is being disaggregated from the State plan preprint approval. Therefore, a new collection and OMB control number is requested.

Respondents: State, Local or Tribal Government.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
CCDF Plan Preprint	253	.5	35	4,427
CCDF Plan Amendments	253	.5	3	380

Estimated Total Annual Burden Hours: 4,807.

In compliance with the requirements of Section 3506(c)(2)(A) 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 Information Services, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality,utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: December 15, 1998.

Bob Sargis,

Acting Reports Clearance Officer.

[FR Doc. 98–33792 Filed 12–21–98; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Establishment of Prescription Drug User Fee Rates for Fiscal Year 1999

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the rates for prescription drug user fees for fiscal year (FY) 1999. The Prescription Drug User Fee Act of 1992 (the PDUFA), as amended by the Food and Drug Administration Modernization Act of 1997 (the FDAMA), authorizes FDA to collect user fees for certain applications for approval of drug and biological products, on establishments where the products are made, and on such products. Fees for applications for FY 1999 were set by the FDAMA, subject to adjustment for inflation. Total application fee revenues fluctuate with the number of fee-paying applications FDA receives. Fees for establishments and products are calculated so that total revenues from each category will approximate FDA's estimate of the revenues to be derived from applications.

FOR FURTHER INFORMATION CONTACT: Michael E. Roosevelt, Office of Financial Management (HFA–120), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–5088.

SUPPLEMENTARY INFORMATION:

I. Background

The PDUFA (Pub. L. 102–571), as amended by the FDAMA (Pub. L. 105–115), establishes three different kinds of user fees. Fees are assessed on: (1) Certain types of applications and supplements for approval of drug and biological products, (2) certain establishments where such products are made, and (3) certain products (21 U.S.C. 379h(a)). When certain conditions are met, FDA may waive or reduce fees (21 U.S.C. 379h(d)).

For 1998 through 2002, under the amendments enacted in the FDAMA, the application fee rates are set in the statute, but are to be adjusted annually for cumulative inflation since 1997. Total application fee revenues are structured to increase or decrease each year as the number of fee-paying applications submitted to FDA increases or decreases (workload adjustment).

For 1998 through 2002, FDA is required to set fee rates for establishment and product categories each year, so that the total fee revenue from each of these two categories are projected to be equal to the total revenue FDA expects to collect from application fees that year. This procedure continues the arrangement under which one-third of the total user fee revenue is projected to come from each of the three types of fees--application fees, establishment fees, and product fees.

This notice establishes fee rates for FY 1999 for application, establishment, and product fees. These fees are retroactive to October 1, 1998, and will remain in effect through September 30, 1999. For fees already paid on applications and supplements submitted on or after

October 1, 1998, FDA will bill applicants for the difference between fees paid and fees due under the new fee schedule. For applications and supplements submitted after December 31, 1998, the new fee schedule must be used. Invoices for establishment and product fees for FY 1999 will be issued in December 1999, using the new fee schedules.

II. Inflation and Workload Adjustment Process

The PDUFA, as amended by the FDAMA, provides that fee rates for each FY shall be adjusted by notice in the **Federal Register**. The adjustment must reflect the greater of: (1) The total percentage change that occurred during the preceding FY in the Consumer Price Index (CPI), or (2) the total percentage pay change for that FY for Federal employees stationed in the Washington, DC metropolitan area. The FDAMA provides for this annual adjustment to be cumulative and compounded annually after 1997 (see 21 U.S.C. 379h(c)(1)).

The FDAMA also structures the total application fee revenue to increase or decrease each year as the number of fee-paying applications submitted to FDA increases or decreases. This provision allows revenues to rise or fall as this portion of FDA's workload rises or falls. To implement this provision each year, FDA will estimate the number of fee-paying applications it anticipates receiving. The number of applications estimated will then be multiplied by the inflation-adjusted statutory application fee. This calculation will produce the FDA estimate of total application fee revenues to be received.

The PDUFA also provides that FDA shall adjust the rates for establishment and product fees so that the total revenues from each of these categories is projected to equal the revenues FDA expects to collect from application fees that year. The FDAMA provides that the new fee rates based on these calculations be adjusted within 60 days after the end of each FY (21 U.S.C. 379h(c)(2)).

III. Inflation Adjustment and Estimate of Total Application Fee Revenue

The FDAMA provides that the application fee rates set out in the statute be adjusted each year for cumulative inflation since 1997. It also provides for total application fee revenues to increase or decrease based on increases or decreases in the number of fee-paying applications submitted.

A. Inflation Adjustment to Application Fees

Application fees are assessed at different rates for qualifying applications depending on whether the applications require clinical data on safety or effectiveness (other than bioavailability or bioequivalence studies) (21 U.S.C. 379h(a)(1)(A) and (b)). Applications that require clinical data are subject to the full application fee. Applications that do not require clinical data and supplements that require clinical data are assessed one-half the fee of applications that require clinical data. If FDA refuses to file an application or supplement, 75 percent of the application fee is refunded to the applicant (21 U.S.C. 379h(a)(1)(D)).

The application fees described previously are set out in the FDAMA for 1999 ($256,338 for applications requiring clinical data, and $128,169 for applications not requiring clinical data or supplements requiring clinical data) (21 U.S.C. 379h(b)(1)), but must be adjusted for cumulative inflation since 1997. That adjustment each year is to be the greater of: (1) The total percentage change that occurred during the preceding FY in the CPI (all items; U.S. city average); or (2) the total percentage pay change for that FY for Federal employees, as adjusted for any locality-based payment applicable to employees stationed in the District of Columbia. The FDAMA provides for this annual adjustment to be cumulative and compounded annually after 1997 (see 21 U.S.C. 379h(c)).

The adjustment for FY 1998 was 2.45 percent (62 FR 64849, December 9, 1997). This was the greater of the CPI increase for FY 1997 (2.15 percent) and the increase in applicable Federal salaries (2.45 percent).

The adjustment for FY 1999 is 3.68 percent. This is the greater of the CPI increase for FY 1998 (1.49 percent) and the increase in applicable Federal salaries (3.68 percent).

Compounding these amounts (1.0245 times 1.0368) yields a total compounded inflation of 6.22 percent for FY 1999. The adjusted application fee rates are computed by applying the inflation percentage for FY 1999 (106.22 percent) to the FY 1999 statutory application fee rates stated previously. For FY 1999 the adjusted application fee rates are $272,282 for applications requiring clinical data, and $136,141 for applications not requiring clinical data or supplements requiring clinical data. These amounts must be submitted with all applications during FY 1999.

B. Estimate of Total Application Fee Revenue

Total application fee revenues for 1999 will be determined by the number of fee-paying applications FDA receives in FY 1999 (from October 1, 1998, through September 30, 1999) multiplied by the fee rates calculated in the preceding paragraph. Before fees can be set for establishment and product fee categories, each of which are projected to be equal to total revenues FDA collects from application fees, FDA must first estimate its total 1999 application fee revenues. To do this FDA has traditionally calculated the number of full application fees FDA received in the preceding fiscal year, made an allowance for waivers and exemptions, and used that figure as a basis for estimating the next year's application volume.

For FY 1998, FDA received and filed 101 human drug applications that require clinical data for approval, 23 that did not require clinical data for approval, and 93 supplements to human drug applications that require clinical data for approval. Because applications that do not require clinical data and supplements that require clinical data are assessed only one-half the full fee, the equivalent number of these applications subject to the full fee is determined by summing these categories and dividing by 2. This amount is then added to the number of applications that require clinical data to arrive at the equivalent number of applications that may be subject to full application fees.

In addition, as of September 30, 1998, FDA assessed fees for three applications that required clinical data, one application that did not require clinical data, and one supplement, all of which were refused filing or withdrawn before filing. After refunds, the full application paid one-fourth the full application fee and is counted as one-fourth of an application, and the application that did not require clinical data and the supplement each paid one-eighth of the full application fee and are each counted as one-eighth of an application.

Using this methodology, the approximate equivalent number of applications that required clinical data and were subject to fees in FY 1998 was 160, before any exemptions, waivers or reductions. Under the FDAMA, FDA may waive fees for certain small businesses submitting their first application and certain orphan products are exempted from application fees. In addition, the FDAMA excludes from fees bulk biological products that are further manufactured, and provides

exceptions for certain supplements for pediatric indications. In FY 1998 waivers or exemptions applied to 41.5 equivalents of full applications. Therefore, based solely on 1998 data, FDA estimates that approximately 118.5 (160 minus 41.5) equivalent applications that require clinical data will qualify for fees in FY 1999, after allowing for exemptions, waivers, or reductions.

This estimate based on the data from 1998 alone predicts a substantial drop in applications, and represents a substantial departure from FDA experience over the past 5 years. Over that period the estimated number of fee-paying applications increased fairly consistently at a rate of about 7 percent each year, as set out in Table 1 of this document.

TABLE 1.

Year	Estimated Number of Fee-Paying Full Application Equivalents
1993	116
1994	124
1995	131
1996	141
1997	169
1998	118.5

Since the volume of fee-paying applications FDA received in 1998 represents such a substantial departure from the trend experienced over the previous 5 years, and since sharp changes produce disruptive volatility in both fees and revenues, FDA reexamined the process to be used in estimating the next year's application volume. FDA considered several different approaches (continuation of current method, using a 2- or 3-year rolling average, and linear regression) and chose the linear regression projection method as the best alternative for this estimate.

Linear regression is well suited to situations like this where there are several years of historical data, the potential exists for shifts from year-to-year, and there is no obvious causative rationale to reasonably predict the year-to-year fluctuations. It also provides a damping effect on year-to-year fee and revenue fluctuations and allows for more stability in both fee levels paid by industry and in agency resource planning. Under this approach, the analysis takes into account the number of fee-paying PDUFA submissions each year since PDUFA began in 1993, adjusts those numbers conservatively to reflect additional exemptions/waivers that would have been granted between 1993 and 1997 if the current law governing exemptions and waivers had been in effect then, and fits the best line to those data points. The extension of that line to the next year estimates the number of submissions for that year. Beginning now for FY 1999, FDA will make this annual estimate based on a linear regression analysis of data on all fee-paying full application equivalent submissions from 1993 through the latest year (1998 in this case).

This will mean that our estimated number of applications will be higher in 1998 than it would have been under our previous estimating method. It will also mean that in future years, if there is a sudden rise in application volume, the regression analysis process will dampen the effect of such year-to-year increases as well. We believe that this is a fair and reasonable approach, and that it will insulate fees and revenues from significant fluctuations that may occur in any single year.

Using this approach, a linear regression line based on the adjusted number of fee-paying full application equivalent submissions since 1993 projects the receipt of 150 fee-paying full application equivalent submissions in 1999, as reflected in Table 2 and the graphic of this document.

TABLE 2.

Year	1993	1994	1995	1996	1997	1998	1999
Adjusted Fee-Paying Full Application Equivalents	101.0	108.9	112.5	136.3	161.5	118.5	
Regression Line	103.9	111.6	119.3	127.0	134.6	142.3	150.0

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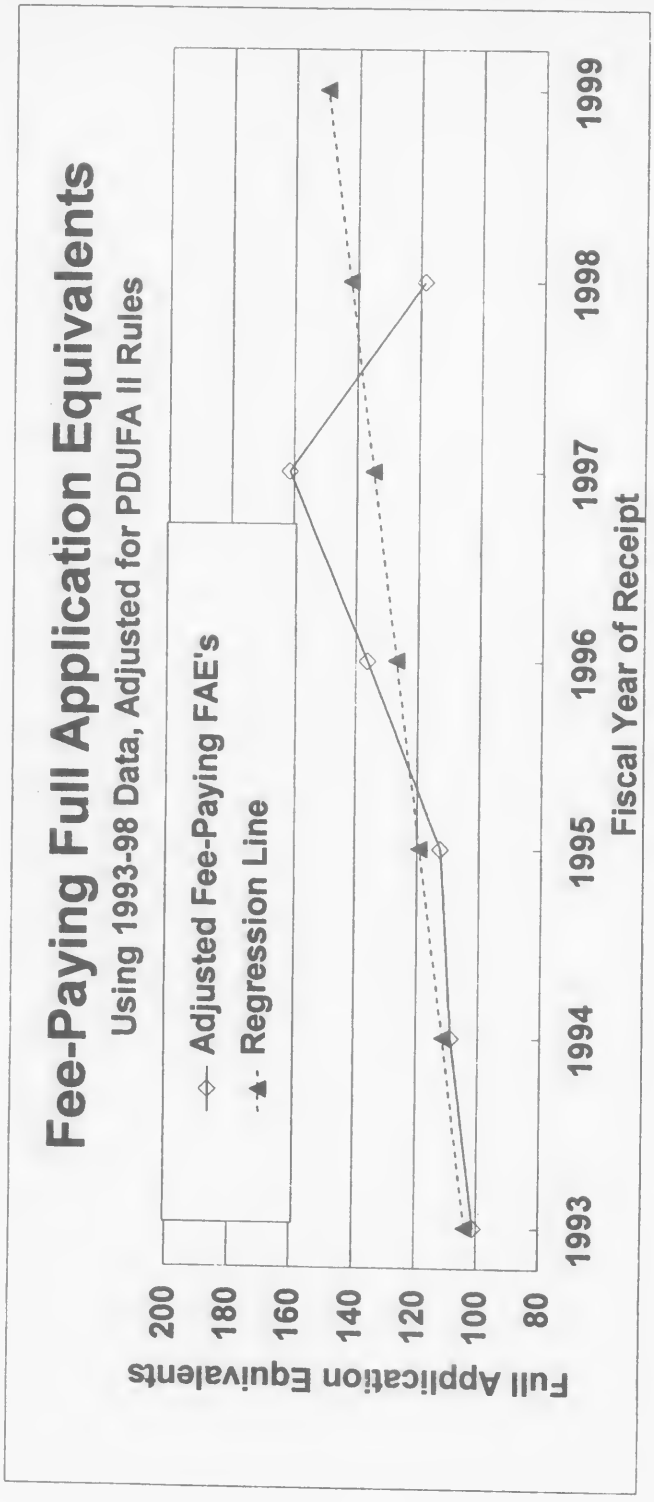

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The total FY 1999 application fee revenue is estimated by multiplying the adjusted application fee rate ($272,282) by the equivalent number of applications projected to qualify for fees in FY 1999 (150), for a total estimated application fee revenue in 1999 of $40,842,300. This is the amount of revenue that FDA is also expected to derive both from establishment fees and from product fees.

IV. Fee Calculations for Establishment and Product Fees

A. Establishment Fees

At the beginning of FY 1998 the establishment fee was based on an estimate of 275 establishments subject to fees. By the end of FY 1998, 343 establishments qualified for and were billed for establishment fees, before all decisions on requests for waivers or reductions were made. We estimate that a total of 25 establishment fee waivers will be granted in 1998, for a net of 318 fee-paying establishments. In FY 1999 fees will be based on an estimate of 318 establishments paying fees after taking waivers into account. The fee per establishment is determined by dividing the adjusted total fee revenue to be derived from establishments ($40,842,300), by the estimated 318 establishments, for an establishment fee rate for FY 1999 of $128,435 (rounded to the nearest dollar).

B. Product Fees

At the beginning of FY 1998 the product fee was based on an estimate that 2,100 products would be subject to product fees. By the end of FY 1998, 2,279 products qualified and were billed for product fees before all decisions on requests for waivers or reductions were made. Assuming that there will be about 55 waivers granted, FDA estimates that 2,224 products will qualify for product fees in FY 1999, after allowing for waivers and exemptions. Accordingly, the FY 1999 product fee rate is determined by dividing the adjusted total fee revenue to be derived from product fees ($40,842,300) by the estimated 2,224 products for a product fee rate of $18,364 (rounded to the nearest dollar).

V. Adjusted Fee Schedules for FY 1999

The fee rates for FY 1999 are set out in Table 3 of this document.

TABLE 3.

Fee Category	Fee Rates For FY 1999
Applications	
Requiring clinical data	$272,282
Not requiring clinical data	$136,141
Supplements requiring clinical data	$136,141
Establishments	$128,435
Products	$18,364

VI. Implementation of Adjusted Fee Schedule

A. Application Fees

Any application or supplement subject to fees under the PDUFA that is submitted after December 31, 1998, must be accompanied by the appropriate application fee established in the new fee schedule. Payment must be made in United States currency by check, bank draft, or U.S. postal money order payable to the order of the U.S. Food and Drug Administration. Please include the user fee ID number on your check.

Your check can be mailed to: Food and Drug Administration, P.O. Box 360909, Pittsburgh, PA 15251–6909.

If checks are to be sent by a courier that requests a street address, they can be sent to: Mellon Bank, Three Mellon Bank Center, 27th Floor (FDA 360909), Pittsburgh, PA 15259–0001. (**Note: This Mellon Bank Address is for courier delivery only.**) Please make sure that the FDA P.O. Box number (P.O. Box 360909) is on the enclosed check.

FDA will bill applicants who submitted application fees between October 1, 1998, and December 31, 1998, based on the adjusted rate schedule.

B. Establishment and Product Fees

By December 31, 1998, FDA will issue invoices for establishments and product fees for FY 1999 under the new fee schedules. Payment will be due by January 31, 1999. FDA will issue invoices in October 1999 for any products and establishments subject to fees for FY 1999 that qualify for fees after the December 1998 billing.

Dated: December 15, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–33831 Filed 12–21–98; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

List of Recipients of Indian Health Scholarship Under the Indian Health Scholarship Program

The regulations governing Indian Health Care Improvement Act Programs (Pub. L. 94–437) provide a 42 CFR 36.334 that the Indian Health Service shall publish annually in the **Federal Register** a list of recipients of Indian Health Scholarships, including the name of each recipient, school and tribal affiliation, if applicable. These scholarships were awarded under the authority of Section 103 and 104 of the Indian Health Care Improvement Act, 25 U.S.C. 1613–1613a, as amended by the Indian Health Care Amendments of 1988, Pub. L. 100–713.

The following is a list of Indian Health Professions Scholarship Recipients for Fiscal Year 1998:

Ables, Millicent Elaine, University of Kansas, Choctaw Nation of Oklahoma
Abold-Arellano, Carol Ann, University of South Dakota, Oglala Sioux of the Pine Ridge Reservation
Adair, Roger Willard, Arizona State University, Cherokee Nation of Oklahoma
Adams, Hayley M., University of Alaska/Anchorage, Nenana Native Association, AK
Aguilar, Dolores E., Presentation College, Cheyenne River Sioux Tribe
Akers, Margaret Ann, University of Tulsa, Muskogee (Creek) Nation, Oklahoma
Albert, Corrina D., University of New Mexico, Pueblo of Laguna
Alexander, Andrea Lynn, Oklahoma State University, Seminole Nation of Oklahoma
Alexander, Lisa Kalliah, University of Washington School of Med., Confederated Tribes of the Grand Ronde
Allery, Crystal Vernelle, Minot State University, Turtle Mountain Band Chippewa
Allick, Albert P., University of Minnesota Duluth Med School, Turtle Mountain Band of Chippewa
Allison, Rochelle Jade, University of New Mexico, Navajo Tribe of AZ, NM, & UT

Amiotte, Halona Sioux, South Dakota State University, Yurok Tribe of the Yurok Reservation, CA
Ammesmaki, Frank P., University of North Dakota, Fond de Lac Band—MN Chippewa
Anderson, Tarina Kay, University of Southern Mississippi, Mississippi Band of Choctaw Indians
Anderson, Veronica Daneile, Connors State College, Cherokee Nation of Oklahoma
Anderson, Zachariah Jessic, University of North Dakota, Muskogee (Creek) Nation, OK
Antone-Morton, Jerrilene Denise, University of Arizona, Navajo Tribe of AZ, NM, & UT
Antonio, John Emery, Baylor University, Pueblo of Laguna, NM
Apple, Jennifer Lynn, Old Dominion University, Choctow Nation of Oklahoma
Archuleta, Flora, University of New Mexico, Hualapai Indian Tribe, AZ
Arkie, Carolyn Ann, New Mexico State University, Pueblo of Acoma, NM
Armentrout, Estelle Marjorie, Salish Kootenai College, Northern Cheyenne Tribe, Montana
Arneson, Richelle Marie, Washington State University, Central Council of Tlingit & Haida Indian Tribes, AK
Arviso, Angela, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Atcitty, Nicole Robin, University of New Mexico/Gallup, Navajo Tribe of AZ, NM, & UT
Atsitty, Nicole Frances, University of Arizona, Navajo Tribe of AZ, NM & UT
Axure, Angela Rose, University of North Dakota, Turtle Mountain Chippewa
Baha-Alchesay, Jaki, Northern Arizona University, White Mountain Apache Tribe
Bean, Michael Scott, Austin College, Cherokee Nation of Oklahoma
Bearpaw, Ernest Lee, University of Great Falls, Blackfeet Tribe, Montana
Beauchamp, Sandra S., San Francisco State University School of Social Welfare, Three Affiliated Tribes, Ft. Berthold
Beaumont, Shane David, Montana Tech/ Computer Science, Crow Tribe of MT
Begay, Andreana, University of New Mexico/ Gallup, Navajo Tribe of AZ, NM, & UT
Begay, Helena Elsie, Phoenix College, Navajo Tribe of AZ, NM, & UT
Begay, Julie Ann, Dakota Wesleyan University, Lower Brule Sioux, SD
Begay, Keithetta, Northern Arizona University, Navajo Tribe of AZ, NM, & UT
Begay, Miranda, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Begay, Pierrette Rose, Arizona State University, Navajo Tribe of AZ, NM, & UT
Begay, Tamana Dollicia, Revelle College at University of CA/SD, Navajo Tribe of AZ, NM, & UT
Begaye, Brandon Wayne, Northern Arizona University, Navajo Tribe of AZ, NM, & UT
Behymer, Virginia May, University of Alaska/ Anchorage, Aleut
Bekes, Kimberly Dawn, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Belgarde, Vita Ann, University of North Dakota, Turtle Mountain Band of Chippewa
Belgrade, Debra Ann, Medcenter One, Turtle Mountain Band of Chippewa
Bell, Jason Burton, University of North Dakota, Three Affiliated Tribes, Ft. Berthold
Benally, Max Joe, Northern Arizona University, Navajo Tribe of AZ, NM, & UT
Benally, Romancelita, University of Arizona, Navajo Tribe of AZ, NM, & UT
Benally, Shawn T., University of New Mexico, Navajo Tribe of AZ, NM, & UT
Benedict, Alison Mary, University of Michigan, St. Regis Band—Mohawk, NY
Bercier, Christine Marie, University of North Dakota, Turtle Mountain Band of Chippewa
Berquist, Melissa Dawn, University of North Dakota, Turtle Mountain Band of Chippewa
Berryhill, Edwina Rae, University of Tulsa, Navajo Tribe of AZ, NM, & UT
Berryhill, Tishanda Leigh, University of Utah College of Medicine, Muskogee (Creek) Nation, OK
Bighorn, Lisa Elaine, Oklahoma College of Medicine & Surgery, Assiniboine & Sioux
Bighorn, Prairie Rose, Rocky Mountain College, Assiniboine & Sioux of Fort Peck, MT
Bivins, John David, Dartmouth Medical School, Cherokee Nation of OK
Blackdee, Elliot Wade, University of Wisconsin, Ho-Chunk Nation (Formerly WI Winnebago)
Blair, Wendy Suzanne, University of Texas Medical School at San Antonio, Comanche of OK
Boatwight, Melinda Lea, East Central University, Choctaw Nation of OK
Boloz, Angelita Colleen, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Bonnet, Bryan Edward, University of Missouri, Choctaw Nation of OK
Boot, Maryjo, University of Arizona College of Pharmacy, Pueblo of Zuni Tribe, NM
Booth, Geri Lynn, Bellin College of Nursing, Lac Courte Oreilles Band of Lake Superior Chippewa
Booth, Sheila Marie, Lake Area Technical Institute, Oglala Sioux Tribe, SD
Boudreau, Elsie Rose, University of Alaska, Alaskan
Bourque-Wilton, Leanna Sheree, Lake Superior State University, Sault Ste, Marie Tribe-Chippewa
Bowling, April Shea, University of Oklahoma, Cherokee Nation of OK
Boyd, Irene Ellen, Allegheny University of Health Sciences, Menominee Indian of WI
Brandt, Julie Marie, Park College, Iowa of KS & NE
Brinson, Timothy James, East Central University, Citizen Band Potawatomi of OK
Brockie, Teresa N., University of North Dakota, Fort Belknap
Brooks, Shelly Beth, University of Arkansas-Fayetteville, Cherokee Nation of OK
Brown, Gerald Ray, Southwestern Oklahoma State University, Cherokee Nation of OK
Brown, Ryan David, University of Oklahoma, Choctaw Nation of OK
Brown-Evans, Dana Renee, University of Oklahoma Health Sciences Center, Muskogee (Creek) Nation, OK
Bruce, Troy Alan, Presentation College, Turtle Mountain Band of Chippewa
Brunoe, Carnella Lynn, Oregon Health Sciences University/Nursing, Pueblo of Laguna
Buckles, Paula Kaye, Miles Community College, Assiniboine & Sioux Tribes
Buckley, Erica Dawn, East Central Oklahoma State University, Muskogee (Creek) Nation of OK
Bueno-Canapo, Stephanie Ann, Yakima Valley Community College, Confederated Yakima
Buffalo, Faith Arlene, Presentation College, Cheyenne River Sioux Tribe
Buford, Amanda Dawn, Northeastern State University, Cherokee Nation of Oklahoma
Bull Chief, Lila Kay, Montana State University, Crow Tribe of Montana
Bush, Gerald Ray, University of Arizona College of Medicine, White Mountain Apache, Fort Apache
Bushnell, Charles Brent, Southwestern Oklahoma State University, Eastern Shawnee Tribe of OK
Caboni, Melendy Laura, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Cain, Marcia L., University of Montana School of Pharmacy, Sitka Tribe Community Association
Calac, Daniel Joseph, Harvard Medical School, Pauma Band of Luiseno Mission Indians, CA
Caldwell, Troy Tinsley, University of Oklahoma, Cherokee Nation of Oklahoma
Campbell, Gabriel Antonio, University of North Dakota, Confederated Salish & Kootenai
Campbell, Jamie Renae, East Central University, Muskogee (Creek) Nation of OK
Camplain, Jamie Lynn, University of Oklahoma Dental School, Choctaw Nation of OK
Camplain-Sudderth, Lisa Nichole, University of Oklahoma Health Sciences Center, Choctaw Nation of OK
Carlos, Angela Mary, University of North Dakota, Seneca Nation of NY
Carlson, Gwendolyn A., West Virginia Wesleyan College, Aleut, AK
Carpio, Jean Marie, University of New Mexico College of Pharmacy, Pueblo of Laguna, NM
Carroll, Ian Lorne, University of Washington School of Medicine, Alaskan
Caruso, Sam Ernest, East Central Oklahoma State University, Seminole Nation of OK
Cary, Brenda Lee, University of Wisconsin, Oneida Tribe of Wisconsin
Cavazos, Lisa Renee, University of Wisconsin, Lac Courte Oreilles Band of Lake Superior Chippewa
Charles, Tracey Roseann, University of Memphis, Choctaw Nation of OK
Charlie, Josephine Ann, Weber State University, Navajo Tribe of AZ, NM, & UT
Charlie, Julius Ray, University of New Mexico/Albuquerque, Navajo Tribe of AZ, NM, & UT
Charlo, Joseph Donald, University of Montana, Confederated Salish & Kootenai Tribes
Chatter, Teddy Duke, University of Utah, Navajo Tribe of AZ, NM, & UT
Chee, Lawrence, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Chelberg, Robert Paul, University of Missouri, Minnesota Chippewa Tribe (6 component reservations)
Chouteau, Christine Wilma, Dartmouth Medical School, Cherokee Nation of OK

Christensen, Kim Ann, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Chythlook, William T., Loma Linda University, Alaskan
Clancy, Vanessa Mae, Miles Community College, Assiniboine & Sioux Tribes
Clark, Dorrance Dean, University of Michigan Dental School, Assiniboine & Sioux Tribes
Clarke, Alberta D., Dine College, Navajo Tribe of AZ, NM, & UT
Clarke, David Eric, Pacific University of College, Santa Ynez Band of Chumash, CA
Clauschee, Rachel Sue, Grand Canyon College, Navajo Tribe of AZ, NM, & UT
Clay, Rondella Evelyn, Eastern Central Oklahoma State University, Three Affiliated Tribes—Ft. Berthold
Cloer-Myers, Melissa Lynn, University of Missouri, Choctaw Nation of OK
Collins, Candyce Cole, Massachusetts College of Pharmacy, Choctaw Nation of OK
Condon, William Roger, University of Mary, Standing Rock Sioux ND & SD
Conner, Bonita Faye, University of North Dakota, White Earth Band-Minnesota Chippewa Tribe
Conners, Tina Jean, State University of NY/ Oswego/ACC, St. Regis Band of Mohawk Indians, NY
Conter, Keri Lee, Rocky Mountain College, Crow Tribe of MT
Coon, Teresa Lynne, East Central University, Seminole Nation of OK
Cooper, Benjamin Dale, Northeastern State University, Cherokee Nation of Oklahoma
Cox, Brian Christopher, George Fox University, Turtle Mountain Band of Chippewa
Cravatt, Jay Patrick, Rose State College, Seminole Nation of Oklahoma
Crebs, Jolene Dora, University of Great Falls, Chippewa—Cree Indians, MT
Credo, Katherine Morris, University of Tex Med Branch at Galveston, Navajo Tribe of AZ, NM, & UT
Crisp, Ronda Crystal, Tri-County Community College, Eastern Band of Cherokee Indians of NC
Crissler, Mary Jo, University of North Dakota, Turtle Mountain Band of Chippewa, ND
Crocker-Ericson, Elizabeth Marie, University of Southern California, Cherokee Nation of OK
Cromer, Kelly Jenise, Southwestern Oklahoma State University, Cheyenne-Arapaho Tribes of OK
Cruz, Mark Deleon, University of San Francisco, Ysleta Del Sur Pueblo of TX
Culver, Jennifer Lyn, Oklahoma State University, Cherokee Nation of Oklahoma
Cummings, James Jackson, Southwestern Oklahoma State University, Cherokee Nation of Oklahoma
Dahlberg, Carl Alex, California State University, Fort Independence Paiute, CA
Dahlen, Jencie Kay, University of North Dakota, Turtle Mountain Band of Chippewa, ND
Dahozy, Roger Norman, Arizona State University, Navajo Tribe of AZ, NM, & UT
Dailey, Samuel, Arizona State University, Navajo Tribe of AZ, NM, & UT
Damon, Dezbaa Altaalkii, Arizona State University, Navajo Tribe of AZ, NM, & UT
Daniels, Letitia Renita, Seminole State College, Seminole of Oklahoma
Daniels, Virginia, California School of Professional Psychology, Navajo Tribe of AZ, NM, & UT
Daugherty, Jamie Suzette, University of Oklahoma, Cherokee Nation of Oklahoma
Davidson, Kelly Ann, Southern Illinois University at Carbondale, Aleut, AK
Davis, Brandy Darlene, Southwestern Community College, Eastern Band of Cherokee Indians of NC
Davis, Daniel G., North Dakota State University, Turtle Mountain Chippewa
Davis, Gloria Marion, University of North Dakota, Turtle Mountain Band Chippewa, ND
Davis, Lisa Marie, University of North Dakota/PNU, Turtle Mountain Band Chippewa, ND
Davis, Omar Leneve, California State University/San Bernadino, Hualapai Indian Tribe, AZ
Dawes, Kari Elaine, Missouri Southern State College, Cherokee Nation of OK
Dean, Erica Rae, Oklahoma State University, Choctaw Nation of Oklahoma
Deardorff, Cynthia Ann, Oklahoma Baptist University, Absentee-Shawnee Tribe of Indians of OK
Declay, Nadia Lupe, University of Arizona, White Mountain Apache Tribe, AZ
Decoteau, Michelle Germaine, Turtle Mountain Community College, Turtle Mountain Band of Chippewa, ND
Dellinger, Diana Lynne, Northeastern Oklahoma State University, Muskogee (Creek) Nation of OK
Delorme, Angelynn, University of North Dakota, Turtle Mountain Band of Chippewa, ND
Delorme, Carolyn Marie, North Dakota State University, Turtle Mountain Band of Chippewa, ND
Dement, Rachel Leah, Emory University School of Medicine, Oglala Sioux Tribe of Pine Ridge, SD
Demers, Larry John, University of North Dakota, Turtle Mountain Band of Chippewa, ND
Demery, Jessica Kareen, University of North Dakota, Standing Rock Sioux ND & SD
Dennison, Alex Ray, University of New Mexico/Albuquerque, Navajo Tribe of AZ, NM, & UT
Denson, Kent Douglas, University of Oklahoma, Chicasaw Nation of Oklahoma
Deroche, Mary Louise, University of Great Falls, Blackfeet Tribe, MT
Deshnod, Sheilah A., University of New Mexico, Navajo Tribe of AZ, NM, & UT
Devereaux, Marvin Charles, University of Montana, Blackfeet Tribe, MT
Devereaux, Toni Lynn, Salish Kootenai College, Blackfeet Tribe, MT
Dewees, Aaron Nicholas, Georgetown College, Lumbee
Dick, Brad Elliot, University of Kansas, Cherokee Nation of OK
Dickerson, Daniel Lee, College of Osteopathic Medicine of the Pacific, Alaskan
Dillard, Ursula Gwynn, Harvard College, Navajo Tribe of AZ. NM, & UT
Dineyazhe, Frances Lynn, University of Arizona, Navajo Tribe of AZ, NM, & UT
Eagle, Kathryn Rae, University of Arizona College of Medicine, Three Affiliated Tribes—Ft. Berthold
Edwards, Polly Ann, University of Oklahoma, Caddo Indian Tribe of OK
Elliott, Evangela, Yakima Valley Community College, Navajo Tribe of AZ, NM, & UT
Ellis, Pamela Renee. Arizona University, Navajo Tribe of AZ, MM, & UT
Emarthla, Nanelle Joyce, University of Central Oklahoma, Seminole Nation of OK
Emery, Charles Richard, Duke Unviersity Med Ctr Phy Asst Prg, Cheyenne River Sioux Tribe, SD
Engavo, Earlene Debra, Central Wyoming College, Arapahoe Tribe of Wind River
Eriacho, Marlene J., University of New Mexico, Navajo Tribe of AZ, NM, & UT
Erickson, Phyllis Jean, Eastern Washington University, Confederated Tribes of the Colville
Esalio, Stacy Gwen, University of New Mexico, Pueblo of Zuni Triben, NM
Eschiti, James Edwards, University of Central Oklahoma, Comanche Indian Tribe of OK
Eskeets, Leann Dora, University of New Mexico/Albuquerque, Navajo Tribe of AZ, NM, & UT
Etter, Evangeline Riggs, Oklahoma City University, Navajo Tribe of AZ, NM, & UT
Evan, Mona I., University of Alaska, Kake Organized Village
Evans, Rosella Evelyn, Salish Kootenai College, Shoshone-Brannock Tribes, Ft. Hall
Factor, Stephen Walter, The University of Oklahoma, Muskogee (Creek) Nation of OK
Fain, Julie Elizabeth, Oklahoma State University, Choctaw Nation of OK
Fairbanks, Barbara Ann, Northwest Technical College, White Earth Band—MN Chippewa
Ficken, April Rachelle, University of Oklahoma Health Sciences Center, Chickasaw Nation of Oklahoma
Filteau, Sarah Louise, Bellin College of Nursing, Bad River Band of Chippewa, WI
Fitzpatrick, Robin Dawn, University of Oklahoma, Crow Tribe of Montana
Fleming, Stephani Rose, Casper College, Turtle Mountain Band of Chippewa, ND
Flemming-Koagel, Pamela Elese, University of Great Falls, Berry Creek Rancheria of Maidu, CA
Floyd, Sharon Ann, Tulsa Junior College, Choctaw Nation of OK
Foldoe, Debra Ann, University of Texas at Arlington, MN Chippewa Tribe
Folger, Gloria, Weber State College, Navajo Tribe of AZ, NM, & UT
Folsom, Ashly Ray, Southwestern Oklahoma State University, Choctaw Nation of Oklahoma
Foster, Shawna Leann, Northeastern State University, Cherokee Nation of OK
Franceschini, Lisa Anne, University of North Dakota, Choctaw Nation of OK
Francisco, Nanel Yazzie, New Mexico State University, Navajo Tribe of AZ, NM, & UT
Fred, Alana Renee. University of Arizona, Navajo Tribe of AZ, NM, & UT
Freeman, Michael Scott, University of the Hlth Sciences Coll Osteo Med, Cherokee Nation of OK
Freeman, Ryan Matthew, University of Oklahoma, Muskogee (Creek) National OK
Frejo, Rayette Sammie, Phoenix College, Duckwater Shonshone Tribe, NV
Frigerio, Sonya Renee, University of New Mexico, Choctaw Nation of OK

Fromme, Melissa Diane, University of Oklahoma, Choctaw Nation of OK
Gaddy, Jasmine Reanna, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Garner, Kristi Lois, Millersville University, Fort Independence Paiute Indian, CA
Garness, Mary, Wisconsin Indianhead Technical College, Bad River Band of the Lake Superior Chippewa, WI
Gashytewa, Carrie Lynette, University of New Mexico, Pueblo of Zuni Tribe, NM
Geddes, Jacquline Lee, Washington State University, Rosebud Sioux Tribe, SD
George, Susan H., SUNY Institute of Technology, Seneca Nation of New York
Gillis, Christopher Jon, Minot State University, Turtle Mountain Band of Chippewa, ND
Gladstone, Joseph Scott, University of Arizona, Douglas Indian Association
Glover, Justin Mathew, Oklahoma State University, Choctaw Nation of Oklahoma
Goggles, Sunny Rae, University of North Dakota, Arapahoe Tribe of the Wind River
Goggles-Garner, Dawn Rae, University of North Dakota, Arapahoe Tribe of the Wind River
Gonzales, Denise Carleen, New Mexico State University, Pueblo of Laguna, NM
Gordon, Jennifer Lynn, California State University, Red Cliff Band of Lake Superior-Chippewa
Gordon, Melissa Marion, Montana State University, Crow Tribe of MT
Gorman, Marianita Elizabeth, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Goureau, Dean Anthony, University of North Dakota, Turtle Mountain Band of Chippewa, ND
Gourneau, Jessica Lynn, University of North Dakota, Turtle Mountain Band of Chippewa, ND
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West, Michael Clinton, Oklahoma State University, Choctaw Nation of OK
Westman, Delana Denise, University of Oklahoma Health Sciences Center, Cherokee Nation of Oklahoma
Weston, Marnie Lee, Phoenix College, Cheyenne River Sioux
White, Richard Kalvin, University of Utah, Navajo Tribe of AZ, NM, & UT
White, Sidney John, Marquette University, Oneida of Wisconsin
White Calfe-Sayler, Verlee Kay, University of North Dakota, Three Affiliated Tribes-Ft. Berthold
White Horse, Wyatt Arthur, University of Wyoming, Rosebud Sioux
Whited, Stephanie Lynn, University of Southern Mississippi, Nenana Native Assiciation, AK
Whitehair, Rosalita Marie, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Wiggins, Elizabeth Owle, University of North Carolina, Eastern Band of Cherokee-NC
Wilcox, Darlene Marie, University of North Dakota, Oglala Sioux
Wilkett, David Matthew, Oklahoma State University, Choctaw Nation of OK

Willcuts, Peggy Sue, South Dakota State University, Rosebud Sioux
Willhite, Laura Jean, University of Oklahoma Health Sciences Center, Cherokee Nation of Oklahoma
Williams, Kinde Elizabeth, University of Oklahoma, Wichita & Affiliated of OK
Williams, Rhonda Lynette, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Wilson, Dena Lynn, Chadron State College, Oglala Sioux
Wilson, Mackenzie P., University of Arizona Coll of Pharm, Navajo Tribe of AZ, NM, & UT
Wilson, Sandra, University of Oklahoma Dental School, Northern Cheyenne
Witherspoon, Lachelle Linette, San Francisco State University, Navajo Tribe of AZ, NM, & UT
Woolley, Eric Brady, University of Oklahoma, Iowa Tribe of Kansas & Nebraska
Woolridge, Mike Sue, Langston University, Chickasaw Nation of Oklahoma
Work, Hugh Edward, University of Oklahoma Health Sciences Center, Choctaw Nation of Oklahoma
Wyaco, Barbie Jen, University of Arizona, Navajo Tribe of AZ, NM, & UT
Yandell, Seth David, Sun Ross State University, Choctaw Nation of OK
Yazzie, Bettie Coconino County Community College, Navajo Tribe of AZ, NM, & UT
Yazzie, Nazhone Paul, University of Arizona, Navajo Tribe of AZ, NM, & UT
Yazzie, Sheldwin Aaron, University of New Mexico, Navajo Tribe of AZ, NM, & UT
Yazzie Stewart David, Grand Canyon University, Navajo Tribe of AZ, NM, & UT
Yazzie-Valencia, Martha, Oklahoma University Health Sciences Center, Navajo Tribe of AZ, NM, & UT
Yoe, Corinna Mae, Weber State University, Navajo Tribe of AZ, NM, & UT
York, Rebecca Ann, University of Arkansas Fayetteville, Cherokee Nation of Oklahoma
Young, Roseann, Arizona State University, Navajo Tribe of AZ, NM, & UT
Zwaryck, Shelby Leona, University of Great Falls, Chippewa Cree of Rocky Boy's, MT

FOR FURTHER INFORMATION CONTACT: The Indian Health Service Scholarship Branch, Twinbrook Metro Plaza, 12300 Twinbrook Parkway, Suite 100, Rockville, Maryland, 20852, Telephone: (301) 443–6197; Fax: (301) 443–6048.

Dated: December 14, 1998.

Michel E. Lincoln,

Acting Director.

[FR Doc. 98–33832 Filed 12–21–98; 8:45 am]

BILLING CODE 4160–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Gene Therapy Policy Conference; Notice of Conference

Notice is hereby given of a meeting of a Gene Therapy Policy Conference entitled: Prenatal Gene Transfer: Scientific, Medical, and Ethical Issues on January 7–8, 1999. The conference will be held at the Hyatt Regency Bethesda Hotel, One Bethesda Metro Center, Bethesda, Maryland 20814, starting on January 7 at approximately 8:00 a.m., and will recess at approximately 5:30 p.m. The conference will reconvene on January 8 at approximately 8:00 a.m. and will adjourn at approximately 6:00 p.m. The conference will be open to the public and free of charge; however, registration is required. Registration is available online at *http://www.nih.gov/od/orda* or you can contact Ms. Anne Dunne, Strategic Results, 6004 Lakeview Road, Baltimore, Maryland 21210, Phone 410–377–0110, Fax 410–377–6429. Ms. Dunne will provide conference information upon request. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Dunne in advance of the conference.

On July 8, 1996, the NIH Director published a Notice of Intent to Propose Amendments to the NIH Guidelines for Research Involving Recombinant DNA Molecules Regarding Enhanced Oversight of Recombinant DNA Activities (61 FR 3577). One significant component of the NIH Director's proposal was to establish Gene Therapy Policy Conferences (GTPC). These conferences are intended to offer the unique advantage of assembling numerous participants who possess significant scientific, ethical, and legal expertise and/or interest that is directly applicable to specific recombinant DNA issues. In order to enhance the depth and value of scientific and ethical/social discussion, each GTPC will be devoted to a single issue relevant to scientific merit and/or safety as it relates to research on the use of novel gene delivery vehicles and applications to human gene therapy, novel applications of gene transfer, or relevant ethical/social implications of a particular application of gene transfer technology.

The findings and recommendations of each GTPC will be made available to multiple Department of Health and Human Services (DHHS) components, including the Food and Drug Administration (FDA) and the Office for Protection from Research Risks (OPRR). The NIH Director anticipates that this expanded public policy forum will serve as a model of interagency communication and collaboration, concentrated expert discussion of novel scientific issues and their potential societal implications, and enhanced opportunity for public discussion of specific issues and the potential impact of such applications on human health and the environment.

On January 7–8, 1999, the NIH will hold its third GTPC entitled: Prenatal Gene Transfer: Scientific, Medical, and Ethical Issues. Topics will include preclinical studies of prenatal gene transfer; prenatal genetic screening and diagnostic tools; optimal clinical trial design focusing on patient safety and measurements of outcome; ethical, legal, and social issues raised by prenatal gene transfer; diagnostic testing and clinical care of patients post gene transfer; and patient education, informed consent, and eligibility.

The findings and recommendations of this conference will be submitted in the form of a report to the NIH Director.

Dated: December 15, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–33765 Filed 12–21–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye 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 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 Eye Institute Special Emphasis Panel.

Date: January 8, 1999.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: 6120 Executive Blvd., Suite 350, Rockville, MD 20892.

Contact Person: Andrew P. Mariani, Phd, Chief, Scientific Review Branch, 6120 Executive Blvd., Suite 350, Rockville, MD 20892, 301/496–5561.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: December 14, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–33763 Filed 12–21–98; 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 a meeting of the Board of Scientific Counselors, National Institute of Mental Health.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Mental Health, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Mental Health.

Date: January 21, 1999.

Agenda: To review and evaluate staff scientists and individual intramural programs and projects.

Place: National Institutes of Health, 9000 Rockville Pike, Building 10, Room 4N230, Bethesda, MD 20892.

Contact Person: Robert W. Dennis, Executive Secretary, Associate Director for Administration, Intramural Research Program, National Institute of Mental Health, NIH, Building 10, Room 4N222, Bethesda, MD 20892, 301–496–4183.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: December 14, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–33762 Filed 12–21–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of 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 a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the 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/or 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 grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Date: February 10–11, 1999.

Closed: February 10, 1999, 7:00 p.m. to 9:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: Bethesda Hyatt Regency, One Bethesda Metro, Bethesda, MD 20814.

Open: February 11, 1999, 8:30 a.m. to 4:00 p.m.

Agenda: Program Developments and Priorities.

Place: Natcher Building, 45 Center Drive, Conference Rooms E1/E2, Bethesda, MD 20892.

Contact Person: James F. Vaughan, Executive Secretary, National Institute on Alcohol Abuse, and Alcoholism, National Institutes of Health, PHS, DHHS, Bethesda, MD 20892.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: December 15, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–33764 Filed 12–21–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Amended Notice of Meeting

Notices is hereby given of a change in the meeting of the Board of Scientific Counselors, NIAAA, January 8, 1999, 8:00 a.m. to January 8, 1999, 3:30 p.m., National Institutes of Health, 9000 Rockville Pike, Building 31C, Conference Room 6, Bethesda, MD 20892 which was published in the **Federal Register** on December 4, 1998, 63FR67124.

The meeting is being amended to reflect location change. The new meeting location is 9000 Rockville Pike, Building 1, Wilson Hall, Bethesda, MD 20892. The meeting is partially closed to the public.

Dated: December 15, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–33767 Filed 12–21–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Recombinant DNA Advisory Committee; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the Recombinant DNA Advisory Committee on January 7, 1999. The meeting will be held at the Hyatt Regency Bethesda Hotel, One Bethesda Metro Center, Bethesda, Maryland 20814, starting at approximately 5:30 p.m. and will adjourn at approximately 9:30 p.m. The meeting will be open to the public to discuss human gene transfer protocols, procedures, data management, and other matters to be considered by the Committee. Attendance by the public will be limited to space available.

Debra W. Knorr, Deputy Director, Office of Recombinant DNA Activities, National Institutes of Health, MSC 7010, 6000 Executive Boulevard, Suite 302, Bethesda, Maryland 20892–7010, Phone 301–496–9838, Fax 301–496–9839, will provide summaries of the meeting and a roster of committee members upon request. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Knorr in advance of the meeting. OMB's "Mandatory

Information Requirements for Federal Assistance Program Announcements" (45 FR 39592, June 11, 1980) requires a statement concerning the official government programs contained in the *Catalog of Federal Domestic Assistance*. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers virtually every NIH and Federal research program in which DNA recombinant molecule techniques could be used, it has been determined not to be cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the *NIH Guidelines*. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the *Catalog of Federal Domestic Assistance* are affected.

Dated: December 15, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH

[FR Doc. 98–33766 Filed 12–21–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

National Institute of Environmental Health Sciences National Toxicology Program

Request for Comments on Chemicals Nominated to the National Toxicology Program (NTP) for Toxicological Studies—Recommendations by the Interagency Committee for Chemical Evaluation and Coordination (ICCEC) for Study, No Studies, or Deferral to Obtain Additional Information.

Background

As part of an effort to earlier inform the public and obtain input into the selection of chemicals for evaluation, the National Toxicology Program (NTP) routinely seeks public input on (1) chemicals nominated to the Program for toxicological studies, and (2) the testing recommendations made by the ICCEC, the Federal interagency committee that serves as the first level of review for nominations. Summaries of the ICCEC's recommendations and public comments received on the nominated chemicals are next presented to the NTP Board of Scientific Counselors (the Program's external scientific advisory committee) for their review and comment in an open, public session. The ICCEC recommendations, Board recommendation, and public comments are incorporated into the recommendations that are then submitted to the NTP Executive Committee, the Federal interagency policy oversight body. The Executive Committee reviews and approves action to move forward to test, defer, or delete on each of the nominated chemicals for the various types of study, and recommends priorities.

Request for Comment

Interested parties are encouraged to comment on the recommendations and provide information on the chemicals listed below. The Program would welcome receiving toxicology and carcinogenesis information from completed or ongoing studies, and information on planned studies, as well as current production data, human exposure information, use patterns, and environmental occurrence for any of the chemicals listed in this announcement. To provide comments or information, please contact Dr. William Eastin at the address given below within 60 days of the appearance of this announcement.

At their meeting on November 23, 1998, the ICCEC reviewed 13 agents nominated to the NTP for consideration to study and recommended 10 agents for metabolism, toxicity, or carcinogenicity studies, recommended that no studies be performed on 2 chemicals, and deferred 1 substance pending receipt of test data from other organizations or from related studies anticipated or in progress by the NTP, and information on production, exposure, and use patterns. Additionally, the ICCEC reviewed 13 agents recommended for study in previous ICCEC meetings. Following review of additional data received from the public and elsewhere, 12 are no longer considered priority candidates for study, and 1 chemical previously recommended for toxicity study was recommended for carcinogenicity study. Chemicals with CAS numbers, nomination source, types of studies under consideration, and rationale and other information are given in the following tables.

Contact may be made by mail to: Dr. William Eastin, NIEHS/NTP, P.O. Box 12233, Research Triangle Park, North Carolina 27709; by telephone at (919) 541–7941; by FAX at (919) 541–3687; or by email at Eastin@NIEHS.NIH.GOV. The URL for the NTP homepage is http://ntp-server.niehs.nih.gov.

Dated: December 11, 1998.

Kenenth Olden,

Director, National Toxicology Program.

Attachment

CHEMICALS NOMINATED TO THE NTP FOR STUDY, AND TESTING RECOMMENDATIONS MADE BY THE ICCEC ON NOVEMBER 23, 1998

Chemical [CAS No.]	Nominated by	ICCEC recommendations	Study rationale; other information
Chemicals Recommended for Testing			
Androstenedione [63–05–8]	NCI	—subchronic (cardiovascular and reproductive) toxicity. —metabolism —carcinogenicity	—widely used steroid dietary supplement. —estrogen and testosterone precursor.
Bentonite [1302–78–9]	NIOSH	—chronic inhalation toxicity	—naturally occurring silicate. —known worker exposure.
Bis(2-chloroethoxy)methane [111–91–1]	NIEHS	—carcinogenicity —metabolism and disposition	—high production. —environmentally persistent. —potential high worker exposure.
Chromium picolinate [14639–25–9]	NCI; Private individual.	—subchronic toxicity —metabolism and pharmacokinetics —reproductive toxicity —carcinogenicity	—widely used dietary supplement. —picolinate ligand enhances chromium absorption.

CHEMICALS NOMINATED TO THE NTP FOR STUDY, AND TESTING RECOMMENDATIONS MADE BY THE ICCEC ON NOVEMBER 23, 1998—Continued

Chemical [CAS No.]	Nominated by	ICCEC recommendations	Study rationale; other information
Cumene hydroperoxide [80–15–9]	NIEHS	—carcinogenicity	—high production. —known worker exposure.
Echinacea	NCI	—subchronic toxicity —immunotoxicity —chronic toxicity	—natural product. —widely used dietary supplement. —wide variety of preparations available.
Fluasterone [112859–71–9]	NCI	—toxicological characterization —carcinogenicity	—fluorine-substituted DHEA analogue. —NCI considering for clinical trial.
Ginkgo biloba extract	NCI	—toxicological characterization —neurotoxicity —carcinogenicity	—natural product (standardized plant extract). —widely used dietary supplement.
Ginkgolide B [15291–75–5]	NCI	—micronucleus test (Ginkgolide B)	—Ginkgolide B is a constituent of *Ginkgo biloba* extract.
Pyrogallol [87–66–1]	Private individual	—subchronic toxicity —carcinogenicity	—natural and industrial product. —FDA approved coloring additive. —widespread human exposure.
Triallyl isocyanurate [1025–15–6]	NIEHS	—subchronic toxicity —metabolism and pharmacokinetics (pending confirmation of significant production).	—moderate production. —indirect food additive.

Chemical [CAS Number]	Nominated by	Nominated for	Rationale; other information
Chemical for Which No Testing is Recommended			
Caffeic acid [331–39–5], Chlorogenic acid [327–97–9].	Private individual	—carcinogenicty	—naturally occurring in a wide variety of nutritionally important foods. —generally weak evidence of toxicity in existing studies.
Chemical Deferred for Additional Information			
Dehydroepiandosterone (DHEA) [53–43–0].	NCI; Private individual.	—Toxicological characterization —carcinogenicity —reproductive toxicity	—widely used steroid dietary supplement. —has FDA IND status. —metabolized to adrostenedione. —defer until results of androstendione studies available.
Chemicals to be Removed from Consideration			
2-Acetylpyridine [1122–62–9]	NCI	—carcinogenicity	—insufficient production and use to warrant testing.
Cyanogen chloride [506–77–4]	EPA	—metabolism —carcinogenicity	—rapid conversion to cyanide in blood
Diethylamine [109–89–7], Isopropylamine [75–31–0], Triethylamine [121–44–8].	NIEHS, NIEHS, UAW.	—subchronic inhalation toxicity —ocular toxicity	—adequate NIOSH studies of DEA and TEA. —too corrosive for humane study. —ocular irritation in workers already well documented.
Ethidium bromide [1239–45–8]	Private individual	—toxicological characterization —carcinogenicity	—already labeled as possible carcinogen. —few people exposed.
Ethyl bromoacetate [105–36–2]	NCI	—metabolism	—rapid hydrolysis in blood —animals would be distressed —other haloacetic acids being studies
4-Methoxy-N-methyl-1,8-napthalimide [3271–05–4].	NCI	—chemical disposition	—unable to obtain material
—Myrcene [123–35–3]	NIEHS	—metabolism —alkylating ability	—unable to obtain radiolabeled material
Phenothiazine [92–84–2]	NIEHS, NIOSH	—toxicological characterization —carcinogenicity	—low production —no longer in agricultural or veterinary use
Saw palmetto, Sitosterol [83–46–5]	Private individual	—toxicological characterization —carcinogenicity	—low potential for reproductive toxicity —two-generation and 13-week studies available —subject of FDA-approved clinical trial

Chemical [CAS Number]	Nominated by	Nominated for	Rationale; other information
Trigonelline [535–83–1]	Private individual	—subchronic toxicity —comparative metabolism	—naturally occurring in a wide variety of nutritionally important foods —metabolite of niacin in humans —metabolized differently in rats and humans —very low acute toxicity
Chemical for Which Previous Testing Recommendation Has Been Modified			
Propargyl alcohol [107–19–7]	NCI	—carcinogenicity	—high production —widespread human exposure —subchronic study available —suspicion of carcinogenicty based on structure

[FR Doc. 98–33761 Filed 12–21–98; 8:45 am]
BILLING CODE 4140–01–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior

ACTION: Notice of Amendment to Approved Tribal-State Compact.

SUMMARY: Pursuant to 25 U.S.C. 2710, of the Indian Gaming Regulatory Act of 1988 (Pub. L. 100–497), the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III (casino) gambling on Indian reservations. The Assistant Secretary—Indian Affairs, Department of the Interior, through her delegated authority, has approved the Amendments to the Red Cliff Band of Lake Superior Chippewa Indians and the State of Wisconsin Gaming Compact of 1991, which was executed on December 11, 1998.

DATES: This action is effective December 22, 1998.

FOR FURTHER INFORMATION CONTACT: George T. Skibine Director, Indian Gaming Management Staff, Bureau of Indian Affairs, Washington, D.C. 20240, (202) 219–4066.

Dated: December 11, 1998.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 98–33799 Filed 12–21–98; 8:45 am]
BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact.

SUMMARY: Pursuant to Section 11 of the Indian Gaming Regulatory Act of 1988, Pub. L. 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III (casino) gambling on Indian reservations. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, has approved the Tribal-State Gaming Compact between the State of California and the Table Mountain Rancheria, which was executed on July 13, 1998.

DATES: This action is effective December 22, 1998.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Indian Gaming Management Staff, Bureau of Indian Affairs, Washington, DC 20240, (202) 219–4066.

Dated: December 11, 1998.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 98–33798 Filed 12–21–98; 8:45 am]
BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–055–99–7122–00–8600]

Nevada Temporary Closure of Certain Public Lands Managed by the Bureau of Land Management, Las Vegas District

AGENCY: Bureau of Land Management, Department of Interior.

ACTION: Temporary closure of selected public lands in Clark County, Nevada, during the operation of the 1999 SCORE Laughlin Desert Challenge Race.

SUMMARY: The District Manager of the Las Vegas District announces the temporary closure of selected public lands under its administration

This action is being taken to help ensure public safety, prevent unnecessary environmental degradation during the official permitted running of the 1999 SCORE Laughlin Desert Challenge Race and to comply with provisions of the U.S. Fish and Wildlife Service's Biological Opinion for Speed Based Off-Highway Vehicle Events (1–5–98–F–053).

DATES: From 6:00 a.m. January 22, 1999 through 8:00 p.m. January 24, 1999 Pacific Standard Time.

Closure Area: As described below, an area within T. 32 S. to T. 33 S. R. 64 E. to R. 66 E.

1. The closure is bounded by State Route #163 on the North, California State Line on the South, US 95 on the West, Big Bend Drive on the East.

Exceptions to the closure are: State Route 163.

2. The entire area encompassed by the designated course and all areas outside the designated course as listed in the legal description above are closed to all vehicles except Law Enforcement, Emergency Vehicles, and Official Race Vehicles. Access routes leading to the course are closed to vehicles.

3. No vehicle stopping or parking.

4. Spectators are required to remain within designated spectator area only.

5. The following regulations will be in effect for the duration of the closure:

Unless otherwise authorized no person shall:

a. Camp in any area outside of the designated spectator areas.

b. Enter any portion of the race course or any wash located within the race course.

c. Spectate or otherwise be located outside of the designated spectator area.

d. Cut or collect firewood of any kind, including dead and down wood or other vegetative material.

e. Possess and or consume any alcoholic beverage unless the person has reached the age of 21 years.

f. Discharge, or use firearms, other weapons or fireworks.

g. Park, stop, or stand any vehicle outside of the designated spectator area.

h. Operate any vehicle including an off-highway vehicle (OHV), which is not legally registered for street and highway operation, including operation of such a vehicle in spectator viewing areas, along the race course, and in designated pit area.

i. Park any vehicle in violation of posted restrictions, or in such a manner as to obstruct or impede normal or emergency traffic movement or the parking of other vehicles, create a safety hazard, or endanger any person, property or feature. Vehicle so parked are subject to citation, removal and impoundment at owners expense.

j. Take a vehicle through, around or beyond a restrictive sign, recognizable barricade, fence or traffic control barrier or device.

k. Fail to keep their site free of trash and litter during the period of occupancy, or fail to remove all personal equipment, trash, and litter upon departure.

l. Violate quiet hours by causing an unreasonable noise as determined by the authorized officer between the hours of 10:00 p.m. and 6:00 a.m. Pacific Standard Time.

m. Allow any pet or other animal in their care to be unrestrained at any time.

n. Fail to follow orders or directions of an authorized officer.

o. Obstruct, resist, or attempt to elude a Law Enforcement Officer or fail to follow their orders or direction.

Signs and maps directing the public to designated spectator areas will be provided by the Bureau of Land Management and the event sponsor.

The above restrictions do not apply to emergency vehicles and vehicles owned by the United States, the State of Nevada or the Clark County. Vehicles under permit for operation by event participants must follow the race permit stipulations.

Operators of permitted vehicles shall maintain a maximum speed limit of 35 mph on all BLM roads and ways. Authority for closure of public lands is found in 43 CFR part 8340 subpart 8341; 43 CFR part 8360, subpart 8364.1 and 43 CFR part 8372. Persons who violate this closure order are subject to fines and or arrest as prescribed by law.

FOR FURTHER INFORMATION CONTACT: Dave Wolf Recreation Manager or Ron Crayton or Ken Burger BLM Rangers, BLM Las Vegas District 4765 Vegas Dr. Las Vegas, Nevada 89108, (702) 647–5000.

Dated: December 9, 1998.

Robert Dunn,

District Manager.

[FR Doc. 98–33756 Filed 12–21–98; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–030–98–1020–24–1 A]

Sierra Front/Northwest Great Basin Resource Advisory Council—Notice of Meeting Locations and Times

AGENCY: Bureau of Land Management, Interior.

ACTION: Resource Advisory Council Meeting Locations and Times.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972 (FACA), the Department of the Interior, Bureau of Land Management (BLM) Council meetings will be held as indicated below. The agenda includes: Black Rock Desert Management Plan, update, overview and schedule; Pronghorn Area of Critical Environmental Concern; Standards and Guidelines for wild horses; Hardrock Mining and related actions; and public comment period.

All meetings are open to the public. The public may present written comments to the council. Each formal council meeting will have a time allocated for public comments. The public comment period for the council meeting is listed below. Individuals who plan to attend and need further information about the meeting or need special assistance such as sign language interpretation or other reasonable accommodations, should contact Mike Holbert, Associate Field Manager, Winnemucca Field Office, 5100 East Winnemucca Boulevard, Winnemucca, NV 89445, (775) 623–1514.

DATE, TIME: The council will meet on Thursday, January 28, 1999 from 9:00 a.m. to 5:00 p.m. and Friday, January 29, 1999, from 8:00 a.m. to 12:00 p.m. at the Bureau of Land Management, Winnemucca Field Office, 5100 East Winnemucca Boulevard, Winnemucca, NV in the main conference room. The public comment period will be at 1:15 p.m., Thursday, January 28, 1999.

FOR FURTHER INFORMATION CONTACT: Mike Holbert, Associate Field Manager, Winnemucca Field Office, 5100 East Winnemucca Blvd., Winnemucca, NV 89445, (775) 623–1514.

Dated: December 16, 1998.

Karl Kipping,

Associate Manager, Carson City Field Office.

[FR Doc. 98–33819 Filed 12–21–98; 8:45 am]

BILLING CODE 4310–HC–M

DEPARTMENT OF THE INTERIOR

National Park Service

Bandelier National Monument, NM

AGENCY: National Park Service, Interior.

ACTION: Transfer of Administrative Jurisdiction, Bandelier National Monument, New Mexico.

SUMMARY: Section 3164 of the National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105–85, 111 Stat. 1629, directs the Secretary of Energy to transfer to the Secretary of the Interior administrative jurisdiction over a 4.47-acre parcel of land depicted on the map entitled, "Boundary Map, Bandelier National Monument," No. 315/80,051, dated March 1995. That transfer of administrative jurisdiction shall be effective on the date of publication of this notice.

SUPPLEMENTARY INFORMATION: Maps and the legal description of the lands involved may be reviewed at the Department of Energy, Los Alamos Area Office, 528—35th Street, Los Alamos, New Mexico, and at Bandelier National Monument, New Mexico.

Dated: July 30, 1998.

John E. Cook,

Regional Director, Intermountain Region, National Park Service.

[FR Doc. 98–33506 Filed 12–21–98; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

Kaloko-Honokohau National Historical Park; Advisory Commission Notice of Meeting

Notice is given in accordance with the Federal Advisory Committee Act that a meeting of the Na Hoapili o Kaloko Honokohau, Kaloko Honokohau National Historical Park Advisory Commission will be held at 10:00 a.m. to 3:00 p.m., January 16, 1999, at the King Kamehameha Kona Beach Hotel, Islander Room, Kailua-Kona, Hawaii.

Committee Reports will be presented.

This meeting is open to the public. It will be recorded for documentation and transcribed for dissemination. Minutes of the meeting will be available to the public after approval of the full Advisory Commission. A transcript will be available after February 27, 1999. For copies of the minutes, contact the Kaloko-Honokohau National Historical Park Superintendent at (808) 329–6881.

Dated: December 11, 1998.

Bryan Harry,

Superintendent, Pacific Islands Support Office.

[FR Doc. 98–33794 Filed 12–21–98; 8:45 am]

BILLING CODE 4310–70–M–

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

December 16, 1998.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor, Departmental Clearance Officer, Todd R. Owen ({202} 219–5096 ext. 143) or by E-Mail to Owen-Todd@dol.gov.

Comments should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for BLS, OSHA, ESA Office of Management and Budget, Room 10235, Washington, DC 20503 ({202} 395–7316), within 30 days from the date of this publication in the **Federal Register.**

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the 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 submission of responses.

Agency: Occupational Safety and Health Administration.

Title: 29 CFR Part 1904 Recording and Reporting Occupational Injuries and Illnesses.

OMB Number: 1218–0176 (extension).

Frequency: Recordkeeping.

Affected Public: Business or other for-profit; Not-for-profit institutions; Farms; State, Local or Tribal Government.

Number of Respondents: 1,110,398.

Estimated Time Per Respondent: 1.57 hours.

Total Burden Hours: 1,741,959.

Total Annualized Capital/startup Costs: 0.

Total Annual (operating/maintaining): 0.

Description: The OSHA No. 200, Log and Summary; the OSHA No. 101, Supplementary Record; and the recordkeeping guidelines provide employers with the means and specific instructions needed to maintain records of work-related injuries and illnesses. Response to this collection of information is mandatory, as specified in 29 CFR Part 1904. Data recorded under this information collection is collected in two major nationwide surveys. One survey is conducted by OSHA the other by the Bureau of Labor Statistics (BLS). The information generated from these surveys is used by OSHA for targeting its programmed inspections. OSHA is also using these data for performance measurement purposes in compliance with the Government Performance and Results Act (GPRA). The BLS uses the data for producing national statistics on occupational injuries and illnesses.

Agency: Bureau of Labor Statistics.

Title: Report on Employment, Payroll, and Hours.

OMB Number: 1220–0011 (revision).

Agency Number: BLS–790 A, B, B–M, C, E, G, G–S, H, S, F1, F2, F3, and CU.

Affected Public: State or Local Governments; Business or other for-profit; Federal Government; Not-for-profit institutions.

Form BLS 790	Number of respondents	Frequency of response	Total annual responses	Response time	Annual burden hours
Current Design Reporting Burden					
BM	400	12	4,800	15	1,200
G, G–S	39,600	12	475,200	5	39,600
CU	[1] 0	1	0	2	0
F1, F2, F3	[2] 30,000	12	360,000	7	42,000
All Other	[3] 297,200	12	3,566,400	7	416,080
Total	367,200		4,406,400		498,880
Probability Design Reporting Burden					
BM	0	12	0	15	0
G, G–S	0	12	0	5	0
CU	[1] 0	1	0	2	0
F1, F2, F3	[2] 10,000	12	120,000	7	42,000
All Other	[3] 59,300	12	711,600	7	416,080
Total	69,300		831,600		97,020

[1] A subset of current reporters may receive this "one-time" supplemental form and is not used for the probability sample.

[2] For current design, assumes 3,000 multi-unit firms reporting by fax for approximately 30,000 establishments. For probability sample, assumes 1,000 multi-unit firms reporting for 10,000 establishments.

[3] All other BLS–790 forms collect the same information and differ only by industry definitions.

Total Annualized Capital/startup Costs: $0.

Total Annual (operating/maintaining): $0.

Description: The Current Employment Statistics program provides estimates of current monthly employment, hours, and earnings, by industry, State and MSA. Data provided are fundamental inputs in the economic decision process at all levels of government, private enterprise, and organized labor. The estimates are vital to the calculation of the Personal Income Accounts and the Federal Reserve Board's Index of Industrial Production.

Agency: Employment Standards Administration.

Title: Office of Federal Contract Compliance Programs (OFCCP) Recordkeeping and Reporting Requirements: Supply and Service.

OMB Number: 1215–0072 (revision).

Frequency: Business or other for-profit; not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 89,807.

Requirement	Average time per response	Frequency	No. respondents	Hours
Recordkeeping:				
Initial Development of AAP	179.46	Once	89,807	161,153
Update of AAP	74.889	Annually	88,909	6,658,288
Maintenance of AAP	74.889	Annually	89,807	6,725,543
Uniform Guidelines on Employees Selection Procedures*	*	*	*	482,804
Reporting:				
Standard Form 100	3.7	Annually	51,603	191,265

*The Uniform Guidelines are used by four agencies other than OFCCP, and have been approved by the Office of Management and Budget under an information collection submitted by the Equal Employment Opportunity Commission. The OFCCP has been apportioned a part of this burden. The EEOC estimate for OFCCP is 482,804 burden hours, or slightly less than a third of the 1.6 million burden hours in the EEOC inventory.

Total Recordkeeping Hours: 14,027,790.

Total Reporting Hours: 191,265.

Total Hours, Reporting and Recordkeeping: 14,219,055.

Total Annualize Capital/startup Costs: 0.

Total Annual Cost (operation/maintenance): $12,375.70.

Description: The Office of Federal Contract Compliance Programs (OFCCP) is responsible for the administration of equal employment opportunity programs which prohibit employment discrimination and require affirmative action. These programs are Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and the Vietnam Era Veterans' Readjustment Assistant Act of 1974 (VEVRAA), as amended, (38 USC 4212). This information collection contains all recordkeeping and reporting requirements and forms which are derived from the implementing regulations found in Title 41 of the Code of Federal Regulations, Chapter 60, for supply and service contractors. The Department of Labor (DOL) is seeking an extension of this information collection in order to substantiate compliance with nondiscrimination and affirmative action requirements monitored by OFCCP. The Department has determined that compliance evaluation fall within the exemption under PRA95. Therefore, these hours have been excluded from this request.

Todd R. Owen,

Departmental Clearance Officer.

[FR Doc. 98–33823 Filed 12–21–98; 8:45 am]

BILLING CODE 4510–24–M

DEPARTMENT OF LABOR

Employment and Training Administration

Job Training Partnership Act: Migrant and Seasonal Farmworker Programs; Proposed Allocation Formula

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of a proposed updated allocation formula described herein, and request for comments.

SUMMARY: The Employment and Training Administration (ETA) is publishing a notice of a description of and rationale for a new allocation formula for the Job Training Partnership Act (JTPA), Section 402 and the Workforce Investment Act (WIA), Section 167, adult migrant and seasonal farmworker programs, and a presentation of preliminary State planning estimates derived therefrom for Program Year (PY) 1999 (July 1, 1999 through June 30, 2000). Public comment is requested.

DATES: Written comments on this notice are invited and must be received on or before February 5, 1999.

ADDRESSES: Written comments shall be submitted to Ms. Anna Goddard, Director, Office of National Programs, Employment and Training Administration, U.S. Department of Labor, Room N–4641, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Mr. Ross S. Shearer, Jr. on (202) 219–8216, Ext. 102 (this is not a toll-free number) or via e-mail at <rshearer@doleta.gov> or Mr. Michael S. Jones on (202) 219–8216, Ext. 103 (this is not a toll-free number) or via e-mail at <mjones@doleta.gov>.

I. Introduction, Scope and Purpose of Notice

This notice is published pursuant to Section 162(d) of the JTPA, which states:

Whenever the Secretary utilizes a formula to allot or allocate funds made available for distribution at the Secretary's discretion under the Act, the Secretary shall, not less than 30 days prior to allotment or allocation, publish such formula in the **Federal Register** for comment along with the rationale for the formula and the proposed amount to be distributed to each State and area. After consideration of any comments received, the Secretary shall publish final allotments and allocations in the **Federal Register**.

Thus, this notice represents the first stage of a two-stage process. Upon receipt of comments from the public regarding this notice, modifications to the proposed formula and preliminary planning estimates will be considered. In the second stage, the final formula and planning estimates will be published in the **Federal Register**.

The formula is developed for the purpose of distributing funds geographically by State service area, on the basis of each State service area's relative share of persons eligible for the program. Beginning with PY 1999, a revised allocation formula is proposed which will improve and update the methodology for allocating funds among the States by using more relevant and current data on the distribution of the farmworker population. The revised

formula is the result of work done by an Interagency Task Force on Farmworker Population Data (Task Force) and the Department's response to public comments received in response to a January 16, 1997 **Federal Register** notice of a proposed updated allocation formula for the JTPA Section 402 program.

Part II of this notice provides a discussion for public comment of the issues associated with farmworker population data, including: the Interagency Task Force on Farmworker Population Data, a description of available farmworker data sources; a discussion of the background of the allocation formula development; an overview of the peer review report; a detailed description of the proposed allocation formula; and a discussion of factors affecting formula development.

Part III describes a hold-harmless provision which is proposed to be put into place for three years following the implementation of the revised allocation formula. The hold-harmless provision is designed to provide a staged transition from old to new funding levels for State service areas.

Part IV describes proposed minimum funding provisions to address State service areas which would receive less than $60,000 and State service areas which would receive from between $60,000 and $119,999 as a result of the implementation of the allocation formula.

Part V describes the proposed application of the formula and the hold-harmless provision using the PY 1999 appropriation for the JTPA, Section 402 program.

II. Description of Proposed Allocation Formula

A. Interagency Task Force on Farmworker Population Data

In April 1994, a special task force was convened to explore options for revising the existing formula and its data bases. The Interagency Task Force on Farmworker Population Data consisted of specialists in the fields of demography, economics, sociology, survey research, statistics, an employment and training program representative and a representative of JTPA, Section 402 grantees. Staff from ETA, the Bureau of Labor Statistics, the Economic Research Service of the U.S. Department of Agriculture, and the Bureau of the Census of the U.S. Department of Commerce were represented in this group. The Task Force was formulated to include three members of the 1986 Interagency Task Force that developed the original allocation formula, which the proposed formula in this notice revises and updates.

The Task Force examined a wide variety of issues in considering those most important to developing a funding formula. The formula proposed in this notice is intended to be responsive to the many concerns about and to the high degree of interest in farmworker population data. It represents the Task Force's best efforts at crafting a funding methodology which meets the following statutory and administrative requirements:

(1) The need to use the most current data available on the farmworker population distribution among States;

(2) The need to employ detailed data which enumerates the farmworker population at the State level, to correlate such detailed data with the State-by-State geographical level at which funds are allocated;

(3) The need to use data which are descriptive and relevant that is, which address the socio-economic conditions, particularly the occupations and incomes, experienced by the farmworker population served by the JTPA, Section 402 and WIA, Section 167 programs.

Moreover, the allocation formula described herein is also informed by the results of public comment received in response to an earlier notice describing an allocation formula proposal. As a result of those comments and the feedback from the Task Force, the Department chose not to proceed with the formula proposed at that time, and instead reconvened the Task Force, developed an approach for a revised, updated JTPA, Section 402 allocation formula responsive to the comments received, consulted with an expert in the field of labor and agricultural economics, and conducted an extensive dialogue and consultation with its JTPA, Section 402 grantee partners.

B. Discussion of Data Sources

In developing both the initial and this proposed allocation formula, eight data bases were evaluated and considered for possible use in a formula distribution of JTPA, Section 402 funds. In evaluating the appropriateness of using any of the eight data bases, three measures of suitability were applied to each one. First, a measure of currency determined whether the data bases were composed of more recent or more obsolete data. Second, a measure of detail determined whether the data bases offered descriptions of the farmworker population at national, State and county levels. Third, a measure of relevance determined whether the data bases contained meaningful data on the socio-economic conditions experienced by the population. These measures were applied to each data source separately, and in combination with others, to determine which one or ones would be suitable for a revised formula.

What follows is a discussion of each of the eight data bases considered.

1. Census of Population

Presently, the Decennial Census of Population (COP) is the only source of data on the farmworker population that provides information on their socio-economic characteristics which is equally available at national, State and county levels. Geographic breadth is perhaps its greatest strength for the purpose at hand. The COP, among other things, counts individuals by occupation, industry, income level, and provides the number of family members for respondents. All of these are factors associated with participant eligibility in the JTPA, Section 402 and WIA Section 167 programs. Finally, the COP has been used, in whole or in part, for the past decade to allocate JTPA, Section 402 funds. The relative funding levels to the grant programs which now comprise the JTPA, Section 402 system have been relatively stable as a result.

The COP also has a number of recognized weaknesses with regard to counting the farmworker population. These have been discussed at length elsewhere, by numerous, knowledgeable critics and this notice contains only a brief recapitulation of these problems. The 1990 COP was conducted during one reference week period during the first week in April. The enumeration in early Spring occurred at a time during which agricultural activity across the country was limited. Occupational questions on the Census form concerned the chief job activity during the survey week. Consequently, those farmworkers who were unemployed due to the seasonal nature of agriculture, or who were employed for a majority of hours in a nonfarm occupation, would not be counted as farmworkers by Census enumerators.

Exacerbating the nonidentification of individuals as farmworkers was the problem of undercounting this elusive population. Farmworkers as a group are characterized by many members who have no fixed address; are highly migratory; have limited English speaking abilities; have low educational levels; work intermittently in various agricultural and non-agricultural occupations during a single year; have only casual employer-employee links; live in rural, often remote areas; and are unfamiliar with or actively distrustful of

government agencies and agents, such as Census enumerators. Therefore, the results are biased against this population.

The COP's weaknesses as a measuring instrument also include the fact that it occurs decennially, and there are no intervening surveys of equivalent breadth. Additionally, measures of the farmworker (or any *occupationally*-defined) population, are the result of projections made from a smaller (in that case, 17 percent of households), not the universe of respondents. However, it should be noted that virtually all farmworker data sources suffer this weakness. As a mitigating factor, the COP is based on a much larger sample of households than any other data set.

2. Census of Agriculture

The Census of Agriculture (COA), conducted every five years by the U.S. Department of Commerce, Bureau of the Census,[1] measures total hired and contract labor expenses incurred in the operation of farms during the entire year. The COA combined tallies of labor expenditures capture nearly all farmworkers who worked for wages. The COA also offers the most complete geographic coverage of hired and contract farm labor in its measure of labor expenses.

The weaknesses of the COA include the fact that no measures of individual worker earnings nor demographic data are available. Therefore, it is not possible to determine, with these data alone, the number and distribution of the economically disadvantaged farmworkers who are the target population for JTPA, Section 402 and WIA Section 167 services. Neither does the COA record data based on discrete occupations within agriculture, or the number of farmworker dependents. The COA expenditure data include farm managers, secretaries, clerks and others who are not eligible for program services based on their occupation. In the COA's tally of hired farmworkers, there is a duplicate count given the high level of turnover in this industry. (The count is not used in the proposed formula.) Finally, there is a potential problem of using expenditure data as a proxy for the number of farmworkers in the States, since areas with substantial agribusiness may have different unit costs, and different expenditure levels which may not necessarily yield equivalent numbers of workers.

[1] For 1992 and before, the U.S. Department of Commerce, Bureau of the Census was responsible for the COA. For the 1997 COA and beyond, that responsibility has been transferred to the U.S. Department of Agriculture, National Agricultural Statistical Service.

3. National Agricultural Worker Survey

The National Agricultural Workers Survey (NAWS), published by the Department of Labor, is conducted three times annually at peak and slack agricultural seasons (January, May and September) and surveys a random sample of agricultural crop workers. The NAWS is rich in demographic and socio-economic detail, and includes income and family member data.

The principal weakness of the NAWS is that it is not designed to estimate either the size or the distribution of the farmworker population among the States. A secondary weakness is that its description of the farmworker population is based on a relatively small annual sample of between 2,000 and 2,700 respondents located in 288 predominantly agricultural counties in 25 States. Additionally, the surveyed respondents work only in crop agriculture thus the NAWS does not survey farmworkers engaged in livestock production who may be eligible for JTPA, Section 402 program services.

4. Current Population Survey

The Current Population Survey (CPS), published by the Bureau of Labor Statistics, is a monthly probability survey based on a random sample of about 57,000 households. But very few of these have farmworkers. Annual summaries of the monthly CPS yield less than 1,300 farmworkers. Earnings questions are asked of a subset of the sample households. Although this is the most timely of the data sources considered, with regard to the farmworker population, the extremely small sample size limits its applicability to the entire farmworker population. Furthermore, because of low statistical reliability, DOL does not publish State estimates directly from the CPS for most States.

5. Farm Labor Survey

The Farm Labor Survey (FLS), published by the U.S. Department of Agriculture, National Agricultural Statistics Service, is a quarterly estimate (for California, Florida, and the entire United States) of the employment level of all hired labor on the farm, including clerical, maintenance workers, etc. Agricultural service workers and contract workers are reported separately. The FLS is a probability survey based on a sample of roughly 15,000 farms. It projects from this sample the average number of persons engaged in agriculture in 17 regions, two of which are States. No income or demographic information is available from FLS data. However, the FLS reports separately annual average hourly wages for all field, livestock, and hourly workers. The hourly wage rates are available for all States except Alaska. The District of Columbia and the Commonwealth of Puerto Rico are also excluded. These annual wage rates are averages of the wage rates for each survey week weighted by the number of hours worked during the week. The annual average is based on data collected for one week each in January, April, July and October.

6. Farm Costs and Returns Survey

The U.S. Department of Agriculture, National Agricultural Statistical Service's annual Farm Costs and Returns Survey (FCRS)[2], data reflect total hired and contract labor expenses incurred in the operation of the farm during the entire year, including expenses for secretaries, and maintenance workers. No individual income or demographic data are available from the FCRS, nor are State estimates of the farmworker population derived directly from the FCRS. Instead, the FCRS data are used to calculate a national estimate which is then distributed among the States primarily by using data from the Census of Agriculture.

7. Bureau of Economic Analysis

U.S. Department of Commerce, Bureau of Economic Analysis (BEA) data consist of annual estimates of all wage and salary workers, including farmworkers and others working on a farm, such as clerical and maintenance workers, but excluding contract workers. The BEA estimates are based on data from the Farm Labor Survey, the Farm Costs and Returns Survey, the NAWS, and the Census of Agriculture discussed above, and Unemployment Insurance Program data.

8. Migrant Enumeration Project

The Migrant Enumeration Project (MEP) data on the number of farmworkers are developed from a Demand for Labor study sponsored by the Office of Migrant Health of the Department of Health and Human Services in 1991–92. The formula used in the study is constructed from information on crop acreage, hours needed to perform a specific operation (e.g., harvest) on one acre of the crop, work hours per farmworker per day, and season length for peak work activity. This information was collected in counties with a migrant presence. Inter-

[2] This report is now called the Agricultural Resource Management Study.

and intra-State duplicate counts are likely with this methodology. The number of dependents found by the MEP was calculated based on NAWS data. No farmworker income information is available from the MEP.

C. Background of Allocation Formula Development

The formula used in allocating funds for the current 1998 Program Year is based on the 1980 COP, adjusted by the Special Agricultural Workers administrative data that accounted for the amnesty provisions of the Immigration Reform and Control Act. Continued application of this formula is questionable in terms of its poor relevancy and aging data; consequently, its continued use has grown less defensible with each passing year.

The COP is an unsatisfactory methodology for counting economically disadvantaged migrant and seasonal farmworkers. Consequently, the obstacle to be overcome has been that of choosing and developing the best demographic sources for accurately measuring the farmworker population within each State and Puerto Rico and adjusting the results for the JTPA, Section 402 eligible farmworker population.

One problem with using the COP for counting farmworkers is derived from the fact that it takes a single "snap-shot" in April that misses many farmworkers due to factors such as migration and to the low farmwork labor demand at that time of year. Other important contributors to the inaccurate count of farmworkers by the COP, relate to language, cultural barriers and non-traditional housing arrangements. The inability of the COP design to estimate the distribution of migrant and seasonal farmworkers is forcefully acknowledged in an October 25, 1994 letter from the Under Secretary for Economic Affairs and Statistical Services, U.S. Department of Commerce.

The ETA, Division of Seasonal Farmworker Programs assembled a Task Force that included social scientists specializing in farm labor, to advise on how to achieve the funds allocation objective. This Task Force, the Interagency Task Force on Farmworker Population Data, reviewed available data sources and recommended a formula to ETA. The formula was published in the January 16, 1997, issue of the **Federal Register**. The proposed formula based 50 percent of the allocation on the COP's farmworker count, adjusted for poverty, and 50 percent of the allocation on a ratio of the total State farmwork labor expenses taken from the COA divided by the average farmwork wage rate in each State, taken from the FLS. The COA/FLS ratio actually computes the total number of farmworker labor hours worked in each State. There was no adjustment of the COA/FLS labor hours for poverty or for other JTPA, Section 402 eligibility criteria because at that time no means for doing so had been recognized for incorporation into the formula.

Although the COA/FLS ratio is a proxy measure, the social scientists on the Task Force contend that the application is an accurate measure and that the inherent deficiencies, such as unreported wages, occur consistently across the United States. The COA data provide the cost of agricultural labor in each State. These figures are derived from tax reports on wages paid by farmers, and the data are accepted within the social science research community as being accurate measures of agricultural activity. When the figures are divided by each State's average agricultural wage rate, the results are indices representing the relative measures of agricultural labor activity in each State. The State average farm labor wage rates for hired workers are published quarterly by the National Agricultural Statistics Service, USDA as part of the Farm Labor Survey (FLS).

The public comments on the January 1997 **Federal Register** Notice were primarily critical of the published formula for the biases inherent in its reliance on the COP. The criticism is largely based on the recognized deficiencies of the COP in counting seasonal farmworkers; and the primary conclusion of the critics, that there are inherent geographical biases underlying the deficiencies of the COP, is convincing. Additionally, many of those that provided comments critical of the COP also advocated using the NAWS to refine the COA data for JTPA, Section 402 eligibility (of crop workers). Following the comment period, the Task Force was convened on May 15, 1997 to evaluate the public responses.

Pursuant to the thrust of the public comments, the Task Force discussion explored the feasibility of reducing reliance on COP and on a methodology for applying NAWS to refine the COA data. As discussion progressed, a strategy was proposed for an integrated application of the COA, NAWS, FLS and COP data sources. The design would refine the COA/FLS proxy, which is available separately for crop and livestock workers, to account for JTPA, Section 402 eligibility factors by applying the NAWS data to adjust the crop workers proxy and applying COP data to adjust the livestock workers proxy. This design would serve as the primary measures of JTPA, Section 402 eligible farmworkers. The COP would be retained as a general feature and for refining the measure of livestock workers. The Task Force approved the proposal for development.

It should be emphasized that the underlying distributive criterion is the relative size of the crop and livestock labor bills across the States. Thus, the underlying relative weight of a State starts with the number of farmwork hours performed in that State. This relative distribution is used as a baseline, to which certain adjustments are made, as explained below.

Over the course of the ensuing months, details of the formula were resolved by ETA, and the results were presented to the Task Force on February 19, 1998 for its review. The formula was approved for its general approach—specifically, its selection of data sources and its design for applying those sources as a tool for gauging the relative geographic demand for JTPA, Section 402 services. However, the Task Force withheld its final approval, pending implementation of three concerns raised during the discussion and summarized immediately below:

(1) The Task Force recommended expanding the number of years used to offset possible effects of the size of the NAWS sample. It was agreed to expand the sample size by using the four years 1992–1995.

(2) NAWS data are organized by "Farm Labor Areas" published in the Guide to Farm Jobs. One Farm Labor Area is comprised of the two States of Texas and Oklahoma. Because NAWS profiles only crop workers, the Task Force recommended separation of Oklahoma and Texas, making Texas a single-State Farm Labor Area (Florida and California are the two others) and combining Oklahoma with the "Delta South-East" Farm Labor Area that includes Arkansas, where there is greater similarity with the crops grown in Oklahoma than in Texas.

(3) The number resulting from the computation of the COA's total agricultural labor costs divided by the wage rate is the total number of agricultural hours worked annually. The result of the refinements by NAWS is the estimated number for each State of agricultural hours worked in crops by JTPA, Section 402 eligible workers. These aggregate figures could be converted into annual units for each State, but such units do not translate directly into the number of farmworkers. This is due to regional variations in the seasonal, short-term nature of these jobs and the likelihood of farmworkers holding many farmwork

jobs in an agricultural season. For example, during any given year, a number of workers in a State are represented in a gross unit of hours, such as 10,000, but it is not the same number of workers for every region and State.

These three required changes, upon which Task Force approval of the formula was conditioned, have been accomplished.

D. Peer Review and Report

The Division of Seasonal Farmworker Programs (DSFP) contracted for and received a Peer Review of the proposed allocation formula and its methodology from Dr. Philip Martin—an expert in the fields of labor and agricultural economics. Dr. Martin, a Professor of Agricultural and Resource Economics at the University of California at Davis, has published extensively on labor migration, economic development, and immigration policy issues, and has testified before Congress and State and local agencies numerous times on these issues.

In evaluating the proposed allocation formula and its methodology, Dr. Martin was asked to: (1) Determine whether or not a single reliable source of data exists from which a count or distribution among grantee jurisdictions within the United States of migrant and seasonal farmworkers approximating the JTPA, Section 402 eligibility criteria could be derived; and, (2) determine the adequacy of the proposed allocation formula for the distribution of JTPA, Section 402 funds among grantee jurisdictions in a manner which approximates the distribution of farmworkers within the United States who meet the JTPA, Section 402 eligibility criteria. Dr. Martin was also asked to provide recommendations, as applicable, for methods by which the allocation formula might be enhanced.

As a result of his review, Dr. Martin reached the following conclusions:

(1) The population of eligible [migrant and seasonal farmworkers (MSFWs)] can be thought of as a room of unknown size and shape. Each source of data on MSFWs can be considered a window that permits a look inside the room. Since no data source or window provides a clear view of the number or distribution JTPA, Section 402-eligible persons across States, data from several sources should be combined to obtain the best allocation formula [for] eligible MSFWs.

(2) The proposed JTPA, Section 402-allocation formula (1) is better than the current formula and (2) represents the best combination of available data sources. It satisfies the major requirements for allocation formulae: accuracy, transparency (it is understandable), and it is based mostly on published data, and thus can be updated efficiently.

(3) There is no better allocation formula available. As unemployment insurance coverage is extended to more farm workers, DOL may want to consider using UI data on wages paid rather than [Census of Agriculture] data, and thus avoid issues related to payments made to family members and fringe benefits.

Dr. Martin's report describes two broad approaches to allocating funds among geographic areas. He describes them as top-down—"according to the eligible population present in the area" and bottoms-up—"according to eligible persons identified or served in the area." Dr. Martin notes that in a 1988 book, he reviewed the top-down and bottoms-up approaches for determining the number and distribution of farmworkers who satisfied various criteria. He was critical of the bottoms-up approach because it tends to compound errors. Further, bottoms-up based allocation methodologies reward recruitment and not the provision of service and they are not sensitive to migration. Dr. Martin notes that most bottoms-up approaches have been abandoned.

Dr. Martin states that he had developed a top-down approach conceptually similar to the proposed JTPA, Section 402 allocation formula. He noted that "[t]he proposed [JTPA, Section] 402 allocation formula improves on [his] top-down formula. Its base is the same COA labor expense divided by the average hourly earnings. However, the proposed [JTPA, Section] 402 formula is able to use the NAWS to more closely determine that State's shares of [JTPA, Section] 402-eligible workers."

E. Proposed Allocation Formula Overview

The proposed JTPA, Section 402-allocation formula can be summarized in five calculations:

(1) *Standardized or adjusted hours of farm work by State*—COA farm labor expenses for directly hired and contract labor are separated into crop and livestock components and divided, respectively, by average hourly earnings for crop and livestock workers in the State/region reported in U.S. Department of Agriculture's (USDA) FLS. The result is each State's share of adjusted or standardized hours of work on (a) crop and (b) livestock farms.

(2) *Crop hours adjustments*—First, each State's share of standardized crop hours is adjusted to reflect that State's or region's share of JTPA, Section 402/WIA, Section 167-eligible hours of work, i.e., the share of hours of crop work done in the State or region by JTPA, Section 402/WIA, Section 167-eligible workers. JTPA, Section 402 eligibility criteria are set forth at 20 CFR 633.107. Regulations for WIA Section 167 are forthcoming. Four JTPA, Section 402-/WIA, Section 167 eligibility criteria from the NAWS are used to determine how many standardized hours were contributed in each of the 12 regions: (a) At least 50 percent of earnings must be from farmwork,[3] (b) workers eligible for JTPA, Section 402/WIA, Section 167 services must have done at least 25 days of farm work in the previous 12 months or had farm earnings of $400 or more in the previous 24 months,[4] (c) family income must be below the Lower Living Standard Income Level (LLSIL) level,[5] and (d) workers must be legally present in the U.S.[6]

Second, the NAWS obtains individual data on how time was spent during the preceding 12 months, so that each worker's time spent doing farm work, nonfarm work, unemployment, and time out of the US can be determined. Eligible farm and nonfarm hours (including unemployment) are divided by eligible farm hours to determine the extent to which a State/region includes JTPA, Section 402/WIA, Section 167-eligible workers who are not doing farm work. This nonfarm adjustment is

[3] NAWS obtains employment and earnings histories from the workers interviewed. The 50 percent of earnings from farm work criterion is approximated by ensuring that the ratio of the midpoint of farm to total earnings categories exceeds 0.5. For example, if farm earnings are self-reported to be in the $7,500 to $9,999 category, and total earnings in the $10,000 to $12,499, dividing the midpoints of these categories: $8,750/$11,250 yields 0.78.

[4] NAWS obtains detailed employment histories from workers for the preceding 12 months; for months 13 through 24 prior to the interview, respondents report whether they did farm work in any month. The JTPA, Section 402/WIA Section 167-eligible population was estimated using NAWS data on workers interviewed who satisfied at least one of three criteria: the interviewed worker (1) was employed in farm work 25 days or more in the 12 months prior to the interview; or (2) worked two months during the 13 through 24 month period prior to the interview; or (3) earned $500 or more from farm work in the 12 months prior to the interview.

[5] NAWS obtains earnings and income data in categories rather than as continuous variables, and interviewed workers reporting family incomes of less than $20,000 for a family of four were considered JTPA, Section 402/WIA, Section 167-eligible.

[6] If male and over 18, workers receiving JTPA, Section 402/WIA, Section 167 services must be registered with the Selective Service. However, data on the number or percent of farmworkers failing to register for the draft is not available.

always greater than one, with greater ratios reflecting more nonfarm time spent in the area.

Third, NAWS data are used to determine the ratio of eligible workers to eligible work days by region " a "turnover ratio." To account for these variations by State and region, the Task Force recommended use of an adjustment for differences in the length of employment (turnover rate) in crop jobs. The specific adjustment is the ratio of the number of eligible workers in the region divided by the number of eligible days. To be consistent with adjustment 2, the number of eligible days is the sum of days worked in farmwork, days worked in non-farmwork and days not worked. The resulting calculation adjusts the data so that States with a relatively larger number of workers represented by a given amount of eligible farmworker time are favored over States with a smaller number of workers needed to make up the same amount of eligible time in the State. Consequently, high turnover States (with more people per day of eligible farmworker presence) are favored by this adjustment.

(3) *Livestock adjustments*—Each State's share of standardized livestock hours of work is adjusted with Census of Population (COP) data to reflect the percentage of livestock workers in the COP in 1990 who were economically disadvantaged, i.e., those with family incomes below the LLSIL. There were 286,555 livestock workers in the 1990 COP, and 18 percent were deemed JTPA, Section 402/WIA, Section 167 eligible. The relative State JTPA, Section 402/WIA, Section 167-eligibility rates ranged from 34 percent in New Mexico to 1 percent in Connecticut.

Each State's share of standardized livestock hours was multiplied by the percent of livestock workers deemed eligible in that State (i.e., the State JTPA, Section 402/WIA, Section 167 eligibility rate), and the resulting total was distributed across States, giving each State its percentage share of the national total of JTPA, Section 402/WIA, Section 167-eligible livestock hours.

(4) *Forestry/Fishery*—The forestry and fishery category comprises each State's share of eligible workers employed in Standard Industrial Classification codes 08 (forestry) and 09 (fishing, hunting, trapping). Eligible workers are those employed in these SICs as reported in the COP with family incomes below the LLSIL.

(5) *Combining the State distributions of the farm occupations*—COP data on farmworkers who had incomes below the LLSIL are used to determine the weights assigned to the three occupational classes of farm labor to provide a rational basis for making the combined final distribution of state distributions: the crop distribution receives a weight of 77 percent, livestock (19 percent), and other (5 percent).

F. Proposed Allocation Formula—Detailed Description

A detailed description of the proposed JTPA, Section 402/WIA, Section 167 allocation formula is as follows:

1. Standardized or Adjusted Hours of Farmwork by State

The standardized or adjusted hours of farmwork by State involves determining the relative number of hours worked by Crop Workers and by Livestock Workers in each State.

(a) Establish The Total Wage Bill for Each State for Crop and Livestock Work

Data from the 1992 Census of Agriculture provide the total agricultural labor wages (SICs 01 and 02) by State, and the total crop labor (SIC 01) wages, by State. The livestock labor (SIC 02) wages are calculated by subtracting the crop labor wages from the total labor wages.[7]

(b) Calculate the Hours Worked in Crop Work and in Livestock Work for Each State

The Farm Labor Survey (FLS) as reported in USDA's *Farm Labor* provides information by region on the average hourly wage, separately, for crop workers and livestock workers. To calculate an approximate number of hours worked by crop workers and livestock workers, the total of labor wages for each State is divided by the hourly wage for that State's region. These calculations were made for both crop workers and livestock workers. This calculation was done for all States except for Alaska and Hawaii.[8]

$$\text{State crop labor hours} = \frac{\text{State total crop payroll}}{\text{average hourly State}^{9}\text{ wage rate}}$$

$$\text{State livestock labor hours} = \frac{\text{State total livestock payroll}}{\text{average hourly State wage rate}}$$

(c) Determination of the Relative Share of Labor Hours for Each State

The percentage of labor hours (for crop work, and for livestock work) that each State contributes to the United States' total was calculated. This is done by dividing each State's total for crop labor bill by the State's average for crop wages and each State's total for livestock labor bill by the State's average for livestock wages. The percentage for crop and livestock hours of each State is calculated by dividing the State's hours for each into the total for all States for each.

2. Crop Hours Adjustments

The crop hours adjustment involves determining the number of hours spent by JTPA-eligible crop workers in each State adjusted for "turnover" variation. The result is expressed as the percentages of total national eligible hours for each jurisdiction corrected for "turnover" variation by each

[7] This reported data includes hired and contract labor and the contract labor data includes contractor's management expenses.

[8] Certain pieces of information on two States were unavailable in the QALS for 1991, and substitutions were made.

• Hawaii does not have hourly wage information for livestock workers in the QALS for 1991. Hourly wage information was available for crop workers and for crop and livestock workers combined. The hourly wage for the workers combined was used as a substitute for the livestock hourly wage.

• Alaska does not have hourly wage information either for crop or for livestock workers in the QALS for 1991. The hourly wage information for the United States was substituted: the U.S. hourly wage for crop workers was used for Alaska crop workers, and the U.S. hourly wage for livestock workers was used for Alaska livestock workers.

[9] Data organized under the U.S. Department of Agriculture Regions.

jurisdiction's ratio of eligible workers to eligible days.

(a) Adjustment 1—Eligibility for JTPA, Section 402/WIA, Section 167 Program

Adjustment 1 applies JTPA, Section 402/WIA, Section 167 eligibility criteria to the NAWS information for the purpose of adjusting the crop worker figures for JTPA, Section 402/WIA, Section 167 eligibility.

(1) 50 Percent of Income Derived From Crop Farmwork

Eligibility for the JTPA, Section 402/WIA, Section 167 program requires that at least 50 percent of a farmworker's income be derived from agricultural employment.

The NAWS collects information from all respondents regarding their total personal income, including their income derived exclusively from agricultural employment. In lieu of specifying an exact dollar amount, the NAWS respondents are asked to choose from among a number of stated ranges within which he or she believes his/her total family income falls (most ranges cover a span of $2,500).

To determine the percentage of a farmworker's income that is derived from agricultural employment, reported agricultural income was divided by total earned income. A result of 50 percent or greater indicates that half or more of the farmworker's income came from agricultural employment.

In order to formulate a number that could be used in such an equation, the midpoint of the income range was assigned as the dollar value of the farmworker's income. For example, a respondent indicates that his total income for the previous year fell in the range of $10,000 to $12,499, and his income from agricultural employment fell within the $7,500 to $9,999 range. The dollar value assigned as the respondent's total income would be the midpoint of $10,000 to $12,499, or $11,250, and the dollar value assigned as the respondent's agricultural income would be the midpoint of the $7,500 to $9,999 range, or $8,750. The percentage of total income that came from agricultural income would be calculated using the two mid-point figures by dividing the agricultural income figure of $8,750 by the total income figure of $11,250. The result in this example being 78 percent, would qualify the hypothetical farmworker as meeting this eligibility criterion.

The LLSIL poverty criteria values used are the highest national (except Alaska, Hawaii and Puerto Rico) non-metro limit for each family size. The calculation uses the higher of the HHS or LLSIL values. For example, for family sizes of 1 to 6, the values applied, are as follows: $7,360, $10,520, $14,440, $17,820, $21,030, and $24,600.

(2) 25 Days or $400 of Crop Farmwork in Previous 24 Months

To be eligible for the JTPA, Section 402/WIA, Section 167 program a farmworker must be employed at least 25 days in farmwork for any consecutive 12-month period within the 24 months preceding application for enrollment, or have earned $400 in farmwork and have been primarily employed in farmwork on a seasonal basis.

The NAWS collects information on farmworkers' periods of employment and non-employment for the twelve months prior to the interview. From this information, one is able to construct the number of days during these twelve months that the NAWS respondent worked in farmwork.

For months 13 through 24 prior to the interview, the respondent is asked to estimate the number of months in which he or she worked in farmwork; one day or more worked per month equals one month. A NAWS respondent who stated that he/she had worked for two or more months in farmwork during the 13 through 24 month period is considered to have worked 25 days in agricultural employment.

As mentioned previously, the NAWS collects information on farmworkers' income from agricultural employment from the previous year. As the responses to this question are categorical (as discussed above), NAWS does not have exact amounts earned by farmworkers. The lowest category is "under $500." Thus, $500 is used as the minimum amount earned from farmwork (rather than $400). Income information is available only for the one year period preceding the NAWS interview.

To satisfy this criterion for eligibility for the JTPA, Section 402/WIA, Section 167 program, a farmworker must fulfill one of the three standards elaborated above: either he/she worked 25 days or more in the 12 months prior to the interview; or he/she worked two months during the 13 through 24 month period prior to the interview; or he/she earned $500 or more from farmwork in the past year.

(3) Below the LLSIL Poverty Line

Eligibility for the JTPA, Section 402/WIA, Section 167 program requires that a crop farmworker and his/her family fall below the LLSIL poverty line.

Because the NAWS collects information on the number of members in a farmworker's household as well as the farmworker's total family income, NAWS is able to estimate whether the income of the farmworker's family places the family below the LLSIL poverty line. A family was determined to fall within the LLSIL poverty line when the family income fell within an income category below the one in which the LLSIL poverty line fell. For example, the LLSIL poverty line for a family of 4 individuals was $18,740. This amount falls in the income range of $17,500 to $19,999. Thus, a family of 4 individuals whose family income falls below this range was considered to satisfy the criterion of falling below the LLSIL poverty line.[10]

(4) Legal or Pending Status

The NAWS collects information on crop farmworkers' citizenship and work authorization status. A farmworker was considered to satisfy the criterion of legal status for the JTPA, Section 402/WIA, Section 167 program if he/she was determined to be a citizen or a legal permanent resident, or if he/she held a valid form of work authorization. A farmworker who was determined to be undocumented was not considered to fulfill this eligibility criterion.

Individuals who met all four of the criteria stated above were coded as eligible for the JTPA, Section 402/WIA, Section 167 program.

In summary, adjustment 1 (the JTPA, Section 402/WIA, Section 167-eligibility ratio) is a ratio which adjusts total crop hours worked to account for hours worked by JTPA, Section 402/WIA, Section 167-eligible farmworkers. This ratio is the total number of farmwork days worked by JTPA, Section 402/WIA Section 167-eligible crop workers divided by the total number of farmwork days worked by all crop workers. This ratio is always less than one, and it is multiplied by the hours worked by all crop workers to produce the estimated hours worked by JTPA, Section 402/WIA, Section 167 eligible farmworkers.

[10] The LLSIL consists of differing metropolitan and rural levels reflective of varying costs-of-living among differing metropolitan and rural regions. However, to facilitate the application of the NAWS data to this formula, and since many farmworkers earn income in more than one State, a single national standard is applied for each family size that is the highest rural level for each family size except that the OMB poverty level for a family size of one is used, as it is higher than the LLSIL.

$$\text{JTPA, Section 402-/WIA, Section 167 eligibility ratio} = \frac{\text{eligible crop hours}}{\text{total crop hours}}$$

(b) Adjustment 2—Time and Location of Activities

For all NAWS respondents, the following data are collected separately by geographic location:

The number of days that respondents spent doing crop farmwork and doing the other activities reported under NAWS, consisting of non-farmwork, not working, or living abroad.

These data permit adjusting for State-to-State movements of crop workers during a 12 month period. For each of these items except living abroad, the days were accumulated under the regions [11] in which the respondents indicated they occurred. These regions are the regions used for the wages in the previous step.

Adjustment 2 (time and location of activity) accounts for the time spent by crop workers in non-agricultural employment and time not employed to provide a percentage of JTPA, Section 402-/WIA, Section 167 eligible non-crop work time in each region. This is a ratio always greater than 1 that is calculated for each USDA region by dividing the sum of the number of days JTPA, Section 402/WIA, Section 167-eligible respondents reported working as crop workers, not working and working in nonagricultural work by the total number of days reported working as crop workers.

$$\text{nonfarm adjustment ratio} = \frac{\text{eligible farm and nonfarm hours in the region}}{\text{eligible farm hours in the region}}$$

To compute the total time that crop workers spent in each State, the number of hours worked by JTPA, Section 402/WIA, Section 167-eligible crop workers (the result of applying adjustment (1) is multiplied by Adjustment 2 to provide the time spent in each State by eligible crop workers.

Time and location computation = (adjustment 1 * adjustment 2)

(c) Adjustment 3—Annual Crop Employment

To this point, the figures are aggregations that could be converted into annual units of eligible hours for each State, but such units do not translate directly into the numbers of jobs or of farmworkers. This is due to regional variations in the seasonal, short-term nature of farmwork employment and the high probability of farmworkers holding multiple farmwork jobs during each agricultural season. The number of workers needed to make up the eligible worker hours in an annualized unit (e.g., 2,000 hrs.) varies from region to region. Although a number of workers are represented in an annualized unit (i.e., a year's worth of hours), due to the regional differences in crop agriculture, there are fractional differences in every 1,000 hours of eligible crop work represented for each region and State. As already stated, the NAWS records have the total number of eligible farmworkers in each region and the total number of days worked annually (in agriculture and non-agricultural employment) and the total number of days present but not working by the eligible farmworkers. These data provide the total sum of time eligible crop workers are present in each region/State. The ratio of the total number of these farmworkers to the total number of days present in each region/State jurisdiction is an expression of the annual average number of days worked per farmworker in crop work. Differences among the regions that are due to the geographic differences in employment and residency/presence in the jurisdiction, are accounted for by the application of this ratio.

Adjustment 3 (annual crop employment) accounts for relative differences in the length of time engaged in crop employment and other eligible activities by eligible workers annually. This is the ratio of the number of eligible workers divided by the number of eligible days. The longer the annual number of days worked in crops, the lower the ratio and the fewer the number of workers represented by every time unit, such as 10,000 hours or an estimated annualized unit. (The reciprocal produces an estimated annual number of days worked in crops per eligible farm worker.) Adjustment 3 converts the final COA/FLS numbers into a people denominated index.

3. Livestock Adjustments

Livestock adjustments involve determining the State relative share of livestock workers expressed as percentages.

The State relative share of livestock hours from the Standardized or Adjusted Hours of Farmwork, described above, is adjusted by the COP data for economically disadvantaged criteria. The number of economically disadvantaged livestock workers in each State is divided by the total number falling below the LLSIL (both of these figures are available from the COP) to calculate the portion of livestock workers in each State (expressed as a percentage) that are members of families falling within the LLSIL. This JTPA, Section 402/WIA, Section 167-eligibility rate for livestock workers in each State is multiplied by the State's percentage share of livestock worker hours. This product expresses the share of livestock worker hours performed by those living below the LLSIL. The products of these calculations for each State are adjusted to sum to 100 so that they express the percentage each State's JTPA, Section 402/WIA, Section 167-eligible livestock workers comprise of the national total.

4. Forestry/Fishery

This step involves a determination of the State percentages of other categories of JTPA, Section 402/WIA, Section 167-eligible farmworkers.

Other seasonal farmworker consists of occupations in the Standard Industrial Classification codes 008 (forestry) and 009 (fishing, hunting, trapping). The Census of Agriculture does not include these SICs. Since the occupations are relatively nonmigratory, it is believed the COP is a reliable source and that any deficiency within the COP occurs consistently from State-to-State. (Arguing the merits of using the COP data sources for measuring the other categories of farmworkers is not useful since there is no other data source to consider.) The data are those workers

[11] The Regions were used because there were some States with few or no observations. Alaska and Hawaii, each single State regions, were not included in this calculation.

whose family income falls below the LLSIL required for JTPA, Section 402/WIA, Section 167 eligibility.

5. Combining the State Distributions of the Farm Occupations

The formula computes the ratio of JTPA, Section 402/WIA, Section 167-eligible crop workers to livestock workers to other workers. Because differing approaches are used for determining each State's relative shares of crop workers, livestock workers and other farmworkers, it is necessary to weight the relative relationship of the three groups of data. The COP is the only available source that counts all three groups of workers, thus it is used to determine the relative distribution of the three, as follows. Using COP data on farmworkers meeting the LLSIL criteria, the formula computes the percentage that the U.S. total of economically disadvantaged (LLSIL) crop workers (216,704) comprise of total (LLSIL) farmworkers (282,625). Similarly, the percentage that LLSIL livestock workers comprise of total LLSIL farmworkers and that the other LLSIL farmworkers comprise of total LLSIL farmworkers is computed. The sum of the State percentages is the relative weight of each group, expressed as the percentage the group represents of the total. The sum of the three national percentages equals 100 percent (71.29662 + 25.60457 + 3.09881 = 100).

G. Alaska, Hawaii and Puerto Rico

FLS (QALS) data on Alaska, Hawaii and Puerto Rico are either incomplete or nonexistent. The COA is not taken in Puerto Rico and the NAWS data are not available for Alaska, Hawaii, and Puerto Rico, where Census data must be relied on for measuring the populations of crop and livestock workers as well as other farmworkers. The basic objection to the Census, its failure to adequately locate and count migratory farmworkers, would not appear to be as significant an issue for the two island jurisdictions where, relative to conditions found on the mainland, the farmworker population tend to live at fixed addresses. However, there is a potential bias of Census under-count that remains for those areas, but at present we have no data set to address this deficiency. Consequently, the necessity of relying on Census data for determining the numbers of combined crop and livestock workers in these two jurisdictions is considered to be the best alternative to complement the approach in the conterminous 48 States.

H. Special Tabulation of COP Data

To collect data for the COP portion of the proposed formula the Department used a special tabulation of 1990 COP data from the Bureau of the Census in the form of a selection of Standard Occupational Classification (SOC) and Standard Industrial Classification (SIC) codes for farmworkers falling below 70 percent of the LLSIL poverty guidelines.

I. SOC and SIC Codes

COP equivalents were used to capture individuals in the following Standard Occupational Classification codes:

477—supervisors, farm workers
479—farm workers
483—marine life cultivation workers
484—nursery workers
485—supervisors, related agricultural occupations
488—graders and sorters, agricultural products
489—inspectors, agricultural products
494—supervisors, forestry and logging workers
495—forestry workers, except logging
498—fishers

COP equivalents were used to capture individuals in the following Standard Industrial Classification codes:

001—agricultural production, crops
002—agricultural production, livestock
007—agricultural services
008—forestry
009—fishing, hunting and trapping

The Department attempted to examine the widest possible range of workers in agricultural activities in designing its special tabulation. Some of the SOC and SIC categories that were considered are new, e.g., SOC codes 494–498 and SIC codes 008, 009, 241 and 515. Of these, SOC 496—timber cutting and logging occupations; SOC 497—captains and other officers, fishing vessels; SIC 241—logging; and SIC 515—farm products, raw materials were discarded as not being representative of the population served by the JTPA, Section 402/WIA, Section 167 program. One result of the codes selected for the proposed formula is that funds would be allocated for Alaska. This is almost solely due to a significant number of low income individuals in fishing occupations. Under the current formula, Alaska does not receive JTPA, Section 402 funds because of the minimal level of farmwork activity.

J. Future Revisions to Allocation Formula-Based Allotments

One of the principal advantages associated with the use of the proposed formula, over the formula currently in place, is the capability to revise the allotment more frequently as the data bases used in the formula are updated. In doing so, the currency and continued relevance of the allocation formula and resulting allotment to the JTPA, Section 402/WIA, Section 167-eligible population is maintained.

Therefore, to maintain the currency and relevance of the allotments resulting from this proposed allocation formula, the Department plans to update the JTPA, Section 402/WIA Section 167 allotments as any of the data bases which comprise the proposed allocation formula are changed. Similarly, the Department plans to revise the allotments as significant refinements to the data bases which comprise the allocation formula allow for greater precision.

III. Description of the Hold-Harmless Provision

For Program Years 1999, 2000 and 2001, the Department intends to apply a hold-harmless provision to the allocation formula in order to allow a staged transition from the application of the old formula to the new one. The staged transition of the hold-harmless provision is proposed specifically as follows:

(1) In PY 1999, each State service area will receive an amount equal to at least 90 percent of their PY 1998 allotments, as applied to the PY 1999 formula funds available. In the event the total amount available for PY 1999 allotments is less than the total amount available for PY 1998 allotments, each State will receive an amount equal to at least 90 percent of what they would have received had the PY 1998 allotment been equal to the PY 1999 allotment.

(2) In PY 2000, each State service area will receive an amount equal to at least 70 percent of their PY 1998 allotments, as applied to the PY 2000 formula funds available. In the event the total amount available for PY 2000 allotments is less than the total amount available for PY 1998 allotments, each State will receive an amount equal to at least 70 percent of what they would have received had the PY 1998 allotment been equal to the PY 2000 allotment.

(3) In PY 2001, each State service area will receive an amount equal to at least 50 percent of their PY 1998 allotments as applied to the PY 2001 formula funds available. In the event the total amount available for PY 2001 allotments is less than the total amount available for PY 1998 allotments, each State will receive an amount equal to at least 50 percent of what they would have received had the PY 1998 allotment been equal to the PY 2001 allotment.

Thereafter, allocations to each State service area would be for an amount

resulting from a direct allocation of the proposed funding formula without adjustment.

IV. Minimum Funding Provisions

Current regulations, at 20 CFR 633.105(b)(2)(i), allow the Department, at its option, not to allocate funds to any jurisdiction whose allocation is less than $120,000. The Department has used its discretion to provide $120,000 in funding to any jurisdictions whose allocation would fall between $60,000 and $120,000.

Through this issuance, the Department is proposing a change to the current application of the minimum funding provision. This proposed change is designed to promote equity in terms of the per capita distribution of funds among jurisdictions. Under the revised proposal, a State area which would receive less than $60,000 by application of the formula will, at the option of the Department, receive no allocation or, if practical, be combined with another adjacent State area. Funding below $60,000 is deemed insufficient for sustaining an independently administered program. However, if practical, State jurisdictions which would receive less than $60,000 would be combined with another adjacent State area.

Although the Department has the authority under 20 CFR 633.105(b)(2) not to allocate any funds for use in State jurisdictions whose State allocation is less than $120,000, it is proposed that any State jurisdiction which would receive more than $60,000 but less than $120,000 under the proposed formula would be combined with another adjacent State area. In doing so, program services would continue to be available to farmworkers in State service areas with relatively small funding allocations while maintaining an equitable basis for the allocation of funds among each of the State service areas.

V. Program Year 1999 Preliminary State Planning Estimates

The state allotments set forth in the Table appended to this notice reflect the distribution resulting from the allocation formula described above. For PY 1998, $71,017,000 was appropriated for JTPA, Section 402 migrant and seasonal farmworker programs, of which $67,123,818 was allocated on the basis of the old formula. The remaining $3,893,182 of the PY 1998 JTPA, Section 402 appropriation was retained in the JTPA, Section 402 national account to fund the farmworker housing program; the Hope, Arkansas Migrant Rest Center; Training and Technical Assistance Mini-Grants; and other training and technical assistance projects and initiatives. The figures in the first numerical column show the actual PY 1998 formula allocations to State service areas. The next column shows the percentage of each allocation.

For PY 1999, $71,571,000 was appropriated for the JTPA, Section 402 migrant and seasonal farmworker program, of which $67,596,408 will be allocated. The remaining $3,974,592 will be retained in the National account for farmworker housing ($3,000,000) and other training and technical assistance projects and initiatives ($974,592). For purposes of illustrating the effects of the proposed allocation formula, the third column of the Table shows the allocations based on the proposed formula without the application of the hold-harmless or minimum funding provisions. The percentages are reported in column 4. The State service area allocations with the application of the first-year (90%) hold-harmless and minimum funding provisions, followed by the percentages, are shown in columns 5 and 6.

A. Proposed Formula Allocation (Without Hold-Harmless Provision)

The $71,571,000 formula total is proposed for allocation in the manner described in Part II, Section E of this notice and set forth in Column 3 of the Table appended to this notice.

B. Proposed Formula Allocation (With Hold-Harmless Provision)

To transition State service areas from the current formula to the revised formula funding levels, a graduated hold-harmless provision would be applied to the first three years: at 90 percent the first year, at 70 percent the second year, and at 50 percent the third. For PY 1999, the State service areas will receive at least 90 percent of their relative share of the PY 1998 formula, as applied to the 1999 formula total. Since the PY 1998 and PY 1999 formula total are actually the same, the proposed PY 1999 revised formula funding of State service areas will result in no less than 90 percent of the actual PY 1998 funding that was actually allocated under the current formula.

Signed at Washington, D.C., this 15th day of December, 1998.

Raymond Bramucci,

Assistant Secretary of Labor.

U.S. DEPARTMENT OF LABOR EMPLOYMENT AND TRAINING ADMINISTRATION MIGRANT AND SEASONAL FARMWORKER PROGRAM—IMPACT OF PROPOSED PY 1999 FORMULA ALLOTMENTS TO STATES

	PY 1988		Proposed PY 1999			
			With hold harmless		Without hold harmless	
	Allotment	Percentage share	Allocation	Percentage share	Allocation	Percentage share
	(1)	(2)	(3)	(4)	(5)	(6)
Alabama	$791,835	1.23853	$712,652	1.10880	$600,334	0.93405
Arizona	1,519,645	2.37692	1,633,011	2.54078	1,639,376	2.55068
Arkansas	1,167,409	1.82598	1,050,668	1.63472	811,923	1.26326
California	14,591,138	22.82241	15,878,912	24.70576	18,622,408	28.97432
Colorado	805,523	1.25994	848,731	1.32053	848,731	1.32053
Connecticut	206,024	0.32225	224,903	0.34992	273,009	0.42477
Delaware	118,334	0.18509	121,415	0.18891	121,415	0.18891
District of Columbia	0	0.00000	0	0.00000	0	0.00000
Florida	4,631,415	7.24413	4,168,274	6.48535	3,039,926	4.72977
Georgia	1,711,615	2.67719	1,540,454	2.39677	865,528	1.34666
Idaho	877,438	1.37243	956,821	1.48870	1,147,954	1.78608
Illinois	1,425,808	2.23015	1,459,797	2.27128	1,459,798	2.27128
Indiana	781,615	1.22255	847,127	1.31803	947,361	1.47398
Iowa	1,314,394	2.05588	1,182,955	1.84054	1,125,745	1.75153
Kansas	697,839	1.09151	762,841	1.18689	939,990	1.46252

U.S. DEPARTMENT OF LABOR EMPLOYMENT AND TRAINING ADMINISTRATION MIGRANT AND SEASONAL FARMWORKER PROGRAM—IMPACT OF PROPOSED PY 1999 FORMULA ALLOTMENTS TO STATES—Continued

	PY 1988		Proposed PY 1999			
			With hold harmless		Without hold harmless	
	Allotment	Percentage share	Allocation	Percentage share	Allocation	Percentage share
	(1)	(2)	(3)	(4)	(5)	(6)
Kentucky	1,352,613	2.11566	1,217,352	1.89406	1,023,974	1.59319
Louisiana	796,032	1.24510	860,171	1.33833	927,503	1.44309
Maine	327,397	0.51209	294,657	0.45845	210,646	0.32774
Maryland	306,291	0.47908	334,922	0.52110	414,039	0.64420
Massachusetts	351,027	0.54905	320,632	0.49887	320,632	0.49887
Michigan	878,641	1.37431	955,539	1.48671	1,112,009	1.73016
Minnesota	1,274,775	1.99391	1,147,298	1.78506	865,373	1.34642
Mississippi	1,449,044	2.26649	1,304,140	2.02909	742,463	1.15519
Missouri	1,094,524	1.71198	985,072	1.53266	919,414	1.43050
Montana	667,189	1.04357	600,470	0.93426	516,002	0.80284
Nebraska	774,884	1.21202	844,183	1.31345	1,002,129	1.55920
Nevada	200,795	0.31407	180,716	0.28117	115,538	0.17976
New Hampshire	112,600	0.17612	101,340	0.15767	79,764	0.12410
New Jersey	400,038	0.62571	446,639	0.69492	673,899	1.04851
New Mexico	598,720	0.93647	660,467	1.02761	892,928	1.38929
New York	1,850,667	2.89468	1,665,600	2.59148	1,307,027	2.03358
North Carolina	3,006,003	4.70177	2,705,403	4.20930	1,833,494	2.85271
North Dakota	468,362	0.73258	510,194	0.79380	604,929	0.94120
Ohio	904,951	1.41546	989,242	1.53915	1,218,930	1.89651
Oklahoma	608,145	0.95122	547,331	0.85158	518,624	0.80692
Oregon	1,087,697	1.70130	1,191,616	1.85402	1,502,764	2.33813
Pennsylvania	1,221,441	1.91049	1,333,176	2.07427	1,615,794	2.51399
Rhode Island	0	0.00000	3,481	0.00542	50,339	0.07832
South Carolina	1,080,106	1.68942	972,095	1.51247	434,082	0.67538
South Dakota	692,869	1.08374	623,582	0.97022	434,085	0.67539
Tennessee	957,799	1.49812	862,019	1.34120	716,714	1.11512
Texas	5,979,800	9.35317	6,444,689	10.02719	6,722,732	10.45980
Utah	245,354	0.38377	264,204	0.41107	272,596	0.42413
Vermont	213,134	0.33337	191,821	0.29845	112,229	0.17462
Virginia	1,036,441	1.62113	932,797	1.45132	853,339	1.32770
Washington	1,705.576	2.66774	1,870,742	2.91066	2,388,466	3.71618
West Virginia	219,325	0.34305	197,393	0.30712	121,869	0.18961
Wisconsin	1,229,201	1.92263	1,106,281	1.72125	1,067,498	1.66090
Wyoming	201,911	0.31581	218,285	0.33963	236,788	0.36841
Continental U.S.	63,933,384	100.00000	64,272,110	100.00000	64,272,110	100.00000
Alaska	0	0.00000	264,479	7.95594	264,479	7.95594
Hawaii	251,607	7.88629	277,897	8.35957	277,897	8.35957
Puerto Rico	2,938,827	92.11371	2,781,922	83.68450	2,781,922	83.68450
Non-Continental U.S.	3,190,434	100.00000	3,324,298	100.00000	3,324,298	100.00000
Total	67,123,818	.....	67,596,408	.....	67,596,408	.....

[FR Doc. 98–33822 Filed 12–21–98; 8:45 am]
BILLING CODE 4510–30–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Combined Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Combined Arts Panel, Media Arts Section A (Education & Access and Heritage & Preservation categories) to the National Council on the Arts will be held on January 7–8, 1999. The panel will meet from 8:45 a.m. to 6:30 p.m. on January 7 and from 9:00 a.m. to 5:00 p.m. on January 8, in Room 716 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506. A portion of this meeting, from 2:00 p.m. to 3:30 p.m. on January 8, will be open to the public for a policy discussion.

The remaining portions of this meeting, meet from 8:45 a.m. to 6:30 p.m. on January 7th, and from 9:00 a.m. to 2:00 p.m. and 3:30 p.m. to 5:00 p.m. on January 8th, are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of May 14, 1998, these sessions will be closed to the public pursuant to (c)(4)(6) and (9)(B) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and, if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: December 15, 1998.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 98–33773 Filed 12–21–98; 8:45 am]

BILLING CODE 7537–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Fellowship Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of Fellowship Panel, (National Heritage Fellowships category) to the National Council on the Arts will be held on January 11–13, 1999. The panel will meet from 8:30 a.m. to 9:30 p.m. in Room 716 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW, Washington, DC 20506.

This meeting is for the purpose of Panel review, discussion, evaluation, and recommendation on nominations for National Heritage Fellowship awards under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by nominees. In accordance with the determination of the Chairman of May 14, 1998, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Panel Coordinator, National Endowment for the Arts, Washington, DC 20506, or call (202) 682–5691.

Dated: December 15, 1998.

Kathy Plowitz-Worden,

Panel Coordinator, National Endowment for the Arts.

[FR Doc. 98–33772 Filed 12–21–98; 8:45 am]

BILLING CODE 7537–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Partnership Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Partnership Advisory Panel (State Partnership Agreements, Arts Education Pre-Screening), to the National Council on the Arts will be held on January 7–8, 1999. The panel will meet from 9:00 a.m. to 6:00 p.m. on January 7 and from 9:00 a.m. to 3:30 p.m. on January 8 in Room M–07 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW, Washington, DC 20506.

This meeting will be open to the public on a space available basis. Topics will include review of the Arts Education sections of the State Partnership Agreement applications, discussion of model programs and procedures, and discussion of guidelines and policy issues.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and, if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW, Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: December 15, 1998.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 98–33774 Filed 12–21–98; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–313]

Entergy Operations, Inc.; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Entergy Operations, Inc. (the licensee) to withdraw its May 9, 1996 application for proposed amendment to Facility Operating License No. DPR–51 for Arkansas Nuclear One, Unit No. 1, located in Pope County, Arkansas.

The proposed amendment would have incorporated battery and DC electrical distribution requirements in accordance with a proposed generic change to NUREG–1430, "Revised Standard Technical Specifications—Babcock and Wilcox Plants," Revision 1.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on July 31, 1996 (61 FR 40016). However, by letter dated November 30, 1998, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated May 9, 1996, and the licensee's letter dated November 30, 1998, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Tomlinson Library, Arkansas Tech University, Russellville, AR 72801.

Dated at Rockville, Maryland, this 16th day of December 1998.

For the Nuclear Regulatory Commission.

Nicholas D. Hilton,

Project Manager, Project Directorate IV–1, Division of Reactor Projects III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 98–33827 Filed 12–21–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–277 and 50–278]

PECO Energy Company, Notice of Withdrawal of Application for Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (the Commission) has

granted the request of PECO Energy Company (the licensee) to withdraw its May 5, 1997, application for proposed amendments to Facility Operating License Nos. DPR–44 and DPR–56 for Peach Bottom Atomic Power Station, Units 2 and 3, located in York County, Pennsylvania.

The proposed amendments would have involved an unreviewed safety question (USQ) and modified the facility, as described in the Updated Final Safety Analysis Report, by replacing the suction strainers for emergency core cooling system.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the Federal Register on June 25, 1997 (62 FR 34318). However, by letter dated December 11, 1998, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated May 5, 1997, as supplemented by letters dated August 22 and September 26, 1997; and the licensee's letter dated December 11, 1998, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Government Publications Section, State Library of Pennsylvania, (REGIONAL DEPOSITORY) Education Building, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, PA, 17105.

Dated at Rockville, Maryland, this 15th day of December 1998.

For the Nuclear Regulatory Commission.

Mohan C. Thadani,

Senior Project Manager, Project Directorate I–2, Division of Reactor Projects -I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 98–33825 Filed 12–21–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–259, 50–260, 50–296]

Tennessee Valley Authority (Browns Ferry Nuclear Plants Units 1, 2, and 3); Exemption

I

Tennessee Valley Authority (TVA or the licensee) is the holder of Facility Operating License Nos. DPR–33, DPR–52 and DPR–68, for operation of the Browns Ferry Nuclear Plant (BFN) Units 1, 2 and 3. The licenses provide, among other things, that the licensee is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (Commission or NRC) now or hereafter in effect.

These facilities consist of three boiling water reactors located in Limestone County, Alabama.

II

Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.71, "Maintenance of records, making of reports," paragraph (e)(4) states, in part, that "Subsequent revisions [to the Updated Final Safety Analysis Report (UFSAR)] must be filed annually or 6 months after each refueling outage provided the interval between successive updates to the FSAR does not exceed 24 months." The three BFN units share a common UFSAR; therefore, this rule requires the licensee to update the same document within 6 months after a refueling outage for each unit.

III

Section 50.12(a) of 10 CFR, "Specific exemptions," states that

> The Commission may, upon application by any interested person, or upon its own initiative, grant exemptions from the requirements of the regulations of this part, which are (1) Authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security. (2) The Commission will not consider granting an exemption unless special circumstances are present.

Section 50.12(a)(2)(ii) of 10 CFR states that special circumstances are present when "Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule. * * *" As noted in the NRC staff's Safety Evaluation, the licensee's proposed schedule for UFSAR updates will ensure that the BFN UFSAR will be maintained current within 24 months of the last revision. The proposed schedule fits within the 24-month duration specified by 10 CFR 50.71(e)(4). Literal application of 10 CFR 50.71(e)(4) would require the licensee to update the same document within 6 months after a refueling outage for each unit, a more burdensome requirement than intended. Accordingly, the Commission has determined that special circumstances are present as defined in 10 CFR 50.12(a)(2)(ii). The Commission has further determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety and is consistent with the common defense and security, and is otherwise in the public interest. The Commission hereby grants the licensee an exemption from the requirement of 10 CFR 50.71(e)(4) to submit updates to the BFN UFSAR within 6 months of each unit's refueling outage. The licensee will be required to submit updates to the BFN UFSAR within 6 months after Unit 2 refueling outages, but not to exceed 24 months from the last submittal.

Pursuant to 10 CFR 51.32, the Commission has determined that granting of this exemption will have no significant effect on the quality of the human environment (63 FR 69311).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 16th day of December 1998.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 98–33826 Filed 12–21–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–397]

Washington Public Power Supply System; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–21, issued to Washington Public Power Supply System (Supply System or the licensee) for operation of the Nuclear Project Number 2 (WNP–2) located in Benton County, Washington.

The proposed amendment would change Section 3.8.1.8 of the Technical Specifications (TS) to allow for the capability to manually transfer between the preferred and alternate offsite power sources during Modes 1 and 2.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed

amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change would remove a specific restriction to allow for the performance of the verification of the manual transfer of the unit power supply from the preferred source to the alternate source during Modes 1 and 2. The transfer of the unit power supply from the preferred source to the alternate source is not an initiator of any previously analyzed accident. Therefore, this proposed change does not increase the frequency of such accidents.

This test is performed by conducting a manual transfer which momentarily parallels the 230 kV and 115 kV offsite AC power sources through step-down transformers. Paralleling of offsite AC power sources is a controlled evolution and the risk associated with the performance of the test while the unit is at power is not significant.

This conclusion is based upon several factors such as: (1) the frequency and voltages are verified to be within the required range prior to paralleling the two offsite AC power sources; (2) breaker interlocks ensure that voltage is available from the alternate circuit and that the alternate circuit is connected to the load prior to opening the preferred circuit; (3) the test does not result in deenergization of any 4.16 kV emergency bus or challenge to any protective relay and the potential for electrical perturbations on the distribution system is the same whether performing the transfer while the unit is at power or while shutdown; and (4) operating history indicates that transferring offsite AC power sources while the unit was shutdown or operating has been performed satisfactorily without electrical distribution system perturbations.

The appropriate plant conditions for performance of the surveillance test will continue to be controlled to ensure that any potential consequences are not significantly increased. This control method has been previously determined to be acceptable as indicated in Generic Letter 91–04, "Changes in Technical Specification Surveillance Intervals to Accommodate a 24-Month Fuel Cycle."

Therefore, operation of WNP–2 in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change removes a specific restriction on the plant conditions for performing a surveillance test, but does not change the method of performance. The appropriate plant conditions for performance of the surveillance test will continue to be controlled to ensure that the possibility for a new or different type of accident is not created. This control method has been previously determined to be acceptable as indicated in Generic Letter 91–04.

The proposed change does not impact the ability of the electrical distribution system to function and mitigate electrical-related transients or accidents. No new failure modes will be introduced and no existing failure modes will be impacted by the proposed change to Technical Specification Surveillance Requirement 3.8.1.8. Operating history indicates that transferring offsite AC power sources while the unit was shutdown or operating has been performed satisfactorily without electrical distribution system perturbations (i.e., during transfer of SM–3 to TR–S and transfer of SM–8 to TR–B).

Therefore, the operation of WNP–2 in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The margin of safety considered in determining the appropriate plant conditions for performing the surveillance test will continue to be controlled to ensure that there is no significant reduction. This control method has been previously determined to be acceptable as indicated in Generic Letter 91–04.

The proposed removal of a specific mode restriction does not impact the functional design, logic or control scheme of any component or system. The AC sources in one division must be operable and independent (to the extent possible). One offsite circuit is allowed to be tied to all engineered safety feature buses, and not violate the separation criteria, provided the necessary automatic transfer capability is operable.

If power is supplied to SM–8 by means of TR–B, then one offsite circuit is inoperable (TS–S) because the automatic transfer capability is inoperable. The lineup of SM–8 to TR–B is bounded by and requires a voluntary entry into Technical Specification 3.8.1, "AC Sources—Operating."

Although a complete loss of offsite power is not anticipated as the result of the manual transfer, a risk analysis has been performed for the plant configuration of the unavailability of TR–S and TR–B for the period of time allowed by the Limiting Condition for Operation for Technical Specification 3.8.1.8. It was determined that the evaluated plant configuration was not risk significant (i.e., a core damage probability of <1E–6). In addition, operating history shows that transferring of offsite AC power sources has been performed several times without electrical distribution system perturbations.

Therefore, operation of WNP–2 in accordance with the proposed amendment will not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By January 21, 1999, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be

filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Richland Public Library, 955 Northgate Street, Richland, Washington 99352. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to Perry D. Robinson, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated December 17, 1998, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Richland Public Library, 955 Northgate Street, Richland, Washington 99352.

Dated at Rockville, Maryland, this 18th day of December 1998.

For the Nuclear Regulatory Commission.

Mel B. Fields,

Project Manager, Project Directorate IV–2, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 98–33998 Filed 12–21–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATES: Weeks of December 21, 1998, January 4, and 11, 1999.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of December 21—Tentative

Wednesday, December 23

9:00 a.m.

Affirmation Session (Public Meeting)

a: Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), Docket Nos. 50–317–LR, 50–318–LR, Order Denying Intervention Petition/Hearing Request And Dismissing Proceeding, (Tentative) (Contact: Ken Hart, 301–415–1659)

Week of December 28—Tentative

There are no meetings scheduled for the week of December 28, 1998.

Week of January 4—Tentative

Wednesday, January 6

11:30 a.m.

Affirmation Session (Public Meeting) (if needed)

Week of January 11—Tentative

Monday, January 11

2:00 p.m.

Briefing on Risk-Informed Initiatives (Public Meeting)

Tuesday, January 12

9:00 a.m.

Briefing on Decommissioning Criteria for West Valley (Public Meeting)

Wednesday, January 13

10:00 a.m.

Briefing on Reactor Licensing Initiatives (Public Meeting)

11:30 a.m.

Affirmation Session (Public Meeting) (if needed)

Friday, January 15

9:00 a.m.

Briefing on Investigative Matters (Closed—Ex. 5 & 7)

10:00 a.m.

Briefing by Executive Branch (Closed—Ex. 1)

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292.

CONTACT PERSON FOR MORE INFORMATION: Bill Hill (301) 415–1661.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: http://www.nrc.gov/SECY/smj/schedule.htm

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This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, D.C. 20555 (301–415–1661). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

* * * * *

Dated: December 18, 1998.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 98–34020 Filed 12–18–98; 3:43 pm]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–440 License No. NPF–58]

The Cleveland Electric Illuminating Company, et al.; Receipt of Petition for Director's Decision Under 10 CFR 2.206

Notice is hereby given that by Petition dated November 9, 1998, David A. Lochbaum (Petitioner), acting on behalf of the Union of Concerned Scientists (UCS), has requested that the U.S. Nuclear Regulatory Commission (NRC) take action with regard to the Perry Nuclear Power Plant, Unit No. 1 (PNPP), operated by The Cleveland Electric Illuminating Company and Centerior Service Company. Petitioner requests that enforcement action be taken to require an immediate shutdown of the PNPP, and that the facility remain shut down until all failed fuel assemblies are removed from the reactor core. As an alternate action, UCS also stated that following the requested shutdown, PNPP could be restarted after its design and licensing bases were updated to permit operation with failed fuel assemblies. Additionally, the Petition requested a public hearing to present new plant-specific information regarding the operation of PNPP, as well as to discuss a UCS report dated April 2, 1998, entitled "Potential Nuclear Safety Hazard/Reactor Operation With Failed Fuel Cladding."

As the basis for the request, the Petitioner cited the NRC's Weekly Information Report for the week ending October 30, 1998, that describes the apparent existence of two pin hole fuel leaks at the Perry facility. In the opinion of the Petitioner, operation with one or more failed fuel assemblies is not permitted by the Perry design and licensing bases. In addition, the Petitioner stated that by operating with possible failed fuel cladding, PNPP is violating its licensing basis for the radiation worker protection (as low as reasonably achievable [ALARA]) program. The Petitioner referred to NRC Information Notice No. 87–39, "Control of Hot Particle Contamination at Nuclear Plants," which describes how continued operation with degraded fuel may elevate radiation exposure rates for plant employees.

The Petitioner further reasserted the UCS position that nuclear power plants operating with fuel cladding failures are potentially unsafe and are in violation of Federal regulations. In its April 1998 report, the UCS stated that it has not been demonstrated that the effects from design-bases transients and accidents (i.e., hydrodynamic loads, fuel enthalpy changes, etc.) prevent pre-existing fuel failures from propagating. Therefore, the Petitioner concluded that it was possible that "significantly more radioactive material will be released to the reactor coolant system during a transient or accident than that experienced during steady state operation."

The request is being treated pursuant to 10 CFR 2.206 of the Commission's regulations. The request has been referred to the Director of the Office of Nuclear Reactor Regulation. As provided by Section 2.206, appropriate action will be taken on this petition within a reasonable time. By letter dated December 16th, 1998, the Director denied Petitioner's request for enforcement action to require The Cleveland Electric Illuminating Company to immediately shut down PNPP. In addition, the Director also extended an offer to the Petitioner for an informal public hearing at a date to be determined. A copy of the petition is available for inspection at the Commission's Public Document Room at 2120 L Street, NW., Washington, DC 20555–0001.

Dated at Rockville, Maryland, this 16th day of December 1998.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 98–33824 Filed 12–21–98; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meetings

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal Prevailing Rate Advisory Committee will be held on—

Thursday, January 14, 1999
Thursday, January 28, 1999
Thursday, February 11, 1999
Thursday, February 25, 1999

The meetings will start at 10:00 a.m. and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street, NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal blue-collar employees, and five representatives from Federal agencies. Entitlement to membership on the

Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

These scheduled meetings will start in open session with both labor and management representatives attending. During the meetings either the labor members or the management members may caucus separately with the Chair to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of a meeting.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public, upon written request to the Committee's Secretary.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on this meeting may be obtained by contacting the Committee's Secretary, Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 5559, 1900 E Street, NW., Washington, DC 20415 (202) 606–1500.

Dated: December 14, 1998.

John F. Leyden,

Chairman, Federal Prevailing Rate Advisory Committee.

[FR Doc. 98–33700 Filed 12–21–98; 8:45 am]

BILLING CODE 6325–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23605; 812–11284]

Evergreen Equity Trust et al.; Notice of Application

December 16, 1998.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements.

SUMMARY OF APPLICATION: Evergreen Equity Trust and Evergreen Variable Annuity Trust (each a "Trust" and collectively the "Trusts"), on behalf of their various series, and First Union National Bank (the "Adviser") request an order that would (a) permit applicants to enter into and materially amend sub-advisory agreements without shareholder approval and (b) grant relief from certain disclosure requirements.

APPLICANTS: The Trusts and the Adviser.

FILING DATES: The application was filed on August 28, 1998. Applicants have agreed to file an amendment to the application during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 7, 1999, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549. Applicants, 200 Berkeley Street, Boston, Massachusetts 02106.

FOR FURTHER INFORMATION CONTACT: Lawrence W. Pisto, Senior Counsel, at (202) 942–0527, or George J. Zornada, Branch Chief, at (202) 942–0564, Office of Investment Company Regulation, Division of Investment Management.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, N.W., Washington, DC 20549 (tel. (202) 942–8090).

Applicants' Representations

1. Each trust is organized as a Delaware business trust and registered under the Act as an open-end management investment company. The Evergreen Equity Trust ("Equity Trust") is currently comprised of eighteen separate series (the "Equity Trust Existing Portfolios") and the Evergreen Variable Annuity Trust ("Annuity Trust") is currently composed of eight separate series (the "Annuity Trust Existing Portfolios" together with the Equity Trust Existing Portfolios, the "Existing Portfolios"), each of which has its own investment objectives and policies. The Annuity Trust Existing Portfolios are offered for sale through separate accounts of various insurance companies as a funding medium for variable annuity contracts and/or variable life insurance policies issued by such insurance companies. Each trust is in the process of establishing a new portfolio ("New Portfolios" and together with the Existing Portfolios, the "Portfolios").[1]

2. The Adviser or an entity controlling, controlled by, or under common control with the Adviser ("Advisory Affiliates"), serves as investment adviser to the Existing Portfolios and will serve as investment adviser to the New Portfolios. The Adviser, a North Carolina corporation and a banking subsidiary of First Union Corporation, a publicly-held bank holding company, is exempt from registration under the Investment Advisers Act of 1940 (the "Advisers Act"). The Advisory Affiliates, Evergreen Investment Management Company, Evergreen Asset Management Corp. ("EAMC") and Meridian Investment Company, are registered under the Advisers Act.

3. The Adviser and Advisory Affiliates serve as advisers to the Existing Portfolios pursuant to investment advisory agreements (each an "Advisory Agreement" and together, the "Advisory Agreements"). Under the

[1] Applicants also request relief with respect to any future series of the Trusts and all future registered open-end management investment companies that are (a) advised by the Adviser or the Advisory Affiliates and (b) use the multi-manager structure as described in the application and comply with the terms and conditions in the application. All existing investment companies that currently intend to rely on the order have been named as applicants.

Advisory Agreements, the Adviser or one of the Advisory Affiliates manages and administers the operation of each Trust's Existing Portfolios. The Adviser or the Advisory Affiliate has overall supervisory and administrative responsibility for the Trusts and, subject to the general supervision of the board of trustees of each Trust (each a "Board" and collectively the "Boards"), has the authority to select and contract with one or more sub-advisers (each a "Manager" and collectively the "Managers") to provide each Portfolio with portfolio management services.[2] The Adviser or Advisory Affiliate will continue to provide specific portfolio management to the Existing Portfolios and the Adviser, Advisory Affiliates, or one or more Managers will provide portfolio management for the New Portfolios. Each Manager performs services pursuant to a written agreement (the "Portfolio Management Agreement"). Each Manager will be an investment adviser registered under the Advisers Act or exempt from registration. Managers' fees are paid by the Adviser or Advisory Affiliate out of its fees from the Portfolios at rates negotiated with the Managers by the Adviser or Advisory Affiliate.

4. The Adviser or Advisory Affiliate will employ its expertise to select Managers that have shown the ability, over a period of time, to select specific investments to achieve well-defined objectives. The Adviser or Advisory Affiliates seek to select Managers that have shown a consistent ability to achieve targeted results within select asset classes and investment style and that have demonstrated expertise in particular areas. The Adviser or Advisory Affiliate has responsibility for communicating performance expectations and evaluations to Managers, supervising and monitoring compliance with the Portfolio's investment objectives and policies, authorizing a Manager to engage in certain investment techniques for a Portfolio and recommending to the Board of each Trust whether Portfolio Management Agreements should be renewed, modified, or terminated.

5. Applicants request relief to permit the Adviser and Advisory Affiliates to enter into and amend Portfolio Management Agreements without shareholder approval. The requested relief will not extend to a Manager that is an affiliated person, as defined in section 2(a)(3) of the Act, of a Trust, the Adviser or an Advisory Affiliate, other than by reason of serving as a Manager to one or more of the Portfolios (an "Affiliated Manager").

6. Applicants also request an exemption from the various disclosure provisions described below that may require each Trust to disclose the fees paid by the Adviser or Advisory Affiliates to the Managers. Each Trust will disclose for each Portfolio (both as a dollar amount and as a percentage of a Portfolio's net assets): (i) aggregate fees paid to the Adviser or Advisory Affiliate and Affiliated Managers; and (ii) aggregate fees paid to Managers other than Affiliated Managers ("Limited Fee Disclosure"). For any Portfolio that employs an Affiliated Manager, the Portfolio will provide separate disclosure of any fees paid to the Affiliated Manager.

Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except pursuant to a written contract that has been approved by the vote of a majority of the company's outstanding voting securities. Rule 18f–2 under the Act provides that each series or class of stock in a series company affected by a matter must approve such matter if the Act requires shareholder approval.

2. Form N–1A is the registration statement used by open-end investment companies. Items 2, 5(b)(iii), and 16(a)(iii) of Form N–1A (and after the effective date of the amendments to Form N–1A, items 3, 6(a)(1)(ii), and 15(a)(3), respectively) require disclosure of the method and amount of the investment adviser's compensation.

3. Form N–14 is the registration form for business combinations involving open-end investment companies. Item 3 of Form N–14 requires the inclusion of a "table showing the current fees for the registrant and the company being acquired and pro forma fees, if different, for the registrant after giving effect to the transaction."

4. Rule 20a–1 under the Act requires proxies solicited with respect to an investment company to comply with Schedule 14A under the Securities Exchange Act of 1934 (the "Exchange Act"). Item 22(a)(3)(iv) of Schedule 14A requires a proxy statement for a shareholder meeting at which a new fee will be established or an existing fee increased to include a table of the current and pro forma fees. Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8), and 22(c)(9), taken together, require a proxy statement for a shareholder meeting at which the advisory contract will be voted upon to include the "rate of compensation of the investment adviser," the "aggregate amount of the investment adviser's fees," a description of "the terms of the contract to be acted upon," and, if a change in the advisory fee is proposed, the existing and proposed fees and the difference between the two fees.

5. Form N–SAR is the semi-annual report filed with the Commission by registered investment companies. Item 48 of Form N–SAR requires investment companies to disclose the rate schedule for fees paid to their investment advisers, including the Mangers.

6. Regulation S–X sets forth the requirements for financial statements required to be included as part of investment company registration statements and shareholder reports filed with the Commission. Sections 6–07(2)(a), (b), and (c) of Regulatio S–X require that investment companies include in their financial statements information about investment advisory fees.

7. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of the Act if, and to the extent that, an exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants believe that their requested relief meets this standard for the reasons discussed below.

8. Applicants assert that the Trusts' investors will rely on the Adviser or Advisory Affiliate to select one or more Managers best suited to achieve a Portfolio's investment objectives. Therefore, applicants assert that, from the perspective of the investor, the role of the Managers is comparable to that of individual portfolio managers employed by other investment advisory firms. Applicants note that the Advisory Agreement will remain subject to section 15(a) of the Act and rule 18f–2 under the Act.

9. Applicants further assert that some Managers use a "posted" rate schedule to set their fees, particularly at lower asset levels. Applicants believe that some organizations may be unwilling to serve as Managers at any fee rate other than their "posted" fee rates, unless the rates negotiated for the Portfolios are not publicly disclosed. Applicants believe that requiring disclosure of Managers' fees may deprive the Adviser of its bargaining power while producing no benefit to shareholders, since the total

[2] Existing Portfolios managed by EAMC are subadvised by Lieber & Company, an indirect wholly-owned subsidiary of First Union Corporation and an affiliated person of the Trust. The Adviser has selected three unaffiliated subadvisers for the New Portfolios.

advisory fee they pay would not be affected.

Applicant's Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Each Trust will disclose in its registration statement the Limited Fee Disclosure.

2. The Adviser or Advisory Affiliate will not enter into a Portfolio Management Agreement with any Affiliated Manager without that agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Portfolio (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, pursuant to voting instructions provided by the unitholders of the sub-account).

3. At all times, a majority of each Trust's Board will be persons each of whom is not an "interested person" of the Trust as defined in Section 2(a)(19) of the Act ("Independent Trustees"), and the nomination of new or additional Independent Trustees to be at the discretion of the then existing Independent Trustees.

4. Independent counsel knowledgeable about the Act and the duties of Independent Trustees will be engaged to represent the Independent Trustees of the Trust. The selection of such counsel will remain within the discretion of the Independent Trustees.

5. The Adviser or Advisory Affiliate will provide the Board of each Trust, no less than quarterly, information about the Adviser's or Advisory Affiliate's profitability for each Portfolio relying on the relief requested in this application. Such information will reflect the impact on profitability of the hiring or termination of any Manager during the applicable quarter.

6. Whenever a Manager is hired or terminated, the Adviser or Advisory Affiliate will provide the Board information showing the expected impact on the Adviser's or Advisory Affiliate profitability.

7. When a Manager change is proposed for a Portfolio with an Affiliated Manager, each Trust's Board, including a majority of the Independent Trustees, will make a separate finding, reflected in the Trust's Board minutes, that the change is in the best interests of the Portfolio and its shareholders (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, in the best interests of the Portfolio and the unitholders of any sub-account) and does not involve a conflict of interest from which the Adviser or Advisory Affiliate, or the Affiliated Manager derives an inappropriate advantage.

8. Before an Existing Portfolio may rely on the order requested in the application, the operation of the Portfolio in the manner described in the application will be approved by a majority of its outstanding voting securities (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, pursuant to voting instructions provided by the unitholders of the sub-account), as defined in the Act, or, in the case of a New Portfolio whose public shareholders purchased shares on the basis of a prospectus containing the disclosure contemplated by condition 11 below, by the sole initial shareholder(s) before offering shares of that New Portfolio to the public.

9. For each Trust's Portfolio relying on the requested order, the Adviser's or Advisory Affiliate will provide general management services, including overall supervisory responsibility for the general management and investment of the Portfolio's securities portfolio, and, subject to review and approval by the Trust's Board will (i) set the Portfolio's overall investment strategies; (ii) select Managers; (iii) when appropriate, allocate and reallocate the Portfolio's assets among multiple Managers; (v) monitor and evaluate the performance of Managers; and (v) ensure that the Managers comply with the Portfolio's investment objectives, policies and restrictions.

10. Within 60 days of the hiring of any new Manager, shareholders (or. if the Portfolio serves as a funding medium for any sub-account of a registered separate account, the unitholders of the sub-account) will be furnished all information about the new Manager or Portfolio Management Agreement that would be included in a proxy statement, except as modified by the order to permit Limited Fee Disclosure. Such information will include Limited Fee Disclosure and any change in such disclosure caused by the addition of a new Manager. The Adviser or Advisory Affiliate will meet this condition by providing shareholders (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, unitholders of the sub-account) with an information statement meeting the requirements of Regulation 14C and Schedule 14C under the Exchange Act. The information statement also will meet the requirements of Schedule 14A under the Exchange Act, except as modified by the order to permit Limited Fee Disclosure.

11. Each Trust will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to the application. In addition, each Portfolio relying on the requested order will hold itself out to the public as employing the Manager of Managers Strategy described in this application. The prospectus will prominently disclose that the Adviser or Advisory Affiliate has ultimate responsibility (subject to oversight by the Board) to oversee the Managers and recommend their hiring, termination, and replacement.

12. No trustee or officer of the Trusts or director or officer of the Adviser or Advisory Affiliate will own directly or indirectly (other than through a pooled investment vehicle over which such person does not have control) any interest in a Manager except for (i) ownership of interests in the Adviser or Advisory Affiliates or any entity that controls, is controlled by, or is under common control with the Adviser or Advisory Affiliates; or (ii) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly-traded company that is either a Manager or an entity that controls, is controlled by, or is under common control with a Manager.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–33812 Filed 12–21–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–23600; 812–11144]

Quantitative Group of Funds, et al.; Notice of Application

December 15, 1998.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from section 15(a) of the Act and rule 18f–2 under the Act.

SUMMARY OF APPLICATION: Applicants, Quantitative Group of Funds (the "Trust") and Quantitative Advisors, Inc. (the "Adviser"), request an order that would permit them to enter into and materially amend sub-advisory agreements without shareholder approval.

FILING DATES: The application was filed on May 11, 1998, and amended on August 31, 1998, and November 23, 1998. Applicants have agreed to file an

amendment during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 11, 1999, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, 55 Old Bedford Road, Lincoln, Massachusetts 01773.

FOR FURTHER INFORMATION CONTACT: Edward P. Macdonald, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. no. 202–942–8090).

Applicants' Representations

1. The Trust, a Massachusetts business trust, is registered under the Act as an open-end management investment company. The Trust consists of six separate series ("Funds")

2. The Adviser, registered under the Investment Advisers Act of 1940 (the "Advisers Act"), serves as investment adviser for the Trust under an investment advisory agreement ("Adviser Agreement"). Under the Adviser Agreement, the Adviser is responsible for providing investment advisory and administrative services to the Funds and is also responsible for selecting subadvisers ("Fund Managers"), subject to the ultimate approval of the board of trustees for each Fund (the "Board"). The Trust pays the Adviser a fee for its services with respect to each Fund.

3. Under agreements between Fund Managers and the Adviser ("Fund Manager Agreements") each Fund Manager provides day-to-day portfolio management services to its respective Fund. Each Fund currently uses a single Fund Manager. All Fund Managers are registered under the Advisers Act, and none of the Fund Managers is an affiliated person of the Adviser within the meaning of section 2(a)(3) of the Act. The Adviser pays each Fund Manager out of the fees its receives from each Fund.

4. In selecting Fund Managers, the Adviser considers a number of criteria, including the nature of the strategy employed by the Fund Manager, the Fund Manager's performance in utilizing investment strategies similar to those used by the Funds, and the Fund Manager's reputation in the community. The Adviser monitors the Fund Managers' investment programs and performance on a daily basis and reports these results to the Board quarterly. In addition, the Adviser reviews brokerage matters, oversees compliance by the Funds with various federal and state statutes and carries out the directives of the Board.

5. Applicants request relief from section 15(a) of the Act and rule 18f–2 under the Act to permit the Adviser to enter into and amend fund Manager Agreements without shareholder approval.[1] The requested relief will not extend to a Fund Manager that is an "affiliated person" of either the Trust or the Adviser, as defined in section 2(a)(3) of the Act other than by reason of serving as Fund Manager to a Fund ("Affiliated Fund Manager").

Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except under a written contract approved by a majority of the company's outstanding voting securities. Rule 18f–2 under the Act provides that each series or class of stock in a series company affected by a matter must approve that matter if the Act requires shareholder approval.

2. Section 6(c) authorizes the SEC to exempt persons or transactions from the provisions of the Act to the extent that an exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants believe that their requested relief meets this standard for the reasons discussed below.

3. Applicants state that the Funds' investors rely on the Adviser to provide overall management and operational services to the Funds, while the Fund Managers are responsible for the day-to-day management of the Funds. Applicants state that the Funds have employed an Adviser/Fund Manager structure since their inception in 1985, and that the Adviser has significant experience in selecting Fund Managers. Applicants assert that the requested relief will permit them to use that structure more efficiently. Applicants note that the Adviser Agreement will remain subject to the shareholder approval requirements of section 15(a) of the Act and rule 18f–2 under the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Fund may rely on the order requested in the application, the operation of the Fund in the manner described in the application will be approved by a majority of its outstanding voting securities, as defined in the Act, or, in the case of a new Fund whose public shareholders purchased shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the sole initial shareholder(s) before offering shares of that Fund to the public.

2. Each Fund will disclose in its prospectus the existence, substance, and effect of the order granted pursuant to the application. In addition, each Fund will hold itself out of the public as employing the "manager of managers" approach described in the application. The prospectuses will prominently disclose that the Adviser has ultimate responsibility to oversee the Managers and recommend their hiring, termination, and replacement.

3. The Adviser will provide general management and administrative services to the Funds, including overall supervisory responsibility for the general management and investment of the Funds' securities portfolios, and, subject to review and approval by each Board with respect to its respective Fund, will: (i) set the Funds' overall investment strategies; (ii) select Fund Managers; (iii) when appropriate, allocate and reallocate a Fund's assets among multiple Fund Managers; (iv) monitor and evaluate the performance of Fund Managers; and (v) ensure that

[1] Applicants request that the relief apply to any registered open-end investment company that in the future is advised by the Adviser or any person controlling, controlled by, or under common control (within the meaning of section 2(a)(9) of the Act) with the Adviser and which operates in substantially in the same manner as the Trust. Applicants also request that the relief apply to any series of the Trust that may be created in the future. Applicants state that all existing investment companies that currently intend to rely on the requested order have been named as applicants, and any other existing or future investment companies that subsequently rely on the requested order will comply with the terms and conditions in the application.

the Fund Managers comply with the relevant Fund's investment objectives, policies and restrictions.

4. At all times, a majority of the Board will be persons who are not "interested persons," within the meaning of section 2(a)(19) of the Act, of the Fund ("Independent Trustees"), and the nomination of new or additional Independent Trustees will be at the discretion of the then existing Independent Trustees.

5. The Adviser will not enter into a Fund Manager's Agreement with any Affiliated Manager without that agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Fund.

6. When a Fund Manager change is proposed for a Fund with an Affiliated Manager, the Board, including a majority of the Independent Trustees, will make a separate finding, reflected in the Board minutes, that the change is in the best interests of the Fund and its shareholders and does not involve a conflict of interest from which the Adviser or the Affiliated Fund Manager derives an appropriate advantage.

7. No director, trustee or officer of the Funds or director or officer of the Adviser will own directly or indirectly (other than through a pooled investment vehicle over which such persons do not have control) any interest in any Fund Manager except for: (i) ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser, or (ii) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly-traded company that is either a Fund Manager or an entity that controls, is controlled by, or is under common control with a Fund Manager.

8. Within 90 days of the hiring of any new Fund Manager, shareholders will be furnished all information about the new Fund Manager or Fund Manager Agreement that would be included in a proxy statement, including any change in the disclosure caused by the addition of a new Fund Manager. The information will include disclosure as to the level of fees to be paid to the Adviser and each Fund Manager. Each Fund will meet this condition by providing shareholders, within 90 days of the hiring of a Fund Manager, with an information statement meeting the requirements of Regulation 14C and Schedule 14C under the Securities Exchange Act of 1934 ("Exchange Act"). The information statement also will meet the requirements of Item 22 of Schedule 14A under the Exchange Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–33814 Filed 12–21–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40791; File No. SR–OPRA–98–03]

Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Amendment to OPRA Plan Revising Certain of Its Facilities and Access Fees

December 15, 1998.

Pursuant to Rule 11Aa3–2 under the Securities Exchange Act of 1934 ("Exchange Act"), notice is hereby given that on December 7, 1998, the Options Price Reporting Authority ("OPRA"),[1] submitted to the Securities and Exchange Commission ("SEC" or "Commission") and amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("Plan"). The amendment revises certain of the fees payable to OPRA by professional and nonprofessional subscribers and vendors for access to OPRA's Basic Service. OPRA has designated this proposal as concerned solely with establishing or changing a fee or other charge collected on behalf of all of the OPRA participants in connection with access to or use of OPRA facilities, permitting the proposal to become effective upon filing pursuant to Rule 11Aa3–2(c)(3)(i) under the Exchange Act.[2] The Commission is publishing this notice to solicit comments from interested persons on the proposed amendment.

I. Description and Purpose of the Amendment

The purpose of the amendment is to revise certain of the fees payable to OPRA by professional and nonprofessional subscribers and vendors for access to OPRA's Basic Service, which consists of market data and related information pertaining to equity and index options ("OPRA Data").[3] The revisions reflect modest increases in the professional and nonprofessional subscriber fees and certain port-based vendor fees, and decreases in the redistribution fee and in various usage-based vendor fees that are alternatives to port-based fees.

Specifically, OPRA is proposing to increase the nonprofessional subscriber fee from a flat monthly rate of $2.00 to $2.50. OPRA is also proposing to increase device-based professional subscriber fees by varying amounts, and to increase the enterprise rate professional subscriber fee payable by the largest subscribers (those with more than 20,000 registered representatives) from $7.50 to $10.00 per registered representative. Professional subscribers are those persons who subscribe to OPRA Data and do not qualify for the reduced fees charged to nonprofessional subscribers. The enterprise rate is available to professional subscribers as an alternative to device-based fees. The change in the enterprise rate for the largest subscribers will bring that fee for those subscribers to the same level that currently applies to subscribers with 20,000 or fewer registered representatives. Concurrently with this revision, the coverage of the enterprise rate will be extended to all of a subscriber's locations worldwide at no added cost for subscribers with at least 7,000 U.S. registered representatives. (Previously, the enterprise rate covered U.S. locations only.)

In proposing an increase of the professional subscriber fee, this amendment represents the fourth stage of a four-year fee revision program that was first described in 1995. Like the first three stages, this amendment is intended to increase OPRA revenues derived from device-based subscriber fees in order to permit a greater share of the costs of collecting, consolidating, processing and transmitting options market information to be covered by professional subscriber fees. Subscriber fees charged to members will continue to be discounted by 2% for members who preauthorize payment by electronic funds transfer through an automated clearinghouse system. OPRA estimates that these fee revisions will increase revenues derived from device-based professional subscriber fees by approximately 7.6%.

[1] OPRA is a National Market System Plan approved by the Commission pursuant to Section 11A of the Exchange Act and Rule 11Aa3–2 thereunder. Securities Exchange Act Release No. 17638 (Mar. 18, 1981).

The Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the member exchanges. The five exchanges which agreed to the OPRA Plan are the American Stock Exchange ("AMEX"); the Chicago Board Options Exchange ("CBOE"); the New York Stock Exchange ("NYSE"); the Pacific Exchange ("PCX"); and the Philadelphia Stock Exchange ("PHLX").

[2] 17 CFR 240.11Aa3–2(c)(3)(i).

[3] Proposed revisions to fees charged to subscribers for access to information pertaining to foreign currency options provided through OPRA's FCO Service are being proposed in a separate filing. *See* File No. SR–OPRA–98–4.

In addition, reflecting the increased utilization of the Internet as a distribution channel, OPRA is proposing to reduce the monthly $1,500 Redistribution Fee payable by redistributors of OPRA data to a monthly fee of $600 payable by those redistributors who utilize the Internet as their exclusive means of redistribution. By lowering this fee, OPRA hopes to encourage new entrants into the business of offering an Internet-based options market data service, thereby increasing the availability of such data at lower cost.

OPRA is proposing to increase the monthly port charge payable by providers of a dialup market data service from $50 to $75 per port. OPRA is also proposing to replace the monthly fee of $5.00 per port payable by providers of a synthetic voice service with the regular device-based professional subscriber fee, treating each port as a separate device for purposes of the fee. At the same time, OPRA is proposing to reduce the usage-based fees that may be elected as alternatives to both of these port-based fees as well as to the device-based radio paging service fee. This will result in all three usage-based fees declining from a flat rate of $.02 per "quote packet" (consisting of any one or more of the last sale price, the bid/ask and related information for a single series of options) to a tiered rate, under which the fee will remain at $.02 per quote packet for the first two million quote packets in a single month, will decline to $.015 for each of the next two million quote packets in the same month, and will decline further to $.01 for each quote packet in excess of four million in the same month. The increase in port-based fees reflects recent developments in computer technology that now permit a single port to serve a greater number of simultaneous inquiries than when these port-based fees were first established. The reduction in usage-based fees reflects OPRA's effort to encourage greater utilization of this type of fee, which in the long run, as improved technology continues to erode the traditional "port" concept, will provide the most reasonable way to allocate OPRA's charges to persons who make use of the services to which these fees apply. In addition to reducing the level of the three usage-based fees as described above, OPRA is also proposing to enlarge the category of "historical" information inquiries, which are not taken into account in calculating usage-based fees. Currently, information derived from a given trading day becomes "historical," and thus no longer fee-liable, upon the opening of trading on the next succeeding trading day. As proposed to be revised, information would become "historical" for purposes of usage-based fees after the close of trading on the same day in which the information was derived.

To the extent the proposed fee revisions are anticipated to result in increased net revenues from information fees, OPRA is proposing them in response to actual and anticipated increases in the costs of collecting, processing, consolidating, and disseminating options last sale and bid/ask information. This, in turn, reflects the continued enhancement and enlargement of systems and equipment necessary to provide the greater capacity and enhanced reliability and security of the OPRA system occasioned by the continuing expansion of the listed options business.

II. Solicitation of Comments

Pursuant to Rule 11Aa3–2(c)(3),[4] because the amendment is concerned solely with changing fees charged on behalf of OPRA, the amendment is effective upon filing with the Commission. The Commission may summarily abrogate the amendment within 60 days of its filing and require refiling and approval of the amendment by Commission order pursuant to Rule 11Aa3–2(c)(2),[5] if it appears to the Commission that such action 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 Exchange Act.

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed plan amendment is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, and all written statements with respect to the proposed plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment between the Commission and any person, other than those withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available at the principal offices of OPRA. All submissions should refer to File No. SR–OPRA–98–03 and should be submitted by January 12, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–33813 Filed 12–21–98; 8:45 am]

BILLING CODE 8010–01–M

[4] 17 CFR 240.11Aa3–2.

[5] 17 CFR 240.11Aa3–2(c)(2).

[6] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40794; File No. SR–CBOE–98–49]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Related to Trading and Listing Options on the Dow Jones Equity REIT Index

December 15, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 5, 1998 the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend certain of its rules to provide for the listing and trading of options on the Dow Jones Equity Real Estate Investment Trust Index ("Index"), a broad-based index. Options on the Index will be cash-settled and will have European-style exercise provisions. The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE 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

(a) Purpose

The purpose of the proposed rule change is to permit the Exchange to list and trade cash-settled, European-style, A.M.-settled stock index options on the Dow Jones Equity Real Estate Investment Trust (REIT) Index. The Index is a capitalization-weighted index currently composed of 116 equity REITs.

Index Design. The Index has been designed to measure the performance of REITs that comprise 95% of the market capitalization of the equity REIT investable universe. The equity REIT investable universe includes equity REITs that are listed on the New York Stock Exchange ("NYSE"), the American Stock Exchange ("AMEX") and the NASDAQ National Market, and are subject to a screening process that: (1) eliminates REITs that have more than 10 no-trading days over the past quarter; (2) eliminates REITs that comprise the bottom 1% of the aggregate REIT market capitalization; and (3) eliminates REITs that comprise the bottom 0.01% of the average dollar-trading volume. All of the component REITs are "reported securities," as that term is defined in Rule 11Aa3–1 under the Act. The Index is a capitalization-weighted index with each REIT affecting the Index in proportion to its market capitalization. All but one REIT in the Index is eligible for options trading.

On October 20, 1998, the 116 equity REITs ranged in capitalization from $207 million to $6.13 billion. The largest REIT accounted for 5.08% of the total weighting of the Index, while the smallest accounted for 0.17%. The total capitalization of the REITs in the Index was $120.4 billion. The average capitalization was $1.04 billion, and the median capitalization was $655 million.

As of October 20, 1998, the Index components represented eleven distinct property classifications: office property (21.01%), apartments (19.31%), shopping centers (12.27%), hotels/restaurants (9.33%), regional malls (9.17%), diversified (8.56%), warehouses/industrial (7.53%), healthcare (5.35%), self-storage (4.99%), manufactured homes (1.65%) and outlet centers (0.83%). In addition, the Index components are diversified by geographical region, representing real estate investments throughout much of the United States.

Calculation. The methodology used to calculate the value of the Index is similar to the methodology used to calculate the value of other well-known broad-based indices. The level of the Index reflects the total market value of the component REITs relative to a particular base period. The Index base date is January 2, 1990, when the Index value was set to 100. The Index had a closing value of 131.44 on October 19, 1998. The daily calculation of the Index is computed by dividing the total market value of the companies in the Index by the Index divisor. The divisor keeps the Index comparable over time and is adjusted periodically to maintain the Index. The values of the Index will be calculated by Dow Jones or its designee and disseminated at 15-second intervals during regular CBOE trading hours to market information vendors via the Options Price Reporting Authority ("OPRA").

Maintenance. Dow Jones or its designee is responsible for the maintenance of the Index. Index maintenance includes monitoring and completing the adjustments for company additions and deletions, share changes, stock splits, stock dividends (other than an ordinary cash dividend), and stock price adjustments due to company restructuring or spin-offs. Some corporate actions, such as stock splits and stock dividends, require simple changes in the common shares outstanding and the stock prices of the companies in the Index. Other corporate actions, such as share issuances or component changes, may change the market value of the Index and require an index divisor adjustment as well.

The Index is reviewed on a quarterly basis by adding or deleting REITs using end-of-quarter market capitalization values. If any component REIT fails to meet the targeted threshold or the investable universe cutoff rules, it will be deleted from the Index. Non-component REITs that become eligible for inclusion are added, largest to smallest, until the 95% threshold is attained. In order to preserve the continuity of the Index, the actual threshold may be slightly higher or lower than the targeted 95%. An annual review is performed to update any changes in an issue's investment structure and/or property type. As a result of these periodic reviews, over time the number of component securities in the Index may change. The Exchange will notify the Commission if the number of securities in the Index drops by 40 or more.

In addition, the Exchange will notify the Commission if any of the following occurs: 10% or more of the weight of the Index is represented by REITs having a market value less than $75 million; less than 80% of the Index is represented by component REITs that are eligible for options trading; 10% or more of the weight of the Index is represented by component REITs trading less than 20,000 shares per day; the largest component REIT accounts for more than 15% of the weight of the Index or the largest five components in the aggregate account for more than 50% of the weight of the Index.

Index Option Trading. In addition to regular Index options, the Exchange may provide for the listing of long-term index option series ("LEAPs") and reduced-value LEAP on the Index. For reduced-value LEAPs, the underlying value would be computed at one-tenth of the Index level. The current and closing index value of any such reduced-value LEAP will, after such initial computation, be rounded to the nearest one-hundredth.

Strike prices will be set to bracket the Index in 2½ point increments for strikes below 200 and 5 point increments above 200. The minimum tick size for series trading below $3 will be 1/16th and for series above $3 the minimum tick will be 1/8th. The trading hours for options on the Index will be from 8:30 a.m. to 3:02 p.m. (Chicago time).

Exercise and Settlement. The proposed options on the Index will expire on the Saturday following the third Friday of the expiration month. Trading in the expiring contract month will normally cease at 3:02 p.m. (Chicago time) on the business day preceding the last day of trading in the component securities of the Index (ordinarily the Thursday before expiration Saturday, unless there is an intervening holiday). The exercise settlement value of the Index at option expiration will be calculated by Dow Jones or its designee based on the opening prices of the component securities on the business day prior to expiration. If a REIT fails to open for trading, the last available price of the REIT will be used in the calculation of the Index, as is done for currently listed indexes. When the last trading day is

moved because of Exchange holidays (such as when the CBOE is closed on the Friday before expiration), the last trading day for expiring options will be Wednesday and the exercise settlement value of Index options at expiration will be determined at the opening of regular Thursday trading.

Surveillance. The Exchange will use the same surveillance procedures currently utilized for each of the Exchange's other index options to monitor trading on options and LEAPs on the Index. For surveillance purposes, the Exchange will complete access to information regarding activity in the under securities.

Position Limits. The Exchange proposes to establish position limits for options on the Index at 250,000 contracts on either side of the market. These limits are roughly equivalent, in dollar terms, to the limits applicable to options on other indices.

Exchange Rules Applicable. As modified herein, the Rules in Chapter XXIV will be applicable to the Index options. Broad-based margin rules will apply to the Index. In addition, the Index will have a broad-based index hedge exemption of 625,000 contracts.

Disclaimer Language. CBOE is proposing to amend Rule 24.14 in order to include specific reference to Dow Jones & Company, Inc., as being entitled to the benefit of the disclaimer of liability in respect of the Index. CBOE believes it has the necessary systems capacity to support new series that would result from the introduction of the Index options. CBOE also has been assured that the OPRA also has the capacity to support the new series.

(b) Basis

The proposed rule change is consistent with Section 6(b) of the Act [3] in general and furthers the objectives of Section 6(b)(5) [4] In particular in that it will permit trading in options based on the Dow Jones Equity REIT Index pursuant to rules designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and thereby will provide investors with the ability to invest in options based on an additional index.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

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 Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. 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 proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of CBOE. All submissions should refer to File No. SR–CBOE–98–49 and should be submitted by January 12, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–33815 Filed 12–21–98; 8:45 am]

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[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40786; File No. SR–CBOE–98–98–51]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc., To Enhance the Exchange's Order Routing System

December 14, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4(e)(6) thereunder,[2] notice is hereby given that on November 13, 1998,[3] the Chicago Board Options Exchange, Inc. ("CBOE") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, and II, and III below, which Items have been prepared by CBOE. 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

CBOE is proposing to allow firm and broker-dealer orders to be routed to the Public Automated Routing ("PAR") workstations across the floor. The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the propose 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. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4(e)(6).

[3] On December 11, 1998, the CBOE submitted Amendment No. 1 to the proposed rule change, which clarifies certain defined terms in the notice and makes certain textual changes, *See* letter from Timothy Thompson, Director, Regulatory Affairs, CBOE, to Anitra Cassas, Attorney, Division of Market Regulation, Commission, dated December 11, 1998.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CBOE is proposing to allow broker-dealer and firm order [4] to be routed over the Exchange's Order Routing System ("ORS")[5] to the PAR workstations (including Mobile PAR) across the floor, regardless of the location of those PAR workstations (*i.e.*, in all trading crowds). Pursuant to a Regulatory Circular RG97–67, broker-dealer and firm orders currently may be routed to those PAR workstations in the trading crowd for options on the Standard & Poor's 100 Stock Index ("OEX"), but not to PAR workstations in the trading crowds for Standard & Poor's 500 Stock Index ("SPX") options, equity options, and narrow-based options. Regulatory Circular RG97–67 was filed with and approved by the Commission as a rule of the Exchange.[6] In its rule filing seeking approval of that Regulatory Circular, CBOE stated that after it had gained experience with routing firm and broker-dealer orders to the PAR workstations in OEX, it may determine to enable the system to route such orders to equity and SPX crowds at some future date.

CBOE is proposing to make this change at this time for at least two reasons. First, the Excahge believes this change will enhance the ability of firms and broker-dealers to transact their business in a more efficient and timely manner. Currently, firm and broker-dealer orders must be routed to a booth on the floor where they are printed and run out to the particular post on the floor for execution. Second, CBOE believes that its experiene with the routing of firm and broker-dealer orders to PAR in OEX and DJX over the last year (*i.e.*, since it has been permitted) has been positive. The Exchange has experienced no capacity problems with the PAR stations or the Order Routing System in handling the order flow. The Exchange has not experienced any incidents of kickouts of customer orders and the routing of firm and broker-dealer orders over PAR has not interfered with the transmission of customer orders to PAR or the execution of customer orders received on PAR. Futher, the Exchange does not believe the routing of brokerdealer orders to PAR has slowed the transmission or processing of customer orders in OEX and DJX and the Exchange does not expect it will slow the transmission or processing of oders in other trading crowds.[7]

2. Statuory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)[8] of the Act, in general, and futhers the objectives of Section 6(b)(5),[9] in particular, in that it should foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities, and should remove impediments to and perfect the mechanism of a free and open market in a manner consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change would 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

CBOE has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change does not: (1) significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from November 13, 1998, the date on which it was filed and, since the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and subparagraph (e)(6) of Rule 19b–4 thereunder.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested person are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No.

[4] A "broker-dealer" order is an order for any account in which a broker-dealer has an interest, such as a proprietary account or a customer account for a broker-dealer or firm that is not an Options Clearing Corporation ("OCC") member firm. A "firm" order is an order for a firm proprietary account of an OCC member. These designations define the origin of an order sent to the Exchange electronically, so that the order can be properly routed. Broker-dealer and firm orders can not be routed to RAES and may not be placed on the customer limit order book.

[5] CBOE's Order Routing System provides member and correspondent firms with a method of efficiently delivering orders to and reports from the CBOE trading floor. ORS also interfaces with several other peripheral systems at CBOE, including the CBOE Trade Match system, the Time-and-Sales system, the Auto-quote system, and the Market-Maker Hand-held Terminals. Member firms with wires attached to the CBOE's front-end computer can send orders electronically from their branches or order desk to the ORS. Reports for such orders are sent back electronically to the point from which the order was entered.

[6] Securities Exchange Act Rel. No. 38702 (May 30, 1997), 62 FR 31184 (June 6, 1997), order approving on a permanent basis certain enhancements to the Exchange's ORS, including the restriction on the routing of firm and broker-dealer orders to the PAR workstations except to the OEX post. (File No. SR–CBOE–97–22) *See also* Securites Exchange Act Rel. No. 38261 (February 10, 1997), 62 FR 7080 (February 14, 1997), notice of filing and immediate effectiveness of File No. SR–CBOE–97–06 in which these same proposed changes were adopted on a pilot basis. The Commission also approved a CBOE proposal to permit routing of firm and broker-dealer orders to PAR stations in the trading crowed for options based on the Dow Jones Industrial Average ("DJX"). Securites Exchange Act Rel. No. 39240 (October 14, 1997), 62 FR 54891 (October 22, 1997).

[7] *See* Amendment No. 1.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(e)(6).

SR–CBOE–98–51 and should be submitted by January 12, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–33818 Filed 12–21–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40793; File No. SR–CHX–98–24]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Stock Exchange, Inc. Relating to the Exchange's Decorum Rules, Short Sales and Minor Rule Violation Plan

December 15, 1998.

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 September 29, 1998,[3] the Chicago Stock Exchange, Incorporated ("CHX" or "Exchange") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend (1) Interpretation and Policy .01 of Rule 3 of Article XII relating to the Exchange's Decorum Rules regarding repetitive administrative/execution messages; (2) Rule 17 of Article IX, to codify the existing requirement for members to comply with Rule 10a–1 under the Act ("Short Sale Rule"); and (3) Rule 9(h) of Article XII, to add certain rules and policies to the Exchange's Minor Rule Violation Plan.

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange filed Amendment No. 1 with the Commission on December 2, 1998. The amendment provides an example of an "inadvertent" violation, modifies the recommended fine schedule to increase the proposed recommended fines for short sale violations, and makes non-substantive changes. *See* Letter from Patricia L. Levy, Senior Vice President and General Counsel, the Chicago Stock Exchange, Inc., to Mignon McLemore, Division of Market Regulation, SEC, dated December 1, 1998.

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 self-regulatory organization 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 first proposes to amend the list of Class B violations set forth under Rule 3, Article XII of the Exchange's Decorum Rules to include repetitive administrative/execution messages sent over the Intermarket Trading System ("ITS") or the Midwest Automated Execution System ("MAX") that are indecorous, inappropriate or unnecessary. In addition, because the Exchange believes that violations of this rule are objective in nature and easily verifiable, the Exchange proposes to include these violations as Class B violations for purposes of the Minor Rule Violation Plan and proposes to retain the existing recommended fines for Class B violations of the Decorum Rates.

Second, the Exchange proposes to codify in its rules the existing requirement for members to compy with the Short Sale Rule. Codifying the Short Sale Rule within the Exchange rules will allow the Exchange to assess fines for violation of the Short Sale Rule under its Minor Rule Violation Plan in appropriate circumstances, as discussed more fully below.

Finally, the Exchange proposes to add certain rules and policies to the Exchange's Minor Rule Violation Plan under Article XII, Rule 9. Specifically, the Exchange is adding violations of its rules relating to: (1) Proprietary short sales by floor members (Article IX, Rule 17) (*e.g.*, failing to properly mark a short sale a short and executing a short sale at an inappropriate tick); (2) the issuance of pre-opening responses under the ITS Rules (Article XX, Rule 39) (*e.g.*, using Designated Order Turnaround ("DOT"), Post Execution Reporting ("PER"), or any method other than ITS to send a pre-opening response); and (3) the failure of a specialist to adjust limit orders to the block price when the MAX automatically executes such limit orders at the limit price upon a price penetration in the primary market (Article XX, Rule 7.06 and related Rule 37(b)(6) of Article XX). The Exchange believes that violations of these rules are objective in nature and are easily verifiable. Thus, the Exchange believes that violations of these rules in inadvertent or isolated circumstances should be handled under the Exchange's Minor Rule Violation Plan and not pursuant to the Exchange's formal disciplinary procedures.[4] The Exchange proposes that the recommended fines for the above violations be $100, $500, and $1,000 for the first, second, third and subsequent violations, respectively, except for violations of the Short Sale Rule, the recommended fines would be $500, $1,000 and $2,500 for the first, second, and third subsequent violations, respectively.[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Sections 6(b)(1),[6] 6(b)(6),[7] 6(b)(7),[8] 6(d)(1)[9] and 19(d)[10] of the Act. The Exchange believes the proposal is consistent with the Section 6(b)(6) requirement that the rules of an exchange provide that its members and persons associated with its members

[4] An inadvertent violation of the Short Sale Rule might occur, for example, if a specialist that is long 1,000 shares of a security sends an order to sell 1,000 shares in that security to the NYSE via a NYSE DOT machine. Because a specialist's inventory is not automatically updated to reflect executions over a DOT machine (unlike executions on the CHX or via ITS which are automatically reflected in a specialist's inventory on a real-time basis), it is possible that a specialist may either forget about the DOT order, or may be late in manually updating his inventory position to reflect the sale via DOT. In either event, the specialist's inventory at that time would not reflect that the specialist is now "flat" rather "long" the security. If the specialist than marks his next sale as "long" rather than properly marking the order as "short," it might be because the specialist merely looked at his inventory position and did not take the DOT order into account in determining whether he was long or short. While this would still be a violation of the short sale rule, depending on the totality of the facts (*e.g.*, whether this is isolated or part of a larger fraud, or if other unusual circumstances existed, etc.) in certain circumstances, this violation might be considered an "inadvertent" violation that is appropriate for the minor rule violation plan. *See* Amendment No. 1, *supra* note 3.

[5] *See* Amendment No. 1, *supra* note 3.

[6] 15 U.S.C. 78f(b)(1).

[7] 15 U.S.C. 78f(b)(6).

[8] 15 U.S.C. 78f(b)(7).

[9] 15 U.S.C. 78f(d)(1).

[10] 15 U.S.C. 78s(d).

shall be disciplined appropriately for violations of the rules of the exchange. The Exchange also believes that the proposal provides an efficient procedure for appropriate disciplining of members for rule violations that are objective in nature. Morever, because CHX Article XII, Rule 3, provides procedural rights to the person fined and permits a disciplined person to appeal or request review of the matter, the Exchange believes the proposal provides a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d)(1) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impost any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Relieved From Members, Participants or Others

The Exchange has neither solicited nor received written comments on 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 its 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 proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–CHX–98–24 and should be submitted by January 12, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc 98–33816 Filed 12–21–98; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40792; File No. SR–PCX–98–61]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Cordless Telephone Fees

December 15, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4(e)(2) thereunder,[2] notice is hereby given that on December 4, 1998, the Pacific Exchange, Inc. ("PCX" 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 PCX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to change its Schedule of Fees and Charges for Exchange Services by reducing cordless telephone charges. The text of the proposed rule change is available at the Office of the Secretary, the PCX and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the PCX 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 PCX 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 originally imposed a fee of $50 per month per cordless telephone on Options Floor members to reflect the costs of upgrading the Erickson cordless telephone system.[3] It was determined at the time of the upgrade that a fee of $50 per month per cordless telephone would be required to cover the costs of the system over the useful life of the system.

The Exchange proposes to reduce the fees associated with cordless telephone use on the Options Floor from $50 per month per cordless telephone to $40 per month per cordless telephone. An analysis of the cordless telephone fees based on actual costs incurred indicates that a fee of $40 per month per cordless telephone is sufficient to cover the costs incurred by the upgrading of the Erickson cordless telephone system over the anticipated useful life of the system. The Exchange estimates that the useful life of the system is approximately four years. At $40 per month per cordless telephone, the PCX can recover expenses incurred for the Erickson telephone system over a 4-year period.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)[4] of the Act, in general, and furthers the objectives of Section 6(b)(4),[5] in particular, because it provides for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The PCX does not believe that the proposed rule change would impose any inappropriate burden on competition.

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4(e)(2).

[3] *See* Securities Exchange Act Release No. 40293 (July 31, 1998), 63 FR 42896 (August 11, 1998).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge and, therefore, has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and subparagraph (e)(2) of Rule 19b–4 thereunder.[7]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR–PCX–98–61 and should be submitted by January 12, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

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[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(e)(2).

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice No. 2949]

Bureau of Oceans and International Environmental and Scientific Affairs; Conservation Measures for Antarctic Fishing Under the Auspices of the Commission for the Conservation of Antarctic Marine Living Resources

AGENCY: Bureau of Oceans and International Environmental and Scientific Affairs, Department of State.

ACTION: Notice.

SUMMARY: At its Seventeenth Meeting in Hobart, Tasmania, October 26 to November 6, 1998, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), of which the United States is a member, adopted conservation measures, pending countries' approval, pertaining to fishing in the CCAMLR Convention Area in Antarctic waters. These were agreed upon in accordance with Article IX of the Convention for the Conservation of Antarctic Marine Living Resources. The measures restrict overall catches of certain species of fish and crabs, restrict fishing in certain areas, specify licensing and inspection obligations of Contracting Parties, encourage cooperation between Contracting Parties to ensure compliance with CCAMLR conservation measures, promote compliance with CCAMLR measures by non-Contracting Party vessels, and mandate the use of Automated Satellite-Linked Vessel Monitoring Systems (VMS) by Contracting Parties.

This notice includes the full text of the conservation measures adopted at the seventeenth meeting of CCAMLR and lists the measures remaining in force from previous years that are not otherwise addressed by U.S. regulations (see Supplementary Information and Conservation Measures Remaining in Force). This notice, therefore, together with the U.S. regulations referenced under Supplementary Information and the conservation measures noted in the section entitled Conservation Measures Remaining in Force, provides a comprehensive register of all current U.S. obligations under CCAMLR.

DATES: Persons wishing to comment on the measures or desiring more information should submit written comments on or before January 21, 1999.

FOR FURTHER INFORMATION CONTACT: Alfred Schandlbauer, Office of Oceans Affairs (OES/OA), Room 5805, Department of State, Washington, D.C. 20520; 202 647–3947.

SUPPLEMENTARY INFORMATION: Individuals interested in CCAMLR should also see 15 CFR Chapter III—International Fishing and Related Activities, Part 300—International Fishing Regulations, Subpart A—General; Subpart B—High Seas Fisheries; and Subpart G—Antarctic Marine Living Resources, for other regulatory measures related to conservation and management in the CCAMLR Convention area. Subpart B notes the requirements for high seas fishing vessel licensing. Subparts A and G describe the process for regulating U.S. fishing in the CCAMLR Convention area and contain the text of CCAMLR Conservation Measures that are not expected to change from year to year. The regulations in Subparts A and G include sections on; Purpose and scope; Definitions; Relationship to other treaties, conventions, laws, and regulations; Procedure for according protection to CCAMLR Ecosystem Monitoring Program Sites; Scientific Research; Initiating a new fishery; Exploratory fisheries; Reporting and recordkeeping requirements; Vessel and gear identification; Gear disposal; Mesh size; Harvesting permits; Import permits; Appointment of a designated representative; Prohibitions; Facilitation of enforcement and inspection; and Penalties. For the text of CCAMLR Conservation Measures remaining in force, see 61 **Federal Register** 66723, dated December 18, 1996, and 63 FR 5587, dated February 3, 1998. For copies of the figures and tables mentioned in the Conservation measures, please contact Alfred Schandlbauer at the Office of Oceans Affairs, Room 5805, Department of State, Washington, D.C. 20520, tel: 202 647–3947.

Conservation Measures Remaining in Force: The Commission agreed that Conservation Measures 2/III, 3/IV, 4/V, 5/V, 6/V, 7/V, 18/XII, 19/IX, 29/XVI, 30/X, 31/X, 32/X, 40/X, 45/XIV, 51/XII, 61/XII, 62/XI, 63/XV, 64/XII, 65/XII, 82/XIII, 95/XIV, 106/XV, 121/XVI, 122/XVI, and 129/XVI should remain in force as they stand. Please contact Alfred Schandlbauer, Department of State, 202 647–3947 (email: aschandl@state.gov) for copies of any of the above-mentioned Measures.

Conservation Measures Adopted in 1998

Conservation Measures Adopted at the Seventeenth Meeting of CCAMLR:

At its Seventeenth Annual Meeting in Hobart, Tasmania, October 26 to November 6, 1998, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) revised several of its previously adopted

Conservation Measures and adopted new measures. The new and revised measures follow:

Conservation Measure 72/XVII

Prohibition of Directed Fishing for Finfish in Statistical Subarea 48.1

Taking of finfish, other than for scientific research purposes, is prohibited in Statistical Subarea 48.1 from 7 November 1998 until at least such time that a survey of stock biomass is carried out, its results reported to and analyzed by the Working Group on Fish Stock Assessment and a decision that the fishery be reopened is made by the Commission based on the advice of the Scientific Committee.

Conservation Measure 73/XVII

Prohibition of Directed Fishing for Finfish in Statistical Subarea 48.2

Taking of finfish, other than for scientific research purposes, is prohibited in Statistical Subarea 48.2 from 7 November 1998 until at least such time that a survey of stock biomass is carried out, its results reported to and analyzed by the Working Group on Fish Stock Assessment and a decision that the fishery be reopened is made by the Commission based on the advice of the Scientific Committee.

Conservation Measure 118/XVII [1]

Scheme to Promote Compliance by Non-Contracting Party

Vessels With CCAMLR Conservation Measures

The Commission hereby adopts the following Conservation Measure in accordance with Article IX.2(i) of the Convention:

1. A non-Contracting Party vessel which has been sighted engaging in fishing activities in the Convention Area is presumed to be undermining the effectiveness of CCAMLR Conservation Measures. In the case of any transshipment activities involving a sighted non-Contracting Party vessel inside or outside the Convention Area, the presumption of undermining the effectiveness of CCAMLR Conservation Measures applies to any other non-Contracting Party vessel which has engaged in such activities with that vessel.

2. Information regarding such sightings shall be transmitted immediately to the Commission in accordance with Article XXII of the Convention. The Secretariat shall transmit this information to all Contracting Parties within one business day of receiving this information, and to the Flag State of the sighted vessel as soon as possible.

3. The Contracting Party which sights the non-Contracting Party vessel shall attempt to inform the vessel that it has been sighted engaging in fishing activities in the Convention Area and is accordingly presumed to be undermining the objective of the Convention and that this information will be distributed to all Contracting Parties to the Convention and to the Flag State of the vessel.

4. When a non-Contracting Party vessel referred to in paragraph 1 enters a port of any Contracting Party, it shall be inspected by authorized Contracting Party officials knowledgeable of CCAMLR Conservation Measures and shall not be allowed to land or transship any fish until this inspection has taken place. Such inspections shall include the vessel's documents, logbooks, fishing gear, catch on board and any other matter, which may include information from a VMS [1], relating to the vessel's activities in the Convention Area.

5. Landing and transshipments of all fish from a non-Contracting Party vessel, which has been inspected pursuant to paragraph 4, shall be prohibited in all Contracting Party ports if such inspection reveals that the vessel has on board species subject to CCAMLR Conservation Measures, unless the vessel establishes that the fish were caught outside the Convention Area or in compliance with all relevant CCAMLR Conservation Measures and requirements under the Convention.

6. Contracting Parties shall ensure that their vessels do not receive transshipments of fish from a non-Contracting Party vessel which has been sighted and reported as having engaged in fishing activities in the Convention Area and therefore presumed as having undermined the effectiveness of CCAMLR Conservation Measures.

7. Information on the results of all inspections of non-Contracting Party vessels conducted in the ports of Contracting Parties, and on any subsequent action, shall be transmitted immediately to the Commission. The Secretariat shall transmit this information immediately to all Contracting Parties and to the relevant Flag State(s).

[1] The term VMS shall be taken to mean a system which operates to the same standard as defined in Conservation Measure 148/XVII.

Conservation Measure 119/XVII [1,2,3]

Licensing and Inspection Obligations of Contracting Parties With Regard to Their Flag Vessels Operating in the Convention Area

1. Each Contracting Party shall prohibit fishing by its flag vessels in the Convention Area except pursuant to a licence [3] that the Contracting Party has issued setting forth the specific areas, species and time periods for which such fishing is authorized and all other specific conditions to which the fishing is subject to give effect to CCAMLR Conservation Measures and requirements under the Convention.

2. A Contracting Party may only issue such a license to fish in the Convention Area to vessels flying its flag, if it is satisfied of its ability to exercise its responsibilities under the Convention and its Conservation Measures, by requiring from each vessel, *inter alia,* the following:

(i) timely notification by the vessel to its Flag State of exit from and entry into any port;

(ii) notification by the vessel to its Flag State of entry into the Convention Area and movement between areas, subareas/divisions;

(iii) reporting by the vessel of catch data in accordance with CCAMLR requirements; and

(iv) operation of a VMS system on board the vessel in accordance with Conservation Measure 148/XVII.

3. The license or an authorized copy of the license must be carried by the fishing vessel and must be available for inspection at any time by a designated CCAMLR inspector in the Convention Area.

4. Each Contracting Party shall verify, through inspections of all of its fishing vessels at the Party's departure and arrival ports, and where appropriate, in its Exclusive Economic Zone, their compliance with the conditions of the license as described in paragraph 1 and with the CCAMLR Conservation Measures. In the event that there is evidence that the vessel has not fished in accordance with the conditions of its license, the Contracting Party shall investigate the infringement and, if necessary, apply appropriate sanctions in accordance with its national legislation.

5. Each Contracting Party shall include in its annual report pursuant to paragraph 12 of the CCAMLR System of Inspection, steps it has taken to implement and apply this Conservation Measure; and may include additional measures it may have taken in relation to its flag vessels to promote the

effectiveness of CCAMLR Conservation Measures.

[1] Except for waters adjacent to the Kerguelen and Crozet Islands.
[2] Except for waters adjacent to the Prince Edward Islands.
[3] Includes permit.

Conservation Measure 146/XVII [1,2]

Marking of Fishing Vessels and Fishing Gear

The Commission hereby adopts the following Conservation Measure in accordance with Article IX of the Convention:

1. All Contracting Parties shall ensure that their fishing vessels licensed [2] in accordance with Conservation Measure 119/XVII to operate in the Convention Area are marked in such a way that they can be readily identified in accordance with internationally recognized standards, such as the FAO Standard Specifications and Guidelines for the Marking and Identification of Fishing Vessels.

2. Marker buoys and similar objects floating on the surface and intended to indicate the location of fixed or set fishing gear shall be clearly marked at all times with the letter(s) and/or numbers of the vessels to which they belong.

[1] Except for waters adjacent to Kerguelen and Crozet Islands.
[2] Includes permitted.

Conservation Measure 147/XVII [1,2]

Cooperation Between Contracting Parties To Ensure Compliance With CCAMLR Conservation Measures With Regard to Their Vessels

1. When a fishing vessel licensed [2] by a Contracting Party to fish in the Convention Area in accordance with Conservation Measure 119/XVII approaches the port of another Contracting Party in order to land or transship its catch, it shall notify the Port State, 72 hours in advance, of its intended arrival. The Port State, in exercise of its rights under international law, shall undertake an inspection of the vessel, within 48 hours of the vessel entering the port, to confirm that it has carried out activities in the Convention Area in accordance with CCAMLR Conservation Measures. The inspection shall be carried out in an expeditious fashion, shall impose no undue burdens on the vessel or its crew, and be guided by the relevant provisions of the CCAMLR System of Inspection.

2. In the event that there is evidence that the vessel has fished in contravention of the CCAMLR Conservation Measures, the Contracting Party shall inform the Flag State of the vessel of its inspection findings. The two Contracting Parties shall, in the spirit of cooperation, take such appropriate action as is required by the Flag State of the vessel to enable it to investigate the infringement and, if necessary, apply appropriate sanctions in accordance with its national legislation.

[1] Except for waters adjacent to the Kerguelen and Crozet Islands
[2] Includes permitted

Conservation Measure 148/XVII [1]

Automated Satellite-Linked Vessel Monitoring Systems (VMS)

The Commission hereby adopts the following Conservation Measure in accordance with Article IX of the Convention:

1. Each Contracting Party shall, no later than 1 March 1999, establish an automated Vessel Monitoring System (VMS) to monitor the position of its fishing vessels, which are licensed [1] in accordance with Conservation Measure 119/XVII, to harvest marine living resources in the Convention Area, and for which catch limits, fishing seasons or area restrictions have been set by Conservation Measures adopted by the Commission.

2. Any Contracting Party unable to establish VMS in accordance with paragraph 1 shall inform the CCAMLR Secretariat within 90 days following the notification of this Conservation Measure, and communicate its intended timetable for implementation of VMS. However, the Contracting Party shall establish VMS at the earliest possible date, and in any event, no later than 31 December 2000.

3. The implementation of VMS on vessels while participating only in a krill fishery is not currently required.

4. For the purpose of this Measure, VMS means a system where, *inter alia*:

(i) through the installation of satellite-tracking devices on board its fishing vessels, the Flag State receives automatic transmission of certain information. This information includes the fishing vessel identification, location, date and time, and is collected by the Flag State at least every four hours to enable it to monitor effectively its flag vessels;

(ii) performance standards provide, as a minimum, that the VMS:

(a) is tamper proof;

(b) is fully automatic and operational at all times regardless of environmental conditions;

(c) provides real time data;

(d) provides the geographical position of the vessel, with a position error of less than 500 m with a confidence interval of 99%, the format being determined by the Flag State; and

(e) in addition to regular messages, provides special messages when the vessel enters or leaves the Convention Area and when it moves between one CCAMLR area, subarea or division within the Convention Area.

5. In the event of technical failure or other non-function of the VMS, the master or the owner of the fishing vessel, as a minimum:

(i) shall communicate at least once every 24 hours, starting from the time that this event was detected, the data referred in paragraph 4(i) by telex, by fax, by telephone message or by radio to the Flag State; and

(ii) shall take immediate steps to have the device repaired or replaced as soon as possible, and, in any event, within two months. If during that period the vessel returns to port it shall not be allowed to commence a further fishing trip without having the defective device repaired or replaced.

6. In the event that the VMS ceases to operate, the Contracting Party as soon as possible shall advise the Executive Secretary of the name of the vessel, the date, time and the location of the vessel when the VMS failed. The Party shall also inform the Executive Secretary when the VMS becomes operational again. The Executive Secretary shall make such information available to Contracting Parties upon request.

7. Contracting Parties shall report to the Secretariat before the start of annual meeting of the Commission in 1999, on the VMS which has been introduced in accordance with paragraphs 1 and 2, including its technical details, and each year thereafter, on:

(i) any change in the VMS;

(ii) in accordance with paragraph XI of the CCAMLR System of Inspection, all cases where they have determined, with the assistance of the VMS that vessels of their flag had fished in the Convention Area in possible contravention of CCAMLR Conservation Measures.

[1] Includes permitted.

Conservation Measure 149/XVII

Prohibition on Directed Fishing for Dissostichus spp. except in Accordance With Specific Conservation Measures in the 1998/99 Season

The Commission,

Concerned to ensure the regulation of directed fishing for *Dissostichus* spp. in all statistical areas and subareas in the Convention Area, and

Noting that Conservation Measures in respect of the regulation of *Dissostichus* spp. have been agreed for all areas

except Statistical Subareas 48.5, 88.2, 88.3 and Statistical Division 58.4.1 (east of 90°E),

hereby adopts the following Conservation Measure in accordance with Article IX of the Convention:

Directed fishing for *Dissostichus* spp. in Statistical Subareas 48.5, 88.2, 88.3 and Statistical Division 58.4.1 (east of 90°E) is prohibited from 7 November 1998 to 30 November 1999.

Conservation Measure 150/XVII

Experimental Harvest Regime for the Crab Fishery in Statistical Subarea 48.3 for the Seasons 1998/99 and 1999/2000

The following measures apply to all crab fishing within Statistical Subarea 48.3 for the 1998/99 and 1999/2000 fishing seasons. Every vessel participating in the crab fishery in Statistical Subarea 48.3 shall conduct fishing operations in accordance with an experimental harvest regime as outlined below:

1. The experimental harvest regime shall consist of at least two phases. Each vessel participating in the fishery shall complete all of the phases. Phase 1 shall be conducted during the first season that a vessel participates in the experimental harvest regime. Phase 2, and any additional phases, shall be completed in the next season of fishing.

2. Vessels shall conduct Phase 1 of the experimental harvest regime at the start of their first season of participation in the crab fishery. For the purposes of Phase 1, the following conditions shall apply:

(i) Phase 1 shall be defined as a vessel's first 200,000 pot hours of effort at the start of its first fishing season;

(ii) every vessel conducting Phase 1 shall expend its first 200,000 pot hours of effort within a total area delineated by twelve blocks of 0.5° latitude by 1.0° longitude. For the purposes of this Conservation Measure, these blocks shall be numbered A to L. In Annex 150/A, the blocks are illustrated (Figure 1), and the geographic position is denoted by the coordinates of the northeast corner of the block. For each string, pot hours shall be calculated by taking the total number of pots on the string and multiplying that number by the soak time (in hours) for that string. Soak time shall be defined for each string as the time between start of setting and start of hauling;

(iii) vessels shall not fish outside the area delineated by the 0.5° latitude by 1.0° longitude blocks prior to completing Phase 1;

(iv) during Phase 1, vessels shall not expend more than 30,000 pot hours in any single block of 0.5° latitude by 1.0° longitude;

(v) if a vessel returns to port before it has expended 200,000 pot hours in Phase 1, the remaining pot hours shall be expended before it can be considered that the vessel has completed Phase 1; and

(vi) after completing 200,000 pot hours of experimental fishing, it shall be considered that vessels have completed Phase 1 and shall commence fishing in a normal fashion.

3. Normal fishing operations shall be conducted in accordance with the regulations set out in Conservation Measure 151/XVII.

4. For the purposes of implementing normal fishing operations after Phase 1 of the experimental harvest regime, the Ten-day Catch and Effort Reporting System set out in Conservation Measure 61/XII shall apply.

5. Vessels shall conduct Phase 2, and any additional phases, of the experimental harvest regime during their second season of participation in the crab fishery. If any vessel initiates Phase 1 of the experimental harvest regime during the 1998/99 or 1999/2000 fishing seasons, the Scientific Committee, and its Working Group on Fish Stock Assessment, shall advise the Commission on an appropriate experimental harvest strategy, Phase 2, for the following fishing season. This advice shall include provisions for:

(i) requiring each vessel to expend approximately one month of experimental fishing effort during its second season of participation in the experimental harvest regime; and

(ii) a data collection and submission policy appropriate to the experimental fishing strategy that is being recommended.

6. Data collected during the experimental harvest regime in both Phase 1 and Phase 2 up to 30 June in any split-year shall be submitted to CCAMLR by 31 August of the following split-year.

7. Vessels that complete all phases of the experimental harvest regime shall not be required to conduct experimental fishing in future seasons. However, these vessels shall abide by the guidelines set forth in Conservation Measure 151/XVII.

8. Fishing vessels shall participate in the experimental harvest regime independently (e.g. vessels may not cooperate to complete phases of the experiment).

9. Crabs captured during the experimental harvest regime shall be considered part of the prevailing TAC for the current fishing season (e.g. for 1998/99, experimental catches shall be considered part of the 1,600-tonne TAC outlined in Conservation Measure 151/XVII).

10. All vessels participating in the experimental harvest regime shall carry at least one scientific observer on board during all fishing activities.

11. The experimental harvest regime shall be instituted for a period of two fishing seasons (1998/99 and 1999/2000), and the details of the regime may be revised by the Commission during this period of time. Fishing vessels commencing experimental fishing in the 1998/99 season must complete the experimental harvest regime during the 1999/2000 season.

Annex 150/A

Locations of Fishing Areas for the Experimental Harvest Regime of the Exploratory Crab Fishery

Figure 1: Operations area for Phase 1 of the experimental harvest regime for the crab fishery in Statistical Subarea 48.3.

Conservation Measure 151/XVII

Limits on the Crab Fishery in Statistical Subarea 48.3 in the 1998/99 Season

The Commission hereby adopts the following Conservation Measure in accordance with Conservation Measure 7/V:

1. The crab fishery is defined as any commercial harvest activity in which the target species is any member of the crab group (Order Decapoda, Suborder Reptantia).

2. In Statistical Subarea 48.3, the crab fishing season is defined as the period from 7 November 1998 to 30 November 1999, or until the catch limit is reached, whichever is sooner.

3. The crab fishery shall be limited to one vessel per Member.

4. The total catch of crab from Statistical Subarea 48.3 shall be limited to 1,600 tons during the 1998/99 crab fishing season.

5. Each vessel participating in the crab fishery in Statistical Subarea 48.3 in the 1998/99 season shall have a scientific observer, appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

6. Each Member intending to participate in the crab fishery shall notify the CCAMLR Secretariat at least three months in advance of starting fishing of the name, type, size, registration number, radio call sign, and research and fishing operations plan of the vessel that the Member has authorized to participate in the crab fishery.

7. All vessels fishing for crab shall report the following data to CCAMLR by 31 August 1999 for crabs caught prior to 31 July 1999:

(i) the location, date, depth, fishing effort (number and spacing of pots and soak time), and catch (numbers and weight) of commercially sized crabs (reported on as fine a scale as possible, but no coarser than 0.5° latitude by 1.0° longitude) for each 10-day period;

(ii) the species, size, and sex of a representative subsample of crab sampled according to the procedure set out in Annex 151/A (between 35 and 50 crabs shall be sampled every day from the line hauled just prior to noon) and by-catch caught in traps; and

(iii) other relevant data, as possible, according to the requirements set out in Annex 151/A.

8. For the purposes of implementing this Conservation Measure, the Ten-day Catch and Effort Reporting System set out in Conservation Measure 61/XII shall apply.

9. Data on catches taken between 31 July 1998 and 31 August 1999 shall be reported to CCAMLR by 30 September 1999 so that the data will be available to the Working Group on Fish Stock Assessment.

10. Crab fishing gear shall be limited to the use of crab pots (traps). The use of all other methods of catching crabs (e.g., bottom trawls) shall be prohibited.

11. The crab fishery shall be limited to sexually mature male crabs—all female and undersized male crabs caught shall be released unharmed. In the case of *Paralomis spinosissima* and *Paralomis formosa*, males with a minimum carapace width of 102 mm and 90 mm, respectively, may be retained in the catch.

12. Crab processed at sea shall be frozen as crab sections (minimum size of crabs can be determined using crab sections).

Annex 151/A

Data Requirements on the Crab Fishery in Statistical Subarea 48.3

Catch and Effort Data

Cruise Descriptions
- cruise code, vessel code, permit number, year.

Pot Descriptions
- diagrams and other information, including pot shape, dimensions, mesh size, funnel position, aperture and orientation, number of chambers, presence of an escape port.

Effort Descriptions
- date, time, latitude and longitude of the start of the set, compass bearing of the set, total number of pots set, spacing of pots on the line, number of pots lost, depth, soak time, bait type.

Catch Descriptions
- retained catch in numbers and weight, by-catch of all species (see Table 1), incremental record number for linking with sample information.

TABLE 1.—DATA REQUIREMENTS FOR BY-CATCH SPECIES IN THE CRAB FISHERY IN STATISTICAL SUBAREA 48.3

Species	Data requirements
Dissostichus eleginoides.	Numbers and estimated total weight
Notothenia rossii	Numbers and estimated total weight
Other Species	Estimated total weight

Biological Data:
- For these data, crabs are to be sampled from the line hauled just prior to noon, by collecting the entire contents of a number of pots spaced at intervals along the line so that between 35 and 50 specimens are represented in the subsample.

Cruise Descriptions
- cruise code, vessel code, permit number.

Sample Descriptions
- date, position at start of the set, compass bearing of the set, line number.

Data
- species, sex, length of at least 35 individuals, presence/absence of rhizocephalan parasites, record of the destination of the crab (kept, discarded, destroyed), record of the pot number from which the crab comes.

Conservation Measure 152/XVII

Prohibition of Directed Fishery on Gobionotothen gibberifrons, Chaenocephalus aceratus, Pseudochaenichthys georgianus, Lepidonotothen squamifrons and Patagonotothen guntheri in Statistical Subarea 48.3 for the 1998/99 Season

The Commission hereby adopts the following Conservation Measure in accordance with Conservation Measure 7/V:

Directed fishing on *Gobionotothen gibberifrons, Chaenocephalus aceratus, Pseudochaenichthys georgianus, Lepidonotothen squamifrons* and *Patagonotothen guntheri* in Statistical Subarea 48.3 is prohibited in the 1998/99 season, defined as the period from 7 November 1998 to 30 November 1999.

Conservation Measure 153/XVII [1] [2]

Limitation of the Total Catch of Champsocephalus gunnari in Statistical Subarea 48.3 in the 1998/99 Season

The Commission hereby adopts the following Conservation Measure in accordance with Conservation Measure 7/V:

1. The total catch of *Champsocephalus gunnari* in the 1998/99 season shall be limited to 4,840 tons in Statistical Subarea 48.3.

2. The fishery for *Champsocephalus gunnari* in Statistical Subarea 48.3 shall close if the by-catch of any of the species listed in Conservation Measure 95/XIV reaches its by-catch limit or if the total catch of Champsocephalus gunnari reaches 4,840 tons, whichever is sooner.

3. If, in the course of the directed fishery for *Champsocephalus gunnari*, the by-catch in any one haul of any of the species named in Conservation Measure 95/XIV

- is greater than 100 kg and exceeds 5% of the total catch of all fish by weight, or
- is equal to or greater than 2 tons, then

the fishing vessel shall move to another location at least 5 n miles distant.[1] The fishing vessel shall not return to any point within 5 n miles of the location where the by-catch of species named in Conservation Measure 95/XIV exceeded 5% for a period of at least five days.[2] The location where the by-catch exceeded 5% is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

4. Where any haul contains more than 100 kg of *Champsocephalus gunnari*, and more than 10% of the *Champsocephalus gunnari* by number are smaller than 240 mm total length, the fishing vessel shall move to another fishing location at least 5 n miles distant.[1] The fishing vessel shall not return to any point within 5 n miles of the location where the catch of small *Champsocephalus gunnari* exceeded 10%, for a period of at least five days.[2] The location where the catch of small *Champsocephalus gunnari* exceeded 10% is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

5. The use of bottom trawls in the directed fishery for *Champsocephalus gunnari* in Statistical Subarea 48.3 is prohibited.

6. The fishery for *Champsocephalus gunnari* in Statistical Subarea 48.3 shall be closed from 1 April 1999 to 30 November 1999.

7. Each vessel participating in the directed fishery for *Champsocephalus gunnari* in Statistical Subarea 48.3 in the 1998/99 season shall have a scientific observer, appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

8. For the purpose of implementing paragraphs 1 and 2 of this Conservation Measure:

(i) the Five-day Catch and Effort Reporting System set out in Conservation Measure 51/XII shall apply in the 1998/99 season; and

(ii) the Monthly Fine-scale Catch and Effort Data Reporting System set out in Conservation Measure 122/XVI shall apply for *Champsocephalus gunnari*. Data shall be reported on a haul-by-haul basis.

9. Fine-scale biological data, as required under Conservation Measure 121/XVI shall be collected and recorded. Such data shall be reported in accordance with the Scheme of International Scientific Observation.

[1] This provision is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 51/XII, pending the adoption of a more appropriate period by the Commission.

Conservation Measure 154/XVII

Limits on the Fishery for Dissostichus eleginoides in Statistical Subarea 48.3 for the 1998/99 Season

The Commission hereby adopts the in accordance with Conservation Measure 7/V:

1. The total catch of *Dissostichus eleginoides* in Statistical Subarea 48.3 in the 1998/99 season shall be limited to 3,500 tons.

2. For the purposes of the fishery for *Dissostichus eleginoides* in Statistical Subarea 48.3, the 1998/99 fishing season is defined as the period from 15 April to 31 August 1999, or until the catch limit is reached, whichever is the sooner.

3. Each vessel participating in the *Dissostichus eleginoides* fishery in Statistical Subarea 48.3 in the 1998/99 season shall have at least one scientific observer, including one appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

4. For the purpose of implementing this Conservation Measure:

(i) the Five-day Catch and Effort Reporting System set out in Conservation Measure 51/XII shall apply in the 1998/99 season, commencing on 15 April 1999; and

(ii) the Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 122/XVI shall apply in the 1998/99 season, commencing on 15 April 1999. Data shall be submitted on a haul-by-haul basis. For the purpose of Conservation Measure 122/XVI the target species is *Dissostichus eleginoides* and 'by-catch species' are defined as any species other than *Dissostichus eleginoides*.

5. Fine-scale biological data, as required under Conservation Measure 121/XVI shall be collected and recorded. Such data shall be reported in accordance with the System of International Scientific Observation.

6. Directed fishing shall be by longlines only. The use of all other methods of directed fishing for *Dissostichus eleginoides* in Statistical Subarea 48.3 shall be prohibited.

Conservation Measure 155/XVII [1, 2]

Precautionary Catch Limit for Electrona carlsbergi in Statistical Subarea 48.3 for the 1998/99 Season

The Commission hereby adopts the following Conservation Measure in accordance with Conservation Measure 7/V:

1. For the purposes of this Conservation Measure the fishing season for *Electrona carlsbergi* is defined as the period from 7 November 1998 to 30 November 1999.

2. The total catch of *Electrona carlsbergi* in the 1998/99 season shall be limited to 109,000 tons in Statistical Subarea 48.3.

3. In addition, the total catch of *Electrona carlsbergi* in the 1998/99 season shall be limited to 14,500 tons in the Shag Rocks region, defined as the area bounded by 52°30′S, 40°W; 52°30′S, 44°W; 54°30′S, 40°W and 54°30′S, 44°W.

4. In the event that the catch of *Electrona carlsbergi* is expected to exceed 20,000 tons in the 1998/99 season, a survey of stock biomass and age structure shall be conducted during that season by the principal fishing nations involved. A full report of this survey including data on stock biomass (specifically including area surveyed, survey design and density estimates), age structure and the biological characteristics of the by-catch shall be made available in advance for discussion at the 1999 meeting of the Working Group on Fish Stock Assessment.

5. The directed fishery for *Electrona carlsbergi* in Statistical Subarea 48.3 shall close if the by-catch of any of the species named in Conservation Measure 95/XIV reaches its by-catch limit or if the total catch of *Electrona carlsbergi* reaches 109,000 tons, whichever is sooner.

6. The directed fishery for *Electrona carlsbergi* in the Shag Rocks region shall close if the by-catch of any of the species named in Conservation Measure 95/XIV reaches its by-catch limit or if the total catch of *Electrona carlsbergi* reaches 14,500 tons, whichever is sooner.

7. If, in the course of the directed fishery for *Electrona carlsbergi*, the by-catch in any one haul of any species other than the target species

- is greater than 100 kg and exceeds 5% of the total catch of all fish by weight, or
- is equal to or greater than 2 tons,

then the fishing vessel shall move to another fishing location at least 5 n miles distant.[1] The fishing vessel shall not return to any point within 5 n miles of the location where the by-catch of species, other than the target species, exceeded 5%, for a period of at least five days.[2] The location where the by-catch exceeded 5% is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

8. For the purpose of implementing this Conservation Measure:

(i) the Catch Reporting System set out in Conservation Measure 40/X shall apply in the 1998/99 season;

(ii) the Monthly Fine-scale Catch and Effort Data Reporting System set out in Conservation Measure 122/XVI shall also apply in the 1998/99 season. For the purposes of Conservation Measure 122/XVI, the target species is *Electrona carlsbergi*, and 'by-catch species' are defined as any cephalopod, crustacean or fish species other than *Electrona carlsbergi*; and

(iii) the Monthly Fine-scale Biological Data Reporting System set out in Conservation Measure 121/XVI shall also apply in the 1998/99 season. For the purposes of Conservation Measure 121/XVI, the target species is *Electrona carlsbergi*, and 'by-catch species' are defined as any cephalopod, crustacean or fish species other than *Electrona carlsbergi*. For the purposes of paragraph 8(ii) of Conservation Measure 121/XVI a representative sample shall be a minimum of 500 fish.

[1] This provision is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 51/XII, pending the adoption of a more appropriate period by the Commission.

Conservation Measure 156/XVII

Catch Limit on Dissostichus eleginoides and Dissostichus mawsoni in Statistical Subarea 48.4 for the 1998/99 Season

1. The total catch of *Dissostichus eleginoides* in Statistical Subarea 48.4 in the 1998/99 season shall be limited to 28 tons.

2. Taking of *Dissostichus mawsoni*, other than for scientific research purposes, is prohibited.

3. For the purposes of the fishery for *Dissostichus eleginoides* in Statistical Subarea 48.4, the 1998/99 fishing season is defined as the period from 15 April to 31 August 1999, or until the catch limit for *Dissostichus eleginoides* in Subarea 48.4 is reached, or until the catch limit for *Dissostichus eleginoides* in Subarea 48.3, as specified in Conservation Measure 154/XVII, is reached, whichever is sooner.

4. Each vessel participating in the *Dissostichus eleginoides* fishery in Statistical Subarea 48.4 in the 1998/99 season shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

5. For the purpose of implementing this Conservation Measure:

(i) the Five-day Catch and Effort Reporting System set out in Conservation Measure 51/XII shall apply in the 1998/99 season, commencing on 15 April 1999; and (ii) the Monthly Fine-scale Catch and Effort Data Reporting System set out in Conservation Measure 122/XVI shall apply in the 1998/99 season, commencing on 15 April 1999. Data shall be reported on a haul-by-haul basis. For the purposes of Conservation Measure 122/XVI, the target species is *Dissostichus eleginoides*, and 'by-catch species' are defined as any species other than *Dissostichus eleginoides*.

6. Fine-scale biological data, as required under Conservation Measure 121/XVI shall be collected and recorded. Such data shall be reported in accordance with the Scheme of International Scientific Observation.

7. Directed fishing shall be by longlines only. The use of all other methods of directed fishing for *Dissostichus eleginoides* in Statistical Subarea 48.4 shall be prohibited.

Conservation Measures 157/XVII [1, 2]

Limitation of the By-catch in Statistical Division 58.5.2 in the 1998/99 Fishing Season

1. There shall be no directed fishing for any species other than *Dissostichus eleginoides* and *Champsocephalus gunnari* in Statistical Division 58.5.2 in the 1998/99 fishing season.

2. In directed fisheries in Statistical Division 58.5.2 in the 1998/99 fishing season, the by-catch of *Channichthys rhinoceratus* shall not exceed 150 tons, and the by-catch of *Lepidonotothen squamifrons* shall not exceed 80 tons.

3. The by-catch of any fish species not mentioned in paragraph 2, and for which there is no other catch limit in force, shall not exceed 50 tons in Statistical Division 58.5.2.

4. If, in the course of a directed fishery, the by-catch in any one haul of any by-catch species for which by-catch limitations apply under this Conservation Measure is equal to, or greater than 2 tons, then the fishing vessel shall not fish using that method of fishing at any point within 5 n miles [1] of the location where the by-catch exceeded 2 tons for a period of at least five days.[2] The location where the by-catch exceeded 2 tons is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

[1] This provision is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 51/XII, pending the adoption of a more appropriate period by the Commission.

Conservation Measure 158/XVII

Fishery for Dissostichus eleginoides in Statistical Division 58.5.2 for the 1998/99 Season

1. The total catch of *Dissostichus eleginoides* in Statistical Division 58.5.2 shall be limited to 3 690 tons in the 1998/99 season.

2. For the purpose of this fishery for *Dissostichus eleginoides*, the 1998/99 fishing season is defined as the period from 7 November 1998 to 30 November 1999.

3. Fishing shall cease if the by-catch of any species reaches its by-catch limit as detailed in Conservation Measure 157/XVII.

4. The catch limit may only be taken by trawling.

5. Each vessel participating in the fishery for *Dissostichus eleginoides* in Statistical Division 58.5.2 shall have at least one scientific observer, and include, if available, one appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities.

6. Each vessel operating in the fishery for *Dissostichus eleginoides* in Statistical Division 58.5.2 shall be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

7. A ten-day catch and effort reporting system shall be implemented:

(i) for the purpose of implementing this system, the calendar month shall be divided into three reporting periods viz: day 1 to day 10, day 11 to day 20, day 21 to the last day of the month. These reporting periods are hereinafter referred to as periods A, B and C;

(ii) at the end of each reporting period, each Contracting Party participating in the fishery shall obtain from each of its vessels its total catch and total days and hours fished for the period and shall, by electronic transmission, cable, telex or facsimile, transmit the aggregated catch and days and hours fished for its vessels so as to reach the Executive Secretary not later than the end of the next reporting period;

(iii) a report must be submitted by every Contracting Party taking part in the fishery for each reporting period for the duration of the fishery, even if no catches are taken;

(iv) the catch of *Dissostichus eleginoides* and of all by-catch species must be reported;

(v) such reports will specify the month and reporting period (A, B and C) to which each report refers;

(vi) immediately after the deadline has passed for receipt of the reports for each period, the Executive Secretary shall notify all Contracting Parties engaged in fishing activities in the division of the total catch taken during the reporting period and the total aggregate catch for the season to date; and (vii) at the end of every three reporting periods, the Executive Secretary shall inform all Contracting Parties of the total catch taken during the three most recent reporting periods and the total aggregate catch for the season to date.

8. A fine-scale effort and biological data reporting system shall be implemented:

(i) the scientific observer(s) aboard each vessel shall collect the data required to complete the CCAMLR fine-scale catch and effort data form C1, latest version. These data shall be submitted to the CCAMLR Secretariat

not later than one month after the vessel returns to port;

(ii) the catch of *Dissostichus eleginoides* and all by-catch species must be reported;

(iii) the numbers of seabirds and marine mammals of each species caught and released or killed must be reported;

(iv) the scientific observer(s) aboard each vessel shall collect data on the length composition from representative samples of *Dissostichus eleginoides* and by-catch species:

(a) length measurements shall be to the nearest centimeter below;

(b) representative samples of length composition shall be taken from each fine-scale grid rectangle (0.5° latitude by 1° longitude) fished in each calendar month; and (v) the above data shall be submitted to the CCAMLR Secretariat not later than one month after the vessel returns to port.

9. The total number and weight of *Dissostichus eleginoides* discarded, including those with the jellymeat condition, shall be reported. These fish will count towards the total allowable catch.

Conservation Measure 159/XVII [1, 2]

Fishery for Champsocephalus gunnari in Statistical Division 58.5.2 in the 1998/99 Fishing Season

1. The total catch for *Champsocephalus gunnari* in Statistical Division 58.5.2 shall be limited to 1 160 tons in the 1998/99 fishing season.

2. Areas in Statistical Division 58.5.2 outside that defined in paragraph 4 below shall be closed to directed fishing for *Champsocephalus gunnari*.

3. Fishing shall cease if the by-catch of any of the species reaches its by-catch limit as detailed in Conservation Measure 157/XVII.

4. For the purpose of this fishery for *Champsocephalus gunnari*, the area open to the fishery is defined as that portion of Statistical Division 58.5.2 that lies within the area enclosed by a line:

(i) starting at the point where the meridian of longitude 72°15′E intersects the Australia-France Maritime Delimitation Agreement Boundary then south along the meridian to its intersection with the parallel of latitude 53°25′S;

(ii) then east along that parallel to its intersection with the meridian of longitude 74°E;

(iii) then northeasterly along the geodesic to the intersection of the parallel of latitude 52°40′S and the meridian of longitude 76°E;

(iv) then north along the meridian to its intersection with the parallel of latitude 52°S;

(v) then northwesterly along the geodesic to the intersection of the parallel of latitude 51°S with the meridian of longitude 74°30′E; and (vi) then southwesterly along the geodesic to the point of commencement.

A chart illustrating the above definition is appended to this Conservation Measure (Annex 159/A).

5. For the purposes of this fishery for *Champsocephalus gunnari*, the 1998/99 fishing season is defined as the period from 7 November 1998 to 30 November 1999.

6. The catch limit may only be taken by trawling.

7. Where any haul contains more than 100 kg of *Champsocephalus gunnari*, and more than 10% of the *Champsocephalus gunnari* by number are smaller than 240 mm total length, the fishing vessel shall move to another fishing location at least 5 n miles distant.[1] The fishing vessel shall not return to any point within 5 n miles of the location where the catch of small *Champsocephalus gunnari* exceeded 10% for a period of at least five days.[2] The location where the catch of small *Champsocephalus gunnari* exceeded 10% is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

8. Each vessel participating in the fishery shall have at least one scientific observer, and include, if available, one appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities.

9. Each vessel operating in the fishery for *Champsocephalus gunnari* in Statistical Division 58.5.2 shall be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

10. A ten-day catch and effort reporting system shall be implemented:

(i) for the purpose of implementing this system, the calendar month shall be divided into three reporting periods, viz: day 1 to day 10, day 11 to day 20 and day 21 to the last day of the month. The reporting periods are hereafter referred to as periods A, B and C;

(ii) at the end of each reporting period, each Contracting Party participating in the fishery shall obtain from each of its vessels its total catch and total days and hours fished for that period and shall, by cable, telex, facsimile or electronic transmission, transmit the aggregated catch and days and hours fished for its vessels so as to reach the Executive Secretary no later than the end of the next reporting period;

(iii) a report must be submitted by every Contracting Party taking part in the fishery for each reporting period for the duration of the fishery, even if no catches are taken;

(iv) the catch of *Champsocephalus gunnari* and of all by-catch species must be reported;

(v) such reports shall specify the month and reporting period (A, B and C) to which each report refers;

(vi) immediately after the deadline has passed for receipt of the reports for each period, the Executive Secretary shall notify all Contracting Parties engaged in fishing activities in the division of the total catch taken during the reporting period and the total aggregate catch for the season to date; and (vii) at the end of every three reporting periods, the Executive Secretary shall inform all Contracting Parties of the total catch taken during the three most recent reporting periods and the total aggregate catch for the season to date.

11. A fine-scale effort and biological data reporting system shall be implemented:

(i) the scientific observer(s) aboard each vessel shall collect the data required to complete the CCAMLR fine-scale catch and effort data form C1, latest version. These data shall be submitted to the CCAMLR Secretariat not later than one month after the vessel returns to port;

(ii) the catch of *Champsocephalus gunnari* and of all by-catch species must be reported;

(iii) the numbers of seabirds and marine mammals of each species caught and released or killed must be reported:

(iv) the scientific observer(s) aboard each vessel shall collect data on the length composition from representative samples of *Champsocephalus gunnari* and by-catch species:

(a) length measurements shall be to the nearest centimeter below; and (b) representative samples of length composition shall be taken from each fine-scale grid rectangle (0.5° latitude by 1° longitude) fished in each calendar month; and (v) the above data shall be submitted to the CCAMLR Secretariat not later than one month after the vessel returns to port.

[1] 1 This provision is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 51/XII, pending the adoption of a more appropriate period by the Commission.

Annex 159/A

Chart of the Heard Island Plateau

Conservation Measure 160/XVII [1]

Prohibition of Directed Fishing for Dissostichus eleginoides in Statistical Subarea 58.7

Taking of *Dissostichus eleginoides*, other than for scientific research purposes in accordance with Conservation Measure 64/XII, is prohibited in Statistical Subarea 58.7 from 7 November 1998. This prohibition shall apply until at least such time that a survey of the *Dissostichus eleginoides* stock in this subarea is carried out, its results reported to and analyzed by the Working Group on Fish Stock Assessment and a decision that the fishery be reopened is made by the Commission based on the advice of the Scientific Committee.

[1] Except for waters adjacent to the Prince Edward Islands

Conservation Measure 161/XVII [1, 2, 3]

General Measures for New and Exploratory Longline Fisheries for Dissostichus spp. in the Convention Area for the 1998/99 Season

The Commission,

Noting the need for the distribution of fishing effort and appropriate catch levels in fine-scale rectangles[3] in these new fisheries,

hereby adopts the following Conservation Measure:

1. Fishing should take place over as large a geographical and bathymetric range as possible to obtain the information necessary to determine fishery potential and to avoid over-concentration of catch and effort. To this end, fishing in any fine-scale rectangle shall cease when the reported catch reaches 100 tons and that rectangle shall be closed to fishing for the remainder of the season. Fishing in any fine-scale rectangle shall be restricted to one vessel at any one time.

2. In order to give effect to paragraph 1 above:

(i) the precise geographic position of the mid-point between the start and end of the longline shall be determined using appropriate means;

(ii) catch and effort information for each species by fine-scale rectangle shall be reported to the Executive Secretary every five days using the Five-Day Catch and Effort Reporting System set out in Conservation Measure 51/XII; and

(iii) the Secretariat shall notify Contracting Parties participating in these fisheries when the total longline catch for *Dissostichus eleginoides* and *Dissostichus mawsoni* combined in any fine-scale rectangle exceeds 100 tons.

3. The by-catch of any species in the new and exploratory fisheries other than *Dissostichus* spp. in the Statistical Subareas and Divisions concerned shall be limited to 50 tons.

4. The total number and weight of *Dissostichus eleginoides* and *Dissostichus mawsoni* discarded, including those with the 'jellymeat' condition, shall be reported.

5[2]. Each vessel participating in the new and exploratory fisheries for Dissostichus spp. during the 1998/99 season shall have on board at least one scientific observer, appointed in accordance with the CCAMLR Scheme of International Scientific Observation, throughout all fishing activities within the fishing season.

6. The data collection plan (Annex 161/A) shall be implemented. Data collected pursuant to the plan for the period up to 31 August 1999 shall be reported to CCAMLR by 30 September 1999 so that the data will be available to the 1999 meeting of the Working Group on Fish Stock Assessment. Such data taken after 31 August shall be reported to CCAMLR not later than three months after the closure of the fishery.

[1] Except for waters adjacent to the Kerguelen and Crozet Islands

[2] Except for waters adjacent to the Prince Edward Islands

[3] A fine-scale rectangle is defined as an area of 0.5° latitude by 1° longitude with respect to the northwest corner of the Statistical Subarea or Division. The identification of each rectangle is by the latitude of its northernmost boundary and the longitude of the boundary closest to 0°.

Annex 161/A

Data Collection Plan for New and Exploratory Longline Fisheries

1. All vessels will comply with conditions set by CCAMLR. These include five-day catch and effort reporting system (Conservation Measure 51/XII) and monthly fine-scale effort and biological data reporting system (Conservation Measures 121/XVI and 122/XVI) will be followed.

2. All data required by the CCAMLR *Scientific Observers Manual* for finfish fisheries will be collected. These include:

(i) haul-by-haul catch and catch per effort by species;

(ii) haul-by-haul length frequency of common species;

(iii) sex and gonad state of common species;

(iv) diet and stomach fullness;

(v) scales and/or otoliths for age determination;

(vi) by-catch of fish and other organisms; and

(vii) observation on occurrence and incidental mortality of seabirds and mammals in relation to fishing operations.

3. Data specific to longline fisheries will be collected. These include:

(i) number of fish lost at surface;

(ii) number of hooks set;

(iii) bait type;

(iv) baiting success (%);

(v) hook type;

(vi) setting, soak, and hauling times;

(vii) sea depth at each end of line on hauling; and

(viii) bottom type.

Conservation Measure 162/XVII

New Longline Fishery for Dissostichus eleginoides and Dissostichus mawsoni in Statistical Subarea 48.6 in the 1998/99 Season

The Commission,

Welcoming the notification of South Africa of its intention to conduct a new longline fishery in Statistical Subarea 48.6 for *Dissostichus eleginoides* and *Dissostichus mawsoni* in the 1998/99 fishing season,

hereby adopts the following Conservation Measure in accordance with Conservation Measure 65/XII:

1. Fishing for *Dissostichus eleginoides* and *Dissostichus mawsoni* in Statistical Subarea 48.6 shall be limited to the new longline fishery by South Africa. The fishery shall be conducted by South African flagged vessels using longlining only.

2. The precautionary catch limit for this new longline fishery in Statistical Subarea 48.6 shall be limited to 707 tons of *Dissostichus* spp. north of 60°S, and 495 tons of *Dissostichus* spp. south of 60°S. In the event that either limit is reached, the relevant fishery shall be closed.

3. For the purpose of this new longline fishery, the 1998/99 fishing season to the north of 60°S is defined as the period from 1 March to 31 August 1999. The 1998/99 fishing season south of 60°S is defined as the period from 15 February 1999 to 15 October 1999.

4. The new longline fishery for the above species shall be carried out in accordance with Conservation Measures 29/XVI and 161/XVII.

5. Each vessel participating in this new longline fishery will be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

Conservation Measure 163/XVII

New Longline Fishery for Dissostichus spp. in Statistical Division 58.4.3 Outside Areas Under National Jurisdictions in the 1998/99 Season

The Commission,

Welcoming the notification of France of its intention to conduct a new longline fishery in Statistical Division 58.4.3 outside areas under national jurisdictions for *Dissostichus* spp. in the 1998/99 fishing season,

hereby adopts the following Conservation Measure in accordance with Conservation Measure 65/XII:

1. Fishing for *Dissostichus* spp. in Statistical Division 58.4.3 outside areas under national jurisdictions shall be limited to the new longline fishery by France. The fishery shall be conducted by French flagged vessels using longlining only.

2. The precautionary catch limit for this new longline fishery in Statistical Division 58.4.3 shall be limited to 700 tons of *Dissostichus* spp. north of 60°S. In the event that this limit is reached, the fishery shall be closed.

3. For the purpose of this new longline fishery, the 1998/99 fishing season to the north of 60°S is defined as the period from 15 April to 31 August 1999.

4. The new longline fishery for the above species shall be carried out in accordance with Conservation Measures 29/XVI and 161/XVII.

5. Each vessel participating in this new longline fishery will be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

Conservation Measure 164/XVII [1]

New Longline Fisheries for Dissostichus eleginoides in Statistical Division 58.4.4 in the 1998/99 Season

The Commission,

Welcoming the notifications of France, South Africa, Spain and Uruguay of their intention to conduct new longline fisheries in Statistical Division 58.4.4 for *Dissostichus eleginoides* in the 1998/99 season,

hereby adopts the following Conservation Measure in accordance with Conservation Measure 31/X:

1. Fishing for *Dissostichus eleginoides* in Statistical Division 58.4.4 shall be limited to the new longline fisheries by France, South Africa, Spain and Uruguay. The fisheries shall be conducted by French, South African, Spanish and Uruguayan flagged vessels using longlining only.

2. The precautionary catch for Statistical Division 58.4.4 shall be limited to 572 tons of *Dissostichus* spp. north of 60°S, to be taken by longlining. In the event that this limit is reached, the fisheries shall be closed.

3. For the purpose of these new longline fisheries, the 1998/99 fishing season is defined as the period from 15 April to 31 August 1999.

4. The new longline fisheries for the above species shall be carried out in accordance with Conservation Measures 29/XVI and 161/XVII.

5. Each vessel participating in these new longline fisheries will be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

[1] Except for waters adjacent to the Prince Edward Islands

Conservation Measure 165/XVII

Exploratory Fishery for Martialia hyadesi in Statistical Subarea 48.3 in the 1998/99 Season

The Commission hereby adopts the following Conservation Measure in accordance with Conservation Measures 7/V and 65/XII:

1. The total catch of *Martialia hyadesi* in the 1998/99 season shall be limited to 2,500 tons.

2. For the purposes of this exploratory fishery, the fishing season is defined as the period from 7 November 1998 to 30 November 1999 or until the catch limit is reached, whichever is sooner.

3. For the purposes of implementing this Conservation Measure:

(i) the Ten-day Catch and Effort Reporting System, as set out in Conservation Measure 61/XII shall apply;

(ii) the data required to complete the CCAMLR standard fine-scale catch and effort data form for squid jig fisheries (Form C3) shall be reported from each vessel. These data shall include numbers of seabirds and marine mammals of each species caught and released or killed. These data shall be reported to CCAMLR by 31 August 1999 for catches taken prior to 31 July 1999; and

(iii) data on catches taken between 31 July 1999 and 31 August 1999 shall be reported to CCAMLR by 30 September 1999 so that the data will be available to the 1999 meeting of the Working Group on Fish Stock Assessment.

4. Each vessel participating in this exploratory fishery for *Martialia hyadesi* in Statistical Subarea 48.3 during the 1998/99 season shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation on board throughout all fishing activities in this subarea.

5. The data collection plan in Annex 165/A shall be implemented. Data collected pursuant to the plan for the period up to 31 August 1999 shall be reported to CCAMLR by 30 September 1999 so that the data will be available to the 1999 meeting of the Working Group on Fish Stock Assessment. Such data taken after 31 August shall be reported to CCAMLR not later than three months after the closure of the fishery.

Annex 165/A

Data Collection Plan for Exploratory Squid (Martialia Hyadesi) Fisheries in Statistical Subarea 48.3

1. All vessels will comply with conditions set by CCAMLR. These include data required to complete the data form (Form TAC) for the Ten-day Catch and Effort Reporting System, as specified by Conservation Measure 61/XII; and data required to complete the CCAMLR standard fine-scale catch and effort data form for a squid jig fishery (Form C3). This includes numbers of seabirds and marine mammals of each species caught and released or killed.

2. All data required by the CCAMLR Scientific Observers Manual for squid fisheries will be collected. These include:

(i) vessel and observer program details (Form S1);

(ii) catch information (Form S2); and

(iii) biological data (Form S3).

Conservation Measure 166/XVII [1,2]

Exploratory Trawl Fishery for Dissostichus spp. in Statistical Division 58.4.1 in the 1998/99 Season

The Commission,

Welcoming the notification of Australia of its intention to conduct an exploratory trawl fishery in Statistical Division 58.4.1 west of 90°E in the 1998/99 season,

hereby adopts the following Conservation Measure in accordance with Conservation Measure 65/XII:

1. Fishing for *Dissostichus* spp. by trawl in Statistical Division 58.4.1west of 90°E shall be limited to the exploratory fishery by Australian flagged vessels.

2. The total catch of *Dissostichus* spp. in the 1998/99 season taken by the trawl method shall not exceed 261 tons.

3. For the purposes of this exploratory trawl fishery, the 1998/99 fishing season is defined as the period from 7 November 1998 to 30 November 1999 or until the catch limit is reached, whichever is the sooner.

4. Each vessel participating in this exploratory trawl fishery for *Dissostichus* spp. in Statistical Division

58.4.1 west of 90°E in the 1998/99 season shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation on board throughout all fishing activities within this division.

5. Each vessel operating in this exploratory trawl fishery for *Dissostichus* spp. in Statistical Division 58.4.1 west of 90°E shall be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

6. For the purpose of implementing this Conservation Measure:

(i) the Five-day Catch and Effort Reporting System set out in Conservation Measure 51/XII shall apply; and

(ii) the monthly fine-scale biological data, as required under Conservation Measure 121/XVI, shall be recorded and reported in accordance with the System of International Scientific Observation.

7. (i) There shall be no directed fishing for any species other than *Dissostichus* spp.

(ii) The by-catch of any fish species other than *Dissostichus* spp. shall not exceed 50 tons.

(iii) If, in the course of a directed fishery, the by-catch in any one haul of any by-catch species for which by-catch limitations apply under this Conservation Measure is equal to, or greater than 2 tons, then the fishing vessel shall not fish using that method of fishing at any point within 5 n miles [1] of the location where the by-catch exceeded 2 tons for a period of at least five days[2]. The location where the by-catch exceeded 2 tons is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

8. The total number and weight of *Dissostichus* spp. discarded, including those with the jellymeat condition, shall be reported. These fish will count towards the total allowable catch.

9. The data collection plan in Conservation Measure 167/XVII for BANZARE Bank as a whole shall be implemented and the results reported to CCAMLR not later than three months after the closure of the fishery.

[1] This provision is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 51/XII, pending the adoption of a more appropriate period by the Commission.

Conservation Measure 167/XVII [1,2]

Exploratory Trawl Fishery for Dissostichus spp. in Statistical Division 58.4.3 in the 1998/99 Season

The Commission,

Welcoming the notification of Australia of its intention to conduct an exploratory trawl fishery in Statistical Division 58.4.3 in the 1998/99 season,

hereby adopts the following Conservation Measure in accordance with Conservation Measure 65/XII:

1. Fishing for *Dissostichus* spp. by trawl in Statistical Division 58.4.3 shall be limited to the exploratory fishery by Australian flagged vessels.

2. The total catch of *Dissostichus* spp. in the 1998/99 season taken by the trawl method shall not exceed 625 tons.

3. For the purposes of this exploratory trawl fishery, the 1998/99 fishing season is defined as the period from 7 November 1998 to 30 November 1999 or until the catch limit is reached, whichever is the sooner.

4. Each vessel participating in this exploratory trawl fishery for *Dissostichus* spp. in Statistical Division 58.4.3 in the 1998/99 season shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation on board throughout all fishing activities within this division.

5. Each vessel operating in this exploratory trawl fishery for *Dissostichus* spp. in Statistical Division 58.4.3 shall be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

6. For the purpose of implementing this Conservation Measure:

(i) the Five-day Catch and Effort Reporting System set out in Conservation Measure 51/XII shall apply; and

(ii) the monthly fine-scale biological data, as required under Conservation Measure 121/XVI, shall be recorded and reported in accordance with the System of International Scientific Observation.

7. (i) There shall be no directed fishing for any species other than *Dissostichus* spp.

(ii) The by-catch of any fish species other than *Dissostichus* spp. shall not exceed 50 tons.

(iii) If, in the course of a directed fishery, the by-catch in any one haul of any by-catch species for which by-catch limitations apply under this Conservation Measure is equal to, or greater than 2 tons, then the fishing vessel shall not fish using that method of fishing at any point within 5 n miles [1] of the location where the by-catch exceeded 2 tons for a period of at least five days [2]. The location where the by-catch exceeded 2 tons is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

8. The total number and weight of *Dissostichus* spp. discarded, including those with the jellymeat condition, shall be reported. These fish will count towards the total allowable catch.

9. The data collection plan in Annex 167/A shall be implemented and the results reported to CCAMLR not later than three months after the closure of the fishery.

[1] This provision is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 51/XII, pending the adoption of a more appropriate period by the Commission.

ANNEX 167/A

Research and Fishery Operations Plan

During the early stages of exploratory fishing on the Elan and BANZARE Banks, subject to the catch limits set by CCAMLR, Australian vessels will conduct a trawl survey to assess the biomass of commercially important species on each of the banks down to 1 500 m depth. Exploration and surveys might not occur on both banks in the same season, but commercial exploration will not occur unless a survey is conducted at the same time. The survey, once commenced, will be completed in as short a time period as possible.

The survey on each bank will comprise 40 hauls at randomly chosen positions. Because the suitability of the bottom on these banks for fishing is not well known, and even the positions of some parts of the banks are not precisely known, it is likely that a high proportion of the sites will be unsuitable for trawling. To make the survey as practicable as possible, the ground shallower than 1 500 m on each bank has been divided into just over 40 squares, each of 15 n miles square for Elan Bank and 25 n miles square for BANZARE Bank (Figures 1 and 2). Within each square, five randomly chosen trawling positions have been nominated (Tables 1 and 2), and the vessel will trawl at one of the five positions in each square. If no nominated trawl position in a square is suitable, then that square will be abandoned. More accurate charts of these areas will be available soon, and it may be necessary to alter the positions of the sampling squares.

Permit Conditions and Data Collection Plan

The vessels will comply with all express and implied conditions set by CCAMLR. General conditions include 120 mm minimum mesh size (Conservation Measure 2/III), and no net monitor cables to be used (Conservation Measure 30/X). The five-day catch and effort reporting system (Conservation Measure 51/XII) and the monthly effort and biological data reporting required by Conservation Measures 121/XVI and 122/XVI will also apply in Statistical Division 58.4.3, and Statistical Division 58.4.1 west of 90°E.

In addition to conditions set by CCAMLR, the Australian Fisheries Management Authority (AFMA) will require that the vessels carry an operating VMS which will enable AFMA to know their position at all times. An inspector/scientific observer will also be aboard all vessels at all times to monitor activities and catches and to collect biological data.

The following data and material will be collected from both the survey and commercial fishing operations, as required by the CCAMLR Scientific Observers Manual for finfish fisheries:

(i) haul-by-haul catch and catch per effort by species;

(ii) haul-by-haul length frequency of common species;

(iii) sex and gonad state of common species;

(iv) diet and stomach fullness;

(v) scales and/or otoliths for age determination;

(vi) by-catch of fish and other organisms; and

(vii) observations on the occurrence of seabirds and mammals in relation to fishing operations, and details of any incidental mortality of these animals.

Figure 1: Chart of the Elan Bank area, showing the location and numbering system of the 15 n mile sampling squares.

Figure 2: Chart of the BANZARE Bank area, showing the location and numbering system of the 25 n mile sampling squares.

Conservation Measure 168/XVII [1,2]

Exploratory Longline Fisheries for Dissostichus eleginoides in Statistical Subarea 58.6 in the 1998/99 Season

The Commission hereby adopts the following Conservation Measure in accordance with Conservation Measure 65/XII:

1. Fishing for *Dissostichus eleginoides* in Statistical Subarea 58.6 shall be limited to the exploratory longline fisheries by France and South Africa. The fisheries shall be conducted by French and South African flagged vessels using longlining only.

2. The precautionary catch limit for these exploratory fisheries in Statistical Subarea 58.6 shall be limited to 1 555 tons of *Dissostichus eleginoides*, to be taken by longlining. In the event that this limit is reached, the fisheries shall be closed.

3. For the purpose of these exploratory longline fisheries, the 1998/99 fishing season is defined as the period from 15 April to 31 August 1999.

4. The exploratory longline fisheries for the above species shall be carried out in accordance with Conservation Measures 29/XVI and 133/XVI.

5. Each vessel participating in these exploratory longline fisheries will be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

[1] Except for waters adjacent to the Crozet Islands

[2] Except for waters adjacent to the Prince Edward Islands

Conservation Measure 169/XVII

Exploratory Longline Fishery for Dissostichus eleginoides and *Dissostichus mawsoni* in Statistical Subarea 88.1 in the 1998/99 Season

The Commission hereby adopts the following Conservation Measure in accordance with Conservation Measure 65/XII:

1. Fishing for *Dissostichus eleginoides* and *Dissostichus mawsoni* in Statistical Subarea 88.1 shall be limited to the exploratory longline fishery by New Zealand. The fishery shall be conducted by no more than two New Zealand flagged vessels using longlining only.

2. The precautionary catch for these exploratory longline fisheries in Subarea 88.1 shall be limited to 271 tons of *Dissostichus* spp. north of 65°S and 2 010 tons of *Dissostichus* spp. south of 65°S. In the event that these limits are reached, the fishery shall be closed.

3. For the purposes of this exploratory longline fishery, the 1998/99 fishing season is defined as the period from 15 December 1998 to 31 August 1999.

4. The directed longline fishery for *Dissostichus* spp. in Statistical Subarea 88.1 north of 65°S shall be carried out in accordance with Conservation Measure 29/XVI. South of 65°S the directed fishery for the above species shall be carried out in accordance with all the provisions of Conservation Measure 29/XVI, except paragraph 3. To permit experimental line weighting trials south of 65°S, longlines may be set during daylight hours if the vessels can demonstrate a consistent minimum line sink rate of 0.3 meters per second. Vessels shall revert to setting longlines at night in accordance with Conservation Measure 29/XVI if a significant level of seabird by-catch occurs.

5. The directed longline fishery for the above species shall be carried out in accordance with Conservation Measure 161/XVII.

6. Each vessel participating in this exploratory longline fishery shall be required to operate a VMS at all times, in accordance with Conservation Measure 148/XVII.

Dated: December 8, 1998.

Raymond V. Arnaudo,

Deputy Director, Office of Oceans Affairs.

[FR Doc. 98–33660 Filed 12–21–98; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed During the Week Ending December 11, 1998

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. sections 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: OST–98–4870.
Date Filed: December 7, 1998.
Parties: Members of the International Air Transport Association.
Subject:
COMP Telex Mail Vote 978
Resolution 017l
Intended effective date: January 1, 1999.

Docket Number: OST–98–4892.
Date Filed: December 9, 1998.
Parties: Members of the International Air Transport Association.
Subject:
PTC3 0257 dated December 8, 1998 r1–5
PTC3 0259 dated December 8, 1998 r6
PTC3 0261 dated December 8, 1998 r7–9
PTC3 0263 dated December 8, 1998 r10–13
PTC3 0266 dated December 8, 1998 r14
Intended effective date: February 1, 1999.

Docket Number: OST–98–4893.
Date Filed: December 9, 1998.
Parties: Members of the International Air Transport Association.
Subject:
PTC3 0255 dated December 8, 1998 r1
PTC3 0256 dated December 8, 1998 r2–6
PTC3 0258 dated December 8, 1998 r7
PTC3 0260 dated December 8, 1998 r8–13

PTC3 0262 dated December 8, 1998 r14–17
PTC3 0264 dated December 8, 1998 r18
PTC3 0265 dated December 8, 1998 r19
PTC3 0267 dated December 8, 1998 r20–21
Expedited PTC3 Resolutions, Excluding U.S.
Intended effective date: February 1, 1999.

Docket Number: OST–98–4904.
Date Filed: December 11, 1998.
Parties: Members of the International Air Transport Association.
Subject:
PTC2 EUR 0228 dated December 8, 1998 r1–2
PTC2 EUR 0229 dated December 8, 1998 r3
PTC2 EUR 0230 dated December 8, 1998 r4
PTC2 EUR 0231 dated December 8, 1998 r5
PTC2 EUR 0232 dated December 8, 1998 r6
Within Europe Expedited Resolutions
PTC2 EUR 0224 dated November 17, 1998—Minutes
Intended effective date: as early as March 27, 1999.

Dorothy W. Walker,
Federal Register Liaison.

[FR Doc. 98–33850 Filed 12–21–98; 8:45 am]
BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending December 11, 1998

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–98–4881.
Date Filed: December 9, 1998.
Due Date for Answers, Conforming Applications, or Motions to Modify Scope: January 6, 1999.
Description: Application of American International Airways, Inc., pursuant to 49 U.S.C. section 41102, part 201 and subpart Q, requests issuance of a certificate of public convenience and necessity authorizing AIA to engage in scheduled foreign air transportation of property and mail between any point or points in the United States and any point in the countries listed in appendix A to this application. AIA also requests authority to integrate this certificate authority with all services AIA is otherwise authorized to conduct pursuant to its existing exemption and certificate authority and consistent with applicable agreements between the U.S. and foreign countries. This application conforms to the scope of the application of Florida West International Airways, Inc. in Docket OST–98–4793.

Dorothy W. Walker,
Federal Register Liaison.

[FR Doc. 98–33851 Filed 12–21–98; 8:45 am]
BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[FAA Docket No. 29303]

RIN 2120AG58

Policy Regarding Airport Rates and Charges, Request for Comments

AGENCY: United States Department of Transportation, Office of the Secretary, and Federal Aviation Administration (FAA).

ACTION: Notice extending comment period.

SUMMARY: On Wednesday, August 12, 1998, the Department of Transportation opened a public docket to receive information and comments from interested parties on the replacement provisions of the Department of Transportation's Policy Regarding Airport Rates and Charges (Policy Statement) issued June 21, 1996, and vacated in part by the United States Court of Appeals for the District of Columbia Circuit. By this notice, the Department is extending the time period for public comment from December 30, 1998, until January 31, 1999. The due date for reply comments is extended to March 1, 1999.

DATES: Comments should be submitted by January 31, 1999. Reply comments will be accepted and must be submitted on or before March 1, 1999. Comments that are received after that date will be considered only to the extent possible.

ADDRESSES: Comments on this notice must be delivered or mailed, in quadruplicate, to: Federal Aviation Administration, Office of Chief Counsel, Attention: Rules Docket (AGC–10), Docket No. 29303, 800 Independence Ave, SW, Room 915G, Washington, DC 20591. All comments must be marked "Docket No. 29303." Commenters wishing the FAA to acknowledge receipt of their comments must include a preaddressed, stamped postcard on which the following statement is made: "Comments to Docket No. 29303." The postcard will be date stamped and mailed to the commenter. Comments on this Notice may be delivered or examined in room 915G on weekdays, except on Federal holidays, between 8:30 am and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Barry Molar, Manager (AAS–400), (202) 267–3187; or Mr. Wayne Heibeck, Compliance Specialist (AAS–400), (202) 267–8726, Airport Compliance Division, Office of Airport Safety and Standards, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591.

SUPPLEMENTARY INFORMATION: On August 12, 1998, the Department published an advance notice of proposed policy on airport rates and charges requesting public comments (63 FR 43228). In that request, we asked parties to provide us with suggestions for replacement provisions for the portions of the Department of Transportation's Policy Regarding Airport Rates and Charges (Policy Statement) issued June 21, 1996, that were vacated by the United States Court of Appeals for the District of Columbia Circuit. The notice provided for comments to be submitted by October 13, 1998. Reply comments were to be submitted on or before October 26, 1998.

Based on a September 4 petition of the Air Transport Association of America (ATA), and a September 10 petition jointly filed by the Airports Council International-North America (ACI–NA) and the American Association of Airport Executives (AAAE), we extended the comment period on the proposed policy to December 30, 1998.

The Department now understands that industry commenters are attempting to respond to the Secretary's initiative on airport competitive practices by December 31, 1998, and need more time to respond to the August 12 advance notice. Consequently, we have determined that a further extension of time is warranted on the advance notice in order to assure that the common issues in the proceeding in Docket No. OST 98–4025 and this proceeding are fully addressed in the comments.

Accordingly

1. The date by which comments to Docket No. 29303 are due is extended to January 31, 1999;

2. Reply comments may be submitted on or before March 1, 1999.

Issued in Washington, DC on December 16, 1998.

Susan L. Kurland,

Associate Administrator for Airports, Federal Aviation Administration.

[FR Doc. 98–33856 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aging Transport Systems Rulemaking Advisory Committee; Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meeting.

SUMMARY: The FAA is issuing this notice to advise the pubic of the initial meeting of the Aging Transport Systems Rulemaking Advisory Committee.

DATES: The meeting will be held on January 20, 1999, at 9 a.m.

ADDRESSES: The meeting will be held at the Federal Aviation Administration, 800 Independence Avenue, SW., Bessie Coleman Conference Center, 2nd floor, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Miss Jean Casciano, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–9683; fax (202) 267–5075; e-mail Jean.Casciano@faa.gov.

SUPPLEMENTARY INFORMATION: Notice is hereby given of a meeting of the Aging Transport Systems Rulemaking Advisory Committee to be held on January 20, 1999, at the Federal Aviation Administration, 800 Independence Avenue, SW., Bessie Coleman Conference Center, 2nd floor, Washington, DC, beginning at 9 a.m. The agenda will include:

- Committee operations.
- Discussion of tasks assigned to the committee.
- Update on the Air Transport Association's inspection effort.
- Future meeting schedule.

Attendance is open to the interested public but will be limited to the space available. The public must make arrangements by January 11, 1999, to present oral statements at the meeting. The public may present written statements to the committee at any time by providing 200 copies to the Executive Director, or by brining the copies to him at the meeting.

A copy of the proposed recommendation to be presented at the meeting may be obtained by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT.** In addition, sign and oral interpretation, as well as an assistive listening device, can be made available if requested 10 calendar days before the meeting by also contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT.**

Issued in Washington, DC, on December 16, 1998.

Joseph A. Hawkins,

Director, Office of Rulemaking.

[FR Doc. 98–33853 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application (99–02–U–00–BIL) To Use the Revenue From a Passenger Facility Charge (PFC) at Billings Logan International Airport, Submitted by the City of Billings for Billings-Logan International Airport, Billings, MT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent To Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to use PFC revenue at Billings-Logan International Airport under the provisions of 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR 158).

DATES: Comments must be received on or before January 21, 1999.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: David P. Gabbert, Manager; Helena Airports District Office; Federal Aviation Administration; FAA Building, Suite 2; 2725 Skyway Drive; Helena, MT 59602.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. J. Bruce Putnam, Director of Aviation and Transit, at the following address: 1901 Terminal Circle, Room 216, Billings, MT 59105–1996.

Air Carriers and foreign air carriers may submit copies of written comments previously provided to Billings-Logan International Airport, under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: David P. Gabbert, Manager, at (406) 449–5271. Federal Aviation Administration; Airports District Office FAA Building, Suite 2; 2725 Skyway Drive; Helena, MT 59602. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application 99–02–U–00–BIL to use PFC revenue at Billings-Logan International Airport, under the provisions of 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). The City of Billings received prior approval to impose a PFC on these projects on January 24, 1994.

On December 15, 1998, the FAA determined that the application to use the revenue from a PFC submitted by City of Billings, Billings-Logan International Airport, Billings, MT, was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 18, 1999. The following is a brief overview of the application.

Level of the proposed PFC: $3.00.

Actual charge effective date: April 1, 1994.

Proposed charge expiration date: November 30, 2003.

Total requested for use approval: $4,261,000.

Brief description of proposed projects: Relocation and upsizing of sanitary sewer; Extension and upgrading of water lines.

Class or classes of air carriers which the public agency has requested not be required to collect PFC's: None.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Office located at: Federal Aviation Administration, Northwest Mountain Region, Airports Division, ANM–600, 1601 Lind Avenue S.W., Suite 315, Renton, WA 98055–4056.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Billings-Logan International Airport.

Issued in Renton, Washington on December 15, 1998.

David A. Field,

Manager, Planning, Programming and Capacity Branch, Northwest Mountain Region.

[FR Doc. 98–33854 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on PFC Application (99–04–C–00–SUN) To Impose and Use, and Use Only the Revenue From a Passenger Facility Charge (PFC) at Friedman Memorial Airport; Submitted by Friedman Memorial Airport Authority (Airport Authority), Hailey, ID

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use, and use only the revenue from a PFC at Friedman Memorial Airport under the provisions of 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before January 21, 1999.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: J. Wade Bryant, Manager, Seattle Airports District Office, SEA-ADO; Federal Aviation Administration; 1601 Lind Avenue SW, Suite 250; Renton, Washington 98055–4056.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Richard R. Baird, Airport Manager, at the following address: P.O. Box 929, Hailey, Idaho 83333.

Air carriers and foreign air carriers may submit copies of written comments previously provided to Friedman Memorial Airport under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Vargas, (425) 227–2660; Seattle Airports District Office, SEA-ADO; Federal Aviation Administration; 1601 Lind Avenue SW, Suite 250; Renton, WA 98055–4056. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application (99–04–C–00–SUN) to impose and use, and use only the revenue from a PFC at Friedman Memorial Airport, under the provisions of 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On December 15, 1998, the FAA determined that the application to impose and use, and use only the revenue from a PFC submitted by the Airport Authority, Hailey, Idaho, was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 18, 1999.

The following is a brief overview of the application.

Level of the proposed PFC: $3.00.

Proposed charge effective date: May 1, 1996.

Proposed charge expiration date: August 31, 2008.

Total estimated net PFC revenue: $1,651,440.

Brief description of proposed project(s): Use Only: Upgrade runway safety areas; Impose and Use: Upgrade airport to meet Object Free Area (OFA) and Obstacle Free Zone (OFZ) standards.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: "Part 135 air taxi/commercial operators who conduct operations in air commerce carrying persons for compensation or hire, in aircraft with a seating capacity of 10 or less."

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Office located at: Federal Aviation Administration, Northwest Mountain Regional Office, Airports Division, ANM–600, 1601 Lind Avenue S.W., Suite 315, Renton, WA 98055–4056.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at Friedman Memorial Airport, Hailey, Idaho.

Issued in Renton, Washington on December 15, 1998.

David A. Field,

Manager, Planning, Programming and Capacity Branch, Northwest Mountain Region.

[FR Doc. 98–33855 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket FHWA–98–4790]

Transportation Equity Act for the 21st Century; Intelligent Transportation Systems (ITS) Standards; Proposed Criteria and Draft List of Critical ITS Standards

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed selection criteria and draft list of critical standards; request for comments.

SUMMARY: This notice invites comments relating to the legislative requirement to identify a list of critical standards that ensure national interoperability in the implementation of intelligent transportation system (ITS) technologies as provided in section 5206(c) of the Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105–178, 112 stat. 107, 456. Actions are currently underway by the U.S. DOT and the Intelligent Transportation Society of America (ITS America), and advisory organization to the U.S. DOT, to identify objective criteria by which critical standards are to be identified. The approach being taken to develop this list of critical standards involves a three-step process; whereby the U.S. DOT will disseminate the proposed set of criteria and draft list of standards through a number of forums, conduct outreach to the public and private stakeholder community, and evaluate comments and recommendations from the ITS America and the public. The U.S. DOT will prepare the final report outlining the critical standards and present it to the Congress by June 1, 1999.

Based upon the currently proposed selection criteria, a draft list of critical standards is also identified in this document. Although not prescribed by law, the identification of critical ITS standards is viewed as an ongoing process and therefore, the U.S. DOT may identify additional ITS standards as critical through subsequent actions on an as necessary basis, but no more than annually.

DATES: Comments on the proposed selection criteria and resulting list of critical ITS standards must be received on or before January 21, 1999.

ADDRESSES: Your signed, written comments must refer to the docket number appearing at the top of this document, and be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590–0001. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

FOR FURTHER INFORMATION CONTACT: *For the ITS standards program:* Mr. Mike Schagrin, ITS Joint Program Office, HVH–1, (202) 366–2180. *For legal issues:* Ms. Jodi George, Office of the Chief Counsel, HCC–32, (202) 366–1346; Federal Highway Administration, 400 Seventh Street, SW., Washington, DC

20590. *For ITS America:* Mr. Roy Courtney, ITS America, Suite 800, 400 Virginia Avenue, SW., Washington, DC 20024 (202) 484–4847.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the **Federal Register's** home page at: http://www.nara.gov/fedreg and the Government Printing Office's database at: http://www.access.gpo.gov/nara.

Internet users can access all comments received by the U.S. DOT Dockets, Room PL–401 by using the universal resource locator (URL): http://dms.dot.gov. Please follow the online instructions for more information and help. The paper "TEA–21 Critical Standards: Proposed Criteria and List of Critical Standards" is available at the U.S. DOT's ITS home page at http://www.its.dot.gov.

Background

A primary goal of the ITS Standards Program, as indicated under section 5206 of TEA–21, is to promote and ensure interoperability in the implementation of intelligent transportation system technologies. A number of standards are especially critical to ensuring national ITS interoperability or enabling the development of other standards. Actions to establish critical standards are required by TEA–21. Specifically, section 5206(b) of TEA–21 requires the Secretary of Transportation (Secretary) "not later than June 1, 1999" to "submit a report [to the Congress] identifying which [ITS] standards are critical to ensuring national interoperability or critical to the development of other standards and specifying the status of the development of each standard identified."

In responding to this requirement, the U.S. DOT has developed a discussion paper that contains proposed criteria for identifying critical ITS standards, along with a draft list of standards. The paper "TEA–21 Critical Standards: Proposed Criteria and List of Critical Standards" reflects preliminary discussions with members of the standards community and the ITS America. Key points from the paper and a list of proposed critical standards are included in this notice. The list of ITS standards from which critical standards will be selected is posted on the U.S. DOT ITS Joint Program Office's home page in text or may be obtained by contacting Mike Schagrin as listed above in the caption FOR FURTHER INFORMATION CONTACT.

Conformity Requirements is Not a Subject of This Notice

In addition to the requirement for identifying critical standards, section 5206(e)(1) of TEA–21 requires the Secretary to "ensure that intelligent transportation system projects * * * conform to the national architecture, applicable standards or provisional standards, and protocols * * *" This TEA–21 conformity requirement is distinct and apart from the requirement to develop critical standards. Whereas only some ITS standards may be identified as critical, all ITS standards are subject to the conformity requirement. The conformity requirement is not a subject of this notice.

Requirement for Critical Standards List and Interim Standards Where Necessary

The U.S. DOT views the identification of "critical" standards as one of its top priorities. A number of ITS standards are especially critical for ensuring national ITS interoperability, and as noted above, the U.S. DOT is currently taking action to identify them. Under section 5206(a)(3) of TEA–21, the U.S. DOT is sponsoring the accelerated development of many ITS standards through the use of recognized standards development organizations (SDOs). It is clear that the Congress recognized the value in using an industry driven standards development process, but possibly feared this mechanism could take too long to be useful in the face of rapid deployment, and/or that U.S. DOT had very little leverage to resolve development activity that resulted in deadlock. The strategy devised by the Congress to deal with this concern was to signal industry that it had until January 2001 to come to agreement on its own, on critical standards, or the Congress would require the U.S. DOT to set the standards for industry. We believe this requirement will be effective in both expediting the standards development process and motivating otherwise deadlocked interests to find solutions before the Secretary must impose them.

Recognizing that not all standards are critical to national interoperability, the Congress is directing the Secretary to identify which standards would be targeted for intervention if the deadline in the TEA–21 is not met. The approach being taken by the U.S. DOT to develop this list of critical standards involves a three-step process as follows:

1. The U.S. DOT develops a proposed set of criteria to be used to select critical standards, required for national interoperability and the development of other standards. The criteria and the resulting list of "critical" standards will be disseminated through a number of forums, including this notice.
2. The ITS America convenes an advisory group representing interested stakeholders from the public and private sectors and conducts a workshop to provide an evaluation of U.S. DOT's proposed approach and its recommendations for both the criteria and the resulting list of standards. These recommendations are to be provided to the U.S. DOT by February 1999.
3. Taking into consideration the comments and recommendations received, the U.S. DOT will prepare the final report outlining the critical standards and present to the Congress by June 1, 1999.

Based on the standards development activity to date, it is anticipated that most critical standards will be completed well before the January 2001 deadline. Where a stalemate exists however, the Secretary is required to select a provisional standard. For those standards well along in the process, the Secretary has the option of waiving the provisional standard requirement, as allowed under section 5206(d) of TEA–21. At any time, the Secretary is also allowed to withdraw a waiver. Notice of any waiver granted, or withdrawn, by the Secretary will be published in the **Federal Register**, as required by TEA–21. In all other respects, the U.S. DOT intends to treat critical standards in the same manner as other (i.e., "non-critical") ITS standards.

Proposed Criteria and List of Critical Standards

Criteria for identifying critical ITS standards have been developed by the U.S. DOT based on detailed consideration of the statutory notions of "criticality" reflected in TEA–21 (i.e., standards that are "critical to ensuring national interoperability" or "critical to the development of other standards"). For simplicity, such critical standards are referred to as "national standards" and "foundation standards," respectively. These concepts are further defined below in the effort to establish objective criteria that logically and unambiguously lead to selection of critical standards.

National standards are those ITS standards that ensure "national interoperability." Whereas there may be other desirable national attributes or outcomes in addition to interoperability, such as economy of scale and the

resultant lower product costs or creation of a competitive marketplace with multiple choices for users, TEA–21 bases "critical" standards solely on national interoperability. In reality, few ITS services require standardized national-level interoperability. In other words, there are services that do not justify a single national hardware or software standard or, otherwise, require a direct interface to a system that is not buffered, translated, or interpreted.

Considering the various systems and interfaces of an ITS, those requiring national interoperability appear most related to the mobile element (e.g., automobile; truck; personal communications device). Unlike in fixed systems, the hardware and software of mobile systems cannot easily be adaptable to communicate with different fixed systems as the mobile unit travels. Using this somewhat bottom-up strategy and considering the practicalities related to mobile operation, ITS and interfaces that require interoperability on a national level are for services that are vehicle-oriented and services that are accessed using personal communications systems.

In considering the requirement for national interoperability for mobile systems, only the communications interface between the vehicle and the infrastructure is important. Such things as the vehicular components may, or may not, be standardized; they are only required to support a standardized communications interface to the roadside. To illustrate this criterion of national (i.e., critical) standards, examples of mobile user-services might include:

1. Private automobiles, through the use of in-vehicle systems, maintaining the capability of obtaining traveler information as it travels across the nation.

2. Commercial vehicles electronically send identification information that results in proper payment of tolls, recording of taxes, and relaying of inspection information in any State.

Foundation standards are necessary for the development of other standards. However, simply defining "foundation standards" as standards that apply to the development of other standards is not sufficiently precise for defining critical standards. For example, an existing "family of standards" (e.g., NTCIP—National Transportation Communications for ITS Protocol) uses a single "overview" standard that underpins the remaining standards in the family. However, such overview standards are simply one piece in the framework of standards for a particular service. Within the framework or family of standards, all standards are important and essentially critical; they are all needed to provide the complete service.

Standards that are of greater applicable importance to the development of other standards include such things as "data dictionary templates" (that provide the basic structure for designing the various data dictionaries) and "location referencing standards" (that are an integral part of the content portion of many application message lists). These types of standards are used by, and are essential for, other standards—across multiple ITS application areas. The foundation standard criterion therefore lends itself to the identification of critical foundation standards as those standards that are essential to the development of other standards, across multiple ITS application areas.

List of Proposed Critical Standards

By applying the criteria outlined above to ITS standards currently under development, the U.S. DOT has identified a proposed list of standards as critical, for the purposes of seeking public input. The following table lists the standards that meet the proposed criteria for criticality as "national" or "foundation" standards. The list is ordered alphabetically by title. The table gives the name of each standard, the objectives of the development project, the name of the lead standards development organization,[1] which critical criterion the standard meets, the specific reason the standard is critical, and the current status[2] of the standard.

PROPOSED LIST OF CRITICAL STANDARDS

Title of standard	Project objective	Lead SDO	Type of criticality	Rationale	Status
Advanced Traveler Information System (ATIS) Data Dictionary [SAE J2353].	Develop a minimum set of medium-independent data elements needed by potential information service providers to deploy ATIS services, and provide the basis for future interoperability of ATIS devices.	SAE	National	Enables service providers with conforming products to provide travel information to mobile users throughout the Nation.	In ballot.
Advanced Traveler Information System (ATIS) Message Set [SAE J2354].	Provide a basic message set using the data elements from J2353 needed by potential information service providers to deploy ATIS services, and provide the basis for future interoperability of ATIS devices.	SAE	National	Enables service providers with conforming products to provide travel information to mobile users throughout the Nation.	In ballot.

[1] Standards Development Organizations. AASHTO is the American Association of State Highway and Transportation Officials, ASTM is the American Society for Testing and Materials, IEEE is the Institute of Electrical and Electronics Engineers, ITE is the Institute of Transportation Engineers, NRSC is the National Radio Systems Committee, and SAE is the Society of Automotive Engineers.

[2] Standards whose status is "draft" are under preballot review by the standards committees of the standards development organizations. "In ballot" standards are currently being balloted by the standards committees, or have passed committee ballot and are being balloted at another level within the standards development organizations. "Approved" standards passed ballot in their respective standards development organizations and are awaiting further approval and/or publication of the standard.

PROPOSED LIST OF CRITICAL STANDARDS—Continued

Title of standard	Project objective	Lead SDO	Type of criticality	Rationale	Status
ATIS Message Structure for High Speed FM Subcarrier [SAE J2369].	Develop a general framework allowing cooperative transmission of ATIS data via FM Subcarrier. Create a preliminary coding and message structure for link travel time and network support functions for deployment of the standard modulation selected to meet ITS requirements. Establish efforts to develop additional messages beyond link travel times, e.g., transit schedules.	SAE	National	Allows mobile users with conforming products to access traveler information services uniformly throughout the Nation.	In ballot.
ATMS Data Dictionary (TMDD)—Sections 1 and 2 (Links/Nodes/Events) [TM 1.01].	Develop functional-level data dictionary for Advanced Traffic Management Systems. Section 1 describes and standardizes roadway links and nodes in accordance with location referring message standard. Section 2 includes data elements for incidents and traffic disruptive roadway events.	ITE	Foundation	ATMS data dictionary is used by traveler information systems that provide services to mobile users throughout the Nation. Provides location referencing and roadway basis for other sections of the TMDD. Used by traveler information systems to describe roadway.	In ballot.
ATMS Data Dictionary (TMDD)—Sections 3 and 4 (DMS/Video/Control/Etc.) [TM 1.02].	Develop funcional-level data dictionary for Advanced Traffic Management Systems. Section 3 includes data elements for traffic control, traffic detectors, actuated signal controllers, traffic modeling, vehicle probes, and ramp metering data. Section 4 includes data elements for dynamic message signs, video and camera control, parking management, and weather stations.	ITE	Foundation	ATMS data dictionary is used by traveler information systems that provide services to mobile users throughout the Nation.	In ballot.
High Speed Subcarrier (HSSC) Layer 1.	Develop a high speed FM subcarrier signaling system for wide-area data transfer for multiple applications, including traffic data for travelers and vehicles.	NRSC	National	Allows traveler information system messages to be broadcast to the traveler (i.e., vehicle) nationally.	Draft.
Information Service Provider-Vehicle Location Referencing Standard [SAE J1746].	A standard location referencing format for information service provider to vehicle and vehicle to information service provider. This standard will reflect the cross-streets profile of the current location referencing message set document.	SAE	National, Foundation.	Assures consistency in location referencing and uniform processing for mobile users nationally; may interface with international standards.	In ballot.
Message Sets for DSRC, Electronic Toll and Traffic Management and Commercial Vehicle Operations [IEEE P1455].	Develop a standard for exchanging DSRC information in bidirectional message transmissions and device control, interfacing with, but independent of the ASTM DSRC standards.	IEEE	National	Provides message sets for other ITS user services, such as electronic toll and traffic management and commercial vehicle operations.	In ballot.

PROPOSED LIST OF CRITICAL STANDARDS—Continued

Title of standard	Project objective	Lead SDO	Type of criticality	Rationale	Status
	Develop an extensible interface to other DSRC areas, such as electronic toll and traffic management and commercial vehicle operations.				
Message Sets for Incident Management: Emergency Management System to Traffic Management System and Emergency Telephone System (or 911) [IEEE P1512].	To standardize the form and content of the incident management messages sets for emergency management systems (EMS) to traffic management systems (TMS) and from emergency management systems to the emergency telephone system (ETS) or (E911).	IEEE	National	Assures consistency in communications to mobile users throughout the Nation; allows incident management messages to be shared among different ITS systems.	Draft.
National Transportation Communications for ITS Protocol (NTCIP) Profile for Center-to-Center Communications-CORBA.	Address real time peer-to-peer exchange (including some remote control/command capability) between transportation management centers and systems such as traffic operations centers, transit operations centers, emergency management centers, and traveler information systems using Common Object Request Broker Architecture.	AASHTO	National	Assures data exchange among traffic centers, emergency management centers, traveler information systems, and transit management centers.	Draft.
National Transportation Communications for ITS Protocol (NTCIP) Profile for Center-to-Center Communications-DATEX–ASN.	Address real time peer-to-peer exchange (including some remote control/command capability) between transportation management centers and systems such as traffic operations centers, transit operations centers, emergency management centers, and traveler information system using a predefined message transfer approach.	AASHTO	National	Assures data exchange among traffic centers, emergency management centers, traveler information systems, and transit management centers.	Draft.
NTCIP—Global Object Definitions [TS 3.4].	Identify and define those object definitions that may be supported by multiple device types, such as actuated signal controllers and variable message signs.	AASHTO	Foundation	Assures that all objects (values and functions) are consistent in other NTCIP standards and in transit communications interface profiles (TCIP) standards.	Published.
NTCIP—Simple Transportation Management Framework [TS 3.2].	Specify a set of rules and protocols for organizing, describing and exchanging transportation management information between transportation management applications and transportation equipment such that they interoperate.	AASHTO	National	Assures uniform information exchange among transportation management applications and equipment that sends or receives the information.	Approved.
On-Board Land Vehicle Mayday Reporting Interface [SAE J2313].	Develop a common specification which prescribes various protocol methods enabling vendors with different communication methods to speak with response agencies in a standard format.	SAE	National	Provides message and information between emergency management centers and mobile users nationally.	In ballot.

PROPOSED LIST OF CRITICAL STANDARDS—Continued

Title of standard	Project objective	Lead SDO	Type of criticality	Rationale	Status
	Address message content for national consistency.				
Standard for Data Dictionaries for Intelligent Transportation Systems [IEEE P1489].	Specify a common set of meta entities and meta attributes for ITS data dictionaries, as well as associated conventions and schemas, that enable describing, standardizing, and managing all ITS data. The consistent use of common structures and associated conventions and schemas, data and information can be unambiguously exchanged among various ITS functional subsystems through their specific application systems.	IEEE	Foundation	Sets requirements for the attributes to be used by all ITS data dictionaries for unambiguous data transfer.	In ballot.
Standard Specification on Dedicates Short-Range Communications (DSRC) Data Link Layer [ASTM2].	Develop a specification for the protocol (data link) communications for DSRC. Support both active and backsetter transponders.	ASTM	National	Allows DSRC systems to communicate between roadsides and vehicles nationally.	In ballot.
Dedicated Short-range Communications (DSRC) Physical Layer—902–928 MHz [ASTM1].	Develop a specification for the radio frequency characteristics (physical layer) for DSRC operation in the range of 902 to 928 MHz. Support both active and backscatter transponders.	ASTM	National	Allows DSRC systems to communicate between roadsides and vehicles nationally.	In ballot.
Template for ITS Message Sets [IEEE P1488].	Develop a standard for an ITS Message Set Template.	IEE	Foundation	Describes the structure and content of message sets for exchange between traffic centers, emergency management centers and traveler information systems in a consistent and uniform manner.	Draft.

(Authority: 23 U.S.C. 315; sec. 5206(c), Pub. L. 105–178, 112 Stat, 107, 456 (1998); 49 CFR 1.48)

Issued on: December 16, 1998.

Kenneth R. Wykle,

Federal Highway Administrator.

[FR Doc. 98–33800 Filed 12–21–98; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–557X; STB Docket No. AB–290 (Sub-No. 187X)]

Trustees of the Cincinnati Southern Railway—Abandonment Exemption—in Hamilton County, OH; The Cincinnati, New Orleans & Texas Pacific Railway Company—Discontinuance of Service Exemption—in Hamilton County, OH

Trustees of the Cincinnati Southern Railway (CSR) and The Cincinnati, New Orleans & Texas Pacific Railway Company (CNO&TP) have filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments and Discontinuances* for CSR to abandon and CNO&TP to discontinue service over a 1.2-mile line of railroad between Stations 722+19 and Stations 71+11 in Cincinnati, Hamilton County, OH.[1] The line traverses United States Postal Service Zip Code 45202.

CSR and CNO&TP have certified that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic has been rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8

[1] CNO&TP's lease and operation of CRS's line was approved by the Interstate Commerce Commission in *The Cincinnati, New Orleans and Texas Pacific Railway Company—Ex-Mod. Of Lease—Cincinnati Southern Railway*, Finance Docket No. 21666 (Sub-No. 1) (ICC served Nov. 13, 1987).

(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 January 21, 1999, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by January 4, 1999. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 11, 1999, with: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423.

A copy of any petition filed with the Board should be sent to applicants representative: James R. Paschall, General Attorney, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510–2191. If the verified notice contains false or misleading information, the exemption is void *ab initio*.

CSR and CNO&TP have filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by December 24, 1998. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565–1545. 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), CSR 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 CSR's filing of a notice of consummation by December 22, 1999, 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 website at "WWW.STB.DOT.GOV."

Decided: December 15, 1998.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 98–33733 Filed 12–21–98; 8:45 am]

BILLING CODE 4915–00–P

[2] 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 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.

[3] Each offer of financial assistance must be accompanied by the filing fee, which currently is set at $1000. See 49 CFR 1002.2(f)(25).

DEPARTMENT OF THE TREASURY

United States Mint

Request for Comments, Extension of Time

ACTION: Request for Comments, Extension of Time.

SUMMARY: In a notice appearing November 27, 1998, the United States Mint announced that it was seeking comments from the public on proposed obverse and reverse designs for the new $1 coin to be issued beginning in 2000. The designs have been displayed on the Mint's web site since December 7, 1998. The Mint set a comment deadline of December 21, 1998. Because of overwhelming response to the Mint's web site, the Mint is extending this deadline to December 28, 1998. Current finalist designs remain displayed on the Mint's web site at http://www.usmint.gov.

COMMENT DEADLINE: December 28, 1998.

RECEIPT OF COMMENTS: Any member of the public wishing to comment should do so via the Internet by accessing the Mint's web site (*http://www.usmint.gov*). Alternatively, comments may be submitted in writing to Michael White, 633 3rd Street NW, Room 715, Washington, DC 20220, Fax (202) 874–4083; mail must be received no later than December 28, 1998.

Philip Diehl,

Director, The United States Mint.

[FR Doc. 98–33795 Filed 12–21–98; 8:45 am]

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federal register

Tuesday
December 22, 1998

Part II

Securities and Exchange Commission

17 CFR Part 202 et al.

Exchanges and Alternative Trading Systems and Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products; Final Rules

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 202, 240, 242 and 249

[Release No. 34–40760; File No. S7–12–98]

RIN 3235–AH41

Regulation of Exchanges and Alternative Trading Systems

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Securities and Exchange Commission today is adopting new rules and rule amendments to allow alternative trading systems to choose whether to register as national securities exchanges, or to register as broker-dealers and comply with additional requirements under Regulation ATS, depending on their activities and trading volume. The Commission is also adopting amendments to rules regarding registration as a national securities exchange, repealing Rule 17a–23, and amending the books and records rules by transferring the recordkeeping requirements from Rule 17a–23 to Rules 17a–3 and 17a–4 as they apply to broker-dealer internal trading systems. Finally, the Commission is excluding from the rule filing requirements for self-regulatory organizations certain pilot trading systems operated by national securities exchanges and national securities associations. These rules will more effectively integrate the growing number of alternative trading systems into the national market system, accommodate the registration of proprietary alternative trading systems as exchanges, and provide an opportunity for registered exchanges to better compete with alternative trading systems.

DATES: *Effective Date:* April 21, 1999, except §§ 242.301(b)(5)(i)(D) and (E) and §§ 242.301(b)(6)(i) (D) and (E), which shall become effective on April 1, 2000.

Compliance Date: Prior to April 21, 1999, the Commission will publish a schedule of those securities with respect to which alternative trading systems must comply with § 242.301(b)(3) on April 21, 1999 and those securities with respect to which alternative trading systems must comply with § 242.301(b)(3) on August 30, 1999. See Section VIII of this release.

FOR FURTHER INFORMATION CONTACT: Elizabeth King, Senior Special Counsel, at (202) 942–0140, Marianne Duffy, Special Counsel, at (202) 942–4163, Constance Kiggins, Special Counsel, at (202) 942–0059, Kevin Ehrlich, Attorney, at (202) 942–0778, Denise Landers, Attorney, at (202) 942–0137 and John Roeser, Attorney, at (202) 942–0762, Division of Market Regulation, Securities and Exchange Commission, Stop 10–1, 450 Fifth Street, NW, Washington, DC 20549. For questions or comments regarding securities registration issues raised in this release, contact David Sirignano, Associate Director, at (202) 942–2870, Division of Corporation Finance, Securities and Exchange Commission, Stop 3–1, 450 Fifth Street, NW, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

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I. Introduction

Today the Securities and Exchange Commission ("Commission" or "SEC") is adopting a regulatory framework for alternative trading systems,[1] to strengthen the public markets for securities, while encouraging innovative new markets. During the past three years, the Commission has undertaken a reevaluation of its regulatory framework for markets because of substantial changes in the way securities are traded. Market participants have incorporated technology into their businesses to provide investors with an increasing array of services, and to furnish these services more efficiently, and often at lower prices. The current regulatory framework, however, designed more than six decades ago, did not envision many of these trading and business functions. In particular, market participants have developed a variety of alternative trading systems that furnish services traditionally provided solely by registered exchanges.

To better understand the questions raised by technological developments in the U.S. markets, in May 1997, the Commission published a concept release exploring ways to respond to the rapid technological developments affecting securities markets and, in particular, the growing significance of alternative trading systems ("Concept Release").[2] After taking into consideration the comments submitted in response to the Concept Release, in April 1998, the Commission proposed a new regulatory framework for alternative trading systems ("Proposing Release").[3]

Alternative trading systems now handle more than twenty percent of the orders in securities listed on The Nasdaq Stock Market ("Nasdaq"), and almost four percent of orders in exchange listed securities. These systems operate markets similar to the registered exchanges and Nasdaq. Over time, an alternative trading system may become the primary market for some securities. Yet these markets are private, available only to chosen subscribers, and are regulated as broker-dealers, not in the way registered exchanges and Nasdaq are regulated. This creates disparities that affect investor protection and the operation of the markets as a whole.

Our national market system, as it has evolved since 1975, has sought the benefits of both market centralization—deep, liquid markets—and competition. To achieve these benefits, the national market system has maintained equally regulated, individual markets, which are linked together to make their best prices publicly known and accessible. Alternative trading systems have remained largely outside the national market system. For example, the evidence in the Commission's report on the National Association of Securities Dealers, Inc. ("NASD") and Nasdaq suggested that widespread use of Instinet by market makers as a private market had a significant impact on public investors and the operation of the Nasdaq market.[4] Through Instinet, market makers were able to quote prices better than those made available to public investors. This private market developed only because the activity on alternative trading systems is not fully disclosed, or accessible, to public investors. Moreover, these trading systems have no obligation to provide investors a fair opportunity to participate in their systems or to treat their participants fairly. These systems may also not be adequately surveilled for market manipulation and fraud. In fact, market participants can manipulate the prices in the public securities markets through the use of alternative trading systems.[5] In addition, alternative trading systems have no obligation to ensure that their systems are sufficient to handle rapid increases in trading volume as occurs in times of market volatility, and at times they have failed to do so. Because of the increasingly important role of alternative trading systems, these differences are inconsistent with the national market system goals set forth

[1] The term "alternative trading system" is defined in Rule 300(a), 17 CFR 242.300(a). This term encompasses some systems that previous Commission releases called proprietary trading systems, broker-dealer trading systems, and electronic communication networks.

[2] Securities Exchange Act Release No. 38672 (May 23, 1997), 62 FR 30485 (June 4, 1997). The comment letters to the Concept Release and a summary of these comments have been placed in Public File S7–16–97, which is available for inspection in the Commission's Public Reference Room.

[3] Securities Exchange Act Release No. 39884 (Apr. 17, 1998), 63 FR 23504 (Apr. 29, 1998). The comment letters to the Proposing Release and a summary of those comments received as of August 25, 1998 have been placed in Public File S7–12–98, which is available for inspection in the Commission's Public Reference Room.

[4] *See* SEC, Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the Nasdaq Market (1996) ("NASD 21(a) Report").

[5] See In the Matter of Ian and Lawrence Fishman, Securities Exchange Act Release No. 40115 (June 24, 1998) (finding that the Fishman brothers manipulated the national best bid and offer in violation of Section 10(b) and Rule 10b–5 under the Exchange Act by coordinating the entry of orders routed to alternative trading systems).

by Congress in the 1975 amendments to the Securities Exchange Act of 1934 ("1975 Amendments")[6] and call into question the fairness of current regulatory requirements.

In 1996, Congress provided the Commission with greater flexibility to regulate new trading systems by giving the Commission broad authority to exempt any person from any of the provisions of the Securities Exchange Act of 1934 ("Exchange Act") and impose appropriate conditions on their operation.[7] This new exemptive authority, combined with the ability to facilitate a national market system, provides the Commission with the tools it needs to adopt a regulatory framework that addresses its concerns about alternative trading systems without jeopardizing the commercial viability of these markets. In the Proposing Release, the Commission proposed ways to use these tools to adopt new rules and rule amendments designed to resolve many of the concerns raised by alternative trading systems, better integrate these systems into our national market system structure, and make the benefits of these systems available to more investors.

In response to its Proposing Release,[8] the Commission received seventy comment letters.[9] Commenters generally supported the Commission's proposals and welcomed the regulatory flexibility these proposals offered.[10] Many commenters agreed with the Commission that the regulatory structure needs to be modernized to better integrate alternative trading systems into the national market system.[11] For example, several commenters expressed the view that, on balance, the proposed regulatory framework for alternative trading systems represented a preferable alternative to the current regulation of these systems as broker-dealers, which is not only inadequate for many alternative trading systems, but also results in disparate regulatory treatment of exchange markets and their alternative trading system competitors.[12] Other commenters believed that the Commission's proposal was a step in the right direction, both from a competitive business perspective and from an investor protection and fair regulation perspective. While some commenters thought that the Commission should continue the present framework for alternative trading systems,[13] most believed that the proposal provided a framework that could maintain a competitive balance among the markets offering services to investors.[14] Other commenters were pleased by the Commission's determination to allow market participants to engage in business decisions regarding how to register with the Commission.[15] Commenters also generally supported the Commission's proposal to allow for-profit exchanges,[16] and generally supported the proposed temporary exemption for pilot trading systems.[17]

The Commission believes that its regulation of markets should both accommodate traditional market structures and provide sufficient flexibility to ensure that new markets promote fairness, efficiency, and transparency. In adopting a new regulatory framework for alternative trading systems today, the Commission has incorporated suggestions and responded to requests for clarification made by commenters. The Commission believes that this regulatory approach effectively addresses commenters' concerns while carefully tailoring a regulatory framework that is flexible enough to accommodate the evolving technology of, and benefits provided by, alternative trading systems.

While the revised regulatory scheme implemented today is designed to address changes in the way securities are traded, the Commission's assessment of the *impact* that these systems may have on the trading of unregistered securities (*i.e.* of both domestic and foreign issuers), and of the appropriate regulatory posture to these developments, is still ongoing. This matter and the broader issues involving recent trends and initiatives that give U.S. investors greater and more instantaneous access to foreign securities markets create tensions between competing Commission goals. The Commission, for example, wishes to foster developments that enable U.S. investors to execute securities trades more efficiently, but it also desires that foreign securities traded in U.S. markets have full and fair disclosure. These tensions and issues will be addressed by the Commission in the future.

II. Executive Summary of Final Rules

The final rules seek to establish a regulatory framework that makes sense both for current and future securities

[6] Pub. L. 29, 89 Stat. 97 (1975). Congress granted to the Commission authority in 1975 to adopt rules that promote (1) economically efficient execution of securities transactions, (2) fair competition, (3) transparency, (4) investor access to the best markets, and (5) the opportunity for investors' orders to be executed without the participation of a dealer. *See* S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975); H.R. Rep. No. 229, 94th Cong., 1st Sess 92 (1975). *See also* section 11A(a)(1) of the Exchange Act, 15 U.S.C. 78k-1(a)(1).

[7] Section 36 of the Exchange Act, 15 U.S.C. 78mm, was enacted as part of the National Securities Markets Improvement Act of 1996, Pub. L. 104–290 ("NSMIA"). *See infra* Section VII.D.1.

[8] *See supra* note 3.

[9] This is the number of comment letters received by the Commission as of the close of business on December 1, 1998.

[10] Some commenters, however, suggested that the better approach would be for the Commission to retain its present regulatory framework for alternative trading systems. *See, e.g.*, Letter from Robin Roger, Principal and Counsel, Morgan Stanley Dean Witter to Jonathan G. Katz, Secretary, SEC, dated Sept. 11, 1998 ("MSDW Letter") at 3–4; Letter from Christopher J. Carroll and W. Hal Hinkle, Co-Chairs, ATS Task Force, The Bond Market Association to Jonathan G. Katz, Secretary, SEC, dated July 28, 1998 ("TBMA Letter") at 2, 8–12; Letter from Lee B. Spencer, Jr., Chairman, SIA Federal Regulation Committee and Perry L. Taylor, Jr., Chairman, SIA Alternative Trading System Subcommittee, Securities Industry Association to Jonathan G. Katz, Secretary, SEC, dated July 31, 1998 ("SIA Letter") at 2, 5. Another commenter suggested that the Commission solicit comment again on the broader issues discussed in the Concept Release. *See* Letter from Louis C. Magill, President, Corporate Capital Securities, Inc. to Jonathan G. Katz, Secretary, SEC, dated July 27, 1998 ("Corporate Capital Letter") at 4.

[11] *See, e.g.*, Letter from Joanne Moffic-Silver, Secretary and General Counsel, Chicago Board Options Exchange to Jonathan G. Katz, Secretary, SEC, dated July 28, 1998 ("CBOE Letter") at 3; Letter from John C. Katovich, Senior Vice President and General Counsel, OptiMark Technologies Inc. to Jonathan G. Katz, Secretary, SEC, dated Aug. 13, 1998 ("OptiMark Letter") at 1.

[12] *See, e.g.*, CBOE Letter at 3.

[13] *See, e.g.*, SIA Letter at 1, 5–6.

[14] *See, e.g.*, Letter from Joan C. Conley, Corporate Secretary, National Association of Securities Dealers, Inc. to Jonathan G. Katz, Secretary, SEC, dated Aug. 10, 1998 ("NASD Letter") at 1–2.

[15] *See, e.g.*, Letter from Douglas M. Atkin, Chief Executive Officer, Instinet International to Jonathan G. Katz, Secretary, SEC, dated Aug. 3, 1998 ("Instinet Letter") at 1, 7; Letter from Frederic W. Rittereiser, President and Chief Executive Officer and William W. Uchimoto, Executive Vice President and General Counsel, Ashton Technology Group, Inc. to Jonathan G. Katz, Secretary, SEC, dated July 28, 1998 ("Ashton Letter") at 1; Letter from Mary Sue Fisher, Managing Director, Legal and Compliance, Chicago Board Brokerage, LLC to Jonathan G. Katz, Secretary, SEC, dated July 29, 1998 ("CBB Letter") at 1–2.

[16] *See, e.g.*, TBMA Letter at 4; Letter from Larry E. Fondren, President, Integrated Bond Exchange, Inc. to Jonathan G. Katz, Secretary, SEC, dated July 27, 1998 ("IBEX Letter") at 13.

[17] *See, e.g.*, Letter from Craig S. Tyle, General Counsel, Investment Company Institute to Jonathan G. Katz, Secretary, SEC, dated July 28, 1998 ("7/28/98 ICI Letter") at 5; Letter from James E. Buck, Senior Vice President and Secretary, New York Stock Exchange, Inc. to Jonathan G. Katz, Secretary, SEC, dated July 28, 1998 ("NYSE Letter") at 9; Letter from Robert H. Forney, President and Chief Executive Officer, Chicago Stock Exchange to Jonathan G. Katz, Secretary, SEC, dated July 30, 1998 ("CHX Letter") at 11; Letter from T. Eric Kilcollin, President and Chief Executive Officer, Chicago Mercantile Exchange to Jonathan G. Katz, Secretary, SEC, dated Aug. 5, 1998 ("CME Letter") at 4; Letter from James F. Duffy, Executive Vice President and General Counsel, Legal and Regulatory Policy, American Stock Exchange, Inc. to Jonathan G. Katz, Secretary, SEC, dated Aug. 18, 1998 ("Amex Letter") at 1; Ashton Letter at 2; CBOE Letter at 3, 8–9. *See infra* Section VI for a discussion of the temporary exemption for pilot trading systems.

markets. This regulatory framework should encourage market innovation while ensuring basic investor protections. The Commission continues to believe that the approach outlined in the Proposing Release will accomplish these goals. In general, this approach gives securities markets a choice to register as exchanges, or to register as broker-dealers and comply with Regulation ATS.[18] The Commission believes the framework it is adopting meets the varying needs and structures of market participants and is flexible enough to accommodate the business objectives of, and the benefits provided by, alternative trading systems. The principal components of this new framework are discussed below.

A. New Interpretation of "Exchange"

A fundamental component of the new regulatory framework is new Rule 3b–16. This rule interprets key language in the statutory definition of "exchange" under section 3(a)(1) of the Exchange Act.[19] Rule 3b–16 reflects a more comprehensive and meaningful interpretation of what an exchange is in light of today's markets. Until now, the Commission's interpretation of the exchange definition reflected relatively rigid regulatory requirements and classifications for "exchange" and "broker-dealers." Advancing technology has increasingly blurred these distinctions, and alternative trading systems today are used by market participants as functional equivalents of exchanges. Accordingly, the Commission's new interpretation of exchange contained in Rule 3b–16[20] encompasses these equivalent markets and the Commission's new general exemptive authority enables it to craft a new regulatory framework.

The statutory definition of "exchange" includes 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."[21] In response to commenters' concerns and suggestions, the Commission has carefully revised Rule 3b–16 to define these terms to mean *any organization, association, or group of persons that: (1) Brings together the orders 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.*[22]

Rule 3b–16 explicitly excludes those systems that the Commission believes perform only traditional broker-dealer activities. The Commission modified these exclusions to address issues raised by commenters. Rule 3b–16 now expressly excludes the following systems from the revised interpretation of "exchange": (1) Systems that merely route orders to other facilities for execution; (2) systems operated by a single registered market maker to display its own bids and offers and the limit orders of its customers, and to execute trades against such orders; and (3) systems that allow persons to enter orders for execution against the bids and offers of a single dealer.[23]

B. Exemption for Regulated Alternative Trading Systems

The framework the Commission adopts today uses the Commission's new exemptive authority to allow most alternative trading systems to choose to be regulated either as exchanges or as broker-dealers. Rule 3a1–1 exempts most alternative trading systems from the definition of "exchange," and therefore the requirement to register as an exchange, if they comply with Regulation ATS. However, any system exercising self-regulatory powers, such as regulating its members' or subscribers' conduct when engaged in activities outside of that trading system, must register as an exchange or be operated by a national securities association. This is because self-regulatory activities in the securities markets must be subject to Commission oversight under Section 19 of the Exchange Act.[24] Thus any system exercising self-regulatory powers will not be permitted the option of registering as a broker-dealer.

In addition, the Commission can determine that a dominant alternative trading system should be registered as an exchange. An alternative trading system would first have to exceed certain volume levels and the Commission, after notice and an opportunity for the alternative trading system to respond, would have to determine that an exemption from exchange regulation is not necessary or appropriate in the public interest or consistent with the protection of investors, taking into account the requirements of exchange registration and the objectives of the national market system.[25] At this time, however, the Commission does not believe that it is necessary or appropriate under this provision that any alternative trading system register as an exchange.

C. Regulation ATS

The Commission is adopting new Regulation ATS, substantially in the form proposed, to impose essential elements of market-oriented regulation on alternative trading systems. This new regulation addresses the concerns raised by the market activities of alternative trading systems that choose to register as broker-dealers. To allow new markets to start, without disproportionate burdens, a system with less than five percent of the trading volume in all securities it trades is required only to: (1) File with the Commission a notice of operation and quarterly reports; (2) maintain records, including an audit trail of transactions; and (3) refrain from using the words "exchange," "stock market," or similar terms in its name.

If, however, an alternative trading system with five percent or more of the trading volume in any national market system security chooses to register as a broker-dealer—instead of as an exchange—the Commission believes it is in the public interest to integrate its activities into the national market system. In addition to the requirements for smaller alternative trading systems, Regulation ATS requires alternative trading systems that trade five percent or more of the volume in national market system securities to be linked with a registered market in order to disseminate the best priced orders in those national market system securities displayed in their systems (including institutional orders) into the public quote stream.[26] Such alternative trading systems must also comply with the same market rules governing execution priorities and obligations that apply to members of the registered exchange or national securities association to which the alternative trading system is linked.[27]

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[18] 17 CFR 242.300–303.

[19] 15 U.S.C. 78c(a)(1).

[20] 17 CFR 240.3b–16.

[21] 15 U.S.C. 78c(a)(1).

[22] Rule 3b–16(a), 17 CFR 240.3b–16(a).

[23] Rule 3b–16(b), 17 CFR 240.3b–16(b).

[24] 15 U.S.C. 78s.

[25] Rule 3a1–1(b)(1), 17 CFR 240.3a1–1(b)(1).

[26] Rule 301(b)(3), 17 CFR 240.301(b)(3). Alternative trading systems will only have to comply with this rule for fifty percent of securities on April 21, 1999. By August 30, 1999, alternative trading systems will have to comply with this rule for all securities. Prior to April 21, 1999, the Commission will publish a schedule of those individual securities for which alternative trading systems must comply with Rule 301(b)(3) on April 21, 1999. *See infra* notes 192–193–and 216–217–and accompanying text.

[27] This linkage requirement would not apply to alternative trading systems that do not display participant orders to anyone, including other system participants. In addition, this requirement would not apply to alternative trading systems to

Continued

In addition, alternative trading systems with twenty percent or more of the trading volume in any single security, whether equity or debt, would be required to: (1) Grant or deny access based on objective standards established by the trading system and applied in a non-discriminatory manner; and (2) establish procedures to ensure adequate systems capacity, integrity, and contingency planning. The Commission believes that these requirements will better integrate those significant alternative trading systems into national market system mechanisms. Moreover, because alternative trading systems that choose to register as broker-dealers are not required to surveil activities on their markets, the Commission intends to work with the self-regulatory organizations ("SROs") to ensure that they can operate ongoing, real-time surveillance for market manipulation and fraud and develop surveillance and examination procedures specifically targeted to alternative trading systems they oversee.

D. For-Profit Exchanges

In this release, the Commission also expresses its view that registered exchanges may structure themselves as for-profit organizations. This will allow alternative trading systems, which are typically proprietary, to choose to register as exchanges without changing their organizational structure. In addition, currently registered exchanges—which are all membership organizations—could choose to demutualize. This release provides guidance on ways for proprietary markets to meet their fair representation requirements as non-membership national securities exchanges.[28]

E. Temporary Exemption From Rule Filing Requirements for SROs' Pilot Trading Systems

To help reduce competitive impediments to innovation by SROs, the Commission is allowing them to start new trading systems without preapproval by the Commission. The Commission is adopting Rule 19b-5 to permit SROs, without filing for approval with the Commission, to operate new pilot trading systems for up to two years. These pilot trading systems will be subject to specific conditions, including limitations on their trading volumes.[29]

the extent that they trade securities other than national market system securities. *See infra* Section IV.A.2.c.(ii).

[28] *See infra* Section IV.B.2.

[29] *See infra* Section VI. The purpose of this new rule is 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.

III. Rule 3b–16 Under the Exchange Act

The Commission today is adopting new Rule 3b–16 under the Exchange Act. This rule defines terms used in the statutory definition of "exchange," found in section 3(a)(1) of the Exchange Act.[30] The statutory definition of "exchange" includes 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." The new rule interprets these terms to include *any organization, association, or group of persons that: (1) Brings together the orders 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.*[31] This rule revises the current interpretation of the term "exchange," as set forth in the *Delta Release.*[32]

New Rule 3b–16 is an important element of the Commission's new regulatory framework for alternative trading systems. As discussed above, the rapid growth and technological advancements of alternative trading systems have eroded the distinctions between the roles played by alternative trading systems and by traditional exchanges. Alternative trading systems today provide services more akin to exchange functions than broker-dealer functions, such as matching counterparties' orders, executing trades, operating limit order books, and facilitating active price discovery. For many of these systems, regulation as a market more appropriately fits their economic functions. Rule 3b–16 defines terms in the statutory definition of exchange to include markets that engage in activities functionally equivalent to markets currently registered as national securities exchanges. Moreover, because in some cases exchange regulation may better meet these systems' business objectives, the Commission believes that alternative trading systems should have the option to register as national securities exchanges.[33] The rule helps modernize the Commission's approach to these systems because it adapts the concept of what is "generally understood" to be an exchange to reflect changes in the markets brought about by automated trading. In addition, in light of recent technological developments, Rule 3b–16 more closely reflects the statutory concept of "bringing together" buying and selling interests.

The Proposing Release sought comment on whether the proposed definition captures the fundamental features of an exchange as that term is generally understood today. The Commission received several comments supportive of its proposed revision to the interpretation of "exchange." For example, the NASD commented that this new definition "is not inappropriate, particularly with the express exclusion for internal broker-dealer systems."[34] Other commenters also supported broadening the Commission's interpretation of what constitutes an exchange and agreed that the proposed rule accurately identified the fundamental features of a securities "exchange."[35] On the other hand, some commenters questioned the basis and need for the Commission to move away from its interpretation in *Delta.* The

[30] 15 U.S.C. 78c(a)(1).

[31] Rule 3b–16(a), 17 CFR 240.3b–16(a). In the Proposing Release, the Commission proposed to define the terms in the definition of "exchange" to be "any organization, association, or group of persons that: (1) Consolidates orders of multiple parties; and (2) sets non-discretionary material conditions (whether by providing a trading facility or by setting rules) under which parties entering such orders agree to the terms of a trade." *See* Proposing Release, *supra* note 3.

[32] See Securities Exchange Act Release No. 27611 (Jan. 12, 1990), 55 FR 1980, 1900 (Jan. 19, 1990) *("Delta Release"). See infra* Section VII for a further discussion of the *Delta Release* and the basis and purpose of the revised interpretation.

[33] *See infra* Section IV.B. (discussing registration as a national securities exchange). Under Section 5 of the Exchange Act, an exemption may be granted to an exchange from registration as a national securities exchange on the basis of low volume, or expected low volume. Currently, there is only one exchange, the Arizona Stock Exchange ("AZX"), that is operating under a limited volume exemption. *See* Securities Exchange Act Release No. 28899 (Feb. 20, 1991), 56 FR 8377 (Feb. 28, 1991). In addition, the Commission solicited comment on whether Tradepoint Financial Networks, plc should be granted a limited volume exemption. *See* Securities Exchange Act Release No. 40161 (July 2, 1998), 45 FR 41920 (July 9, 1998).

The Commission believes that the low volume exemption continues to be appropriate for some exchanges, such as an exchange that, for example, disciplines its members (other than by excluding them or limiting them from trading based on objective criteria, such as creditworthiness), or has other self-regulatory attributes that exclude it from the definition of alternative trading system, Rule 300(a), and therefore preclude it from making the choice to register as a broker-dealer. Any exchange seeking a low volume exemption would, of course, have to have low volume. The Commission believes that the low volume exemption would be inappropriate for any alternative trading system that can register as a broker-dealer and comply with Regulation ATS, and that the conditions under Regulation ATS should generally be met by any alternative trading system falling within Rule 3b–16, including an alternative trading system that, for other reasons, seeks a low volume exemption.

[34] NASD Letter at 3, n.4.

[35] *See* CME Letter at 2; IBEX Letter at 4.

Commission responds to these comments below in Section VII.

Finally, one commenter expressed concern that the proposed revision to the Commission's interpretation of "exchange" would encompass every market participant providing electronic or other technologically advanced trading service.[36] The Commission does not intend for the distinction between exchanges and broker-dealers to turn on automation, and does not believe that its revised interpretation of "exchange" has this effect. In particular, the Commission notes that paragraph (a) of new Rule 3b–16 does not contain the word automation, but is instead descriptive of those activities the Commission considers to be the activities of a "market" where buyers and sellers meet and includes purely floor-based exchanges, as well as fully automated ones. Moreover, paragraph (b) clearly excludes certain systems that—even though automated—are not exchanges, such as automated single dealer systems.

The language of Rule 3b–16 the Commission is adopting today modifies the language the Commission proposed in response to commenters' suggestions and concerns, and their requests for clarification. The discussion below is intended to further explain how the Commission envisions that its new interpretation of "exchange" will be applied and responds to specific requests for clarification by commenters.

A. Brings Together the Orders of Multiple Buyers and Sellers

In order to be covered by the definition in Rule 3b–16, a system must satisfy the first part of Rule 3b–16(a)—*brings together the orders of multiple buyers and sellers.* This emphasizes the concept of "bringing together purchasers and sellers of securities" set forth in the definition of "exchange" in section 3(a)(1) of the Exchange Act. While the intent is the same, the language in Rule 3b–16(a)(1) has been modified from the proposal to address the concerns of some of the commenters who requested that the definition be clarified.

1. To Bring Together

The Commission is adopting the language "brings together" in Rule 3b–16, rather than "consolidates" as originally proposed. While the Commission believes that "consolidates" and "brings together" have the same meaning, the latter more closely mirrors the language in the statute and is a plainer use of language.

A system brings together orders if it displays, or otherwise represents, trading interests entered on the system to system users. These systems include consolidated quote screens, such as the system operated by Nasdaq. A system also brings together orders if it receives subscribers' orders centrally for future processing and execution. For example, a limit order matching book that allows subscribers to display buy and sell orders in particular securities and to obtain execution against matching orders contemporaneously entered or stored in the system "brings together orders." These activities are currently performed by systems that bring together orders internally for crossing[37] or matching,[38] as well as floor-based markets that impose trading rules. In addition, interdealer brokers ("IDBs")[39] bring together orders, regardless of their level of automation.[40] Accordingly, a system "brings together orders" when orders entered in the system for a given security have the opportunity to interact with other orders entered into the system for the same security.

2. Multiple Buyers and Sellers

In addition, to satisfy paragraph (a)(1) of Rule 3b–16, a system must bring together orders of multiple buyers and multiple sellers. The Commission proposed to use the term "multiple parties" in paragraph (a)(1) of Rule 3b–16, rather than the term "multiple buyers and sellers." The Commission believes that this modification to the language proposed in Rule 3b–16 addresses the concerns of those commenters who requested that the Commission clarify that systems in which there is only a single seller, such as systems that permit issuers to sell their own securities to investors, would not be included within Rule 3b–16. While such systems have multiple buyers (*i.e.*, investors), they have only one seller for each security (*i.e.*, issuers) and, therefore, do not meet the multiple buyers and sellers test. An example of this type of system is CP Direct in which an issuer can offer to sell its commercial paper to the customers of CS First Boston.[41] Another example of systems that do not meet the multiple buyers and sellers criteria are systems in which securities are offered by a single seller at successively lower prices. In addition, systems designed for the purpose of executing orders against a single counterparty, such as the dealer operating a system, would not be considered to have multiple buyers and sellers. Thus a single counterparty that buys *and* sells securities through a system, where other parties entering orders only execute against the single designated counterparty, would not meet the requirements of the first part of Rule 3b–16.[42] However, the mere interpositioning of a designated counterparty as riskless principal for settlement purposes after the purchasing and selling counterparties to a trade have been matched would not, by itself, mean that the system does not have multiple buyers and sellers.

3. Definition of "Order"

Finally, the rule makes clear that, to be included within the definition in Rule 3b–16(a), a system must bring together participants' "orders." The term "order" is defined in paragraph (c) of Rule 3b–16 to include any firm indication of a willingness to buy or sell a security, whether made on a principal

[36] Instinet Letter at 7.

[37] A crossing system is, typically, one that allows participants to enter unpriced orders to buy and sell securities. Orders are crossed at specified times at a price derived from another market.

[38] Matching systems allow participants to enter priced limit orders and match those orders with other orders in the system. Participants are able to view unmatched limit orders in the system's book. The sponsor of a matching system typically acts as riskless principal or a dealer firm on behalf of the system acts as riskless principal, with respect to matched orders, or contracts with another broker-dealer to perform this function.

[39] Currently, debt markets are not centrally organized by a single entity, but are nonetheless informally organized around interdealer brokers. Interdealer brokers (also called blind brokers and brokers' brokers) display, on an anonymous basis, the offers to buy and sell securities that are placed with them by subscribers. In order to place a bid or offer, a subscriber typically telephones the interdealer broker, which enters the order into its system and displays it to other subscribers. Some interdealer brokers display all bids and offers; others display only the best bid and offer. To execute against an offer displayed on the computer screen, a subscriber telephones the interdealer broker, although sometimes execution may be electronic. The identities of the counterparties are, generally, kept confidential through clearance and settlement of the trade. Some interdealer brokers, however, reveal the names of each counterparty after execution. Traditionally interdealer brokers facilitated trading only between dealers. Increasingly, however, interdealer brokers are permitting non-dealers to participate in their systems.

[40] *But see infra* notes 123–130 and accompanying text (discussing the exclusion from Regulation ATS for alternative trading systems that trade exclusively government, and other related, securities).

[41] *See* Bruce Rule, *PSA Panels Embrace Internet for Institutional Trading; and Regulators Love the Audit Trail,* Investment Dealers' Digest, Nov. 18, 1996 (discussing CP Direct). The converse situation—*i.e.*, where there is one buyer and multiple sellers for a given instrument—would also not meet the "multiple buyers and sellers" requirement. The Commission, however, is not aware of any system that currently operates this way.

[42] This type of system would also be expressly excluded from Rule 3b–16 under paragraph (b)(2). *See infra* Section III.C.2.

or agency basis.[43] Firm indications of buying or selling interest specifically include bid or offer quotations, market orders, limit orders, and any other priced order.

Several commenters requested that the Commission clarify the proposed definition of "order." One commenter expressed concern that the proposed definition of "order" was too broad and recommended that the revised interpretation of "exchange" be clarified to exclude trading systems that broadcast non-executable indicative quotations, and noted that IDBs frequently communicate an indicative price to a customer, which is merely a starting point for a negotiation of the final transaction price.[44] The Commission notes that the term "order" is defined as "any *firm* indication of a willingness to buy or sell a security, * * * including any bid or offer quotation, market order, limit order, or other priced order."[45] Whether or not an indication of interest is "firm" will depend on what actually takes place between the buyer and seller.

The label put on an order—"firm" or "not firm"—is not dispositive. For example, a system claiming it displays only "indications of interest" that are not orders, may be covered by the new interpretation of "exchange" if those indications are, in fact, firm in practice. In general, the Commission intends to read the definition of "order" broadly and will not consider systems to fall outside the definition in Rule 3b–16 based solely on a system's labeling of indications of interest as "not firm." Instead, what actually takes place between the buyers and sellers interacting in a particular system will determine whether indications of interest are "firm" or not. At a minimum, an indication of interest will be considered firm if it can be executed without the further agreement of the person entering the indication. Even if the person must give its subsequent assent to an execution, however, the indication will still be considered firm if this subsequent agreement is always, or almost always, granted so that the agreement is largely a formality. For instance, indications of interest where there is a clear or prevailing presumption that a trade will take place at the indicated price, based on understandings or past dealings, will be viewed as orders.

Generally, however, a system that displays *bona fide,* non-firm indications of interest—including, but not limited to, indications of interest to buy or sell a particular security without either prices or quantities associated with those indications—will not be displaying "orders" and, therefore, not fall within Rule 3b–16.

Nevertheless, the price or size of an indication of interest may be either explicit or may be inferred from the facts and circumstances accompanying the indication. For example, an indication of interest will be considered to include a price if the system in which the indication of interest is entered defaults automatically to a price pegged to another market, index, rate, or other variable, or if the person entering such indication indicates that such person is interested in trading at a price pegged to another market, index, rate, or other variable, which includes "market" orders.

The same commenter expressed concern that the proposed definition of order could have the effect of including markets within the definition of "exchange" that quote prices over the telephone for a potential transaction.[46] As discussed above, whether or not a particular system is an exchange does not turn solely on the level of automation used: "orders" can be given over the telephone, as well as electronically.

The Commission emphasizes that merely because a system "brings together orders of multiple buyers and sellers," does not mean that the system is an exchange. In order to fall within Rule 3b–16, a system must also satisfy the requirements in paragraph (a)(2). Thus, whether or not an "order" is part of a system that falls within the new interpretation of "exchange" depends upon the activities of that system taken as a whole. For example, a system could display subscribers' "orders" to other market participants, but would not be encompassed by Rule 3b–16 if subscribers contacted each other and agreed to the terms of their trades outside of the system.[47] Unless a system also establishes rules or operates a trading facility under which subscribers can agree to the terms of their trades, the system will not be included within Rule 3b–16, even if it brings together "orders."

Finally, the NYSE commented that the Commission's definition of "order" appeared to cover trading interest that, in the Order approving the Pacific Exchange ("PCX") Application of the OptiMark System ("OptiMark Order"), the Commission did not consider to be an order. In the OptiMark Order, the Commission took the position that the profiles entered into OptiMark are not bids or offers under Rule 11Ac1–1 ("Firm Quote Rule").[48] The Commission's definition of "order" in paragraph (c) of Rule 3b–16 is intended to be broader than the terms bid and offer in the Firm Quote Rule.[49] Therefore, it is possible for an indication of interest to be an "order" under Rule 3b–16, without being a bid or offer under the Firm Quote Rule.

B. Established, Non-Discretionary Methods

In addition to bringing together the orders of multiple parties, to be included within Rule 3b–16, a system would have to use *established, non-discretionary methods * * * under which such orders interact with each other and the buyers and sellers entering orders agree to the terms of the trade.* A system uses established non-discretionary methods either by providing a trading facility or by setting rules governing trading among subscribers. The Commission intends for "established, non-discretionary methods" to include any methods that dictate the terms of trading among the multiple buyers and sellers entering orders into the system. Such methods include those that set procedures or priorities under which open terms of a trade may be determined. For example, traditional exchanges' rules of priority, parity, and precedence are "established, non-discretionary methods," as are the trading algorithms of electronic systems. Similarly, systems that determine the trading price at some designated future date on the basis of pre-established

[43] Rule 3b–16(c), 17 CFR 240.3b–16(c).

[44] TBMA Letter at 15–16 (stating that the bids and offers associated with telephone-based IDBs are generally "subject," *i.e.*, the broker must check back with the dealer client before finalizing the transaction).

[45]: Rule 3b–16(c), 17 CFR 240.3b–16(c).

[46] TBMA Letter at 15.

[47] These bulletin board types of systems were described in no-action letters from the staff. See Letter dated June 24, 1996 from Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC, Jack W. Murphy, Chief Counsel, Division of Investment Management, SEC, and Martin P. Dunn, Chief Counsel, Division of Corporate Finance, SEC to Barry Reder, Coblentz, Cahen, McCabe and Breyer, LLP (counsel to Real Goods Trading Corporation); Letter dated Aug. 5, 1996 from Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC to: Bruce D. Stuart, Esq. (counsel to PerfectData Corporation); and Letter dated April 17, 1996 from Abigail Arms, Associate Director, Division of Corporate Finance, SEC, and Catherine McGuire, Associate Director, Division of Market Regulation, SEC to Andrew Klein (President and Chief Executive Officer of Spring Street Brewing Company).

[48] *See* Securities Exchange Act Release No. 39086 (Sept. 17, 1997), 62 FR 50036 (Sept. 24, 1997). In approving OptiMark, the Commission stated that OptiMark's unique design warrants a non-traditional approach in determining whether to require the dissemination of trading interest expressed through operation of OptiMark.

[49] *See* Rule 11Ac1–1(c), 17 CFR 240.11Ac1–1(c).

criteria (such as the weighted average trading price for the security on the specified date in a specified market or markets) are using established, non-discretionary methods. A requirement that the trade subsequently be ratified does not avoid this element. For example, a system that trades limited partnership units might use established, non-discretionary methods even though approval from the general partner is required prior to settlement. Rules that merely supply the means of communication with a system (for example, software or hardware tools that subscribers may use in accessing a system), however, do not satisfy this element of Rule 3b–16.

In general, where customers of a broker-dealer exercise control over their own orders in a trading system operated by the broker-dealer, that broker-dealer is unlikely to be viewed as using discretionary methods in handling the order. An example of systems that the Commission believes do not use established, non-discretionary methods are traditional block trading desks. Block trading desks generally retain some discretion in determining how to execute a customer's order, and frequently commit capital to satisfy their customers' needs. For example, a block positioner may "shop" the order around in an attempt to find a contra-side interest with another investor. In some cases, the block positioner may take the other side of the order, keeping the block as a proprietary position. While block trading desks do cross customers' orders, these crosses are not done according to fixed non-discretionary methods, but instead are based on the block trading desks' ability to find a contra-side to the order. It may cross two customer orders, or it may assemble a block of several customer orders with completion dependent on its willingness to take a proprietary position for part of the block. Execution prices, size of the proprietary position and agency compensation may all be part of a single negotiated deal. Consequently, the Commission would not consider traditional block trading desks to be using established, non-discretionary methods and, therefore, they would not fall within Rule 3b–16.

In addition, systems that merely provide information to subscribers about other subscribers' trading interest, without facilities for execution, do not fall within paragraph (a) of Rule 3b–16. One commenter asked the Commission to clarify that such systems would not be viewed as exchanges.[50] While such vendors may allow buyers and sellers to find each other, they do not provide a facility or set rules under which those orders interact with each other. Accordingly, the Commission agrees with this commenter that such systems are not exchanges.

In contrast, when a customer gives a broker-dealer flexibility in how to handle an order, it relinquishes a degree of control over that order. The Commission recognizes that broker-dealers exercising discretion or judgment over customer orders may use internal systems to trade and manage these orders. The mere use of these systems does not make a broker an exchange, unless those systems themselves predetermine the handling and execution practices for the order, replacing the broker-dealer's judgment and flexibility in working the order.

One commenter suggested that the lack of display of customer orders outside the broker-dealer should be determinative of whether the system was an exchange.[51] The Commission notes that it is possible for a system to use established, non-discretionary methods even if orders are not displayed. For example, the OptiMark System—by design—does not display participants' indications of interest. There is, however, no discretion exercised by the operator of the OptiMark System; the trade optimization calculations are established, non-discretionary methods.

Finally, the Commission proposed to explicitly exclude from the revised interpretation of "exchange" trading systems that allow a single broker-dealer to internally manage its customers' orders.[52] The Commission was concerned that such systems might technically be covered by paragraph (a) of Rule 3b–16 if they occasionally crossed or matched customer orders. Because the Commission believes that these systems have generally automated traditional brokerage functions, it proposed to clearly exclude them from the revised interpretation of "exchange." Several commenters noted their agreement with the Commission's proposed exclusion of these internal broker-dealer systems from its reinterpretation of "exchange,"[53] but requested that the Commission clarify it. In particular, the Securities Industry Association ("SIA") and The Bond Market Association ("TBMA") requested that the Commission clarify the intended meaning of the terms "predetermined procedures" and "communicated to customers" as used in the proposed exclusion.[54]

The Commission intended to exclude a number of different types of systems under this proposed exclusion. First, this exclusion was intended to cover internal systems operated by market makers to automate the management of their customer orders, including the display of customer limit orders, and to match those displayed orders with other customer orders. The Commission is now adopting a more specific exclusion to cover these types of systems.

In addition, in large part, the Commission intended to exclude systems that automate the management of customer orders that require a broker-dealer to use its discretion. These types of systems would not be included within paragraph (a) of Rule 3b–16 because—like traditional block trading desks—they do not use established, non-discretionary methods. The purpose of the proposed exclusion for internal broker-dealer systems was to exclude traditional internal systems created to increase efficiency rather than to provide a non-discretionary trading system for customers. In light of the comments on the proposed exclusion for internal broker-dealer systems and the difficulty of distinguishing among internal systems on this basis, the Commission now believes it is better not to attempt to set specific requirements that internal broker-dealer systems must meet in order to be excluded from Rule 3b–16. Instead, the Commission is clarifying that trading systems that do not use established, non-discretionary methods fail to meet the two-part test in paragraph (a) and are, therefore, not included within the revised interpretation of "exchange."

1. Established, Non-Discretionary Methods Provided by a Trading Facility

As stated previously, a trading system that uses established, non-discretionary methods would include a traditional exchange floor where specialists are responsible for executing orders. It would also include a computer system (whether comprised of software, hardware, protocols, or any combination thereof) through which orders interact, or any other trading mechanism that provides a means or location for the bringing together and execution of orders. For example, the Commission considers the use of an algorithm by an electronic trading system that sets trading procedures and priorities to be a trading facility that uses established, non-discretionary methods.

[50] MSDW Letter at 11.

[51] MSDW Letter, pp. 7–8.

[52] Proposed Rule 3b–12(b)(2).

[53] *See* NASD Letter at 3, n.4; TBMA Letter at 3, 14; SIA Letter at 3, 10; MSDW Letter at 5–6.

[54] *See* TBMA Letter at 3, 14–15; SIA Letter at 3, 10–11.

The Commission will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly (such as where a system arranges for a third party or parties to offer the trading facility). Thus, if a system that brings together the orders of multiple parties arranges for a third party vendor to distribute software that establishes non-discretionary methods under which orders interact, that system will fall within Rule 3b–16. Similarly, if a bulletin board operator contracted with another party to provide execution facilities for the bulletin board users, the bulletin board will be deemed to have established a trading facility because it took affirmative steps to arrange for the necessary exchange functions for its users.[55] In addition, if an organization arranges for separate entities to provide different pieces of a trading system, which together meet the definition contained in paragraph (a) of Rule 3b–16, the organization responsible for arranging the collective efforts will be deemed to have established a trading facility. For example, the arrangement between the Delta Government Options Corporation ("Delta"), RMJ Options Trading Corporation, and Security Pacific National Trust Company, as described in a 1990 Commission release,[56] would together meet the definition set forth in Rule 3b–16. Moreover, a trading system that falls within the Commission's interpretation of "exchange" in Rule 3b–16 will still be considered an "exchange," even if it matches two trades and routes them to another system or exchange for execution. Whether or not the actual execution of the order takes place on the system is not a determining factor of whether the system falls under Rule 3b–16.

2. Established, Non-Discretionary Methods Provided by Setting Rules

Alternatively, a system may use established, non-discretionary methods through the imposition of rules under which parties entering orders on the system agree to the terms of a trade. For example, if a system imposes affirmative quote obligations on its subscribers, such as obligations to post two-sided quotations or to post quotations no worse than the quotes subscribers post on other systems, the Commission will consider it to be using established, non-discretionary methods.

In addition, rules imposing execution priorities, such as time and price priority rules, would be "established, non-discretionary methods." Similarly, a system that standardizes the material terms of instruments traded on the system, such as the system operated by Delta at the time the Commission published the *Delta Release*,[57] will be considered to use established, non-discretionary methods.

Similarly, Nasdaq's use of established, non-discretionary methods bring it within the revised interpretation of "exchange" in Rule 3b–16. The NASD imposes basic rules by which securities are traded on Nasdaq. Specifically, it imposes affirmative obligations on market makers in Nasdaq National Market ("Nasdaq NM") and SmallCap securities, including obligations to post firm and two-sided quotes. It also operates the Small Order Execution System ("SOES") and SelectNet systems, requiring market makers to accept executions or orders for execution in these securities. Through Nasdaq, market participants act in concert to centralize and disseminate trading interest and establish the basic rules by which securities are traded. The Commission believes that Nasdaq performs what today is generally understood to be the functions commonly performed by a stock exchange. Nasdaq, however, is currently registered as a securities information processor under section 11A of the Exchange Act[58] and is operated by the NASD, a registered securities association under Section 15A of the Exchange Act.[59] Because the requirements currently applicable to a registered securities association are virtually identical to the requirements applicable to registered exchanges, the Commission does not believe it is necessary or appropriate in the public interest to require Nasdaq to register as an exchange.[60] Under the rules the Commission is adopting today, however, Nasdaq could choose to register under section 6 of the Exchange Act as a national securities exchange.[61]

C. Systems Excluded From Rule 3b–16

The Proposing Release specifically excluded from the proposed, revised interpretation of "exchange" several types of activities that could be considered traditional brokerage activities: order routing systems, dealer quotation systems, and internal broker-dealer order management and execution systems. Commenters widely agreed that automated broker-dealer functions should not be encompassed in the meaning of "exchange."[62] The Commission agrees. Commenters did, however, ask for clarification about the application of the exclusions in paragraph (b). In particular, some commenters appeared to misunderstand Rule 3b–16 as requiring that a system fall within one of the exclusions in paragraph (b) in order to be outside of the revised interpretation of "exchange." This was not the Commission's intent. A system is not included within the revised interpretation of "exchange" if: (1) It fails to meet the two-part test in paragraph (a) of Rule 3b–16; *or* (2) it falls within one of the exclusions in paragraph (b).

The Commission has included paragraph (b) of Rule 3b–16 to explicitly exclude some systems that the Commission believes are not exchanges. Paragraph (b) of Rule 3b–16 expressly excludes: (1) Systems that merely route orders to other execution facilities; and (2) systems that allow persons to enter orders for execution against the bids and offers of a single dealer, and systems that automate the activities of registered market markers.

Two commenters asked the Commission to exclude from the revised interpretation of "exchange" all correspondent clearing relationships, as well as agreements among broker-dealers to handle their respective order flow.[63] The Commission has excluded routing systems under Rule 3b–16(b)(1). Whether or not correspondent clearing

[55] Whether or not a bulletin board will be considered an exchange under the rule will also depend on whether it meets the other elements of the definition.

[56] *See Delta Release, supra* note 32. The Commission notes that the arrangement between these entities no longer exists, and that Delta, in its current form, would not fit the new interpretation of the definition of exchange.

[57] *See id.*, at 1897.

[58] 15 U.S.C. 78k–1.

[59] 15 U.S.C. 78*o*–3. The NASD, parent of Nasdaq, is the self-regulatory organization. The NASD delegates to NASD Regulation, Inc. ("NASDR"), the wholly owned regulatory subsidiary of the NASD, its SRO responsibilities to surveil trading conducted on Nasdaq and the OTC Bulletin Boards, and to enforce compliance by its members (and persons associated with its members) with applicable laws and rules. Nasdaq also surveils trading conducted on its market and refers potential violations to NASDR. *See also infra* note 342.

[60] *See infra* notes 93–94 and accompanying text (discussing Rule 3a1–1(a)(1), which explicitly exempts any system operated by a national securities association from the definition of the term "exchange").

[61] 15 U.S.C. 78f. If Nasdaq registered as an exchange, it would have its own SRO responsibilities, but the Commission does not expect this to increase Nasdaq's current burden. In view of the NASD's SRO status the Commission could use its authority under Sections 17 and 19 of the Exchange Act, 15 U.S.C. 78q and 78s, to delegate any obligations Nasdaq would have as a registered exchange to enforce compliance by its members (and persons associated with its members) with the federal securities laws to NASDR.

[62] *See* SIA Letter at 3, 10–11; DBSI Letter at 3; NASD Letter at 4; TBMA Letter at 3, 14.

[63] *See* TBMA Letter at 14, n.26; SIA Letter at 10–11, n.18.

relationships are excluded, however, depends on the nature of the systems used in that relationship. The Commission does not believe that systems operated by clearing firms should be excluded simply because their correspondents participate in them. The Commission believes that such an exclusion would be overly broad.

One commenter questioned whether IDBs are the functional equivalent of internal broker-dealer systems and, therefore, should be excluded from Rule 3b–16.[64] The Commission believes that most screen-based IDBs function by displaying, on an anonymous basis, the offers to buy and sell securities that are placed with them by subscribers. While typically a subscriber uses a telephone to place the orders and ordinarily use the telephone to request execution, multiple buyers and sellers are involved, and generally customers view some or all orders on screens. Thus, IDBs bring together the orders of multiple buyers and sellers. Where an IDB has set procedures under which it executes subscriber orders against displayed or retained orders in a predetermined fashion, the methods by which these orders are brought together likely would be established and non-discretionary. The Commission believes that IDBs that function in this fashion are covered by Rule 3b–16. If an IDB does not display orders or communicate them verbally to customers, and does not execute orders according to pre-determined, well-understood rules, it may not be covered by the rules the Commission is adopting today. As a general matter, however, the Commission believes that most IDBs would be covered by the definition in Rule 3b–16(a) and not excluded by any of its exclusions.

In addition, one commenter recommended that any entity that has the discretion to commit capital to a trade be excluded from Rule 3b–16, because broker-dealers commit capital, but exchanges do not.[65] The Commission generally views the willingness to predictably commit capital as a traditional broker-dealer activity. For this reason it is explicitly excluding registered market maker and single dealer systems, which commit capital in all—or almost all—trades. In addition, broker-dealers frequently commit capital as part of their block trading desk activities. As discussed above, the Commission does not believe that traditional block trading desks are covered under paragraph (a) of Rule 3b–16. However, the Commission does not believe that a system engaging in activities as a market should be excluded from the scope of Rule 3b–16 simply because the broker-dealer operating the system may participate as a dealer in that system.

Finally, one commenter asserted that "passive systems," such as POSIT,[66] should be excluded from the Commission's revised interpretation of "exchange," because they do not have a traditional price discovery mechanism.[67] The Commission, however, does not agree that systems like POSIT are simply an automation of traditional brokerage functions, but believes they are markets. Like other markets, "passive" or derivative pricing systems bring together the orders of multiple buyers and sellers. All subscribers enter orders,[68] which interact at pre-specified times. In addition, "passive systems" establish non-discretionary methods under which subscribers agree to the terms of the trade. Such systems cross orders at pre-established times during the day according to specified priorities, such as time priority. While these orders are traded at a price that is not known at the time a subscriber enters an order, the parameters under which such price will be determined are established and not subject to discretion by the operator of the "passive system." While these systems do not themselves have traditional price discovery mechanisms, they have the potential to—and frequently do—affect the markets from which their prices are derived.[69] The Commission, however, agrees with this commenter that these systems do not raise the same concerns as alternative trading systems with price discovery mechanisms and, therefore, even if such systems have significant trading volume, if they choose to register as broker-dealers they are not required to meet the fair access and systems capacity requirements.[70] The Commission, however, will monitor the activities of these passive systems and if concerns arise with regard to their activities will reconsider whether these requirements should apply.

1. Order Routing Systems

The Commission proposed to exclude from proposed Rule 3b–16 those trading systems that merely route orders to an exchange or broker-dealer for execution. The only commenter to address this provision was the SIA, which expressed its support for this exclusion.[71] The Commission is adopting the exclusion as proposed in Rule 3b–16(b)(1). Examples of such systems include the New York Stock Exchange's ("NYSE's") and the American Stock Exchange's ("Amex's") Common Message Switch[72] and BRASS.[73] Nasdaq, however, is not *merely* a routing system. In addition to SelectNet's routing capabilities, Nasdaq is a quotation facility, permits executions through its SOES system, and establishes rules for its members regarding the firmness of their bids and offers and how members deal with each other.

The Commission does not believe that these routing systems meet the two-part test in paragraph (a) of Rule 3b–16 because they do not bring together orders of multiple buyers and sellers.

[64] TBMA Letter at 14, n.25 (suggesting that the Commission expressly recognize the possibility that some IDBs may be able to rely on the exclusion for internal broker-dealer systems).

[65] SIA Letter at 3–4, 6–7, 9.

[66] POSIT is an alternative trading system operated by ITG Inc. Broker-dealers and institutions enter unpriced orders to buy and sell exchange listed and Nasdaq securities into POSIT at any time prior to a pre-selected crossing time. At the crossing time, buy orders in the system for each security are crossed, where possible, with sell orders and crossed orders are executed at a price derived from the primary market where the security trades.

[67] Letter from Timothy H. Hosking, General Counsel, ITG Inc., to Jonathan G. Katz, Secretary, SEC dated Nov. 20, 1998 ("ITG Letter") at 2–3.

[68] The indications of interest entered into "passive" or derivative pricing systems are "orders," under Rule 3b–16(c). While the orders are entered without a specified price, subscribers agree to trade at a price based on the primary market, such as the mid-point of the bid and ask at the time orders are matched or at the primary market's opening price.

[69] In addition, there exists the incentive for subscribers to these "passive systems" to manipulate the price in the market from which the "passive system" derives its price in order to obtain a favorable execution on the passive system.

[70] *See* Rules 301(b)(5)(iii) and 301(b)(6)(iii), 17 CFR 242.301(b)(5)(iii) and 242.301(b)(6)(iii). *See infra* notes 248, 278, 241–291 and accompanying text. Further, the Commission did not propose, nor is it adopting, a requirement that alternative trading systems that register as broker-dealers publicly display any orders that are not displayed to that system's subscribers. Thus, alternative trading systems—like most "passive" systems—that do not display subscriber orders at all, are not subject to the public display requirement if they register as broker-dealers under Regulation ATS.

[71] SIA Letter at 10.

[72] A similar system, also operated by the Amex, is Automated Post Execution Reporting System, or AutoPERS.

[73] BRASS is an order routing system operated by Automated Securities Clearance, Ltd. ("ASC"). ASC provides system users with software and hardware that enables users to enter orders into the system which are then routed to an exchange or Nasdaq for execution. BRASS software enables a market maker to execute orders against its inventory at the market maker's quoted price, monitor compliance with the Commission's Limit Order Display Rule, *infra* note 76, route an order to another market maker or market, report executed transactions, and monitor, among other things, trading positions, and profit/loss margins. Separately, an entity affiliated with ASC, the BRASS Utility, LLC ("BRUT"), operates an electronic communications network ("ECN") to which orders can be routed through the use of BRASS software. *See infra* note 178.

Instead, all orders entered into a routing system are sent to another execution facility. In addition, routing systems do not establish non-discretionary methods under which parties entering orders interact with each other.

2. Dealer Systems

In the Proposing Release, the Commission discussed the application of proposed Rule 3b–16 to single dealer systems. Such systems automate the order routing and execution mechanisms of a single market maker and guarantee that the market maker will execute orders submitted to it at its own posted quotation for the security or, for example, at the inside price quoted on Nasdaq. Because single market maker systems merely provide a more efficient means of executing the trading interest of separate customers with one dealer, the Commission stated that they should not be considered exchanges. Accordingly, the Commission proposed to explicitly exclude from proposed Rule 3b–16 those trading systems that display the quotations of a single dealer and allow persons to enter orders for execution against the dealer's proprietary account, usually at the dealer's quote. This exclusion was intended to encompass systems operated by third market makers,[74] as well as those systems operated by dealers, primarily in debt securities, who display their own quotations to customers and other broker-dealers on proprietary or vendor screens.

The Commission is today adopting paragraph (b)(2) of Rule 3b–16 to exclude systems that display quotes of a single dealer and allow persons to enter orders for execution against the bids and offers of a single dealer. If a market maker executes a customer order at the National Best Bid or Offer ("NBBO"), rather than at its displayed bid or offer, the Commission will consider the NBBO as the market maker's quote for purposes of that trade. As in the proposal, paragraph (b)(2) is intended to exclude from Rule 3b–16 all dealers, including third market makers.

The Commission received two comment letters asking the Commission to reconsider its proposed exclusion of third market makers.[75] These commenters disagreed with the Commission's distinction between third market makers and exchanges, and stated that these systems compete directly with the regional exchanges for order flow. Consequently, these commenters suggested that the Commission include third market makers within its revised interpretation of "exchange." As discussed in the Proposing Release, however, the Commission does not believe that a single dealer that automates its means of communicating trading interest to customers is a market. Instead, such systems automate functions traditionally performed by dealers.

Accordingly, the exclusion the Commission is adopting today in paragraph (b)(2) of Rule 3b–16 is intended to cover systems operated by third market makers. Because of the Commission's own rules and those of the SROs, a third market maker's quote may not always reflect its own bids and offers, but may—at times—represent a customer limit order. The Limit Order Display Rule[76] requires third market makers (among others) to display customer limit orders in a security that are at a price that would improve the bid or offer of such market maker in that security. The Commission does not believe that a market maker engaging principally in the business of trading for its own account should be included within Rule 3b–16 solely because it is complying with the Limit Order Display Rule. Consequently, in the Proposing Release the Commission stated that, for purposes of this exclusion, if a dealer displayed a customer order to comply with a Commission or SRO rule, that customer order would be considered to be the "dealer's quote."[77] To ensure that Rule 3b–16 clearly excludes such dealers, the Commission is adopting paragraph (b)(2)(ii) of Rule 3b–16. Paragraph (b)(2)(ii) excludes a registered market maker that displays its own quotes and customer limit orders, and allows its customers and other broker-dealers to enter orders for execution against the displayed orders. The exclusion also allows such a registered market maker, as an incidental activity resulting from its market maker status, to match or cross orders for securities in which it makes a market, even if those orders are not displayed.[78]

Two other commenters expressed their support for the single dealer exclusion.[79] One of these commenters, however, suggested that the Commission modify the exclusion so that trading systems that display the quotes of a dealer *and its affiliates* and allow persons to execute against those quotes be excluded from Rule 3b–16.[80] The Commission is adopting the exclusion from Rule 3b–16 for single dealer systems, but does not agree with this commenter that a dealer's affiliates should be included in the exclusion.

In addition, one commenter requested that the Commission clarify whether the exclusion for dealer quotation systems would apply to systems that allow other broker-dealers to execute against a single dealer's quotations.[81] The Commission intends for this exclusion to cover dealer quotation systems that permit other broker-dealers to execute against the dealer's quotations and realizes that its use of the term "customer" in the proposal would preclude this. Accordingly, the Commission is adopting the exclusion in paragraph (b)(2) so that it encompasses single dealer systems that allow any person to enter orders for execution against that dealer's quotes.[82] A single dealer system could also match orders that are not displayed to any person other than the dealer and its employees, provided this matching is only incidental to its primary activity as a dealer.[83]

D. Examples of Systems Illustrating Application of Rule 3b–16

The following examples are provided to illustrate various applications of Rule 3b–16.[84] While these examples are intended to provide guidance, the application of Rule 3b–16 will be fact-specific.

1. Examples of Systems Included Within Rule 3b–16

a. System A is a trading floor that maintains a continuous two-sided auction market under a unitary specialist system. Through the use of an electronic communication system, orders are transmitted from member firms to the floor and execution reports are transmitted from the floor to the member firms. System A also has an automated routing and small order execution system. Price discovery occurs through the interaction of bids and offers of market participants under the application of System A's rules of priority, parity, and precedence. The specialist's dealings are subject to compliance obligations established by System A. System A is included under Rule 3b–16.

[74] Third market firms are NASD member firms that execute orders for exchange-listed securities.

[75] *See* Letter from David E. Rosedahl, Executive Vice President and Chief Regulatory Officer, Pacific Exchange, Inc. to Jonathan G. Katz, Secretary, SEC, dated Aug. 20, 1998 ("PCX Letter") at 2–6; CHX Letter at 3–4.

[76] Rule 11Ac1–4(b)(1)(i), 17 CFR 240.11Ac1–4(b)(1)(i).

[77] Proposing Release, *supra note* 3, at n.9.

[78] Rule 3b–16(b)(2)(ii), 17 CFR 240.3b–16(b)(2)(ii).

[79] *See* SIA Letter at 10; DBSI Letter at 3.

[80] DBSI Letter at 3.

[81] SIA Letter at 11.

[82] Rule 3b–16(b)(4), 17 CFR 240.3b–16(b)(4).

[83] Rule 3b–16(b)(2)(i), 17 CFR 240.3b–16(b)(2)(i).

[84] These systems may also implicate other provisions of the federal securities laws.

b. System B allows participants to enter, replace, or cancel limit orders prior to a pre-established auction cutoff time. Bids and offers (including price and size) are displayed in the System B's order book, which participants can view on their screens. After the cutoff time, the system reviews all orders with respect to each security and determines the price at which the volume of buying interest is closest to the volume of selling interest. That price is the "auction price." Participants that have entered bids at or above, and offers at or below, the auction price receive an execution at the auction price on the basis of time priority up to the available size. Matched orders are executed by a registered broker-dealer. System B is included under Rule 3b–16.

c. System C allows participants to enter limit orders and matches those orders with other orders in System C based on internal parameters. System C displays unmatched limit orders in the system's book on an anonymous basis to all participants. The broker-dealer operating System C acts as a riskless principal in executing all matched orders. System C is included under Rule 3b–16.

d. System D limits participation to institutional investors that trade illiquid restricted securities. To offer a security, a seller notifies System D as to the security, the price and the amount offered. After System D accepts an order, it enters it into the system where it is posted anonymously. Prospective purchasers may accept a posted order or seek to negotiate a transaction by contacting System D. System D facilitates the purchase and sale of securities through the system on an agency basis. Participants enter a bid or offer by calling a dedicated telephone number at System D. Once each side of the transaction agrees to the terms of the trade, System D obtains necessary documentation from the participants and reviews all the documentation. Once all the documentation has been processed, System D notifies the parties setting the transfer and settlement date, at which time System D will coordinate the transfer of funds and the issuer is notified to effect the transfer on its books. System D is included under Rule 3b–16.

e. System E allows participants to enter orders for securities by computer, facsimile, or telephone. Those orders are not displayed to other participants. System E crosses orders at specified times at a price derived from another market such as the closing price, a volume weighted average price, or the midpoint between the closing bid and ask on the primary market. System E is included under Rule 3b–16, but would be exempt from the requirements of Regulation ATS under Rule 301(a)(5) if it is registered as a broker-dealer.

f. System F displays, on an anonymous basis, firm offers to buy and sell securities from its participants. Participants typically telephone an employee of System F to place a bid or offer, which the employee enters into the system for display to other participants. To execute against a bid or offer displayed on the computer screen, a participant telephones an employee at System F. The employee is required to execute the participant's order against the displayed order if it matches. System F is included under Rule 3b–16. If System F allowed subscribers to execute against a displayed order by sending a message electronically, it would also be included under Rule 3b–16.

g. System G permits competing market makers to post continuous two-sided quotes in certain securities. Quotes are consolidated and disseminated to subscribers electronically. System G maintains and enforces rules setting standards for the posting of quotes and executions. Trades are executed by subscribers calling market makers outside the system and executing trades based on quotes displayed in the system. System G is included under Rule 3b–16.

h. System H is owned and operated by a bank. System H permits registered broker-dealers to place orders to buy or sell securities at specified prices and sizes and have those orders displayed to all users on an anonymous basis. Registered broker-dealers may trade both for their own account or on an agency basis on behalf of their customers. System H automatically executes an order if it matches an existing order. If no match is immediately available, System H displays the order on the system on an anonymous basis to all users. System H is included under Rule 3b–16.

i. System I permits participants to enter a range of ranked contingent buy and sell orders at which they are willing to trade securities. These orders are matched based on a mathematical algorithm whose priorities are designed to achieve the participants' objectives. System I does not display orders to any participants. System I is included under Rule 3b–16.

2. Examples of Systems Not Included Within Rule 3b–16

a. System J routes orders from broker-dealers to registered exchanges or to other broker-dealers for execution. System J also routes execution reports back to the broker-dealers that entered the orders. System J provides no facility for execution, but rather only acts as a communications system for the transmission of orders and execution reports. System J falls within the exclusion in paragraph (b)(1) of Rule 3b–16.

b. System K displays a registered market maker's quotes in exchange-listed securities and permits subscribers to submit orders for those securities to the market maker. Limit orders are displayed in the market maker's quote pursuant to requirements under the Commission's order execution rules. Market orders are executed against the market maker's quote or at the NBBO or at a price better than the NBBO. Limit orders are held until marketable. System K falls within the exclusion in paragraph (b)(2) of Rule 3b–16.

c. System L allows a dealer to disseminate its proprietary quotations to its customers and permits customers to transmit orders to buy from or sell to that dealer at those quoted prices. System L is not included under Rule 3b–16 because it falls within the exclusion in paragraph (b)(2) of Rule 3b–16.

d. System M is operated by a broker-dealer that makes markets in Nasdaq securities. System M permits the broker-dealer's customers, as well as other broker-dealers (including correspondent broker-dealers with whom it has a clearing arrangement) to send orders electronically or by telephone to the broker-dealer. An order transmitted electronically goes directly to the system server. An order transmitted by phone is received by an employee of the broker-dealer, who enters it into the System M. If it is a market order for a Nasdaq security in which the broker-dealer makes a market, System M checks to see if the order can be crossed against a customer limit order held by the broker-dealer. If two customer orders cannot be crossed, System M automatically executes the market order against the firm's inventory if the order size is at or below certain parameters. If the order size exceeds those parameters, the market order will be routed to a trader for manual execution against the firm's inventory, or other handling as the trader determines. If the order is for a security in which the broker-dealer does not make a market, System M sends the order to a market maker in the security or to another market for execution. System M falls within the exclusions in paragraph (b)(1) and (b)(2) of Rule 3b–16.

e. System N allows participants to post the names of securities they wish to buy or sell. Other participants view

this "bids wanted list" or "offers wanted list" and place bids or offers for the specified securities during a defined auction period. The participant who posted the security on the "bids wanted list" or "offers wanted list" may either accept or reject the best bid or offer at the close of the auction. System N is not included under Rule 3b–16 because there is only one seller.

f. System O permits correspondent firms of a broker-dealer to send orders electronically to that broker-dealer. The broker-dealer executes the orders against its own inventory. System O falls within the exclusion in paragraph (b)(2)(i) of Rule 3b–16.

g. System P is an Internet web site set up by an issuer. Through this web site, the issuer provides information to prospective buyers and sellers of its common stock. Prospective buyers and sellers post their identities, contact information, and the number of shares offered or sought at a given price. The issuer makes that information, along with the date the information was submitted, available to prospective buyers and sellers. The participants contact each other outside of the web site to execute trades. System P is not included under Rule 3b–16 because it does not establish non-discretionary methods under which buyers and sellers interact.

h. System Q is a screen-based system on which broker-dealers post indications of interest to institutional customers in the securities the broker-dealers wish to trade and advertise trades they have recently conducted. System R sets no requirements and provides no procedures regarding whether or how posted quantities and prices of securities can be executed. System Q is not included under Rule 3b–16 because it does not establish non-discretionary methods under which buyers and sellers interact.

i. System R is an internal system operated by a broker-dealer to display only to its registered representatives the prices and sizes of securities offered for sale by the firm in its capacity as a dealer. A registered representative can enter a buy order, specifying price and size, on behalf of its customer. If the terms of the customer's order match the dealer's posted offer, System R automatically executes the order. If the terms are different, System R places the customer's order on the screen for later matching. Assuming the matches of customer orders are merely incidental relative to the dealer's own trades, System R falls within the exclusion in paragraph (b)(2)(i) of Rule 3b–16.

j. System S permits an issuer to post prices to sell its own securities to a broker-dealer's customers. The issuer is under no obligation to post prices on the system and may choose to do so at any time. If a customer accepts the posted price and size, System S routes the order to the issuer who retains discretion to accept or reject the trade. If the posted price or size is not accepted as posted, System S automatically alerts the issuer that further negotiation is necessary. System S is not included under Rule 3b–16 because it has only one seller and, therefore, fails to meet the "multiple buyers and sellers requirement."

k. System T facilitates the clearance and settlement of securities products. Participating IDBs disseminate and match trading interest through their own proprietary trading screens to their own customers. The participating IDBs then submit matched transactions between their customers to System T for clearance and settlement. The IDBs' screens are not linked together and the IDBs interact only with those dealers using the system. The customers' orders interact only with the quote of the IDB of which they are a customer and do not interact with the other customer orders of that IDB. Dissemination and execution of orders by the IDBs is governed solely by their rules and not by System T.[85] System T is not included under Rule 3b–16.

E. Exemption From the Definition of "Exchange"

Section 36 of the Exchange Act[86] gives the Commission broad authority to exempt any person, security, or transaction from provisions of the Exchange Act and the rules thereunder. Such an exemption may be subject to conditions. Using this authority, the Commission is adopting Rule 3a1–1.[87] This rule exempts from the definition of "exchange": (1) Any alternative trading system that compies with Regulations ATS[88] (2) any alternative trading system that under Rule 301(a) of Regulation ATS is not required to comply with regulation ATS and alternative trading system operated by a national securities association,[89] and (3) any alternative trading system operated by a national securities association.[90] Finally, as described more fully below,[91] paragraph (b)(1) of Rule 3a1–1 also conditions an alternative trading system's exemption on the absence of a Commission determination that the exemption in a particular case is not "necessary or appropriate in the public interest or consistent with the protection of investors."[92]

The Commission has determined that this exemption is in the public interest and will promote efficiency, competition, and capital formation because it has the effect of providing alternative trading systems with the option of positioning themselves in the marketplace as either registered exchanges or as broker-dealers. The Commission believes that allowing alternative trading systems to make a business decision about how to register with the Commission will continue to encourage the development of new and innovative trading facilities. The Commission has also determined that this exemption is consistent with the protection of investors because investors will benefit from conditions governing an alternative trading system, in particular Regulation ATS's enhanced transparency, market access, system integrity, and audit trail provisions.

Moreover, because national securities associations are subject to requirements virtually identical to those applicable to national securities exchanges,[93] Rule 3a1–1 also exempts from the definition of "exchange" any alternative trading system operated by a national securities association.[94] The Commission believes that the regulation of alternative trading systems operated by a national securities association is adequate, and therefore, that such systems should not be required to register either as exchanges, or as broker-dealers and comply with Regulation ATS. Consequently, trading systems operated by national securities associations may continue to operate as they do now.

Finally, in response to a commenter's request that the Commission clarify that the exemption from the definition of "exchange" provided in Rule 3a1–1(a)(2) includes broker-dealers that are excluded from the scope of Regulation ATS by Rule 301(a),[95] the Commission is adding paragraph (a)(3) to Rule 3a1–

[85] In some cases, however, the systems operated by the interdealer brokers may fall within Rule 3b–16. See supra System F.

[86] 15 U.S.C. 78mm.

[87] 17 CFR 240.3a1–1.

[88] 17 CFR 240.3a1–1(a)(2). *See infra* note and accompanying text for the definition of an alternative trading system.

[89] 17 CFR 240.3a1–1(a)(3). *See* notes—and accompanying text.

[90] 17 CFR 240.3a1–1(a)(1).

[91] *See infra* Section III.F.

[92] Rule 3a1–1(b), 17 CFR 240.3a1–1(b).

[93] Registration as a national securities association under section 15A of the Exchange Act is voluntary. 15 U.S.C. 78o–3. Currently the only national securities association is the NASD, which operates Nasdaq.

[94] Rule 3a1–1(a)(1). *See also* Rule 301(a)(3) (excluding alternative trading systems operated by a national securities association from the scope of proposed Regulation ATS).

[95] Instinet Letter at 8, n.11.

1. The Commission intended for broker-dealers that perform only activities delineated in Rule 301(a) to be exempt from the definition of exchange under Rule 3a1–1, and is making this clear by adding this new paragraph.[96]

The Commission intends for the exemption provided by Rule 3a1–1 to make clear that alternative trading systems that register as broker-dealers and comply with Regulation ATS not be regulated as national securities exchanges. The Commission believes that the requirements in Regulation ATS as adopted will address the market-like functions of alternative trading systems without imposing requirements applicable to exchanges that might not fit comfortably with certain alternative trading systems' structures and businesses.

In the Proposing Release, the Commission requested comment on whether an exclusion from the definition in Rule 3b–16 for alternative trading systems that register as broker-dealers and comply with the provisions of Regulation ATS would be preferable to the exemption under Rule 3a1–1. Several commenters expressed a preference for an exclusion, rather than an exemption.[97] Most of these commenters were concerned that foreign regulators would view these systems, currently registered as broker-dealers, as exchanges if they were now exempted from the definition of exchange rather than excluded from it. The Commission believes that its new framework being adopted today represents a carefully balanced approach to the regulation of markets that is grounded in the particular statutory structure of the Exchange Act. First, the Commission notes that its exemption for alternative trading systems applies to the definition of an exchange. By exempting alternative trading systems from this definition, the Commission is making clear its view that these systems should not be treated as exchanges under the Exchange Act or in any other context. Moreover, the Commission does not intend its interpretation of exchange to be used outside of the Exchange Act context. The Commission strongly cautions against applying this interpretation in other contexts where its effects will differ from those under the Exchange Act. The Commission also believes that application in another context of only one element of the structure adopted today would be inappropriate and would seriously call into question the validity of the interpretation in that context.

Another concern raised by at least one commenter was that investors could be influenced in how they view a trading system, if such trading system is included within the Commission's interpretation of "exchange."[98] The Commission believes that investors' views of systems are shaped more by the functions those systems perform than by the way they are classified. The Commission also believes that the enhanced regulation of alternative trading systems that choose to remain registered as broker-dealers that is provided by Regulation ATS provides more protection for the investors who use these systems.

In the Proposing Release, the Commission also requested comment on the scope, form, and conditions of the exemption in Rule 3a1–1. Commenters generally approved of the Commission's proposal to allow alternative trading systems the choice to register as exchanges or be exempt from the definition of "exchange" by registering as broker-dealers and complying with Regulation ATS.[99] One commenter questioned whether national securities exchanges would have the choice to register as alternative trading systems, in effect ceasing to act as SROs and electing instead to be regulated as a broker-dealer under Regulation ATS.[100] The Commission believes that, as a general matter, national securities exchanges do have this choice under the rules the Commission is adopting today.[101] Any national securities exchange making this choice would, of course, be required to give up its SRO functions and privileges, and to register as a broker-dealer and become a member of a national securities association or other SRO.[102] That organization would then act as the SRO for this alternative trading system. If a national securities exchange chose, as part of this restructuring, to allow its members to form their own national securities association to operate this new alternative trading system, that alternative trading system would be run directly by a national securities association, and, as stated above, would be regulated in a manner that was equivalent to being regulated as a national securities exchange.[103]

F. Commission's Authority To Require Registration as an Exchange

Rule 3a1–1(b) contains an exception to the exemption from the exchange definition. Under this exception, the Commission effectively may require a trading system that is a substantial market (as set forth in the rule) to register as a national securities exchange if it finds in a particular case that it is necessary or appropriate in the public interest or consistent with the protection of investors.[104] In particular, the Commission could deny or withhold exemptive status from a trading system that otherwise meets the exemptive conditions under Rule 3a1–1(a). Although the standard for denying or withholding the exemption is based on objective factors, the Commission has discretion whether to initiate any process to consider whether to revoke a

[96] 17 CFR 240.3a1–1(a)(3).

[97] *See* TBMA Letter at 12–13 (expressing concern that foreign regulators might be influenced by the Commission's categorization of a system as an "exchange," even if that system chose to be regulated in the U.S. as a broker-dealer); Instinet Letter at 3, 6–7, 13–14 and 6–7, n.9 (stating that classifying a securities firm as an exchange in the U.S. could significantly impair a firm's ability to participate in foreign markets * * * because a number of foreign regulators may regard all broker-dealers covered by the expanded 'exchange' definition as 'exchanges'). *See also* CBB Letter at 3.

[98] TBMA Letter at 12.

[99] *See* Letter from Mike Cormack, Manager, Equity Trading, American Century to Jonathan G. Katz, Secretary, SEC, dated Aug. 12, 1998 ("American Century Letter") at 1–2 (supporting the Commission's proposal to permit alternative trading systems to register as exchanges because it would provide an option for innovators, and noting alternative trading systems' objection to the NASD's proposed central limit order book based on the belief that an SRO regulating alternative trading systems should not operate a competing system); NASD Letter at 3 (commenting that both registration as an exchange and Regulation ATS "generally appear to ensure that alternative trading systems operate with the appropriate levels of investor protection, while affording alternative trading systems the necessary flexibility to choose between different models of regulation"); CME Letter at 3 (generally supporting the additional requirements for alternative trading systems because they will improve investor protection and lessen the regulatory disparity that currently exists between alternative trading systems and traditional exchanges); Instinet Letter at 7, n.10 (stating that the Commission should modify the exemption in Rule 3a1–1 from exchange registration so that alternative trading systems that, while acting in good faith, fail to comply fully with each of the technical requirements of Regulation ATS do not violate Sections 5 and 6 of the Exchange Act); ICI Letter at 2; IBEX Letter at 4.

[100] CHX Letter at 6 (questioning why traditional exchanges should not have the opportunity to make the same choice as alternative trading systems, and commenting that SROs should be permitted to form subsidiaries that were alternative trading systems registered as broker-dealers).

[101] In making this significant decision, a national securities exchange would have to follow its constitution and by-laws (including provisions concerning membership votes), and any applicable state law requirements.

[102] Section 15(b)(8) of the Exchange Act requires any broker-dealer engaging in transactions other than solely on a national securities exchange of which it is a member, to become a member of a national securities association. 15 U.S.C. 78o(b)(8).

[103] The Commission does not mean to imply that national securities exchanges cannot make this choice. The Commission is merely pointing out that if a national securities exchange does so, it cannot continue to act as its own SRO.

[104] Rule 3a1–1(b), 17 CFR 240.3a1–1(b)(1).

particular entity's exemption under the rule.

Specifically, under Rule 3a1–1(b), if an organization, association, or group of persons meets certain, specified volume levels, the Commission could consider whether registration as an exchange is necessary. The Commission will not consider making an assessment whether a particular system should register as an exchange unless that system, during three of preceding four calendar quarters had: (1) Fifty percent or more of the average daily dollar trading volume in any security and five percent or more of the average daily dollar trading volume in any class of security; or (2) Forty percent or more of the average daily dollar trading volume in any class of securities. The Commission would also provide such a system with notice and an opportunity to respond before determining that exemption from registration as an exchange is not appropriate in the public interest. In making that determination, the Commission would take into account the requirements for exchange registration under section 6 of the Exchange Act and the objectives of the national market system under section 11A of the Exchange Act. For example, it may not be consistent with the protection of investors or in the public interest for a trading system that is the dominant market, in some important segment of the securities market, to be exempt from registration as an exchange if competition cannot be relied upon to ensure fair and efficient trading structures in that case. In that case it may be necessary for the Commission's greater oversight authority over registered exchanges to apply.[105] As another example, if the Commission believed that an exemption under Rule 3a1–1 for a particular trading system that meets the volume thresholds would create systemic risk or lead to instability in the securities markets' infrastructure, it could determine that an exemption from registration as an exchange was not appropriate in the public interest or consistent with the protection of investors.

The Commission believes that there are alternative trading systems operating today that exceed the volume levels in paragraph (b)(1) of Rule 3a1–1. However, the Commission does not believe at this time that there are any alternative trading systems—given their current operations—for which the exemption from the definition of exchange in paragraph (a) of Rule 3a1–1 is not appropriate.

In addition, under section 19(c)(3) of the Exchange Act,[106] the Commission has the authority to promulgate rules for the de-registration of an exchange. In order to ensure a smooth transition for exchanges that wish to de-register and become registered broker-dealers subject to Regulation ATS, the Commission will consider promulgating de-registration rules. Such rules would also give the Commission the opportunity to formally consider whether certain exchanges should be prohibited from de-registering, just as Rule 3a1–1(b) gives the Commission the opportunity to consider whether certain alternative trading systems registered as broker-dealers should be compelled to register as exchanges.

IV. Regulation of Alternative Trading Systems

Securities markets have become increasingly interdependent. The use of technology permits market participants to link products, implement complex hedging strategies across markets and across products, and trade on multiple markets simultaneously. While these opportunities benefit many investors, they may also create misallocations of capital, widespread inefficiency, and trading fragmentation if markets are not coordinated. In addition, a lack of coordination among markets has the potential to increase system-wide risks. Congress adopted the 1975 Amendments, in part, to address these negative effects of potentially fragmented markets.[107] The Commission believes that it is consistent with Congress' goals to integrate significant alternative trading systems into the national market system.

In the 1975 Amendments, Congress specifically endorsed the development of an national market system, and sought to clarify and strengthen the Commission's authority to promote the achievement of such a system.[108] Because of uncertainty as to how technological and economic changes would affect the securities markets, Congress explicitly rejected mandating specific components of an national market system.[109] Instead, Congress recognized that the securities markets dynamically change and, accordingly, granted the Commission broad authority to oversee the implementation, operation, and regulation of the national market system in accordance with Congressional goals and objectives.[110]

Congress identified two paramount objectives in the development of an national market system: the maintenance of stable and orderly markets with maximum capacity, and the centralization of all buying and selling interest so that each investor has the opportunity for the best possible execution of his or her order, regardless of where the investor places the order.[111] In addition, Congress directed the Commission to remove present and future competitive restrictions on access to market information and order systems, and to assure the equal regulation of markets, exchange members, and broker-dealers effecting transactions in the national market system.[112] In particular, Congress found that it was in the public interest to assure "fair competition * * * between exchange markets and markets other than exchange markets."[113]

To further national market system goals, Congress granted the Commission broad authority to make rules, including those to: (1) Prevent the use and publication of deceptive trade and order information; (2) assure the prompt, accurate, and reliable distribution of quotation and transaction information; (3) enable non-discriminatory access to such information; and (4) assure that all broker-dealers transmit and direct orders for securities in a manner consistent with the operation of a national market system.[114] Moreover, Congress recognized that in order to implement national market system goals, the Commission would need to classify markets, firms, and securities and facilitate the development of

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[105] The Commission does not mean to imply that the NASD will be required to register Nasdaq as a national securities exchange. As stated above, because Nasdaq is operated by a national securities association, it is currently subject to requirements virtually identical to those applicable to national securities exchanges. Any alternative trading system, however, currently operated by a national securities association could choose to register as an exchange.

[106] 15 U.S.C. 78s(c)(3).

[107] *See* S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975) at 2, 8; H.R. Rep. No. 229, 94th Cong., 1st Sess 92 (1975).

[108] *See supra* note 6.

[109] *See* S. Rep. No. 75. *supra* note 107. "(T)he increasing tempo and magnitude of the changes that are occurring in our domestic and international economy make it clear that the securities markets are due to be tested as never before," and that it was, therefore, important to assure "that the securities markets and the regulations of the securities industry remain strong and capable of fostering (the) fundamental goals (of the Exchange Act) under changing economic and technological conditions." *Id.* at 3.

[110] S. Rep. No. 75 *supra* note 107, at 8–9.

[111] S. Rep. No. 75 *supra* note 107, at 7; *see* Section 11A(a)(1)(C) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C).

[112] *See* S. Rep. No. 75 *supra* note 107, at 104–05.

[113] Section 11A(a)(1)(C)(ii) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C)(ii). A fundamental goal of a national market system was to "achieve a market characterized by economically efficient executions, fair competition, (and the) broad dissemination of basic market information." S. Rep. No. 75 *supra* note 107, at 101.

[114] *See* Section 11A(c)(1) of the Exchange Act, 15 U.S.C. 78k–1(c)(1).

"subsystems within the national market system." [115]

The Commission believes the rules it is adopting today advance national market system goals. At present, alternative trading systems are not fully integrated into the national market system, leaving gaps in market access and fairness, systems capacity, transparency, and surveillance. These concerns, together with the increasing significance of alternative trading systems, call into question the fairness of current regulatory requirements, the effectiveness of existing national market system mechanisms, and the quality of public secondary markets. Under the rules the Commission is adopting today, alternative trading systems that have the most significant effect on our markets will be required to integrate their trading into national market system mechanisms. Alternative trading systems may choose to register either as national securities exchanges or as broker-dealers. Systems that elect broker-dealer regulation will be integrated into the national market system under Regulation ATS if they have significant trading volume.[116] Discussed in Section IV.A. below are the requirements for alternative trading systems that choose to register as broker-dealers and comply with Regulation ATS. Any alternative trading system that registers as a national securities exchange will be obligated—as currently registered exchanges are—to participate in the national market system mechanisms. Section IV.B. contains a discussion of the requirements applicable to alternative trading systems that choose to register as exchanges.

A. Regulation ATS

1. Scope of Regulation ATS

a. Definition of Alternative Trading System

The Commission proposed to define the term "alternative trading system" as any system that: (1) Constitutes, maintains, or provides a marketplace 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 under Exchange Act Rule 3b–16; [117] and (2) does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system, or discipline subscribers other than by exclusion from trading.[118] This proposed definition would have the effect of precluding any trading system that performs self-regulatory functions from opting to register as a broker-dealer, rather than as an exchange. Such a system would consequently be required to register as an exchange or be operated by a national securities association. Nothing, however, would prevent a registered exchange from giving up its self-regulatory functions and choosing instead to comply with Regulation ATS.[119]

The Commission received only one comment on this proposed definition. This commenter suggested that the proposed definition for alternative trading systems was too complex and should instead, simply be defined as an exchange that does not set conduct rules or discipline subscribers.[120] Under the framework the Commission is adopting today, an alternative trading system is exempt from the definition of an exchange if it registers as a broker-dealer and complies with Regulation ATS.[121]

Because the Commission continues to believe that any system that uses its market power to regulate its participants should be regulated as an SRO, the Commission is adopting the definition of alternative trading system as proposed. The Commission would consider a trading system to be "governing the conduct of subscribers" outside the trading system if it imposed on subscribers, as conditions of participation in trading, any requirements for which the trading system had to examine subscribers for compliance. In addition, if a trading system imposed as conditions of participation, directly or indirectly, restrictions on subscribers' activities outside of the trading system, the Commission believes that such a trading system should be a registered exchange or operated by a national securities association. For example, the Commission would not consider a trading system to be an alternative trading system, as defined in Rule 300(a), if that trading system prohibited subscribers from placing orders on its system at prices inferior to those subscribers place on other systems. The Commission believes such rules should only be imposed and enforced by regulatory bodies because of the potential that they may be applied for anti-competitive purposes. The Commission does not intend for this limitation to preclude an alternative trading system from imposing credit conditions on subscribers or requiring subscribers to submit financial information to the alternative trading system.

b. Exclusion of Trading Systems Registered as Exchanges or Operated by a National Securities Association

The Commission proposed to exclude from the scope of Regulation ATS certain alternative trading systems that are subject to other appropriate regulations. In particular, Rule 301(a) would exclude alternative trading systems (1) registered as exchanges, (2) exempt from exchange registration based on limited volume,[122] or (3) operated by a national securities association. These systems are subject to regulation as markets under other provisions of the Exchange Act. The Commission is adopting these exclusions as proposed.

c. Exclusion of Alternative Trading Systems Trading Solely Government and Related Securities

(i) Discussion

In addition, the Commission proposed that any alternative trading system that trades only government securities,[123] Brady Bonds, and repurchase and reverse repurchase agreements involving government securities or Brady Bonds be excluded from the scope of Regulation ATS, as long as the alternative trading system is registered as a broker-dealer. The Commission believes that alternative trading systems trading only government securities raise several of the structural issues raised by alternative trading systems trading equity and other debt securities. Nevertheless, the Commission recognizes that government securities are subject to other forms of regulation that help to ensure that those markets are fair and orderly. In particular,

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[115] S. Rep. No. 75 *supra* note 107, at 7.

[116] In addition to its authority under section 11A of the Exchange Act, 15 U.S.C. 78k–1, the Commission is adopting Regulation ATS pursuant to its rulemaking power under other parts of the Exchange Act, including sections 3(b) (power to define terms), 15(b)(1) (registration and regulation of broker-dealers), 15(c)(2) (prescribing means reasonably designed to prevent fraud), 17(a) (books and records requirements), 17(b) (inspection of records), 23(a)(1) (general power to make rules and classify persons, securities, and other matters), and 36 (general exemptive authority). 15 U.S.C. 78c(b), 78*o*(b)(1), 78*o*(c)(2), 78q(a), 78q(b), 78w(a)(1), and 78mm, respectively. For a discussion on the general exemptive authority in section 36 of the Exchange Act, 15 U.S.C. 78mm, *see infra* Section VII.D.1.

[117] *See supra* Section III (discussing Rule 3b–16).

[118] Rule 300(a), 17 CFR 242.300(a).

[119] *See supra* note and accompanying text. The Commission has the authority to require significant markets to remain registered as exchanges. *See supra* Section III.F.

[120] PCX Letter at 3.

[121] Rule 3a1–1(a)(2), 17 CFR 240.3a1–1(a)(2).

[122] *See supra* note 33.

[123] The term "government security" is defined in section 3(a)(42) of the Exchange Act, 15 U.S.C. 78c(a)(42).

government securities broker-dealers are currently regulated jointly by the Commission, U.S. Department of the Treasury ("Treasury"), and federal banking regulators, under the Exchange Act (particularly the provisions of the Government Securities Act of 1986) and the federal banking laws.[124] Unlike surveillance of trading in equities and other instruments traded primarily on registered exchanges,[125] surveillance of trading in government securities is coordinated among the Treasury, the Commission, and the Board of Governors of the Federal Reserve System.

The Commission is adopting this proposed exclusion from Regulation ATS with some modifications.[126] Specifically, the Commission is eliminating Brady Bonds from the types of securities an alternative trading system can trade and fall within this exclusion. The Commission received no comments specifically addressing the trading of Brady Bonds by alternative trading systems. Based on information the Commission has available about trading on alternative trading systems, however, the Commission is not aware of any systems trading Brady Bonds that do not also trade other non-government securities, most typically other emerging market debt. Accordingly, no alternative trading systems trading Brady Bonds would have been exempt under the proposals. Further, the Commission does not treat Brady Bonds in the same manner as government securities in other contexts. Moreover, the significance of Brady Bonds in the market is diminishing.

In addition, the Commission is expanding the exclusion in two respects. First, the Commission is adding commercial paper[127] and certain options on government securities[128] to the types of securities alternative trading systems may trade without being subject to Regulation ATS. The Commission believes this expansion is appropriate because commercial paper does not require registration even as a broker-dealer, and because the term "government securities" includes certain options on government securities for purposes of sections 15C and 17A of the Exchange Act.[129] Second, the Commission is expanding this exclusion from Regulation ATS to include alternative trading systems that are banks and that trade solely government securities, repurchase and reverse repurchase agreements on government securities, certain options of government securities, and commercial paper because of banks' traditional role in the government securities market.[130]

(ii) Response to Commenters

The Commission solicited comment on whether it was appropriate to exclude from the regulatory framework for alternative trading systems those alternative trading systems trading solely government and other related securities. Of those commenters who addressed this issue, most were in favor of excluding such systems. Most of these commenters agreed with the Commission that alternative trading systems trading government securities are subject to their own specialized oversight structure and, therefore, were appropriately excluded from the scope of the Commission's proposal.[131] Only one commenter opposed the proposed exclusion of alternative trading systems that trade government securities.[132]

One commenter suggested that the Commission exclude alternative trading systems that trade government securities from the definition in Rule 3b–16, rather than exclude them from Regulation ATS. This commenter stated that if these alternative trading systems were classified as exchanges that fact would be cited by proponents of a narrow interpretation of the Treasury Amendment to the Commodity Exchange Act, potentially resulting in a broad definition of "board of trade" beyond its intended meaning as a traditional organized exchange.[133] As stated earlier, the Commission believes that it would be inappropriate and

[124] *See generally* Department of the Treasury, Securities and Exchange Commission, and Board of Governors of the Federal Reserve System, Joint Study of the Regulatory System for Government Securities (March 1998); Department of the Treasury, Report of the Secretary of the Treasury on Specialized Government Securities Brokers and Dealers (July 1995) ("1995 Treasury Report").

The Government Securities Act of 1986 ("GSA") amended the Exchange Act to incorporate new section 15C, which, among other things, established registration and notice requirements for government securities brokers and dealers. Section 15C generally requires government securities brokers and dealers (*i.e.*, 15C firms or specialized government securities brokers and dealers) to register with the Commission and to become members of an SRO (twenty-two firms as of March 1998). Firms that are registered with the Commission as general securities brokers or dealers (*i.e.*, traditional broker-dealers registered under section 15(b) of the Exchange Act) are required to file notice with the Commission of their government securities business (3,023 firms as of April 1998). In addition, financial institutions that engage in government securities broker or dealer activities are required to file notice of such activities with their appropriate regulatory agency (120 institutions as of March 1998).

Under the regulatory structure established by the GSA, the Treasury was granted authority to adopt regulations for all government securities brokers and dealers concerning financial responsibility, protection of investors' funds and securities, recordkeeping, reporting, and audit requirements, and to adopt regulations governing the custody of government securities held by depository institutions. The Government Securities Act Amendments of 1993 ("GSAA") expanded the authority of the federal regulators and the SROs over government securities transactions. The GSAA, among other things, reauthorized the Treasury's rulemaking responsibilities, granted the Treasury authority to prescribe large position recordkeeping and reporting rules, extended the Commission's antifraud and antimanipulation authority to all government securities brokers and dealers, required government securities brokers and dealers to provide to the Commission on request records of government securities transactions to reconstruct trading in the course of a particular inquiry or investigation, removed the statutory restrictions on the authority of the NASD to extend sales practice rules to its members' transactions in government securities, and provided the bank regulatory agencies with the authority to issue sales practice rules for financial institutions engaged in government securities broker or dealer activities.

The GSA also strengthened the ability of federal regulators to examine, and to bring enforcement actions against, government securities brokers and dealers. The Commission and the SROs have examination and enforcement authority over government securities brokers and dealers registered under section 15C and over the government securities activities of general securities brokers and dealers. The Commission's enforcement authority includes the power to censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of the entity. For financial institutions that are government securities brokers or dealers, the institution's appropriate regulatory agency has examination and enforcement authority over the institution. The appropriate regulatory agency must notify the Commission of any sanctions imposed on such institutions, and the Commission must maintain a record of the sanctions.

[125] Although all marketable Treasury notes, bonds, and zero-coupon securities are listed on the NYSE, exchange trading volume is a small fraction of the total over-the-counter volume in these instruments. *See* U.S. Department of the Treasury, U.S. Securities and Exchange Commission, and Board of Governors of the Federal Reserve System, Joint Report on the Government Securities Market 26 (1992).

[126] In other words, these systems are not required to register as either an exchange or to comply with the requirements of Regulation ATS. Rule 301(a)(4), 17 CFR 242.301(a)(4).

[127] Rule 301(a)(4)(ii)(E), 17 CFR 242.301(a)(4)(ii)(E). The term "commercial paper" is defined in Rule 300(m), 17 CFR 242.300(m). This definition is based on the definition of commercial paper as set forth in 12 CFR 541.5, an Office of Thrift Supervision regulation that defines commercial paper, and section 3(a)(3) of the Securities Act of 1933, which uses identical language to identify these securities as one category of exempted securities.

[128] Rule 301(a)(4)(D), 17 CFR 242.301(a)(4)(D).

[129] Section 3(a)(42) of the Exchange Act, 15 U.S.C. 78c(a)(42).

[130] Rule 301(a)(4), 17 CFR 242.301(a)(4).

[131] *See, e.g.*, TBMA Letter at 17–18 (also urging the Commission to clarify the application of proposed Regulation ATS where a trading system trades government securities, as well as non-government securities); CBB Letter at 3 (but requesting guidance from the Commission on whether an ATS trading government securities and relying on such an exemption would be precluded from trading products other than securities); SIA Letter at 3, 11.

[132] IBEX Letter at 4–5.

[133] TBMA Letter at 13, n.21.

without a reasoned basis to transfer part or all of its determination regarding regulation to other statutory contexts.[134] The Commission's reinterpretation of "exchange" is grounded on its decision to use its exemptive authority to allow alternative trading systems to choose to be regulated as broker-dealers. The Commission's reinterpretation of exchange should not be relied upon by other regulators to interpret other, potentially more restrictive statutory schemes.

In addition, this same commenter encouraged the Commission to consider the effects of the proposed rules on banks that operate alternative trading systems. In particular, this commenter noted that the exclusion for alternative trading systems that trade government securities applied only if the alternative trading system registered as a broker-dealer, not if the alternative trading system were a bank.[135] The Commission did not intend to require banks trading government securities to register as broker-dealers and, therefore, Rule 301(a)(4), as adopted, excludes from Regulation ATS alternative trading systems that trade government securities if these systems are registered as broker-dealers *or are banks.*

Several commenters raised questions about the application of Regulation ATS to alternative trading systems that trade not only government securities, but also other types of securities.[136] One commenter asked the Commission to extend the proposed exemption for alternative trading systems that trade only government securities and other related securities to all trading in those securities. This commenter stated that broker-dealers that trade government securities, as well as other securities and financial instruments, should not be required to restructure their operations to avail themselves of an exclusion for government securities activities.[137]

The Commission does not believe that an alternative trading systems' government securities trading will be subject to more burdensome regulation if it is conducted in the same system as trading in other securities, than if it is conducted in a separate and, therefore, excluded system. Accordingly, the exclusion applies to systems that only trade government and other related securities.

Government securities are not "covered securities" [138] and, therefore, are not subject to the transparency requirements of Regulation ATS. In addition, an alternative trading system is only required to comply with the fair access requirements for those securities (or categories of securities) in which it represents twenty percent or more of the total volume. The fair access requirement does not apply to government securities regardless of whether government securities trading is conducted in the same alternative trading system as securities subject to the fair access requirements or in a separate alternative trading system. Finally, the capacity, integrity, and security requirements would never be triggered by an alternative trading system's government securities trading. If, however, the trading in other securities on that same system exceeds the twenty percent threshold, an alternative trading system in which government securities are traded would have to meet the capacity, integrity, and security standards. Nevertheless, it seems unlikely that an alternative trading system would choose to create a separate alternative trading system for its government securities trading solely for the privilege of trading government securities on a system with lesser capacity, integrity, and security than the system on which other securities are traded. Therefore, the Commission does not believe that it will be necessary, as a practical matter, for an alternative trading system to restructure its system to avail itself of the government securities exclusion.

Another commenter asked that the Commission expressly confirm that the exclusion from the scope of Regulation ATS for systems trading government and related securities does not preclude such an alternative trading system from offering services involving products other than securities.[139] In response, the Commission has clarified that to be excluded from the scope of Regulation ATS an alternative trading system need only limit its *securities* activities to government securities, Brady Bonds, repurchase and reverse repurchase agreements on such instruments, and commercial paper.

Finally, this commenter suggested that the Commission adopt rules to permit government securities alternative trading systems to trade other fixed income securities on a limited pilot basis. This commenter argued that, without such a limited exemption, Regulation ATS would have a chilling effect on the ability of government securities alternative trading systems to introduce technological innovation, and that such a provision would raise no significant investor protection concerns.[140] The Commission, however, does not believe that allowing one category of alternative trading systems (*i.e.*, those trading government securities) to trade other types of fixed income securities where the regulation and surveillance is different, without complying with Regulation ATS is appropriate. The notice and recordkeeping requirements under Regulation ATS are limited and should not interfere with market participants' ability to test new, innovative systems.

d. Alternative Trading Systems Trading Non-Government Debt Securities

(i) Discussion

The Commission proposed that alternative trading systems that trade debt securities (other than those trading government and other related securities) be subject to Regulation ATS, if they choose not to register as exchanges. Under Regulation ATS, these systems would be required to file a notice with the Commission, maintain an audit trail, periodically report certain information to the Commission, and ensure that they have adequate safeguards to protect subscribers' confidential trading information. In addition, alternative trading systems with twenty percent or more of the trading volume in a particular category of debt would have to meet the fair access and systems capacity, integrity, and security standards.[141] The Commission solicited comment on what categories of debt would be appropriate for this purpose and what sources of debt transaction volume information is available. Specifically, the Commission solicited comment on whether the following categories would be appropriate: mortgage and asset-backed securities, municipal securities, corporate debt securities, foreign corporate debt securities, and sovereign debt securities.

The Commission is adopting the proposal to include alternative trading systems that trade fixed income securities within its new regulatory framework. With respect to the fair access and systems capacity, integrity and security requirement, the rules as adopted require alternative trading systems with twenty percent or more of the volume in municipal securities, investment grade corporate debt securities, and non-investment grade corporate debt securities to comply with the fair access and systems capacity,

[134] *See supra* note 97 and accompanying text.

[135] TBMA Letter at 17.

[136] *See* TBMA Letter at 17; Instinet Letter at 8, n.11; CBB Letter at 3–4.

[137] Instinet Letter at 8, n.11.

[138] *See infra* note 180 and accompanying text for the definition of "covered security."

[139] CBB Letter at 3.

[140] CBB Letter at 3–4.

[141] The proposal would not require an alternative trading system to publicly display its best orders in fixed income securities.

integrity, and security requirements. Accordingly, the Commission is adopting rules to define these three categories of debt securities. The Commission is deferring any action on requiring alternative trading systems that trade foreign corporate debt or foreign sovereign debt to comply with the fair access and systems capacity, integrity, and security requirements.

For municipals, the Commission is incorporating into Regulation ATS the definition of municipal securities in section 3(a)(29) of the Exchange Act.[142] A debt security (other than an exempted security) with a fixed maturity of at least one year will be considered investment grade corporate debt if it is rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization,[143] and will be considered non-investment grade corporate debt if it is not so rated.[144] The Commission believes that these categories are widely recognized as relatively distinct markets within the debt market as a whole and, while not encompassing all forms of debt securities, will ensure that alternative trading systems that provide markets for significant segments of the debt market take adequate measures for systems capacity, integrity, and security, as well as provide fair access.

While the Commission is adopting rules to establish the appropriate categories for debt securities, the volume-based rules with respect to all categories, except municipal securities, will not become effective until volume information is available in a format that will enable alternative trading systems to determine their relative volume. Volume data for municipal securities is available and being published through the Municipal Securities Rulemaking Board's ("MSRB") Daily Volume Price Reports. On August 24, 1998, the MSRB started producing a Combined Daily Report to summarize both intra-dealer and customer transactions of municipal securities that are traded four or more times per day pursuant to Rule G–14. This report is made available through data vendors, such as Bloomberg, by approximately 6:00 am each business day.[145] Among other information, the Combined Daily Report provides total volume data against which alternative trading systems that trade municipal securities can measure their compliance obligations under Regulation ATS.

Volume data for the remaining two categories—investment grade and non-investment grade corporate debt—, however, is not currently compiled or published so that alternative trading systems can determine their obligations under Regulation ATS. In order to allow time for logistical arrangements to make such data available, the Commission will not make these fair access and systems capacity, integrity and security provisions of Regulation ATS effective until April 1, 2000.[146]

(ii) Response to Commenters

Some commenters thought that the Commission should exclude debt securities entirely from Regulation ATS.[147] On the other hand, several commenters supported the Commission's proposal to include alternative trading systems that trade debt securities.[148] The Commission believes that many of the same concerns about the trading of equity securities on alternative trading systems apply equally to the trading of fixed income securities on alternative trading systems. Specifically, it is important that markets with significant portions of the volume in particular instruments have adequate systems capacity, integrity, and security, regardless of whether those instruments are equity securities or debt securities. Similarly, as electronic systems for debt grow, it will become increasingly important for the fair operation of our markets for market participants to have fair access to significant market centers in debt securities. One of the consequences of the growing role of alternative trading systems in the securities markets generally is that debt securities are increasingly being traded on these systems, similar to the way equity securities are traded. This change in the market requires appropriate measures for markets for debt.

Two commenters suggested that the Commission exempt or exclude alternative trading systems trading municipal securities for the same reasons that it proposed to exclude alternative trading systems that trade government securities.[149] For example, one commenter asserted that the municipal securities market is overseen not only by securities regulators, but also by the federal banking regulators. This commenter also pointed out that the Commission had proposed excluding municipal securities in the Concept Release and stated that the Commission should have maintained this approach in the Proposing Release.[150] Although the Commission did solicit comment in the Concept Release on whether alternative trading systems trading municipal securities should be excluded from any proposed new regulatory framework, the Commission has concluded that it would not be appropriate to do so.

There are substantial differences between the oversight of the government securities market and the municipal securities markets, and between government securities instruments and municipal securities instruments. For example, municipal securities are far more varied products than government securities. While traditional general obligation bonds issued by municipalities are more akin to government securities in that they are backed by the full faith and credit of the issuing taxing authority, revenue bonds, which bear greater resemblance to privately issued bonds due to their ties to specific revenue sources, are riskier products.[151] Most municipal bonds are rarely traded. The market for government securities, on the other hand, is deep and liquid.[152] Therefore, alternative trading systems that may develop for municipal securities may have widely different qualities than those for government securities. Moreover, regulation of the government

[142] 15 U.S.C. 78c(a)(29).

[143] Rule 300(l), 17 CFR 242.300(l).

[144] Rule 300(m), 17 CFR 242.300(m).

[145] An initiative by TBMA would also make the MSRB data available on TBMA's web site <http://www.investinginbonds.com>. *See* Robert Whalen, *Investor Aids: TBMA's Internet-Based Price Reporting Aims to Increase Market Transparency*, The Bond Buyer, Nov. 25, 1998, at 28.

[146] Due to the Commission's concerns regarding the Year 2000 computer technology conversion process, no new Commission rules requiring major computer reprogramming will be made effective between June 1, 1999 and March 31, 2000. *See* Securities Exchange Act Release No. 40377 (Aug. 27, 1998), 63 FR 47501 (Sept. 3, 1998). Accordingly, because the logistical framework for investment grade and non-investment grade corporate debt data has not been fully developed, the Commission is not making Rules 301(b)(5)(D) and (E) and Rules 301(b)(6)(D) and (E) effective until after the moratorium is lifted.

[147] *See* TBMA Letter at 3, MSDW Letter at 13; SIA Letter at 11; DBSI Letter at 1 (adopting TBMA Letter).

[148] *See* NYSE Letter at 6 (supporting regulation of alternative trading systems that trade debt securities as important for investor protection); IBEX Letter at 2–3 (also generally urging the Commission to take steps to increase transparency, access to best priced orders, and other investor protections in the debt markets, *e.g.*, insider trading and front running rules).

[149] *See* TBMA Letter at 18–20; SIA Letter at 3, 11.

[150] TBMA Letter at 19–20.

[151] *See* Robert Zipf, How the Bond Market Works 86–87 (1997) (noting characteristics of general obligation and revenue bonds and the heightened risk of revenue bonds relative to general obligation bonds).

[152] As of June 30, 1998, there was approximately $3.4 trillion of U.S. Treasury debt securities outstanding with average daily trading volume of over $200 billion. By comparison, there was approximately $1.4 trillion of municipal debt securities outstanding with average daily trading volume of approximately $1 billion. The Bond Market Association, *Research Quarterly* (August 1998) <http://www.bondmarkets.com/research/9808rschq.pdf>.

securities market is shared by the Federal Reserve Board, the Treasury Department and the Commission and other bank regulators, while oversight of the municipal securities market is assigned to the Commission and the MSRB. For these reasons, the Commission believes it would not be appropriate to exempt alternative trading systems that trade municipal securities from Regulation ATS.

Only one commenter directly addressed the Commission's request for comment on possible categories of debt. Although TBMA encouraged the Commission to exclude alternative trading systems trading debt securities from Rule 3b–16,[153] it stated that, if the Commission chose to go forward with the proposal, it "believes that the proposed categories reflect a reasonable indication of how market participants view and trade debt securities."[154]

Several commenters recommended that the Commission consider the clearing agencies as a source of information on the trading volume in the debt market.[155] One commenter also noted that for municipal securities, the MSRB's transaction reporting requirements could be a good source for volume information.[156] As discussed above, the Commission plans to use the MSRB's transaction reporting program as a basis for volume in the municipal securities market.

e. Exemptions From Certain Requirements of Regulation ATS Pursuant to Application to the Commission

The Commission today is also adopting a provision to allow the Commission, upon application by an alternative trading system, to exempt by order such alternative trading system from one or more of the requirements of Regulation ATS.[157] The Commission expects to issue such an order only under unusual circumstances, and only after determining that such an order is consistent with the public interest, the protection of investors and the removal of impediments to, and the perfection of the mechanisms of, a national market system.

While the Commission believes that the requirements it is adopting under Regulation ATS are appropriate for all alternative trading systems operating today, the Commission is aware that a system may develop in the future to which these requirements may not be appropriate, and they could hinder the development of specialized trading systems. For example, the Commission could consider exempting an alternative trading system that limited participation only to investment companies with similar investment strategies, such as index funds, from the transparency requirements.[158]

2. Requirements for Alternative Trading Systems Subject to Regulation ATS

Discussed below are the requirements for alternative trading systems subject to Regulation ATS.

a. Membership in an SRO

Because alternative trading systems that choose to register as broker-dealers will not themselves have self-regulatory responsibilities, the Commission believes it is important for such systems to be members of an SRO. For this reason, the Commission proposed to require alternative trading systems subject to Regulation ATS to be members of an SRO.

Most alternative trading systems are currently registered as broker-dealers and, therefore, are also members of an SRO.[159] The Commission understands some alternative trading systems may have concerns about SROs abusing their regulatory authority for competitive reasons. While the Commission understands that SROs operate competing markets and, therefore, have potential conflicts of interest in overseeing alternative trading systems, the Commission believes these conflicts can be minimized using the Commission's oversight.[160] The Commission considers it part of its own oversight responsibility over SROs to prevent and take the necessary steps to address any such actions by SROs.[161] Further, an alternative trading system that wishes to avoid potential conflicts of interest altogether may choose to register as an exchange. The Commission also notes that section 15A of the Exchange Act would permit an association of brokers and dealers to establish an SRO that does not operate a market.[162] Such a national securities association could be established solely for purposes of overseeing the activities of alternative trading systems. Of course, this association must be able to effectively conduct its SRO responsibilities.

The Commission expects SROs to effectively surveil trading that occurs on alternative trading systems by integrating alternative trading system trading data into the SRO's existing surveillance systems. SROs should also incorporate relevant information regarding the entities trading on such systems into their existing surveillance programs. The enhanced recordkeeping requirements for alternative trading systems will aid SRO oversight considerably in this regard.[163]

The Commission believes it is appropriate to continue to require alternative trading systems that register as broker-dealers to be SRO members and is, therefore, adopting this requirement as proposed.[164]

b. Notice of Operation as an Alternative Trading System and Amendments

The Commission proposed to require an alternative trading system registered as a broker-dealer to file a notice with the Commission before commencing operation, amendments to this notice in the event of material changes, and a notice when an alternative trading system ceases operation. The Commission is adopting these requirements as proposed.

More specifically, under Regulation ATS, alternative trading systems are required to file an initial operation report with the Commission on Form ATS at least twenty days prior to commencing operation.[165] Alternative trading systems operating currently must file Form ATS within twenty days of the effective date of these final rules.[166] Form ATS requests information about the alternative trading system, including a detailed description of how it will operate, its prospective subscribers, and the securities it intends to trade. In addition, the alternative trading system is required to describe its existing procedures for reviewing systems capacity, security, and contingency planning. Alternative trading systems are currently required to

[153] TBMA Letter at 6–7, 21.

[154] TBMA Letter at 24.

[155] *See* TBMA Letter at 23–25; IBEX Letter at 12. IBEX also suggested reactivating the SIA practice of publishing the average daily trading volume of corporate and other bonds on a monthly basis which was discontinued in 1994. IBEX Letter at 12.

[156] TBMA Letter at 23–25.

[157] Rule 301(a)(5), 17 CFR 242.301(a)(5).

[158] The transparency requirements are discussed *infra* Section IV.A.2.c.

[159] Section 15(b)(8) of the Exchange Act, 15 U.S.C. 78*o*(b)(8).

[160] For example, the structural reforms undertaken by the NASD since August 1996 should aid in ensuring the independence of NASDR and insulating its staff from the commercial interests of Nasdaq.

[161] *See supra* note 4.

[162] Section 15A of the Exchange Act, 15 U.S.C. 78*o*–3.

[163] *See* Rule 301(b)(8), 17 CFR 242.301(b)(8).

[164] Rule 301(b)(1), 17 CFR 242.301(b)(1).

[165] Rule 301(b)(2)(i) and Form ATS, 17 CFR 242.301(b)(2)(i) and 17 CFR 249.637.

[166] Most currently operating alternative trading systems have filed Part 1 of Form 17A–23. To avail themselves of the exemption in Rule 3a1–1(a)(2), these systems must file Form ATS within 20 days of the effective date of these rules. Internal broker-dealer systems, 17 CFR 240.17a–3(a)(16)(ii)(A), which may also have previously filed Part I of Form 17A–23, do not have to file Form ATS.

report most of this information on Part I of Form 17A–23, which the Commission proposed to repeal.[167] Form ATS is not an application and the Commission would not "approve" an alternative trading system before it began to operate. Form ATS is, instead, a notice to the Commission.

An alternative trading system is also required to notify the Commission of material changes to its operation by filing an amendment to Form ATS at least twenty calendar days prior to implementing such changes.[168] One commenter requested that the Commission provide more specific guidance as to what would be considered a "material change."[169] As discussed in the Proposing Release, material changes to an alternative trading system include any change to: the operating platform, the types of securities traded, or the types of subscribers. The Commission notes that currently all alternative trading systems implicitly make materiality decisions in determining when to notify their subscribers of changes.

In addition to reporting material changes at least twenty days before implementation, alternative trading systems are required to notify the Commission in quarterly amendments of *any* changes to the information in the initial operation report that have not been reported in a previous amendment.[170] Finally, if an alternative trading system ceases operations, it is required to promptly file a notice with the Commission.[171] Under Regulation ATS, the initial operation report, any amendments, and the report filed when an alternative trading system ceases operation will be kept confidential.

In the Proposing Release,[172] the Commission requested comment on the notice requirements and Form ATS. The Commission specifically requested comment on whether such requirements would be burdensome for alternative trading systems, and if so, whether the burden is inappropriate. The Commission also sought comment on the frequency of filings and whether more or less frequent filings would be preferable. Finally, the Commission sought comment on whether it would be appropriate to permit or to require electronic filing of Form ATS and all subsequent amendments.

Most of the commenters did not comment directly on the notice requirements or Form ATS. One commenter recommended that the Commission allow for filing of the initial operation report on Form ATS within twenty days after commencing operation, rather than twenty days before commencing operation as proposed.[173] This commenter stated that such a change would ease the regulatory burden on new systems that often have uncertain timelines and would avoid the possibility that a new trading system would be prevented from operating solely because of the need to wait for a twenty-day regulatory time period to run.

The Commission, however, believes that twenty days is a short enough period of time that alternative trading systems would not be inconvenienced by the requirement. If a system were only required to provide notice after it commenced operations, the Commission would have no notice of potential problems that might impact investors before the system begins to operate. The Commission also notes that currently broker-dealer trading systems have an identical requirement to file Form 17A–23 with the Commission twenty days prior to commencing operation. The Commission knows of no broker-dealer trading system that was unable to start operating because of the twenty day period. Consequently, the Commission believes the Rule, as adopted, is a reasonable means for the Commission to carry out its functions and imposes no unnecessary burdens on respondents.

The Commission also requested comment on whether the information in Form ATS should remain confidential. Two commenters supported the Commission's proposal to keep confidential the information contained in Form ATS,[174] and one commenter encouraged the public availability of filed information.[175] The Commission continues to believe that notice reports filed with the Commission and the alternative trading system's SRO pursuant to Regulation ATS should be kept confidential. Information required on Form ATS may be proprietary and disclosure of such information could place alternative trading systems in a disadvantageous competitive position. Further, because the Commission wishes to encourage candid and complete filings in order to make informed decisions and track market changes, preserving confidentiality provides respondents with the necessary comfort to make full and complete filings. Finally, based on the Commission's experience with Rule 17a–23 filings, the Commission believes that confidentiality is appropriate.

Finally, the Commission solicited comment on the possibility of permitting Form ATS to be filed electronically. Several commenters supported the acceptance of electronic filings by the Commission as a way to reduce the regulatory burden of filing Form ATS and in light of the technological nature of alternative trading systems.[176] The Commission agrees that electronic filing is an important goal and plans to work toward it. Currently, however, legal and technological limitations—primarily relating to security and authentication—make an electronic filing system infeasible. At this time, the Commission is capable of, and plans to, provide alternative trading systems with the ability to access Form ATS and Form ATS–R on-line, through the Commission's web site, so that the form can be downloaded. Alternative trading systems would then have to submit these forms to the Commission by mail or facsimile. Ultimately, the Commission anticipates that current technological barriers will be overcome, and a system able to electronically accept Forms ATS and ATS–R will be available.

c. Market Transparency

(i) Importance of Market Transparency

In 1997, the Commission implemented rules that require a market maker or specialist to make publicly available any superior prices that it privately offers through certain types of alternative trading systems known as ECNs.[177] The rules permit an ECN to fulfill these obligations on behalf of market makers or specialists using its system, by submitting the ECN's best priced market maker or specialist quotations to an SRO for inclusion into

[167] 17 CFR 240.17a–23. *See infra* Section V.

[168] Rule 301(b)(2)(ii), 17 CFR 242.301(b)(2)(ii).

[169] SIA Letter at 17–18.

[170] Rule 301(b)(2)(iii), 17 CFR 242.301(b)(2)(iii). Alternative trading systems would also be required to file an amendment to Form ATS to correct any previously filed information that has been discovered to have been inaccurate when filed. Rule 301(b)(2)(iv), 17 CFR 242.301(b)(2)(iv).

[171] Rule 301(b)(2)(v), 17 CFR 301(b)(2)(v). An alternative trading system is required to provide a duplicate of each of these filings to surveillance personnel designated by the SRO of which it is a member. Rule 301(b)(2)(vii), 17 CFR 301(b)(2)(vii).

[172] *See supra* note 3.

[173] SIA Letter at 17–18.

[174] *See* SIA Letter at 17–18; American Century Letter at 6.

[175] IBEX Letter at 5.

[176] *See* IBEX Letter at 5; SIA Letter at 18; American Century Letter at 6.

[177] ECNs include any automated trading mechanism that widely disseminates market maker orders to third parties and permits such orders to be executed through the system, other than crossing systems. Rule 11Ac–1–1, 17 CFR 240.11Ac1–1. *See also* Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) ("Order Handling Rules Adopting Release").

public quotation displays ("ECN Display Alternative").[178]

Since the Order Handling Rules were implemented, the spread between bids and offers in covered securities has narrowed dramatically.[179] This has benefited investors, including retail investors, who have enjoyed significant cost savings when trading covered securities.[180]

These rules, however, were not intended to fully coordinate trading on alternative trading systems with public market trading.[181] While these rules have helped integrate orders on certain alternative trading systems into the public quotation system, they only disclose the orders market makers and specialists enter into ECNs, unless the system voluntarily undertakes to disclose institutional prices.[182] In many cases, institutional orders, as well as other non-market maker orders, remain undisclosed to the public.[183] Moreover, it is voluntary for an ECN to reflect the best priced quotations in the public quotation system on behalf of market makers and specialists that participate in its system.

Because certain trading interest on alternative trading systems is not integrated into the national market system, price transparency is impaired and dissemination of quotation information is incomplete. These developments are contrary to the goals the Commission enunciated over twenty-five years ago when it noted that an essential purpose of a national market system:

> [I]s to make information on prices, volume, and quotes for securities in *all* markets available to *all* investors, so that buyers and sellers of securities, wherever located, can make informed investment decisions and not pay more than the lowest price at which someone is willing to sell, and not sell for less than the highest price a buyer is prepared to offer.[184]

(ii) Integration of Orders Into the Public Quotation System

Alternative trading systems are becoming increasingly popular venues for trading securities. Because these systems are not registered exchanges and do not participate in the national market system, there is a possibility that our securities markets could become less transparent over time.[185] The Commission believes that it is inconsistent with congressional goals for a national market system if the best trading opportunities are made accessible only to those market participants who, due to their size or sophistication, can avail themselves of prices in alternative trading systems. The vast majority of investors may not be aware that better prices are disseminated to alternative trading system subscribers and many do not qualify for direct access to these systems and do not have the ability to route their orders, directly or indirectly, to such systems. As a result, many customers, both institutional and retail, do not always obtain the benefit of the better prices entered into an alternative trading system. As the American Association of Individual Investors pointed out, "(s)imply stated, investors benefit, as do markets, from knowing the full array of best-priced orders from all sources * * * It is in the best interests of individual investors that alternative trading systems disseminate best-priced orders into quotation systems that are available to the public."[186]

(A) New Requirements for Alternative Trading Systems

The Commission is adopting Exchange Act Rule 301(b)(3) to further enhance transparency of orders displayed on alternative trading systems, and to ensure that publicly displayed prices better reflect market-wide supply and demand. Specifically, this rule requires alternative trading systems with five percent or more of the trading volume in any "covered security"[187] to publicly disseminate their best priced orders in those securities. These orders will then be included in the quotation data made available to quotation vendors by national securities exchanges and national securities associations.[188] Only those orders that are displayed to more than one alternative trading system subscriber would be subject to the

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[178] Presently, nine alternative trading systems have elected to display quotes under tha ECN Display Alternative. *See* Letters dated Jan. 17, 1997 from Richard R. Lindsey, Director, Division of Market Regulation, SEC to: Charles R. Hood, Senior V.P. and General Counsel, Instinet Corporation (recognizing Instinet as an ECN); Joshua Levina and Jeffray Citron, Smith Wall Associates (racognizing the Island System as an ECN); Gerald D. Putnam, President, Terra Nova Trading, LLC (recognizing tha TONTO System, now known as Archipelago, as an ECN); and Roger D. Blanc, Wilkie Farr & Gallagher (counsel to Bloomberg) (recognizing Bloomberg Tradebook as an ECN). *See also* Letter dated October 6, 1997 from Richard R. Lindsey, Director, Division of Market Regulation, SEC to Matthew G. Maloney, Dickstein Shapiro Morin & Oshinsky LLP (counsel to Spear, Leeds & Kellogg) (recognizing the REDI System as an ECN); Letter dated February 4. 1998 from Robert L.D. Colby, Deputy Director, Division of Market Regulation, SEC, to Linda Lerner, General Counsel, All-Tech Investmant Group, Inc. (recognizing the Attain System as an ECN); Letter dated April 21, 1998 from Richard R. Lindsey, Director, Division of Market Regulation, SEC to Mark Dorsey, Fried, Frank, Harris, Shriver & Jacobsen (counsel to The Brass Utility, LLC) (recognizing BRUT as an ECN); and Letters dated Nov. 13, 1998 from Robert L.D. Colby, Deputy Director, Division of Market Regulation, SEC to: Lloyd H. Feller, Morgan, Lewis & Bockius LLP (counsel to Strike Technologies LLC) (recognizing the Strika System as an ECN); John M. Schaible, PIM Global Equities, Inc. (recognizing the Trading System as an ECN).

[179] Quoted spreads, which measure the differenca between the inside ask and the insida bid, have declined by forty-one percent. The effective spread, which takes into account that trades may occur inside or outside the quoted spread, declined by twenty-four percent. The lower decline in the effective spread is due to a decline in trading inside the spread. *See* NASD Economic Research, Market Quality Monitoring: Overview of 1997 Market Changes (Mar. 17, 1998).

[180] A covered security is defined in the same way as it is under Rule 11Ac1–1(a)(6), 17 CFR 240.11Ac1–1. Specifically, a "covered security" is any security reported by an effective transaction reporting plan 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 Exchange Act, 15 U.S.C. 78c(a)(51)(A)(ii). *See* Rule 300(g). Accordingly, a covered security includes all exchange-listed securities, Nasdaq NM securities, and Nasdaq SmallCap securities.

[181] *See* Order Handling Rules Adopting Release, *supra* note 177, at 87–96.

[182] There is divergence among ECNs in tha extent to which they have chosen to integrate non-market maker orders into the prices they display to the public. Several of the nina ECNs that are currently linked to Nasdaq display to the public the best prices of any orders entered into their systems (including both market makers and institutions).

[183] Because such trading interest frequently remains undisclosed, within certain alternative trading systems non-market maker participants are able to display prices that lock and cross the public quotations. If the quotes of such participants wera disclosed to the public, the Commission believes it would result in improved price opportunities for public investors.

[184] *See* SEC, Statement of the Securities and Exchange Commission on the Future Structure of the Securities Markets (Feb. 2, 1972), 37 FR 5286 (Feb. 4, 1972) (emphasis added).

[185] In the Concept Release, *supra* note 2, the Commission considered whether to require certain alternative trading systems to register as exchanges. This approach would have addressed the Commission's concerns about lack of transparency by requiring certain significant alternative trading systems to participate directly in the national market system plans. Commenters to the Concept Release, however, expressed concerns about requiring alternative trading systems to register as exchanges, and that a much more workable and realistic approach would be to enhance the system of broker-dealer regulation under which alternative trading systems are currently regulated. For example, in recommending that the Commission consider allowing alternative trading systems to continue to be regulated as broker-dealers, the SIA commented that "additional steps to integrate aggregate trading interest on alternative trading systems to public view would be a sensible way of addressing concerns that may exist in the aftermath of the Order Handling Rules." Sea letter from A. B. Krongard, Chairman, Securities Industry Association Task Force on Alternativa Trading System Concept Release to Jonathan G. Katz, Secretary, SEC, received Oct. 6, 1997.

[186] Letter from John Markese, President, American Association of Individual Investors, to Jonathan G. Katz, Secretary, SEC, dated Nov. 24, 1998 ("AAII Letter") at 1.

[187] *See supra* nota 180.

[188] 17 CFR 240.11Ac1–1.

public display requirement. As discussed in Section IV.A.2.c.iii. below, alternative trading systems are also required to provide all registered broker-dealers with access to these displayed orders.

Importantly, the public display requirement in Rule 301(b)(3) applies only to orders in "covered securities." The term "covered securities" includes only exchange-listed, Nasdaq NM, and Nasdaq SmallCap securities. Accordingly, alternative trading systems trading equity securities not included within the definition of "covered security," or debt securities, would not be subject to the public display requirement under Regulation ATS.

In the Proposing Release, the Commission proposed a public display requirement substantially similar to the one it is adopting today. The proposal, however, would have only required alternative trading systems to publicly display their best priced orders in a covered security when the system represents ten percent of the trading volume in that security. The Commission decided instead to adopt a five percent threshold in light of the comment letters, many of which supported the public display requirement and recommended that the volume threshold be lower than ten percent.

In the Proposing Release, the Commission proposed that the display requirement be applied on a security-by-security basis and would not have required an alternative trading system to publicly display orders for any securities in which its trading volume accounted for less than ten percent of the total volume for such security. The Commission, however, requested comment on whether an alternative trading system should be required to display the best priced orders in *all* securities traded in its system, if it reaches the volume threshold in a specified number or percentage of the securities it trades.

After considering the comments on the issue, the Commission is adopting the security-by-security approach as proposed. Although a system that trades more than the volume threshold in a substantial number of securities could be considered a significant market whose best prices in all securities should be transparent, for now the Commission has decided to take the security-by-security approach with a lower volume threshold (five percent) than proposed. The security-by-security approach, among other things, will more readily enable the phase-in of securities subject to the transparency requirements as discussed below.

The Commission emphasizes that, as proposed, Rule 301(b)(3) only requires alternative trading systems to publicly display subscribers' orders that are displayed to more than one other system subscriber. Thus, if an alternative trading system, like some crossing systems, by its design does not display orders to other subscribers, the rules do not require those orders to be integrated into the public quote stream.[189] Similarly, if a portion of a subscriber's order is not displayed to other alternative trading system subscribers, that hidden portion is not subject to the public display requirement in Rule 301(b)(3). Thus, the Commission's rules allow institutions and non-market makers to guard the full size of their orders by using the "reserve size" features offered by some alternative trading systems, which allow subscribers to display orders incrementally. For example, a subscriber that wishes to sell 100,000 shares of a given security could place its order in an alternative trading system and specify that only 10,000 shares are to be displayed to other alternative trading system subscribers at a time. In this instance, Rule 301(b)(3) requires that only 10,000 shares be reflected in the public quote. The ability to continue to control how much of their own orders to reveal was a concern of several institutions who commented.[190] Finally, alternative trading systems are not required to provide to the public quote stream orders displayed to only one other alternative trading system subscriber, such as through use of a negotiation feature.

The Commission believes that in light of the significant trading volume on some alternative trading systems, integration of institutional and non-market maker broker-dealer orders into the national market system is essential to prevent the development of a two-tiered market. Trading anonymity will be preserved because an alternative trading system will comply with any public display requirement by identifying itself, rather than the subscriber that placed the order. Thus, the Commission's proposal, much like the ECN Display Alternative, is designed to preserve the benefits associated with anonymity. Moreover, the Commission believes that the continued ability of institutions to retain their anonymity and to use features within alternative trading systems to shield the full size of their orders gives institutions the ability to keep their full trading interest private. The Commission recognizes that anonymity is often important to institutional investors so that when they are unwinding or building security holdings they do not signal their trading strategy and negatively impact their own market position.[191]

Requiring alternative trading systems to furnish to the public quotation system the full size of the best displayed buy and sell orders will ensure that the public quote better reflects true trading interest in a particular security. Furthermore, the Commission believes that institutional investors' orders entered into alternative trading systems provide valuable liquidity, and that displaying such trading interest will substantially strengthen the national market system. Moreover, this public display requirement levels the playing field between market makers—who, when they send customer limit orders to ECNs, the ECN must publicly display that order—and those ECNs, who do not have to display customer limit orders sent directly to the ECN.

In order to monitor the effects of the public display requirement, however, the rules will permit affected alternative trading systems to phase-in institutional orders in covered securities.[192] Before April 21, 1999, the Commission will publish a schedule for the phase-in of individual securities. Fifty percent of the securities subject to the transparency requirement will be phased-in on April 21, 1999 and the remainder of the securities will be phased-in on August 30, 1999.[193]

(B) Response to Comments

The Commission requested comment on whether a ten percent volume

[189] One commenter (who does not internally display orders) expressed its support for this aspect of the proposed transparency requirement, stating that, while exchanges and broker-dealers should be subject to the same public display requirement, if an alternative trading system did not display any orders to subscribers, it should not be required to publicly display those orders to non-subscribers through the public quotation stream. *See* OptiMark Letter at 4.

[190] *See infra* notes 206–207 and accompanying text.

[191] The Commission plans to monitor the effects of the reserve function on market liquidity and transparency.

[192] In addition to phasing in the transparency requirements for institutional orders, affected alternative trading systems may also choose to phase-in the access requirements for the covered securities. *See infra* notes 216–217 and accompanying text.

[193] The Commission notes that the later date will fall within the moratorium to facilitate Year 2000 conversion. Securities Exchange Act Release No. 40377 (Aug. 27, 1998), 63 FR 47051 (Sept. 3, 1998). The Commission believes that the phase-in will not require major reprogramming, however, and consequently is not subject to the moratorium. In addition, alternative trading systems may voluntarily publicly display all non-market maker broker-dealer and institutional orders covered by the requirement on or before April 21, 1999.

threshold would effectively ensure that alternative trading systems comprising a significant percentage of the market are subject to basic market transparency requirements. The commenters that responded to this issue were split on whether a ten percent volume threshold was too high or too low, although most felt it was too high and should be lowered.[194] A few commenters, however, stated that they believed the volume thresholds were too low.[195]

As discussed above, the transparency requirement the Commission is adopting in Rule 301(b)(3) obligates an alternative trading system to disseminate into the public quote the best priced orders in each covered security in which the trading on such system represents more than five percent of total trading volume. The Commission is persuaded by commenters that stated that a ten percent threshold would exclude trading on too many alternative trading systems. The Commission believes that lowering the threshold to five percent will provide more benefits to investors, promote additional market integration, and further discourage two-tier markets. At the same time, the Commission believes that those alternative trading systems with less than five percent of the volume would not add sufficiently to transparency to justify the costs associated with linking to a market.

The Commission requested comment on whether an alternative trading system should be required to display the best priced orders in all securities traded in its system, if it reaches the volume threshold in a specified number or percentage of the securities it trades. Of those commenters addressing this issue, most were in favor of display of the best priced orders in *all* securities traded on an alternative trading system once that alternative trading system exceeded the volume threshold in some fixed number of securities.[196] The NYSE stated that if an alternative trading system developed a "general presence" in the market, for example by reaching the volume threshold in ten or more securities, that alternative trading system should display the best priced orders in all securities it trades. One commenter, however, specifically opposed the display of all securities traded on an alternative trading system rather than mandating display on a security-by-security basis.[197] This commenter also noted that even display on a security-by-security basis may capture a system that trades a significant amount of one security, despite the fact that that security was a minor part of the overall trading in the system. As discussed above, however, the Commission is adopting the rule as proposed.

The Commission also requested comment on whether alternative trading systems should be required to display the full size of the best priced order, even if the full size is hidden from alternative trading system subscribers through use of a "reserve size" or similar feature. All commenters directly addressing this issue[198] stated that the reserve feature should be maintained, especially if the Commission's rules as adopted required displayed institutional orders to be integrated into the public quotation stream. The Commission agrees that the reserve features are critical to institutions' ability to minimize the market impact of their orders. Further, when orders are not displayed to anyone, the Commission's concerns about a two-tiered market—where some market participants have information others do not—are absent. Accordingly, Rule 301(b)(3) only requires alternative trading systems to publicly disseminate the best priced orders that are displayed to other alternative trading system subscribers.

The Commission requested comment on whether it would be more appropriate to adopt an alternative to Rule 301(b)(3) that would permit, but not require, the public display of the best-priced institutional orders displayed in a high volume alternative trading system. Under this alternative, an alternative trading system meeting the requirements of Rule 301(b)(3)(i) would only be required to provide to a national securities exchange or national securities association the best-priced orders in covered securities displayed in the alternative trading system by any broker or dealer and by any other subscriber that elects to make its orders available for public display. The

[194] *See* AAII Letter at 1 (suggesting that the volume threshold be much lower than ten percent), NYSE Letter at 5 (stating that it believed a more appropriate level would be five percent of the aggregate daily volume in a security in any two of the three most recent months, because very few registered markets (exchanges and associations) accounted for more than ten percent of the volume in any security); CHX Letter at 8 (suggesting that the Commission require all alternative trading systems to display their best orders regardless of trading volume); NASD Letter at 1 (suggesting a volume threshold of one percent); American Century Letter at 5 (stating opposition to any volume threshold, as volume in any alternative trading system may be sporadic over time). *See also* ICI Letter at 3; IBEX Letter at 7–8; Ashton Letter at 4; TBMA Letter pp. 21–22 (stating that it concurred that display of equity securities trading on alternative trading systems was beneficial to the market as a whole).

[195] *See* SIA Letter at 12 (stating that a volume level of ten percent had the potential to capture insignificant market players and therefore recommending that the Commission consider a level of twenty percent).

[196] *See* ICI Letter at 2, n.5 (stating that the display requirement should apply to all securities and to all alternative trading systems, regardless of volume. The ICI stated that this would avoid the practice of routing to a particular system simply to avoid display); NYSE Letter at 5 (stating that if an alternative trading system developed a "general presence" in the market, for example by reaching the volume threshold in ten or more securities, that alternative trading system should display the best priced orders in all securities it traded); Ashton Letter at 4 (stating that once an alternative trading system achieved one percent in a given "category" of securities over a six month period, the system should be required to display its best orders in all the securities in that category); CHX Letter at 8 (stating that any volume threshold should be applied on an alternative trading system as a whole, not on a security-by-security basis, because of the burden of tracking security-by-security); American Century Letter at 5 (commenting that a rule requiring public display of all orders displayed in an alternative trading system was preferable). *See also* IBEX Letter at 8; NASD Letter at 11. *But see* SIA Letter at 12.

[197] *See* SIA Letter at 13–14 (supporting display of orders on a security-by-security basis and recommending that the volume threshold be raised to twenty percent of the trading volume in that security nationwide; also stating that no orders should be required to be displayed in the public quotation stream unless the trading volume in that security on the alternative trading system exceeded twenty percent of the alternative trading system's overall trading activity). Of course, the Commission assumes that those commenters who opposed display of non-market maker orders generally would also oppose the display of all securities as well, rather than only those above a certain volume threshold. *See infra* notes 204–205.

[198] *See* ICI Letter at 3 (stating that the ICI supports display of institutional orders provided that the reserve size feature is retained, and provided that orders are displayed in the public quotation system under the name of the alternative trading system, and not the name of the subscriber placing the order, thereby preserving anonymity); IBEX Letter at 8–9 (stating that the "reserve size" feature permitted alternative trading system subscribers to avoid adverse market impact and negotiate a larger transaction with a single counter-party, two features IBEX believes to be of considerable value. IBEX stated, however, that reserve size availability to subscribers to an alternative trading system should be contingent on an initial increment being publicly displayed; non-subscribers being able to execute against the reserve size; and the full size and price of each increment being immediately reported, as executed, to the public quotation system); Ashton Letter at 6 (stating that all orders up to 10,000 shares should be displayed, and that orders in excess of 10,000 shares, should have a minimum of 10,000 shares publicly displayed; also stating that negotiation and reserve size features should be available to non-subscribers, as well as subscribers); American Century Letter at 5 (stating that it was "imperative" that the reserve feature be maintained, because it provided depth of supply and demand at a price, while protecting the order from being used as a "free option" by other participants in the market). *See also* Instinet Letter at 11–13 (arguing against total pre-trade transparency); Bloomberg Letter at 19 n.32 (noting reserve feature in the Tradebook System); Letter from Daniel G. Weaver, Associate Professor of Finance, Zicklin School of Business, Barauch College to Jonathan G. Katz, Secretary, SEC, dated Nov. 23, 1998 ("Weaver Letter") (stating that institutions will move their trading upstairs even if the full size of their orders is hidden from alternative trading system subscribers through their use of a "reserve size" feature).

Commission requested comment on whether such an alternative would sufficiently address the Commission's concerns with transparency and fragmentation in the markets. The Commission is concerned, however, that this alternative could exacerbate the competitive disparities between broker-dealers and ECNs. Under the Order Handling Rules, different order display requirements are imposed on limit orders received by a market maker and forwarded to an ECN, than are imposed on orders entered directly into an ECN. One commenter expressed concern that this differential treatment could serve as a disincentive for customers to place orders with a broker-dealer that acts as a market maker in a security.[199]

Most commenters that expressed support for the display of institutional and non-market maker broker-dealer orders did so because the display of these orders would increase transparency and liquidity in the market. The Investment Company Institute ("ICI") stated that it would support the display of institutional orders because it believed display of those orders would improve the overall transparency and liquidity of the market. This support, however, was contingent upon the continued availability of the "reserve" feature offered by some alternative trading systems.[200] Another commenter, similarly, supported disclosure of institutional orders because displayed orders "are good for markets," and stated that there was no cause for concern that requiring institutions to display in the public quotation stream would lead to a decrease in orders displayed through alternative trading systems. In fact, this commenter stated its belief that the opposite would occur, and pointed to the proliferation of ECNs as evidence.[201] The NYSE also commented that requiring display of institutional orders in the market would add transparency and liquidity. The NYSE added that it strongly believes all orders of high volume alternative trading systems, including orders of 10,000 shares or more, should be required to be publicly displayed.[202] Ashton suggested that orders of up to 10,000 shares on all alternative trading systems should be fully displayed, and orders exceeding 10,000 shares should have at least 10,000 shares publicly displayed. Ashton stated that it believed this would strike the appropriate balance between displaying such orders and minimizing their market impact.[203]

The commenters who opposed display of non-market maker broker-dealer and institutional orders did so because of the market impact they felt such orders would have if displayed. Instinet stated that requiring the display of institutional orders would have several negative effects on the market. In particular, Instinet claimed that public display of institutional orders could have a "significant negative impact" on the price and volatility of a security, would divert this order flow to entities not subject to Regulation ATS or to offshore markets, and would curtail the ability of institutions to manage the securities transactions of the individual investors for whom they act as proxy.[204] Instinet also stated that institutional and other non-market maker investors do not perform specialized market functions, and therefore should not be subject to mandatory display in the public quotation system. Finally, Instinet stated it believed that customers should be able to determine the transparency of their orders whether they were placed with a "traditional brokerage firm" or a firm "that offers both traditional and electronic execution opportunities."[205]

The Commission is not persuaded by commenters that suggest that institutions currently willing to use alternative trading systems to display their orders to other alternative trading system subscribers, including other institutions, market-makers, and broker-dealers, will be less willing to use alternative trading systems that must display those orders to the public market. Our reasons are as follows. The primary group of market participants that will benefit from the public display of institutional orders is retail investors. Retail investors are not currently alternative trading system subscribers. To avoid market impact, institutions try to avoid signaling other institutions and market professionals, not retail investors. Almost all market professionals and a significant number of institutions already subscribe to alternative trading systems. Thus, the Commission believes that the additional exposure to the market should not affect institutions' behavior in their use of alternative trading systems. Moreover, to the extent that institutions want to display small sized orders in the public market, rather than their entire order, they will still be able to make use of an alternative trading system's "reserve size" feature. This will enable institutions to avoid exposing the total size of their order to the public market.

The Commission also received numerous comment letters from institutions who expressed similar concerns. Some of these commenters appeared to be concerned that they might be forced to display all orders sent to alternative trading systems, even those orders, or those portions of orders, that are not displayed to any other alternative trading system subscribers.[206] To the extent that these letters are concerned with "full disclosure," that concern is misplaced. Instead, the Commission proposed, and is adopting, a public display requirement that applies only to those orders (or those portions of orders) that alternative trading system subscribers

[199] *See* Letter from Wessels, Arnold & Henderson, LLC to Jonathan G. Katz, Secretary, SEC, dated Nov. 12, 1997 (commenting on the Concept Release).

[200] 7/28/98 ICI Letter at 2–3. In a later letter, the ICI requested clarification of whether certain orders the ICI described as "non-firm" would be subject to display under the Commission's rules. *See* Letter from Craig S. Tyle, General Counsel, ICI, to Jonathan G. Katz, dated November 13, 1998 ("11/13/98 ICI Letter"). *See also* the discussion *supra* at Section III.A.3.

[201] American Century Letter at 4–5.

[202] NYSE Letter at 6.

[203] Ashton Letter at 6.

[204] Instinet Letter at 3, 12, and 14.

[205] *Id.* at n.18 and n.23. *See also* Letter from David K. Whitcomb, Professor of Finance and Economics, Rutgers University to Jonathan G. Katz, Secretary, SEC, dated July 27, 1998 ("Whitcomb Letter") at 2–3 (stating that institutions may, in some instances, feel strongly that displaying their orders more widely than to other participants in the alternative trading system is undesirable, and that, as a result, institutions may be induced to spread their business among firms on the basis of whether the alternative trading system has reached the volume threshold for public display of orders, rather than on the basis of quality of service.); Letter from Ruben Lee, Oxford Finance Group to Jonathan G. Katz, Secretary, SEC, dated July 28, 1998 ("Lee Letter") at 2–3 (stating that while mandatory transparency might help retail investors monitor the quality of their executions and reduce the inequality in access to information that retail investors face, it could compromise efficiency and liquidity).

[206] *See* 7/28/98 ICI Letter; 11/13/98 ICI Letter; Letter from Rick Dahl, Chief Investment Officer, Missouri State Employees' Retirement System to Jonathan G. Katz, Secretary, SEC, dated Nov. 12, 1998 ("Mosers Letter"); Letter from Russell Rhoads, Director of Equity Trading, and Michael B. Orkin, Chairman and CEO, Caldwell & Orkin, Inc. to Jonathan G. Katz, Secretary, SEC, dated Nov. 20, 1998 ("Caldwell Letter"); Letter from Todd M. Sheridan, Senior Portfolio Manager, Caterpillar Investment Management Ltd. to Jonathan G. Katz, Secretary, SEC, dated Nov. 19, 1998; Letter from Praveen K. Gottipalli, Director of Investments, Symphony Asset Management to Jonathan G. Katz, Secretary, SEC, dated Nov. 20, 1998 ("Symphony Letter"); Letter from Cinda A. Carmer, Senior Securities Trader, Heartland Capital Management, Inc. to Jonathan G. Katz, Secretary, SEC, dated Nov. 17, 1998; Letter from Patrick J. McCloskey, Senior Vice President, Wellington Management Company, LLP to Jonathan G. Katz, Secretary, SEC, dated Nov. 23, 1998 ("Wellington Letter"); Letter from Carrie Canter, Principal, Equity Trading, Barrow, Hanley, Mewhinney & Strauss, Inc. to Jonathan G. Katz, Secretary, SEC, dated Nov. 12, 1998 ("Barrow Letter"). *See also* Weaver Letter (stating that if the Commission required institutions to display the full size of their orders, even if the full size is hidden from alternative trading system subscribers through their use of a "reserve size" feature, institutions will move their trading upstairs).

have already decided to display to the large number of other alternative trading system subscribers. Institutions will remain free to use a reserve feature, if an alternative trading system has one, to not display full size of their orders to other alternative trading system subscribers. That non-display of total order size will also apply if that order is displayed in the public quote.

Other commenters generally expressed concerns similar to those expressed by Instinet, emphasizing concerns about best execution for institutional orders, and expressing concern about increased market volatility.[207] The Commission believes that display of institutional orders in the public quote stream will not harm best execution—if anything—best execution will be enhanced as all market participants will have an opportunity to execute against these orders. The Commission also believes that the experience with display of market maker orders under the Order Handling Rules suggests that display of institutional orders will not lead to increased market volatility. Many of the largest market participants already have access to alternative trading system institutional orders; therefore, their display in the public quote stream should not necessarily lead to increased market volatility. It will, however, allow those market participants who do not have access to these alternative trading systems to have the opportunity to execute against these orders.

Some of the letters the Commission has received since the beginning of November also express a concern that if institutional orders were publicly displayed, institutions would lose their anonymity.[208] The Commission did not propose, nor is it adopting, any requirement that would jeopardize an institution's anonymity. Similar to the way in which ECNs currently display orders in the public quote, alternative trading systems would display their best priced orders in the public quote, but would not indicate which of their subscribers had entered the order.

In addition, a number of institutional commenters suggested if Nasdaq had implemented its proposed limit order file, they would not oppose a requirement that alternative trading systems publicly display institutional orders, if those orders represent the best priced order in the alternative trading system they use.[209] Unfortunately, none of these commenters explained why they would be willing to publicly display their orders through a Nasdaq sponsored central limit order file, but not publicly display orders they have chosen to display to other alternative trading system subscribers.

Finally, one commenter expressed concern that the order display rule would mean that retail investors would increasingly observe trades taking place below the bid and above the ask, and would be frustrated by their lack of access to these trades.[210] Because certain institutions' orders will now be displayed in the public quote, however, retail investors will have access to them. The lack of access retail investors currently have to alternative trading systems is one of the reasons the Commission believes that the display of institutional orders in the public quote stream is particularly important. In addition, this commenter stated that requiring public display of institutional orders would tilt the playing field in favor of dealers who do not have to display institutional orders.[211] Under the Order Handling Rules, however market makers are required to display all customer limit orders that improve their quote.

For these reasons, the Commission agrees with those commenters who believe that institutional orders that are displayed to subscribers of an alternative trading system should be integrated into the public quotation system if they represent the top of the book in the alternative trading system.[212] The Commission believes that any market impact that results from such display will be vitiated by the retention of the reserve feature, as discussed above. The Commission notes that such institutional orders are currently displayed to the subscribers of alternative trading systems, who may number in the thousands. These subscribers are often the market makers and other active traders in the security. As a result, prices displayed only on alternative trading systems are immediately known to key market players who can adjust their trading to take advantage of their information advantage. Moreover, the Commission believes that these orders will provide enhanced transparency and liquidity when integrated into the public quotation stream, and will further curtail the development of a two-tiered market.

Nonetheless, the Commission is concerned about commenters' statements that institutions may react to the transparency requirement by shipping more orders upstairs or overseas. The Commission intends to closely monitor the impact of this requirement, and will modify it if harm appears to result.

(iii) Access to Publicly Displayed Orders

(A) Application of Access Requirements Under Regulation ATS

The Commission believes that in addition to the display of better alternative trading system prices in the public quotation system, the availability of such trading interest to public investors is an essential element of the national market system. Therefore, the Commission proposed that alternative trading systems afford all non-subscriber broker-dealers equivalent access to the alternative trading system orders displayed in the public quote, similar to the manner in which ECNs currently comply with the ECN Display

[207] *See* Letter from Gary E. Shugrue, General Partner, Argos Partners Ltd., to Jonathan G. Katz, Secretary, SEC, dated Nov. 11, 1998 ("Argos Letter"); Letter from Stacey Matthews, Chelsey Capital, to Jonathan G. Katz, Secretary, SEC, dated Nov. 16, 1998, ("Chelsey Letter"); Letter from John D. Race, Partner, DePrince, Race & Zollo, Inc., to Jonathan G Katz, Secretary, SEC, dated Nov. 16, 1998, ("DePrince Letter"); Letter from Michael W. Masters, Portfolio Manager, Masters Capital Investments, LLC, to Jonathan G. Katz, Secretary, SEC, dated Nov. 16, 1998, ("Masters Letter"); Letter from Denise O'Brien, Head of Equity Trading, Wanger Asset Management, LP, to Jonathan G. Katz, Secretary, SEC, received Nov. 19, 1998, ("Wanger Letter"); Letter from Gerald N. Brown, Becker Capital Management, to Jonathan G. Katz, Secretary, SEC, received Nov. 19, 1998 ("Becker Letter"); Letter from Della L. Hood-Laster, V.P. Equity Trading, Loomis Sayles & Company, LP, to Jonathan G. Katz, Secretary SEC, dated Nov. 12, 1998, ("Loomis Letter"). *See also* Barrow Letter and Mosers Letter.

[208] *See* Letter from Susan Ellis, Vice President, Trading, Granahan Investment Management, Inc. to Jonathan G Katz, Secretary, SEC dated Nov. 16, 1998; Letter from Genrald N. Brown, Becker Capital Management to Jonathan G. Katz, Secretary, SEC received Nov. 19, 1998; Letter from Teresa M. Brandt, Head Equity Trader, Advantus Capital Management, Inc. to Jonathan G. Katz, Secretary, SEC dated Nov. 19, 1998; Letter from Kristen Straubel, Head Trader and Robert T. Lutts, President, Cabot Money Management, Inc. to Jonathan G. Katz dated Nov. 20, 1998; Letter from Tracy Altebrando, Senior Equity Trader, Metropolitan Capital Advisors, Inc. to Jonathan G. Katz, Secretary, SEC, dated Nov. 25, 1998. *See also* Wanger Letter, Caldwell Letter, Symphony Letter, Wellington Letter.

[209] *See, e.g.*, Loomis Letter, Chelsey Letter.

[210] Letter from Ed Restrepo, Head Trader, VanWagoner Capital Management to Jonathan G. Katz, Secretary, SEC, dated Nov. 16, 1998 ("VanWagoner Letter").

[211] *See* VanWagoner Letter. *See also* Letter from Stacey Carter Fleece, Chief Financial Officer, Brookhaven Capital Management to Jonathan G. Katz, Secretary, SEC dated Nov. 18, 1998 (stating that institutional orders submitted to dealers do not have to be published); Letter from John D. Robinson, Head Trader, Longwood Asset Management to Jonathan G. Katz, Secretary, SEC, dated Nov. 25, 1998.

[212] Under Rule 301(b)(3), non-market maker broker-dealer orders entered into alternative trading systems must also be displayed. 17 Cr R 242.302(b)(3).

Alternative under the Quote Rule.[213] The Commission agrees with those commenters who stressed the importance of equivalent access for non-participants and who stated that simply requiring alternative trading systems to display prices in the public quotation system does not go far enough to facilitate the best execution of customer orders without a mechanism to access orders at those prices.[214] Accordingly, the Commission is adopting the requirement as proposed.[215] Specifically, with respect to any security in which an alternative trading system is required to publicly display its best priced orders because it has five percent or more of all trading in that security, such alternative trading system must provide for members of the SRO with which it is linked the ability to effect a transaction with those orders. As discussed above, the Commission is phasing in the public display requirement.[216] In addition, alternative trading systems are not required to provide access to a security until the public display requirement is effective for that security.[217]

The Commission believes that non-subscribing broker-dealers should be able to execute against those alternative trading system orders that are publicly displayed to the same extent as if that price had been reflected in the public quote by a national securities exchange or national securities association. Thus, an alternative trading system should respond to orders entered by non-participants no slower than it responds to orders entered directly by subscribers. The Commission believes that, under current NASD rules, any alternative trading system that allows non-subscribing broker-dealers to execute against publicly displayed alternative trading system orders in the same manner as ECNs linked to the Nasdaq market currently do would comply with this requirement. The NASD does not currently require ECNs to automatically execute orders sent to the ECN through the NASD's SelectNet linkage with the ECN. Any SRO to which alternative trading systems may be linked, may determine that it is necessary for the fair and orderly operation of its market to require that publicly displayed alternative trading system orders be subject to automatic execution. Any such proposed rule change, of course, would have to be filed with the Commission by the SRO, published for comment, and approved by the Commission. The Commission would not approve any such SRO rule unless it finds that such rule is consistent with the Exchange Act.

(B) Response to Comments

The Commission asked for comment on whether alternative trading systems should be required to provide non-subscribers with equivalent access to displayed orders. Several commenters responded to this issue. Most of these commenters stated that non-subscribers should be given equivalent access.[218] Only one commenter cautioned against granting such access. This commenter argued that alternative trading systems and traditional broker-dealers engage in the same business and, therefore, it would impede innovation as well as be unfair to require fair access to trading opportunities on alternative trading systems when the Commission is not proposing to require such access to more traditional broker-dealers.[219] The Commission does not believe that alternative trading systems and traditional broker-dealers engage in the same business.[220] As discussed above, the Commission believes that the public display of orders on alternative trading systems that are currently displayed only to the subscribers of those alternative trading systems will improve the public securities markets. Without a mechanism to access these orders, any public display requirement is insufficient. Accordingly, the Commission is adopting the fair access requirement.

In the Proposing Release, the Commission also stated that it believes that for an alternative trading system to comply with this equivalent execution access requirement, the publicly displayed alternative trading system orders would need to be subject to automatic execution through small order execution systems operated by the SRO to which the alternative trading system is linked. One commenter strongly urged the Commission to eliminate the automatic execution access requirements from its proposal. This commenter was opposed to such a linkage, because it believed it would effectively eliminate pure agency brokers from markets in covered securities, because brokers would be required to commit capital if automatic execution resulted in multiple executions against client orders. This commenter also noted that the Commission's Order Handling Rules do not require automatic execution, but require only that response times for non-subscriber trade requests are no slower than response times for subscribers, and believed this to be a more balanced approach to execution access issues.[221] Similarly, American Century, while supporting equivalent access to non-subscribers, stated that automatic execution access requirements were risky as well, because of the possibility of double execution.[222] The Commission does not expect—by operation of its rules alone—that alternative trading systems will be subject to automatic execution through SROs' small order execution systems. Nevertheless, the Commission believes that an SRO to which an alternative trading system is linked should be able to establish rules regarding how that alternative trading system is integrated into its market. The Commission notes that any change to SRO rules regarding automatic execution would have to be approved by the Commission after notice and the opportunity for the public to comment, and subject to Commission review for competitive fairness and consistency with the Exchange Act.

In addition, the Commission asked if there was a feasible way to allow market-wide interaction without linkage to SRO order execution systems, and whether there was a feasible way to grant equivalent non-subscriber access to institutions that are not broker-dealers.

(iv) Execution Access Fees

(A) Limitations on Alternative Trading System Fees Charged to Non-Subscribers

In the Proposing Release, the Commission stated that an alternative trading system's fee schedules should not be used to circumvent the ability of non-participants to access a system's publicly displayed orders.[223] Because reasonable fees are a component of equal access, the rules the Commission is adopting today prohibit an alternative trading system from setting fees that are inconsistent with the principle of equivalent access to the alternative trading system quotes by members of the SRO to which the alternative trading

[213] Rule 11Ac1–1(c)(5)(ii), 17 CFR 240.11Ac1–1(c)(5)(ii) ("Quote Rule"). *See also* Order Handling Rules Adopting Release, *supra* note 177.

[214] *See infra* note 218 and accompanying text.

[215] Rule 301(b)(5), 17 CFR 242.301(b)(5).

[216] *See supra* notes 192–193 and accompanying text.

[217] The Commission emphasizes that, as with the transparency phase-in, alternative trading systems may voluntarily provide access to non-subscribers on or before April 21, 1999 in all securities covered by the rule.

[218] *See* ICI Letter at 3; IBEX Letter at 9–10; Ashton Letter at 6; American Century Letter at 2; OptiMark Letter at 4.

[219] Instinet Letter at 10.

[220] *See supra* notes 205–212 and accompanying text.

[221] Instinet Letter at 16–17.

[222] American Century Letter at 2.

[223] *See* Proposing Release, *supra* note 3, at n. 108.

system is linked. The rules also require an alternative trading system to comply with the rules or standards governing fees established by the national securities exchange or national securities association through which non-subscribers have access.[224]

The Commission believes that fees charged by an alternative trading system would be inconsistent with equivalent access if they have the effect of creating barriers to access for non-subscribers. As the Commission stated in adopting the Order Handling Rules, any ECN fees should be similar to the communications or systems charges imposed by various markets.[225] In addition, the Commission believes that the national securities exchange or national securities association to which the alternative trading system provides the prices and sizes of its best priced orders should have further authority to assure that fees charged by alternative trading systems to non-subscribers are disclosed or otherwise consistent with fees typically charged by the members of the exchange or association for access to displayed orders. There are a number of ways the exchange or association could address the issue of fees charged by alternative trading systems. For example, subject to Commission review and approval, an exchange or association could establish a standard for what constitutes a fair and reasonable fee for non-subscriber access to an alternative trading system, consistent with the effective operation of the self regulatory organization's market and the Commission's equivalent access requirement. The exchange or association may also require alternative trading system fees to be charged in a manner consistent with the exchange's or association's market, such as requiring the fee to be incorporated in the displayed quote.

At such time as quotations in the national market system are reflected in decimals rather than in fractions, the Commission will reconsider the rule's limitation on alternative trading systems charging fees only as permitted by the national securities exchange or national securities association to which they are linked. At that time, the Commission will also consider whether alternative trading systems should be permitted or required to reflect any fee charged in their quotations.

Any rules the exchange or association develops will of course need to be consistent with the goals of promoting competition and protecting investors. The Commission encourages SROs that accept alternative trading system quotes to work with alternative trading systems to develop uniform standards regarding display and execution access by SRO members to alternative trading systems linked to the SRO.[226] In addition, to foster equivalent access to alternative trading systems for exchange-listed securities, the Commission expects Intermarket Trading System ("ITS") participants to modify ITS Plan requirements where necessary to accommodate alternative trading system participation in the markets of ITS participants, and access to those alternative trading systems through ITS. If the SROs and ITS participants cannot come to terms with affected alternative trading systems within a reasonable time, the Commission will consider exercising its authority to mandate the necessary linkages.

(B) Response to Comments

The Commission requested comment on the fees that alternative trading systems should be permitted to charge non-subscribers under the proposed rules. In addition, the Commission requested comment on whether there were alternatives for assuring fair execution access for non-subscribers other than limiting fees, or another test for determining whether non-subscriber fees assure equal access.

Ten comment letters addressed the issue of fees charged by alternative trading systems for access by non-subscribers. Of these, seven were generally in favor of permitting alternative trading systems to charge some fee to non-subscribers,[227] two were opposed,[228] and one felt the issue needed to be addressed in a separate release by the Commission.[229]

Most of the commenters who were in favor of allowing fees stated that fees should be "reasonable," or should not exceed the fees typically charged to subscriber broker-dealers. The NASD, while not opposing such fees, stated that the Commission should reconsider the benchmark for an alternative trading system's fees, because it believed that for many alternative trading systems, non-subscriber orders were of primary importance. Because of this, the NASD stated that any fees should be set at the low end of the threshold, rather than at the level that a "substantial proportion" of an alternative trading system's broker-dealer customers were paying. The NASD supported permitting SROs to regulate fees, so that such issues could be discussed at the SRO level. The NASD also recommended that the Commission discuss "the practical issues related to billing disputes and refusals to trade," because billing disputes have led to locked and crossed markets.[230] Finally, the NASD asked the Commission to address the best execution obligations of market participants when a fee is not included in the publicly displayed price of an order. A broker-dealer's duty of best execution requires it to seek the most favorable terms reasonably available under the circumstances for a customer's transaction. While price is the predominant element of best execution, the traditional non-price factors of executions should also be considered.[231]

Instinet commented that market forces should determine the appropriate fees that broker-dealers can charge for their services. Consequently, Instinet opposed any proposal to limit (or eliminate entirely) access fees charged by a broker-dealer subject to Regulation ATS if the rules of the national securities exchange or association to which the broker-dealer is linked limits (or prohibits) such fees. The Commission will, of course, review any proposed SRO rules relating to access fees. To be approved by the Commission, any such rules must be necessary to maintain consistency within the SRO's market, as well as being designed to promote just and equitable principles of trade, to promote fair competition, to facilitate transactions in securities, and, in general, to protect investors and the public interest.[232] Instinet also stated,

[224] Rule 301(b)(4), 17 CFR 242.301(b)(4).

[225] *See* Order Handling Rules Adopting Release, *supra* note 177, at n.272.

[226] *See, e.g.*, NASD Rule 4623. Securities Exchange Act Release Nos. 38156 (Jan. 10, 1997), 62 FR 2415 (Jan. 16, 1997); 38008 (Dec. 2, 1996), 61 FR 64550 (Dec. 5, 1996).

[227] *See* ICI Letter at 3; Instinet Letter at 17–18; NASD Letter at 12; American Century Letter at 2; OptiMark Letter at 5. *See also* IBEX Letter at 11 (opposing allowing SROs to dictate a fee schedule for alternative trading systems, in which fees charged non-subscribers are lower than those charged subscribers), Ashton Letter at 6, n.7 (opposed to the idea that non-subscribers be linked through an SRO execution system only).

[228] *See* NYSE Letter at 7; CHX Letter at 8–10.

[229] SIA Letter at 17 (stating that fees imposed by alternative trading systems raised a number of procedural, structural and policy issues, and recommending that the Commission make these the subject of a separate release).

[230] NASD Letter at 12. *See also* ICI Letter at 3 (recommending that alternative trading systems be required to comply with any SRO rules limiting fees).

[231] *See* Order Handling Rules Adopting Release, *supra* note 177, at nn.347–65 and accompanying text; Division of Market Regulation, Division of Market Regulation, Market 2000: An Examination of Current Equity Market Developments App V (1994) ("Market 2000 Study").

[232] While SRO proposed rule changes relating to fees imposed by the SRO are eligible to become effective upon filing under section 19(b)(3)(A)(ii) of

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however, that it would urge the Commission to ensure that all public execution access fee requirements were handled in such a way that all orders integrated into the public quote stream were treated consistently, and so that all broker-dealers were able to set appropriate fees for the services they performed, subject to SRO rules.[233]

American Century stated that all market participants who posted bids and offers, not just alternative trading systems, should be permitted to charge fees. American Century recommended that participants who provide liquidity be permitted to charge a fee for that liquidity, and that those who took liquidity should pay fees.[234] OptiMark stated that the Commission should consider what economic incentive it would be creating by permitting alternative trading systems that register as broker-dealers to charge fees, but not permitting those that register as exchanges to do so.[235]

The Commission also requested comment on whether fees should be included in the price of an order quoted to the public, particularly once orders are quoted in decimals. In this regard, the NYSE and the Chicago Stock Exchange ("CHX") stated that fees made it difficult to determine the true cost of executing an order and indicated that this would change if fees could be included in the quote.[236] As discussed above, when quotations in the national market system are reflected in decimals rather than fractions, the Commission will reconsider whether alternative trading systems should reflect any fees charged in their quote, and if so, whether they should be subject to SRO requirements.

(v) Amendment to Rule 11Ac1–1 Under the Exchange Act

The Commission also proposed an amendment to Rule 11Ac1–1 under the Exchange Act.[237] The amendment would expand the ECN Display Alternative to allow alternative trading systems that display orders and provide equal execution access to those orders under Rule 301(b)(3) of Regulation ATS to fulfill market makers' and specialists' obligations under the Quote Rule. Only two comment letters addressed the proposed amendment to the Quote Rule, both of which supported it.[238]

The Commission is adopting the amendment to the Quote Rule as proposed.[239] The Quote Rule currently requires all market makers and specialists to make publicly available any superior prices that it privately offers through ECNs. The ECN Display Alternative in the Quote Rule permits an ECN to fulfill these obligations on behalf of market makers and specialists using its system by submitting the ECN's best market maker or specialist priced quotation to an SRO for inclusion into the public quotation.[240] Today's amendment to the Quote Rule is intended to expand the ECN Display Alternative to allow alternative trading systems that display orders and provide equal execution access to those orders under Rule 301(b)(3) of proposed Regulation ATS to fulfill market makers' and specialists' obligations under the Quote Rule.

d. Fair Access

(i) Importance of Fair Access

The Exchange Act requires registered exchanges and national securities associations to consider the public interest in administering their markets and to establish rules designed to admit members fairly.[241] These requirements are intended to ensure that markets treat investors and other market participants fairly.[242] Alternative trading systems that choose to register as exchanges will be subject to these requirements. Under the current regulatory approach, however, there is no mechanism to prevent unfair denials or limitations of access by alternative trading systems or regulatory oversight of such denials or limitations of access. Access to alternative trading systems may not be critical when market participants are able to substitute the services of one alternative trading system with those of another. However, when an alternative trading system has a significantly large percentage of the volume of trading, unfairly discriminatory actions hurt investors lacking access to the system.

Fair treatment by alternative trading systems of potential and current subscribers is particularly important when an alternative trading system captures a large percentage of trading volume in a security, because viable alternatives to trading on such a system are limited. Although the Commission is adopting rules to require alternative trading systems with significant trading volume to publicly display their best bid and offer and provide equal access to those orders,[243] direct participation in alternative trading systems offers benefits in addition to execution against the best bid and offer. For example, participants can enter limit orders into the system, rather than just execute against existing orders on a fill-or-kill basis. Participants in an alternative trading system can view all orders, not just the best bid or offer, which provides important information about the depth of interest in a particular security. Participants also have access to unique features of alternative trading systems, such as "negotiation" features, whereby one participant can send orders to another participant proposing specific terms to a trade, without either participant revealing its identity. Some alternative trading systems also allow participants to enter "reserve" orders which hide the full size of an order from view. Because of these advantages to participants in an alternative trading system, access to the best bid and offer through an SRO is an incomplete substitute. Therefore, the rules the Commission is adopting today require most alternative trading systems that are registered as broker-dealers and that have a significant percentage of overall trading volume in a particular security to comply with fair access standards, as described in more detail below.[244]

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the Exchange Act, and Rule 19b–4(e)(2) of the Exchange Act, the Commission continues to require SROs to file proposed rule changes regarding fees applicable to non-members or non-participants under section 19(b)(2) for full notice and comment. *See* Securities Exchange Act Release No. 35123 (Dec. 20, 1994), 59 FR 66692 (Dec. 28, 1994). Thus, a proposed SRO rule relating to fees that alternative trading systems charge would not be eligible to become effective upon filing.

[233] Instinet Letter at 17–18 (also stating that the SRO to which an alternative trading system belonged should not be authorized to set fees).

[234] American Century Letter at 2 (also agreeing that decimalization will provide a more valid framework for this pricing structure). *See also* ICI Letter at 3, n.8 (stating that market makers should be able to assess liquidity fees when their quotes are "hit").

[235] OptiMark Letter at 4–5.

[236] NYSE Letter at 7 (stating that such fees could make it impossible for market participants to determine the true cost of executing orders, but indicating that if fees were included in the disseminated quotation that would be acceptable); CHX Letter at 8–10 (alternatively, CHX suggested the Commission allow firms to ignore alternative trading system quotes at the NBBO if the next price available after payment of the access fee is worse than the next best available execution). *But see* IBEX Letter at 11 (opposing including fees in the public quote).

[237] *See supra* note 213.

[238] *See* Ashton Letter at 6 (suggesting that the Commission consider amending the Quote Rule to require all exchanges, over-the-counter dealers, and alternative trading systems to disseminate to the public quote the actual size behind the best bid and offer quotations). *See also* IBEX Letter at 11.

[239] Rule 11Ac1–1(c)(5)(ii)(A) and (B), 17 CFR 11Ac1–1(c)(5)(ii)(A) and (B).

[240] *See supra* notes 177–183 and accompanying text.

[241] Sections 6(b)(2) and 6(c) of the Exchange Act, 15 U.S.C. 78f(b)(2) and (c); section 15A(b)(8) of the Exchange Act, 15 U.S.C. 78o–3(b)(8).

[242] "Restraints on membership cannot be justified as achieving a valid regulatory purpose and, therefore, constitute an unnecessary burden on competition and an impediment to the development of a national market system." H.R. Rep. No. 123, 94th Cong., 1st Sess. 53 (1975).

[243] *See supra* Section IV.A.2.c.(ii).

[244] Rule 301(b)(5), 17 CFR 242.301(b)(5). Alternative trading systems that derive their prices

(ii) Fair Access Requirement

The Commission is adopting Exchange Act Rule 301(b)(5) to ensure that qualified market participants have fair access to the nation's securities markets. As the Commission proposed, an alternative trading system registered as a broker-dealer and subject to Regulation ATS will be required to establish standards for access to its system and apply those standards fairly to all prospective subscribers, if the alternative trading system, during four of the preceding six months, accounts for twenty percent or more of the trading volume.[245] This twenty percent volume threshold will be applied on a security-by-security basis for equity securities.[246] Accordingly, if an alternative trading system accounted for twenty percent or more of the share volume in any equity security, it must comply with the fair access requirements in granting access to trading in that security.

For debt securities, the Commission proposed that if an alternative trading system accounted for twenty percent or more of the volume in any category of debt security, the alternative trading system would be subject to the fair access requirements in granting access to trading in securities in that category. The Commission solicited comment on the appropriate categories of debt securities. Specifically, the Commission asked whether categories such as mortgage and asset-backed securities, municipal securities, corporate debt securities, foreign corporate debt securities, and foreign sovereign debt securities would be appropriate. After considering the comments, the Commission is adopting rules that require alternative trading systems with twenty percent or more of the volume in municipal securities, investment grade corporate debt securities, and non-investment grade corporate debt securities to meet the fair access requirements with respect to that category. The Municipal Securities Rulemaking Board's transaction reporting plan now provides information on the aggregate trading in municipal securities.[247] The fair access requirement will be effective for alternative trading systems with twenty percent or more of the volume in municipal securities on April 21, 1999.

Because similar information for investment grade and non-investment grade corporate debt, however, is not currently available, the fair access requirements in Rule 301(b)(5)(D) and (E) will not be made effective until April 1, 2000 with the expectation that further information will be available at that time.[248] The Commission is deferring action on the fair access standards for alternative trading systems trading a substantial portion of the market in foreign corporate debt and foreign sovereign debt until such time as reliable data is available by which alternative trading systems may determine their relative portion of the market.

The Commission is excluding from the fair access requirement those alternative trading systems that match customer orders for securities with other customer orders, at prices for those same securities established outside such system.[249] Thus, regardless of their trading volume, systems that, for example, match customer orders prior to the market opening and then execute those orders at the opening price for the securities are not required to comply with the fair access requirement. In addition, systems that match unpriced orders at the mid-point of the bid and ask, or at a value weighted average or prices on another market are not subject to the fair access requirements. The Commission, however, would not consider an alternative trading system to be excluded from the fair access requirements in paragraph (b)(5) of Rule 301 if that system priced any security traded on that system using prices established outside such system for instruments other than the particular security being executed. Therefore, a system would not be excluded if it traded options or other derivatives based on prices established on the primary market for the underlying security.

Alternative trading systems subject to this fair access requirement must comply with the requirements in paragraph (b)(5)(ii) of Rule 302. Specifically, these alternative trading systems must establish standards for granting access to trading on their systems,[250] and maintain these standards in their records.[251] An alternative trading system must apply these standards fairly and is prohibited from unreasonably prohibiting or limiting any person with respect to trading in any equity securities, or in certain categories of debt securities, when that trading exceeds the twenty percent volume threshold. For example, the Commission will consider it a denial of access by an alternative trading system if the alternative trading system refuses to open an account for a customer, thereby denying that customer the use of its trading facilities.[252] In addition, if an alternative trading system grants, denies or limits access to trading to any person, the alternative trading system is required to keep records of each action, including the reasons for such action.[253] Each alternative trading system will also be required to provide a list of all grants, denials or limitations of access to the Commission on Form ATS–R each quarter. For each grant, denial or limitation of access, alternative trading systems must provide the name of the person, nature and effective date of the decision, and any other information that the alternative trading system deems relevant. For denials or limitations of access, alternative trading systems must provide information describing the reasons for the decision.[254] For example, if an applicant has a relevant disciplinary history, has insufficient financial resources, or refuses to agree to abide by the rules of the alternative trading system, an alternative trading

for securities from prices for those same securities on another market are not subject to this requirement.

[245] The Commission notes that this twenty percent volume threshold is based on current market conditions. If there is a change in these market conditions, or if the Commission believes that alternative trading systems with less than twenty percent of the trading volume are engaging in inappropriate exclusionary practices or in anticompetitive conduct, the Commission may revisit these fair access thresholds. The Commission intends to monitor the impact and effect of these fair access rules, as well as the practices of alternative trading systems, and will consider changing these rules if necessary to prevent anticompetitive behavior and ensure that qualified investors have access to significant sources of liquidity in the securities markets.

[246] The term "equity security" is defined in section 3(a)(11) of the Exchange Act, 15 U.S.C. 78c(a)(11) and Rule 3a1–1, 17 CFR 240.3a1–1. Options and limited partnerships are included within the definition of an equity security.

[247] *See supra* Section IV.A.1.d.

[248] *See supra* note 146 (discussing the April 1, 2000 effective date).

[249] Rule 301(b)(5)(iii), 17 CFR 242.301(b)(5)(iii).

[250] Several commenters agreed with the Commission that an alternative trading system should be required to establish standards for granting access to trading in its system. *See* IBEX Letter at 12; Ashton Letter at 6; SIA Letter at 4, 14.

[251] Rule 303(a)(1)(iii), 17 CFR 242.303(a)(1)(iii). The Commission expects an alternative trading system to maintain a record of its standards at each point in time. If the alternative trading system amends or modifies its access standards, the records kept should reflect historic standards, as well as current standards.

[252] Moreover, if an alternative trading system requires subscribers to open an account with another broker-dealer with which the alternative trading system has a clearing arrangement, the alternative trading system is responsible for ensuring that the clearing broker-dealer does not unfairly deny access to any person. Thus, the alternative trading system—as part of its agreement with the clearing firm—must ensure that the clearing firm establishes standards for customers opening an account and that notices are sent to any prospective customer denied an account.

[253] Rule 301(b)(5)(ii), 17 CFR 242.301(b)(5)(ii).

[254] Rule 301(b)(5)(ii)(D), 17 CFR 242.301(b)(5)(ii)(D).

system should include such reasons in its filing with the Commission. The Commission intends to enforce the fair access rules by reviewing these reports and investigating any possible violations of the rule.[255]

The fair access requirements the Commission is adopting today are based on the principle that qualified market participants should have fair access to the nation's securities markets. Alternative trading systems remain free to have reasonable standards for access. Such standards should act to prohibit *unreasonably* discriminatory denials of access. A denial of access is reasonable if it is based on objective standards. For example, an alternative trading system may establish minimum capital or credit requirements for subscribers.[256] Similarly, an alternative trading system may reasonably deny access to investors based on a relevant, unfavorable disciplinary history. In addition, an alternative trading system could allow institutional subscribers the option of refusing to trade with broker-dealer subscribers, as long as the alternative trading system grants this option to subscribers based on objective and fairly applied standards. Provided that these or other standards were applied consistently to all subscribers, an alternative trading system would be considered to be granting and denying access fairly. A denial of access might be unreasonable, however, if it were discriminatorily applied among similar subscribers or if it were based solely on the trading strategy of a potential participant.

The proposed rules included a right of appeal to the Commission of any denial or limitation of access, as well as a requirement that an alternative trading system notify a person denied or limited access of their right of appeal. The Commission has decided not to adopt these provisions. The Commission is concerned that such a right of appeal would prove burdensome to the alternative trading system, the party denied or limited access, and Commission staff. In addition, commenters generally approved of the goals of fair access, but were not supportive of providing a right of appeal to the Commission.

(iii) Response to Comments

Commenters who addressed the proposed fair access requirement generally agreed with the Commission's goal of ensuring that alternative trading systems with significant volume establish criteria for fairly determining access.[257] Two commenters, for various reasons, did not believe that a requirement ensuring fair access by alternative trading systems was necessary.[258] Another commenter argued that alternative trading systems that do not display to subscribers should not be required to grant access to non-subscribers.[259]

The Commission solicited comment on the level of volume at which fair access requirements should be applied. Of those commenters who addressed the Commission's proposed threshold of twenty percent, three believed that the level should be raised,[260] two believed it should be lowered,[261] and one believed twenty percent was appropriate.[262] One of the commenters that recommended the Commission lower the threshold from twenty percent stated that fair access should be ensured regardless of volume, because volume levels are subject to variation over time, and because unfair denials of access by even small systems could make access to quotes in illiquid securities particularly difficult.[263]

The Commission agrees with this commenter that fair access is an important element of fair markets. Nevertheless, in balancing the need for fair access with the costs that may be associated with such a requirement, the Commission believes that a twenty percent threshold strikes the right balance. As discussed above, the rules the Commission is adopting today require that an alternative trading system subject to Regulation ATS comply with fair access requirements if, during at least four of the preceding six months, the alternative trading system accounted for twenty percent or more of the average daily share volume in any equity security or certain categories of debt.[264]

The Commission also requested comment on whether persons denied access to an alternative trading system should have the right to appeal this action to the Commission, what form the appeal should take, and what the appropriate standard for Commission review should be. Five comment letters directly addressed the issue of appeal to the Commission of denials of access.

One commenter favored a right to appeal a denial of access, but stated that the appeal process should begin at the SRO level.[265] This commenter stated that appeal to the Commission should occur only if the SRO fails to resolve the dispute. Another commenter, similarly, stated that it believes denials or limitations of access should be handled through current SRO complaint and disciplinary procedures, rather than through procedures used to appeal SRO determinations to the Commission. This commenter stated that it believes formal Commission procedures could blur the allocation of supervisory authority over broker-dealers and could lead to duplicative or inconsistent review proceedings in some cases. Moreover, this commenter was concerned that a

[255] Rule 301(b)(9), 17 CFR 242.301(b)(9); Form ATS–R, 17 CFR 249.638.

[256] For example, the Commission has recognized that the creditworthiness of a counterparty is a legitimate concern of market participants. *See* Letter from Richard R. Lindsey, Director, Division of Market Regulation, SEC, to Richard Grasso, Chairman and Chief Executive Officer, NYSE, dated Nov. 22, 1996 at 17. The Commission also requested comment on what might be appropriate reasons for an alternative trading system to deny market participants access. Most commenters also stated that objective standards, such as creditworthiness, would be appropriate, provided that these standards were applied in a non-discriminatory manner. *See* IBEX Letter at 12 (stating that credit-worthiness would be the most significant standard); ICI Letter at 4 (requesting that the Commission clarify that the standards for access can take into account factors that are relevant to credit or other forms of counterparty risk); SIA Letter at 14 (recommending that the Commission allow alternative trading systems to limit access to any category of its choosing, provided that the standards are not applied in a discriminatory manner, and stating that an alternative trading system should be permitted to select its standards, publish them, and apply them as stated in a non-discriminatory manner); TBMA Letter at 26 (requesting that the Commission clarify that an alternative trading system would still be allowed to set standards describing the customers with whom it wishes to do business, provided its standards are applied in a non-discriminatory manner). *See also* OptiMark Letter at 4, n.8 (stating that non-subscribers who wished to become subscribers should not be "unreasonably denied").

[257] *See, e.g.*, IBEX Letter at 12 (stating that reasonable credit or capital requirements or past bad faith dealings should be the only basis for denying access); Ashton Letter at 6 (arguing that alternative trading systems should be required to provide equivalent access through nondiscriminatory system fees).

[258] *See* TBMA Letter at 26 (stating that it would support a fair access requirement for exchanges, but not for alternative trading systems); ICI Letter at 4 (stating that it was not aware of any material barriers to entry to the existing ECNs, and so did not believe that the fair access requirement was necessary).

[259] OptiMark Letter at 4.

[260] *See* TBMA Letter at 22–23 (recommending that the threshold level be raised to thirty-five percent to avoid capturing insignificant market participants, particularly in regard to the bond market); SIA Letter at 3–4 (recommending that the threshold level be raised to forty percent); ICI Letter at 4 (recommending raising the threshold level to fifty percent).

[261] *See* IBEX Letter at 12 (recommending that the threshold level be lowered to ten percent); American Century Letter at 3.

[262] NASD Letter at 12 (stating that twenty percent is an appropriate level).

[263] American Century Letter at 3.

[264] Rule 301(b)(5)(i), 17 CFR 242.301(b)(5)(i).

[265] IBEX Letter at 13. *See also* ICI Letter at 4 (stating that the Commission should not provide a right to appeal denial of access, but that complaints should be handled as any other complaint against broker-dealers were handled: through the appropriate SRO or the Commission).

right to appeal to the Commission could lead to the frequent filing of frivolous or vexatious complaints against the broker-dealer, thereby impeding its ability to screen out potentially unqualified customers.[266] As discussed above, the Commission has decided not to adopt the proposed right of appeal to the Commission.

One commenter opposed a right to appeal denial of access, on the basis that there was no need for it. If, however, the Commission did implement its proposal to provide those denied access with the right to appeal to the Commission, this commenter recommended that the Commission ensure that this process did not become a means to dictate with whom a proprietary system may contract and that the allowable relief not be so expansive as to allow the Commission to alter the alternative trading system's published access standards.[267]

e. Capacity, Integrity, and Security Standards

As discussed in the Proposing Release,[268] in November 1989 and May 1991, the Commission published two policy statements regarding the use of technology in the securities markets.[269] These policy statements established the automation review program and called for the SROs to establish, on a voluntary basis, comprehensive planning, testing, and assessment programs to determine systems' capacity and vulnerability. The Commission recommended that SROs: (1) establish current and future capacity estimates; (2) conduct capacity stress tests; and (3) obtain annual independent assessments of systems to determine whether they can perform adequately.[270] In addition, the Commission staff conducts oversight reviews of the SROs' systems operations. All SROs currently participate in the Commission's automation review program, which has been a significant force in stimulating the SROs to upgrade their systems technology.[271]

The automation review program was established because of "the impact that systems failures have on public investors, broker-dealer risk exposure, and market efficiency."[272] While this program did not directly apply to alternative trading systems, the Commission noted that all broker-dealers should engage in systems testing and use the policy statement as a guideline.[273] Because some alternative trading systems now account for a significant share of trading in the U.S. securities markets, failures of their automated systems have as much of a potential to disrupt the securities markets as failures of SROs' automated systems. For this reason, the Commission proposed to require alternative trading systems with significant volume to meet certain systems capacity, integrity, and security standards.[274] The proposed requirements were similar to those standards SROs currently follow under the automation review program.

(i) Application of Capacity, Integrity, and Security Standards

The Commission is adopting Exchange Act Rule 301(b)(6) to reduce the likelihood that alternative trading systems that play a significant role in our national market system will disrupt the securities markets due to failures of their automated systems. This rule requires alternative trading systems trading twenty percent or more of the volume in any equity security or in certain categories of debt securities[275] to comply with standards regarding the capacity, integrity, and security of their automated systems. As for the fair access requirements discussed above, the volume thresholds are on a security-by-security basis for equity securities. Accordingly, if any one equity security traded on an alternative trading system accounts for more than twenty percent of the total share volume in that security during four of the preceding six months, the alternative trading system is required to meet the capacity, integrity, and security requirements for that security, although in practice this may cause compliance with the standards for all securities traded in that system. With respect to debt securities, an alternative trading system is required to meet the systems capacity, integrity, and security standards if it trades twenty percent or more of the volume during four of the preceding six months in any of the following categories: municipal securities, non-investment grade corporate debt, and investment grade corporate debt.[276]

The Municipal Securities Rulemaking Board's transaction reporting plan now provides information on the aggregate trading in municipal securities.[277] Because similar information for investment grade and non-investment grade corporate debt, however, is not currently available, the system capacity, integrity, and security requirements in Rule 301(b)(6)(D) and (E) will not be made effective until April 1, 2000.[278] The Commission is deferring action on the system reliability standards for alternative trading systems trading a substantial portion of the market in foreign corporate debt and foreign

[266] Instinet Letter at 19.

[267] SIA Letter at 14–15. *See also* TBMA Letter at 26.

[268] See Proposing Release, *supra* note 3, at Section III.A.2.e.

[269] Securities Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48704 ("ARP I"); Securities Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22489 ("ARP II"). ARP I and ARP II were published in response to operational difficulties experienced by SRO automated systems during the October 1987 market break. These releases predicted future capacity requirements, emphasized the need to maintain accurate trade and quote information, and discussed the degree to which computer automation has become, and is likely to increase as, an integral part of securities trading.

[270] ARP II, *supra* note 269, set forth guidance concerning the nature of these independent reviews.

[271] The Commission notes that the United States General Accounting Office ("GAO") has conducted several studies on the subject of computer systems and their role in the financial markets. Generally, the GAO has recommended that the Commission take steps to improve systems capacity, integrity, and security. *See* GAO, Stronger System Controls and Oversight Needed to Prevent NASD Computer Outage (Dec. 1994) (regarding Nasdaq system outages); GAO, Stock Markets: Information Vendors Need SEC Oversight to Control Automation Risks (Jan. 1992) (regarding risk assessments of automated operations of stock market information dissemination vendors); GAO, Computer Security Controls at Five Stock Exchanges Ned Strengthening (Aug. 1991) (regarding systems related risks at stock markets); GAO, Active Oversight of Market Automation by SEC and CFTC Needed (Apr. 1991) (regarding automation risks of the securities and futures markets); GAO, Tighter Computer Security Needed (Jan. 1990) (regarding the Common Message Switch System and the Intermarket Trading System operated by the Securities Industry Automation Corporation and the Nasdaq system operated by the NASD).

[272] ARP I, *supra* note 269, 54 FR at 48705; ARP II, *supra* note 269, 56 FR at 22490.

[273] *See* ARP I, *supra* note 269, 54 FR at 48706, at n.17; ARP II, *supra* note 269, 56 FR at 22493, at n.15.

[274] With regards to system capacity, integrity, and security standards, the Commission notes that during the past year, Instinet, Island, Bloomberg, and Archipelago (operated by Terra Nova) have all experienced system outages due to problems with their automated systems. On a number of occasions, ECNs have had to stop disseminating market maker quotations in order to keep from closing altogether, including during the market decline of October 1997 when one significant ECN withdrew its quotes from Nasdaq because of lack of capacity. Similarly, a major interdealer broker in non-exempt securities experienced serious capacity problems in processing the large number of transactions in October 1997 and had to close down temporarily. As a result, the Commission believes that the volume thresholds discussed above are necessary to ensure that trading systems have developed systems capacity, integrity, and security standards that are adequate to prevent such system outages.

[275] Rule 301(b)(6) applies to the same categories of debt securities as Rule 301(b)(5), discussed *supra* note 248 and accompanying text. Specifically, the categories are investment grade corporate debt securities, non-investment grade corporate debt securities, and municipal securities. 17 CFR 242.301(b)(6).

[276] *See supra* Section IV.A.2.d.

[277] *See supra* Section IV.A.1.e.

[278] *See supra* note 146 (discussing the April 1, 2000 effective date).

sovereign debt until such time as reliable data is available by which alternative trading systems may determine their relative portion of the market.

As for the fair access requirement, the Commission is excluding from the systems capacity, integrity, and security requirement those alternative trading systems that match customer orders for securities with other customer orders, at prices for those same securities established outside such system.[279] Thus, regardless of their trading volume, systems that, for example, match customer orders prior to the market opening and then execute those orders at the opening price for the securities are not required to comply with these systems reliability requirements. In addition, systems that match unpriced orders at the mid-point of the bid and ask, or at a value weighted average or prices on another market are not subject to the fair access requirements. The Commission, however, would not consider an alternative trading system to be excluded from the requirements in paragraph (b)(6) of Rule 301 if that system priced any security traded on that system using prices established outside such system for instruments other than the particular security being executed. Therefore, a system would not be excluded if it traded options or other derivatives based on prices established on the primary market for the underlying security.

An alternative trading system that meets these volume thresholds will be required to: (1) Establish reasonable current and future capacity estimates; (2) conduct periodic capacity stress tests of critical systems to determine such system's ability to process transactions in an accurate, timely, and efficient manner; (3) develop and implement reasonable procedures to monitor system development and testing methodology; (4) review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; and (5) establish adequate contingency and disaster recovery plans. An alternative trading system is required to meet these proposed standards with respect to all its systems that support order entry, order handling, execution, order routing, transaction reporting, and trade comparison in the particular security.[280] In addition, alternative trading systems subject to this provision are required to notify the Commission staff of material systems outages and material systems changes.[281] This information will enable Commission staff to better understand the operation of the alternative trading system and to identify potential problems and trends that may require attention.

Finally, under Regulation ATS, alternative trading systems that meet the volume levels set forth above are required to perform an annual independent review of the systems that support order entry, order handling, execution, order routing, transaction reporting and trade comparison.[282] As discussed in greater detail in the Commission's May 1991 Policy Statement,[283] an independent review should be performed by competent, independent audit personnel following established audit procedures and standards. If internal auditors are used by an alternative trading system to complete the review, these auditors should comply with the standards of the Institute of Internal Auditors and the Electronic Data Processing Auditors Association ("EDPAA"). If external auditors are used, they should comply with the standards of the American Institute of Certified Public Accountants ("AICPA") and the EDPAA.

(ii) Response to Comments

In the Proposing Release,[284] the Commission requested comment on its proposal to require significant alternative trading systems to satisfy systems capacity, integrity, and security standards. While most commenters did not specifically address this proposed requirement, those that did comment generally supported it.[285]

The Commission asked whether the twenty percent volume threshold proposed was appropriate. In this regard, the NASD supported the twenty percent proposed volume threshold.[286] Two other commenters, however, suggested that the Commission's proposed threshold was too low.[287] Specifically, one of these commenters argued that the Commission should raise the volume threshold from twenty percent to thirty-five percent to avoid including debt market participants with no significant role in price discovery. This commenter stated that, given the decentralized and fungible nature of the debt markets, an alternative trading system trading debt securities would need twenty percent or more of the relevant market to materially affect the markets in the manner in which the Commission is concerned.[288] Another commenter, similarly, suggested that these requirements not be imposed until an alternative trading system had forty percent of the market in any security. In addition, before the capacity, integrity, and security requirements are triggered, this commenter recommended that any security (or category of debt) in which the alternative trading system reached forty percent of aggregate daily volume also represent twenty percent or more of the alternative trading system's overall trading activity.[289] One commenter, however, argued that the Commission's proposed threshold was too high, and that it should instead be applicable to alternative trading systems with one percent of the consolidated volume in a category of equity securities, such as listed or Nasdaq securities.[290]

In addition, while the ICI stated its belief that competitive pressures will generally suffice to ensure that alternative trading systems have the capacity to execute trades in a timely manner, the ICI also stated that it would not oppose such requirements as long as the Commission applied them in a flexible manner and did not dictate how alternative trading systems structure their operations.[291]

The Commission believes that alternative trading systems that have a significant role in the marketplace should be able to handle reasonably foreseeable volume surges and be prepared for reasonably anticipated future volume increases. As a result, the Commission continues to believe that the volume thresholds above are appropriate. Investors and other market participants increasingly rely on alternative trading systems to buy and sell securities. The ability of these markets to meet the demands of market participants is directly related to the reliability of their automated systems. The Commission realizes that alternative trading systems have significant business incentives to ensure that their systems have adequate capacity so that participants' orders do not experience unnecessary delays. The

[279] Rule 301(b)(6)(iii), 17 CFR 242.301(b)(6)(iii).

[280] Rule 301(b)(6)(ii)(A)–(F), 17 CFR 242.301(b)(6)(ii)(A)–(F).

[281] Rule 301(b)(6)(ii)(G), 17 CFR 242.301(b)(6)(ii)(G).

[282] Rule 301(b)(6), 17 CFR 242.301(b)(6). Regulation ATS also requires alternative trading systems to preserve documentation relating to their efforts to meet the requirements of this rule. *See* Rule 303(a)(1)(iv), 17 CFR 242.303(a)(iv).

[283] *See* ARP II, *supra* note 269.

[284] *See* Proposing Release, *supra* note 3, at Section III.A.2.e.

[285] *See* Ashton Letter at 5; NASD Letter at 11; TBMA Letter at 27 (but only if a system plays some role in price discovery such as a traditional exchange does).

[286] NASD Letter at 11.

[287] *See* TBMA Letter at 22–23; SIA Letter at 13.

[288] *See* TBMA Letter at 22–23.

[289] SIA Letter at 13.

[290] Ashton Letter at 5.

[291] ICI Letter at 4.

systems capacity, integrity, and security rules are intended as a back-up to ensure that alternative trading systems that have a significant role in the market maintain sufficient systems and procedures to minimize the effects of potential systems problems in the secondary markets.

f. Examination, Inspection, and Investigations of Subscribers

The Commission proposed that an alternative trading system be required to cooperate with the Commission's or an SRO's inspection, examination, or investigation of the alternative trading system or any of the alternative trading system's subscribers. Presently, the Commission has the authority to inspect and examine any member of any national securities exchange or any national securities association directly. This is because all such members are broker-dealers. Alternative trading systems, however, also could have certain other subscribers, such as institutions or individuals, to which the Commission's inspection authority does not extend. Because alternative trading systems could be used by subscribers to manipulate the market in a security,[292] it is imperative that alternative trading systems cooperate in all inspections, examinations, and investigations. Although neither the Commission nor the SROs has the authority to directly inspect non-broker-dealer subscribers of alternative trading systems, any relevant trading information involving such subscribers would be maintained by the alternative trading system under its recordkeeping requirements, and would be required to be made available upon request to its SRO or the Commission. Under the rules the Commission is adopting today, an alternative trading system's exemption from exchange registration is conditioned on it cooperating with the Commission's or an SRO's inspection, examination, or investigation of the alternative trading system or any of its subscribers.[293]

g. Recordkeeping

The Commission proposed that alternative trading systems be required to keep certain records. The Commission is adopting these recordkeeping requirements as proposed. As adopted, Regulation ATS requires alternative trading systems to make and keep the records necessary to create a meaningful audit trail.[294] Specifically, alternative trading systems are required to maintain daily summaries of trading and time-sequenced records of order information, including the date and time the order was received, the date, time, and price at which the order was executed, and the identity of the parties to the transaction. In addition, alternative trading systems are required to maintain a record of subscribers and any affiliations between subscribers and the alternative trading system.[295] While some of the information that is required by the Regulation ATS will also be required under the NASD's Order Audit Trail System ("OATS"),[296] OATS is an NASD rule and does not cover all securities traded through alternative trading systems.

These recordkeeping requirements also require alternative trading systems to keep records of all notices provided to subscribers, including notices addressing hours of operation, system malfunctions, changes to system procedures, and instructions pertaining to access to the alternative trading system.[297] In addition, alternative trading systems are required to keep documents made (if any) in the course of complying with the systems capacity, integrity, and security standards in Rule 301(b)(6). These documents include all reports to an alternative trading system's senior management, and records concerning current and future capacity estimates, the results of any stress tests conducted, procedures used to evaluate the anticipated impact of new systems when integrated with existing systems, and records relating to arrangements made with a service bureau to operate any automated systems. These records will allow the Commission to examine whether alternative trading systems are complying with the requirements under Proposed Rule 301(b)(6). Finally, an alternative trading system subject to the fair access requirements discussed above is required to keep a record of its access standards.[298]

Regulation ATS requires that these records be kept for at least three years, the first two years in an easily accessible place. Some records, such as partnership articles and articles of incorporation, must be kept for the life of the alternative trading system.[299] Alternative trading systems are permitted to keep records in any form broker-dealers are permitted to keep records under Rule 17a–4(f) under the Exchange Act.[300]

The Commission recognizes that alternative trading systems subject to Regulation ATS are subject to the recordkeeping requirements for broker-dealers under Rules 17a–3 and 17a–4 of the Exchange Act,[301] which may require that some of the same records be made and kept. Regulation ATS does not require an alternative trading system to duplicate trading records maintained in the course of its normal recordkeeping operations, provided that the alternative trading system can sort and retrieve system records separately upon request. In addition, as broker-dealers are currently permitted to do,[302] Regulation ATS permits an alternative trading system to retain a service bureau, depository, or other recordkeeping service to maintain required records on behalf of the alternative trading system as long as the designated party agrees to make the records available to the Commission upon request.[303]

The Commission solicited comment on these recordkeeping requirements. In general, the comments received on this provision were mixed. Two commenters supported requiring alternative trading systems to keep the records necessary to create a meaningful audit trail.[304] On the other hand, one commenter expressed concern that the Commission's proposal would impose the same recordkeeping requirements on both small and large alternative trading systems. Instead, this commenter argued that smaller systems should be subject to none or only minimal regulation generally, and that even the recordkeeping requirements may serve as a significant barrier to market entry and innovation.[305]

The Commission believes that, for the most part, the records it is requiring alternative trading systems to make and keep are records that alternative trading

[292] The Commission is aware of several incidents involving the manipulation of quotations through alternative trading systems. The participants who engaged in the manipulation were able to profit as a result. *See supra* note 5.

[293] Rule 301(b)(7), 17 CFR 242.301(b)(7).

[294] Rule 301(b)(8), 17 CFR 242.301(b)(8).

[295] Rule 302(a), 17 CFR 242.302(a).

[296] Securities Exchange Act Release No. 39729 (Mar. 6, 1998), 63 FR 12559 (Mar. 13, 1998).

[297] Rule 303(a)(1)(ii), 17 CFR 242.303(a)(1)(ii).

[298] *See supra* Section IV.A.2.d.

[299] Rule 303(a)(2), 17 CFR 242.303(a)(2).

[300] Rule 303(b), 17 CFR 242.303(b). Rule 17a–4(f) provides for the maintenance of records on microfilm, microfiche, or electronic storage media. The Commission recognizes that alternative trading systems may generate much of the information in electronic form and generally may wish to keep records in electronic format. 17 CFR 240.17a–4(f).

[301] 17 CFR 240.17a–3 and 17 CFR 240.17a–4.

[302] 17 CFR 240.17a–4(i).

[303] Rule 303(d), 17 CFR 242.303(d).

[304] *See* ICI Letter at 4; Ashton Letter p. 5.

[305] TBMA Letter at 16. TBMA suggested exempting alternative trading systems that do not exceed fifteen percent of the relevant market from Regulation ATS and, thus, from the recordkeeping requirements. TBMA stated that the additional recordkeeping requirements would not provide the Commission significant new information beyond what is currently included within broker-dealer recordkeeping requirements. *Id.*

systems would otherwise keep as part of their business, and that therefore these requirements will not place undue burdens upon alternative trading systems. In addition, the Commission believes that the highly automated nature of alternative trading systems will help facilitate the construction and maintenance of an audit trail. The Commission also believes that these recordkeeping requirements are necessary to permit surveillance and examination to help assure fair and orderly markets.

One commenter recommended that an alternative trading system's records and reports only be available to an alternative trading system's SRO on a confidential, need-to-know basis.[306] Regulation ATS provides that alternative trading systems are required to permit inspections and examinations of their records by the Commission or the SRO of which they are a member.[307] The Commission noted in the Proposing Release that, while potential conflicts of interest in overseeing alternative trading systems may arise, the Commission believes these conflicts can be managed using the Commission's oversight authority. The Commission also recognized that some market participants might be concerned that SROs could abuse their regulatory authority, but noted that the Commission has oversight responsibility over SROs to prevent such activity. In this regard, the Commission expects SROs to carefully assess, and revise where necessary, their internal policies and procedures for protecting the confidentiality of sensitive information obtained in the course of fulfilling their SRO regulatory responsibilities.[308]

Finally, one commenter asked that the Commission consider the relationship of any new recordkeeping requirements with applicable SRO recordkeeping rules, such as the NASD's recently-adopted OATS.[309] The Commission notes that, while some of the information required by Regulation ATS will also be required by SRO rules, such rules do not have the same scope and are not designed to meet the same goals. Moreover, SRO rules may not apply to all alternative trading system activities. In addition, the Commission is only requiring that records of certain information be made and kept, but is not dictating in what form those records are maintained. This means that alternative trading systems have flexibility in how they comply with SRO and Commission rules. Further, if duplicative rules exist, the same alternative trading system practices should serve to satisfy both sets of rules.

h. Reporting and Form ATS–R

The Commission proposed that alternative trading systems be required to periodically report certain information about their activities. The Commission is adopting these requirements as proposed. Regulation ATS, as adopted, requires alternative trading systems to file with the Commission transaction reports within 30 calendar days of the end of each calendar quarter on Form ATS–R.[310] Specifically, Form ATS–R requires alternative trading systems to report total volume in terms of number of units traded and dollar value for the following categories of securities: (1) Listed equity securities, (2) Nasdaq NM securities, (3) Nasdaq SmallCap securities, (4) equity securities that are eligible for resale pursuant to Rule 144A under the Securities Act of 1933,[311] (5) penny stocks, (6) equity securities not included in (1)–(5), (7) rights and warrants, (8) listed options, and (9) unlisted options. In addition, alternative trading systems are required to report the total settlement value in U.S. dollars for: (1) Corporate debt securities (separately for investment grade and non-investment grade), (2) government securities, (3) municipal securities, (4) mortgage related securities, and (5) debt securities not included in (1)–(4). Alternative trading systems are required to file after-hours trading information in listed equity, Nasdaq NM, and Nasdaq Small Cap securities, as well as listed options. This information will permit the Commission to monitor the trading on alternative trading systems. In addition, alternative trading systems subject to the fair access requirements in Rule 301(b)(5), as discussed above,[312] must report quarterly on Form ATS–R the persons to whom they grant, deny or limit access to the alternative trading systems, as well as the date of the action, the effective date of the action, and the nature of the denials or limitations of access.

Because Rule 17a–23[313] will be eliminated, data filed by alternative trading systems on Form ATS–R will replace the information currently filed on Form 17A–23 by broker-dealers operating trading systems. Unlike Part II of Form 17A–23, Form ATS provides a template on which alternative trading systems are required to file the requested information with the Commission. This template should allow alternative trading systems to file the required information in a more uniform format that will be more useful to the Commission. For example, the Commission anticipates using this information to develop examination modules for the inspection of alternative trading systems. The Commission also expects to use the information to further understand the effect of alternative trading systems on the securities markets.

Another difference between Part II of Form 17A–23 and Form ATS is that Form ATS requires alternative trading systems to provide information about the volume of particular types of securities that are not listed on an exchange or traded on Nasdaq. These new reporting requirements on Form ATS–R will improve the quality of the data that the Commission has available to consider the effectiveness of its regulatory program. Due to the highly automated nature of alternative trading system operations and the experiences with Rule 17a–23, the Commission does not anticipate that gathering and submitting the data required on Form ATS–R will be overly burdensome. Alternative trading systems are also required to make reports on Form ATS–R available to surveillance personnel of any SRO of which they are a member.[314]

The Commission solicited comment on the transaction reporting requirements and Form ATS–R. In particular, the Commission solicited comment on the frequency and scope of transaction reporting requirements

[306] Ashton Letter at 5. Ashton pointed out that, because SRO-sponsored systems compete directly with alternative trading systems, SROs should not be able to gain confidential information through the regulatory reporting process. *Id.*

[307] Rule 301(b)(7), 17 CFR 242.301(b)(7).

[308] *See also* Securities Exchange Act Release No. 35124 (Dec. 20, 1994), 59 FR 66702 (Dec. 28, 1994) (addressing similar concerns in the context of Rule 17a–23).

[309] Instinet Letter at 20–21. Instinet stated that the Commission should work with SROs to establish recordkeeping requirements that minimize duplication and inconsistency as well as providing alternative trading systems substantial flexibility in structuring their recordkeeping operations. *Id.*

[310] Rule 301(b)(9), 17 CFR 242.301(b)(9).

[311] 17 CFR 230.144A. Brokers and others who use alternative trading systems to trade Rule 144A eligible securities and other types of restricted securities should ensure those systems are structured to permit the traders' compliance with their obligations under Rule 144A and under the Securities Act of 1933.

[312] *See supra* notes 253–255 and accompanying text.

[313] *See infra* Section V. Rule 17a–23 under the Exchange Act generally requires U.S. broker-dealers that sponsor broker-dealer trading systems to provide a description of their systems to the Commission and report transaction volume and other information on a quarterly basis. This rule also requires that such broker-dealers keep records regarding system activity and to make such records available to the Commission. 17 CFR 240.17a–23. *See also* Securities Exchange Act Release No. 35124 (Dec. 20, 1994), 59 FR 66702 (Dec. 28, 1994).

[314] Rule 301(b)(2)(vii), 17 CFR 242.301(b)(2).

proposed in Regulation ATS. No commenters responded to the Commission's request for comments on the information requested on Form ATS–R.

The Commission received no comments opposing the proposed reporting requirements. Several commenters generally supported the Commission's proposal to require alternative trading systems to report their trading volume.[315] One commenter, however, commented that the Commission should require monthly reporting instead of the proposed quarterly reporting requirement.[316] The Commission believes that quarterly reporting under Regulation ATS, as adopted. will provide sufficiently frequent reporting to the Commission. In view of the Commission's desire to minimize respondent reporting burdens, the Commission believes that more frequent reporting would not provide materially improved investor protections. Based on the Commission's experience with reporting requirements under Rule 17a–23, the Commission believes that a quarterly filing requirement of Form ATS–R is appropriate.

The Commission also requested comment on the appropriateness of permitting Form ATS–R to be filed electronically. Two commenters thought that if the Commission were to accept filings electronically it would be faster and less expensive.[317]

Finally, one commenter recommended that an alternative trading system's records and reports only be available to an alternative trading system's SRO on a confidential, need-to-know basis.[318] As described above with respect to the recordkeeping requirements,[319] the Commission believes that the separation between the market and regulatory functions of an SRO and the Commission's oversight of SROs are sufficient to maintain an appropriate level of confidentiality of, and access to, alternative trading system information. The Commission believes that SROs need to have access to relevant information in order to carry out their oversight responsibilities. The Commission expects that SROs will maintain and enforce appropriate internal policies and procedures to protect against misuse of such information.

i. Procedures To Ensure Confidential Treatment of Trading Information

The Commission requested comment on proposed Rule 301(b)(10) requiring alternative trading systems to have in place safeguards and procedures to protect trading information and to separate alternative trading system functions from other broker-dealer functions, including proprietary and customer trading. The Commission did not propose specific procedures, but encouraged commenters to express their views on the requirements, including how to prevent the misuse by alternative trading systems of confidential customer information. The Commission received only three comment letters which directly addressed this issue. All supported the Commission's proposal, although one also requested clarification on what the confidentiality provisions covered.[320]

The rules the Commission is adopting today require alternative trading systems to have in place safeguards and procedures to protect trading information and to separate alternative trading system functions from other broker-dealer functions, including proprietary and customer trading. The Commission believes that the sensitive nature of the trading information subscribers send to alternative trading systems requires such systems to take certain steps to ensure the confidentiality of such information. For example, unless subscribers consent, registered representatives of alternative trading systems should not disclose information regarding trading activities of such subscribers to other subscribers that could not be ascertained from viewing the alternative trading system's screens directly at the time the information is conveyed.

The Commission's concern regarding confidentiality grew out of its inspections of some ECNs, during which the Commission staff found that some of the broker-dealers operating ECNs used the same personnel to operate the ECN as they did for more traditional broker-dealer activities, such as handling customer orders that were received by telephone. These types of situations create the potential for misuse of the confidential trading information in the ECN, such as customers' orders receiving preferential treatment, or customers receiving material confidential information about orders in the ECN. The rules concerning confidentiality that the Commission is adopting today are designed to eliminate the potential for abuse of the confidential trading information that subscribers send to alternative trading systems. The Commission recognizes that some alternative trading systems provide traditional brokerage services as well as access to their alternative trading systems. The proposed rules are not intended to preclude these services; rather, they are designed to prevent the misuse of private customer information in the system for the benefit of other customers, the alternative trading system operator, or its employees.

Therefore, the Commission is adopting rules which require that: (1) Information, such as the identity of subscribers and their orders, be available only to those employees of the alternative trading system who operate the system or are responsible for its compliance with the proposed rules; (2) the alternative trading system has in place procedures to ensure that all its employees are unable to use any confidential information for proprietary or customer trading, unless the customer agrees; and (3) procedures exist to ensure that employees of the alternative trading system cannot use such information for trading in their own accounts.[321]

The Commission intends the rules to prevent the disclosure or the use of information about a customer's trading orders. Many of the alternative trading systems operating today are anonymous; one of the reasons ECNs are popular with investors is that they permit wide dissemination of orders but provide anonymity. The broker-dealers operating these systems, under the rules the Commission is adopting today, cannot disclose any confidential customer information (including the identity of the subscriber entering an order) to other customers, or use that information for proprietary or agency trades.

The Commission expects that existing alternative trading systems will

[315] *See* ICI Letter at 4 (supporting the proposal to require reports quarterly); Ashton Letter at 5; IBEX Letter at 5.

[316] Ashton Letter at 5.

[317] *See* IBEX Letter at 5; American Century Letter at 6.

[318] Ashton Letter at 5. Ashton pointed out that, because SRO-sponsored systems compete directly with alternative trading systems, SROs should not be able to gain confidential information through the regulatory reporting process. *Id.*

[319] *See supra* Section IV.A.2.g.

[320] *See* ICI Letter at 4–5 (stating that it agreed that the failure to keep trading information confidential created the potential for abuse); Instinet Letter at 21 (requesting that the Commission clarify whether or not the proposed confidentiality provisions would prohibit registered representatives from providing customers with information (other than confidential customer information) regarding the trading activity of the alternative trading system); American Century Letter at 1–2 (stating that agency broker-dealer functions should be separate from intermediated broker-dealer functions that allow an alternative trading system employee to "work" an order on behalf of customers, and that these employees should not have access to the orders of customers who choose to work their orders without the assistance of employees of the alternative trading system).

[321] Rule 301(b)(10), 17 CFR 242.301(b)(10).

implement procedures such as these as quickly as possible, if they do not already have them in place. These procedures should be clear and unambiguous and presented to all employees, regardless of whether they have direct responsibility for the operation of the alternative trading system. Presently, many broker-dealers employ various means to ensure that sensitive information does not flow from one division to another. These methods include physical separation, written procedures, separate personnel, and restricted access. The Commission believes that firewalls such as these could be used by broker-dealers that operate alternative trading systems to ensure that sensitive information regarding the alternative trading system is contained in the proper unit of the broker-dealer.

The Commission is not adopting specific procedures because it believes that the broker-dealers who operate the alternative trading systems are in the best position to know what procedures would best prevent abuses. Experience has demonstrated, however, potential for abuse and the Commission regards these procedures as important.

B. Registration as a National Securities Exchange

Trading systems that fall within Rule 3b–16 are only required to comply with Regulation ATS if they wish to be exempt from the definition of "exchange." Such systems may choose instead to register as national securities exchanges. The Commission expects that some trading systems will find that registration as a national securities exchange provides attractive benefits that make this option more suitable to their business objectives. In particular, registered exchanges enjoy more autonomy in their daily operations than do broker-dealers that are members of SROs. Because any trading system that registers as an exchange would be an SRO, it would not be subject to oversight by a competing national securities exchange or national securities association.[322] Similarly, as a national securities exchange, a trading system would be able to establish its own rules of conduct, trading rules, and fee structures for access. An alternative trading system registered as a broker-dealer, on the other hand, would have to comply with the rules of the SRO to which it belongs, including any rules regarding fees or the automatic execution of orders.

In addition, systems that elect to register as exchanges may benefit from the added prestige and investor confidence associated with status as a registered exchange. Registered exchanges are also able to establish listing standards, which may promote investor confidence in the quality of the securities traded on the exchange. Registered exchanges may also become direct participants in the national market system mechanisms, such as the ITS, Consolidated Tape Association ("CTA"), and the Consolidated Quotation System ("CQS"). Direct participation in these systems may provide a higher degree of transparency and execution opportunities for subscribers to a trading system. As direct participants in the national market system mechanisms, registered exchanges are also entitled to share in the revenues generated by the national market system systems, such as revenue from CTA fees. Moreover, as the Commission noted in the Proposing Release, only registered exchanges are eligible to be participants of the Options Clearing Corporation ("OCC").[323] Consequently, any trading system that wants to trade standardized options issued by the OCC would have to register as an exchange and become a member of the OCC.

Finally, if a trading system chooses to register as an exchange, it could allow broker-dealers that are members of exchanges with off-board trading restrictions to trade certain securities on the trading system pursuant to unlisted trading privileges. The Commission believes that if a trading system is registered and regulated as an exchange, it should be considered to be an exchange, rather than an over-the-counter market, for purposes of exchange off-board trading.[324]

As discussed in the Proposing Release, the Commission views certain obligations of exchanges as fundamental to fair and efficient operation in the marketplace and critical for the protection of investors. The Commission did not propose any relief from the current obligations of registered exchanges under the Exchange Act. Nevertheless, the Commission requested comment on whether any exemptions from exchange regulatory provisions would be necessary or appropriate to enable alternative trading systems to register as exchanges. Commenters, however, generally thought that any trading system that chooses to register as an exchange should be subject to the same requirements as currently registered exchanges and cautioned the Commission against relieving registered exchanges from any requirements because of their for-profit structure. Consequently, at this time the Commission has determined that those trading systems choosing to register as exchanges should satisfy all requirements that apply to national securities exchanges under the Exchange Act.[325]

Many, if not all, alternative trading systems currently operating are proprietary, rather than not-for-profit entities. The Commission does not believe that there is any overriding regulatory reason to require exchanges to be not-for-profit membership organizations, and believes that alternative trading systems may retain their proprietary structure even if they choose to register as exchanges. The Exchange Act does not require national securities exchanges to be not-for-profit organizations. As the Commission stated in the Proposing Release, it believes that Congress clearly intended the 1975 Amendments to encourage innovation by exchanges and recognized that future exchanges may adopt diverse structures.[326] The Commission believes that it is possible for a for-profit exchange to meet the standards set forth in section 6(b) of the Exchange Act.

Any system meeting the definition set forth in Rule 3b–16 may apply for registration as a national securities exchange by filing an application with the Commission on Form 1.[327] The Commission, in Rule 6a–1, set forth the procedure for filing such an application.[328] All Exhibits must accompany Form 1, including audited

[322] Alternative trading systems that continue to be regulated as broker-dealers would remain subject to oversight by national securities exchanges and the NASD, in their self-regulatory capacities. *See supra* Section IV.A.2.a.

[323] Options Clearing Corporation By-laws, Art. VII, Sections 1 and 4. Registered exchanges that are members of the OCC determine such matters as listing, registration, clearance, issuance and exercise of options contracts. Exchange members of the OCC are also able to use registration and disclosure materials tailored for standardized options.

[324] The Commission has the authority to review final disciplinary sanctions imposed by SROs on members or associated persons of members, including sanctions imposed for violations of SRO rules. The Commission may only affirm a sanction imposed by an SRO on one of its members, participants or associated persons of its members for a violation an SRO's rules, if the Commission finds that: (1) The member, participant, or associated person of the member engaged in the acts or practices that the SRO found were engaged in; (2) such acts or practices are in violation of the SRO's rules; and (3) the SRO's rules, and the application by the SRO of its rules, are consistent with the purposes of the Exchange Act. Sections 19(d)(2) and 19(e) of the Exchange Act, 15 U.S.C. 78s(d)(2) and 78s(e).

[325] 15 U.S.C. 78f.

[326] *See* S. Rep. No. 75, *supra* note 107.

[327] Section 6(a) of the Exchange Act, 15 U.S.C. 78f(a).

[328] 17 CFR 240.6a–1.

financial statements prepared in accordance with United States Generally Accepted Accounting Principles.

The Commission has adopted an amendment to its rules of practice regarding the processing of filings. Applications for registration as a national securities exchange, as well as applications for exemption from registration due to the limited volume of transactions, will not be considered filed until all necessary information, including financial statements and other required documents, have been furnished in the proper form.[329] Further, under section 6(b) of the Exchange Act, the Commission must make certain determinations before registering an exchange.[330] In reviewing applications for registration as a national securities exchange, the Commission will not register an exchange unless it is satisfied that the exchange meets the requirements discussed below.

1. Self-Regulatory Responsibilities

As a prerequisite for the Commission's approval of an exchange's application for registration, the exchange must be organized and have the capacity to carry out the purposes of the Exchange Act. Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the federal securities laws and the rules of the exchange.[331] The Commission believes that the self-regulatory role of registered exchanges is fundamental to the enforcement of the federal securities laws. Congress has delegated to the SROs certain quasi-governmental functions and responsibilities, and has charged the Commission with overseeing the SROs to make sure they have the ability and resources to comply with those obligations. In this regard, the Commission believes that persons responsible for operating an SRO should not have a disciplinary history, and will seriously question the ability of an exchange to carry out its SRO functions if the founders or prospective managers of an applicant for registration as a national securities exchange are subject to a statutory disqualification, as that term is defined in section 3(a)(39) of the Exchange Act.[332] The Commission believes that persons who, for example, have willfully violated the federal securities laws or have been convicted within the past ten years of a felony or misdemeanor involving misappropriation of funds, or securities fraud, larceny, theft, robbery, extortion, or other related crimes would be inappropriate selections to fill the role of director, officer, or manager of an exchange.

An alternative trading system wishing to register as a national securities exchange may choose to set listing standards for its system. If an applicant chooses to set listing standards, it must have written listing and maintenance standards, as well as an adequate regulatory staff to apply those standards.[333] The applicant must also have rules restricting the listing of securities issued in a limited partnership rollup transaction.[334] The ability to carry out these functions must be adequately represented on an exchange's application for registration before the Commission will register the exchange.

An applicant for registration as an exchange must also have rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to refrain from imposing any unnecessary or inappropriate burdens on competition, among other things.[335] For example, an exchange must maintain procedures to surveil for securities law violations, such as insider trading and manipulation on the exchange. The Commission understands that surveillance procedures can vary and will depend on the nature of, and types of securities traded, on a particular exchange. Thus, while the Commission will require all applicants for registration as an exchange to have adequate measures in place, they will not have to use the same procedures. The Commission will also require an applicant for registration as a national securities exchange to show that it has sufficient resources, including both staff expertise and capital, to support its surveillance function.[336] Consistent with these requirements, an applicant should, at a minimum, demonstrate that the officers charged with day-to-day management of the exchange are familiar with the federal securities laws and the role of a registered exchange as an SRO. In addition, an applicant for registration as a national securities exchange must demonstrate that it has the capability to maintain an audit trail of the transactions on its system. Furthermore, an applicant must establish rules providing for the allocation of fees for the use of its system.[337]

An exchange must also have general conflict of interest rules regarding, for example, trading on the exchange by its employees, owners, or exchange officials. Moreover, an exchange must have rules that ensure that no member's order is unfairly disadvantaged. For example, if an exchange has priority rules, those rules need to treat all exchange members fairly. Finally, an exchange must have rules establishing procedures for the clearance and settlement of trades effected on the exchange. Alternatively, an exchange must have rules requiring members to make their own arrangements for clearance and settlement of trades.

While exchanges are required to enforce compliance by their members, and persons associated with their members, with applicable laws and rules, the Commission has used its authority under sections 17 and 19 of the Exchange Act to allocate to particular SROs oversight of broker-dealers that are members of more than one SRO ("common members").[338] For example, in order to avoid unnecessary regulatory duplication, the Commission appoints a single SRO as the designated examining authority ("DEA") to examine common members for compliance with the financial responsibility requirements.[339] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with applicable

[329] 17 CFR 202.3(b)(2). The Commission is not required to propose changes to its Rules of Practice prior to adoption. *See* 5 U.S.C. 553(b)(3)(A).

[330] Section 6(b) of the Exchange Act, 15 U.S.C. 78f(b).

[331] Section 6(b)(1) of the Exchange Act, 15 U.S.C. 78f(b)(1).

[332] 15 U.S.C. 78c(a)(39). *See also* 15 U.S.C. 78o(b).

[333] *See* Section 12(d) of the Exchange Act, 15 U.S.C. 78l(d); Rule 12d2–2, 17 CFR 240.12d2–2 (requiring national securities exchanges to file an application with the Commission to strike a security from listing and registration).

[334] *See* 15 U.S.C. 78f(b)(9).

[335] Section 6(b)(5) of the Exchange Act, 15 U.S.C. 78f(b)(5). *See also* Section 6(b)(8) of the Exchange Act, 15 U.S.C. 78f(b)(6).

[336] The Commission notes that, according to the audited financial statements for 1997, the NYSE had total assets of $1,174,887,000 and total expenses of $488,811,000; the Amex had total assets of $195,547,000 and total expenses of $173,742,000; the PCX had total assets of $67,622,000 and total expenses of $60,636,000; the CSE had total assets of $13,124,585 and total expenses of $5,343,403; and the Boston Stock Exchange ("BSE") had total assets of $33,339,961 and total expenses of $16,106,837.

[337] Section 6(b)(4) of the Exchange Act, 15 U.S.C. 78f(b)(4).

[338] 15 U.S.C. 78q and 78s. *See also* 17 CFR 240.17d-2; 17 CFR 240.19g2–1.

[339] With respect to a common member, section 17(d)(1) of the Exchange Act authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions. 15 U.S.C. 78q(d)(1).

financial responsibility rules.[340] Consistent with past Commission action, the Commission may continue to designate one SRO, such as the NASD or the NYSE, as the primary DEA for common members of exchanges.

In addition, the Commission has previously permitted existing SROs to contract with each other to allocate non-financial regulatory responsibilities.[341] Rule 17d–2 under the Exchange Act permits SROs to establish joint plans for allocating the regulatory responsibilities imposed by the Exchange Act with respect to common members.[342] An SRO participating in a regulatory plan is relieved of regulatory responsibilities with respect to a broker-dealer member of such SRO, if those regulatory responsibilities have been designated to another SRO under the regulatory plan. Alternative trading systems registered as exchanges would also be able to establish joint plans with respect to common members.

A registered exchange would also be expected to maintain an audit trail of trading. A fully automated exchange, however, can produce comprehensive, instantaneous automated records that can be monitored remotely. Therefore, fully automated exchanges might be able to contract with other SROs to perform certain oversight activities, while retaining ultimate responsibility for ensuring that these activities are performed.

Further, the Commission also believes that the ultimate responsibility for enforcement and disciplinary actions for violations relating to transactions executed in an SRO's market or rules unique to that SRO should continue to be retained by that SRO. In addition, these exchanges must establish a disciplinary process including appropriate sanctions for violations of the rules and a fair procedure for administering the disciplinary process.[343] Existing exchanges generally employ personnel and establish extensive programs to fulfill this responsibility. However, it may be possible for an exchange to contract with another SRO to perform its day-to-day enforcement and disciplinary activities. Nevertheless, a registered exchange would retain ultimate responsibility for this function.[344] In considering an exchange's application for registration the Commission will consider whether allowing the exchange to contract with another SRO to perform its day-to-day enforcement and disciplinary activities would be consistent with the public interest.

2. Fair Representation

Section 6(b)(3) of the Exchange Act requires that registered exchanges have rules that: (1) Provide that one or more directors is representative of issuers and investors, and not associated with a member of the exchange, or with any broker-dealer; and (2) "assure a fair representation of its members in the selection of its directors and administration of its affairs."[345]

(i) Public Directors

Congress adopted the requirement that at least one director be representative of issuers and investors because of the public's interest in ensuring the fairness and stability of significant markets.[346] Public representation on an exchange's board of directors helps to achieve this goal. The Commission believes that, under this structure, representation of the public on an oversight body that has substantive authority and decision making ability is critical to ensure that an exchange actively works to protect the public interest and that no single group of investors has the ability to systematically disadvantage other market participants through use of the exchange governance process.[347] Therefore, the Commission would expect alternative trading systems that apply for registration as exchanges to have public representation on their boards of directors.

(ii) Fair Representation of Exchange Members

The second requirement, that of fair representation of an exchange's members, also serves to ensure that an exchange is administered in a way that is equitable to all market members and participants. Because a registered exchange is not solely a commercial enterprise, but also has significant regulatory powers with respect to its members, competition between exchanges may not be sufficient to ensure that an exchange carries out its regulatory responsibilities in an equitable manner. The fair application of an exchange's authority to bring and adjudicate disciplinary procedures may be particularly important, because these actions can have significant and far-reaching ramifications for broker-dealers.

Historically, the fair representation requirement was one of the major obstacles to the regulation of alternative trading systems as exchanges because of the concern that it would be incompatible with their proprietary structures.[348] In the Proposing Release,

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[340] *See* Securities Exchange Act Release No. 23192 (May 1, 1986) 51 FR 17426 (May 12, 1986). Moreover, section 108 of NSMIA, *supra* note 7, adds a provision to section 17 of the Exchange Act that calls for improving coordination of supervision of members and elimination of any unnecessary and burdensome duplication in the examination process.

[341] For example, the Commission has approved a regulatory plan filed by the Amex, CBOE, NASD, NYSE, PCX, and the Philadelphia Stock Exchange ("Phlx") that divides the oversight responsibilities among these SROs for common members, by designating each participating SRO as the options examination authority for a portion of the common members. This designated SRO has sole regulatory responsibility for certain options-related trading matters. *See* Securities Exchange Act Release No. 20158 (Sept. 8, 1983), 48 FR 41265 (Sept. 14, 1983). The SRO designated under the plan as a broker-dealer's options examination authority is responsible for conducting options-related sales practice examinations and investigating options-related customer complaints and terminations for cause of associated persons. The designated SRO is also responsible for examining a firm's compliance with the provisions of applicable federal securities laws and the rules and regulations thereunder, its own rules, and the rules of any SRO of which the firm is a member. *Id.*

[342] 17 CFR 240.17d–2. Securities Exchange Act Release No. 12935 (Oct. 28, 1976), 41 FR 49093 (Nov. 8, 1976). In addition to the regulatory responsibilities it otherwise has under the Exchange Act, the SRO to which a firm is designated under these plans assumes regulatory responsibilities allocated to it. Under Rule 17d–2(c), the Commission may declare any joint plan effective if, after providing notice and opportunity for comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and in conformity with the factors set forth in Exchange Act section 17(d). 15 U.S.C. 78q(d). The Commission has approved plans filed by the equity exchanges and the NASD for the allocation of regulatory responsibilities pursuant to Rule 17d–2. *See, e.g.*, Securities Exchange Act Release Nos. 13326 (Mar. 3, 1977), 42 FR 13878 (Mar. 14, 1977) (NYSE/Amex); 13536 (May 12, 1977), 42 FR 26264 (May 23, 1977) (NYSE/BSE); 14152 (Nov. 9, 1977), 42 FR 59339 (Nov. 16, 1977) (NYSE/CSE); 13535 (May 12, 1977), 42 FR 26269 (May 23, 1977) (NYSE/CHX); 13531 (May 12, 1977), 42 FR 26273 (May 23, 1977) (NYSE/PSE); 14093 (Oct. 25, 1977), 42 FR 57199 (Nov. 1, 1977) (NYSE/Phlx); 15191 (Sept. 26, 1978), 43 FR 46093 (Oct. 5, 1978) (NASD/BSE, CSE, CHX and PSE); and 16858 (May 30, 1980), 45 FR 37927 (June 5, 1980) (NASD/BSE, CSE, CHX and PSE).

[343] *See* section 6(b)(6) of the Exchange Act, 15 U.S.C. 78f(b)(6). *See also* section 6(b)(7) of the Exchange Act, 15 U.S.C. 78f(b)(7).

[344] *See, e.g.* section 19 of the Exchange Act, 15 U.S.C. 78s

[345] Section 6(b)(3) of the Exchange Act, 15 U.S.C. 78f(b)(3).

[346] *Id.*

[347] *See* NASD 21(a) Report, *supra* note 4.

[348] *See Delta Release*, *supra* note 32, at 1900. In *Board of Trade of the City of Chicago v. Securities and Exchange Commission*, 923 F.2d 1270 (7th Cir. 1991) ("*Delta II*"), the court stated that:

> The Delta system cannot register as an exchange because the statute requires that an exchange be controlled by its participants, who in turn must be registered brokers or individuals associated with such brokers. So all the financial institutions that trade through the Delta system would have to register as brokers, and (the system sponsors) would have to turn over the ownership and control of the

however, the Commission proposed to allow non-membership, for-profit alternative trading systems that choose to register as exchanges some flexibility in satisfying this "fair representation" requirement.

The Commission notes that it has not, in the past, interpreted an exchange's obligation to provide fair representation of its members to mean that all members must have equal rights. Instead, the Commission has allowed registered SROs a degree of flexibility in complying with this requirement. For example, PCX "electronic access members" ("ASAP Members") do not have voting rights, and therefore are not represented on the board of that exchange.[349]

More recently, the Commission approved the merger between the Amex and the NASD. As a result of the merger, Amex, reorganized as New Amex LLC ("New Amex"), is now a subsidiary of the NASD. In reviewing the merger, the Commission considered several fair representation issues. Specifically, the Commission considered, among other things, Amex member representation on the Board of Governors of New Amex, Amex member representation on the Board of the NASD, the voting rights of the Amex membership, and representation of the Amex membership in the disciplinary process.

The Commission found that the composition of the New Amex Board satisfied the fair representation requirement by providing the Amex membership with the opportunity to nominate four Amex floor governors to the New Amex Board.[350] Further, the Commission found that the inclusion of one New Amex floor governor on the NASD Board[351] helped to fulfill the fair representation requirement by providing for New Amex input on the parent Board.[352] In addition, the Commission believes that the fair representation requirement was furthered by the corporate governance provisions of New Amex's constitution that require the consent of either Amex (through a Membership vote), the Amex Committee (a committee designed specifically to represent the interests of the Amex membership), or both, in situations impacting certain membership interests or material market changes to New Amex. Lastly, the Commission found that the disciplinary procedures of New Amex met the fair representation requirement by providing for review of all disciplinary matters by a committee composed of both Amex members and public representatives. Specifically, the Amex Adjudicatory Council, which is empowered to act for the full New Amex Board in reviewing appeals from disciplinary proceedings, is composed of three Public Members and three Floor Governors, all of whom are nominated by the Amex Nominating Committee (or by petition signed by twenty-five Members) and elected by a full Amex Membership vote.[353]

In addition, with respect to clearing agencies, the Commission has stated that registered clearing agencies may employ several methods to comply with the fair representation standard.[354] The Commission believes that other structures may also provide independent, fair representation for an exchange's constituencies in its material decision making processes if the exchange is not owned by its participants. For example, a proprietary alternative trading system that registers as an exchange might be able to fulfill this requirement by establishing an independent subsidiary that has final, binding responsibility for bringing and adjudicating disciplinary proceedings and making rules for the exchange, and ensuring that the governance of such subsidiary equitably represents the exchange's participants.[355] As another possibility, certain directors appointed to the board to represent the interests of trading members or participants could be limited to considering certain topics relating to system use and rules, while consideration of ownership issues could be restricted to board members representing the interests of the owners or stockholders.[356]

Some commenters expressed concern that the flexibility afforded alternative trading systems in complying with their "fair representation" requirement not extend so far as to result in unequal regulation of alternative trading systems registered as exchanges and traditional exchanges. In addition, these commenters expressed concern that the efficiency of the markets not be compromised.[357] American Century also expressed its support for structures in which an alternative trading system's board included both owners and participants.[358] On the other hand, several commenters stated that members (or participants) of a proprietary exchange should not have any right to participate in the governance of the exchange and that imposing constraints on the manner in which alternative trading systems are governed may undermine the factors that lead to their efficiency and innovativeness.[359]

The Commission believes alternative trading systems should be required to assure fair representation of their members if they choose to register as exchanges. As discussed above, registered exchanges have special responsibilities under the Exchange Act, regardless of whether they are not-for-profit or for-profit. Accordingly, the Commission continues to believe that exchange participants—including

system to the institutions. The system would be kaput.

Id. at 1272–73.

[349] *See* Securities Exchange Act Release No. 28335 (Aug. 13, 1990), 55 FR 34106 (Aug. 21, 1990) (order approving rule change establishing electronic access memberships on the PCX).

[350] The New Amex Board consists of eighteen total governors. Floor governor nominees will be proposed by either the Amex Nominating Committee (consisting of three floor members and two public members) or a petition signed by twenty five members and will be selected by a plurality of the Amex Regular and Options Principal members voting together as a single class. The Amex membership elects the members of the Amex Nominating Committee.

[351] The Chief Executive Officer of New Amex will also be a governor on the NASD Board.

[352] The New Amex Floor Governor is nominated by the Amex Membership and will be able to directly express the Amex members' viewpoint and concerns within the NASD Board forum. In addition, the Chief Executive Officer of New Amex will be able to provide information about, and communicate the needs of, New Amex to the NASD Board.

[353] *See* Securities Exchange Act Release No. 40622 (Oct. 30, 1998), 63 FR 59819 (Nov. 5, 1998).

[354] 15 U.S.C. 78q–1(b)(3)(c). These methods include: (1) Solicitation of board of directors nominations from all participants; (2) selection of candidates for election to the board of directors by a nominating committee which would be composed of, and selected by, the participants or representatives chosen by participants; (3) direct participation by participants in the election of directors through the allocation of voting stock to all participants based on their usage of the clearing agency; or (4) selection by participants of a slate of nominees for which stockholders of the clearing agency would be required to vote their share. *See* Securities Exchange Act Release No. 14531 at 24 (Mar. 6, 1978), 43 FR 10288 (Mar. 10, 1978). *See also* Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (June 23, 1980).

[355] The proprietary foreign exchange Easdaq, a recognized secondary market in Belgium, has established a "regulatory authority" that has a degree of independence from Easdaq's board of directors.

[356] The Commission in the past has approved exchange rules limiting the voting rights of "special access" or non-equity members as consistent with section 6(b)(3) of the Exchange Act, 15 U.S.C. 78f(b)(3). *See, e.g.*, Securities Exchange Act Release No. 22959 (Feb. 28, 1986), 51 FR 8060 (Mar. 7, 1986) (approving rule change by NYSE establishing "electronic access membership" with restricted voting rights).

[357] *See* CBOE Letter at 5–6; NASD Letter at 4–5.

[358] American Century Letter at 6.

[359] *See* Ashton Letter at 4 (for-profit exchanges should be afforded considerable flexibility in their formative business stages in meeting fair representation obligations); OptiMark Letter at 3–4 (users of alternative trading systems should be treated fairly, but are not entitled to exercise any formal rights in regard to the management of the system, and are adequately protected through a combination of regulatory safeguards and market forces); Lee Letter at 1–2 (owners of exchanges already have incentives to create suitable governance structures).

participants in a for-profit exchange—need to have substantive input into disciplinary and other key processes to prevent these processes from being conducted in an inequitable, discriminatory, or otherwise inappropriate fashion.

The NASD asked the Commission to provide more specific guidance on the details of the flexibility the Commission proposes to allow alternative trading systems applying for registration as exchanges.[360] The Commission has provided several examples of ways in which fair representation requirements can be met in non-traditional ways and believes that there may be other acceptable ways. The Commission, however, does not believe it is necessary to specify in greater detail what types of structures would be acceptable to it. What constitutes fair representation for a particular exchange will be determined in the context of that system's application for registration under sections 6(a) and 19(a) of the Exchange Act. Under section 19(a) of the Exchange Act, notice of an application for registration as an exchange is published for comment before approval.[361] This will provide interested persons with notice of, and an opportunity to comment on, the manner in which a particular exchange proposes to meet its fair representation obligations.[362]

3. Membership on a National Securities Exchange

An applicant for registration as a national securities exchange must have rules to admit members and persons associated with those members.[363] Section 6(c)(1) of the Exchange Act[364] prohibits exchanges from granting new membership to any person not registered as a broker-dealer, or associated with a broker-dealer. In the Concept Release, the Commission solicited commenters' views on whether to allow institutional membership on national securities exchanges. Because most commenters were opposed to institutional membership on exchanges, the Commission did not propose to exempt registered exchanges from the limitations in section 6(c)(1). Nevertheless, in the Proposing Release, the Commission asked for comment on whether institutions should be permitted to be members of national securities exchanges.

Most commenters expressing a view on institutional membership on registered exchanges agreed that such exchanges should be prohibited from having non-broker-dealer members.[365] One commenter, however, believed that direct institutional access to exchanges is a choice that would benefit market participants by providing lower execution costs for the shareholders of institutional funds. Although this commenter noted the Commission's concerns about the regulatory burden an institution might face if it chose to be a direct member of an exchange, it thought that membership should be a choice available to those institutions that feel they have the economies of scale to warrant direct access or believe that anonymity is worth the regulatory cost of membership.[366]

As discussed in the Proposing Release, the Commission believes that, in order to ensure the central goals of exchange regulation, direct institutional members or participants in exchanges would have to be subject to the majority of rules and regulations to which broker-dealers are currently subject.[367] Moreover, because institutions that were granted exchange membership or direct access to exchanges would likely need to become members in one or more of the national clearance and settlement corporations in order to clear and settle their trades, these institutions would need to demonstrate and maintain financial creditworthiness. Insufficient net capital and incomplete books and records could compromise financial soundness, audit trails, and other general risk management objectives that are critical to sound markets and clearance and settlement systems. Consequently, the Commission would need to require non-broker-dealer institutions to comply with financial responsibility obligations, including the requirements to maintain certain minimum levels of net capital and appropriate books and records.[368] Without such requirements, institutional membership on an exchange may also conflict with an exchange's obligation to have rules that foster the efficient clearance and settlement of securities transactions.

The Commission believes that non-broker-dealer institutions essentially would be required to comply with the same requirements imposed on registered broker-dealers and, therefore, undermine most benefits an institution receives by virtue of not registering as a broker-dealer.[369] Thus, the Commission does not believe that allowing institutional membership on exchanges would be any less costly to an institution than establishing a broker-dealer affiliate, which can become a member in a registered exchange. At the same time, it would impose ad-hoc regulatory burdens on the Commission and the exchanges as they tried to impose critical rules and regulations on institutions. Further, the Commission does not believe that it is currently practical or serves the best interests of investors or the markets generally to allow non-broker-dealers to be members of national securities exchanges, because of the potential lack of regulatory oversight the Commission would have over these entities. Therefore, just as currently registered exchanges are required to limit membership to broker-dealers, alternative trading systems that choose to register as exchanges would be prohibited from extending membership to non-broker-dealers.

Accordingly, the Commission believes that exchange membership should continue to be limited to registered broker-dealers and persons associated with registered broker-dealers in accordance with section 6(c)(1) of the Exchange Act.[370] Institutions, however, would be able to access alternative trading systems registered as exchanges through a registered broker-dealer member of such a trading system, including an affiliate of the institution. Institutions currently have efficient access to the NYSE through SuperDOT

[360] NASD Letter at 4–5.

[361] 15 U.S.C. 78s(a).

[362] 15 U.S.C. 78f(a) and 78s(a). *See* NASD Letter at 4–5 (commenting that the public should have an opportunity to comment on the proposed governance structure of an exchange before the Commission approves its application for registration).

[363] 15 U.S.C. 78f(b)(3)–(4) and 78f(c).

[364] 15 U.S.C. 78f(c)(1). Section 6(c)(1), adopted in 1975, prohibits exchanges from granting new memberships to non-broker-dealers. At the time this Section was adopted, one non-broker-dealer maintained membership on an exchange. This non-broker-dealer was not affected by the prohibition and continues to maintain its membership.

[365] CBOE Letter at 6 ("it would be difficult, if not impossible, for the Commission to adequately regulate or oversee the array of non-broker-dealer institutions that currently are, or may become, participants on (alternative trading systems)"); NASD Letter at 8 (institutions should not be members of alternative trading systems that register as exchanges); IBEX Letter at 13 (institutional and individual investors should be granted exchange access through the sponsorship of discount or full-service broker-dealers).

[366] American Century Letter at 4.

[367] Sections 6(f) and 15(e) of the Exchange Act, 15 U.S.C. 78f(f) and 78*o*(e), would permit the Commission to subject institutional members to all exchange rules and relevant Exchange Act provisions.

[368] The Commission could adopt such requirements pursuant to its authority under Section 15(c) of the Exchange Act, 15 U.S.C. 78*o*(e).

[369] The Commission notes that institutions currently have the option to establish a broker-dealer affiliate, which can become a member in an exchange. The institution can then direct its order flow through its affiliated entity. Many investment companies already have affiliated broker-dealers.

[370] 15 U.S.C. 78f(c)(1).

terminals given to them by NYSE members,[371] and the OptiMark System[372] will enable institutions to directly enter orders in the OptiMark System through use of an exchange member give-up. Access of this nature should not impose significant costs or burdens on institutions or on broker-dealers providing the access. The Commission believes if institutions continue to have indirect access to exchanges, their needs can be met without compromising important regulatory objectives.

Finally, while the NASD agreed with the Commission's views that institutions should not be "members" of registered exchanges, it asked the Commission to provide guidance on whether a registered exchange may set up a broker-dealer subsidiary to provide sponsored access to retail and institutional customers. Further, the NASD asked whether the registered exchange could be the SRO for its broker-dealer subsidiary. The NASD believes that there is an inherent conflict of interest in such an arrangement and that the Commission should explain its views and provide SROs with guidance on the responsibilities for oversight of the broker-dealer in such circumstances.[373]

In this regard, a registered exchange is not explicitly prohibited from establishing a broker-dealer subsidiary through which it can provide sponsored access to its non-broker-dealer customers. Nonetheless, the Commission recognizes concerns about the potential conflict of interest if a registered exchange were the SRO for its subsidiary, and believes that it may be difficult for an exchange to fulfill its obligations under sections 6(b)(6), 6(b)(7), and 19(g) with respect to such a subsidiary.[374]

4. Fair Access

Sections 6(b)(2)[375] and 6(c)[376] of the Exchange Act prohibit registered exchanges from denying access to, or discriminating against, members. The obligation to ensure fair access for members does not, however, restrict the authority of a national securities exchange to maintain reasonable standards for access.[377] The securities industry and the general public need access to exchanges to ensure the best execution of orders. Exchanges are venues for trading that should be open to all qualified persons. The Commission stated in the Proposing Release that alternative trading systems that register as exchanges would be required to comply with section 6(b)(2) and section 6(c) of the Exchange Act. IBEX was the only commenter to express a view on this requirement and its comment was favorable.[378] Thus, the Commission would require any alternative trading system registered as an exchange to ensure the fair access of registered broker-dealers.

In a similar vein, exchanges are prohibited from adopting any anti-competitive rules.[379] To further emphasize the goal of vigorous competition, Congress requires the Commission to consider the competitive effects of exchange rules,[380] as well as the Commission's own rules.[381] The fair access and fair competition requirements in the Exchange Act are intended to ensure that national securities exchanges treat investors and their participants fairly, consistent with the expectations of the investing public. For example, as discussed above, an exchange's rules, including its rules of priority, must treat all members fairly. Accordingly, before granting an application for registration as an exchange, the Commission would review the exchange's rules for compliance with these requirements.

5. Compliance With ARP Guidelines

All national securities exchanges are expected to maintain sufficient systems capacity to handle foreseeable trading volume. Applicants for registration as a national securities exchange must have adequate computer system capacity, integrity and security to support the operation of an exchange. The Commission believes that adequate capacity is vital to the efficient operation of exchanges, particularly during periods of high volume or volatility, such as have been experienced in the past year. To this end, all exchanges and the NASD currently participate in the Commission's automation review program ("ARP").[382] Given the highly automated nature of most alternative trading systems, the Commission stated in the Proposing Release that it would expect any exchange applying for registration as a national securities exchange to comply with the policies and procedures outlined by the Commission in its policy statements concerning the automation review program, including cooperation with any reviews conducted by the Commission. In this regard, the Commission would consider the resources and ability of an applicant for registration as an exchange to meet the standards set forth in the automation review program. In particular, the Commission would consider whether the applicant had sufficient capital to maintain its automated systems, and staff with technical expertise.

The Commission received one comment letter addressing this issue. The PCX commented that registered exchanges should only have to comply with the ARP guidelines if they reach the threshold level that triggers these requirements for alternative trading systems registered as broker-dealers. The PCX noted that, although many exchanges do not account for twenty percent, or even ten percent, of the trading in ITS eligible equity securities, all exchanges are required to comply with the ARP guidelines. The PCX commented that these regulatory requirements impose substantial costs on exchanges and that there is no basis for imposing these types of requirements on exchanges when such requirements are not imposed on alternative trading systems registered as broker-dealers that have substantially greater trading volume.[383]

The Commission notes that today it is adopting a requirement that alternative trading systems with twenty percent or more of the volume in any equity security, or certain categories of debt, comply with certain systems capacity, integrity, and security requirements. While some registered exchanges may have less than twenty percent of the volume in similar securities, the Commission nevertheless believes that these exchanges' direct participation in the national market system necessitates

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[371] Exchange members are subject to regulatory action by the NYSE for violations of NYSE rules by their customers entering orders through the members' SuperDOT terminals.

[372] *See infra* note 452.

[373] NASD Letter at 8.

[374] 15 U.S.C. 78f(b)(6)–(7) and 15 U.S.C. 78s(g). These provisions require that a registered exchange be able to enforce compliance by its members with the federal securities laws, appropriately discipline its members for violations of such laws, and provide a fair disciplinary procedure. The Commission notes, however, that unless a broker-dealer effects transactions in securities solely on a national securities exchange of which it is a member, it must become a member of a national securities association or another national securities exchange. Section 15(b)(8) of the Exchange Act, 15 U.S.C. 78o(b)(8).

[375] 15 U.S.C. 78f(b)(2).

[376] 15 U.S.C. 78f(c).

[377] A denial of access would be reasonable, for example, if it were based on objective standards, such as capital and credit requirements, and if these standards were applied fairly.

[378] IBEX Letter at 13–14.

[379] Section 6(b)(8) of the Exchange Act, 15 U.S.C. 78f(b)(8); section 15A(b)(9) of the Exchange Act, 15 U.S.C. 78o–3(b)(9).

[380] Section 6(b)(6) of the Exchange Act, 15 U.S.C. 78f(b)(6).

[381] Section 23(a) of the Exchange Act, 15 U.S.C. 78w(a).

[382] *See supra* notes 269–273 and accompanying text.

[383] PCX Letter at 7–8.

participation in the automation review program. Moreover, while there are costs associated with capacity planning and testing, contingency planning, stress testing, and independent reviews, as well as ensuring that automated systems have sufficient capacity, these are costs that all highly automated business must bear and not merely regulatory costs.[384] The Commission's ARP guidelines are intended only to ensure that short-term cost cutting by registered exchanges does not jeopardize the operation of the securities markets.

6. Registration of Securities

Under the Exchange Act, securities traded on a national securities exchange must be registered with the Commission and approved for listing on the exchange.[385] In addition, national securities exchanges are permitted to trade securities listed on other exchanges and Nasdaq pursuant to unlisted trading privileges ("UTP").[386] These requirements ensure that investors have adequate information and that all relevant trading activity in a security is reported to, and surveilled by, the exchange on which it is listed. The Commission discussed in the Proposing Release that an alternative trading system choosing to register as an exchange would be subject to these requirements and would be required to have rules for trading the class or type of securities it seeks to trade pursuant to UTP.[387] Moreover, to trade Nasdaq NM securities, such a system would have to become a signatory to an existing plan governing such trading.[388]

With regard to these securities registration requirements, OptiMark commented that they would preclude, as a practical matter, those alternative trading systems that trade privately placed securities or unregistered foreign securities from choosing to register as exchanges. In addition, the various conditions and limited scope of the Nasdaq/National Market System/ Unlisted Trading Privileges ("OTC–UTP") plan[389] would impair the ability of alternative trading systems that offer competing facilities for securities listed on existing exchanges to register as exchanges. For example, UTP may be extended for Nasdaq NM securities, but this does not include Nasdaq SmallCap securities or other over-the-counter securities. Moreover, formally amending the OTC–UTP plan to admit any new member and to allocate expenses and revenues among competing market centers is a time-consuming process.

Consequently, OptiMark recommended that the Commission exercise its exemptive authority to reduce the differences in regulatory treatment between alternative trading systems registered as exchanges and those registered as broker-dealers. In particular, OptiMark suggested that, regardless of whether they are registered exchanges or broker-dealers, alternative trading systems that limit their screen availability to certain qualified persons be permitted to trade unregistered securities, including private placements and foreign securities. Similarly, OptiMark believed that alternative trading systems that seek to compete for order flow with existing exchanges should be able to do so in *all* securities listed on those exchanges, regardless of the alternative trading system's registration status.[390]

The issue of trading unregistered securities, and in particular unregistered foreign securities, on exchanges raises many difficult issues. Registration of securities provides public information for investors that is prepared in accordance with U.S. accounting and auditing standards. This assures that the issuer's disclosures are consistently presented and can be easily compared to the information provided by other issuers. For this reason, the Exchange Act requires securities to be registered if they trade on national securities exchanges.

The Commission has maintained the current structure in the final rules: continuing to require registered exchanges to trade only registered securities, but not extending this requirement to alternative trading systems not registered as exchanges. The Commission is continuing to review on a broader basis the issuing and trading of unregistered foreign securities in the U.S. and, as part of that review, will specifically consider whether unregistered foreign securities should continue to be freely traded on alternative trading systems that are not registered as exchanges.

7. National Market System Participation

As discussed in the Proposing Release, any alternative trading system that elects to register as a national securities exchange would also be expected to become a participant in the market-wide transaction and quotation reporting plans currently operated by registered exchanges and the NASD. These plans—the CQS,[391] the CTA,[392] the ITS,[393] the Options Price Reporting Authority ("OPRA"),[394] and OTC–

[384] In this regard, those exchanges applying for registration in 1999 should also be prepared to demonstrate that their systems are year 2000 compliant.

[385] Section 12(a) of the Exchange Act makes it unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration statement has been filed with the Commission and is in effect as to such security for such exchange in accordance with the provisions of the Exchange Act and the rules and regulations thereunder. 15 U.S.C. 78*l*(a). Section 12(b) of the Exchange Act, 15 U.S.C. 78*l*(b), contains procedures for the registration of securities on a national securities exchange. Section 12(a) does not apply to an exchange that the Commission has exempted from registration as a national securities exchange. *See, e.g.*, Securities Exchange Act Release No. 28899 (Feb. 20, 1991), 56 FR 8377 (Feb. 29, 1991). *See also* Securities Exchange Act Release No. 37271 ()une 3, 1996), 61 FR 29145 ()une 7, 1996).

[386] Section 12(f) of the Exchange Act, 15 U.S.C. 78*l*(f). Under section 12(f) of the Exchange Act, 15 U.S.C. 78*l*(f), exchanges cannot trade securities not listed on an exchange or classified as Nasdaq NM securities (such as Nasdaq SmallCap or OTC securities) without Commission action. Section 12(f) of the Exchange Act authorizes the Commission to permit the extension of UTP to any security listed otherwise than on an exchange. The OTC–UTP plan which provides UTP for Nasdaq NM securities, is the only extension to date approved by the Commission. *See* OTC–UTP plan, *infra* note 401. Thus, registered exchanges cannot currently trade Nasdaq SmallCap securities or exempted securities that are not separately listed on the exchange.

[387] Rule 12f–5, 17 CFR 240.12f–5.

[388] *See* OTC–UTP plan, *infra* note 401 and accompanying text.

[389] The OTC–UTP plan provides for the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq NM securities by its participants. Any registered Exchange where Nasdaq NM securities are traded may become a full participant in the OTC–UTP plan. *See infra* note 401. *See also* Securities Exchange Act Release Nos. 24407 (Apr. 27, 1987), 52 FR 17349 (May 7, 1987); 36985 (Mar. 18, 1996), 61 FR 12122 (Mar. 25, 1996).

[390] OptiMark Letter at 3.

[391] The CTA provides vendors and other subscribers (including alternative trading systems) with consolidated last sale information for stocks admitted to dealings on any exchange pursuant to a plan approved by the Commission ("CTA plan"). *See, e.g.*, Securities Exchange Act Release Nos. 10787 (May 10, 1974), 39 FR 17799 (final rules approving CTA plan); 16983 (July 16, 1980), 45 FR 49414 (July 24, 1980); 37191 (May 9, 1996), 61 FR 24842 (May 16, 1996).

[392] The CQS gathers quotations from all market makers in exchange-listed securities and disseminates them to vendors and other subscribers pursuant to a plan approved by the Commission ("CQ plan"). Securities Exchange Act Release No. 16518 (Jan. 22, 1980), 45 FR 6521 (final rules approving CQ plan); 37191 (May 9, 1996), 61 FR 24842 (May 16, 1996).

[393] The ITS is a communications system designed to facilitate trading among competing markets by providing each market participating in the ITS pursuant to a plan approved by the Commission ("ITS plan") with order routing capabilities based on current quotation information. *See, e.g.* Securities Exchange Act Release Nos. 37191 (May 9, 1996), 61 FR 24842 (May 16, 1996); 17532 (Feb. 10. 1981), 46 FR 12919 (Feb. 18, 1981); 23365 ()une 23, 1986), 51 FR 23865 (July 1, 1986) (CSE/ITS linkage); 18713 (May 6, 1982) 47 FR 20413 (May 12, 1982) (NASD's CAES/ITS linkage); 28874 (Feb. 12, 1991), 56 FR 6889 (Feb. 20, 1991) (CBOE/ITS linkage).

[394] *See infra* note 401 and accompanying text for a description of the OPRA plan.

UTP [395]—link trading, quotation, and reporting for all registered exchanges and the NASD and are responsible for the transparent, efficient, and fair operation of the securities markets. These plans form the backbone of the national market system and participation in these plans by all registered exchanges is vital to the success of the national market system.

Participation in effective quote and transaction reporting plans and procedures would, therefore, be mandatory for any newly registered exchange, as it is now for currently registered exchanges.[396] The CTA and the CQS, which make quote and transaction information in exchange-listed securities available to the public,[397] both have provisions governing the entry of participants to the plans,[398] and allow any national securities exchange or registered national securities association to become a participant.[399] New participants are required to pay certain entry fees to the existing participants.[400] Participants in these plans share in the income and expenses associated with the plans' operations.[401] Because national securities exchanges are required to participate in an effective quote and transaction reporting plan, the Commission expects the participants of existing plans to include them in the plans under reasonable conditions adapted to the situations of the new exchanges.

In addition to requiring participation by newly registered exchanges in quote and transaction reporting plans, the Commission would expect newly registered exchanges to participate in ITS,[402] or an equivalent system if one were developed. ITS provides trading links between market centers and enables a broker or dealer who participates in one market to execute orders, as principal or agent, in an ITS security at another market center, through the system.[403] The ITS plan requires that the members of participant markets avoid initiating a purchase or sale at a worse price than that available on another ITS participant market ("trade-throughs").[404] Participation in ITS would give users of these new exchanges access to other ITS participant markets. Moreover, participation in ITS would require new exchanges to adopt rules to comply with other applicable ITS plan provisions and policies on matters such as, for example, trade-throughs, locked markets,[405] and block trades.[406] As with the quote and transaction reporting plans, alternative trading systems that register as exchanges would have to be integrated into ITS, or another system that links markets for trading purposes would have to be created to accomplish full integration of the newly registered exchanges into the national market system.

The Commission solicited comment on what issues were raised by the possible integration of new exchanges into ITS. One commenter strongly believed that the current voting structure of ITS establishes barriers to entry, which leads to barriers to innovation. This commenter was concerned that the network supporting ITS may not be strong enough to handle sharply higher volumes of securities transactions and that, in an environment with multiple exchanges, the failure of these linkages would impede market participants' quest for best prices.[407] Another commenter, similarly, expressed concern that the means of access to, and participation in, the national market system plans more generally was not clearly defined and, therefore, provided the current participants in these plans an opportunity to delay and to set unreasonable terms and conditions for entry of new participants.[408] The Commission realizes that integrating new exchanges into the national market system plans may require amendments to these plans and notes that national market system plans may be amended

[395] *See infra* note and accompanying text for a description of the OTC–UTP plan.

[396] *See* Rules 11Ac1–1(b)(1) and 11Aa3–2(c), 17 CFR 240.11Ac1–1(b)(1) and 240.11Aa3–2(c).

[397] Both the CTA and the CQS are presently operated by the eight national securities exchanges and the NASD.

[398] The CTA plan also contains a provision for entities other than participants to report directly to the CTA as "other reporting parties." Pursuant to this provision, parties other than a national securities exchange or association may be permitted to provide transaction data directly to the CTA. Alternative trading systems that do not elect to register as exchanges would be eligible for participation in the CTA plan pursuant to this provision; however, as non-member participants, these systems would neither be obligated to pay the required fees and expenses to the plan, nor able to share in the plan's profits.

[399] *See* Securities Exchange Act Release No. 37191 (May 9, 1996), 61 FR 24842 (May 16, 1996).

[400] These fees represent the "tangible and intangible assets" provided by the plans to the new participant. *See* Proposing Release, *supra* note 3 at nn.342–43 (discussing entry fees for the CTA, CQS, and ITS plans).

[401] Similar to the CTA and CQ plans, the OTC–UTP plan governing trading of Nasdaq NM securities provides for the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq NM securities by its participants. Any national securities exchange where Nasdaq NM securities are traded may become a full participant of the OTC–UTP plan. The plan also provides that new participants pay a share of development costs, share ongoing operating costs, and are entitled to share in the plan's profits. *See* Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Exchange-listed Nasdaq/National Market System Securities and for Nasdaq/National Market System Securities Traded on Exchanges on an Unlisted Trading Privilege Basis ("OTC–UTP plan"). Securities Exchange Act Release No. 24407 (Apr. 29, 1987), 52 FR 17349 (May 7, 1987). *See also* Securities Exchange Act Release No. 36985 (Mar. 18, 1996), 61 FR 12122 (Mar. 25, 1996).

The OPRA plan also provides for the collection and dissemination of last sale and quotation information with respect to options that are traded on the participant exchanges. Under the terms of this plan, any national securities exchange whose rules governing the trading of standardized options have been approved by the Commission may become a party to the OPRA plan. The plan provides that any new party, as a condition of becoming a party, must pay a share of OPRA's start-up costs. It also provides for revenue sharing among all parties. The OPRA plan was approved pursuant to Section 11A of the Exchange Act and Rule 11a3–2 thereunder. *See* Securities Exchange Act Release No. 17638 (Mar. 18, 1981) ("OPRA plan").

[402] To become a participant in ITS, an exchange or association must subscribe to, and agree to comply and to enforce compliance with, the provisions of the plan. *See* ITS plan, *supra* note 393, at section 3(c).

[403] ITS also establishes a procedure that allows specialists to solicit pre-opening interest in a security from specialists and market makers in other markets, thereby allowing these specialists and market makers to participate in the opening transaction. Participation in an opening transaction can be especially important when the price of a security has changed since the previous close.

[404] A trade-through occurs when an ITS participant purchases securities at a lower price or sells at a higher price than that available in another ITS participant market. For example, if the NYSE is displaying a bid of 20 and an offer of 20⅛ for an ITS security, the prohibition on trade-throughs would prohibit another ITS participant market from buying that security from a customer at 19⅞ or selling that security to a customer at 20 ½. In addition, each participant market has in place rules to implement the ITS Trade-Through Rule. *See, e.g.* NASD Rule 5262. The plan also provides a mechanism for satisfying a market aggrieved by another market's trade-through.

[405] A locked market occurs when an ITS participant disseminates a bid for an ITS security at a price that equals or exceeds the price of the offer for the security from another ITS participant or disseminates an offer for an ITS security at a price that equals or is less than the price of the bid for the security from another ITS participant. The plan provides a mechanism for resolving locked markets.

[406] The ITS block trade policy provides that the member who represents a block size order shall, at the time of execution of the block trade, send or cause to be sent, through ITS to each participating ITS market center displaying a bid (or offer) superior to the execution price a commitment to trade at the execution price and for the number of shares displayed with that market center's better priced bid (or offer).

[407] American Century Letter at 3 (citing instances of downtime on alternative trading systems that are attributable to SelectNet, rather than the alternative trading system).

[408] Ashton Letter at 4 (also stating that the Commission should be sensitive to the "veiled anti-competitive motives" of the existing plan participants and be prepared to direct any new qualified exchanges to be accepted into all national market system plans).

either by vote of the participants, or by Commission action.[409]

The Commission also requested comment on whether any changes were necessary to incorporate alternative trading systems registered as exchanges into the national market system plans. In this regard, the Chicago Board Options Exchange ("CBOE") and the NYSE stated that they did not believe that there would need to be significant changes to these plans, and that any changes that would be necessary to accommodate alternative trading systems registered as exchanges into ITS would be relatively easy to resolve.[410] The CBOE, however, did state that alternative trading systems registered as exchanges should be subject to the same requirements regarding access to the national market system plans as are applicable to traditional exchanges, including payment of participation entry fees.[411]

The NASD suggested that, before the Commission approves an alternative trading system's application for registration as an exchange, the Commission address more completely the manner in which such an alternative trading system registered as an exchange may participate in national market system plans. The NASD noted three areas in which the Proposing Release was silent. First, the Commission did not address what mechanism would be used for access among any new exchange and other exchanges or markets. For example, in the context of Nasdaq securities, the NASD thought it was unclear whether the existing approach to linkage and execution should continue to occur through Nasdaq's SelectNet system or its successor, or whether there should be a new ITS-like entity formed with a completely new approach to access. The NASD expressed a preference for using the current approach to linkages. Second, the NASD noted that the Commission did not address whether alternative trading systems registered as exchanges could continue to charge an access fee, and believed strongly that such alternative trading systems should not be allowed to charge for another market accessing displayed interest. Third, the Commission did not address the intermarket linkage issues raised by access to traditional exchanges by non-broker-dealers that have indirect access to alternative trading systems registered as exchanges.[412]

OptiMark asked the Commission to consider the effect of an alternative trading system's ability to charge an execution fee on its choice to register as an exchange or as a broker-dealer. OptiMark noted that the Proposing Release only contemplated that alternative trading systems operating as broker-dealers would be able to charge a fee to non-subscribers; alternative trading systems registered as exchanges and participating in ITS would not.[413]

Susquehanna Investment Group ("Susquehanna") expressed concern about potentially integrating many alternative trading systems registered as exchanges into the national market system mechanisms. Susquehanna commented that integrating new exchanges' quotations into the national market system should be done only with careful consideration for the preservation of the ITS trade-through rule.[414] Instinet also stated that in order for an alternative trading system to make a determination about the feasibility of registering as an exchange, the Commission needs to address those unresolved issues relating to ITS, including the rules governing time/price priority within a multiple exchange structure. In addition, Instinet stated that inter-exchange rules need to be set forth for both the listed and over-the-counter securities markets.[415]

The Commission agrees that access to national market system systems is of key importance. It currently has outstanding proposals for incorporation of one linkage into ITS of an alternative trading system—OptiMark—and a traditional exchange—PCX—and has sought comment on organizational and other changes to ITS to make it more responsive to changing conditions.[416] The precise arrangements for inclusion of new exchanges into these plans depends on the structure of these exchanges, and will be addressed when an applicant seeks registration as an exchange.

8. Uniform Trading Standards

In addition to participation in national market system mechanisms, an alternative trading system that registers as an exchange would be required to comply with any Commission-instituted trading halt relating to securities traded on or through its facilities.[417] Newly registered exchanges would be required in some instances to adopt trading halt rules to comply with certain Commission rules.[418] A newly registered exchange would also have the authority and be expected to impose trading halts for individual securities, for classes of securities, and for its system as a whole under the appropriate circumstances.[419] The Commission does not believe that this requirement would present any undue burden for alternative trading systems that elect to register as national securities exchanges because most alternative trading systems are already subject to the imposition of trading halts as members of the NASD.

In addition, to promote the orderly operation of the securities markets in accordance with Section 6 of the Exchange Act,[420] the Commission would expect all newly registered national securities exchanges to implement circuit breaker rules to temporarily halt trading during periods

[409] Securities Exchange Act Release No. 40204 (July 15, 1998), 63 FR 390306 (July 22, 1998) (proposal providing for the linkage of the PCX application of the OptiMark system to the ITS system); Securities Exchange Act Release No. 40260 (July 24, 1998), 63 FR 40748 (July 30, 1998) (proposal expanding the ITS/CAES linkage to all listed securities, including non-Rule 19c-3 securities).

[410] *See* CBOE Letter at 4–5; NYSE Letter at 8–9. The NYSE also stated that consideration of this issue can be better evaluated at the time an alternative trading system registers as an exchange and seeks to become a member of ITS. *Id. But see* CHX Letter at 7 (expressing concern about a for-profit exchange becoming a full participant in the national market system plans because such exchanges would be subject to pressures not to expend significant resources on maintaining surveillance and enforcement capability and would not have the same commitment to the public interest and the investing public as traditional not-for-profit exchanges).

[411] CBOE Letter at 4–5.

[412] NASD Letter at 7.

[413] OptiMark Letter at 4–5 (also asking that the Commission consider how members of exchanges, other than the exchange through which an alternative trading system registered as a broker-dealer disseminates its quotations, could access such alternative trading system's quotes).

[414] Letter from Gerald D. O'Connell, Susquenhanna Investment Group to Jonathan G. Katz, Secretary, SEC, dated July 23, 1998 ("Susquehanna Letter") at 1–2. *See also* OptiMark Letter at 4 (asking the Commission to clarify that participation in national market system plans is not conditioned on any universal public display requirement).

[415] Instinet Letter at 1–2, 3, 6.

[416] *See supra* note 409.

[417] The Commission may suspend trading in any security for up to 10 days, and all trading on any national securities exchange or otherwise, for up to 90 days pursuant to sections 12(k)(1)(A) and (B) of the Exchange Act, 15 U.S.C. 78*l*(k)(1)(A) and (B).

[418] For example, a newly registered exchange would be required under Rule 11Ac1–1, 17 CFR 240.11Ac1–1, to halt trading when neither quotation nor transaction information can be disseminated.

[419] The Commission has found that trading halt rules instituted by a national securities exchange or a national securities association are consistent with the objectives of Section 6(b)(5) of the Exchange Act, 15 U.S.C. 78f(b)(5). *See, e.g.*, Securities Exchange Act Release Nos. 39582 (Jan. 26, 1998), 63 FR 5408 (Feb. 2, 1998); 26198 (Oct. 19, 1988), 53 FR 41637 (Oct. 24, 1988). *See, e.g.*, Amex Rule 117, NASD Rule 4120(a)(3), and NYSE Rules 80B and 717. There is no requirement that exchanges or associations of securities dealers employ identical trading halt rules, and these rules may vary according to the needs of the individual market.

[420] 15 U.S.C. 78f.

of extraordinary market volatility or unusual market declines. The Commission believes that for circuit breakers to be effective, all markets must impose corresponding circuit breakers.[421]

9. Proposed Rule Changes

Under Section 19(b)(1) of the Exchange Act, SROs are required to file all proposed rule changes with the Commission.[422] Thus, once registered as an exchange, an alternative trading system would have to submit copies of any proposed rule changes to the Commission for approval.

C. Application for Registration as an Exchange

The Commission proposed to revise Rules 6a–1, 6a–2 and 6a–3 under the Exchange Act[423] to clarify the requirements for registration as an exchange and to accommodate the registration as exchanges of automated and proprietary trading systems. Additionally, the Commission proposed to revise Form 1, the application used by exchanges to register or to apply for an exemption based on limited volume, and to repeal Form 1–A. After considering the comments, the Commission is adopting the amendments to Rule 6a–1, Rule 6a–2, Rule 6a–3 and Form 1 as proposed.

1. Revisions to and Repeal of Form 1–A

The Commission is adopting the revisions to Form 1 and repealing Form 1–A as proposed. Form 1 is revised by reorganizing and redesignating the Statements and the exhibits. Because the Commission expects most future applicants for registration as an exchange to be fully or partially automated, the Commission revised some of the information requested in Form 1 to be more applicable to automated exchanges. Specifically, the Commission is adding two new exhibits requiring an applicant for registration as an exchange to describe the way any of its electronic trading systems operate, and the criteria used by the exchange in admitting members.[424] In addition, the Commission is adding a new exhibit to Form 1 to reflect the possibility that an exchange is owned by shareholders, rather than members.[425] The Commission is also adopting other changes to the information requested on Form 1 to reflect the fact that a for-profit exchange would have participants or subscribers trading, rather than members.

Both the NYSE and the Amex expressed concern that these new Exhibits would require new and additional information.[426] Exhibits E and L, however, need only accompany the application for registration as an exchange and, therefore, are inapplicable to currently registered exchanges. In addition, Exhibit K applies only to non-member owned exchanges. Therefore, because all currently registered exchanges are member-owned, new Exhibit K does not apply to them. The Commission has clarified that Exhibit K exclusively applies to non-member owned exchanges. If, however, a currently registered, member-owned exchange were to convert to a for-profit structure, it would have to comply with the requirement to update Exhibit K.

Exchanges currently registered with the Commission are required to use amended Form 1 in complying with Rules 6a–2 and 6a–3. The information registered exchanges are required to update under Rules 6a–2 and 6a–3 is not substantially different from what registered exchanges are required to update today. The Commission has provided the chart below to assist currently registered exchanges in complying with the filing obligations under amended Rules 6a–2 and 6a–3.

Amended form 1	Filing requirements under amended rules 6a–2 and 6a–3	Corresponding part of former Form 1 on which information was requested
Questions 1–7 of the Execution Page	File an amendment within 10 days after any action is taken that renders the information previously filed inaccurate (Rule 6a–2((a)(1)).	Questions 1–6 of the Statement.
Exhibit A	File an amendment every three years (Rule 6a–2(c)) or make information available by publication, upon request, or via an Internet Web site (Rule 6a–2(d)).	Exhibit A(1).
Exhibit B	File an amendment every three years (Rule 6a–2(c)) or make information available by publication, upon request, or via an Internet Web site (Rule 6a–2(d)).	Exhibit A(2).
Exhibit C	File an amendment every three years (Rule 6a–2(c)) or make information available by publication, upon request, or via an Internet Web site (Rule 6a–2(d)).	Question 7 of the Statement.
	File an amendment within 10 days after any action is taken that renders the information previously filed inaccurate (Rule 6a–2(a)(2)).	Exhibit A(3) Exhibit H.
Exhibit D	File an annual amendment (Rule 6a–2(b)(1))	Exhibit F.
Exhibit E	No requirement to update; only required on application for registration	
Exhibit F	File an amendment within 10 days after any action is taken that renders the information previously filed inaccurate (Rule 6a–2(a)(2)).	Exhibit B.
Exhibit G	File an amendment within 10 days after any action is taken that renders the information previously filed inaccurate (Rule 6a–2(a)(2)).	Exhibit C.
Exhibit H	File an amendment within 10 days after any action is taken that renders the information previously filed inaccurate (Rule 6a–2(a)(2)).	Exhibit D.
Exhibit I	File an annual amendment (Rule 6a–2(b)(1))	Exhibit E.

[421] If circuit breakers are imposed in one market, but not in another, overall market disruptions caused by trading imbalances can migrate from one market to the next, and efforts to stabilize such imbalances during periods of heavy trading and extreme volatility would be subverted. *See also* Securities Exchange Act Release No. 39846 (Apr. 9, 1998), 63 FR 18477 (Apr. 15, 1998) (approving proposed changes to SRO rules regarding circuit breakers).

[422] Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b).

[423] 17 CFR 240.6a–1, 240.6a–2 and 240.6a–3.

[424] Exhibit E requires an exchange to describe, among other things, the means of access to the electronic trading system, the procedures governing display of quotes and/or orders, execution, reporting, clearance, and settlement. Exhibit L requires an exchange to describe its criteria for membership, conditions under which members may be subject to suspension or termination, and procedures that would be involved in such suspension or termination.

[425] Exhibit K requires non-member owned exchanges to provide a list of direct owners and control persons.

[426] *See* NYSE Letter at 11; Amex Letter at 6.

Amended form 1	Filing requirements under amended rules 6a–2 and 6a–3	Corresponding part of former Form 1 on which information was requested
Exhibit J	File an amendment every three years (Rule 6a–2(c)) or make information available by publication, upon request, or via an Internet Web site (Rule 6a–2(d)). File an amendment within 10 days after any action is taken that renders the information previously filed inaccurate (Rule 6a–2(a)(2)).	Exhibit G.
Exhibit K	Only for-profit exchanges are required to file an annual amendment (Rule 6a–2(b)(2)) or make information available by publication, upon request, or via an Internet Web site (Rule 6a–2(d)), and to file an amendment within 10 days after any action is taken that renders the information previously filed inaccurate (Rule 6a–2(a)(2)).	
Exhibit L	No requirement to update; only required on application for registration as an exchange.	
Exhibit M	File an amendment (Rule 6a–2(b)(2)) or make information available by publication, upon request, or via an Internet Web site (Rule 6a–2(d)).	Question 8 of the Statement.
	File an amendment within 10 days after any action is taken that renders the information previously filed inaccurate (Rule 6a–2(a)(2)).	Question 9(a) of the Statement. Exhibit I. Exhibit J.
Exhibit N	File an amendment (Rule 6a–2(b)(2)) or make information available by publication, upon request, or via an Internet Web site (Rule 6a–2(d)).	Exhibit K. Exhibit L. Exhibit M.
Deleted		Question 9(b) of the Statement.

2. Amendments to Rules 6a–1, 6a–2, and 6a–3 Under the Exchange Act

In order to reduce some of the filing burdens for exchanges and to allow exchanges to comply with the filing requirements by posting information on an Internet web page, the Commission is amending Rules 6a–1, 6a–2, and 6a–3 under the Exchange Act.

a. Rule 6a–1 Application for Registration as an Exchange or Exemption Based on Limited Volume of Transactions

The Commission proposed to amend Rule 6a–1 to clarify that Form 1 should only be used by an exchange to apply for registration as a national securities exchange or for an exemption from registration under section 5 of the Exchange Act based on such exchange's limited volume of transactions. The Commission received no comments on these proposed changes and is adopting them as proposed.

b. Rule 6a–2 Periodic Amendments

Paragraph (a) of amended Rule 6a–2 requires an exchange to file an amendment to Form 1 within 10 days of changes to: (1) Information filed on the Execution Page of Form 1, or amendment thereto; (2) information regarding all affiliates and subsidiaries (Exhibit C); (3) application for membership, participation or subscription to the exchange or for a person associated with a member, participant, or subscriber of the exchange (Exhibit F); (4) financial statements, reports or questionnaires required of members, participants or subscribers (Exhibit G); (5) listing applications, any agreements required to be executed in connection with listing and a schedule of listing fees (Exhibit H);[427] (6) officers, governors, members of all standing committees, or persons performing similar functions, who presently hold or have held their offices or positions during the previous year (Exhibit J); (7) persons with direct ownership and control for non-member owned exchanges (Exhibit K); and (8) any members, participants, subscribers or other users and the information pertaining thereto (Exhibit M).[428] Additionally, rather than exchanges filing these changes in the form of a notice, as is currently required under paragraph (a) of Rule 6a–3, the changes will be filed in the form of an amendment on Form 1.

These amendments to Rule 6a–2 relieve exchanges from some of the filing requirements to which exchanges are currently subject. Specifically, a registered exchange no longer has to file notice within 10 days of changes to: (1) Its constitution, articles of incorporation or association, or by-laws (Exhibit A); (2) written rulings or settled practices of any governing board or committee of the exchange that have the effect of rules or interpretations (Exhibit B); and (3) the schedule of securities listed on the exchange (Exhibit N).

Paragraph (b) of amended Rule 6a–2 requires an exchange to file annually an amendment to Form 1 with the following information: (1) Unconsolidated financial statements for each subsidiary or affiliate or the exchange for latest fiscal year (Exhibit D); (2) audited consolidated financial statements for last fiscal year of the exchange prepared in accordance with, or reconciled to, United States generally accepted accounting principals (Exhibit I);[429] (3) a list of persons with direct ownership and control for non-member exchanges (Exhibit K); (4) a list of all members, participants, subscribers or other users and the information pertaining thereto (Exhibit M); and (5) a schedule of securities listed on the exchange, securities admitted to unlisted trading privileges and securities admitted to trading on the exchange which are exempt from registration under Section 12(a) of the Act (Exhibit N).[430] These amendments remove exchanges' obligations to include the following as part of the annual amendment: (1) The exchange's affiliates and subsidiaries (Exhibit C) and (2) a list of officers, governors, and members of standing committees be

[427] A technical modification was made to the amendments as proposed to include Exhibit H in Rule 6a–2(a)(2).

[428] Rule 6a–2(a), 17 CFR 240.6a–2(a).

[429] A technical modification was made to the amendments as proposed to remove Exhibit I from Rule 6a–2(a)(2) and to include Exhibit I in Rule 6a–2(b)(1).

[430] A technical modification was made to the amendments to include Exhibit N in Rule 6a–2(b)(2).

included as part of an annual amendment (Exhibit J).

Paragraph (c) of amended Rule 6a–2 requires an exchange to file an amendment to Form 1 every three years with the following information: (1) A copy of the constitution, articles or incorporation or association and by-laws (Exhibit A); (2) a copy all written rulings, settled practices having effect of rules and interpretations of any governing board or committee of the exchange (Exhibit B); (3) information regarding all affiliates and subsidiaries (Exhibit C); and (4) a list of officers, governors, members of all standing committees, or persons performing similar functions, who presently hold or have held their offices or positions during the previous year (Exhibit J).[431]

Paragraph (d) of amended Rule 6a–2 provides exchanges with alternatives to the annual filing requirement for Exhibits K, M, and N, and to the three year filing requirement for Exhibits A, B, C, and J. Pursuant to Rule 6a–2(d) exchanges have the following options, in lieu of paper filing: (1) To publish or cooperate in the publication of this information on an annual or more frequent basis, and to certify to the accuracy of the information; (2) to keep the information up to date, and certify that the information is up to date and available to the Commission and the public upon request; or (3) to make the information available continuously on an Internet web site controlled by an exchange, indicate the location of the Internet Web site where such information may be found, and to certify that the information available at such location is accurate as of its date.[432]

Comments from the NYSE and the Amex suggested that the amendments to Rule 6a–2 and Form 1, as adopted, reimpose some of the annual filing requirements previously eliminated.[433] As discussed above, Rule 6a–2 and Form 1, as adopted, relax the current filing burdens without reimposing any filing requirements. The technical modifications to the amendments to Rule 6a–2 clarify the operation of the rule, as adopted.

c. Rule 6a–3 Supplemental Material

Paragraph (b) of Rule 6a–3 currently requires registered exchanges, or exchanges exempt from registration based on their limited volume of transactions, to furnish to the Commission copies of all materials issued or made available to members. The Commission proposed to continue to require exchanges to provide the Commission with the information currently required under the rule. However, as an alternative to filing such information on paper, the Commission proposed to permit exchanges to make the information available on an Internet web site and provide the Commission with the location of the web site. The Commission did not receive comments addressing these proposed changes, and is adopting the amendments to Rules 6a–3(b) as proposed.[434]

D. National Securities Exchanges Operating Alternative Trading Systems

National securities exchanges could, under the rules the Commission is adopting today, form subsidiaries or affiliates that operate alternative trading systems registered as broker-dealers.[435] If a national securities exchange chose to form such a subsidiary or affiliate, the exchange itself could remain registered as a national securities exchange, while the subsidiary or affiliate operated as a broker-dealer. Such subsidiaries or affiliates would of course be required to become members of a national securities association or another national securities exchange.[436] In addition, any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link the alternative trading system with the exchange, including using the premises or property of such exchange for effecting or reporting a transaction, without being considered a "facility of the exchange."[437]

V. Broker-Dealer Recordkeeping and Reporting Obligations

A. Elimination of Rule 17a–23

Under the regulatory framework adopted in this release, alternative trading systems are required to register as exchanges or broker-dealers, and comply with the requirements under Regulation ATS. These systems are currently subject to recordkeeping and reporting requirements under Rule 17a–23 of the Exchange Act.[438] Because these alternative trading systems are now subject to recordkeeping and reporting requirements relating to their operations, either as registered exchanges or as broker-dealers under proposed Regulation ATS, the Commission is eliminating duplicative recordkeeping and reporting obligations for these systems by repealing Rule 17a–23. Only the recordkeeping requirements in Rule 17a–23 as they apply to broker-dealers that are not also alternative trading systems, are being moved to the broker-dealer recordkeeping rules, Rules 17a–3 and 17a–4 under the Exchange Act.

B. Amendments to Rules 17a–3 and 17a–4

Certain trading systems operated by broker-dealers are not alternative trading systems, and therefore are not required to register as exchanges or comply with Regulation ATS under the framework the Commission is adopting today. This group of internal broker-dealer systems[439] will continue to be regulated under the traditional broker-dealer regulatory scheme. The Commission is amending Rules 17a–3 and 17a–4 under the Exchange Act[440] to require broker-dealers to continually make and keep records regarding the activities of internal broker-dealer systems for non-alternative trading systems. These recordkeeping requirements are similar to the recordkeeping requirements under Rule 17a–23, which the Commission today is repealing.[441] The Commission believes that these recordkeeping requirements continue to be valuable to the oversight and inspections of internal broker-dealer systems by the Commission and the SROs.

These amendments ensure that broker-dealers continue to keep records of any of their customers that have access to their internal broker-dealer system, as well as any affiliations between those customers and the

[431] A technical modification was made to the amendments to include Exhibit J in Rule 6a–2(c).

[432] Rule 6a–2(d), 17 CFR 240.6a–2(d).

[433] Securities Exchange Act Release No. 35123 (Dec. 20, 1994), 59 FR 66692 (Dec. 28 1994).

[434] 17 CFR 240.6a–3. This rule is now found at paragraph (c) of Rule 6a–3.

[435] In addition, the owner of the alternative trading system would continue to be liable for securities law violations.

[436] *But see supra* note 374.

[437] Section 3(a)(2) of the Exchange Act, 15 U.S.C. 78c(a)(2). *See also* supra note 48 (discussing the OptiMark System as a facility of the PCX); 35030 (Nov. 30, 1994), 59 FR 63141 (Dec. 7, 1994) (discussing the Chicago Match system as a facility of the CHX); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (discussing the Off-Hours Trading system as a facility of the NYSE).

[438] 17 CFR 240.17a–23.

[439] The term "internal broker-dealer system" is defined as "any facility, other than a national securities exchange, an exchange exempt from registration based on limited volume, or an alternative trading system as defined in Regulation ATS * * * that provides a mechanism, automated in full or in part, for collecting, receiving, disseminating, or displaying system orders and facilitating agreement to the basic terms of a purchase or sale of a security between a customer and the sponsor, or between two customers of the sponsor, through use of the internal broker-dealer system or through the broker or dealer sponsor of such system." Rule 17a–3(a)(16)(ii)(A), 17 CFR 240.17a–3(a)(16)(ii)(A).

[440] 17 CFR 240.17a–3 and 240.17a–4.

[441] Only one commenter addressed the Commission's proposal to repeal Rule 17a–23 and amend Rules 17a–3 and 17a–4. This commenter agreed that amended Rules 17a–3 and 17a–4 would impose similar obligations as current Rule 17a–23. TBMA Letter at 25–26.

broker-dealer. Broker-dealers are also required to keep daily trading summaries, including information on the types of securities for which transactions have been executed through the internal broker-dealer system, and transaction volume information.[442] In addition, to clarify the application of Rule 17a–3, the Commission is defining, for the purposes of the rule, the terms "internal broker-dealer system,"[443] "sponsor,"[444] and "system order."[445]

The Commission is also amending Rule 17a–4 under the Exchange Act to require that the records required under the amendments to Rule 17a–3 be preserved for three years, the first two years in an accessible place.[446] This amendment also requires the preservation of all notices regarding an internal broker-dealer system provided to its participants, whether communicated in writing, through the internal broker-dealer system, or by other automated means. Such notices include notices concerning the internal broker-dealer system's hours of operations, malfunctions, procedural changes, maintenance of hardware and software, and instructions for accessing the system.

VI. Temporary Exemption of Pilot Trading System Rule Filings

A. Introduction

The Commission recognizes that registered exchanges, unlike alternative trading systems registered as broker-dealers, must submit rule filings for Commission approval. In the Concept Release, the Commission generally sought comment on ways to expedite the rule filing process and specifically sought comment on whether the Commission should exempt new SRO trading systems or mechanisms from rule filing requirements.[447] Commenters pointed out that, under the current regulatory structure, registered exchanges and alternative trading systems compete on a "playing field that is far from level,"[448] and attributed this, in part, to exchanges' inability to implement new trading systems before submitting a rule filing and receiving Commission approval.[449] In response to commenters' concerns and to make existing markets more competitive, the Commission proposed Rule 19b–5, a temporary exemption for SROs that would defer the rule filing requirements of Section 19(b) under the Exchange Act[450] for pilot trading systems ("pilot trading system rule").[451]

In formulating the pilot trading system rule, the Commission drew on its prior experience with SROs' attempts to operate new pilot trading systems for their members.[452] In the Proposing Release, the Commission sought comment on whether the proposed pilot trading system rule would provide appropriate regulation and would level the competitive playing field between SROs and alternative trading systems. As an alternative, the Commission sought comment on the benefits and disadvantages of allowing SROs to file proposed rule changes relating to pilot trading systems under an expedited approval process pursuant to section 19(b)(3)(A) of the Exchange Act. Overall, comments on the proposed pilot trading system rule were supportive of it as a way to ease the regulatory disparity between registered exchanges and alternative trading systems.

The Commission received no comments opposing proposed Rule 19b–5. In general, commenters supported the proposal, stating that it would encourage further innovation and reduce some of the regulatory burdens that make it difficult for SROs to compete with broker-dealer operated trading systems. Some commenters, while generally supporting the temporary exemption, suggested modifying proposed Rule 19b–5. These comments focused on the proposed definition of a pilot trading system, the types of securities the Commission proposed to allow SROs to trade on pilot trading systems, and the confidential treatment of information filed by SROs regarding their pilot trading systems.[453] After considering the comments, the Commission is adopting Rule 19b–5 substantially as proposed.

Currently, SROs are required to submit a rule filing to the Commission and undergo a public notice, comment, and approval process before they operate any new trading system.[454] As adopted, the pilot trading system rule permits SROs that develop separate, new systems that qualify as "pilot trading systems,"[455] to begin their operation shortly after submitting new Form PILOT to the Commission is merely an informational filing and an SRO does not need to await Commission approval to begin operating its pilot trading system.[456] During the operation of the pilot trading system, the

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[442] Rules 17a–3(a)(16)(i)(B) and (C), 17 CFR 240.17a–3(a)(16)(i)(B) and (C).

[443] *See supra* note 439.

[444] The term "sponsor" is defined as "any broker or dealer that organizes, operates, administers, or otherwise directly controls an internal broker-dealer system or, if the operator of the internal broker-dealer system is not a registered broker or dealer, any broker or dealer that, pursuant to contract, affiliation, or other agreement with the system operator, is involved materially on a regular basis with executing transactions in connection with use of the internal broker-dealer system, other than solely for its own account or as a customer with access to the internal broker-dealer system." Rule 17a–3(a)(16)(ii)(B), 17 CFR 240.17a–3(a)(16)(ii)(B).

[445] The term "system order" is defined as "any order or other communication or indication submitted by any customer with access to the internal broker-dealer system for entry into a trading system announcing an interest in purchasing or selling a security," but specifically excludes "inquiries or indications of interest that are not entered into the internal broker-dealer system." Rule 17a–3(a)(16)(ii)(C), 17 CFR 240.17a–3(a)(16)(ii)(C).

[446] Rules 17a–4(b)(1) and (10), 17 CFR 240.17a–4(b)(1) and (10).

[447] *See* Concept Release, *supra* note 2, 62 FR at 30518–19.

[448] *See* Proposing Release, *supra* note 3 (discussing comments responding to the Concept Release).

[449] *Id.* at n.252.

[450] 15 U.S.C. 78s(b).

[451] The Commission is also adopting measures to relieve SROs of the requirement to file rule changes with the Commission when an SRO wishes to list or trade new derivative securities products. Securities Exchange Act Release No. 40761 (Dec. 8, 1998).

[452] For example, in November 1990, the NYSE submitted a rule filing proposing an after-hours crossing system to automate the execution of single stock orders and baskets of securities and received Commission approval in May 1991. *See* Securities Exchange Act Release Nos. 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991); 32368 (May 25, 1993), 58 FR 31565 (June 3, 1993). In August 1993, the CHX submitted a rule filing to operate the Chicago Match system, an electronic matching system that crossed orders entered by the CHX's members and non-members including institutional customers, and obtained Commission approval in November 1994. *See* Securities Exchange Act Release No. 35030 (Nov. 30, 1994), 59 FR 63141 (Dec. 7, 1994). More recently, in May 1997, the PCX submitted a rule filing for approval of the OptiMark System and received Commission approval in September 1997. *See* Securities Exchange Act Release No. 39086 (Sept. 17, 1997), 62 FR 50036 (Sept. 24, 1997).

[453] *See* ICI Letter at 5; Corporate Capital Letter at 2; CBOE Letter at 8; CHX Letter at 11; NASD Letter at 13; Amex Letter at 1–2; NYSE Letter at 9; American Century Letter at 6. *See also* Ashton Letter at 2; CME Letter at 4; SIA Letter at 15; PCX Letter at 8.

[454] Section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1), requires an SRO to file with the Commission any proposed rule or any proposed rule change ("proposed rule change") accompanied by a concise general statement of the basis and purpose of the proposal. Once a proposed rule change has been filed, the Commission is required to publish notice of it and provide an opportunity for public comment. The proposed rule change may not take effect unless it is approved by the Commission or is otherwise permitted to become effective under Section 19(b) of the Exchange Act. Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), sets forth the standards and time periods for Commission action either to approve a proposed rule change or to institute and conclude a proceeding to determine whether a proposed rule change should be disapproved. The Commission may also approve a proposed rule change on an accelerated basis if the Commission finds good cause for so doing and publishes its reasons for so finding. Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2)(B).

[455] *See* paragraph (c) of Rule 19b–5, 17 CFR 240.19b–5(c), for the definition of "pilot trading system."

[456] 17 CFR 249.821.

sponsoring SRO must submit to the Commission quarterly reports, as well as amendments to Form PILOT concerning any material changes to the pilot trading system. Rule 19b–5 exempts an SRO from the requirement to file rule changes for the pilot trading system with the Commission for two years. Before two years expire, the SRO must submit a rule filing to obtain from the Commission permanent approval of the pilot trading system or must cease operation of the trading system.[457] In addition, the temporary exemption under Rule 19b–5 expires sixty days after a pilot trading system exceeds certain volume levels. A pilot trading system that exceeds these volume levels must file for permanent approval before the two-year period expires.[458]

The Commission believes the pilot trading system rule addresses many of the concerns raised by commenters.[459] Inherent in the rule filing process is public disclosure of SROs' business plans for trading systems prior to their operation. Consequently, SROs' competitors are informed about the proposed pilot trading system and have an avenue to copy, delay, or obstruct implementation of the trading system before it can be tested in the marketplace.[460] The rule filing process also hinders innovation because registered exchanges do not realize the full competitive benefits of their efforts.[461] In contrast, alternative trading systems that offer similarly innovative, start-up services do not have the same rule filing obligations and, thus, have a significant advantage in their flexibility to devise, implement, and modify new pilot trading systems. Comments to the Proposing Release echo these concerns.[462] By deferring the rule filing process, the pilot trading system rule allows SROs to better compete with alternative trading systems, while continuing to ensure that investors are protected and the pilot trading system is operated in a manner consistent with the Exchange Act.

Finally, the Commission recognizes that domestic markets must compete with less regulated foreign markets and broker-dealers. The Commission agrees with commenters that excessive regulation of traditional exchanges, alternative trading systems, or other markets hinders these exchanges' ability to compete and survive in the global arena. The pilot trading system rule responds to SROs' need for a more balanced competitive playing field.

B. Rule 19b–5

The Commission is adopting Rule 19b–5 to provide a temporary exemption from Section 19(b) of the Exchange Act for SRO proposed rule changes concerning the operation of pilot trading systems.

1. Types of Systems Eligible for Exemption Under Rule 19b–5

a. Definition of Pilot Trading System. The Commission is adopting the definition of pilot trading system substantially as proposed. Under paragraph (c) of Rule 19b–5, a trading system operated by an SRO would be a "pilot trading system" if it met one of two definitions. First, a trading system would be a "pilot trading system," even if it traded the same securities or operated during the same hours as an SRO's existing trading system, if the SRO operated it for less than two years, and during at least two of the last four consecutive calendar months, it traded no more than one percent of the U.S. average daily trading volume of each security traded on the trading system. In addition, the trading system could not have an aggregate share trading volume of more than twenty percent of the average daily trading volume of all trading systems operated by the SRO.[463] Second, a trading system would also be considered a "pilot trading system" if it were independent[464] of any other trading system operated by the SRO, the SRO operated it for less than two years, and, during at least two of the last four consecutive calendar months, it traded no more than five percent of the U.S. average daily trading volume of each security traded on the trading system. In addition, under this second definition, the trading system would have to have aggregate share trading no more than twenty percent of the average daily trading volume of all trading systems operated by the SRO.[465]

If at any time within the two-year period a pilot trading system exceeds the volume thresholds, it would be allowed to continue to operate for 60 more days under this exemption.[466] During this 60 day period, if the SRO intended to continue operating the trading system, it would have to file for permanent approval under Section 19(b) of the Exchange Act of the rules related to the trading system.

The Commission received several comments asking the Commission to relax or eliminate the proposed requirement that, to be a pilot trading system with five percent of the trading volume in a security, the pilot trading system would have to be "independent." As proposed, a pilot trading system would be independent if it trades securities different from the issues of securities traded on any other trading system that is operated by the same SRO and that has been approved by the Commission. A pilot trading system would also be deemed independent if it does not operate during the same trading hours as any other trading system that is operated by the same SRO and that has been approved by the Commission. Finally, a pilot trading system would be deemed independent if no market maker or specialist on any other trading system operated by the SRO trades on the pilot trading system the same securities in which they act as a market maker or specialist.[467] The Commission emphasized that a pilot trading system need only satisfy one of the three criteria to qualify the pilot trading system as independent. After considering the comments, the Commission continues to believe such criteria are not unduly restrictive and are necessary for the protection of investors, and is adopting it as proposed.

b. *Response to Comments on the Proposed Definition of Pilot Trading System.* In its proposed definition of a pilot trading system, the Commission sought to impose limits that were in the public interest and for the protection of investors, while still providing SROs with the flexibility to innovate. The Commission requested comment on this proposed definition, and specifically asked whether the proposed two-year time period, trading volume limits, and independence criteria were appropriate. Commenters were asked to provide specific reasons for any concerns about the proposed definition and to suggest alternatives. Several commenters focused on particular aspects of the proposed pilot trading system definition.

The NYSE commented that the specific provisions of proposed Rule

[457] Rule 19b–5(f)(1) and (f)(2), 17 CFR 240.19b–5(f)(1) and (f)(2). *See also infra* Section VI.C.

[458] Rule 19b–5(c)(3), 17 CFR 240.19b–5(c)(3).

[459] *See infra* Section VI.B.

[460] *See* Proposing Release, *supra* note 3, at ns.256–61 and accompanying text.

[461] *See* Proposing Release, *supra* note 3, at n.261.

[462] *See* Ashton Letter at 2; SIA Letter at 15; CME Letter at 3; Amex Letter at 1; Bloomberg Letter at 6.

[463] Rule 19b–5(c)(2), 17 CFR 240.19b–5(c)(2).

[464] A pilot trading system is "independent" of other trading systems if it meets one of the standards set forth in paragraph (d) of Rule 19b–5.

[465] Rule 19b–5(c)(1), 17 CFR 240.19b–5(c)(1).

[466] Rule 19b–5(c)(3), 17 CFR 240.19b–5(c)(3). *See also infra* Section VI.C.

[467] Rule 19b–5(d), 17 CFR 240.19b–5(d). For purposes of the pilot trading system rule, a specialist means any member subject to a requirement of an SRO that such member regularly maintain a market in a particular security. Rule 19b–5(a), 17 CFR 240.19b–5(a).

19b–5 were carefully crafted. In addition, the NYSE agreed with the Commission's proposal to distinguish between systems that are "independent" of other SRO trading systems and systems that work together with existing SRO trading systems.[468] The ICI supported the proposed limited exemption for pilot trading systems. The ICI, however, discouraged any further expansion of the criteria that would constitute a pilot trading system and encouraged the Commission to carefully monitor pilot trading systems as they operate under the exemption.[469]

On the other hand, several commenters stated that Rule 19b–5 should be liberalized to provide SROs with a meaningful opportunity to develop pilot trading systems on a comparable basis to alternative trading systems.[470] For example, the CME generally asserted that the numerous proposed restrictions on what would qualify as a pilot trading system would render the proposal of little practical value to exchanges.[471] With regard to the volume thresholds proposed by the Commission, the NASD and the PCX stated that the volume thresholds were too low. [472] The PCX stated that the volume restrictions did not make sense because they limited the ability of registered exchanges to introduce new trading systems—particularly when neither alternative trading systems nor third market makers are subject to similar volume limitations. Instead, the PCX stated that Rule 19b–5 should treat exchange pilot trading systems as though they were alternative trading systems for two years, provided the trading systems did not exceed a fairly high percentage (perhaps ten percent) of total trading volume in any security.[473] Moreover, the Amex said the volume thresholds for individual securities would limit the utility of the exemption for primary markets. In particular, the Amex suggested that the Commission apply only an aggregate volume threshold whereby volume in an SRO pilot trading system could not exceed a specified percentage of total volume in all such SRO's trading systems. This approach, the Amex believed, would eliminate the administrative burden on SROs monitoring the one percent or five percent thresholds and would avoid the potentially adverse impact on the operation and success of a pilot trading system that could occur by removing securities from the system that exceeded a specified threshold.[474]

Other commenters thought the criteria establishing the independence of a pilot trading system from other trading systems operated by the same SRO were too restrictive.[475] In particular, the CBOE and NASD asserted that the independence criteria unnecessarily precluded exchange specialists and market makers from participating in pilot trading systems.[476] Similarly, the CHX stated that it was too limiting to require a pilot trading system to trade different securities or operate during different hours than the sponsoring SRO's other trading systems in order to be "independent."[477]

c. Adopted Definition of Pilot Trading System. The Commission has considered these comments. As discussed above, it believes that, because the proposed definition of a pilot trading system, including the proposed volume thresholds and independence criteria is novel and untried, the criteria are appropriate. The Commission notes that, pursuant to paragraph (b)(5) under section 6 of the Exchange Act, rules of a registered exchange should be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.[478] The Commission believes that the desire of the registered exchanges to innovate and compete with alternative trading systems must be balanced with their statutory obligations under section 6 of the Exchange Act. Therefore, the volume thresholds and other standards are designed to ensure that once a pilot trading system's activities reach a significant level, the pilot trading system will be subject to the public notice and comment process under section 19(b) of the Exchange Act. The Commission recognizes that the definition of "pilot trading system" is more narrow than some SROs would prefer, but notes that this does not prevent registered exchanges from developing trading systems that do not meet the definition of "pilot trading system" and filing proposed rule changes relating to those systems under section 19(b) of the Exchange Act.

Similarly, through the independence criteria, the Commission identified characteristics that render pilot trading systems sufficiently distinct from the sponsoring SRO's other trading systems so that a five percent, rather than one percent volume level, is acceptable. "Independent" pilot trading systems pose less risk of substantially changing the existing markets in a manner detrimental to investors and, therefore, the Commission believes should be able to operate under the exemption at higher volume thresholds than their "non-independent" counterparts before having to submit proposed rule filings under section 19(b) of the Exchange Act.[479] The Commission will monitor use of the pilot trading system exemption, and will consider modifying these criteria in the future based on its experience with SRO's use of the exemption.

2. Scope of Pilot Trading Rule Exemption

The Commission is adopting Rule 19b–5 to provide a temporary exemption from Section 19(b) of the Exchange Act for SRO proposed rule changes concerning the operation of pilot trading systems. This temporary exemption includes all rules related to the operation of pilot trading systems. The Commission defines trading system in paragraph (b) of Rule 19b–5 to include the rules of a self-regulatory organization that: (i) Determine how the orders of multiple buyers and sellers are brought together; and (ii) establish non-discretionary methods under which such orders interact with each other and under which the buyers and sellers entering such orders agree to the terms of trade.[480] The Commission intends this exemption to provide SROs with flexibility to establish and modify the pilot trading system without obtaining prior approval from the Commission. However, this exemption does not include any SRO rules that would fundamentally affect the relationship between an SRO's members and those members' customers, or an SRO's oversight of its members.

The Commission notes that Rule 19b–5 does not relieve SROs from any obligation under the federal securities laws, other than the requirement to file proposed rule changes relating to the operation of a pilot trading system. Rule 19b–5, therefore, does not provide an exemption for SRO rules relating to other requirements imposed under other provisions of the Exchange Act, such as sections 11(a) and 10(a), and Rule 10a–1 thereunder. In addition, an SRO must ensure that securities listed and traded on any pilot trading system comply

[468] NYSE Letter at 9.

[469] ICI Letter at 5.

[470] *See* CBOE Letter at 2, 9; CHX Letter at 11; CME Letter at 4; PCX Letter at 8–10.

[471] *See* CME Letter at 4; PCX Letter at 9–10.

[472] *See* NASD Letter at 13; PCX Letter at 9–10.

[473] PCX Letter at 9–10.

[474] Amex Letter at 1, 3.

[475] *See* CBOE Letter at 9; CHX Letter at 11.

[476] *See* CBOE Letter at 9; NASD Letter at 2, 14.

[477] CHX Letter at 11.

[478] 15 U.S.C. 78f(b)(5).

[479] *See supra* note 467 and accompanying text.

[480] Rule 19b–5(b), 17 CFR 240.19b–5(b).

with, among other things, the registration requirements of the Exchange Act.[481] An SRO also continues to be required to enforce compliance with its own rules and the federal securities laws, including members' compliance with the Order Handling Rules.[482] SROs, similarly, are expected to operate the pilot trading systems in compliance with rules governing market-wide trading halts.

3. SROs' Continuing Obligations Regarding Pilot Trading Systems

In order to ensure that pilot trading systems are operated in a manner consistent with the Exchange Act, the Commission proposed requiring SROs to comply with certain conditions before a pilot trading system would be eligible for the temporary exemption. In particular, the Commission proposed that SROs comply with the following with regard to pilot trading systems: (1) Notify and periodically file information about the pilot trading system with the Commission, (2) implement trading rules and procedures, (3) establish effective surveillance, (4) establish reasonable clearance and settlement procedures, (5) limit the types of securities traded, (6) cooperate with inspections and examinations by the Commission, and (7) have procedures to ensure the confidential treatment of trading information.[483]

The Commission sought comment on whether there were any additional conditions with which SROs should be required to comply in order to be temporarily exempt from the rule filing requirements under Rule 19b–5. Commenters did not recommend any additional conditions. The Commission notes, however, that, as discussed below, it is adding a requirement that SROs make publicly available the rules relating to the operation of the pilot trading system.[484]

In the Proposing Release, the Commission stated that SROs would have to "ensure" that these conditions were satisfied in order to rely on the temporary exemption under proposed Rule 19b–5. One commenter raised concerns regarding the requirement that SROs "ensure" that the conditions were met in order to rely on the proposed pilot trading system rule. Specifically the CBOE requested that an SRO be allowed to rely on proposed Rule 19b–5 if the SRO acts in good faith in determining that the requirements of the pilot trading system rule have been met.[485] Based upon the Commission's experience with reviewing new pilot trading system proposals submitted by SROs, the Commission continues to believe that SROs operating pilot trading systems should satisfy the proposed requirements in order to operate such systems in a manner consistent with the Exchange Act. Nonetheless, the Commission recognizes that full compliance with some of the conditions may be beyond the SROs' control. The Commission agrees it is not practical to hold SROs strictly liable for the failure of unaffiliated entities to satisfy certain requirements of the proposed pilot trading system rule. Therefore, the Commission will consider an SRO exempt from rule filing requirements under Rule 19b–5 if the SRO acts in good faith in determining that the operation of the pilot trading system meets the conditions set out in paragraph (e) of that rule, and in operating the pilot trading system.

a. Notice and Filings to the Commission. The Commission proposed that SROs be required to provide written notice of, and information about, the operation of a pilot trading system to the Commission on new Form PILOT. On Form PILOT, an SRO would have to provide general information about the pilot trading system, including: (1) The date the SRO expects to commence operation of the pilot trading system; (2) a list of securities to be traded; (3) a list of anticipated members to the pilot trading system; and (4) the names of entities assisting in the operation of the pilot trading system.[486] The SRO could start operation of the pilot trading system twenty days after this filing is complete. If the SRO materially changes its proposed pilot trading system prior to commencing operation, the SRO would be required to file an amendment to Form PILOT and wait twenty days before commencing operation. The Commission is adopting the notice requirement and Form PILOT as proposed.[487]

The twenty day period following an SRO's filing of Form PILOT is intended to provide the Commission with time to review the form for compliance by the SRO with the pilot trading system rule. In addition, after reviewing Form PILOT the Commission may determine, after notice to the SRO and an opportunity for the SRO to respond, that the operation of a particular pilot trading system would not be necessary or appropriate in the public interest or consistent with the protection of investors without the SRO filing proposed rule changes under section 19(b) of the Exchange Act.[488]

The Commission also proposed to require an SRO to file an amendment to Form PILOT at least twenty days before it implements any material change to the operation of the pilot trading system. The Commission would consider a material change to the pilot trading system to include the addition of new types of securities, or a new date for commencing operation of the pilot trading system. The Commission proposed that an SRO also submit quarterly reports on Form PILOT that would include information about the trading volume effected on the pilot trading system during the most recent calendar quarter. The Commission received no comments on these requirements and is adopting them as proposed.[489]

The Commission proposed that all notices and reports filed on Form PILOT be kept confidential. The Commission, however, requested comment on whether all information on Form PILOT should be publicly available or whether, as an alternative, information on Form PILOT should be publicly available, unless an SRO specifically requests confidential treatment. The Commission received several comments on the confidential treatment of information on Form PILOT. The CBOE recommended that all information about a pilot trading system filed quarterly on Form PILOT be deemed confidential.[490] The NYSE suggested only limited confidentiality for filings on Form PILOT, that is, pilot trading system information should be publicly available shortly prior to, or on the date of, launch of a new system.[491] Another commenter offered that the Commission make public only certain information on Form PILOT.[492] One commenter suggested that the confidential treatment of Form PILOT information be at the filer's discretion.[493]

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[481] *See supra* notes 504–505 and accompanying text.

[482] *See* Section 6(b)(2) of the Exchange Act, 15 U.S.C. 78f(2). *See also* Order Handling Rules Adopting Release, *supra* note.

[483] The Commission is not adopting the requirement concerning the procedures to ensure the confidential treatment of trading information because SROs are not currently required to do this with regard to their other trading systems.

[484] *See* discussion *infra* VI.B.3.i.

[485] CBOE Letter at 10.

[486] Examples include computer companies that design and maintain systems and clearing agencies.

[487] Rule 19b–5(e)(1), 17 CFR 240.19b–5(e)(1).

[488] Rule 19b–5(g), 17 CFR 240.19b–5(g).

[489] Rule 19b-5(e)(1), 17 CFR 240.19b–5(e)(1). The Commission requires that SROs identify filings made pursuant to Rule 19b–5 by including a file number on Form PILOT that appears as follows: PILOT—name of SRO—year—file number.

[490] CBOE Letter at 9.

[491] NYSE Letter at 9.

[492] Amex Letter, p. 2.

[493] American Century Letter, p. 6.

After considering commenters' suggestions, the Commission has determined that the confidential treatment of Form PILOT information is an important element in reducing the disparate regulatory treatment of SROs and alternative trading systems and that such confidentiality is critical in the period prior to a pilot trading system commencing operations. However, the Commission also considers important the public's interest in having access to accurate information about the pilot trading system. Accordingly, the Commission is modifying proposed Rule 19b–5, so that information reported by an SRO on Form PILOT is confidential until the pilot trading system commences operation.[494] Thereafter, Form PILOT information will be made available to the public. b. Fair Access

b. Fair Access. Because information and access advantages of certain SRO members could subvert the fair and orderly trading of securities on a pilot trading system or the primary market, the Commission is adding a specific condition to the pilot trading system rule requiring that the SRO provide fair access to the pilot trading system to all members of the SRO. The Commission is adding this fair access requirement in order to ensure that markets treat their members fairly.[495] In particular, the SRO shall establish written standards for granting access to the pilot trading system and apply those standards fairly to all members. Fair access does not require an SRO to allow every member to trade on a pilot trading system or to give each member trading on the pilot trading system the same privileges. However, this requirement does prohibit an SRO from unfairly discriminating in the access it does give its members to the pilot trading system. In addition, the SRO must ensure that information regarding orders on the pilot trading system is equally available to all members of the SRO with access to the pilot trading system.[496] However, a specialist may have preferred access to information regarding orders it represents in its capacity as specialist on the pilot trading system.[497] This means that such SRO rules need not require a member acting as a specialist on the pilot trading system to expose its orders to all members, that is maintain an "open book." Such rules established by the SRO will be considered part of the pilot trading system for purposes of the temporary exemption.[498]

c. Trading Rules and Procedures. The Commission proposed to require SROs operating pilot trading systems under Rule 19b–5 to adopt and implement trading rules and procedures necessary to operate the pilot trading system in a manner consistent with the Exchange Act. The Commission received no comments specifically addressing this condition and is adopting it substantially as proposed. As adopted, an SRO must have appropriate trading rules and procedures to promote the fair and orderly trading of securities on the pilot trading system, including: (1) Margin requirements; (2) listing standards; (3) sales practice guidelines, such as rules regarding communications with the public; and (4) disclosure requirements. The trading rules and procedures should be appropriate for, and ensure the fair and orderly trading of, each type of security to be traded on the pilot trading system.[499]

d. Surveillance. Under the proposal, an SRO would have to establish procedures for the effective surveillance of trading activity on a pilot trading system. In the Proposing Release, the Commission noted the importance of an SRO being able to obtain information necessary to detect and deter market manipulation, illegal trading, and other trading abuses. To satisfy this requirement, the Commission proposed that an SRO have to develop and implement internal surveillance procedures to monitor transactions effected on the pilot trading system, and obtain surveillance information from other markets, both domestic and foreign.

Specifically, in the Proposing Release, the Commission discussed its expectation that there be a comprehensive information sharing agreement ("ISA") in place between the SRO operating a pilot trading system and any other market trading the securities, or trading the underlying securities of derivative securities products, traded on such pilot trading system.[500] Such agreements provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a potential manipulation. An SRO operating a pilot trading system trading U.S. securities, or new derivative securities products overlying U.S. securities, would have to continue to ensure that all exchanges on which the U.S. securities trade are members of the Intermarket Surveillance Group ("ISG").[501] The ISG was formed to coordinate, among other things, effective surveillance and investigative information sharing arrangements in the stock and options markets.

The Commission received no comments specifically addressing the surveillance requirement under the proposed pilot trading system rule. The Commission continues to believe that in order for an SRO to operate a pilot trading system in a manner consistent with the Exchange Act, the SRO must be able to obtain information necessary to detect and deter market manipulation, illegal trading, and other trading abuses. Therefore, the Commission is adopting, as proposed, the requirement that an SRO develop and implement internal surveillance procedures to monitor transactions effected on the pilot trading system, and obtain surveillance information from other markets, both

[494] Rule 19b–5(e)(11), 17 CFR 240.19b–5(e)(11).

[495] The Commission notes that registered exchanges and national securities associations already have obligations to ensure that their markets treat investors and other market participants fairly. The Exchange Act requires registered exchanges and national securities associations to consider the public interest in administering their markets and to establish rules designed to admit members fairly. Sections 6(b)(2) and 6(c) of the Exchange Act, 15 U.S.C. 78f(b)(2) and (c); section 15A(b)(8) of the Exchange Act, 15 U.S.C. 78o–3(b)(8). *See also supra* notes 241–244 and accompanying text.

[496] Rule 19b–5(e)(2)(i), 17 CFR 240.19b–5(e)(2)(i).

[497] Rule 19b–5(e)(2)(ii), 17 CFR 240.19b–5(e)(2)(ii).

[498] Rule 19b–5(e)(2)(iii), 17 CFR 240.19b–5(e)(2)(iii).

[499] Rule 19b–5(e)(3), 17 CFR 240.19b–5(e)(3).

[500] The Commission believes that a comprehensive ISA requires that the parties provide to each other, upon request, information about market trading, clearing activity, and the identity of the ultimate purchasers and sellers of securities. *See* Securities Exchange Act Release No. 31529 (Nov. 27, 1992), 57 FR 57248 (Dec. 3, 1992). Similarly, an SRO that operates a pilot trading system that trades securities, or derivatives of securities that are listed or traded on a foreign market, should have a comprehensive ISA with such foreign markets. In addition, the SRO should ensure there are no blocking or secrecy laws in the foreign country that would prevent or interfere with the transfer of information under the comprehensive ISA. If securing a comprehensive ISA is not possible, the SRO should contact the Commission. In such instances, the Commission may determine that it is appropriate instead to rely on a Memorandum of Understanding ("MOU") between the Commission and the foreign regulator. Generally, the Commission has permitted an SRO to rely on an MOU in the absence of a comprehensive ISA only if the SRO receives an assurance from the Commission that such an MOU can be relied on for surveillance purposes and includes, at a minimum, the transaction, clearing, and customer information necessary to conduct an investigation. *See* Securities Exchange Act Release No. 35184 (Dec. 30, 1994), 60 FR 2616 (Jan. 10, 1995). In addition, an SRO should endeavor to develop comprehensive ISAs with foreign exchanges even if the SRO receives prior Commission approval to rely on an MOU in place of a comprehensive ISA.

[501] *See* ISG Agreement, dated July 14, 1983, amended Jan. 29, 1990. The ISG members are: Amex, BSE, CBOE, CHX, NASD, NYSE, PCX, and Phlx. The major stock index futures exchanges joined the ISG as affiliate members in 1990.

domestic and foreign by means of an ISA.[502]

e. *Clearance and Settlement.* In the Proposing Release, the Commission observed that the integrity of the trading markets depends on the prompt and accurate clearance and settlement of securities transactions. For this reason, the Commission proposed that, as a condition of the exemption under Rule 19b–5, an SRO establish reasonable clearance and settlement procedures for transactions effected on the pilot trading system. For example, to ensure that adequate linkages have been formed, part of the user agreement should, at a minimum, request information about the name of the clearing agency member through which the user will clear its trades. The Commission received no comments specifically addressing the clearance and settlement requirement under the proposed pilot trading system rule. Therefore, the Commission is adopting as proposed, the requirement that an SRO operating a pilot trading system ensure that the necessary linkages to clearing agencies exist for all pilot trading system users.[503]

f. *Types of Securities.* The Commission proposed to limit the types of securities an SRO could trade on a pilot trading system. Two separate limitations were proposed. First, under the proposal a pilot trading system would only be permitted to trade securities listed on a national securities exchange or to which unlisted trading privileges was extended pursuant to a rule, regulation, or order of the Commission under section 12(f) of the Exchange Act. In general, section 12 of the Exchange Act requires an exchange to trade only those securities that the exchange lists, except that section 12(f) of the Exchange Act provides UTP under certain circumstances.[504] For example, under the OTC–UTP plan, exchanges are permitted to trade certain over-the-counter securities pursuant to a Commission order.[505] As proposed, a pilot trading system operated by a registered exchange or a national securities association would be limited to trading listed securities or securities to which UTP has been extended under section 12(f) of the Exchange Act. Because national securities associations currently trade securities that are neither exchange listed or subject to UTP, this provision was unnecessarily restrictive. Consequently, the Commission is modifying the limitation on the types of securities a pilot trading system may trade from that proposed. In particular, Rule 19b–5(e)(6), as adopted, only restricts pilot trading systems by requiring that securities traded be registered under section 12 of the Exchange Act.[506] Registered exchanges will still be required to comply with sections 12(a) and 12(f) of the Exchange Act, and therefore, can only trade securities listed on that exchange, or securities it is permitted to trade under the OTC–UTP Plan.

g. *Activities of Specialists.* As proposed, an SRO's pilot trading system would not be eligible for the exemption in Rule 19b-5 if it traded derivative securities, such as options, warrants, or hybrid products, the value of which were based, in whole or in part, upon the performance of any security traded on another trading system operated by that SRO. Similarly, the proposed exemption excluded SRO pilot trading systems that traded any security or instrument, such as an equity security, the derivative of which traded on another trading system operated by that SRO. The Commission, in proposing these limitations, intended to preclude an SRO from relying on the temporary exemption if a pilot trading system simultaneously traded a security overlying or underlying a security traded on that SRO's primary market. The Commission has always considered this type of trading to raise special concerns that should be resolved through the normal rule filing process.[507]

In commenting on proposed Rule 19b–5, the CBOE and the Amex considered these limitations overly restrictive. The Amex suggested removing this limitation and instead requiring SROs to specify on Form PILOT their rules and procedures for trading such securities on the pilot trading system.[508] The CBOE suggested an alternative to the limitation that pilot trading systems may not trade securities that overlie or underlie securities traded on another trading system operated by the same SRO. In particular, the CBOE suggested requiring the SRO to create firewalls or other safeguards between persons trading the derivative and the underlying or overlying securities, rather than flatly prohibiting it.[509]

After considering the commenters' recommendations, the Commission has determined that SROs may operate pilot trading systems under Rule 19b–5 that simultaneously trade a security that is overlying or underlying a security traded on another trading system operated by that market, provided that such trading remains separate. This means that, as part of the SRO's general requirement to have written trading rules and procedures to operate the pilot trading system,[510] an SRO must have adequate rules and procedures to trade related securities simultaneously. In addition, the Commission is adopting a more narrow prohibition than it proposed, which prohibits a member firm that is a specialist in a security from acting as a specialist on a pilot trading system operating during the same hours in a related security.[511] For example, a member firm may not be a specialist in a security, such as an equity security, on the pilot trading system when it is also a specialist in a derivative of that security, such as an option or equity-linked note, whose value, in whole or significant part, is based on the performance of that security.[512] The Commission would not consider listed options in a single underlying instrument to be related securities, for purposes of the pilot trading system exemption. The

[502] Rule 19b—5(e)(4), 17 CFR 240.19b–5(e)(4).

[503] Rule 19b–5(e)(5), 17 CFR 240.19b–5(e)(5).

[504] 15 U.S.C. 78l(f).

[505] *See* Securities Exchange Act Release No. 39505 (Dec. 31, 1997), 63 FR 1515 (Jan. 9, 1998).

[506] Rule 19b–5(e)(6), 17 CFR 240.19b–5(e)(6).

[507] *See, e.g.*, Securities Exchange Act Release Nos. 21759 (Feb. 14, 1985), 50 FR 7250 (Feb. 21, 1985) (order approving NYSE proposal to trade options on NYSE-listed stocks in a separate physical location from the equity trading floor); 26147 (Oct. 3, 1988), 53 FR 39556 (Oct. 7, 1988) (order approving the trading on the Amex of options on Amex-listed stocks, concluding that side-by-side trading or integrated market-making issues did not arise because the Amex proposed to trade stocks and related options in physically separate locations); and 28556 (Oct. 19, 1990), 55 FR 43233 (Oct. 26, 1990) (order approving rule changes to establish rules governing the trading of stocks, warrants, and other securities instruments and contracts on the CBOE conditioned on the fact that trading in securities other than options will take place on a trading floor separate from the location where options are traded).

[508] Amex Letter at 4.

[509] CBOE Letter at 10.

[510] Rule 19b–5(e)(3), 17 CFR 240.19b–5(e)(3).

[511] Rule 19b–5(e)(7)(iii), 17 CFR 240.19b–5(e)(7)(iii), defines related securities to mean any two securities in which the value of one security is determined, in whole or significant part, by the performance of the other security; or the value of both securities is determined, in whole or significant part, by the performance of a third security, combination of securities, index, indicator, interest rate or other common factor.

[512] A specialist, for purposes of the pilot trading system rule, means any member that is subject to an SRO requirement to regularly maintain a market in a particular security. Rule 19b–5(a), 17 CFR 240.19b–5(a). The definition of specialist is meant to preclude member firms with exclusive information about buy and sell orders from using unfairly such non-public material market information to their competitive advantage. For instance, a member acting as a specialist on the NYSE also could not simultaneously act as a specialist in related securities on a pilot trading system sponsored by the NYSE. Similarly, a member acting as a designated primary market maker on the CBOE also could not simultaneously act as a designated primary market maker in related securities on a pilot trading system sponsored by the CBOE.

limitation under Rule 19b-5(e)(7)(ii) does not preclude any member firm from being a specialist on a pilot trading system in a security related to a security in which the member firm is a specialist on the SRO's other trading systems, when such related securities trade at different times.[513] Also, a member may be a specialist in related securities that, the Commission, upon application by the SRO, later determines is necessary or appropriate in the public interest and consistent with the protection of investors.[514]

The Commission notes that Rule 19b–5 does not prohibit an SRO from developing a trading system that permits a member firm to be a specialist in related securities that trade simultaneously on trading systems operated by the same SRO. However, the SRO could not avail itself of the Rule 19b–5 temporary exemption, and instead would have to file proposed rule changes with the Commission under Section 19(b) of the Exchange Act for public notice and comment and obtain Commission approval prior to operating such trading system.

h. *Inspections and Examinations.* As a condition to the exemption, the Commission proposed that an SRO cooperate with any examination or inspection by the Commission of persons effecting transactions on the pilot trading system. The Commission received no comments on this requirement and is adopting it as proposed.[515] As adopted, the SRO shall cooperate with the examination, inspection, or investigation by the Commission of transactions effected on the pilot trading system. The Commission staff will review SRO compliance with the conditions in Rule 19b–5 through its routine inspections. In order for the Commission staff to determine whether an SRO has properly relied on the exemption under Rule 19b–5, the SRO must maintain at its principal place of business all relevant records and information pertaining to the pilot trading system and the basis for which the SRO relied on the exemption from the rule filing requirement.[516] The Commission notes that if an SRO outsources the operation or maintenance of any aspect of a pilot trading system, such vendor would be considered to be operating a facility of an SRO and therefore would also be subject to Commission examination or inspection.

i. *Public Availability of Pilot Trading System Rules.* Although pilot trading system rules do not need to be approved by the Commission, the Commission believes the current trading rules and procedures of the pilot trading system should be publicly available. Accordingly, the Commission is adopting a requirement that the SRO make its trading rules and procedures of the pilot trading system publicly available.[517]

C. Rule Filing Under Section 19(b)(2) of the Exchange Act Required Within Two Years

Within two years of a pilot trading system commencing operation, an SRO must submit a rule filing under section 19(b)(2) of the Exchange Act to obtain approval for the pilot trading system to operate on a permanent basis.[518] In accordance with section 19(b) of the Exchange Act, after a formal notice and comment period, the Commission will decide whether to approve the proposed rule changes relating to a pilot trading system on a permanent basis or whether to institute proceedings to disapprove the proposed rule changes. Simultaneous with its request for Commission approval under to section 19(b)(2) of the Exchange Act, an SRO may request Commission approval pursuant to Section 19(b)(3)(A) of the Exchange Act, effective immediate upon filing, to continue to operate the trading system for a period not to exceed six months.[519]

VII. The Commission's Interpretation of the "Exchange" Definition

A. The Commission's Interpretation in Delta

In the Exchange Act, Congress provided a broad definition of the term "exchange," permitting the Commission to apply the definition flexibly as the securities markets evolve over time.[520] Section 3(a)(1) of the Exchange Act provides that:

> The term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, 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, and includes the market place or market facilities maintained by such exchange.[521]

Although the statutory definition of "exchange" is quite broad, in the 1990 *Delta Release*,[522] the Commission interpreted the definition narrowly to include only those organizations that are "designed, whether through trading rules, operational procedures or business incentives, to centralize trading and provide buy and sell quotations on a regular or continuous basis so that purchasers and sellers have a reasonable expectation that they can regularly execute their orders at those price quotations."[523] Based on this

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[513] An SRO also may request an exemption from the limitation under Rule 19b–5(e)(7)(i) by filing an application for an order for exemptive relief under section 36. See 17 CFR 240.0–12.

[514] Rule 19b–5(e)(7), 17 CFR 240.19b–5(e)(7).

[515] Rule 19b–5(e)(8), 17 CFR 240.19b–5(e)(8).

[516] Rule 19b–5(e)(9), 17 CFR 240.19b–5(e)(9).

[517] Rule 19b–5(e)(10), 17 CFR 240.19b–5(e)(10). This specific requirement is necessary because Rule 6a–2, as amended, requires exchanges to file its trading rules and procedures only once every three years, while national securities associations have no such publication requirement except through the rule filing process under section 19(b) of the Exchange Act.

[518] Rule 19b–5(f)(1), 17 CFR 240.19b–5(f)(1).

[519] Rule 19b–5(f)(1) and (f)(2), 17 CFR 240.19b–5(f)(1) and (f)(2).

[520] It was recognized at the time the Exchange Act was enacted that a regulatory structure for securities exchanges would "be of little value tomorrow if it is not flexible enough to meet new conditions immediately as they arise and demand attention in the public interest." *See* SEC *Report of the Special Study of the Securities Markets of the Securities and Exchange Commission*, H.R. Doc. No. 95, 88th Cong., 1st Sess. Pt. 1 (1963) ("*Special Study*"), at 6. *See also* S. Rep. No. 792, 73rd Cong., 2d Sess. (1934) at 5 (noting that "exchanges cannot be regulated efficiently under a rigid statutory program," and that "considerable latitude is allowed for the exercise of administrative discretion in the regulation of both exchanges and the over-the-counter market.")

[521] 15 U.S.C. 78c(a)(1).

[522] *Delta Release, supra* note 32. In 1988, the Commission granted Delta temporary registration as a clearing agency to allow it to issue, clear, and settle options executed through a trading system operated by RMJ Securities ("RMJ"). Concurrently, the Commission's Division of Market Regulation issued a letter stating that the Division would not recommend enforcement action against RMJ if its system did not register as a national securities exchange. Subsequently, the Board of Trade of the City of Chicago and the Chicago Mercantile Exchange petitioned the U.S. Court of Appeals for the Seventh Circuit for review of the Commission's actions. Both challenges were premised on the view that RMJ's system unlawfully failed to register as an exchange or obtain an exemption from registration. The Seventh Circuit vacated Delta's temporary registration as a clearing agency, pending publication of a reasoned Commission analysis of whether or not RMJ's system was an exchange within the meaning of the Exchange Act. *Board of Trade of the City of Chicago v. Securities and Exchange Commission*, 883 F.2d 525 (7th Cir. 1989) ("*Delta I*"). In 1989, the Commission solicited comment on the issue, and in 1990 published its interpretation of the term "exchange" and its determination that RMJ's system did not meet that interpretation.

[523] *See Delta Release, supra* note 32. The Commission also identified the following factors as supporting the conclusion that the system in *Delta* should not be classified as an exchange. Unlike a traditional exchange, the system (1) was not open to the participation of retail investors on an agency basis; (2) did not offer limit order protection; and (3) provided a forum for trading instruments that lacked certain indicia of standardization. These factors were admittedly outside the Commission's "central focus" in *Delta*. *Id.* Moreover, most alternative trading systems that will fall now under

interpretation, which was upheld by the Seventh Circuit on review,[524] the Commission staff has given operators of trading systems that do not enhance liquidity in traditional ways through market makers, specialists, or a single price auction structure, assurances that it would not recommend enforcement action if those systems operated without registering as exchanges.[525]

Several concerns compelled the Commission in 1990 to narrowly interpret the definition of the term "exchange." First, the Commission was concerned that a broad interpretation would place "evolving (alternative) trading systems within the 'strait jacket' of exchange regulation," thus stifling innovation.[526] Second, the Commission was concerned that a broad definition would subject brokers, dealers, and other statutorily defined entities to the regulatory scheme prescribed for exchanges.[527] Third, the Commission was concerned that "an expansive definition of the term 'exchange' would force a non-member, for-profit, proprietary trading system into a regulatory scheme for which it is ill-suited, thus ignoring the Congressional and judicial mandate to apply flexibly the definition of the term 'exchange' to the economic realm." [528] These concerns, however, are largely eliminated by Congress' broad grant of exemptive authority in 1996,[529] which has permitted the Commission to craft a regulatory framework for markets which excludes other statutorily defined entities (e.g., broker-dealers operating internal matching systems) and flexibly regulate markets to accommodate their diverse business structures. In addition, while the Delta interpretation was appropriate at the time, its emphasis on the "expectation" of regular execution of orders at quoted prices no longer reflects today's markets where alternative trading systems compete directly with registered exchanges and Nasdaq. The Delta approach has resulted in the anomaly of regulating as exchanges small volume entities that raise an expectation of liquidity within their system (such as AZX), while regulating as broker-dealers higher volume entities (such as Instinet).

More fundamentally, although traditional exchanges still provide liquidity through two-sided quotations and, hence, raise an expectation of execution at the quoted price, this is no longer the essential characteristic of a securities market where stock and other securities exchange hands. Today's technology enables market participants and investors to tap simultaneous and multiple sources of liquidity from remote locations. Market makers and specialists may be important liquidity providers on a particular exchange, but liquidity now comes from many sources across multiple markets.[530] For example, the public exposure of investor limit orders means that it is now easier to access liquidity in trading venues that do not have market makers or specialists.[531] Today, through their computer terminals and other communication links, brokers acting on behalf of their customers or institutions trading for themselves can see what the quoted price is on an exchange or Nasdaq and check it against the price available for the same security on one or more alternative trading systems.[532]

Notably, in *Delta*, the Commission indicated that the Exchange Act does not preclude an alternative trading system from coming within the "exchange definition." [533] The Commission recognized that its interpretation of the term "exchange" could be subject to change as the securities markets continued to change:

> In order to permit the Commission to apply flexibly the (Exchange) Act's definition of the term "exchange" to innovative trading systems in securities, Congress imbued the (Exchange) Act's definition of the term "exchange" with a certain "plasticity" * * *; "it invites reinterpretation as the way the term * * * 'generally understood' evolves." [534]

Moreover, on review, although the United States Court of Appeals for the Seventh Circuit Court accepted the Commission's interpretation of the term "exchange" and affirmed the Commission's determination that Delta was not an "exchange," the court nevertheless stated that the "Commission could have interpreted the section to embrace the Delta System" but that it was not compelled to do so.[535]

B. The Growing Significance of Alternative Trading Systems in the National Market System

Within the past six years, the significance of alternative trading systems in the securities markets has increased dramatically. In 1994, the Commission's Division of Market Regulation reported that alternative trading systems accounted for thirteen percent of the volume in Nasdaq securities and 1.4 percent of the trading volume in NYSE-listed securities.[536] In the Proposing Release, the Commission estimated that, as of the end of 1996, the trading volume on alternative trading systems amounted to almost twenty percent of the trades in Nasdaq stocks, and almost four percent of orders in securities listed on the NYSE.

In addition to the general increase in the volume of trading occurring on alternative trading systems, the actual number of alternative trading systems has skyrocketed. In 1991, the Commission was aware of only a few such systems. Today, over forty such systems are currently operating. The viability of this number of alternative trading systems indicates that these systems account for an increasing proportion of trading and that a growing number of investors use these systems. Moreover, the arrival of trading services on the Internet portends an increasing level of retail interest in alternative means for trading.

As more alternative trading systems have developed to offer varying services to diverse customer bases, the availability of trading information and the accessibility of trading opportunities have become increasingly fragmented. The national market system relies on centralized sources of trading

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the Commission's new interpretation in Rule 3b–16 allow broker-dealer subscribers to act on behalf of retail customers in placing and executing orders on the system; function as limit order books where orders are executed according to time, price, and size priority; and trade standard securities.

[524] *Board of Trade of the City of Chicago v. SEC*, 923 F.2d 1270 (7th Cir. 1991).

[525] For a list of no-action letters issued to system sponsors until the end of 1993 and a short history of the Commission's oversight of such systems, *see* Securities Exchange Act Release No. 33605, 59 FR 8368, 8369–71 (Feb. 18, 1994). *See also* Letters from the Division of Market Regulation to: Tradebook (Dec. 3, 1996); The Institutional Real Estate Clearinghouse System (May 28, 1996); Chicago Board Brokerage, Inc. and Clearing Corporation for Options and Securities (Dec. 13, 1995).

[526] *Delta Release*, *supra* note 32, at 1899.

[527] *Id.*

[528] *Id.*

[529] *See supra* note 7.

[530] The rules adopted today reflect and facilitate multiple sources of liquidity. Increasing the linkages among markets where significant trading activity occurs—both exchanges and alternative trading systems—will make the overall market for securities more transparent and liquid.

[531] *See* Order Handling Rules Adopting Release, *supra* note 177 at Section III.

[532] In fact, an alternative trading system that posts firm orders to buy or sell a security does raise a certain expectation of execution at those quoted prices. The expectation is based on the life of the outstanding orders in the system, rather than on continuous two-sided quotations published by specialists or market makers.

[533] *See Delta Release*, *supra* note 32, at 1900.

[534] *Delta Release*, *supra* note 32, at 1895 (quoting *Delta I*, *supra* note 522, at 535).

[535] *Delta II*, *supra* note 348, at 1273. The court held that, because the statutory provision is ambiguous, the Commission had the discretion to interpret the definition the way it did.

[536] *See* Division of Market Regulation, Market 2000: An Examination of Current Equity Market Developments app IV (1994) ("Market 2000 Study").

opportunities and trading information. Exchange regulation is designed to facilitate centralization and enhance the general public's opportunities to obtain trading information and to access trading interest.

The narrow interpretation of the term "exchange" in Delta has eroded the effectiveness of the Commission's oversight of markets. For example, as discussed in the Concept Release, it is clear that regulatory concerns may be raised by entities that constitute a market where buyers and sellers interact, but do not necessarily ensure a two-sided market by design.[537] Moreover, the Commission's traditional approach to broker-dealer regulation is not designed to substitute for market regulation. Consequently, these alternative trading systems are not fully integrated into the mechanisms that promote market fairness, efficiency, and transparency. In addition to raising regulatory fairness concerns, this lack of integration into the national market system has had a negative impact on the quality and pricing efficiency of secondary markets.[538]

C. The Revised Interpretation of "Exchange"

For purposes of effectively regulating the securities markets, including alternative trading systems, the Commission believes a revised interpretation of what constitutes an exchange is in order.[539] Although the Commission has considered many characteristics of the modern exchange in revising its interpretation,[540] it believes two elements most accurately reflect the functions and uses of today's exchange markets. Under the interpretation in Rule 3b–16, the first essential element of an exchange is the bringing together of orders of multiple buyers and sellers. This reflects the statutory concept of bringing together purchasers and sellers and also reflects the reality of today's marketplace—where supply and demand originate from a variety of sources, not simply from individual brokers and dealers.[541] The second essential element is that trading on an exchange takes place according to established, non-discretionary rules or procedures. As discussed above, an essential indication of the non-discretionary status of rules and procedures is that those rules and procedures are communicated to the system's users. Thus, participants have an expectation regarding the manner of execution—that is, if an order is entered, it will be executed in accordance with those procedures and not at the discretion of a counterparty or intermediary.[542]

Some commenters thought the Commission should retain its current interpretation of an exchange. For example, TBMA advocated a less expansive definition of exchange, and recommended that the Commission continue to regulate alternative trading systems within the broker-dealer framework, crafting appropriate regulations to address particular issues presented by unique operations as they develop.[543] TBMA also raised a question about whether, by eliminating the requirement that a system provide a reasonable expectation of liquidity to be considered an exchange, the Commission's proposal conflicted with the statutory definition of "exchange" because liquidity is "generally understood" to be a fundamental characteristic of an exchange. As noted above, however, today's technology gives market participants the ability to access multiple markets for liquidity at any given time. As a result, assuring liquidity within a single market by posting continuous two-sided quotations is no longer the essential characteristic of a market where securities exchange hands.[544]

Accordingly, the Commission believes that new Rule 3b–16 more accurately describes the range of markets that perform exchange functions as understood today. At the same time, the Commission's exemption from the exchange definition for many alternative trading systems provides a flexible framework, permitting each participant to choose the regulatory approach that best serves its own business needs.

D. Other Practical Reasons for Revising the Current Interpretation

1. Additional Flexibility Provided by the National Securities Markets Improvement Act of 1996

As stated above, one principal reason the Commission, to date, has interpreted the term "exchange" narrowly has been to avoid the imposition of unnecessary and burdensome regulatory obligations on small and emerging trading systems, which could stifle innovation.[545] The enactment of NSMIA,[546] however, alleviates the concern that an expanded interpretation of the term exchange will inhibit innovation.[547] Specifically,

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[537] *See* Proposing Release, *supra* note 3, at n.290.

[538] For example, the evidence in the Commission's report on the NASD and the Nasdaq market pursuant to section 21(a) of the Exchange Act suggests that widespread use of Instinet by market makers as a private market has had a significant impact on public investors and the operation of the Nasdaq market. *See* NASD 21(a) Report, *supra* note 4.

[539] Courts have consistently upheld an agency's discretion to revise earlier interpretations when a revision is reasonably warranted by changed circumstances. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 186 (1991). In *Rust*, the Court stated that "an initial agency interpretation is not instantly carved in stone, and the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 186 (*quoting Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844–45 (1984)). The Court also stated that "an agency is not required to 'establish rules of conduct to last forever,' but rather 'must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.'" *Id.* at 186–87 (*quoting Motor Vehicles Mfrs. Ass'n of United States v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983)). *See also Arkansas AFL–CIO v. FCC*, 11 F.3rd 1430, 1441 (8th Cir. 1993) (deferring to Federal Communications Commission decision to alter its interpretation of the statutory term "operated in the public interest" to meet the changing realities of the broadcast industry).

[540] *See Concept Release, supra* note 2, at nn.125–133 and accompanying text.

[541] This broad conception of "bringing together" buyers and sellers is consistent with the *Delta Release*, which emphasized that the means employed for bringing together buyers and sellers "may be varied, ranging from a physical floor or trading system * * * to other means of intermediation (such as a formal market making system or systemic procedures such as a consolidated limit order book or regular single price auction)." *Delta Release, supra* note 32, at 1899.

[542] The elements of the interpretation are discussed in greater detail in Section III, *supra*.

[543] *See* TBMA Letter at 3–4.

[544] The Commission also notes that the statutory definition of "exchange" is written in the disjunctive: facilities for bringing together purchasers and sellers or facilities performing functions commonly performed by stock exchanges. Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1). *See* TBMA Letter, at 8–9 (recommending that the Commission continue to rely on its interpretation in the *Delta Release*); SIA Letter at 2, 6–7 (a significant characteristic of exchanges is structural features that create a reasonable expectation of the regular execution of orders at posted prices). *See also* Letter from Christopher J. Carroll, Managing Director, Deutsche Bank Securities, Inc. to Jonathan G. Katz, Secretary, SEC, dated July 31, 1998 ("DBSI Letter") at 2; NYSE Letter at 2–3, 4–5, 8 (commenting that only alternative trading systems meeting the *Delta* interpretation of exchange should have the ability to register with the Commission as an exchange); Instinet Letter at 8 (recommending that the Commission retain its current interpretation of "exchange"); CBB Letter at 3 (recommending that if the Commission believed its current interpretation of "exchange" in the *Delta Release* was inadequate, that the Commission should simply withdraw that interpretation and rely solely on the statutory definition of "exchange").

[545] For example, at the time of the *Delta Release*, the Commission sought to avoid interpreting the term "exchange" in a way that could unintentionally and inappropriately subject many broker-dealers to exchange regulation. One key factor in the Commission's decision not to regulate the Delta system as an exchange was the concern that doing so would subject traditional broker-dealer activities to exchange regulation. *Delta Release, supra* note 32.

[546] Pub. L. 104–290, 110 Stat. 3416 (1996). 15 U.S.C. 78mm.

[547] Throughout the past 60 years, the Commission has attempted to accommodate market innovations within the existing statutory framework to the

NSMIA added section 36(a)(1) to the Exchange Act, which provides that:
the Commission, by rule, regulation, or order, may 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 (the Exchange Act) or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[548]

Prior to adoption of NSMIA, the Commission's authority under the Exchange Act to reduce or eliminate certain consequences of exchange registration was limited.[549] Section 36, however, allows the Commission greater flexibility in regulating new trading systems by giving the Commission broad authority to exempt any person from any provision of the Exchange Act. As a result, the Commission now has greater authority to adopt a more consistent regulatory approach to securities markets in general, and particularly for alternative trading systems that do not neatly fit into the existing regulatory framework.[550]

2. No-action Approach to Alternative Trading Systems Is No Longer Workable

The Commission also believes that the proliferation of new trading systems necessitates the revision of the interpretation of the term "exchange." The no-action review process that the Commission has used to date to address hybrid systems that incorporate features of both exchanges and broker-dealers worked well and was consistent with the protection of investors when relatively few systems applied for no-action treatment. The no-action process allowed the Division to review the system's services and mechanisms and to monitor the impact of such systems on a case-by-case basis. This is no longer practicable. Absent a revised interpretation of "exchange," the Commission would have to continue to respond to an increasing volume of no-action requests from developing alternative trading systems that seek to avoid the burdens associated with registration as a national securities exchange. The Commission's revised interpretation eliminates the need for this no-action approach. By codifying a regulatory framework that does not rely on Commission staff review of each novel system development, the Commission believes that technological improvements and enhanced services will become available more rapidly.

3. More Rational Treatment of Regulated Entities

The Commission believes that the revised interpretation of the term exchange, in combination with the adoption of Regulation ATS, which allows alternative trading systems to register as broker-dealers,[551] is consistent with other goals and provisions of the Exchange Act. The new regulatory framework, including the revised interpretation of "exchange" avoids the need for the Commission to draw what are now arbitrary distinctions between organizations that perform similar functions, avoids classifying alternative trading systems in a manner that does not fit the structure of these systems, and squarely addresses the regulatory concerns raised by these systems.

Moreover, the Commission's new framework helps assure consistency with existing broker-dealer regulations. For those alternative trading systems that wish to participate in the markets as exchanges, regulation as a national securities exchange is available. However, the Commission expects that many alternative trading systems will not elect to register as national securities exchanges. Under the Commission's proposal, these systems would have to maintain a structure more akin to that of traditional broker-dealers and comply with regulatory obligations more appropriately tailored to their chosen business structure. These obligations include the new requirements for more significant alternative trading systems to address the transparency, fair access, and systems capacity, integrity, and security concerns raised by these particular systems.[552]

VIII. Effective Dates and Compliance Dates

The rules and rule amendments adopted in this release are effective on April 21, 1999, except for Exchange Act Rules 301(b)(5)(D) and (E) and Rules 301(b)(6)(D) and (E), which shall become effective on April 1, 2000. Alternative trading systems, however, will only have to comply with the public display requirement in Rule 301(b)(3) for fifty percent of the securities subject to this requirements on April 21, 1999. Alternative trading systems will have to comply with Rule 301(b)(3) for all such securities by August 30, 1999.[553] Prior to April 21, 1999, the Commission will publish a schedule of those securities for which alternative trading systems must comply with Rule 301(b)(3) on April 21, 1999.

IX. Costs and Benefits of the Rules and Amendments

To assist the Commission in its evaluation of the costs and benefits that may result from the rules and amendments, commenters were requested to provide analysis and data, if possible, relating to the costs and benefits associated with the proposals. The Commission initially identified certain costs and benefits associated with its changes in the Proposing Release. Although the Commission received seventy comment letters, as of December 1, 1998 concerning the proposed rules, none of the commenters responded specifically to the request for comment on the cost/benefit analysis. Some commenters did raise related issues and the Commission will address those comments in this analysis. After considering the comments, the Commission continues to believe that the benefits of the rules and amendments justify the associated costs.

A. Costs and Benefits of the Rules and Amendments Regarding Alternative Trading Systems

The Commission identified several benefits and costs to investors and market participants in the Proposing Release with regard to alternative trading systems. The Commission is not making any changes to the rules or amendments that increase the cost estimates for alternative trading system notice, reporting and recordkeeping obligations. The most significant change

extent possible in light of investor protection concerns, without imposing regulation that would stifle or threaten the commercial viability of such innovations. For example, at various times, the Commission considered the implications of evolving market conditions on exchange regulation. *See* Securities Exchange Act Release Nos. 8661 (Aug. 4, 1969), 34 FR 12952 (initially proposing Rule 15c2–10); 11673 (Sept. 23, 1975), 40 FR 45422 (withdrawing then-proposed Rule 15c2–10 and providing for registration of securities information processors); 26708 (Apr. 13, 1989), 54 FR 15429 (reproposing Rule 15c2–10); 33621 (Feb. 14, 1994), 59 FR 8379 (withdrawing proposed Rule 15c2–10).

[548] 15 U.S.C. 78mm(a)(1).

[549] Prior to the addition of section 36 to the Exchange Act, the Commission could only exempt an exchange from the registration provisions of sections 5 and 6 on the basis of an exchange's limited volume of transactions. *See* Section 5 of the Exchange Act, 15 U.S.C. 78e.

[550] *See* S. Rep. No. 104–293, 104th Cong. 2d Sess. 15 (1996).

[551] *See supra* Section IV.A.

[552] *See supra* IV.A.2.

[553] Because the rules and rule amendments regarding Regulation ATS, exchange registration, and Rule 19b–5 constitute "major rules" within the meaning of the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. 801 *et seq.*, the rules and rule amendments cannot take effect until 60 days after the date of publication in the **Federal Register**. Although the amendments to Rules 17a–3 and 17a–4 and repeal of Rule 17a–23 and Form 17A–23 do not constitute "major rules," they will become effective at the same time as Regulation ATS because they operate in an integrated fashion with Regulation ATS.

the Commission is making in the rules as adopted is to revise the fair access provisions. The rules and amendments in the Proposing Release provided investors with a right of appeal to the Commission and required alternative trading systems to provide investors denied or limited access to the system with notice of that action and their right to appeal the decision to the Commission. The Commission has decided not to adopt the right of appeal provisions and the requirement of notice to investors denied or limited access. Instead, alternative trading systems with significant volume will be required to provide quarterly notices to the Commission on Form ATS–R of all grants, denials, and limitations of access as well as descriptive information regarding those access decisions. The net effect of these changes to the fair access requirements is a decrease, relative to the original proposal, in the burdens on alternative trading systems with significant volume. Several commenters objected to the proposed fair access rules on various grounds.[554]

Several commenters had general comments with regard to the burdens imposed on respondents under Regulation ATS. One commenter argued that the Commission should impose only minimal requirements on start-up or smaller trading systems.[555] The alternative trading system rules have been tailored to minimize their burden on alternative trading systems generally and small systems specifically. Because many of the provisions in the rules are triggered by a volume threshold, the Commission expects that small alternative trading systems will not have sufficient volume to trigger those thresholds and will, therefore, not have to comply with those provisions. The recordkeeping and reporting requirements with which smaller, lower volume alternative trading systems will have to comply under Regulation ATS are substantially similar to those with which alternative trading systems currently comply. Consequently the costs for smaller alternative trading systems should remain unchanged.

One commenter argued that material changes on Form ATS should be reported twenty days after such a change is made rather than twenty days before.[556] The Commission believes that is important to have some advance notice of significant changes in order to permit it to carry out its market oversight and investor protection functions. By requiring notice before such changes are made, the Commission has an opportunity to make inquiries to clarify any questions that might arise. Currently, alternative trading systems are required to give twenty days prior notice of material changes on Part 1–A of Form 17A–23. This burden remains unchanged under the new rules.

Several commenters pointed out areas for possible reductions of regulatory overlap. One commenter argued that the Commission should eliminate those broker-dealer requirements that would be irrelevant for alternative trading systems.[557] The Commission, however, does not believe that the broker-dealer requirements as they apply to alternative trading systems, are irrelevant or overly burdensome. Another commented that recordkeeping burdens should be coordinated with the NASD's OATS program.[558] These recordkeeping rules do not specify the manner in which such records must be maintained, but only that they must be made available upon request. Such records may be required for other purposes, but it is important to assure that all alternative trading systems maintain records sufficient to construct an audit trail.

One commenter argued that the Commission's rules and amendments impose costs and burdens on market innovators rather than encouraging such systems.[559] As discussed above, however, the Commission does not intend its new regulatory framework to impose a penalty on systems because of their use of technology. The Commission's new framework is based on the functions performed by a trading system, not on its use of technology.

Finally, a large number of institutional subscribers to alternative trading systems submitted comments within the last two weeks. These commenters expressed a number of concerns about the public display requirement. Among the concerns voiced by these commenters was a concern about decreasing liquidity, limiting a potentially advantageous trading strategy, being able to provide best execution for their clients, and increasing costs to execute trades. The Commission responds to these concerns below.[560]

The Commission solicited comment on the feasibility of permitting alternative trading systems to file forms electronically. Three commenters supported electronic filing as an option to reduce the burdens on respondents.[561] While not feasible at this time, the Commission intends to make electronic filing an option when it is possible.

Three commenters argued that the Commission's rules should not apply to debt securities, in part, due to the burdens that such requirements would place on a largely decentralized market.[562] Other commenters supported including debt securities within Regulation ATS.[563] The Commission continues to believe that many of the same concerns about the trading of equity securities on alternative trading systems apply equally to the trading of fixed income securities on alternative trading systems. Debt securities are increasingly being traded on alternative trading systems, similar to the way that equity securities are traded. Accordingly, the Commission's new regulatory framework would require alternative trading systems trading debt securities, other than alternative trading systems trading solely government and related securities, to register as an exchange or register as a broker-dealer and comply with Regulation ATS. If an alternative trading system chooses to register as a broker-dealer, Regulation ATS applies the same notice, recordkeeping, and reporting requirements on debt alternative trading systems as apply to equity alternative trading systems. Because of the way the debt market currently operates, however, the transparency provisions do not apply to alternative trading systems that trade debt securities. Only those alternative trading systems that trade at least twenty percent of certain categories of debt are be subject to the fair access requirements[564] and the provisions governing systems capacity, security, and integrity.[565]

Under the rules and amendments in this release, alternative trading systems have a choice between registering as a national securities exchange or registering as a broker-dealer and complying with Regulation ATS. The choice between these two options is

[554] *See* ICI Letter at 4 (stating that requirements would be overly burdensome for alternative trading systems); IBEX Letter at 13 (arguing that appeal process should begin at the SRO level); Instinet Letter at 19 (stating that a right of appeal to the Commission could lead to frequent frivolous appeals).

[555] TBMA Letter at 16.

[556] SIA Letter at 17–18. *But see* IBEX Letter at 5 (stating that the reporting requirements under proposed Regulation ATS were not inappropriately burdensome).

[557] CBB Letter at 4.

[558] Instinet Letter at 20.

[559] Instinet Letter at 10.

[560] *See supra* Section IV.A.2.c.

[561] *See* IBEX Letter at 5; SIA Letter at 18; American Century Letter at 6.

[562] *See* TBMA Letter at 6–7, 21; SIA Letter at 3, 11; DBSI Letter at 1; MSDW Letter at 13.

[563] *See* NYSE Letter at 6; IBEX Letter at 2–3.

[564] Rule 301(b)(5), 17 CFR 242.301(b)(5).

[565] Rule 301(b)(6), 17 CFR 242.301(b)(6).

complex and each alternative trading system will make a choice based on its business plan and the role it wishes to play in the market. There are several factors that will have an impact on each alternative trading system's decision.

First, the regulatory costs associated with registering and operating as a national securities exchange are higher than the regulatory costs associated with registering as a broker-dealer and complying with Regulation ATS. Second, registered exchanges have national market system obligations that require those exchanges to bear the expenses associated with joining the CTA, CQS, and ITS plans. To offset some of those costs, however, registered exchanges also participate in the revenue generated from the sale of quotation information. Third, registered exchanges are SROs and, therefore, have obligations to surveil trading activity and member conduct on the exchange. These obligations can be significant in terms of time, personnel, and financial resources. However, a significant advantage to a registered exchange of being an SRO is that it is not subject to oversight by a competitor. Fourth, registered exchanges are subject to the statutory requirement to provide fair access, which requires a commitment of resources to consider membership applications and to report denials to the Commission and defend any denial decisions before the Commission if an appeal is made.

Because of the range of obligations of registered exchanges, operation as an exchange requires a significant investment of financial resources. A relatively high volume of trading may be required to justify this financial investment. While the advent of for-profit and non-member owned exchanges may make it easier to raise the financial resources necessary to operate as a registered exchange, the Commission does not expect that many alternative trading systems will choose to register as exchanges.

On the other hand, alternative trading systems that register as broker-dealers must comply with the filing and conduct obligations associated with being a registered broker-dealer including membership in an SRO and compliance with that SRO's rules. They must also comply with Regulation ATS, which includes filing, recordkeeping and reporting obligations. Unlike registered exchanges, alternative trading systems are subject to oversight by an SRO, which may operate a competing market. Regulation ATS is designed to impose few requirements on lower volume alternative trading systems. Only alternative trading systems with significant volume are required to link to an SRO and publicly display orders, provide investors with fair access, and comply with systems capacity, integrity, and security requirements. These obligations for alternative trading systems with significant volume are similar, although not identical, to obligations of registered exchanges. Therefore, it is more likely that a high volume alternative trading system will consider the costs and benefits of registering as an exchange to be more comparable to the costs and benefits of regulation as a broker-dealer alternative trading system. The costs associated with regulation as a registered exchange, and with operating as a broker-dealer and complying with Regulation ATS are discussed more fully below.

1. Benefits

a. *Improved Market Transparency.* The Commission's amendments and rules enhance transparency of trading on alternative trading systems. Transparency of orders helps ensure that publicly available prices fully reflect overall supply and demand and helps reduce the negative consequences of market fragmentation (*e.g.*, the chance that an order for a security in one market will be executed at a price inferior to that available at the same time in another market). The Commission has been particularly concerned that the development of so-called "hidden markets," in which a market participant privately publishes quotations at prices superior to the quotation information it disseminates publicly, impedes national market system objectives. Some systems that permit this activity have become significant markets in their own right, but are not currently required to integrate their orders into the public quote because they are not registered as national securities exchanges or national securities associations.

For alternative trading systems choosing to register as broker-dealers, the Commission's amendments and rules improve the transparency of orders in systems that account for a significant portion of the trading volume in any security. The amendments and rules help to incorporate alternative trading system quotes into the national market system, thus reducing fragmentation, improving liquidity, facilitating price discovery, and narrowing the quoted spread.[566]

Because non-market maker broker-dealers and institutions at times enter the best priced orders in an alternative trading system, the Commission expects that display of these orders in the public quote will also improve the NBBO. For example, of all orders on ECNs by non-market maker broker-dealers and institutions that could improve the NBBO if included in the public quote stream, only about six percent of those orders were actually entered into the public quote stream. Consequently, about ninety-four percent of those orders that could have improved the NBBO were not included in the public quote stream and thus did not impact the NBBO. These orders were therefore unavailable to some investors, in particular, retail investors, who do not have direct access to ECNs. The unavailability of these quotes continues to effectively result in a two-tiered market. While the Commission is unable to precisely quantify the market impact of these changes, it does believe that the benefit for investors will be significant based on preliminary estimates.

Based on an analysis of ECN trading activity during a four day period in June 1997 (June 23, 1997 to June 27, 1997), the staff estimates that spreads could decrease by as much as four percent for Nasdaq issues when non-market maker broker-dealer and institutional orders are displayed in the public quote. In making this estimate, the staff has assumed an average spread of 35 cents per share, a maximum increase of eleven percent for the times that ECNs could narrow the inside, and a maximum of 12.5 cents per share improvement. In addition to the effects on the bid-ask spread, retail investors and other non-subscribers will gain access to the liquidity and better prices now available only to alternative trading system subscribers. Moreover, because many broker-dealers offer retail customers automatic execution of their small orders at the publicly quoted price, a better price in the public quote potentially improves the price received by thousands of broker-dealer customers. Larger orders negotiated between institutions and broker-dealers also potentially benefit because the price negotiated will reflect a smaller spread. For these reasons, the Commission believes that new display and access requirements will result in significant benefits to investors.

[566] The Office of Management and Budget has recognized that although it may be difficult to quantify the benefits of price transparency, "[t]here is a strong consensus among economists that regulations requiring the disclosure of information about the price and quality of products and services can produce significant benefits for consumers and improve the functioning of markets when this information would not otherwise be available." Office of Management and Budget, *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, 63 FR 44034 (Aug. 17, 1998).

The above data is consistent with the results of the transparency improvements achieved through the implementation of the Order Handling Rules.[567] The NASD studied the effect of the Order Handling Rules on the Nasdaq market by comparing various measures between a pre-period of twenty days in the beginning of 1997 (December 18, 1997 to January 17, 1998) and a post-period of twenty days in the beginning of 1998 (January 5, 1998 to February 2, 1998). The success of the Order Handling Rules further supports the view that the amendments and rules the Commission is adopting today will further investors' opportunities to trade at the best prices.

In its study, the NASD also found that quoted spreads in the Nasdaq market decreased by an average of forty-one percent. The NASD estimates that this reduction in spreads resulted in annual savings to investors of between $284 million and $673 million. Because of the increased market transparency provided by the display of institutional and non-market maker broker-dealer orders, the Commission believes that the rules and amendments in this release will also further shrink spreads.

Finally, the Commission believes that improved transparency of orders in alternative trading systems will reduce the potential for alternative trading system subscribers to manipulate the public market. It has been alleged that institutions and non-market makers intentionally influence the market by displaying an order in an alternative trading system that locks the price displayed in the public market. For example, if the public market is displaying a bid of 20 and an offer of 21, an institution or non-market maker might display an offer of 20 in an alternative trading system. Market participants often then assume that the order in the alternative trading system indicates the direction in which the market is moving and begin selling to market makers bidding 20, pushing the public market lower. The price in the alternative trading system is then canceled and the institution or non-market maker buys securities at a lower price. This type of activity is possible only because institution and non-market maker orders in alternative trading systems are not displayed to the public market. The Commission believes that the integrity of the public markets is threatened when institutions and non-market makers can affect the public markets without participating in them.

The transparency of trading on alternative trading systems that choose to register as exchanges will also improve. All registered exchanges are expected to participate in the national market system plans, such as the CTA, CQS, and ITS. These plans form an integral part of the national market system, and contribute greatly to the operation of linked, transparent, efficient, and fair markets. In addition to improving transparency, alternative trading system participation in these market-wide mechanisms will benefit investors by reducing trading fragmentation.

b. *Improved Investor Protections.* The Commission's amendments and rules provide benefits to investors by improving the surveillance of trading on alternative trading systems. Adequate surveillance of the trading on alternative trading systems is critical to the continued integrity of our markets. This is particularly the case with regard to alternative trading systems that have a significant percentage of the trading volume in one or many issues of securities. The oversight of trading activities on alternative trading systems that choose to register as broker-dealers will improve because the proposals clarify the relationship between SROs and alternative trading systems.

The notice, reporting, and recordkeeping requirements under Regulation ATS also contribute to the Commission's and the SROs' ability to effectively oversee alternative trading systems regulated as broker-dealers. The Commission believes that these enhancements to the surveillance and oversight of alternative trading systems regulated as broker-dealers benefit the public by helping to prevent fraud and manipulation.

The surveillance of trading on alternative trading systems that choose to register as exchanges under the Commission's proposal will also be improved. All registered exchanges are SROs, which have direct obligations to surveil the trading on their own markets. The Commission believes that, through improved surveillance mechanisms, it will be better able to detect fraud and manipulation that could occur on alternative trading systems. For example, alternative trading systems can be used to artificially narrow the NBBO spreads for the sole purpose of trading through a broker-dealer's automatic execution system at the artificial prices.[568] The Commission and the SROs will be able to more readily detect such activity through enhanced surveillance. The Commission believes that this more direct oversight of trading activities will therefore benefit investors and the market generally by helping to prevent fraud and manipulation.

c. *Fair Access.* The Commission's rules require alternative trading systems with significant volume to provide a fair opportunity to participate in alternative trading systems. Fair and non-discriminatory treatment of potential and current subscribers by alternative trading systems is important, especially when an alternative trading system captures a large percentage of trading volume in a security. Although an alternative trading system with significant volume is required to provide access to orders that it is required to display in the public quote stream, there are other benefits to direct participation on an alternative trading system. In particular, participation on an alternative trading system allows an investor to enter its own orders, view contingent orders not publicly displayed (such as all or none orders) and use special features of an alternative trading system, such as a negotiation feature or reserve size feature. Accordingly, the rules prevent discriminatory denials of access and ensure that market participants are not prevented from gaining access to significant sources of liquidity.

d. *Systems Capacity, Integrity, and Security.* The Commission believes that its rules regarding systems capacity, integrity, and security of alternative trading systems provide several benefits to the marketplace and to investors. Marketplaces are increasingly reliant on technology and most of their functions are becoming highly automated. Alternative trading systems are subject only to business incentives to avoid system breakdowns that may disrupt the market. In the past, alternative trading system failures have affected the public market, particularly during periods of high trading volume. Some alternative trading systems have had prolonged shut-downs during the busiest trading sessions due to systems problems. For example, during the past year, Instinet, Island, Bloomberg, and Archipelago (operated by Terra Nova) have all experienced systems outages due to problems with their automated systems. On a number of occasions, ECNs have had to stop disseminating market maker quotations in order to keep from closing altogether, including during the market decline of October 1997 when one significant ECN withdrew its quotes from Nasdaq because of lack of capacity. Similarly, a major IDB in non-exempt

[567] *See supra* note 177. Under the Order Handling Rules, market makers who enter orders on ECNs are required to reflect those prices in their public quotations. In the alternative, the ECN can make the best market maker prices publicly available through an SRO.

[568] *See supra* note 5.

securities experienced serious capacity problems in processing the large number of transactions in October 1997 and had to close down temporarily.

The Commission's rules require alternative trading systems that handle a significant volume of trades to establish reasonable capacity estimates, conduct stress tests, implement procedures to monitor system development, review systems vulnerability, and establish adequate contingency plans. Investors will benefit from the rules because significant systems will be less likely to shut down as a result of systems failures and will be better equipped to handle market demand and provide liquidity during periods of market stress. The ability of alternative trading systems to provide more reliable and consistent service in the market benefits investors and the public markets generally. The Commission also believes that investors will benefit from robust system security provided by ensuring that significant alternative trading systems maintain sufficient security measures to prevent unauthorized access.

All currently registered exchanges participate in the Commission's automation review program. Alternative trading systems that choose to register as exchanges will similarly be expected to participate in this program. Under the automation review program, exchanges are expected to maintain sufficient systems capacity to meet current and anticipated volume levels. The benefits to investors and the public generally, as with significant alternative trading systems, will be the assurance that systems are reasonably equipped to handle market demand and provide liquidity during periods of market stress.

2. Costs

The alternative trading system rules and amendments have been tailored to minimize their burden on alternative trading systems and especially small systems. Many of the provisions in the rules and amendments are triggered by a volume threshold. The Commission expects that small alternative trading systems will not have sufficient volume to trigger those thresholds and will therefore not have to comply with those provisions. The recordkeeping and reporting requirements with which smaller, lower volume alternative trading systems have to comply under Regulation ATS are substantially similar to those with which alternative trading systems currently comply. Consequently the costs for smaller alternative trading systems should remain materially unchanged. The paperwork, filing, and recordkeeping costs are discussed in the Paperwork Reduction Act section below.

a. *Notice, Reporting, and Recordkeeping.* All alternative trading systems that will be subject to notice, reporting, and recordkeeping requirements under the Commission's new rules are currently subject to similar requirements under Rule 17a–23. The requirements under Regulation ATS, however, require some additional information that is not currently required under Rule 17a–23.

Under Regulation ATS, alternative trading systems file an initial operation report, notices of material systems changes, and quarterly reports. The rules also include new Forms ATS and ATS–R to standardize reporting of such information and make it more useful for the Commission. The rules require information that is not currently required under Rule 17a–23, such as greater detail about the system operations, the volume and types of securities traded, criteria for granting access to subscribers, procedures governing order execution, reporting, clearance and settlement, procedures for reviewing systems capacity and contingency procedures, and the identity of any other entities involved in operating the system.

Regulation ATS requires staff time to comply with the initial notice and amendment requirements. While the Commission has designed the requirements in an effort to balance the costs of filing with the benefits to be gained from the information, some effort will be necessary to gather and file this information. Most of the information, however, already exists. Alternative trading systems will only be required to gather this information and supply it in the required format to the Commission. The periodic updating requirements will also require staff time over the life of the alternative trading system to comply with the rules.

The Commission estimates that there are currently about forty-five alternative trading systems that will be required to register as exchanges or register as broker-dealers and comply with Regulation ATS.[569] The Commission also estimates that, over time, there will be approximately three new alternative trading systems each year that choose to register as broker-dealers and comply with Regulation ATS.[570] The Commission also estimates that, over time, there will be approximately three alternative trading systems that file cessation of operations reports each year. Thus, the Commission anticipates that, over time, if all forty-five current alternative trading systems choose to register as broker-dealers and comply with Regulation ATS, there will be approximately forty-five alternative trading systems operating each year.

b. *Public Display of Orders and Equal Execution Access.* Regulation ATS requires that alternative trading systems with significant volume display their best-priced orders for securities in which they have 5 percent or more of total trading volume in the public quote. The Commission identified the anticipated benefits of this requirement above. Below is a discussion of possible costs associated with this requirement.

One possible cost is the impact on institutional order flow to alternative trading systems generally. Institutions have several options available to them to execute trades. They can send orders to block trading desks, a number of different types of alternative trading systems, or directly to registered exchanges through broker-dealer give-ups. Although not currently displayed to the public, orders sent to an alternative trading system by institutions are displayed to other alternative trading system subscribers.[571] Thus, placing large orders, or a series of successive small orders, in an alternative trading system signals to a large number of sophisticated market participants the interest in a particular security.

The Commission is not persuaded by commenters that suggest that institutions currently willing to use alternative trading systems to display their orders to other alternative trading system subscribers, including other institutions, market-markers, and broker-dealers, will be less willing to use alternative trading systems that must display those orders to the public market. Our reasons are as follows. The primary group of market participants

[569] This estimate is based on filings made with the Commission under Rule 17a–23. At the time of the Proposing Release, the Commission estimated that forty-three alternative trading systems would be required to register as exchanges or broker-dealers and comply with Regulation ATS. The Commission now estimates that there are forty-five alternative trading systems operating.

[570] Based on the Commission's experience over the last three years with Rule 17a–23, it appears that there are more than three new alternative trading systems per year. However, we expect that in the future, there will be approximately three new alternative trading systems per year. The rapid growth experienced over the last several years is unlikely to continue in perpetuity.

[571] A number of ECNs, however, currently display the best order in their system in the public quote, regardless of whether that order is entered by an institution, market maker or another broker-dealer although the Commission's Order Handling Rules only require the display of market maker orders. Thus, institutional orders sent to these systems are already displayed to the public.

that will benefit from the public display of institutional orders is retail investors. Retail investors are not currently alternative trading system subscribers. To avoid market impact, institutions try to avoid signaling other institutions and market professionals, not retail investors. Almost all market professionals and a significant number of institutions already subscribe to alternative trading systems. Thus, the Commission believes that the additional exposure to the market should not affect institutions' use of alternative trading systems. Moreover, to the extent that institutions want to display small sized orders in the public market, rather than their entire order, they will still be able to make use of an alternative trading system's "reserve size" feature. This will enable institutions to avoid exposing the total size of their order to the public market.

Nonetheless, assuming institutions do have a preference for showing their sized orders to other alternative trading system subscribers but not the public market, there may be two reactions by institutions. First, institutions could choose to move their orders to more opaque venues, such as block trading desks. The cost of this movement of orders would be a loss of transparency to the limited group of alternative trading system subscribers who now benefit from the display of institutional orders on alternative trading systems, and the loss of business to alternative trading systems. While block trading desks would benefit from the increased business, it likely would increase institutions' transaction costs. For this reason, as well as those discussed above, the Commission believes it unlikely for institutions to react this way. Second, because the public display requirement only applies to alternative trading systems with five percent or more of the volume in a particular security, there is a possibility that institutions may move their order flow to smaller alternative trading systems in order to avoid the public display requirement. Such movements of order flow could benefit some alternative trading systems in the form of increased revenue and be a cost to other alternative trading systems who lose revenue.

Currently, alternative trading systems are able to attract subscribers because prices in their systems are often better than the prices available in the public markets. Because alternative trading systems are now required to publicly display their best priced orders for securities in which they represent five percent or more of the trading volume, the best priced orders for certain securities will also be available through the public markets. Alternative trading systems will no longer be able to provide subscribers with the unlimited ability to avoid public display in the NBBO and possible interaction with non-subscribers. Consequently, some subscribers could leave an alternative trading system if they think there are fewer advantages than before in having direct access to the alternative trading system.

However, the growth of ECNs since the Order Handling Rules were implemented indicates that alternative trading systems can, and are, attracting subscribers.[572] As mentioned above, there are still significant benefits to being a subscriber to an alternative trading system, including, but not limited to: the ability to enter orders and the use of such features as a negotiation feature or a "reserve size" feature; the ability to access the best priced orders for securities in which an alternative trading system represents less than 5 percent of the trading volume and therefore is not subject to the transparency requirements; and access to the entire "book," not merely the "top of the book," that contains important real-time market information regarding depth of trading interest. All of these benefits will be retained under the new display requirement.

Despite the impact on high volume alternative trading systems, integrating their best-priced orders into the public market is critical to the national market system. Section 11A of the Exchange Act directs the Commission to facilitate a national market system and to carry out Congress' objectives of, among other things, assuring "the practicability of brokers executing investors' orders in the best market."[573] The public display requirement adopted today furthers the objectives in Section 11A of the Exchange Act by ensuring that the public markets reflect the best priced orders displayed in alternative trading systems that have a significant trading market in particular securities.

Several commenters also expressed concern about whether or not alternative trading systems will be permitted to continue charging fees to non-subscribers that access alternative trading systems publicly displayed orders. Currently, alternative trading systems charge a range of fees to subscribers. In particular, alternative trading systems may allow institutional subscribers to select higher fees and then have soft-dollars rebated in an amount equal to the excess above the actual cost for execution of a trade. Because of the presence of soft dollars, it is difficult to estimate the amount of revenue that alternative trading systems receive from institutional subscribers. The Commission notes, however, that it is not requiring alternative trading systems to change their fee structures. The Commission is merely limiting alternative trading systems to charging non-subscribers fees that are consistent with equivalent access.[574] The Commission does not believe that such limitations will substantially affect an alternative trading system's revenues. In fact, some alternative trading systems may have increased revenues from the fees charged to non-subscribers.

The rules the Commission is adopting today prohibit an alternative trading system from charging fees that would effectively deny non-subscribers equivalent access to an alternative trading system's publicly displayed orders. As long as a fee does not deny equivalent access, it would be permissible under these rules. The SROs will be able to establish rules to ensure that alternative trading system fees are not inconsistent with the standard of equivalent access. Any SRO rule impacting an alternative trading system's access fees would have to be filed with the Commission for public comment, review, and approval. The Commission cannot approve any SRO rule unless it finds that such rule is consistent with the Exchange Act, including whether the rule will promote "efficiency, competition, and capital formation."[575]

As discussed above, one of the expected benefits of displaying the best-priced orders in alternative trading systems to all investors is that spreads will shrink. The success of the Order Handling Rules indicates that the Commission's current proposal should further enhance liquidity and price improvement opportunities in the public markets. Because non-market maker broker-dealers and institutions at times enter the best priced orders in an alternative trading system, the Commission expects that display of these orders in the public quote will improve the NBBO. As a result, some market markers may experience a loss of revenue. For example, a market maker

[572] When the Order Handling Rules were implemented on January 17, 1997, four ECNs linked to Nasdaq. Today there are a total of nine ECNs linked to the public quote stream. *See supra* note 178.

[573] Section 11A(a)(1)(C) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C).

[574] Under the Order Handling Rules, ECNs are limited to charging non-subscribers fees consistent with equivalent access.

[575] Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f).

may currently be at the NBBO even when an alternative trading system is better than that market maker's bid or offer. Accordingly, if the better priced institutional or non-market maker broker-dealer order were displayed in the public quote, that market maker would not execute an order unless it improved its quote. While reduced spreads may represent a cost to market makers, as discussed above, it represents a corresponding benefit to investors. Moreover, reduced spreads make the overall market more efficient by reducing transaction costs. If trading is less expensive, all other things being equal, investors can be expected to trade more.

The staff also notes that a market maker is not required to execute a customer order at the NBBO if the best available price is represented by an alternative trading system quote. Instead, a market maker may attempt to execute that customer order against the alternative trading system quote. If the market maker acts as agent in effecting the customer's trade, it may be entitled to a brokerage fee. Therefore, market makers may be able to offset, at least partially, the loss of trading profits with additional brokerage revenues.

c. *Fair Access.* Under Regulation ATS, alternative trading systems with significant volume are required to establish and maintain standards for granting access to their system and keep records of such standards. In addition, such alternative trading systems must apply those standards in a fair and non-discriminatory manner and submit certain information regarding grants, denials, and limitations of access with their quarterly reports on Form ATS–R. Based on current volume estimates, at most two alternative trading systems will be initially subject to this requirement. The Paperwork Reduction Act section of this release summarizes the filing and recordkeeping costs associated with the fair access requirement.

The fair access requirement, as adopted, differs from that proposed. The proposal would have provided market participants who believe they had been unfairly denied or limited access to an alternative trading system subject to the fair access requirement with a right to appeal that alternative trading system's action to the Commission. Alternative trading systems subject to the fair access requirement would also have been required to provide investors with notice of a denial or limitation of access and their right to appeal that action to the Commission. The fair access requirement being adopted today does not include any right to appeal an alternative trading system's access decisions to the Commission. Instead, the Commission intends to enforce the prohibition on alternative trading systems with significant volume unfairly denying access through its inspection and enforcement authority. The Commission believes the fair access requirement it is adopting will be less costly to alternative trading systems than the one proposed because alternative trading systems will not be required to defend their access decisions in appeals before the Commission. Moreover, the requirement adopted does not require alternative trading systems to send notice of their decisions to market participants.

d. *Systems Capacity, Integrity, and Security.* The Commission does not believe that its amendments and rules requiring alternative trading systems to meet certain systems related standards imposes significant costs. The standards the Commission is adopting are general standards that are consistent with good business practices. In addition, smaller alternative trading systems will not be subject to the proposed requirements. For those alternative trading systems that do not, for business reasons alone, ensure adequate capacity, integrity, and security of their systems, there will be costs associated with complying with the requirements. The costs associated with upgrading systems to an adequate level may include, for example, investing in computer hardware and software. In addition, alternative trading systems will incur costs associated with the independent review of their systems on an annual basis. An independent review should be performed by competent, independent audit personnel following established audit procedures and standards. If internal auditors are used by an alternative trading system to complete the review, these auditors should comply with the standards of the EDPAA. If external auditors are used, they should comply with the standards of the AICPA and the EDPAA. The review must be conducted according to established procedures and standards. The costs involved may vary widely depending on the business of the alternative trading system. Alternative trading systems will also be subject to paperwork burdens and recordkeeping and reporting requirements. These requirements are necessary for the Commission and the appropriate SROs to ensure compliance with systems related requirements. In addition, keeping such records permits alternative trading systems to effectively analyze systems problems that occur. While alternative trading systems are not required to file such documentation with the Commission on a regular basis, the Commission recognizes that generating and maintaining such documentation will impose some additional costs.

The notification requirement for material systems outages should impose relatively little additional costs on alternative trading systems. Moreover, the Commission believes that this small burden is justified by the need to keep Commission staff abreast of systems' developments and problems. The Paperwork Reduction Act section of this release summarizes the costs associated with the recordkeeping and reporting burdens of compliance with the systems capacity, integrity, and security requirements.

e. *Costs of Exchange Registration.* The framework the Commission is adopting today for alternative trading systems is designed to allow such systems the option of registering as national securities exchanges. If an alternative trading system chooses to register as an exchange, corresponding regulatory obligations could impose costs on such systems, however, the elective nature of exchange regulation under the framework the Commission is adopting today ensures that only those entities for whom it is cost-effective will choose exchange registration and therefore bear the costs.

For example, exchange-registered alternative trading systems will have to be organized to, and have the capacity to, carry out the purposes of the Exchange Act, including their own compliance and the ability to enforce member compliance with the securities laws. Consequently, any newly registered exchange will have to establish appropriate surveillance and disciplinary mechanisms. In addition, newly registered exchanges will incur certain start-up costs associated with this obligation, such as writing rule manuals.

National securities exchanges currently operating have significant assets and expenses in order to carry out their functions. The cost of acquiring the necessary assets and the operating funds required to carry out the day-to-day functions of a national securities exchange are significant. For example, for the fiscal year 1997, the NYSE had total assets of $1,174,887,000 and total expenses of $488,811,000. The Cincinnati Stock Exchange ("CSE"), currently the only completely automated national securities exchange, had total assets of $13,124,585 and total expenses of $5,343,403. Due to these costs, it appears that an alternative trading system will need to have

significant volume in order to make the benefits of exchange registration outweigh the costs.

As registered exchanges, alternative trading systems will also be subject to more frequent inspection by the Commission. As broker-dealers, alternative trading systems will be inspected on a regular basis by any SRO of which they are a member, and by the Commission only on an intermittent basis. As registered exchanges, these systems will be inspected more regularly by Commission staff, but will, of course, no longer be subject to examinations by SROs.

The Commission inspects different SRO programs on independent review cycles. For example, separate inspections are conducted for an SRO's surveillance, arbitration, listings, and financial soundness programs. Where appropriate, SROs will be examined for other programs they may operate, such as index programs. Each type of examination will be performed at regular intervals, which are typically two to three years. An SRO, however, may expect several examinations throughout a particular year, each in a different program. Each examination typically involves three to four attorneys and/or accountants from the Commission, who spend one week at the SRO, or up to two weeks for particularly large programs, to examine records and interview SRO personnel. In order to comply with section 17(b) under the Exchange Act, an SRO must expend resources to provide copies of relevant documents to, and answer questions from, the Commission staff. The cost to an SRO of each examination varies greatly depending on the scope of the examination and the size or complexity of the SRO's particular program.

In addition, there will also be costs associated with meeting the obligations set forth in section 11A of the Exchange Act and the rules thereunder. These costs include the costs of joining, or creating new, market-wide plans, such as the CQS, CTA, ITS, and OTC–UTP, although some of these costs will be offset by the right to share in the revenues generated by these plans. For example, to join the CTA plan, applicants will be asked to pay, as a condition to entry into the plan, an amount that reflects the value of the tangible and intangible assets created by the CTA plan that will be available to the applicant.[576] Similarly, new participants in ITS will have to pay a share of the development costs, which will reflect a share of the initial development costs, which were $721,631, and a share of costs incurred after June 30, 1978.[577] These costs will also include the costs of complying with Rule 11Ac1–1(b) under the Exchange Act,[578] which requires national securities exchanges and national securities associations to make the best bid, best offer, and aggregate quotation size for each security traded on its facilities available to quotation vendors for public dissemination.[579]

The Commission notes that the remaining costs will be partially offset because the alternative trading systems assuming the costs of exchange registration will no longer be regulated as broker-dealers. Consequently, they will no longer be obligated to comply with the broker-dealer requirements, such as filing and updating Form BD, maintaining books and records in accordance with Rules 17a–3 and 17a–4 under the Exchange Act, and paying fees for membership in an SRO. In addition, because exchange-registered alternative trading systems share the responsibilities of self-regulation, the regulatory burden carried by currently registered exchanges should be reduced. Other benefits include the freedom from oversight by a competing SRO, no obligation to comply with net capital requirements, the right to establish trading and conduct rules, the right to establish fee schedules, the ability to directly participate in the national market system mechanisms, and the right to share in the profits and benefits produced by the national market system mechanisms such as the CQS, CTA, ITS and OTC–UTP plans.[580]

The costs of exchange registration also include certain paperwork, filing, and recordkeeping requirements. These costs are discussed in the Paperwork Reduction Act section below.

The Commission anticipates that only a few of the existing alternative trading systems would consider registering as a national securities exchange. For most of the alternative trading systems currently in existence, the Commission believes that the costs and obligations discussed above potentially make registering as a national securities exchange less commercially viable than registering as a broker-dealer and complying with Regulation ATS.

B. Amendments to Application and Related Rules for Registration as an Exchange

The Commission identified several costs and benefits to investors and market participants in the Proposing Release with respect to amendments to the application and rules for exchange registration. Only two commenters identified areas of concern regarding exchange registration. These commenters suggested that the Commission was seeking to reimpose annual filing requirements previously eliminated in 1994.[581] In response, the Commission has made technical modifications to Rule 6a–2 to clarify the operation of the rule. The Commission does not believe that these filing burdens are reimposed under the rules as adopted. These commenters also questioned the value of requiring exchanges to compile and submit amendments to Form 1 that contain information that has been provided to the Commission throughout the year in other contexts. The Commission continues to believe that it is important to have all the required information gathered in one place in order to make it useful for Commission staff. In addition, the additional costs should be minimal because the respondents are required only to compile existing documents rather than generate new material.

1. Benefits

The Commission believes that the amendments provide benefits to organizations that are currently

[576] The amount to be paid to the CTA plan will vary on a case-by-case basis and may reflect a current independent valuation of the CTA facilities, prior valuations, an assessment of costs contributed to the plan by existing members, the estimated usage of the plan facilities by the applicant, costs for anticipated system modifications to accommodate the applicant, and other relevant factors as determined by the current participants. *CTA Plan: Second Restatement of Plan Submitted to the Securities and Exchange Commission Pursuant to Rule 11Aa3–1 under the Securities Exchange Act of 1934*, May 1974 as restated March 1980 and December 1995, at 8–9. *See supra* note 391. The terms of the CQ plan are substantially similar with respect to the assessment of a payment upon entry into the system. *CQ Plan: Restatement of Plan Submitted to the Securities and Exchange Commission Pursuant to Rule 11Ac1–1 under the Securities Exchange Act of 1934*, July 1978, as restated December 1995, at 8–9. *See supra* note 392.

[577] *Plan for the Purpose of Creating and Operating an Intermarket Communication Linkage Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934, Composite: Amendments through May 30, 1997*, at 78–79.

[578] 17 CFR 240.11Ac1–1.

[579] The Commission estimates that each national securities exchange or national securities association will submit information to vendors approximately 24,266,000 times per year, which reporting is generally done through automated facilities that conduct the reporting on a continuous basis. Due to the continuous nature of the information feeds, the Commission does not believe that it is feasible to estimate the average cost per response or annual burdens hours involved in complying with Rule 11Ac1–1(b) for a new registered exchange. 17 CFR 240.11Ac1–1(b).

[580] *See supra* Section III.B.1.

[581] *See* NYSE Letter at 10; Amex Letter at 5–6.

registered, or in the future will apply for registration, as national securities exchanges. Generally, the Commission expects that the regulatory framework discussed in this release accommodates automated and for-profit exchanges and makes registering as a national securities exchange more commercially viable for possible future exchanges.[582] First, the amendments to Rules 6a–1, 6a–2, and 6a–3 ease compliance burdens by simplifying the rule. By simplifying the rule language itself, the Commission anticipates that parties attempting to comply with Rules 6a–1, 6a–2, and 6a–3 will be better able to understand the rules' requirements and comply with them. Much of the information required on Form 1 will not change, but the revised form recasts the questions and exhibits in a different format that will ease compliance and make the responses more relevant to investors and the Commission. While national securities exchanges have traditionally been membership-owned, Form 1 also is revised to accommodate proprietary national securities exchanges.

Second, the amendments give national securities exchanges the option of complying with certain ongoing filing requirements by posting information on an Internet web site and supplying the location to the Commission, instead of filing a complete paper copy with the Commission. The Commission anticipates that exchanges will choose to use the Internet to comply with Rules 6a–2 and 6a–3 rather than filing many exhibits on paper. The availability of such information on the Internet will also provide the public with easier and less expensive access to the information than requesting paper copies from the Commission or the national securities exchanges as currently required. In addition, permitting exchanges to use the Internet as a means of compliance will reduce expenses associated with clerical time, postage, and copying.

The amended rules also reduce the frequency of certain ongoing filings to update the information in Form 1, directly reducing the compliance burden on national securities exchanges while still meeting investors' and the Commission's need for reasonably current information. Specifically, the amendments eliminate exchanges' requirement to submit changes to their constitution, their rules, or the securities listed on the exchange within ten days. The amendments also permit exchanges to file certain information regarding subsidiaries and affiliates every three years rather than annually. These amendments will conserve registered exchanges' staff time to comply with the rules.

2. Costs

The amendments are intended to simplify the filing requirements and reduce the compliance burdens for national securities exchanges and will likely impose few additional costs on national securities exchanges. Initially, there may be some additional personnel costs required to review the proposed rules and revised Form 1, but the Commission believes that the simplified requirements will reduce overall compliance burdens and costs over time. Reducing the frequency of filings for some requirements may result in some information being less current. The Commission, however, believes that much of this type of information does not change frequently. Moreover, the option of posting such information on an Internet web site should encourage more frequent updating of current information. Compliance with Rules 6a–1, 6a–2, and 6a–3 also include certain paperwork costs, which are discussed as "burdens" in the Paperwork Reduction Act section below.

C. Costs and Benefits of the Repeal of Rule 17a–23 and the Amendments to Rules 17a–3 and 17a–4

The Commission identified several costs and benefits to investors and market participants in the Proposing Release with respect to Rules 17a–23, 17a–3, and 17a–4. One commenter stated that the transfer of recordkeeping burdens would impose no additional burdens.[583]

Approximately forty-five of the broker-dealer trading systems currently filing reports under Rule 17a–23 will be alternative trading systems under the amendments and rules in this release. These trading systems will not fall within the definition of "internal broker-dealer system," and will, therefore, not be required to maintain records under the new provisions of Rules 17a–3(a)(16) and 17a–4(b)(10). In its Paperwork Reduction Act analysis, the Commission notes that annual aggregate burdens for the recordkeeping obligations under Rule 17a–23 will be eliminated. Although the reporting requirements under Rule 17a–23 will be eliminated, alternative trading systems will be subject to similar recordkeeping requirements under Regulation ATS.[584] These paperwork "burdens" are discussed below in the Paperwork Reduction Act section.

D. SRO Pilot Trading System

The Commission identified several costs and benefits to investors and market participants in the Proposing Release with respect to Rule 19b–5. While the Commission solicited comment on the costs and benefits of Rule 19b–5, no comments were received specifically on that point. Several commenters did, however, address the Commission's proposal. One commenter agreed that Rule 19b–5 would reduce regulatory costs and encourage innovation, but believed that the rule's limitations should be reduced.[585] Two other commenters expressed support for the goals of Rule 19b–5, but argued that burdens wouldn't be reduced as a practical matter due to the limitations of the rule.[586] In response, the Commission notes that it has adopted the rule with some changes that should permit SROs more flexibility in taking advantage of the temporary exemption from rule filing requirements.

By permitting SROs to begin operating eligible pilot trading systems immediately and to continue operating for two years under a flexible regulatory scheme, the Commission believes that Rule 19b–5 will benefit SROs and investors. Rule 19b–5 will enhance competition in the trading markets without imposing significant SRO compliance burdens.[587] Rule 19b–5 will permit the timely implementation of pilot trading systems without the widespread dissemination of critical business information. Therefore, Rule 19b–5 will reduce SRO costs associated with the Commission approval process and improve the competitive balance between SROs and alternative trading

[582] For example, the International Securities Exchange, which announced its intentions to register as a national securities exchange on November 10, 1998, would not be able to register as a national securities exchange without the changes to the rules as adopted today. *See International Securities Exchange Will be First Fully Electronic Options Exchange in U.S.*, International Securities Exchange Press Release, Nov. 10, 1998.

[583] TBMA Letter at 25–26.

[584] The costs and benefits associated with these recordkeeping requirements are discussed in Section IX.A.2.a. *supra*.

[585] CBOE Letter at 8–9.

[586] *See* CME Letter at 3–4; PCX Letter at 8.

[587] The Commission estimates that the current preparation and filing of proposed rule changes pursuant to section 19(b)(2) of the Exchange Act to operate a pilot trading system constitute major market impact filings requiring approximately 100 hours and $10,000 to $15,000 of SRO time and money, respectively, for each proposal. This does not include the cost to the SRO of any delay in obtaining Commission approval or in disclosing business information; nor does this include the benefit to an SRO of bringing its new pilot trading system to market in a shorter amount of time. The cost per hour and per filing is derived from information supplied by the SROs. For the purposes of our estimates, we have valued related overhead at thirty-five percent of the value of legal work. *See GSA Guide to Estimating Reporting Costs* (1973).

systems that are regulated as broker-dealers.[588] Moreover, the Commission believes that Rule 19b–5 will foster innovation and create a streamlined procedure for SROs to operate pilot trading systems and will reduce filing costs for SROs pilot trading systems.

The costs of complying with Rule 19b–5 includes certain paperwork, filing, and recordkeeping requirements that are discussed below in the Paperwork Reduction Act section.

X. Effects on Competition, Efficiency and Capital Formation

Section 23(a)(2)[589] of the Act requires that the Commission, when promulgating rules under the Exchange Act, to consider the impact any rule would have on competition and to not adopt any rule that would impose a burden on competition that is not necessary or appropriate in the public interest. In the Proposing Release, the Commission solicited comment on the effects on competition, efficiency and capital formation of the rules and amendments. Specifically, the Commission requested commenters to address how the proposed rules and amendments would affect competition between and among alternative trading systems, broker-dealers, exchanges, investors, and other market participants. The Commission received no comments specifically regarding these issues.

The Commission has considered the rules and rule amendment in light of the standards cited in section 23(a)(2) of the Act and believes they would not likely impose any significant burden on competition not necessary or appropriate in furtherance of the Exchange Act. As discussed above in the Cost-Benefit Section, the Commission recognizes that some alternative trading systems and their institutional users will be affected competitively by the rules adopted today. Nonetheless, the Commission believes that the rules and amendments will encourage innovation, accommodate the growing role of technology in the securities markets, improve transparency for market participants and ensure the stability of trading systems with a significant role in the markets, thereby furthering the development of a national market system in accordance with the goals under section 11A of the Exchange Act. In particular, as discussed above in the Cost-Benefit Section, the Commission believes that the rules and amendments will significantly reduce spreads, thereby benefiting all investors.

In adopting these rules and amendments, the Commission has considered whether the action will protect investors, and promote efficiency, competition, and capital formation.[590] The Commission believes that the rules and amendments will allow the Commission to better oversee the activities of alternative trading systems and integrate alternative trading systems into the national market system. The rules and amendments will also better accommodate automated and for-profit exchanges and permit SROs to operate pilot trading systems temporarily without Commission approval. These steps will help to protect investors by preventing discriminatory denials or limitations of access, preventing systems related failures, and permitting access to best-priced orders. In addition, alternative trading systems should continue to compete based on innovation, price, and service rather than access to "hidden markets."

Rules 3a1–1, 3b–16, and Regulation ATS adopted today are intended to provide a choice between registering as a broker-dealer and registering as an exchange for markets operated as alternative trading systems.[591] In addition, the amendments to Rules 6a–1, 6a–2, and 6a–3 adopted today are intended to update the requirements for registered or exempt exchanges in order to accommodate different forms of organization and methods of operation. The Commission believes that these changes will create a more efficient market, encourage competition among alternative trading systems, and stimulate capital formation by making the regulatory framework sufficiently flexible to accommodate new or different approaches to exchange formation and operation, including automated and for-profit exchanges. The Commission further believes that the costs identified in the above analysis are not substantial enough to deter any market participants from attempting to become an alternative trading system.[592]

In addition, Rule 19b–5 and Form Pilot are intended to provide SROs the opportunity to develop and operate pilot trading systems with less cost and time delay. As previously stated, currently, SROs are required to submit a rule filing to the Commission and undergo a public notice, comment, and approval process, before they operate a new pilot trading system. Rule 19b–5 would permit SROs that develop pilot trading systems to begin operation shortly after submitting Form PILOT to the Commission. One of the consequences of SROs filing rule changes before implementation is that the rule filing process informs SROs' competitors about the proposed pilot trading system and provides an avenue for those competitors to copy, delay, or obstruct implementation of a pilot trading system before it can be tested in the marketplace. As a result, the Commission believes that proposed Rule 19b–5 and Form Pilot should help create a more efficient market, encourage competition between SROs and alternative trading systems, and stimulate capital formation by creating a streamlined procedure for SROs to operate pilot trading systems and reducing filing costs for SROs generally.

XI. Summary of Final Regulatory Flexibility Analysis

A Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with section 4 of the Regulatory Flexibility Act ("RFA").[593] The FRFA relates to the adoption of new rules 3a1–1,[594] 3b–16,[595] 19b–5,[596] Regulation ATS,[597] new Forms ATS,[598]

[588] The Commission estimates that under current procedures, a rule filing for a new pilot trading system takes 90 days, on average, from the date of the original submission to be approved. In contrast, the expedited treatment of SRO rule changes for pilot trading systems in this release permits SROs to operate a pilot trading system twenty days after submitting an initial operation report on Form PILOT, so long as such system complies with Rule 19b–5 under the Exchange Act.

[589] 15 U.S.C. 78w(a)(2).

[590] 15 U.S.C. 78c(f).

[591] The Commission further believes that repealing Rule 17a–23 and amending Rules 17a–3 and 17a–4 under the Act will help to create a more efficient market, encourage competition, and stimulate capital formation innovation.

[592] As previously stated, alternative trading systems are able to attract subscribers because prices in their systems are often better than the prices available in the public markets. Because alternative trading systems are now required to publicly display their best priced orders for securities in which they represent more than 5 percent of the trading volume, the best priced orders for certain securities will also be available through the public markets. Consequently, some subscribers could leave an alternative trading system if they think there are fewer advantages than before in having direct access to the alternative trading system. However, the growth of ECNs since the Order Handling Rules were implemented indicates that alternative trading systems can, and are, attracting subscribers. As mentioned above, there are still significant benefits to being a subscriber to an alternative trading system, including, but not limited to: the ability to enter orders and the use of such features as a negotiation feature or a "reserve size" feature; the ability to access the best priced orders for securities in which an alternative trading system represents less than 5 percent of the trading volume and therefore is not subject to the transparency requirements; and access to the entire "book," not merely the "top of the book," that contains important real-time market information regarding depth of trading interest.

[593] 5 U.S.C. 604.

[594] 17 CFR 240.3a1–1.

[595] 17 CFR 240.3b–16.

[596] 17 CFR 240.19b–5.

[597] 17 CFR 242.300 *et seq.*

[598] 17 CFR 242.637.

ATS–R,[599] PILOT,[600] amendments to rules 6a–1,[601] 6a–2,[602] 6a–3,[603] 11Ac1–1,[604] 17a–3,[605] 17a–4,[606] the Commission's rules of practice,[607] to Form 1, and the repeal of Rule 17a–23[608] under the Exchange Act.[609] The FRFA notes the potential costs of operation and procedural changes that may be necessary to comply with the new rules and rule amendments ("new regulatory framework"). A summary of the Initial Regulatory Flexibility Analysis ("IRFA") appeared in the Proposing Release.[610]

As more fully discussed in the FRFA, market participants have developed a variety of alternative trading systems that furnish services traditionally provided solely by registered exchanges. Our current regulatory framework, designed more than six decades ago, however, did not foresee many of these trading and business functions. Alternative trading systems now handle twenty percent or more of the orders in securities listed on Nasdaq, and almost four percent of orders in listed securities. Even though these systems provide services that are similar to those provided by the registered exchanges and Nasdaq, the current regulatory framework largely ignores the market functions of alternative trading systems. This creates disparities that affect investor protection, market intermediaries, and other markets. For example, activity on alternative trading systems is not fully disclosed to, or accessible by, public investors and may not be adequately surveilled for market manipulation and fraud. Moreover, these trading systems have no obligation to provide investors a fair opportunity to participate in their systems or to treat their participants fairly. In addition, they do not have an obligation to ensure that their capacity is sufficient to handle trading demand. Because of the increasingly important role of alternative trading systems, these differences call into question not only the fairness of current regulatory requirements, but also the efficacy of the existing national market system structure.

As described in the FRFA, under the new regulatory framework, the Commission will offer trading systems a choice between broker-dealer regulation and exchange regulation. Specifically, the Commission proposed to allow alternative trading systems to choose whether to register as national securities exchanges, or to register as broker-dealers and comply with additional requirements under proposed Regulation ATS depending on their activities and trading volume. In conjunction with this proposal, the Commission proposed to repeal Rule 17a–23, which currently requires alternative trading systems—as well as broker-dealer trading systems that are not alternative trading systems—to maintain certain records and file reports with the Commission. The Commission also proposed amendments to Form 1, which securities markets file to register as national securities exchanges, and related rules. Finally, to enable registered exchanges and national securities associations to better compete in the fast changing marketplace, the Commission proposed to temporarily exempt certain pilot trading systems operated by such exchanges and associations from the rule filing requirements of the Exchange Act.

In the Proposing Release, the Commission solicited public comment on the proposed new rules and rule amendments which were designed to resolve many of the concerns raised by alternative trading systems. As discussed in the FRFA, commenters generally supported the Commission's proposals and welcomed the regulatory flexibility these proposals offered. While no public comments were received in response to the IRFA, several of the comments were related to the IRFA. Several commenters encouraged the Commission to accept electronic filings as a means of reducing the burden on market participants. The Commission is, in fact, working toward the goal of accepting filings in electronic form. One commenter suggested that the Commission impose only minimal regulatory requirements, if any, on alternative trading systems that trade only minimal volume in order to avoid erecting significant barriers to entry and innovation. The Commission believes that the requirements of Regulation ATS are minimal for new alternative trading systems, especially as compared to the current no-action letter process. Regulation ATS sets forth concrete requirements for a system to operate, imposes only notice filings, and reserves more burdensome requirements for high volume systems. Another commenter stated that the reporting requirements under proposed Regulation ATS are similar to current Rule 17a–23 and, thus, are not inappropriately burdensome. The Commission agrees and notes that most current potential respondents under Regulation ATS already have experience with the requirements and burdens associated with Rule 17a–23, so Regulation ATS will not impose significant new burdens on currently operating alternative trading systems.

The Commission is adopting new Regulation ATS substantially in the form it was proposed.

The FRFA addresses how the proposal would affect broker-dealers that operate alternative trading systems and internal broker-dealer trading systems that are small entities. As more fully explained in the FRFA, the Commission believes that the improved regulatory framework provided by Regulation ATS justifies the costs incurred by industry participants to comply with Regulation ATS. The FRFA also describes the Commission's consideration of significant alternatives to Regulation ATS. The FRFA concludes that the alternatives, in the context of a new regulatory framework, would not accomplish the stated objectives of Regulation ATS. A copy of the FRFA may be obtained by contacting Denise Landers, Attorney, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 10–1, Washington D.C. 20549.

XII. Paperwork Reduction Act

As explained in the Proposing Release, certain provisions of the rules and rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) ("PRA"). Accordingly, the Commission submitted the collection of information requirements contained in the rules and rule amendments to the Office of Management and Budget ("OMB") for review and were approved by OMB which assigned the following control numbers: Form 1, Rules 6a-1 and 6a-2, control number 3235–0017; Rule 6a-3, control number 3235–0021; Rule 17a–3(a)(16), control number 3235-0508; Rule 17a–4(b)(10), control number 3235–0506; Rule 19b–5 and Form PILOT, control number 3235–0507; Rule 301, Form ATS and Form ATS-R, control number 3235–0509; Rule 302, control number 3235–0510; and Rule 303, control number 3235–0505. The collections of information are in accordance with Section 3507 of the

[599] 17 CFR 242.638.
[600] 17 CFR 249.821.
[601] 17 CFR 240.6a–1.
[602] 17 CFR 240.6a–2.
[603] 17 CFR 240.6a–3.
[604] 17 CFR 240.11Ac1–1.
[605] 17 CFR 240.17a–3.
[606] 17 CFR 240.17a–4.
[607] 17 CFR 202.3.
[608] 17 CFR 240.17a–23.
[609] 15 U.S.C. 78a *et seq.*
[610] *See supra* note .

PRA.[611] With regard to Rule 301, Form ATS, and Form ATS-R, Rule 302, and Rule 303, the Commission staff has changed its estimate of the paperwork burdens slightly due to an increase in the estimated number of respondents that will be affected and a change to the fair access rules. Accordingly, the Commission has submitted a PRA change worksheet to OMB.[612]

The collection of information obligations imposed by the rules and rule amendments are mandatory. However, it is important to note that an alternative trading system operating as a broker-dealer is optional, operation of a national securities exchange is optional, and operating a pilot trading system is optional. The information collected, retained, and/or filed pursuant to the rules and rule amendments under Regulation ATS will be kept confidential to the extent permitted by the Freedom of Information Act (5 U.S.C. § 552 *et seq.*). The information collected, retained, and/or filed pursuant to the rules for registration as a national securities exchange will not be confidential and will be available to the public. The information collected, retained, and/or filed pursuant to the rules for operation of pilot trading systems will not be confidential and will be made available to the public when the pilot trading system starts to operate. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number.

The collections of information are necessary for persons to obtain certain benefits or to comply with certain requirements. As described in the Proposing Release, the rules and rule amendments to which the collections of information are related allow the Commission to respond to the impact of technological developments in the securities markets and permit the Commission to more effectively oversee the growing number of alternative trading systems. The collections of information are also necessary to permit the Commission to effectively oversee SRO pilot trading systems. With the exception of two changes to the final rules, there are no material changes to the rules and amendments as adopted that affect the burden estimates in the Proposing Release. The Commission is adopting different fair access requirements from those it published in the Proposing Release. The Commission has determined to not adopt the fair access requirements that would have required investors denied or limited access to have a right to appeal to the Commission and alternative trading systems making access denial or limitation decisions to notify such investors of the decision and their right of appeal to the Commission. Instead, the Commission has decided to adopt rules that require alternative trading systems to report quarterly to the Commission a record of all grants, denials, and limitations of access as well as other descriptive information surrounding the decision. These changes eliminate the proposed paperwork burden of providing notice to investors and adds a compliance burden on Form ATS–R to report such information to the Commission. Aggregate paperwork burdens have also been revised to reflect updated information regarding the estimated number of alternative trading systems that will be subject to the rules. In the Proposing Release, the Commission staff estimated that there were approximately forty-three alternative trading systems operating. The Commission staff now estimates that there are forty-five alternative trading systems operating, so the aggregate paperwork burdens have been revised to reflect this change.

The Commission solicited public comment on the collection of information requirements contained in the Proposing Release. While the Commission received no comments that specifically addressed the PRA portion of the release, it did receive several comments that touched on PRA related issues.

Several commenters encouraged the Commission to accept electronic filings as a means of reducing the burden on market participants. The Commission is, in fact, working toward the goal of accepting filings in electronic form. The Commission anticipates that the option of electronic filing will be made available to respondents at some point in the relatively near future. Several commenters also suggested that the Commission reduce the burden on national securities exchanges by relieving them of the obligation to file annual amendments to Form 1 due to the same information being submitted to the Commission in other forms periodically throughout the year. The Commission believes that it is important to have one complete annual filing that compiles all the changes to the information contained on Form 1 throughout the year and all other required SRO information. Additionally, the Commission believes that such a filing represents only a compilation of existing information, so the additional burden of requiring an annual filing is largely clerical and generally minimal.

One commenter suggested that the Commission impose only minimal regulatory requirements, if any, on alternative trading systems that trade only minimal volume in order to avoid erecting significant barriers to entry and innovation. The Commission believes that the requirements of Regulation ATS are minimal for new alternative trading systems, especially as compared to the current no-action letter process. Regulation ATS sets forth concrete requirements for a system to operate, imposes only notice filings, and reserves more burdensome requirements for high volume systems. Another commenter stated that the reporting requirements under proposed Regulation ATS are similar to current Rule 17a–23 and, thus, are not inappropriately burdensome. The Commission agrees and notes that most current potential respondents under Regulation ATS already have experience with the requirements and burdens associated with Rule 17a–23, so Regulation ATS will not impose significant new burdens on currently operating alternative trading systems.

As noted above in the Cost-Benefit section, below is a summary of the paperwork burdens that were identified in the Proposing Release. Although not mandated by the PRA, to give regulated entities and others an understanding of the paperwork costs, the discussion below provides dollar estimates assuming certain labor costs.

A. Form 1, Rules 6a–1 and 6a–2

These amendments are intended to simplify the filing requirements and reduce the compliance burdens for national securities exchanges and will likely impose few additional costs on national securities exchanges. Initially, there may be some additional personnel costs required to review the proposed rules and revised Form 1, but the Commission believes that the simplified requirements will reduce overall compliance burdens and costs over time. Reducing the frequency of filings for some requirements may result in some information being less current. The Commission, however, believes that much of this type of information does not change frequently. Moreover, the option of posting such information on an Internet web site should encourage more frequent updating of current information.

The Commission staff has estimated that each respondent will incur an average burden of forty-seven hours to comply with Rule 6a–1 and file an

[611] 44 U.S.C. 3507.

[612] For a further discussion of the changes, see the discussions of Rule 301, Form ATS, Form ATS–R, Rule 302, and Rule 303, infra.

initial application for registration on Form 1. This represents a two hour increase from the current average burden due to the estimated additional burden of the added exhibits. The Commission staff has estimated that the average additional cost per response will be approximately $30.[613] Because the Commission receives applications for registration as an exchange on Form 1 from time to time, and not on a predictable basis, it cannot estimate the annual aggregate costs and burden hours associated with such filings.[614]

The Commission notes that it is making no material changes to Rule 6a–1, Rule 6a–2, or Form 1 from the Proposing Release. Thus, the collection of information burdens are not changing from those proposed.

B. Rule 6a–3

The Commission anticipates that the amendments will not change the paperwork burden associated with complying with Rule 6a–3. The Commission staff has estimated that the average burden for each respondent to comply with Rule 6a–3 is one-half hour per response because compliance only requires photocopying existing documents. The Commission also estimates that each respondent will file supplemental information under Rule 6a–3 approximately twenty-five times per year. The estimated average cost per response for each individual respondent is $9.50, resulting in an estimated annual average cost burden for each respondent of $237.50.[615]

C. Rule 17a–3(a)(16)

No additional recordkeeping burdens will be imposed on internal broker-dealer systems under the amendments to Rule 17a–3. The amendments apply only to systems that are presently subject to the recordkeeping requirements of Rule 17a–23. Because the Commission is repealing Rule 17a–23 and amending Rules 17a–3 and 17a–4 by transferring the recordkeeping requirements from Rule 17a–23, the Commission does not anticipate any new recordkeeping costs or burdens for respondents.

Based on Commission experience with the burdens associated with Rule 17a–23, the Commission has estimated the burdens that will be associated with Rule 17a–3(a)(16). The Commission staff has estimated that there will be approximately ninety-four broker-dealers operating one hundred twenty-three internal broker-dealer systems that will have to make the records described in Rule 17a–3(a)(16). The Commission staff has estimated that each respondent will spend approximately twenty-seven hours per year keeping the required records under Rule 17a–3(a)(16) at an annual cost of $1,298.16.[616] The aggregate burden for approximately ninety-four broker-dealers operating internal broker-dealer trading systems is estimated to be 2,619 hours for a total average cost of $122,027.04.[617]

D. Rule 17a–4(b)(10)

No additional recordkeeping burdens will be imposed on internal broker-dealer systems under the amendments to Rule 17a–4. The amendments apply only to systems that are presently subject to the recordkeeping requirements of Rule 17a–23. Because the Commission is repealing Rule 17a–23 and amending Rules 17a–3 and 17a–4 by transferring the recordkeeping requirements from Rule 17a–23, the Commission does not anticipate any new recordkeeping costs or burdens for respondents.

Based on Commission experience with the burdens associated with Rule 17a–23, the Commission has estimated the burdens that will be associated with Rule 17a–4(b)(10). The Commission staff has estimated that there will be approximately ninety-four broker-dealers operating one hundred twenty-three internal broker-dealer systems that will have to keep the records described in Rule 17a–4(b)(10). The Commission staff has estimated that each respondent will spend approximately three hours to preserve the required records under Rule 17a–4(b)(10) at an annual cost of $144.24.[618] The aggregate burden for approximately ninety-four broker-dealers operating internal broker-dealer trading systems is estimated to be two hundred eighty two hours for a total average cost of $13,558.56.[619]

E. Rule 19b–5 and Form PILOT

For SROs that choose to operate pilot trading systems and avail themselves of the provisions of Rule 19b–5, compliance with Rule 19b–5 and the filings required on Form PILOT are mandatory. Initial filings on Form PILOT are confidential until the pilot system is operational and subsequent filings are not confidential. Thus, after a pilot trading system starts to operate, all filings on Form PILOT are available to the public. Rule 19b–5 reiterates SROs' existing recordkeeping obligations under Rule 17a–1, which requires that such records be kept for not less than five years, the first two years in an easily accessible place.

The Commission anticipates receiving approximately 6 notices per year regarding pilot trading systems on Form PILOT.[620] An SRO will be required to submit a Form PILOT providing detailed operational data and update this information quarterly. The Commission staff has estimated that an SRO will expend twenty-four hours to file an initial operation report and three hours to file a quarterly report and a systems change notice.[621] The Commission also estimates that an SRO will file two amendments per year to report changes to the system.[622] The Commission staff has estimated that an SRO will expend $1,242 per initial Form PILOT filing and $155 for each quarterly Form PILOT and system

[613] The estimated average additional cost per response of $30 is derived from two additional hours of clerical work at $15 per hour.

[614] Since 1991, the Commission has received three total applications for registration as a national securities exchange.

[615] The estimated average cost per response of $9.50 is composed of $7.50 for clerical work (0.5 hours at $15 per hour) and $2 for printing, supplies, copying, and postage (approximately thirty-five percent of the total labor costs). The Commission staff has estimated overhead for this collection of information burden, and all other collection of information burdens discussed below, based on thirty-five percent of total labor costs based on the *GSA Guide to Estimating Reporting Costs* (1973). The estimated average annual cost of $237.50 is derived from twenty-five annual filings at a cost of $9.50 per filing.

[616] The Commission staff has estimated that an employee of a broker-dealer charged to ensure compliance with Commission regulations receives annual compensation of $100,000. This compensation is the equivalent of $48.08 per hour ($100,000 divided by 2,080 payroll hours per year). The estimated annual cost of $1,298.16 is derived from twenty-seven burden hours per respondent at $48.08 per hour.

[617] The estimated aggregate burden of 2,619 hours is derived from ninety-four broker-dealer respondents incurring an average burden of twenty-seven hours each. The estimated aggregate cost of $122,027.04 is derived from ninety-four broker-dealer respondents incurring an average burden of $1,298.16 each.

[618] The Commission staff has estimated that an employee of a broker-dealer charged to ensure compliance with Commission regulations receives annual compensation of $100,000. This compensation is the equivalent of $48.08 per hour ($100,000 divided by 2,080 payroll hours per year). The estimated annual cost of $144.24 is derived from three burden hours per respondent at $48.08 per hour.

[619] The estimated aggregate burden of two hundred eighty-two hours is derived from ninety-four broker-dealer respondents incurring an average burden of three hours each. The estimated aggregate cost of $13,558.56 is derived from ninety-four broker-dealer respondents incurring an average burden of $144.24 each.

[620] This estimate is based on a review of past SRO filings under section 19(b) of the Exchange Act. The Commission staff has estimated that approximately 6 rule filings per year in the past could have been filed under Rule 19b–5.

[621] The estimates for burden hours involved with filing Form PILOT are based on the Commission's experience with similar reporting requirements under Rule 17a–23.

[622] This estimate is based on the Commission's experience with collection of similar information under Rule 17a–23.

change notice filed.[623] Thus, the total estimated annual burden for SROs to comply with Rule 19b–5 by filing an initial notice on Form PILOT is estimated to be one hundred forty-four hours for a total average cost of $7,452.[624] The total estimated annual burden for SROs to file systems change notices and quarterly reports on Form PILOT is estimated to be one hundred eight hours for a total average cost of $5,580.[625]

F. Rule 301, Form ATS and Form ATS–R

For alternative trading systems that choose to register as a broker-dealer, the requirements of Rule 301, Form ATS and Form ATS–R are mandatory. All filings required under Rule 301, Form ATS and Form ATS–R are considered confidential and are not available to the public. All records required to be made under the Rule are required to be preserved for three years, the first two years in an easily accessible place.

The alternative trading system amendments and rules have been tailored to minimize their burden on alternative trading systems and especially small systems. Many of the provisions in the proposed rules are triggered by a volume threshold. The Commission expects that small alternative trading systems will not have sufficient volume to trigger those thresholds and will therefore not have to comply with those provisions. The recordkeeping and reporting requirements with which smaller, lower volume alternative trading systems have to comply under proposed Regulation ATS are substantially similar to those with which alternative trading systems currently comply. Consequently the costs for smaller alternative trading systems should remain unchanged.

1. Notice, Reporting, and Recordkeeping

All alternative trading systems that will be subject to notice, reporting, and recordkeeping requirements under the Commission's rules as adopted today are currently subject to similar requirements under Rule 17a–23. The requirements under Regulation ATS, however, require some additional information that is not currently required under Rule 17a–23.

Under Regulation ATS, alternative trading systems file an initial operation report, notices of material systems changes, and quarterly reports. The rules also include new Forms ATS and ATS–R to standardize reporting of such information and make it more useful for the Commission. The rules require information that is not currently required under Rule 17a–23, such as greater detail about the system operations, the volume and types of securities traded, criteria for granting access to subscribers, procedures governing order execution, reporting, clearance and settlement, procedures for reviewing systems capacity and contingency procedures, and the identity of any other entities involved in operating the system.

Regulation ATS requires staff time to comply with the initial notice and amendment requirements. While the Commission has designed the requirements in an effort to balance the costs of filing with the benefits to be gained from the information, some effort will be necessary to gather and file this information. Most of the information, however, already exists. Alternative trading systems will only be required to gather this information and supply it in the required format to the Commission. The periodic updating requirements will also require staff time over the life of the alternative trading system to comply with the rules.

The Commission staff has estimated that there are currently about forty-five alternative trading systems that will be required to register as exchanges or register as broker-dealers and comply with Regulation ATS.[626] The Commission also estimates that, over time, there will be approximately three new alternative trading systems each year that choose to register as broker-dealers and comply with Regulation ATS.[627]

The Commission also estimates that, over time, there will be approximately three alternative trading systems that file cessation of operations reports each year. Thus, the Commission anticipates that, over time, if all forty-five current alternative trading systems choose to register as broker-dealers and comply with Regulation ATS, there will be approximately forty-five alternative trading systems operating each year.

The Commission staff has estimated that the average burden per respondent to file the initial operations report on Form ATS will be twenty hours. This burden is computed by estimating that completing the report will require an average of thirteen hours of professional work and seven hours of clerical work.[628] The Commission staff has estimated that the average cost per response will be $1,019 representing the twenty hours and cost of supplies.[629] If all forty-five alternative trading systems opt to register as broker-dealers and comply with Regulation ATS, the total, one time cost to comply with the proposed requirements to file initial operation reports is estimated to be $45,855.[630] The Commission also estimates that, over time, approximately three new alternative trading systems will register as broker-dealers per year, incurring an annual aggregate burden of sixty hours for an average total cost of $3,057 after the first year following adoption of Regulation ATS.[631]

In addition, the rules require alternative trading systems to amend their initial operations report to notify the Commission of material systems changes and other changes to the

[623] The estimated average cost of $1,242 to file an initial Form PILOT is composed of $800 for in-house professional work (sixteen hours at $50 per hour), $120 for clerical work (eight hours at $15 per hour) and $322 for printing, supplies, copying, and postage (approximately thirty-five percent of the total labor costs).

The total estimated average cost of $155 to file quarterly reports and system change notices on Form PILOT is composed of $100 for in-house professional work (two hours at $50 per hour), $15 for clerical work (one hour at $15 per hour) and $40 for printing, supplies, copying and postage (approximately thirty-five percent of the total labor costs).

[624] The estimated average burden of one hundred forty-four hours is derived from six SRO respondents incurring an average burden of twenty-four hours per filing. The estimated average cost of $7,452 is derived from six SRO respondents making six initial Form PILOT filings at $1,242 per filing.

[625] The estimated average burden of one hundred eight hours is derived from six SRO respondents filing four quarterly reports and two systems change notices at three burden hours per filing. The estimated average cost of $5,580 is derived from six SRO respondents filing four quarterly reports and two systems change notices at $155 per filing.

[626] This estimate is based on filings made with the Commission under Rule 17a–23. At the time of the Proposing Release, the Commission estimated that forty-three alternative trading systems would be required to register as exchanges or broker-dealers and comply with Regulation ATS. Since that time, two such alternative trading systems have started to operate.

[627] Based on the Commission's experience over the last three years with Rule 17a–23, it appears that there are more than three new alternative trading systems per year. However, we expect that in the steady state over time, there will be approximately three new alternative trading systems per year. The rapid growth experienced over the last several years is unlikely to continue at such a high rate in perpetuity.

[628] This estimate for burden hours of filing Form ATS is based on the burdens associated with filing Form 1, adjusted for differences between Form 1 and Form ATS. The division between professional and clerical time is based on estimates of the proportions used in the estimates of burdens for filing Form 1.

[629] The estimated average cost per response of $1,019 is composed of $650 for in-house professional work (thirteen hours at $50 per hour), $105 for clerical work (seven hours at $15 per hour) and $264 for printing, supplies, copying, and postage (approximately thirty-five percent of the total labor costs).

[630] This estimated cost of $45,855 is derived from forty-five alternative trading systems filing at an average cost of $1,019 each.

[631] This estimated cost of $3,057 is derived from three new alternative trading systems filing at an average cost of $1,019 each.

information contained in the initial operations report. The Commission staff has estimated that each respondent will file six such amendments per year.[632] The Commission staff has estimated that each respondent will incur an average burden of two hours per response and incur an average cost of $111.50 for each amendment to the initial operation report that it submits.[633] If all forty-five alternative trading systems opt to comply with Regulation ATS rather than to register as exchanges, the total aggregate cost per year to comply with the proposed requirement to file amendments to the initial operation reports is estimated to be $30,105.[634]

Alternative trading systems registering as broker-dealers will also be required to file quarterly reports on Form ATS–R, reporting participating system subscribers, the securities traded on the system, and aggregate volume information. The Commission staff has estimated that the quarterly reports will cause each respondent to incur an average burden of 4 hours per response and incur an average cost of $223 for each Form ATS–R that it submits.[635] The annual burden per respondent is estimated to be $892.[636] If all forty-five alternative trading systems opt to register as broker-dealers and comply with Regulation ATS, the total cost per year to comply with the requirement to file quarterly reports is estimated to be $40,140.[637]

Finally, alternative trading systems registered as broker-dealers will be required to submit a notice and a report on Form ATS when they cease operations. The Commission anticipates a total of three such filings per year. The Commission staff has estimated that individual respondents will incur a burden of two hours to file the cessation notice. The Commission staff has estimated that individual respondents will incur a cost of $111.50 to file the cessation of operations report on Form ATS.[638] The annual aggregate burden for three alternative trading systems to file cessation of operations reports is estimated to be $334.50.[639]

2. Fair Access

Under Regulation ATS, alternative trading systems with significant volume are required to establish and maintain standards for granting access to their system and keep records of such standards. In addition, alternative trading systems with significant volume are required to submit certain information regarding grants, denials, and limitations of access with their quarterly reports on Form ATS–R. The Commission staff has estimated that each respondent obligated to establish and maintain such records will incur a burden of seventeen hours per year to make and keep standards for granting access for a total estimated cost of $958.50.[640]

Although these estimates reflect a program change from the Proposing Release, the total burdens on respondents are decreasing slightly as a result of the program changes. The Commission is eliminating the proposal to require alternative trading systems that deny investors access to the system to provide them with notice of the denial and their right of appeal to the Commission. Under the rules as adopted, there is no right of appeal to the Commission. In the Proposing Release, the Commission estimated that the burden to comply with the notice requirement would be approximately twenty-seven hours per year for each respondent. Under the rules as adopted, such alternative trading systems are required to submit fair access information on Form ATS–R on a quarterly basis. The burden for this requirement is only twelve hours per year for each respondent. Thus, the changes from the Proposing Release are anticipated to reduce the burden on each respondent by approximately fifteen hours per year. The Commission staff has estimated that only two respondents will be affected by this program change, resulting in an aggregate reduction of thirty burden hours for all respondents. This reduction, however, is offset by an increase in the estimated number of respondents. Specifically, the aggregate paperwork burden for Rule 301, Form ATS, and Form ATS–R is increasing by one hundred sixty hours due to updating the estimate of the number of potential respondents from forty-three in the Proposing Release to forty-five currently.

3. Systems Capacity, Integrity, and Security

The notification requirement for material systems outages should impose relatively little additional costs on alternative trading systems. Moreover, the Commission believes that this small burden is justified by the need to keep Commission staff abreast of systems' developments and problems.

The Commission staff has estimated that each respondent will incur an average annual burden of fifteen hours to comply with the recordkeeping requirements associated with the systems capacity, integrity, and security provisions of Regulation ATS. The Commission staff has estimated that each respondent will make an average of five system outage notices per year, for an estimated average burden of 1.25 hours per year.[641] The Commission staff has estimated that the total estimated average cost of compliance for each respondent will be $85 per year.[642] Such alternative trading systems will

[632] This estimate is based on the Commission's experience with collection of similar information under Rule 17a–23.

[633] The estimated average cost per response of $111.50 is composed of $75 for in-house professional work (1.5 hours at $50 per hour), $7.50 for clerical work (0.5 hours at $15 per hour), and $29 for printing, supplies, copying, and postage (approximately thirty-five percent of the total labor costs).

[634] This estimated cost of $30,105 is composed of $111.50 cost per amendment for forty-five alternative trading systems filing six times per year.

[635] The estimated cost of $223 per response is composed of $150 for in-house professional work (three hours at $50 per hour), $15 for clerical work (one hour at $15 per hour) and $58 for printing, supplies, copying, and postage (approximately thirty-five percent of the total labor costs).

[636] The estimated annual cost of $892 to file Form ATS–R is derived from four quarterly reports at an estimated annual cost of $223 per filing.

[637] This estimated cost of $40,140 is derived from forty-five alternative trading systems with an estimated annual filing cost for each of $892.

[638] The estimated cost of $111.50 per response is composed of $75 for in-house professional work (1.5 hours at $50 per hour), $7.50 for clerical work (0.5 hours at $15 per hour), and $29 for printing, supplies, copying and postage (approximately thirty-five percent of the total labor costs).

[639] The estimated cost of $334.50 is derived from an average of three alternative trading systems filing one cessation of operations report per year on Form ATS at an estimated cost of $111.50 each.

[640] The estimated hurden of seventeen hours is derived from five hours for estahlishing and maintaining standards for fair access and twelve hours to report fair access information on Form ATS–R on a quarterly basis (four responses at three hours per response). The estimated cost of $958.50 is derived from $650 for professional work (thirteen hours at $50 per hour), $60 for clerical work (four hours at $15 per hour), and $248.50 for printing, supplies, copying, and postage (approximately thirty-five percent of the total labor costs). The Commission staff has estimated overhead based on thirty-five percent of total labor costs based on the *GSA Guide to Estimating Reporting Costs* (1973). The estimated hurden of thirteen hours of professional work is derived from five hours for estahlishing and maintaining standards for fair access and eight hours (two hours for four quarterly reports on Form ATS–R) to compile and report fair access information. The estimated hurden of four hours of clerical work is derived from one hour per quarter to compile and send information on Form ATS–R.

[641] The Commission notes that compliance with the notice provision can be achieved hy a telephone call, so the hurden for each notice is minimal. The Commission staff has estimated only 0.25 hours per notice will he required. The estimate of five system outage notices per year is based on the Commission's experience with the Automated Review Program.

[642] The estimated average cost per response of $17 is composed of $12.50 for in-house professional work (0.25 hours at $50 per hour) and $4.50 for printing, supplies, copying, and postage (approximately thirty-five percent of the total labor costs). The estimated annual cost of $85 is derived from five notices at $17 per notice.

also be required to keep records relating to the steps taken to comply with systems capacity, integrity, and security requirements under Regulation ATS. The Commission staff has estimated that each respondent will incur a burden of ten hours per year to comply with such recordkeeping requirements for a total estimated cost of $675 per year.[643] The Commission staff has estimated that two alternative trading systems will be required to comply with the systems capacity, integrity, and security provisions of Regulation ATS due to their significant volume. The estimated aggregate cost for these alternative trading systems chose to comply with the systems capacity, integrity, and security requirements is $1,520.[644]

G. Rule 302

Rule 302 requires alternative trading systems to make certain records with respect to trading activity through the alternative trading systems. This collection of information will permit the Commission to detect and investigate potential market irregularities and to ensure investor protection. Such information is not available in any other form from any other sources.

For alternative trading systems that choose to register as a broker-dealer, the requirements of Rule 302 are mandatory. All records required to be made under Rule 302 are considered confidential and are not available to the public. All records required to be made under the Rule are required to be preserved for three years, the first two years in an easily accessible place.

The Commission staff has estimated that each alternative trading system that chooses to register as a broker-dealer will be required to expend an average of thirty-six hours to comply with Rule 302 at an average cost of $1,730.88.[645] If all forty-five alternative trading systems opt to register as broker-dealers, rather than as exchanges, the total cost for recordkeeping under Rule 302 is estimated to be $77,889.60 per year.[646]

The Commission notes that it is making no material changes to Rule 302 from the Proposing Release. The collection of information burdens are increasing slightly due to an updated estimate of the number of respondents and not due to any changes to the rule as proposed.

H. Rule 303

Rule 303 requires alternative trading systems registered as broker-dealers to preserve certain records produced under Rule 302, as well as standards for granting access to the system and records generated in complying with the systems capacity, integrity and security requirements for alternative trading systems with significant trading volume. Alternative trading systems registered as broker-dealers are not required to file such information, but merely to retain it in an organized manner and make it available to the Commission upon request.

For alternative trading systems that choose to register as a broker-dealer, the requirements of Rule 303 are mandatory. All records required to be made under Rule 303 are considered confidential and are not available to the public. All records required to be made under the Rule are required to be preserved for three years, the first two years in an easily accessible place.

The Commission staff has estimated that each alternative trading system that chooses to register as a broker-dealer will be required to expend an average of four hours per year to comply with Rule 303 at an average cost of $192.32.[647] If all forty-five alternative trading systems opt to register as broker-dealers, rather than as exchanges, the total cost for record preservation is estimated to be $8,654.40 per year.[648]

The Commission notes that it is making no material changes to Rule 302 from the Proposing Release. The collection of information burdens are increasing slightly due to an updated estimate of the number of respondents and not due to any changes to the rule as proposed.

[643] The total estimated cost of $675 is composed of $500 for in-house professional work (ten hours at $50 per hour) and $175 for printing, supplies, copying, and postage (approximately thirty-five percent of the total labor costs).

[644] The estimated aggregate cost of $1,520 is derived from two alternative trading systems incurring an estimated annual cost of $760 each ($85 for providing systems outage notices and $675 for recordkeeping requirements).

[645] The estimated cost of $1,730.88 is derived from an average of thirty-six hours of compliance time at $48.08 per hour. The value of compliance time is estimated as follows: an employee of a broker-dealer charged to ensure compliance with Commission regulations receives estimated annual compensation of $100,000. This compensation is the equivalent of $48.08 per hour ($100,000 divided by 2,080 payroll hours per year).

[646] This estimated cost of $77,889.60 is derived from forty-five alternative trading systems incurring an annual cost of $1,730.88 each.

[647] The estimated cost of $192.32 is derived from an average of four hours of compliance time at $48.08 per hour. The value of compliance time is estimated as follows: An employee of a broker-dealer charged to ensure compliance with Commission regulations receives estimated annual compensation of $100,000. This compensation is the equivalent of $48.08 per hour ($100,000 divided by 2,080 payroll hours per year).

[648] This estimated cost of $8,654.40 is derived from forty-five alternative trading systems incurring an annual cost of $192.32 each.

XIII. Statutory Authority

The rules and rule amendments in this release are being adopted pursuant to 15 U.S.C. 78 *et seq.*, particularly sections 3(b), 5, 6, 11A, 15, 17(a), 17(b), 19, 23(a), and 36 of the Exchange Act, 15 U.S.C. 78c, 78e, 78f, 78k–1, 78o, 78q(a), 78q(b), 78s(b), 78w(a), and 78mm.

List of Subjects

17 CFR Part 202

Administrative practice and procedure, Securities.

17 CFR Part 240

Brokers-dealers, Fraud, Issuers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 242

Securities.

17 CFR Part 249

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows.

PART 202—INFORMAL AND OTHER PROCEDURES

1. The authority citation for part 202 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 77t, 78d–1, 78u, 78w, 78*11*(d), 79r, 79t, 77sss, 77uuu, 80a–37, 80a–41, 80b–9, and 80b–11, unless otherwise noted.

* * * * *

2. Paragraph (b) of § 202.3 is revised to read as follows:

§ 202.3 Processing of filings.

(a) * * *

(b)(1) Applications for registration as brokers, dealers, investment advisers, municipal securities dealers and transfer agents are submitted to the Office of Filings and Information Services where they are examined to determine whether all necessary information has been supplied and whether all required financial statements and other documents have been furnished in proper form. Defective applications may be returned with a request for correction or held until corrected before being accepted as a filing. The files of the Commission and other sources of information are considered to determine whether any person connected with the applicant appears to have engaged in activities which would warrant commencement of proceedings on the question of denial of registration. The staff confers with applicants and makes suggestions in

appropriate cases for amendments and supplemental information. Where it appears appropriate in the public interest and where a basis therefore exists, denial proceedings may be instituted. Within forty-five days of the date of the filing of a brokerûdealer, investment adviser or municipal securities dealer application (or within such longer period as to which the applicant consents), the Commission shall by order grant registration or institute proceedings to determine whether registration should be denied. An application for registration as a transfer agent shall become effective within 30 days after receipt of the application (or within such shorter period as the Commission may determine). The Office of Filings and Information Services is also responsible for the processing and substantive examination of statements of beneficial ownership of securities and changes in such ownership filed under the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Investment Company Act of 1940, and for the examination of reports filed pursuant to § 230.144 of this chapter.

(2) Applications for registration as national securities exchanges, or exemption from registration as exchanges by reason of such exchanges' limited volume of transactions filed with the Commission are routed to the Division of Market Regulation, which examines these applications to determine whether all necessary information has been supplied and whether all required financial statements and other documents have been furnished in proper form. Defective applications may be returned with a request for correction or held until corrected before being accepted as a filing. The files of the Commission and other sources of information are considered to determine whether any person connected with the applicant appears to have engaged in activities which would warrant commencement of proceedings on the question of denial of registration. The staff confers with applicants and makes suggestions in appropriate cases for amendments and supplemental information. Where it appears appropriate in the public interest and where a basis therefore exists, denial proceedings may be instituted. Within 90 days of the date of the filing of an application for registration as a national securities exchange, or exemption from registration by reason of such exchanges' limited volume of transactions (or within such longer period as to which the applicant consents), the Commission shall by order grant registration, or institute proceedings to determine whether registration should be denied as provided in § 240.19(a)(1) of this chapter.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

4. Section 240.3a1–1 is added before the undesignated center heading "Definition of 'Equity Security' as Used in Sections 12(g) and 16" to read as follows:

§ 240.3a1–1 Exemption from the definition of "Exchange" under Section 3(a)(1) of the Act.

(a) An organization, association, or group of persons shall be exempt from the definition of the term "exchange" under section 3(a)(1) of the Act, (15 U.S.C. 78c(a)(1)), if such organization, association, or group of persons:

(1) Is operated by a national securities association;

(2) Is in compliance with Regulation ATS, 17 CFR 242.300 through 242.303; or

(3) Pursuant to paragraph (a) of § 242.301 of Regulation ATS, 17 CFR 242.301(a), is not required to comply with Regulation ATS, 17 CFR 242.300 through 242.303.

(b) Notwithstanding paragraph (a) of this section, an organization. association, or group of persons shall not be exempt under this section from the definition of "exchange," if:

(1) During three of the preceding four calendar quarters such organization, association, or group of persons had:

(i) Fifty percent or more of the average daily dollar trading volume in any security and five percent or more of the average daily dollar trading volume in any class of securities; or

(ii) Forty percent or more of the average daily dollar trading volume in any class of securities; and

(2) The Commission determines, after notice to the organization, association, or group of persons, and an opportunity for such organization, association, or group of persons to respond, that such an exemption would not be necessary or appropriate in the public interest or consistent with the protection of investors taking into account the requirements for exchange registration under section 6 of the Act, (15 U.S.C. 78f), and the objectives of the national market system under section 11A of the Act, (15 U.S.C 78k–1).

(3) For purposes of paragraph (b) of this section, each of the following shall be considered a "class of securities":

(i) Equity securities, which shall have the same meaning as in § 240.3a11–1;

(ii) Listed options, which shall mean any options traded on a national securities exchange or automated facility of a national securities exchange;

(iii) Unlisted options, which shall mean any options other than those traded on a national securities exchange or automated facility of a national securities association;

(iv) Municipal securities, which shall have the same meaning as in section 3(a)(29) of the Act, (15 U.S.C. 78c(a)(29));

(v) Investment grade corporate debt securities, which shall mean any security that:

(A) Evidences a liability of the issuer of such security;

(B) Has a fixed maturity date that is at least one year following the date of issuance;

(C) Is rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and

(D) Is not an exempted security, as defined in section 3(a)(12) of the Act, (15 U.S.C. 78c(a)(12));

(vi) Non-investment grade corporate debt securities, which shall mean any security that:

(A) Evidences a liability of the issuer of such security;

(B) Has a fixed maturity date that is at least one year following the date of issuance;

(C) Is not rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and

(D) Is not an exempted security, as defined in section 3(a)(12) of the Act, (15 U.S.C. 78o);

(vii) Foreign corporate debt securities, which shall mean any security that:

(A) Evidences a liability of the issuer of such debt security;

(B) Is issued by a corporation or other organization incorporated or organized under the laws of any foreign country; and

(C) Has a fixed maturity date that is at least one year following the date of issuance; and

(viii) Foreign sovereign debt securities, which shall mean any security that:

(A) Evidences a liability of the issuer of such debt security;

(B) Is issued or guaranteed by the government of a foreign country, any political subdivision of a foreign country, or any supranational entity; and

(C) Does not have a maturity date of a year or less following the date of issuance.

5. Section 240.3b–16 is added before the undesignated center heading "Registration and Exemption of Exchanges" to read as follows:

§ 240.3b–16 Definitions of terms used in Section 3(a)(1) of the Act.

(a) An organization, association, or group of persons shall be considered to constitute, maintain, or provide "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 those terms are used in section 3(a)(1) of the Act, (15 U.S.C. 78c(a)(1)), if such organization, association, or group of persons:

(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.

(b) An organization, association, or group of persons shall not be considered to constitute, maintain, or provide "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," solely because such organization, association, or group of persons engages in one or more of the following activities:

(1) Routes orders to a national securities exchange, a market operated by a national securities association, or a broker-dealer for execution; or

(2) Allows persons to enter orders for execution against the bids and offers of a single dealer; and

(i) As an incidental part of these activities, matches orders that are not displayed to any person other than the dealer and its employees; or

(ii) In the course of acting as a market maker registered with a self-regulatory organization, displays the limit orders of such market maker's, or other broker-dealer's, customers; and

(A) Matches customer orders with such displayed limit orders; and

(B) As an incidental part of its market making activities, crosses or matches orders that are not displayed to any person other than the market maker and its employees.

(c) For purposes of this section the term *order* means any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order.

(d) For the purposes of this section, the terms *bid* and *offer* shall have the same meaning as under § 240.11Ac1–1.

(e) The Commission may conditionally or unconditionally exempt any organization, association, or group of persons from the definition in paragraph (a) of this section.

6. Section 240.6a–1 is amended by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 240.6a–1 Application for registration as a national securities exchange or exemption from registration based on limited volume.

(a) An application for registration as a national securities exchange, or for exemption from such registration based on limited volume, shall be filed on Form 1 (§ 249.1 of this chapter), in accordance with the instructions contained therein.

(b) Promptly after the discovery that any information filed on Form 1 was inaccurate when filed, the exchange shall file with the Commission an amendment correcting such inaccuracy.

* * * * *

7. Section 240.6a–2 is revised to read as follows:

§ 240.6a–2 Amendments to application.

(a) A national securities exchange, or an exchange exempted from such registration based on limited volume, shall file an amendment to Form 1, (§ 249.1 of this chapter), which shall set forth the nature and effective date of the action taken and shall provide any new information and correct any information rendered inaccurate, on Form 1, (§ 249.1 of this chapter), within 10 days after any action is taken that renders inaccurate, or that causes to be incomplete, any of the following:

(1) Information filed on the Execution Page of Form 1, or amendment thereto; or

(2) Information filed as part of Exhibits C, F, G, H, J, K or M, or any amendments thereto.

(b) On or before June 30 of each year, a national securities exchange, or an exchange exempted from such registration based on limited volume, shall file, as an amendment to Form 1, the following:

(1) Exhibits D and I as of the end of the latest fiscal year of the exchange; and

(2) Exhibits K, M, and N, which shall be up to date as of the latest date practicable within 3 months of the date the amendment is filed.

(c) On or before June 30, 2001 and every 3 years thereafter, a national securities exchange, or an exchange exempted from such registration based on limited volume, shall file, as an amendment to Form 1, complete Exhibits A, B, C and J. The information filed under this paragraph (c) shall be current as of the latest practicable date, but shall, at a minimum, be up to date within 3 months as of the date the amendment is filed.

(d)(1) If an exchange, on an annual or more frequent basis, publishes, or cooperates in the publication of, any of the information required to be filed by paragraphs (b)(2) and (c) of this section, in lieu of filing such information, an exchange may:

(i) Identify the publication in which such information is available, the name, address, and telephone number of the person from whom such publication may be obtained, and the price of such publication; and

(ii) Certify to the accuracy of such information as of its publication date.

(2) If an exchange keeps the information required under paragraphs (b)(2) and (c) of this section up to date and makes it available to the Commission and the public upon request, in lieu of filing such information, an exchange may certify that the information is kept up to date and is available to the Commission and the public upon request.

(3) If the information required to be filed under paragraphs (b)(2) and (c) of this section is available continuously on an Internet web site controlled by an exchange, in lieu of filing such information with the Commission, such exchange may:

(i) Indicate the location of the Internet web site where such information may be found; and

(ii) Certify that the information available at such location is accurate as of its date.

(e) The Commission may exempt a national securities exchange, or an exchange exempted from such registration based on limited volume, from filing the amendment required by this section for any affiliate or subsidiary listed in Exhibit C of the exchange's application for registration, as amended, that either:

(1) Is listed in Exhibit C of the application for registration, as amended,

of one or more other national securities exchanges; or

(2) Was an inactive subsidiary throughout the subsidiary's latest fiscal year.

Any such exemption may be granted upon terms and conditions the Commission deems necessary or appropriate in the public interest or for the protection of investors, provided however, that at least one national securities exchange shall be required to file the amendments required by this section for an affiliate or subsidiary described in paragraph (e)(1) of this section.

8. Section 240.6a–3 is revised to read as follows:

§ 240.6a–3 Supplemental material to be filed by exchanges.

(a)(1) A national securities exchange, or an exchange exempted from such registration based on limited volume, shall file with the Commission any material (including notices, circulars, bulletins, lists, and periodicals) issued or made generally available to members of, or participants or subscribers to, the exchange. Such material shall be filed with the Commission within 10 days after issuing or making such material available to members, participants or subscribers.

(2) If the information required to be filed under paragraph (a)(1) of this section is available continuously on an Internet web site controlled by an exchange, in lieu of filing such information with the Commission, such exchange may:

(i) Indicate the location of the Internet web site where such information may be found; and

(ii) Certify that the information available at such location is accurate as of its date.

(b) Within 15 days after the end of each calendar month, a national securities exchange or an exchange exempted from such registration based on limited volume, shall file a report concerning the securities sold on such exchange during the calendar month. Such report shall set forth:

(1) The number of shares of stock sold and the aggregate dollar amount of such stock sold;

(2) The principal amount of bonds sold and the aggregate dollar amount of such bonds sold; and

(3) The number of rights and warrants sold and the aggregate dollar amount of such rights and warrants sold.

9. Section 240.11Ac1–1 is amended by redesignating paragraph (c)(5)(ii)(A) as paragraph (c)(5)(ii)(A)(*1*), paragraph (c)(5)(ii)(B), introductory text, as paragraph (c)(5)(ii)(A)(*2*), paragraph (c)(5)(ii)(B)(*1*) as paragraph (c)(5)(ii)(A)(*2*)(*i*), paragraph (c)(5)(ii)(B)(*2*) as paragraph (c)(5)(ii)(A)(*2*)(*ii*), in newly designated paragraph (c)(5)(ii)(A)(*2*)(*ii*) by removing the period and adding in its place "; or", and adding new paragraph (c)(5)(ii)(B) to read as follows:

§ 240.11Ac1–1 Dissemination of quotations.

* * * * *

(c) * * *

(5) * * *

(ii) * * *

(A)(*1*) * * *

(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) of this chapter; and

(*2*) Otherwise is in compliance with Regulation ATS, § 242.300 through § 242.303 of this chapter.

* * * * *

10. Section 240.17a–3 is amended by adding paragraph (a)(16) to read as follows:

§ 240.17a–3 Records to be made by certain exchange members, brokers and dealers.

(a) * * *

(16)(i) The following records regarding any internal broker-dealer system of which such a broker or dealer is the sponsor:

(A) A record of the broker's or dealer's customers that have access to an internal broker-dealer system sponsored by such broker or dealer (identifying any affiliations between such customers and the broker or dealer);

(B) Daily summaries of trading in the internal broker-dealer system, including:

(*1*) Securities for which transactions have been executed through use of such system; and

(*2*) Transaction volume (separately stated for trading occurring during hours when consolidated trade reporting facilities are and are not in operation):

(*i*) With respect to equity securities, stated in number of trades, number of shares, and total U.S. dollar value;

(*ii*) With respect to debt securities, stated in total settlement value in U.S. dollars; and

(*iii*) With respect to other securities, stated in number of trades, number of units of securities, and in dollar value, or other appropriate commonly used measure of value of such securities; and

(C) Time-sequenced records of each transaction effected through the internal broker-dealer system, including date and time executed, price, size, security traded, counterparty identification information, and method of execution (if internal broker-dealer system allows alternative means or locations for execution, such as routing to another market, matching with limit orders, or executing against the quotations of the broker or dealer sponsoring the system).

(ii) For purposes of paragraph (a) of this section, the term:

(A) *Internal broker-dealer system* shall mean any facility, other than a national securities exchange, an exchange exempt from registration based on limited volume, or an alternative trading system as defined in Regulation ATS, §§ 242.300 through 242.303 of this chapter, that provides a mechanism, automated in full or in part, for collecting, receiving, disseminating, or displaying system orders and facilitating agreement to the basic terms of a purchase or sale of a security between a customer and the sponsor, or between two customers of the sponsor, through use of the internal broker-dealer system or through the broker or dealer sponsor of such system;

(B) *Sponsor* shall mean any broker or dealer that organizes, operates, administers, or otherwise directly controls an internal broker-dealer trading system or, if the operator of the internal broker-dealer system is not a registered broker or dealer, any broker or dealer that, pursuant to contract, affiliation, or other agreement with the system operator, is involved on a regular basis with executing transactions in connection with use of the internal broker-dealer system, other than solely for its own account or as a customer with access to the internal broker-dealer system; and

(C) *System order* means any order or other communication or indication submitted by any customer with access to the internal broker-dealer system for entry into a trading system announcing an interest in purchasing or selling a security. The term "system order" does not include inquiries or indications of interest that are not entered into the internal broker-dealer system.

* * * * *

11. Section 240.17a–4 is amended by revising paragraph (b)(1) and adding paragraph (b)(10) to read as follows:

§ 240.17a–4. Records to be preserved by certain exchange members, brokers and dealers.

* * * * *

(b) * * *

(1) All records required to be made pursuant to paragraphs (a)(4), (a)(6), (a)(7), (a)(8), (a)(9), and (a)(10) of § 240.17a–3.

* * * * *

(10) All notices relating to an internal broker-dealer system provided to the customers of the broker or dealer that sponsors such internal broker-dealer system, as defined in paragraph (a)(16)(ii)(A) of § 240.17a–3. Notices, whether written or communicated through the internal broker-dealer trading system or other automated means, shall be preserved under this paragraph (b)(10) if they are provided to all customers with access to an internal broker-dealer system, or to one or more classes of customers. Examples of notices to be preserved under this paragraph (b)(10) include, but are not limited to, notices addressing hours of system operations, system malfunctions, changes to system procedures, maintenance of hardware and software, and instructions pertaining to access to the internal broker-dealer system.

* * * * *

§ 240.17a–23 [Removed]

12. Section 240.17a–23 is removed and reserved.

13. Section 240.19b–5 is added to read as follows:

§ 240.19b–5 Temporary exemption from the filing requirements of Section 19(b) of the Act.

Preliminary Notes

1. The following section provides for a temporary exemption from the rule filing requirement for self-regulatory organizations that file proposed rule changes concerning the operation of a pilot trading system pursuant to section 19(b) of the Act (15 U.S.C. 78s(b), as amended). All other requirements under the Act that are applicable to self-regulatory organizations continue to apply.

2. The disclosures made pursuant to the provisions of this section are in addition to any other applicable disclosure requirements under the federal securities laws.

(a) For purposes of this section, the term *specialist* means any member subject to a requirement of a self-regulatory organization that such member regularly maintain a market in a particular security.

(b) For purposes of this section, the term *trading system* means the rules of a self-regulatory organization that:

(1) Determine how the orders of multiple buyers and sellers are brought together; and

(2) Establish non-discretionary methods under which such orders interact with each other and under which the buyers and sellers entering such orders agree to the terms of trade.

(c) For purposes of this section, the term *pilot trading system* shall mean a trading system operated by a self-regulatory organization that is not substantially similar to any trading system or pilot trading system operated by such self-regulatory organization at any time during the preceding year, and that:

(1)(i) Has been in operation for less than two years;

(ii) Is independent of any other trading system operated by such self-regulatory organization that has been approved by the Commission pursuant to section 19(b) of the Act, (15 U.S.C. 78s(b));

(iii) With respect to each security traded on such pilot trading system, during at least two of the last four consecutive calendar months, has traded no more than 5 percent of the average daily trading volume of such security in the United States; and

(iv) With respect to all securities traded on such pilot trading system, during at least two of the last four consecutive calendar months, has traded no more than 20 percent of the average daily trading volume of all trading systems operated by such self-regulatory organization; or

(2)(i) Has been in operation for less than two years;

(ii) With respect to each security traded on such pilot trading system, during at least two of the last four consecutive calendar months, has traded no more than 1 percent of the average daily trading volume of such security in the United States; and

(iii) With respect to all securities traded on such pilot trading system, during at least two of the last four consecutive calendar months, has traded no more than 20 percent of the average daily trading volume of all trading systems operated by such self-regulatory organization; or

(3)(i) Has been in operation for less than two years; and

(ii)(A) Satisfied the definition of *pilot trading system* under paragraph (c)(1) of this section no more than 60 days ago, and continues to be independent of any other trading system operated by such self-regulatory organization that has been approved by the Commission pursuant to section 19(b) of the Act, (15 U.S.C. 78s(b)); or

(B) Satisfied the definition of *pilot trading system* under paragraph (c)(2) of this section no more than 60 days ago.

(d) A pilot trading system shall be deemed *independent* of any other trading system operated by a self-regulatory organization if:

(1) Such pilot trading system trades securities other than the issues of securities that trade on any other trading system operated by such self-regulatory organization that has been approved by the Commission pursuant to section 19(b) of the Act, (15 U.S.C. 78s(b));

(2) Such pilot trading system does not operate during the same trading hours as any other trading system operated by such self-regulatory organization that has been approved by the Commission pursuant to section 19(b) of the Act, (15 U.S.C. 78s(b)); or

(3) No specialist or market maker on any other trading system operated by such self-regulatory organization that has been approved by the Commission pursuant to section 19(b) of the Act, (15 U.S.C. 78s(b)), is permitted to effect transactions on the pilot trading system in securities in which they are a specialist or market maker.

(e) A self-regulatory organization shall be exempt temporarily from the requirement under section 19(b) of the Act, (15 U.S.C. 78s(b)), to submit on Form 19b–4, 17 CFR 249.819, proposed rule changes for establishing a pilot trading system, if the self-regulatory organization complies with the following requirements:

(1) *Form PILOT.* The self-regulatory organization:

(i) Files Part I of Form PILOT, 17 CFR 249.821, in accordance with the instructions therein, at least 20 days prior to commencing operation of the pilot trading system;

(ii) Files an amendment on Part I of Form PILOT at least 20 days prior to implementing a material change to the operation of the pilot trading system; and

(iii) Files a quarterly report on Part II of Form PILOT within 30 calendar days after the end of each calendar quarter in which the market has operated after the effective date of this section.

(2) *Fair access.*

(i) The self-regulatory organization has in place written rules to ensure that all members of the self-regulatory organization have fair access to the pilot trading system, and that information regarding orders on the pilot trading system is equally available to all members of the self-regulatory organization with access to such pilot trading system.

(ii) Notwithstanding the requirement in paragraph (e)(2)(i) of this section, a specialist on the pilot trading system may have preferred access to information regarding orders that it represents in its capacity as specialist.

(iii) The rules established by a self-regulatory organization pursuant to paragraph (e)(2)(i) of this section will be considered rules governing the pilot trading system for purposes of the temporary exemption under this section.

(3) *Trading rules and procedures and listing standards.*

(i) The self-regulatory organization has in place written trading rules and procedures and listing standards necessary to operate the pilot trading system.

(ii) The rules established by a self-regulatory organization pursuant to paragraph (e)(3)(i) of this section will be considered rules governing the pilot trading system for purposes of the temporary exemption under this section.

(4) *Surveillance.* The self-regulatory organization establishes internal procedures for the effective surveillance of trading activity on the self-regulatory organization's pilot trading system.

(5) *Clearance and settlement.* The self-regulatory organization establishes reasonable clearance and settlement procedures for transactions effected on the self-regulatory organizations pilot trading system.

(6) *Types of securities.* The self-regulatory organization permits to trade on the pilot trading system only securities registered under section 12 of the Act, (15 U.S.C. 78*l*).

(7) *Activities of specialists.*

(i) The self-regulatory organization does not permit any member to be a specialist in a security on the pilot trading system and a specialist in a security on a trading system operated by such self-regulatory organization that has been approved by the Commission pursuant to section 19(b) of the Act, (15 U.S.C. 78s(b)), or on another pilot trading system operated by such self-regulatory organization, if such securities are related securities, except that a member may be a specialist in related securities that the Commission, upon application by the self-regulatory organization, later determines is necessary or appropriate in the public interest and consistent with the protection of investors;

(ii) Notwithstanding paragraph (e)(7)(i) of this section, a self-regulatory organization may permit a member to be a specialist in any security on a pilot trading system, if the pilot trading system is operated during trading hours different from the trading hours of the trading system in which such member is a specialist.

(iii) For purposes of paragraph (e)(7) of this section, the term *related securities* means any two securities in which:

(A) The value of one security is determined, in whole or significant part, by the performance of the other security; or

(B) The value of both securities is determined, in whole or significant part, by the performance of a third security, combination of securities, index, indicator, interest rate or other common factor.

(8) *Examinations, inspections, and investigations.* The self-regulatory organization cooperates with the examination, inspection, or investigation by the Commission of transactions effected on the pilot trading system.

(9) *Recordkeeping.* The self-regulatory organization shall retain at its principal place of business and make available to Commission staff for inspection, all the rules and procedures relating to each pilot trading system operating pursuant to this section for a period of not less than five years, the first two years in an easily accessible place, as prescribed in § 240.17a–1.

(10) *Public availability of pilot trading system rules.* The self-regulatory organization makes publicly available all trading rules and procedures, including those established under paragraphs (e)(2) and (e)(3) of this section.

(11) Every notice or amendment filed pursuant to this paragraph (e) shall constitute a "report" within the meaning of sections 11A, 17(a), 18(a), and 32(a), (15 U.S.C. 78k–1, 78q(a), 78r(a), and 78ff(a)), and any other applicable provisions of the Act. All notices or reports filed pursuant to this paragraph (e) shall be deemed to be confidential until the pilot trading system commences operation.

(f)(1)A self-regulatory organization shall request Commission approval, pursuant to section 19(b)(2) of the Act, (15 U.S.C. 78s(b)(2)), for any rule change relating to the operation of a pilot trading system by submitting Form 19b–4, 17 CFR 249.819, no later than two years after the commencement of operation of such pilot trading system, or shall cease operation of the pilot trading system.

(2) Simultaneous with a request for Commission approval pursuant to section 19(b)(2) of the Act, (15 U.S.C. 78s(b)(2)), a self-regulatory organization may request Commission approval pursuant to section 19(b)(3)(A) of the Act, (15 U.S.C. 78s(b)(3)(A)), for any rule change relating to the operation of a pilot trading system by submitting Form 19b–4, 17 CFR 249.819, effective immediate upon filing, to continue operations of such trading system for a period not to exceed six months.

(g) Notwithstanding paragraph (e) of this section, rule changes with respect to pilot trading systems operated by a self-regulatory organization shall not be exempt from the rule filing requirements of section 19(b)(2) of the Act, (15 U.S.C. 78s(b)(2)), if the Commission determines, after notice to the SRO and opportunity for the SRO to respond, that exemption of such rule changes is not necessary or appropriate in the public interest or consistent with the protection of investors.

PART 242—REGULATIONS M AND ATS

14. The authority citation for part 242 is revised to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78mm, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 80a–23, 80a–29, and 80a–37.

15. The part heading for part 242 is revised as set forth above.

16. Part 242 is amended by adding Regulation ATS, §§ 242.300 through 242.303 to read as follows:

Regulation ATS—Alternative Trading Systems

Sec.

Regulation ATS—Alternative Trading Systems

Preliminary Notes

1. An alternative trading system is required to comply with the requirements in this Regulation ATS, unless such alternative trading system:

(a) Is registered as a national securities exchange;

(b) Is exempt from registration as a national securities exchange based on the limited volume of transactions effected on the alternative trading system; or

(c) Trades only government securities and certain other related instruments.

All alternative trading systems must comply with the antifraud, antimanipulation, and other applicable provisions of the federal securities laws.

2. The requirements imposed upon an alternative trading system by Regulation ATS are in addition to any requirements applicable to broker-dealers registered under section 15 of the Act, (15 U.S.C. 78o).

3. An alternative trading system must comply with any applicable state law relating to the offer or sale of securities or the registration or regulation of persons or entities effecting transactions in securities.

4. The disclosures made pursuant to the provisions of this section are in addition to any other disclosure requirements under the federal securities laws.

§ 242.300 Definitions.

For purposes of this section, the following definitions shall apply:

(a) *Alternative trading system* means any organization, association, person, group of persons, or system:

(1) That 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 within the meaning of § 240.3b–16 of this chapter; and

(2) That does not:

(i) Set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or

(ii) Discipline subscribers other than by exclusion from trading.

(b) *Subscriber* means any person that has entered into a contractual agreement with an alternative trading system to access such alternative trading system for the purpose of effecting transactions in securities or submitting, disseminating, or displaying orders on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or national securities association.

(c) *Affiliate of a subscriber* means any person that, directly or indirectly, controls, is under common control with, or is controlled by, the subscriber, including any employee.

(d) *Debt security* shall mean any security other than an equity security, as defined in § 240.3a11–1 of this chapter, as well as non-participatory preferred stock.

(e) *Order* means any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order.

(f) *Control* means the power, directly or indirectly, to direct the management or policies of an alternative trading system, whether through ownership of securities, by contract, or otherwise. A person is presumed to *control* an alternative trading system, if that person:

(1) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions);

(2) Directly or indirectly has the right to vote 25 percent or more of a class of voting security or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the alternative trading system; or

(3) In the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the alternative trading system.

(g) *Covered security* shall have the meaning provided in § 240.11Ac1–1(a)(6) of this chapter, *provided, however*, that a debt or convertible debt security shall not be deemed a covered security for purposes of Regulation ATS.

(h) *Effective transaction reporting plan* shall have the meaning provided in § 240.11Aa3–1(a)(3) of this chapter.

(i) *Exchange market maker* shall have the meaning provided in § 240.11Ac1–1(a)(9) of this chapter.

(j) *OTC market maker* shall have the meaning provided in § 240.11Ac1–1(a)(13) of this chapter.

(k) *Investment grade corporate debt security* shall mean any security that:

(1) Evidences a liability of the issuer of such security;

(2) Has a fixed maturity date that is at least one year following the date of issuance;

(3) Is rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and

(4) Is not an exempted security, as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)).

(l) *Non-investment grade corporate debt security* shall mean any security that:

(1) Evidences a liability of the issuer of such security;

(2) Has a fixed maturity date that is at least one year following the date of issuance;

(3) Is not rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and

(4) Is not an exempted security, as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)).

(m) *Commercial paper* shall mean any note, draft, or bill of exchange which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

§ 242.301 Requirements for alternative trading systems.

(a) *Scope of section.* An alternative trading system shall comply with the requirements in paragraph (b) of this section, unless such alternative trading system:

(1) Is registered as an exchange under section 6 of the Act, (15 U.S.C. 78f);

(2) Is exempted by the Commission from registration as an exchange based on the limited volume of transactions effected;

(3) Is operated by a national securities association;

(4)(i) Is registered as a broker-dealer under sections 15(b) or 15C of the Act (15 U.S.C. 78o(b), and 78o–5), or is a bank, and

(ii) Limits its securities activities to the following instruments:

(A) Government securities, as defined in section 3(a)(42) of the Act, (15 U.S.C. 78c(a)(42));

(B) Repurchase and reverse repurchase agreements solely involving securities included within paragraph (a)(4)(ii)(A) of this section;

(C) Any put, call, straddle, option, or privilege on a government security, other than a put, call, straddle, option, or privilege that:

(*1*) Is traded on one or more national securities exchanges; or

(*2*) For which quotations are disseminated through an automated quotation system operated by a registered securities association; and

(D) Commercial paper.

(5) Is exempted, conditionally or unconditionally, by Commission order, after application by such alternative trading system, from one or more of the requirements of paragraph (b) of this section. The Commission will grant such exemption only after determining that such an order 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.

(b) *Requirements.* Every alternative trading system subject to this Regulation ATS, pursuant to paragraph (a) of this section, shall comply with the requirements in this paragraph (b).

(1) *Broker-dealer registration.* The alternative trading system shall register as a broker-dealer under section 15 of the Act, (15 U.S.C. 78o).

(2) *Notice.* (i) The alternative trading system shall file an initial operation report on Form ATS, § 249.637 of this chapter, in accordance with the instructions therein, at least 20 days prior to commencing operation as an alternative trading system, or if the alternative trading system is operating as of April 21, 1999, no later than May 11, 1999.

(ii) The alternative trading system shall file an amendment on Form ATS at least 20 calendar days prior to implementing a material change to the operation of the alternative trading system.

(iii) If any information contained in the initial operation report filed under paragraph (b)(2)(i) of this section becomes inaccurate for any reason and has not been previously reported to the

Commission as an amendment on Form ATS, the alternative trading system shall file an amendment on Form ATS correcting such information within 30 calendar days after the end of each calendar quarter in which the alternative trading system has operated.

(iv) The alternative trading system shall promptly file an amendment on Form ATS correcting information previously reported on Form ATS after discovery that any information filed under paragraphs (b)(2)(i), (ii) or (iii) of this section was inaccurate when filed.

(v) The alternative trading system shall promptly file a cessation of operations report on Form ATS in accordance with the instructions therein upon ceasing to operate as an alternative trading system.

(vi) Every notice or amendment filed pursuant to this paragraph (b)(2) shall constitute a "report" within the meaning of sections 11A, 17(a), 18(a), and 32(a), (15 U.S.C. 78k–1, 78q(a), 78r(a), and 78ff(a)), and any other applicable provisions of the Act.

(vii) The reports provided for in paragraph (b)(2) of this section shall be considered filed upon receipt by the Division of Market Regulation, Stop 10–2, at the Commission's principal office in Washington, DC. Duplicate originals of the reports provided for in paragraphs (b)(2)(i) through (v) of this section must be filed with surveillance personnel designated as such by any self-regulatory organization that is the designated examining authority for the alternative trading system pursuant to § 240.17d–1 of this chapter simultaneously with filing with the Commission. Duplicates of the reports required by paragraph (b)(9) of this section shall be provided to surveillance personnel of such self-regulatory authority upon request. All reports filed pursuant to this paragraph (b)(2) and paragraph (b)(9) of this section shall be deemed confidential when filed.

(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 covered security 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 covered security as reported by an effective transaction reporting plan or 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)).

(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 covered security, displayed to more than one person in the alternative trading system, for inclusion in the quotation data made available by the exchange or association to quotation vendors pursuant to § 240.11Ac1–1 of this chapter.

(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)(A) 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.

(4) *Fees.* The alternative trading system shall not charge any fee to broker-dealers that access the alternative trading system through a national securities exchange or national securities association, that is inconsistent with equivalent access to the alternative trading system required by paragraph (b)(3)(iv) of this section. In addition, if the national securities exchange or national securities association to which an alternative trading system provides the prices and sizes of orders under paragraphs (b)(3)(ii) and (b)(3)(iii) of this section establishes rules designed to assure consistency with standards for access to quotations displayed on such national securities exchange, or the market operated by such national securities association, the alternative trading system shall not charge any fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules.

(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 covered security, 20 percent or more of the average daily volume in that security reported by an effective transaction reporting plan or 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));

(B) With respect to an equity security that is not a covered security and for which transactions are reported to a self-regulatory organization, 20 percent or more of the average daily volume in that security 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;

(E) With respect to non-investment grade corporate debt, 20 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; and

(C) Make and keep records of:

(*1*) All grants of access including, for all subscribers, the reasons for granting such access;

(*2*) All denials or limitations of access and reasons, for each applicant, for denying or limiting access.

(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 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)), 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 covered security, 20 percent or more of the average daily volume reported by the effective transaction reporting plan or 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));

(B) With respect to equity securities that are not covered securities 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;

(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 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)), or derived from such prices.

(7) *Examinations, inspections, and investigations.* The alternative trading system shall permit the examination and inspection of its premises, systems, and records, and cooperate with the examination, inspection, or investigation of subscribers, whether such examination is being conducted by the Commission or by a self-regulatory organization of which such subscriber is a member.

(8) *Recordkeeping.* The alternative trading system shall:

(i) Make and keep current the records specified in § 242.302; and

(ii) Preserve the records specified in § 242.303.

(9) *Reporting.* The alternative trading system shall:

(i) File the information required by Form ATS–R (§ 249.638 of this chapter) within 30 calendar days after the end of each calendar quarter in which the market has operated after the effective date of this section; and

(ii) File the information required by Form ATS–R within 10 calendar days after an alternative trading system ceases to operate.

(10) *Procedures to ensure the confidential treatment of trading information.*

(i) The alternative trading system shall establish adequate safeguards and procedures to protect subscribers' confidential trading information. Such safeguards and procedures shall include:

(A) Limiting access to the confidential trading information of subscribers to those employees of the alternative trading system who are operating the system or responsible for its compliance with these or any other applicable rules;

(B) Implementing standards controlling employees of the alternative trading system trading for their own accounts; and

(ii) The alternative trading system shall adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to paragraph (b)(10)(i) of this section are followed.

(11) *Name.* The alternative trading system shall not use in its name the word "exchange," or derivations of the word "exchange," such as the term "stock market."

§ 242.302 Recordkeeping requirements for alternative trading systems.

To comply with the condition set forth in paragraph (b)(8) of § 242.301, an alternative trading system shall make and keep current the following records:

(a) A record of subscribers to such alternative trading system (identifying any affiliations between the alternative trading system and subscribers to the alternative trading system, including common directors, officers, or owners);

(b) Daily summaries of trading in the alternative trading system including:

(1) Securities for which transactions have been executed;

(2) Transaction volume, expressed with respect to equity securities in:

(i) Number of trades;

(ii) Number of shares traded; and

(iii) Total settlement value in terms of U.S. dollars; and

(3) Transaction volume, expressed with respect to debt securities in:

(i) Number of trades; and

(ii) Total U.S. dollar value; and

(c) Time-sequenced records of order information in the alternative trading system, including:

(1) Date and time (expressed in terms of hours, minutes, and seconds) that the order was received;

(2) Identity of the security;

(3) The number of shares, or principal amount of bonds, to which the order applies;

(4) An identification of the order as related to a program trade or an index arbitrage trade as defined in New York Stock Exchange Rule 80A;

(5) The designation of the order as a buy or sell order;

(6) The designation of the order as a short sale order;

(7) The designation of the order as a market order, limit order, stop order, stop limit order, or other type or order;

(8) Any limit or stop price prescribed by the order;

(9) The date on which the order expires and, if the time in force is less than one day, the time when the order expires;

(10) The time limit during which the order is in force;

(11) Any instructions to modify or cancel the order;

(12) The type of account, *i.e.*, retail, wholesale, employee, proprietary, or any other type of account designated by the alternative trading system, for which the order is submitted;

(13) Date and time (expressed in terms of hours, minutes, and seconds) that the order was executed;

(14) Price at which the order was executed;

(15) Size of the order executed (expressed in number of shares or units or principal amount); and

(16) Identity of the parties to the transaction.

§ 242.303 Record preservation requirements for alternative trading systems.

(a) To comply with the condition set forth in paragraph (b)(9) of § 242.301, an alternative trading system shall preserve the following records:

(1) For a period of not less than three years, the first two years in an easily accessible place, an alternative trading system shall preserve:

(i) All records required to be made pursuant to § 242.302;

(ii) All notices provided by such alternative trading system to subscribers generally, whether written or communicated through automated means, including, but not limited to, notices addressing hours of system operations, system malfunctions, changes to system procedures, maintenance of hardware and software, instructions pertaining to access to the market and denials of, or limitations on, access to the alternative trading system;

(iii) If subject to paragraph (b)(5)(ii) of § 242.301, at least one copy of such alternative trading system's standards for access to trading, all documents relevant to the alternative trading systems decision to grant, deny, or limit access to any person, and all other documents made or received by the alternative trading system in the course of complying with paragraph (b)(5) of § 242.301; and

(iv) At least one copy of all documents made or received by the alternative trading system in the course of complying with paragraph (b)(6) of § 242.301, including all correspondence, memoranda, papers, books, notices, accounts, reports, test scripts, test results, and other similar records.

(2) During the life of the enterprise and of any successor enterprise, an alternative trading system shall preserve:

(i) All partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books and stock certificate books; and

(ii) Copies of reports filed pursuant to paragraph (b)(2) of § 242.301 of this chapter and records made pursuant to paragraph (b)(5) of § 242.301 of this chapter.

(b) The records required to be maintained and preserved pursuant to paragraph (a) of this section must be produced, reproduced, and maintained in paper form or in any of the forms permitted under § 240.17a–4(f) of this chapter.

(c) Alternative trading systems must comply with any other applicable recordkeeping or reporting requirement in the Act, and the rules and regulations thereunder. If the information in a record required to be made pursuant to this section is preserved in a record made pursuant to § 240.17a–3 or § 240.17a–4 of this chapter, or otherwise preserved by the alternative trading system (whether in summary or some other form), this section shall not require the sponsor to maintain such information in a separate file, provided that the sponsor can promptly sort and retrieve the information as if it had been kept in a separate file as a record made pursuant to this section, and preserves the information in accordance with the time periods specified in paragraph (a) of this section.

(d) The records required to be maintained and preserved pursuant to this section may be prepared or maintained by a service bureau, depository, or other recordkeeping service on behalf of the alternative trading system. An agreement with a service bureau, depository, or other recordkeeping service shall not relieve the alternative trading system from the responsibility to prepare and maintain records as specified in this section. The service bureau, depository, or other recordkeeping service shall file with the Commission a written undertaking in a form acceptable to the Commission, signed by a duly authorized person, to the effect that such records are the property of the alternative trading system required to be maintained and preserved and will be surrendered promptly on request of the alternative trading system, and shall include the following provision: With respect to any books and records maintained or preserved on behalf of (name of alternative trading system), the undersigned hereby undertakes to permit examination of such books and records at any time, or from time to time, during business hours by representatives or designees of the Securities and Exchange Commission, and to promptly furnish to the Commission or its designee a true, correct, complete and current hard copy of any, all, or any part of, such books and records.

(e) Every alternative trading system shall furnish to any representative of the Commission promptly upon request, legible, true, and complete copies of those records that are required to be preserved under this section.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

17. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * * *

18. Section 249.1 and Form 1 are revised to read as follows:

§ 249.1 Form 1, for application for, and amendments to applications for, registration as a national securities exchange or exemption from registration pursuant to Section 5 of the Exchange Act.

The form shall be used for application for, and amendments to applications for, registration as a national securities exchange or exemption from registration pursuant to Section 5 of the Act, (15 U.S.C. 78e).

Note: Form 1 does not and the amendments will not appear in the Code of Federal Regulations.

OMB APPROVAL
OMB Number: 3235–0017
Expires: 8/31/2001
Estimated Average burden hours per form: 30

Form 1—Application for, and Amendments to Application for, Registration as a National Securities Exchange or Exemption From Registration Pursuant to Section 5 of the Exchange Act

BILLING CODE 8010–01–M

FORM 1 INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. Form 1 is the application for registration as a national securities exchange or an exchange exempt from registration pursuant to Section 5 of the Securities Exchange Act of 1934 ("Exchange Act").

2. **UPDATING** - A registered exchange or exchange exempt from registration pursuant to Section 5 of the Exchange Act must file amendments to Form 1 in accordance with Exchange Act Rule 6a-2.

3. **CONTACT EMPLOYEE** - The individual listed on the Execution Page (Page 1) of Form 1 as the contact employee must be authorized to receive all contact information, communications and mailings and is responsible for disseminating such information within the applicant's organization.

4. **FORMAT**
   - Attach an Execution Page (Page 1) with original manual signatures.
   - Please type all information.
   - Use only the current version of Form 1 or a reproduction.

5. If the information called for by any Exhibit is available in printed form, the printed material may be filed provided it does not exceed 8 1/2 X 11 inches in size.

6. If any Exhibit required is inapplicable, a statement to that effect shall be furnished in lieu of such Exhibit.

7. An exchange that is filing Form 1 as an application may not satisfy the requirements to provide certain information by means of an Internet web page. All materials must be filed with the Commission in paper.

8. **WHERE TO FILE AND NUMBER OF COPIES** - Submit one original and two copies of Form 1 to: SEC, Division of Market Regulation, Office of Market Supervision, 450 Fifth Street, N.W., Washington, DC 20549.

9. **PAPERWORK REDUCTION ACT DISCLOSURE**
   - Form 1 requires an exchange seeking to register as a national securities exchange or seeking an exemption from registration as a national securities exchange pursuant to Section 5 of the Exchange Act to provide the Securities and Exchange Commission ("SEC" or "Commission") with certain information regarding the operation of the exchange. Form 1 also requires national securities exchanges or exchanges exempt from registration based on limited volume to update certain information on a periodic basis.
   - 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. Sections 3(a)(1), 5, 6(a) and 23(a) authorize the Commission to collect information on this Form 1 from exchanges. *See* 15 U.S.C. §§78c(a)(1), 78e, 78f(a) and 78w(a).
   - Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on the facing page of Form 1 and any suggestions for reducing this burden.
   - Form 1 is designed to enable the Commission to determine whether an exchange applying for registration is in compliance with the provisions of Sections 6 and 19 of the Exchange Act. Form 1 is also designed to enable the Commission to determine whether a national securities exchange or exchange exempt from registration based on limited volume is operating in compliance with the Exchange Act.
   - It is estimated that an exchange will spend approximately 47 hours completing the initial application on Form 1 pursuant to Rule 6a-1. It is also estimated that each exchange will spend approximately 25 hours to prepare each amendment to Form 1 pursuant to Rule 6a-2.
   - Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.
   - It is mandatory that an exchange seeking to operate as a national securities exchange or as an exchange exempt from registration based on limited volume file a Form 1 with the Commission. It is also mandatory that national securities exchanges or exchanges exempt from registration based on limited volume file amendments to Form 1 under Rule 6a-2.
   - No assurance of confidentiality is given by the Commission with respect to the responses made in Form 1. The public has access to the information contained in Form 1.
   - This collection of information has been reviewed by the Office of Management and Budget ("OMB") in accordance with the clearance requirements of 44 U.S.C. §3507. The applicable Privacy Act system of records is SEC-2 and the routine uses of the records at set forth at 40 FR 39255 (August 27, 1975) and 41 FR 5318 (February 5, 1976).

FORM 1 INSTRUCTIONS

B. EXPLANATION OF TERMS

APPLICANT - The entity or organization filing an application for registration, or an exemption for registration, or amending any such application on this Form 1.

AFFILIATE - Any person that, directly or indirectly, controls, is under common control with, or is controlled by, the national securities exchange or exchange exempt from registration based on the limited volume of transactions effected on such exchange, including any employees.

CONTROL - The power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any person that (i) is a director, general partner or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25% or more of a class of voting securities or has the power to sell or direct the sale of 25% or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity.

DIRECT OWNERS - Any person that owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 5% or more of a class of a voting security of the applicant. For purposes of this Form 1, a person beneficially owns any securities (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant or right to purchase the security.

MEMBER - Shall have the same meaning as assigned in Exchange Act Section 3(a)(3).

NATIONAL SECURITIES EXCHANGE - Shall mean any exchange registered pursuant to Section 6 of the Exchange Act.

PERSON ASSOCIATED WITH A MEMBER - Shall have the same meaning as assigned in Section 3(a)(21) of the Exchange Act.

Form 1 Page 1 Execution Page	**U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 APPLICATION FOR, AND AMENDMENTS TO APPLICATION FOR REGISTRATION AS A NATIONAL SECURITIES EXCHANGE OR EXEMPTION FROM REGISTRATION PURSUANT TO SECTION 5 OF THE EXCHANGE ACT**	Date filed (MM/DD/YY):	OFFICIAL USE ONLY

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of the applicant would violate the federal securities laws and may result in disciplinary, administrative or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS

❑ APPLICATION ❑ AMENDMENT

1. State the name of the applicant: _____

2. Provide the applicant's primary street address (Do not use a P.O. Box):

_____

_____

3. Provide the applicant's mailing address (if different):

_____

_____

4. Provide the business telephone and facsimile number:

_____

(Telephone) (Facsimile)

5. Provide the name, title and telephone number of a contact employee:

_____

(Name) (Title) (Telephone Number)

6. Provide the name and address of counsel for the applicant:

_____

_____

_____

7. Provide the date that applicant's fiscal year ends: _____

8. Indicate legal status of applicant: [ ] Corporation [ ] Sole Proprietorship [ ] Partnership

[ ] Limited Liability Company [ ] Other (specify): _____

If other than a sole proprietor, indicate the date and place where applicant obtained its legal status (e.g. state where incorporated, place where partnership agreement was filed or where applicant entity was formed):

(a) Date (MM/DD/YY): _____ (b) State/Country of formation: _____

(c) Statute under which applicant was organized: _____

EXECUTION:

The applicant consents that service of any civil action brought by or notice of any proceeding before the Securities and Exchange Commission in connection with the applicant's activities may be given by registered or certified mail or confirmed telegram to the applicant's contact employee at the main address, or mailing address if different, given in Items 2 and 3. The undersigned, being first duly sworn, deposes and says that he/she has executed this form on behalf of, and with the authority of, said applicant. The undersigned and applicant represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true and complete.

Date: _____ _____

(MM/DD/YY) (Name of applicant)

By: _____ _____

(Signature) (Printed Name and Title)

Subscribed and sworn before me this _____ day of _____, _____ by _____

(Month) (Year) (Notary Public)

My Commission expires _____ County of _____ State of _____

This page must always be completed in full with original, manual signature and notarization.

Affix notary stamp or seal where applicable.

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

Form 1 Page 2	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 APPLICATION FOR, AND AMENDMENTS TO APPLICATION FOR, REGISTRATION AS A NATIONAL SECURITIES EXCHANGE OR EXEMPTION FROM REGISTRATION PURSUANT TO SECTION 5 OF THE EXCHANGE ACT	OFFICIAL USE	OFFICIAL USE ONLY

EXHIBITS

File all Exhibits with: an application for registration as a national securities exchange, or exemption from registration pursuant to Section 5 of the Exchange Act and Rule 6a-1, or amendments to such applications pursuant to Rule 6a-2. For each exhibit, include the name of the applicant, the date upon which the exhibit was filed and the date as of which the information is accurate (if different from the date of the filing). If any Exhibit required is inapplicable, a statement to that effect shall be furnished in lieu of such Exhibit.

Exhibit A — A copy of the constitution, articles of incorporation or association with all subsequent amendments, and of existing by-laws or corresponding rules or instruments, whatever the name, of the applicant.

Exhibit B — A copy of all written rulings, settled practices having the effect of rules, and interpretations of the Governing Board or other committee of the applicant in respect of any provisions of the constitution, by-laws, rules, or trading practices of the applicant which are not included in Exhibit A.

Exhibit C — For each subsidiary or affiliate of the applicant, and for any entity with whom the applicant has a contractual or other agreement relating to the operation of an electronic trading system to be used to effect transactions on the exchange ("System"), provide the following information:

1. Name and address of organization.
2. Form of organization (e.g., association, corporation, partnership, etc.).
3. Name of state and statute citation under which organized. Date of incorporation in present form.
4. Brief description of nature and extent of affiliation.
5. Brief description of business or functions. Description should include responsibilities with respect to operation of the System and/or execution, reporting, clearance, or settlement of transactions in connection with operation of the System.
6. A copy of the constitution.
7. A copy of the articles of incorporation or association including all amendments.
8. A copy of existing by-laws or corresponding rules or instruments.
9. The name and title of the present officers, governors, members of all standing committees or persons performing similar functions.
10. An indication of whether such business or organization ceased to be associated with the applicant during the previous year, and a brief statement of the reasons for termination of the association.

Exhibit D — For each subsidiary or affiliate of the exchange, provide unconsolidated financial statements for the latest fiscal year. Such financial statements shall consist, at a minimum, of a balance sheet and an income statement with such footnotes and other disclosures as are necessary to avoid rendering the financial statements misleading. If any affiliate or subsidiary is required by another Commission rule to submit annual financial statements, a statement to that effect, with a citation to the other Commission rule, may be provided in lieu of the financial statements required here.

Form 1 Page 3	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 APPLICATION FOR, AND AMENDMENTS TO APPLICATION FOR, REGISTRATION AS A NATIONAL SECURITIES EXCHANGE OR EXEMPTION FROM REGISTRATION PURSUANT TO SECTION 5 OF THE EXCHANGE ACT	OFFICIAL USE	OFFICIAL USE ONLY

EXHIBITS

Exhibit E — Describe the manner of operation of the System. This description should include the following:

1. The means of access to the System.
2. Procedures governing entry and display of quotations and orders in the System.
3. Procedures governing the execution, reporting, clearance and settlement of transactions in connection with the System.
4. Proposed fees.
5. Procedures for ensuring compliance with System usage guidelines.
6. The hours of operation of the System, and the date on which applicant intends to commence operation of the System.
7. Attach a copy of the users' manual.
8. If applicant proposes to hold funds or securities on a regular basis, describe the controls that will be implemented to ensure safety of those funds or securities.

Exhibit F — A complete set of all forms pertaining to:

1. Application for membership, participation or subscription to the entity.
2. Application for approval as a person associated with a member, participant or subscriber of the entity.
3. Any other similar materials.

Exhibit G — A complete set of all forms of financial statements, reports or questionnaires required of members, participants, subscribers or any other users relating to financial responsibility or minimum capital requirements for such members, participants or any other users. Provide a table of contents listing the forms included in this Exhibit G.

Exhibit H — A complete set of documents comprising the applicant's listing applications, including any agreements required to be executed in connection with listing and a schedule of listing fees. If the applicant does not list securities, provide a brief description of the criteria used to determine what securities may be traded on the exchange. Provide a table of contents listing the forms included in this Exhibit H.

Exhibit I — For the latest fiscal year of the applicant, audited financial statements which are prepared in accordance with, or in the case of a foreign applicant, reconciled with, United States generally accepted accounting principles, and are covered by a report prepared by an independent public accountant. If an applicant has no consolidated subsidiaries, it shall file audited financial statements under Exhibit I alone and need not file a separate unaudited financial statement for the applicant under Exhibit D.

Exhibit J — A list of the officers, governors, members of all standing committees, or persons performing similar functions, who presently hold or have held their offices or positions during the previous year, indicating the following for each:

1. Name.
2. Title.
3. Dates of commencement and termination of term of office or position.
4. Type of business in which each is primarily engaged (e.g. floor broker, specialist, odd lot dealer, etc.).

Form 1 Page 4	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 APPLICATION FOR, AND AMENDMENTS TO APPLICATION FOR, REGISTRATION AS A NATIONAL SECURITIES EXCHANGE OR EXEMPTION FROM REGISTRATION PURSUANT TO SECTION 5 OF THE EXCHANGE ACT	OFFICIAL USE	OFFICIAL USE ONLY

EXHIBITS

Exhibit K — This Exhibit is applicable only to exchanges that have one or more owners, shareholders, or partners that are not also members of the exchange. If the exchange is a corporation, please provide a list of each shareholder that directly owns 5% or more of a class of a voting security of the applicant. If the exchange is a partnership, please provide a list of all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 5% or more of the partnership's capital. For each of the persons listed in the Exhibit K, please provide the following:

1. Full legal name;
2. Title or Status;
3. Date title or status was acquired;
4. Approximate ownership interest; and
5. Whether the person has control, a term that is defined in the instructions to this Form.

Exhibit L — Describe the exchange's criteria for membership in the exchange. Describe conditions under which members may be subject to suspension or termination with regard to access to the exchange. Describe any procedures that will be involved in the suspension or termination of a member.

Exhibit M — Provide an alphabetical list of all members, participants, subscribers or other users, including the following information:

1. Name;
2. Date of election to membership or acceptance as a participant, subscriber or other user;
3. Principal business address and telephone number;
4. If member, participant, subscriber or other user is an individual, the name of the entity with which such individual is associated and the relationship of such individual to the entity (e.g. partner, officer, director, director, employee, etc.);
5. Describe the type of activities primarily engaged in by the member, participant, subscriber, or other user (e.g. floor broker, specialist, odd lot dealer, other market maker, proprietary trader, non-broker dealer, inactive or other functions). A person shall be "primarily engaged" in an activity or function for purposes of this item when that activity or function is the one in which that person is engaged for the majority of their time. When more than one type of person at an entity engages in any of the six types of activities or functions enumerated in this item, identify each type (e.g. proprietary trader, Registered Competitive Trader and Registered Competitive Market Maker) and state the number of members, participants, subscribers, or other users in each; and
6. The class of membership, participation or subscription or other access.

Exhibit N — Provide a schedule for each of the following:

1. The securities listed in the exchange, indicating for each the name of the issuer and a description of the security;
2. The securities admitted to unlisted trading privileges, indicating for each the name of the issuer and a description of the security;
3. The unregistered securities admitted to trading on the exchange which are exempt from registration under Section 12(a) of the Act. For each security listed, provide the name of the issuer and a description of the security, and the statutory exemption claimed (e.g. Rule 12a-6); and
4. Other securities traded on the exchange, including for each the name of the issuer and a description of the security.

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§ 249.1a and Form 1–A [Removed]

19. Section 249.1a and Form 1–A are removed.

§ 249.636 and Form 17A–23 [Removed and reserved]

20. Section 249.636 and Form 17A–23 are removed and reserved.

21. Section 249.637 and Form ATS are added to read as follows:

§ 249.637 Form ATS, information required of alternative trading systems pursuant to § 242.301(b)(2) of this chapter.

This form shall be used by every alternative trading system to file required notices, reports and amendments under § 242.301(b)(2) of this chapter.

Note: Form ATS does not and the amendments will not appear in the Code of Federal Regulations.

OMB APPROVAL
OMB Number: 3235–0509
Expires: 8/31/2001
Estimated Average burden hours per form: 8

Form ATS—Intial Operation Report, Amendment to Initial Operation Report and Cessation of Operations Report of Alternative Trading System Activities

BILLING CODE 8010–01–M

FORM ATS INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. Form ATS is the form an alternative trading system must file to notify the Securities and Exchange Commission ("SEC" or "Commission") of its activities pursuant to Regulation ATS, § 242.300 et seq.

2. **WHEN TO FILE FORM ATS**
- An alternative trading system must file an initial operation report on Form ATS at least 20 days prior to commencing operation.
- The alternative trading system must update Form ATS information by submitting amendments to the initial operation report at least 20 calendar days prior to implementing a material change to the operation of the alternative trading system as described on Form ATS or any amendment thereto. Additionally, the alternative trading system must update Form ATS information by submitting amendments to the initial operation report on Form ATS within 30 calendar days after the end of each calendar quarter in which the alternative trading system has operated, correcting any information contained in any initial operation report or any amendment thereto that has been rendered inaccurate and that has not previously been reported to the SEC.
- An alternative trading must also file a cessation of operations report on Form ATS promptly upon ceasing to operate.
- Form ATS shall not be considered filed, unless it complies with applicable requirements.

3. **CONTACT EMPLOYEE** - The individual listed on page 1 as the contact employee must be authorized to receive all contact information, communications and mailings and be responsible for disseminating that information within the alternative trading system's organization.

4. **FORMAT**
- Attach an Execution Page (Page 1) with original manual signatures.
- Please type all information.
- Provide the name of the alternative trading system, the CRD number, the SEC File number, and the filing date on each page.
- Use only the current version of Form ATS or a reproduction.

5. **WHERE TO FILE AND NUMBER OF COPIES** - Submit one original and two copies of Form ATS to: SEC, Division of Market Regulation, 450 Fifth Street, N.W., Stop 10-2, Washington D.C. 20549. Simultaneously with the filing of the original with the SEC, file one duplicate copy of Form ATS with surveillance personnel designated by the self-regulatory organization that is the designated examining authority for the alternative trading system pursuant to Rule 17d-1 under the Securities Exchange Act of 1934.

6. **RECORDKEEPING** - A copy of this Form ATS, as well as the forms filed with the SEC, must be retained by the alternative trading system and made available for inspection upon request of the SEC.

7. **PAPERWORK REDUCTION ACT DISCLOSURE**
- Form ATS requires an alternative trading system subject to Regulation ATS to provide the Commission with certain information regarding the operation of the alternative trading system, material and other changes to the operation of the alternative trading system, and notice upon ceasing operation of the alternative trading system.
- 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. Sections 3(b), 11A(a), 11A(c), 15(c), 17(a), 23(a) and 36(a) authorize the Commission to collect information on this Form ATS from alternative trading systems that are subject to Regulation ATS. See 15 U.S.C. §§78c(b), 78k-1(a), 78k-1(c), 78o(c), 78q(a), 78w(a) and 78mm(a).
- Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on the facing page of Form ATS and any suggestions for reducing this burden.
- Form ATS is designed to enable the Commission to determine whether an alternative trading system subject to Regulation ATS is in compliance with Regulation ATS and other federal securities laws.
- It is estimated that an alternative trading system will spend approximately 20 hours completing the initial operation report on Form ATS, approximately 2 hours preparing each amendment to Form ATS, and approximately 2 hours preparing a cessation of operations report on Form ATS.
- Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.
- It is mandatory that an alternative trading system subject to Regulation ATS file an initial operation report on Form ATS, file an amendment to Form ATS prior to making a material change, file quarterly amendments to Form ATS to reflect changes not previously reported, and file notice on Form ATS upon ceasing operation of the ATS.

FORM ATS INSTRUCTIONS

- All reports provided to the Commission on Form ATS are deemed confidential and will be available only to the examination of Commission staff, state securities authorities and the self-regulatory organizations. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522 ("FOIA"), and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.

- This collection of information has been reviewed by the Office of Management and Budget ("OMB") in accordance with the clearance requirements of 44 U.S.C. §3507. The applicable Privacy Act system of records is SEC-2 and the routine uses of the records are set forth at 40 FR 39255 (August 27, 1975) and 41 FR 5318 (February 5, 1976).

B. EXPLANATION OF TERMS

ALTERNATIVE TRADING SYSTEM - Shall mean any organization, association, person, group of persons, or system: (1) that 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 within the meaning of Rule 3b-16 under the Exchange Act; and (2) that does not (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system, or (ii) discipline subscribers other than by exclusion from trading.

SUBSCRIBER - Shall mean any person that has entered into a contractual agreement with an alternative trading system to access such alternative trading system for the purpose of effecting transactions in securities or for submitting, disseminating, or displaying orders on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or national securities association.

ORDER - Shall mean any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order or other priced order.

Form ATS Page 1 Execution Page	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 INITIAL OPERATION REPORT, AMENDMENT TO INITIAL OPERATION REPORT AND CESSATION OF OPERATIONS REPORT FOR ALTERNATIVE TRADING SYSTEMS	Date filed (MM/DD/YY):	OFFICIAL USE ONLY

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of alternative trading systems, would violate the federal securities laws and may result in disciplinary, administrative or criminal action.
INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS

❑ INITIAL OPERATION REPORT ❑ AMENDMENT TO INITIAL OPERATION REPORT ❑ CESSATION OF OPERATIONS REPORT

1. Exact name, principal business address, mailing address, if different, and telephone number of alternative trading system:

A. Full name of alternative trading system (if sole proprietor, last, first and middle name): _____

B. CRD Number: _____

C. Name(s) under which business is conducted, if different from Item 1A. _____

D. SEC File No.: 8-_____

E. If this filing makes a name change on behalf of the alternative trading system, enter the previous name and specify whether the name change is of the _____ alternative trading system name (1A), or _____ business name (1C):

Previous name: _____

F. Alternative trading system's main street address (Do not use a P.O. Box):

_____

_____

G. Mailing address (if different):

_____

_____

H. Business telephone and facsimile number:

_____
(Telephone) (Facsimile)

I. Contact employee:

_____
(Name and Title) (Telephone Number) (Facsimile)

EXECUTION:

The alternative trading system consents that service of any civil action brought by, or notice of any proceeding before, the SEC or a self-regulatory organization in connection with the alternative trading system's activities may be given by registered or certified mail or confirmed telegram, to the alternative trading system's contact employee at the main address, or mailing address if different, given in Items 1F and 1G. The undersigned, being first duly sworn, deposes and says that he/she has executed this form on behalf of, and with the authority of, said alternative trading system. The undersigned and alternative trading system represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true and complete.

Date: _____ _____
(MM/DD/YY) (Name of alternative trading system)

By: _____ _____
(Signature) (Printed Name and Title)

Subscribed and sworn before me this _____ day of _____, _____ by _____
(Month) (Year) (Notary Public)

My Commission expires _____ County of _____ State of _____

This page must always be completed in full with original, manual signature and notarization.

Affix notary stamp or seal where applicable.

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

Form ATS Page 2	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 INITIAL OPERATION REPORT, AMENDMENT TO INITIAL OPERATION REPORT AND CESSATION OF OPERATIONS REPORT FOR ALTERNATIVE TRADING SYSTEMS	OFFICIAL USE	OFFICIAL USE ONLY

Alternative trading system name: _____ CRD No: _____

Filing date: _____ SEC File No.: 8- _____

2. If this is an initial operation report, the date the alternative trading system expects to commence operation: _____

3. Attach as Exhibit A, a description of classes of subscribers (for example, broker-dealer, institution, or retail). Also describe any differences in access to the services offered by the alternative trading system to different groups or classes of subscribers.

4. Attach as Exhibit B:

   a. A list of the types of securities the alternative trading system trades (for example, debt, equity, listed, Nasdaq NM) or, if this is an initial operation report, the types of securities it expects to trade. Note whether any types of securities are not registered under Section 12(a) of the Exchange Act of 1934 ("Exchange Act").

   b. A list of the securities the alternative trading system trades, or if this is an initial operation report, the securities it expects to trade. Note whether any securities are not registered under Section 12(a) of the Exchange Act.

5. Attach as Exhibit C, the name, address, and telephone number of counsel for the alternative trading system.

6. Attach as Exhibit D, a copy of the constitution, articles of incorporation or association, with all amendments, and of the existing by-laws or corresponding rules or instruments, whatever the name, of the alternative trading system. If this information is publicly available on a continuous basis on an Internet site controlled by the alternative trading system, the alternative trading system may indicate the location of the Internet web site where such information may be found in lieu of filing such information with the Commission.

7. Attach as Exhibit E, the name of any entity, other than the alternative trading system, that will be involved in operation of the alternative trading system, including the execution, trading, clearing and settling of transactions on behalf of the alternative trading system. Provide a description of the role and responsibilities of each entity.

8. Attach as Exhibit F, the following information:

   a. The manner of operation of the alternative trading system;

   b. Procedures governing entry of orders into the alternative trading system;

   c. The means of access to the alternative trading system;

   d. The procedures governing execution, reporting, clearance and settlement of transactions effected through the alternative trading system;

   e. Procedures for ensuring subscriber compliance with system guidelines; and

   f. A copy of the alternative trading system's subscriber manual and any other materials provided to subscribers.

9. Attach as Exhibit G, a brief description of the alternative trading system's procedures for reviewing system capacity, security and contingency planning procedures.

10. If any other entity, other than the alternative trading system, will hold or safeguard subscriber funds or securities on a regular basis, attach as Exhibit H the name of such entity and a brief description of the controls that will be implemented to ensure the safety of such funds and securities.

11. Attach as Exhibit I, a list providing the full legal name of those direct owners reported on Schedule A of Form BD.

BILLING CODE 8010-01-C

FORM ATS-R INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. Form ATS-R must be filed by alternative trading systems subject to Regulation ATS within 30 days after the end of each calendar quarter, or more frequently upon request of the Securities and Exchange Commission ("SEC" or "Commission"). This Form should be prepared as of the last day of each calendar quarter.

2. **WHEN TO FILE A FORM ATS-R** - File Form ATS-R within 30 calendar days after the end of each calendar quarter in which the alternative trading system has operated after the effective date of Regulation ATS. Also file Form ATS-R within 10 calendar days after an alternative trading system ceases to operate.

3. **CONTACT EMPLOYEE** - The individual listed on page 1 as the contact employee must be authorized to receive all contact information, communications and mailings and be responsible for disseminating that information within the alternative trading system's organization.

4. **FORMAT**
- Attach the Execution Page (Page 1) with every filing of Form ATS-R.
- Please type all information.
- Be sure to note the alternative trading system name, CRD number, SEC file number, and report period dates on each page.
- Use only the current version of Form ATS-R or a reproduction.

5. **WHERE TO FILE AND NUMBER OF COPIES** - Submit one original and two copies of Form ATS-R to: SEC, Division of Market Regulation, 450 Fifth Street, N.W., Stop 10-2, Washington D.C. 20549.

6. **RECORDKEEPING** - A copy of this Form ATS-R, as well as the forms filed with the SEC, must be retained by the alternative trading system and made available for inspection upon request of the SEC.

7. **PAPERWORK REDUCTION ACT DISCLOSURE**
- Form ATS-R requires an alternative trading system subject to Regulation ATS to provide the Commission with quarterly reports regarding trading activities.
- 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. Sections 3(b), 11A(a), 11A(c), 15(c), 17(a), 23(a) and 36(a) authorize the Commission to collect information on this Form ATS from alternative trading systems that are subject to Regulation ATS. *See* 15 U.S.C. §§78c(b), 78k-1(a), 78k-1(c), 78o(c), 78q(a), 78w(a) and 78mm(a).
- Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on the facing page of Form ATS-R and any suggestions for reducing this burden.
- Form ATS-R is designed to enable the Commission to more effectively track the growth and development of alternative trading systems, as well as to more effectively comply with its statutory obligations with respect to alternative trading systems and improve investor protection.
- It is estimated that an alternative trading system will spend approximately 4 hours completing Form ATS-R.
- Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.
- It is mandatory that an alternative trading system subject to Regulation ATS file quarterly reports on Form ATS-R with the Commission.
- All reports provided to the Commission on Form ATS-R are deemed confidential and will be available only to the examination of Commission staff, state securities authorities and the self-regulatory organizations. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522 ("FOIA"), and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.
- This collection of information has been reviewed by the Office of Management and Budget ("OMB") in accordance with the clearance requirements of 44 U.S.C. §3507. The applicable Privacy Act system of records is SEC-2 and the routine uses of the records at set forth at 40 FR 39255 (August 27, 1975) and 41 FR 5318 (February 5, 1976).

8. Only those alternative trading systems subject to the fair access obligations under Rule 301(b)(5) are required to respond to question 7 on Form ATS-R.

FORM ATS-R INSTRUCTIONS

B. EXPLANATION OF TERMS

ALTERNATIVE TRADING SYSTEM - Shall mean any organization, association, person, group of persons, or system (1) that 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 within the meaning of Rule 3b-16 under the Exchange Act; and (2) that does not (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system, or (ii) discipline subscribers other than by exclusion from trading.

INVESTMENT GRADE CORPORATE DEBT SECURITIES - Shall mean any security that: (1) evidences a liability of the issuer of such security; (2) has a fixed maturity date that is at least one year following the date of issuance; (3) is rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and (4) is not an exempted security, as defined in §3(a)(12) of the Act (15 U.S.C. 78o).

NON-INVESTMENT GRADE CORPORATE DEBT SECURITIES - Shall mean any security that: (1) evidences a liability of the issuer of such security; (2) has a fixed maturity date that is at least one year following the date of issuance; (3) is not rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and (4) is not an exempted security, as defined in §3(a)(12) of the Act (15 U.S.C. 78o).

DEBT SECURITIES - Shall mean any security other than an equity security, as defined in §240.3a11-1.

EQUITY SECURITIES - Shall have the same meaning as in §240.3a11-1.

GOVERNMENT SECURITIES - Shall have the same meaning as in Exchange Act Section 3(a)(42), including those instruments in paragraph (D) of § 3(a)(42) of the Exchange Act.

LISTED EQUITY SECURITIES - Shall mean any equity securities that are listed and registered, or admitted to unlisted trading privileges, on a national securities exchange.

LISTED OPTIONS - Shall mean any options traded on a registered national securities exchange or automated facility of a registered national securities association.

MORTGAGE RELATED SECURITIES - Shall have the same meaning as in Exchange Act Section 3(a)(41).

MUNICIPAL SECURITIES - Shall have the same meaning as in Exchange Act Section 3(a)(29).

NASDAQ NATIONAL MARKET SECURITIES - Shall mean any securities designated as Nasdaq National Market Securities by The Nasdaq Stock Market.

NASDAQ SMALLCAP MARKET SECURITIES - Shall mean any securities designated as Nasdaq SmallCap Market Securities by The Nasdaq Stock Market.

PENNY STOCK - Shall have the same meaning as in Exchange Act Section 3(a)(51).

SUBSCRIBER - Shall mean any person that has entered into a contractual agreement with an alternative trading system to access such alternative trading system for the purpose of effecting transactions in securities or to submit, disseminate, or display orders on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or national securities association.

UNLISTED OPTIONS - Shall mean any options other than those traded on a registered national securities exchange or automated facility of a registered national securities association.

Form ATS-R Page 1 Execution Page	**U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 QUARTERLY REPORT OF ALTERNATIVE TRADING SYSTEM ACTIVITIES**	OFFICIAL USE	OFFICIAL USE ONLY

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS

Alternative Trading System Name: _____

Period covered by this report. _____ to _____

1. Exact name, principal business address, mailing address, if different, and telephone number of alternative trading system:
   - A. Full name of alternative trading system (if sole proprietor, last, first and middle name): _____
   - B. CRD Number: _____
   - C. Name(s) under which business is conducted, if different from Item 1A. _____
   - D. SEC File No.: 8- _____
   - E. If this filing makes a name change on behalf of the alternative trading system, enter the previous name and specify whether the name change is of the _____ alternative trading system name (1A), or _____ business name (1C):

     Previous name: _____
   - F. Alternative trading system's main street address (Do not use a P.O. Box): _____
   - G. Mailing address (if different): _____
   - H. Business telephone and facsimile number: _____

     (Telephone) (Facsimile)
   - I. Contact employee: _____

     (Name and Title) (Telephone) (Facsimile)
2. Attach as Exhibit A, a list of all subscribers that were participants of the alternative trading system at any time during the period covered by this report.
3. Attach as Exhibit B, a list of all securities that were traded on the alternative trading system at any time during the period covered by this report.

EXECUTION:

The alternative trading system consents that service of any civil action brought by, or notice of any proceeding before, the SEC or self-regulatory organization in connection with the alternative trading system's activities may be given by registered or certified mail, or confirmed telegram, to the alternative trading system's contact employee at the main address, or mailing address if different, given in Items 1F and 1G. The undersigned, being first duly sworn, deposes and says that he/she has executed this form on behalf of, and with the authority of, said alternative trading system. The undersigned and alternative trading system represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true and complete.

Date: _____ (MM/DD/YY) _____ (Name of alternative trading system)

By: _____ (Signature) _____ (Printed Name and Title)

Subscribed and sworn before me this _____ day of _____ (Month), _____ (Year) by _____ (Notary Public)

My Commission expires _____ County of _____ State of _____

This page must always be completed in full with original, manual signature and notarization.

Affix notary stamp or seal where applicable.

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

Form ATS-R Page 2	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 QUARTERLY REPORT OF ALTERNATIVE TRADING SYSTEM ACTIVITIES	OFFICIAL USE	OFFICIAL USE ONLY

Alternative trading system name: _____ CRD Number: _____

Period covered in this report: _____ to _____ SEC File Number: 8-_____

4. Provide the total unit and dollar volume of transactions in the following securities. For securities reported in 4J-4N, report total settlement value in U.S. Dollars. Enter "None," "N/A" or "0" where appropriate.

Category of Securities	*Total Unit Volume of Transactions*	*Total Dollar Volume of Transactions*
A. Listed Equity Securities		
B. Nasdaq National Market Securities		
C. Nasdaq SmallCap Market Securities		
D. Equity securities issued pursuant to Rule 144A of the Securities Act of 1933		
E. Penny Stock, other than any securities included in Items 4A-4D above		
F. Other equity securities not included in Items 4A-4E above		
G. Rights and warrants		
H. Listed options		
I. Unlisted options		
J. Government securities		
K. Municipal securities		
L. Investment grade corporate debt securities		
M. Non-investment grade corporate debt securities		
N. Mortgage related securities		
O. Debt securities other than any securities included in Items 4J-4N above		

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

Form ATS-R Page 3	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 QUARTERLY REPORT OF ALTERNATIVE TRADING SYSTEM ACTIVITIES	OFFICIAL USE	OFFICIAL USE ONLY

Alternative trading system name: _____ CRD Number: _____

Period covered in this report: _____ to _____ SEC File Number: 8-_____

5. A. List the types of equity securities reported in Item 4F above:

_____

_____

_____

B. List the types of debt reported in Item 4O above:

_____

_____

_____

6. Provide the total unit and dollar volume of transactions for after-hours trading in the following securities. Enter "None," "N/A" or "0" where appropriate.

Category of Securities	*Total Unit Volume of Transactions*	*Total Dollar Volume of Transactions*
A. Listed Equity Securities		
B. Nasdaq National Market Securities		
C. Nasdaq SmallCap Market Securities		
D. Listed options		

7. Attach as Exhibit C, a list of all persons granted, denied, or limited access to the alternative trading system during the period covered by this report, designating for each person (a) whether they were granted, denied, or limited access; (b) the date the alternative trading system took such action; (c) the effective date of such action; and (d) the nature of any denial on limitation of access.

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BILLING CODE 8010-01-C

22. Section 249.638 and Form ATS–R are added to read as follows:

§ 249.638 Form ATS–R, information required of alternative trading systems pursuant to § 242.301(b)(8) of this chapter.

This form shall be used by every alternative trading system to file required reports under § 242.301(b)(8) of this chapter.

Note: Form ATS–R does not and the amendments will not appear in the Code of Federal Regulations.

OMB APPROVAL

OMB Number: 3235–0509

Expires: 8/31/2001

Estimated Average burden hours per form: 3.5

Form ATS–R—Quarterly Report of Alternative Trading System Activities

BILLING CODE 8010–01–M

FORM ATS-R INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. Form ATS-R must be filed by alternative trading systems subject to Regulation ATS within 30 days after the end of each calendar quarter, or more frequently upon request of the Securities and Exchange Commission ("SEC" or "Commission"). This Form should be prepared as of the last day of each calendar quarter.

2. **WHEN TO FILE A FORM ATS-R** - File Form ATS-R within 30 calendar days after the end of each calendar quarter in which the alternative trading system has operated after the effective date of Regulation ATS. Also file Form ATS-R within 10 calendar days after an alternative trading system ceases to operate.

3. **CONTACT EMPLOYEE** - The individual listed on page 1 as the contact employee must be authorized to receive all contact information, communications and mailings and be responsible for disseminating that information within the alternative trading system's organization.

4. **FORMAT**
- Attach the Execution Page (Page 1) with every filing of Form ATS-R.
- Please type all information.
- Be sure to note the alternative trading system name, CRD number, SEC file number, and report period dates on each page.
- Use only the current version of Form ATS-R or a reproduction.

5. **WHERE TO FILE AND NUMBER OF COPIES** - Submit one original and two copies of Form ATS-R to: SEC, Division of Market Regulation, 450 Fifth Street, N.W., Stop 10-2, Washington D.C. 20549.

6. **RECORDKEEPING** - A copy of this Form ATS-R, as well as the forms filed with the SEC, must be retained by the alternative trading system and made available for inspection upon request of the SEC.

7. **PAPERWORK REDUCTION ACT DISCLOSURE**
- Form ATS-R requires an alternative trading system subject to Regulation ATS to provide the Commission with quarterly reports regarding trading activities.
- 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. Sections 3(b), 11A(a), 11A(c), 15(c), 17(a), 23(a) and 36(a) authorize the Commission to collect information on this Form ATS from alternative trading systems that are subject to Regulation ATS. *See* 15 U.S.C. §§78c(b), 78k-1(a), 78k-1(c), 78o(c), 78q(a), 78w(a) and 78mm(a).
- Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on the facing page of Form ATS-R and any suggestions for reducing this burden.
- Form ATS-R is designed to enable the Commission to more effectively track the growth and development of alternative trading systems, as well as to more effectively comply with its statutory obligations with respect to alternative trading systems and improve investor protection.
- It is estimated that an alternative trading system will spend approximately 4 hours completing Form ATS-R.
- Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.
- It is mandatory that an alternative trading system subject to Regulation ATS file quarterly reports on Form ATS-R with the Commission.
- All reports provided to the Commission on Form ATS-R are deemed confidential and will be available only to the examination of Commission staff, state securities authorities and the self-regulatory organizations. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522 ("FOIA"), and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.
- This collection of information has been reviewed by the Office of Management and Budget ("OMB") in accordance with the clearance requirements of 44 U.S.C. §3507. The applicable Privacy Act system of records is SEC-2 and the routine uses of the records at set forth at 40 FR 39255 (August 27, 1975) and 41 FR 5318 (February 5, 1976).

8. Only those alternative trading systems subject to the fair access obligations under Rule 301(b)(5) are required to respond to question 7 on Form ATS-R.

BILLING CODE 8010-01-C

23. Section 249.821 and Form PILOT are added to read as follows:

§ 249.821 Form PILOT, information required of self-regulatory organizations operating pilot trading systems pursuant to § 240.19b–5 of this chapter.

This form shall be used by all self-regulatory organizations, as defined in section 3(a)(26) of the Act, (15 U.S.C 78c(a)(26)), to file required information and reports with regard to pilot trading systems pursuant to § 240.I20240.19b–5 of this chapter.

Note: Form PILOT does not and the amendments will not appear in the Code of Federal Regulations.

OMB APPROVAL
OMB Number: 3235–0507
Expires: 8/31/2001
Estimated Average burden hours per form: 6

Form PILOT—Initial Operation Report, Amendment to Initial Operation Report and Quarterly Report for Pilot Trading Systems Operated by Self-Regulatory Organizations

BILLING CODE 8010–01–M

FORM PILOT INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. Form PILOT is the form a self-regulatory organization ("SRO") files to notify the Securities and Exchange Commission ("SEC" or "Commission") of its intention to operate a pilot trading system pursuant to Rule 19b-5, § 240.19b-5, under the Securities Exchange Act of 1934 ("Exchange Act").

2. **WHEN TO FILE A FORM PILOT** - The SRO must file the initial operation report, Part I of Form PILOT, at least 20 days prior to commencing operation of the pilot trading system. The SRO operating a pilot trading system under Rule 19b-5 must update information reported in Part I of Form PILOT by submitting amendments to the initial operation report at least 20 calendar days prior to implementing a material change to the operation of the pilot trading system as described on Form PILOT or any amendment thereto, other than information reported in Items 3b and 4b on Form PILOT relating to subscribers to, and securities traded on, the pilot trading system. Additionally, the SRO must file Part II of Form PILOT by submitting quarterly reports within 30 calendar days after the end of each calendar quarter in which the pilot trading system has operated after the effective date of Regulation ATS.

3. **CONTACT EMPLOYEE** - The individual listed on page 1 as the contact employee must be authorized to receive all contact information, communications and mailings and be responsible for disseminating that information within the SRO.

4. **FORMAT**
- Attach an Execution Page (Page 1) with original manual signatures.
- Please type all information.
- Provide the name of the SRO, pilot trading system and the filing date on each page.
- Use only the current version of Form PILOT or a reproduction.

5. **WHERE TO FILE AND NUMBER OF COPIES** - Submit one original and eight copies of Form Pilot to: SEC, Division of Market Regulation, 450 Fifth Street, N.W., Washington D.C. 20549.

6. **RECORDKEEPING** - A copy of this Form PILOT, as well as any amendments thereto filed with the SEC, must be retained by the SRO operating the pilot trading system at its principal place of business and made available for inspection upon request of the SEC.

7. **PAPERWORK REDUCTION ACT DISCLOSURE**
- Form PILOT requires an SRO intending to operate a pilot trading system pursuant to the temporary exemption under Rule 19b-5 to file certain information about the operation of the pilot trading system and notices of material changes to the pilot trading system. In addition, Form PILOT requires SROs to report transaction volume on the pilot trading system on a quarterly basis.
- 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. Sections 3(a)(26), 3(a)(27), 3(a)(28) 19(b), 23(a) and 36(a) authorize the Commission to collect information on this Form PILOT from SROs. *See* 15 U.S.C. §§78c(a)(26), 78c(a)(27), 78c(a)(28), 78s(b), 78w(a) and 78mm(a).
- Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on the facing page of Form PILOT and any suggestions for reducing this burden.
- Form PILOT is designed to enable the Commission to determine whether an SRO has properly availed itself of Rule 19b-5, is operating a pilot trading system in compliance with the Exchange Act, and is carrying out its statutory oversight obligations under the Exchange Act.
- It is estimated that an SRO will spend approximately 24 hours completing the initial operation report on Form PILOT pursuant to Rule 19b-5. It is also estimated that each SRO will spend approximately 3 hours to prepare each notice of a material change and approximately 3 hours to prepare quarterly transaction information.
- It is mandatory that an SRO seeking to operate a pilot trading system under Rule 19b-5 file a Form PILOT with the Commission. It is also mandatory that an SRO operating a pilot trading system file notices of material systems changes and quarterly transaction reports on Form PILOT.
- Prior to commencing operations, all reports provided to the Commission on Form PILOT are deemed confidential and will be available only to the examination of Commission staff and state securities authorities. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522 ("FOIA") and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation. Once the pilot trading system commences operation, all reports provided to the Commission on Form PILOT will be publicly available as of the operation date provided on Form PILOT or any amendment to Form PILOT.
- This collection of information has been reviewed by the Office of Management and Budget ("OMB") in accordance with the clearance requirements of 44 U.S.C. §3507. The applicable Privacy Act system of records is SEC-2 and the routine uses of the records at set forth at 40 FR 39255 (August 27, 1975) and 41 FR 5318 (February 5, 1976).

FORM PILOT INSTRUCTIONS

B. EXPLANATION OF TERMS

PILOT TRADING SYSTEM - Shall mean any trading system, operated by an SRO, that:

(1)(i) has been in operation for less than two years; (ii) is independent of any other trading system operated by such self-regulatory organization that has been approved by the Commission pursuant to Section 19(b) of the Exchange Act; (iii) with respect to each security traded on such pilot trading system, during at least two of the last four consecutive calendar months, has traded no more than 5% of the average daily trading volume of such security in the United States; and (iv) with respect to all securities traded on such pilot trading system, during at least two of the last four consecutive calendar months, has traded no more than 20% of the average daily trading volume of all trading systems operated by such self-regulatory organization; or

(2)(i) has been in operation for less than two years; (ii) with respect to each security traded on such pilot trading system, during at least two of the last four consecutive calendar months, has traded no more than 1% of the average daily trading volume of such security in the United States; and (iii) with respect to all securities traded on such pilot trading system, during at least two of the last four consecutive calendar months, has traded no more than 20% of the average daily trading volume of all trading systems operated by such self-regulatory organization; or

(3)(i) has been in operation for less than two years; and (ii)(A) satisfied the definition of "pilot trading system" under paragraph (1) above no more than 60 days ago, and continues to be independent of any other trading system operated by such self-regulatory organization that has been approved by the Commission pursuant to Section 19(b) of the Exchange Act; or (B) satisfied the definition of "pilot trading system" under paragraph (2) above no more than 60 days ago.

INVESTMENT GRADE CORPORATE DEBT SECURITIES - Shall mean any security that: (1) evidences a liability of the issuer of such security; (2) has a fixed maturity date that is at least one year following the date of issuance; (3) is rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and (4) is not an exempted security, as defined in §3(a)(12) of the Act (15 U.S.C. 78o).

NON-INVESTMENT GRADE CORPORATE DEBT SECURITIES - Shall mean any security that: (1) evidences a liability of the issuer of such security; (2) has a fixed maturity date that is at least one year following the date of issuance; (3) is not rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and (4) is not an exempted security, as defined in §3(a)(12) of the Act (15 U.S.C. 78o).

DEBT SECURITIES - Shall mean any security other than an equity security, as defined in §240.3a11-1.

EQUITY SECURITIES - Shall have the same meaning as in §240.3a11-1.

GOVERNMENT SECURITIES - Shall have the same meaning as in Exchange Act Section 3(a)(42).

LISTED EQUITY SECURITIES - Shall mean any equity securities that are listed and registered, or admitted to unlisted trading privileges, on a national securities exchange.

LISTED OPTIONS - Shall mean any options traded on a registered national securities exchange or automated facility of a registered national securities association.

MORTGAGE RELATED SECURITIES - Shall have the same meaning as in Exchange Act Section 3(a)(41).

MUNICIPAL SECURITIES - Shall have the same meaning as in Exchange Act Section 3(a)(29).

NASDAQ NATIONAL MARKET SECURITIES - Shall mean any securities designated as Nasdaq National Market Securities by The Nasdaq Stock Market.

NASDAQ SMALLCAP MARKET SECURITIES - Shall mean any securities designated as Nasdaq SmallCap Market Securities by The Nasdaq Stock Market.

PENNY STOCK - Shall have the same meaning as in Exchange Act Section 3(a)(51).

Form PILOT Page 1 Execution Page	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 PART I INITIAL OPERATION REPORT, AMENDMENT TO INITIAL OPERATION REPORT, AND QUARTERLY REPORT FOR PILOT TRADING SYSTEMS OPERATED BY A SELF-REGULATORY ORGANIZATION	Date filed (MM/DD/YY):	OFFICIAL USE ONLY

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of pilot trading systems would violate the federal securities laws and may result in disciplinary, administrative or criminal action.
INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS

❑ INITIAL OPERATION REPORT ❑ AMENDMENT TO INITIAL OPERATION REPORT ❑ QUARTERLY REPORT

1. Exact name, principal business address, mailing address, if different, and telephone number of pilot trading system:

A. Name of the SRO filing Form PILOT: _____

C. File No. PILOT- _____

B. Full Name of pilot trading system: _____

D. If this filing makes a name change on behalf of the pilot trading system, enter the previous name.

Previous name: _____

E. Pilot trading system's business address (Do not use a P.O. Box):

_____

_____

F. Business telephone and facsimile number:

_____
(Telephone) (Facsimile)

G. Contact employee:

_____
(Name and Title) (Telephone Number) (Facsimile)

2. If this is an initial operation report, the date the SRO expects to commence operation of the pilot trading system:

Operation Date: _____

EXECUTION:
The SRO consents that service of any civil action brought by, or notice of any proceeding before, the SEC in connection with the pilot trading system's activities may be given by registered or certified mail, or confirmed telegram, to the pilot trading system's contact employee at the business address given in Item 1E. The undersigned, being first duly sworn, deposes and says that he/she has executed this form on behalf of, and with the authority of, said SRO. The undersigned and the SRO represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true and complete.

Date: _____ _____
(MM/DD/YY) (Name of SRO)

By: _____ _____
(Signature) (Printed Name and Title)

Subscribed and sworn before me this _____ day of _____, _____ by _____
(Month) (Year) (Notary Public)

My Commission expires _____ County of _____ State of _____

This page must always be completed in full with original, manual signature and notarization.
Affix notary stamp or seal where applicable.

DO NOT WRITE BELOW THIS LINE - FOR OFFICIAL USE ONLY

Form PILOT Page 2	**U.S. SECURITIES AND EXCHANGE COMMISSION** **WASHINGTON, D.C. 20549** **PART I** **INITIAL OPERATION REPORT, AMENDMENT TO INITIAL OPERATION REPORT, AND QUARTERLY REPORT FOR PILOT TRADING SYSTEMS OPERATED BY A SELF-REGULATORY ORGANIZATION** **(to be filed at least 20 calendar days prior to commencing operation)**	OFFICIAL USE	OFFICIAL USE ONLY

SRO name: _____

Pilot trading system name: _____

Filing date: _____

3. Attach as Exhibit A:

   a. A description of classes of members trading on the pilot trading system, and any persons to whom those members provide access to trading on the pilot trading system. Also describe any differences in access to the services offered by the pilot trading system to different classes of members.

   b. A list of the members, by name, or if this is an initial operation report, a list of the anticipated members who may trade on the pilot trading system.

4. Attach as Exhibit B:

   a. A list of the types of securities the pilot trading system trades (for example, debt, equity, listed, Nasdaq NM), or if this is an initial operation report, the types of securities it expects to trade. Note whether any types of securities are not registered under Section 12(a) of the Exchange Act.

   b. A list of the securities the pilot trading system trades, or if this is an initial operation report, the securities the SRO expects to trade on the pilot trading system. Note whether any securities are not registered under Section 12(a) of the Exchange Act.

5. Attach as Exhibit C, the name, address, and telephone number of counsel for the pilot trading system.

6. Attach as Exhibit D, the name of any entity, other than the SRO, that will be involved in the operation of the pilot trading system, including the execution, trading, clearing and settling of transactions on behalf of the SRO. Provide a detailed description of the role and responsibilities of each entity.

7. Attach as Exhibit E, the following information:

   a. The manner of operation of the pilot trading system;

   b. Procedures governing entry of orders into the pilot trading system;

   c. The SRO's means of granting access to the pilot trading system;

   d. The procedures governing execution, reporting, clearance and settlement of transactions effected through the pilot trading system;

   e. The procedures for ensuring compliance with system guidelines;

   f. A copy of the pilot trading system's manual and any other materials provided to members trading on the pilot trading system; and

   g. A copy of the agreement between the SRO and members trading on the pilot trading system, and, if applicable, any agreement between members and those persons members provide access to trading on the pilot trading system.

8. Attach as Exhibit F, a brief description of the SRO's procedures for reviewing capacity, security and contingency planning with respect to the pilot trading system.

Form PILOT Page 3	U.S. SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549	OFFICIAL USE	OFFICIAL USE ONLY

Part II
INITIAL OPERATION REPORT, AMENDMENT TO INITIAL OPERATION REPORT, AND QUARTERLY REPORT FOR PILOT TRADING SYSTEMS OPERATED BY A SELF-REGULATORY ORGANIZATION

SRO name: _____

Pilot trading system name: _____

Period covered in this report: _____ to _____

9. Provide the total unit and dollar volume of transactions in the following securities. For securities reported in Item 9. J. through 9. O, report total settlement value in U.S. dollars. Enter "None," "N/A" or "0" where appropriate.

Category of Securities	*Total Unit Volume of Transactions*	*Total Dollar Volume of Transactions*
A. Listed Equity Securities		
B. Nasdaq National Market Securities		
C. Nasdaq SmallCap Market Securities		
D. Equity securities issued pursuant to Rule 144A of the Securities Act of 1933		
E. Penny Stock, other than any securities included in Items 9A-9D above		
F. Other equity securities not included in Items 9A-9E above		
G. Rights and warrants		
H. Listed options		
I. Unlisted options		
J. Investment-grade corporate debt securities		
K. Non-investment-grade corporate debt securities		
L. Government securities		
M. Municipal securities		
N. Mortgage related securities		
O. Debt securities other than any securities included in Items 9J - 9N above		

10. A. List the types of equity securities reported in Item 9O above: _____

B. List the types of debt reported in Item 9O above: _____

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By the Commission.

Dated: December 8, 1998.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–33299 Filed 21–21–98; 8:45 am]

BILLING CODE 8010–01–C

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–40761; File No. S7–13–98]

RIN 3235–AH39

Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting an amendment to Rule 19b–4 under the Securities Exchange Act of 1934. The amendment permits self-regulatory organizations to list and trade new derivative securities products pursuant to existing self-regulatory organization trading rules, procedures, surveillance programs and listing standards without submitting a proposed rule change pursuant to section 19(b).

EFFECTIVE DATE: February 22, 1999.

FOR FURTHER INFORMATION CONTACT: Sharon M. Lawson, Senior Special Counsel at (202) 942–0182 or Marianne H. Duffy, Special Counsel at (202) 942–4163, Office of Market Supervision, Division of Market Regulation, Securities and Exchange Commission, Mail Stop 10–1, 450 Fifth Street, NW, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

A. Purpose Of Amendment

On April 17, 1998, the Securities and Exchange Commission ("SEC" or "Commission") proposed for comment an amendment to Rule 19b–4 ("Proposed Rule")[1] under the Securities Exchange Act of 1934, as amended ("Exchange Act" or "Act"),[2] to expand the scope of self-regulatory organization ("SRO")[3] matters that do not constitute proposed rule changes, within the meaning of section 19(b) of the Act[4] and Rule 19b–4[5] thereunder. In particular, under the amendment, an SRO rule change would not include the listing and trading of certain new derivative securities products, as defined below, pursuant to existing trading rules, procedures, surveillance programs and listing standards. Today, the Commission adopts the amendment without any material changes from the proposal. In response to certain commenters, the Commission also is providing clarification on the amendment.

B. Description Of Amendment

The Commission previously adopted rules that interpret the terms "stated policy, practice or interpretation" and "proposed rule change."[6] For example, paragraph (c) of Rule 19b–4[7] provides that certain stated policies, practices and interpretations of SROs do not constitute proposed rule changes. Specifically, a "stated policy, practice or interpretation" of an SRO is not a proposed rule change if it is reasonably and fairly implied by an existing SRO rule.

Similarly, today the Commission is adopting an amendment to Rule 19b–4, in substantially the same form that it was proposed, so that the listing and trading of new derivative securities products would not be proposed rule changes so long as existing SRO trading rules, procedures, surveillance programs and listing standards apply to the product class covering a specific new derivative securities product.[8] Specifically, the Commission is adding a new paragraph (e) to Rule 19b–4 which states:

> the listing and trading of a new derivative securities product by (an SRO) shall not be deemed a proposed rule change, pursuant to paragraph (c)(1) of (Rule 19b–4), if the Commission has approved, pursuant to section 19(b) of the Act [], such (SRO's) trading rules, procedures and listing standards for the product class that would include the new derivative securities product, and the SRO has a surveillance program for the product class.[9]

In adopting new paragraph (e), the Commission believes that when the Commission has approved, pursuant to section 19(b) of the Act, an SRO's trading rules, procedures and listing standards for the product class that would include the new derivative securities product, the listing and trading of the new derivative securities product is reasonably and fairly implied by the SRO's existing trading rules, procedures and listing standards. The Commission therefore is deeming the listing and trading of new derivative securities products to not be proposed rule changes under rule 19b–4(c)(1) when certain conditions are met.

II. Background

A. Current Procedures For Submission and Approval of SRO New Derivative Securities Product Rule Filings

Over the years, the Commission has sought to revise the rule filing requirements to meet the changing needs of the SROs in a competitive international marketplace. The Commission previously has responded to the need for flexibility in regulating new derivative securities products by developing streamlined filing procedures to ease the SROs' regulatory burden in many circumstances. Today, the Commission is adopting an amendment to Rule 19b–4 under the Act that expands the scope of SRO matters that do not constitute proposed rule changes to include the listing and trading of new derivative securities products pursuant to existing SRO trading rules, procedures, surveillance programs and listing standards.

1. Standard Statutory Procedures

Section 19(b)(1)[10] of the Act requires an SRO to file with the Commission its proposed rule changes accompanied by a concise general statement of the basis and purpose of the proposed rule change. Once a proposed rule change has been filed, the Commission is required to publish notice of it and provide an opportunity for public comment. The proposed rule change

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[1] Securities Exchange Act Release No. 39885 (April 17, 1998) 63 FR 23584 (April 29, 1998) ("Proposing Release").

[2] 15 U.S.C. 78a *et seq.*

[3] Section 3(a)(26) of the Exchange Act, 15 U.S.C. 78c(a)(26), defines SRO to mean any national securities exchange, registered securities association, registered clearing agency, and for purposes of section 19(b) of the Act, 15 U.S.C. 78s(b), and other limited purposes, the Municipal Securities Rulemaking Board.

[4] 15 U.S.C. 78s.

[5] 17 CFR 240.19b–4.

[6] Sections 3(a)(26), 3(a)(27), 15 U.S.C. 78c(a)(27), 3(a)(28), 15 U.S.C. 78c(a)(28) and section 3(b), 15 U.S.C. 78c(b), of the Act provide that the Commission may promulgate rules regarding, among other things, "stated policies, practices and interpretations" of SROs Section 19(b) authorizes the Commission to promulgate rules regarding "proposed rule changes" of SROs. Section 23(a), 15 U.S.C. 78w(a), of the Act provides that the Commission shall have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of the Exchange Act for which it is responsible or for the execution of the functions vested in it by the Exchange Act, and may for such purposes classify persons, securities, transactions, statements, applications, reports and other matters within its jurisdiction, and prescribe greater, lesser or different requirements for different classes thereof. (See *e.g.*, Securities Exchange Act Release No. 34140 (June 1, 1994) 59 FR 29393 (June 7, 1994)). In addition, in 1996, Congress granted the Commission the authority, under section 36(a), 15 U.S.C. 78mm(a), to exempt any class of person, security or transaction from any provision of the Act. Pub. L. 104–290, 110 Stat. 3416 (1996). The rule adopted today effectively exempts SROs from certain requirements under Section 19(b) of the Act that otherwise would apply to the listing and trading of new derivative securities products.

[7] 17 CFR 240.19b–4(c).

[8] See IV. A. *Definition of "New Derivative Securities Product"*, infra, for a complete discussion of the technical changes to the definition of new derivative securities product in response to commenters' requests for clarification.

[9] See *Text Of The Final Rule*, infra.

[10] 15 U.S.C. 78s(b)(1).

may not take effect unless it is approved by the Commission or is otherwise permitted to become effective under section 19(b) of the Act.[11] Section 19(b)(2)[12] of the Act sets forth the standards and time periods for Commission action either to approve a proposed rule change or to institute and conclude a proceeding to determine whether a proposed rule change should be disapproved. Generally, the Commission must either approve the proposed rule change or institute disapproval proceedings within 35 days of the publication of notice of the filing or within a longer period as the Commission finds appropriate or to which the SRO consents. The Commission must approve a proposed rule change if it finds that the rule change is consistent with the requirements of the Act, and the rules and regulations thereunder, applicable to the SRO proposing the rule change. If the Commission does not make that finding, it must institute proceedings to determine whether to disapprove the proposed rule change. The Commission also may approve a proposed rule change on an accelerated basis prior to 30 days after publication of the notice if the Commission finds good cause for so doing and publishes its reasons for so finding.[13]

Currently, SROs obtain Commission approval of proposals submitted under section 19(b)(2) to adopt listing standards in order to list and trade various derivative securities products, including, but not limited to: narrow-based stock index options[14] and warrants;[15] portfolio depositary receipts ("PDRs");[16] foreign currency options;[17] index fund shares;[18] and equity linked term notes ("ELNs").[19]

2. Recent Efforts To Streamline Procedures for Certain New Derivative Securities Product Rule Filings

Section 19(b)(3) of the Act[20] provides that, in certain circumstances, a proposed rule change may become effective immediately upon filing with the Commission and without the notice and approval procedures required by Section 19(b)(2). Paragraph (A) of Section 10(b)(3) permits certain types of proposed rule changes to take effect in this manner if appropriately designated by the SRO as: (1) Constituting a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO; (2) establishing or changing a due, fee, or other charge imposed by the SRO; or (3) concerned solely with the administration of the SRO. Section 19(b)(3)(A)(iii)[21] also gives the Commission the authority to expand, by rule, the scope of proposed rule changes that may become effective under section 19(b)(3)(A) if the Commission determines that the expansion is consistent with the public interest and the purposes of Section 19(b). Currently, existing Rule 19b–4(e) under the Act[22] details the scope of proposed rule changes that may be filed under section 19(b)(3)(A) of the Act.

For the past several years, the commission has worked with the SROs to develop procedures to streamline the review process of new derivative securities product rule filings. As a result, SROs can submit a proposed rule change in accordance with section 19(b)(3)(A) of the Act for certain proposed new derivative securities products. For example, on June 3, 1994, the Commission approved proposed rule changes submitted by several SROs to establish generic listing standards for options on narrow-based stock indices and to adopt streamlined procedures for introducing trading in options that satisfy these listing standards.[23] In addition, certain SROs have in place rules similar to the streamlined procedures for listing warrants on narrow-based stock indices.[24]

Furthermore, the Commission has approved rules for an SRO that allow for the listing of specific broad-based[25] stock index warrant issuances without further Commission approval pursuant to section 19(b) of the Act, as long as the index has been previously approved by the Commission for broad-based index option trading. In addition, the Commission has approved rules for certain SROs that permit the listing of specific narrow-based[26] stock index warrant issuances without further Commission approval pursuant to section 19(b) of the Act, as long as the listing complies with the SRO's Generic Narrow-Based Index Warrant Approval Orders and the Commission has already approved the underlying stock index for

[11] See generally, Senate Comm. on Banking, Housing & Urban Affs., Report to Accompany S. 249: Securities Acts Amendments of 1975, S. Rep. No. 94–75, 94th Cong., 1st Sess. 22–38 (Comm. Print 1975), reprinted in, (1975) U.S. Code Cong. & Ad. News 179, 200–15 (excerpt on "Self-Regulation and SEC Oversight").

[12] U.S.C. 78s(b)(2).

[13] Section 19(b)(2)(B) of the Act, 15 U.S.C. 78s(b)(2)(B).

[14] See *e.g.*, Securities Exchange Act Release No. 39453 (December 16, 1997), 62 FR 67101 (December 23, 1997) (order approving Chicago Board Options Exchange's, Incorporated) ("Amex" proposal to list and trade options based on the Dow Jones High Yield Select 10 Index). See also, CBOE Rule 24.2.

[15] See *e.g.*, Securities Exchange Act Release No. 39079 (September 15, 1997), 62 FR 49543 (September 22, 1997) (order approving American Stock Exchange's Incorporated ("Amex") proposal to list and trade warrants based on the ING Barings, Inc.'s BEMI Latin America Index ("BEMI Latin America Index Order")). See also, Amex Rules 1100–1110 and Section 106 of the Amex Company Guide.

[16] See *e.g.*, Securities Exchange Act Release No. 31591 (December 11, 1992), 57 FR 60253 (December 18, 1992) (order approving Amex rules to provide for the listing and trading of PDRs, and specifically PDRs based on the Standard and Poors Corporation ("S&P") 500 Index known as SPDRs). See also, Amex Rules 1000–1004.

[17] See *e.g.*, Securities Exchange Act Release No. 36505 (November 22, 1995) 60 FR 61277 (November 29, 1995) (order approving Philadelphia Stock Exchange's, Incorporated ("Phlx") proposal to list and trade dollar-denominated delivery foreign currency options on the Japanese Yen). See also, Phlx Rule 1000.

[18] See *e.g.*, Securities Exchange Act Release No. 36947 (March 8, 1996) 61 FR 10606 (March 14, 1996) (order approving Amex proposal to list and trade index fund shares that are series of the World Equity Benchmark Shares issued by Foreign Fund, Inc. and based on 17 Morgan Stanley Capital International indices). See also, Amex Rules 1000A–1003A.

[19] See *e.g.*, Securities Exchange Act Release No. 32345 (May 20, 1993), 58 FR 30833 (May 27, 1993) (order approving the listing and trading of ELNs on the Amex). See also, Section 107B of the Amex Company Guide.

[20] 15 U.S.C. 78s(b)(3).

[21] 15 U.S.C. 78s(b)(3)(A)(iii).

[22] 17 CFR 240.19b–4(e). As discussed in V. *Technical Changes*, infra, existing Rule 19b–4(e) is being redesignated as Rule 19b–4(f).

[23] Securities Exchange Act Release No. 34157 (June 3, 1994) 59 FR 30062 (June 10, 1994) (order approving generic narrow-based index options listing standards for the Amex, the CBOE, the New York Stock Exchange Incorporated, ("NYSE"), the Pacific Exchange, Inc. ("PCX"), and the Phlx ("Generic Narrow-Based Index Option Approval Order")). Moreover, as of April 28, 1997, the NYSE transferred its options business to the CBOE. See Securities Exchange Act Release Nos. 38541 and 38542 (April 23, 1997) 62 FR 23516 and 23521 (April 30, 1997) (orders approving proposed rule changes by the CBOE and NYSE, respectively, regarding the transfer of the NYSE's options business to the CBOE). These SROs are the only U.S. exchanges that list standardized options products, which are issued, cleared, and settled through The Options Clearing Corporation ("OCC").

[24] Securities Exchange Act Release Nos. 37007 (March 21, 1996) 61 FR 14165 (March 29, 1996) (Amex, CBOE, and Phlx) and 37445 (July 16, 1996) 61 FR 38494 (July 24, 1996) (NYSE) (orders approving uniform listing and trading guidelines for narrow-based stock index warrants ("Generic Narrow-Based Index Warrant Approval Orders")).

[25] Securities Exchange Act Release No. 36296 (September 28, 1995) 60 FR 52234 (October 5, 1995) (order approving the National Association of Securities Dealers', Incorporated ("NASD") proposal to adopt uniform listing and trading guidelines for broad-based index warrants on the NASD's Automated Quotation Stock Market).

[26] Securities Exchange Act Release Nos. 36165 (August 29, 1995) 60 FR 46653 (September 7, 1995) (NYSE); 36166 (August 29, 1995) 60 FR 46660 (September 7, 1995) (PCX); 36167 (August 29, 1995) 60 FR 46667 (September 7, 1995) (Phlx); 36168 (August 29, 1995) 60 FR 46637 (September 7, 1995) (Amex); and 36169 (August 29, 1995) 60 FR 36169 (CBOE) (September 7, 1995) (orders approving uniform listing and trading guidelines for index, currency and currency index warrants).

warrant or options trading. The Commission also has approved rules allowing for the listing of warrants overlying a single currency without a section 19(b) rule filing provided that the underlying currency has been approved for options trading.[27] Moreover, the Commission has approved rules allowing for the listing of warrants overlying a currency index without a section 19(b) rule filing provided the index previously has been approved by thee Commission pursuant to a section 19(b) rule filing.[28]

B. Reasons for Expanding the Scope of SRO Matters That Do Not Constitute Proposed Rule Change

Despite the streamlined procedures discussed above, the Commission believes that, consistent with investor protection, more can be done to speed the introduction of new derivative securities products. Over the years, the Commission has approved numerous SRO trading rules, procedures and listing standards for various classes of new derivative securities products. Based on this experience, the Commission believes that once it has approved, pursuant to section 19(b) of the ACT, an SRO's trading rules, procedures and listing standards for the product class that would include a new derivative securities product, the listing and trading of the new derivative securities product are reasonably and fairly implied by the SRO's existing trading rules, procedures and listing standards.[29]

SRO's are facing increasing competition from overseas and over-the-counter ("OTC") derivatives markets.[30] SROs need to bring new derivative securities products to market quickly to provide investors with tailored products that directly meet their evolving investment needs. Although the existing generic rules have helped to speed the process of reviewing new derivative securities product proposals, the Commission now believes that further changes are warranted. Expanding the scope of SRO matters that do not constitute a proposed rule change to include the listing and trading of certain new derivative securities products will significantly speed the introduction of new derivative securities products and enable SROs to maintain their competitive balance with the overseas and OTC derivative markets. The amendment should foster innovation and create a streamlined procedure for SROs to promptly list new products subject to appropriate trading rules, procedures, surveillance programs and listing standards.

Moreover, the Commission believes that there is less need for SEC review, notice and approval prior to an SRO trading a new derivative securities product pursuant to existing trading rules, procedures, a surveillance program and listing standards. SROs have over 20 years of experience with SEC review of new derivative securities product proposals. SROs that have sought approval from the Commission to list and trade such new derivative securities products are familiar with the factors discussed in this release that must be considered when listing and trading such new derivative securities products. The procedures discussed below will enable the Commission to continue to effectively protect investors and promote the public interest.

III. Summary of Comments

In the proposing Release, commenters were asked whether the proposed amendment provides appropriate review of the listing and trading of new derivative securities products subject to existing trading rules, procedures, surveillance programs and listing standards. Commenters were asked whether more or less information was needed on Form 19b–4(e) for the effective Commission review.[31] The Commission received ten comment letters on the Proposing Release.[32] Commenters generally supported deeming the listing and trading of certain new derivative securities products to not be proposed rule changes pursuant to Rule 19b–4(c)(1). The majority of commenters recommended specific modifications to the Proposed Rule.

First, the Amex questioned what types of securities are covered by the definition of new derivative securities product due to other definitions of "derivative securities," "warrants" and "underlying instruments" in other rules under the Act.[33] The Amex questioned whether the Commission intended to encompass securities under the amendment such as issuer call warrants, convertible securities and continent value rights ("CVRs").[34] The same commenter suggested that "(d)ue to the broad language of the [definition], SROs and issuers will be unable to determine whether the phrase 'any type of option' is limited to 'standardized options'." [35] The commenter also sought clarifications as to whether the qualifier "any type of" applies only to the word "option" or to the entire definition. In addition, the commenter "request[ed] that the term 'hybrid securities product' be defined (in a manner) consistent with the CFTC prior statements and rulemaking." [36] The commenter also asked whether the words "based upon"

[27] Supra note 26.

[28] Supra note 26.

[29] As the Commission noted in the Proposing Release, as is the current practice with equity issues, once an SRO has received approval for its trading rules, procedures and listing standards, the listing and trading of a specific new equity issue is not deemed a proposed rule change that requires a filing under Rule 19b–4 of the Act. Rather, an SRO can immediately list and trade a new equity issue so long as that equity issue satisfies the previously Commission approved trading rules, procedures and listing standards of the SRO.

[30] In order to further promote competition, the Commission has adopted, in a separate release issued today (Securities Exchange Act Release No. 40760 (December 8, 1998)), Rule 19b–5 under the Act that permits SROs to operate new pilot trading systems subject to certain conditions, for a period not to exceed two years, without submitting a Rule 19b–4 filing.

[31] Specifically, the Commission asked whether Form 19b–4(e) should require the SRO to cite its relevant standards under which it has listed a new derivative securities product. Commenters were also asked to discuss whether there were any legal or policy reasons why the Commission should consider a different approach in regulating new derivative securities products. The Commission did not receive any comments on these questions.

[32] The comment letters have been placed in Public File S7–13–98, which is available for inspection in the Commission's Public Reference Room. Commenters consisted of six SROs, two futures markets and one federal agency. See letters from: James E. Buck, Senior Vice President and Secretary, NYSE, dated May 27, 1998, ("NYSE Letter"); Jean A. Webb, Secretary, U.S. Commodity Futures Trading Commission ("CFTC"), dated May 29, 1998 ("CFTC Letter"); Charles J. Henry, President and Chief Operating Officer, CBOE, dated May 29, 1998 ("CBOE Letter"); Thomas R. Donovan, President and Chief Operating Officer, Chicago Board of Trade ("CBOT"), dated May 29, 1998 ("CBOT Letter"); T. Eric Kilcolin, President and Chief Operating Officer, Chicago Mercantile Exchange ("CME"), dated May 29, 1998 ("CME Letter"); James L. Duffy, Executive Vice President and General Counsel, Amex, dated July 2, 1998 ("Amex Letter");' H. Warren Langley, President and Chief Operating Officer, PCX, dated July 6, 1998 ("Amex Letter"); H. Warren Langley, President and Chief Operating Officer, PCX, dated July 6, 1998 "PCX Letter"(); Edity Hallahan, Vice President and Associate General Counsel, Phlx, dated July 24, 1998 ("Phlx Letter"); Alden S. Adkins, Senior Vice President and General Counsel, NASD Regulation, Incorporated "NASDR"), dated July 29, 1998 ("NASD Regulation Letter"); and Joan C. Conley, Corporate Secretary, NASD, dated August 10, 1998 ("NASD Letter"). The NASDR Letter did not contain substantive comments, but rather merely stated that a substantive comment letter would be provided in August 1998 by the NASD. The NASD Letter provided no specific comments except to express that the NASD "fully support(s) the (Proposing Release)." NASD Letter at 2.

[33] Amex Letter at 3–6. See *Text of the Final Rule*, infra, for the complete definition of new derivative securities product.

[34] See also Amex Letter at 19 (requesting a list of SRO rule filings from prior years that would have satisfied the conditions of the amendment).

[35] Amex Letter at 4. See Section IV. D. *Compliance With Other Federal Securities Laws*, infra, for a more detailed discussion of "standardized options."

[36] Amex Letter at 5.

are intended to mean "based in whole" or "based in part."

Second, several commenters asked that the term "product class" be clarified. One commenter was concerned "that, depending upon how the crucial term 'product class' is interpreted, the scope of the Propos(ed Rule) could be so restricted that it would have limited impact on the introduction of new derivative securities products in the listed markets." [37] The CBOE and PCX requested that the Commission "clarify in the adopting release for the rule that the term 'product class' is to be construed broadly, perhaps providing examples of product classes and permissible changes to product class characteristics that would not require a rule filing under section 19(b) of the Act." [38] The CBOE believed that "it is important for the adopting release to make it clear that 'product class' is to be interpreted broadly, so that the Propos(ed Rule) may fulfill its intended purpose of providing meaningful relief to SROs in connection with the introduction of new derivative (securities) products.[39]

Third, several commenters suggested that the Commission broadly interpret what is meant by the phrase "existing SRO trading rules, procedures, surveillance programs and listing standards." One commenter "urge(d) that the Commission be flexible in the degree of specificity it will require for the 'generic' listing standards and that, in adopting the proposal, it provide guidance as to what it will seek in such listing standards." The same commenters proposed "that the required 'generic' standards provide a general description of the type of security authorized for listing, but not contain detailed specifications for the product." [40] Another commenter sought clarification as to whether "a narrow-based index option must meet the current generic criteria index option listing standards." The commenter believed that "more flexible generic listing standards are necessary to accommodate products that do not currently fit the generic option listing standards * * * but do not pose significant new legal or regulatory issues." [41] Another commenter "assume(d) that * * * the Commission would not object to the establishment by SROs of broad ranges or formulas for position limits, margin requirements and other characteristics of (new) derivative securities products in the rules initially filed with the Commission for approval under section 19(b)(2) (of the Act,) thereby allowing SROs to avoid subsequent rule filings and approvals for changes to such rules or procedures that are within the previously approved ranges or formulas." [42]

Fourth, two commenters raised concerns regarding the requirement that SROs "ensure" that certain standards are met before listing and trading a new derivative securities product. One commenters found that the Proposed Rule "appear(ed) to set forth high standards for SROs to satisfy in 'ensuring' that various conditions and requirements are satisfied, even extending to some areas that are beyond the SROs' control, with the suggestion that if some of these conditions and requirements are not met, the SRO would not be able to rely on the proposed amendment, and the listing of products in the absence of section 19(b)(2) filings and approvals would be in violation of the Act." [43] To avoid this possibility, the two SROs suggested that the Commission "acknowledge in the adopting release that certain elements described as conditions in the Proposing Release, such as the requirement to maintain adequate systems capacity, are obligations of the SROs generally, and are not elevated to special status by virtue of the (Proposed Rule.") [44] Such SROs suggested that the Commission "indicate that the SROs may rely on the (Proposed R)ule provided they act in good faith in determining that the requirements of the (Proposed R)ule have been satisfied with respect to a particular product." [45]

Fifth, the Amex had several detailed questions regarding the standards that new derivative securities products in general, and index based new derivative securities products in particular, should meet in order to be consistent with the Act.[46] The Amex sought guidance regarding the requirement of SROs to obtain representations from relevant price reporting authorities regarding the systems capacity for each new derivative securities product.[47] The Amex also sought clarification regarding quotation dissemination for underlying securities not subject to transaction reporting, foreign securities and instruments that are not securities.[48] The Amex also requested more detailed information regarding the requirement that an index underlying a new derivative securities product be constructed according to established criteria for initial inclusion and maintenance of component securites.[49] For example, the Amex desired quanitiable standards regarding the number, weight and liquidity of component securities that an index should include and maintain.[50]

Sixth the Amex raised several detailed questions regarding comprehensive information sharing agreements ("ISAs") with other markets.[51] Specifically, the Amex did not believe that the Commission should require an SRO to obtain the identity of the ultimate purchasers and sellers of securities pursuant to a comprehensive ISA because the Amex represents that, under an ISA, SROs "do not have the authority to obtain information regarding the ultimate purchasers and sellers of securities even with respect to their own members trading in their own markets." [52] In addition, the Amex requested that the Commission provide a list of the comprehensive ISAs and SEC memoranda of understanding ("MOU") with specific countries that SROs may rely upon when listing and trading new derivative securities products.[53] In addition, the Amex believed that "it would be appropriate to interpret the Commission's (ISA) coverage standard (for index based new derivative securities products), if not

[37] CBOE Letter at 3.

[38] CBOE Letter at 7 and PCX Letter at 2.

[39] CBOE Letter at 3.

[40] NYSE Letter at 1 and 2.

[41] Phlx Letter at 1–2.

[42] CBOE Letter at 7–8.

[43] CBOE Letter at 4.

[44] CBOE Letter at 10 and PCX Letter at 2.

[45] PCX Letter at 2.

[46] Amex Letter at 10–12.

[47] Amex Letter at 10.

[48] Amex Letter at 10.

[49] Amex Letter at 6–10. The Amex suggests that, for purposes of classifying an index as broad-based, it is "reasonable and appropriate for SROs to employ" the criteria discussed in the Interpretation and Statement of General Policy issued by the SEC and the CFTC. Securities Exchange Act Release No. 20578 (January 18, 1984) 49 FR 2884 (January 24, 1984) ("Joint Policy Statement").

[50] Amex Letter at 12. See also, Amex Letter at 18 (requesting that Commission provide a detailed list of materials that SROs would need to maintain in order to be in compliance with the amendment) and Phlx Letter at 2. The Phlx believes that "the criteria outlined in the (Proposed Release) require an underlying index." Therefore, the Phlx believes that "many other (new) derivative (securities) products, such as foreign currency options or unit investment trusts (referred to herein as PDRs), do not fall under the standards set forth in the Proposing Release. In addition, the CBOE believes that the Proposing Release does not indicate whether current surveillance procedures are adequate for purposes of Rule 19b–4(e) or whether there are unique issues presented by new derivative securities products that will require new surveillance procedures. CBOE Letter at 4 and 11.

[51] Amex Letter at 14–16. All comments regarding this issue were submitted by the Amex. See Section IV. B. *Information Sharing Agreements*, 1 infra, for a complete discussion of comprehensive ISAs.

[52] Amex Letter at 14.

[53] Amex Letter at 16.

eliminated in its entirety, to call for 50% coverage."[54]

Seventh several commenters raised issues regarding the Proposed Rule's interacdtion with the SEC's review of stock index futures products. The commenters suggested that the Commission "develop an expedited procedure for reviewing applications of futures exchanges to trade stock index futures contracts."[55] Two comments were also concerned that a securities exchange could use its authority under the Proposed Rule to trade a futures contract. These commenters requested that the Proposed Rule "be refined to make certain that no securities exchange could use the proposal to try to trade a futures contract under the guise of a new derivative securities product."[56] Additionally, several commenters sought clarification regarding the implications of a securities exchange categorizing an index as broad-based or narrow-based.[57] One commenter "believe(d) that the SEC should make it clear that the classification decision made by the securities exchange is in no way binding on a later application from a futures exchange to trade futures contracts based on the same index."[58]

Eighth, several commenters asked about the public availability of Form 19b–4(e) filed by an SRO. One commenter noted that "(w)hile the (Proposing) Release is silent on the issue, we assume that (any Form 19b–4(e) filed by an SRO) will be (a) public document." The same commenter suggests that "the Commission could make (any Form 19b–4(e) filed by an SRO) available on its (w)eb site."[59] The CFTC requested that the SEC provide the CFTC "with immediate notice of (new derivative securities products) listed pursuant to (Rule 19b–4(e) in order to permit the CFTC to monitor developments and to make a determination whether any action is necessary."[60]

Ninth, several commenters requested that the Commission take additional steps to enhance the timeliness of the rule filing process under section 19(b) of the Act. One commenter requested that "the Commission make available a list of SRO rule filings from prior years that could have employed (the amendment to Rule) 19b–4."[61] One commenter "recommend(ed) that the Commission consider exercising its authority under section 19(b((3)(A) to permit SRO (new) derivative securities products that do not otherwise qualify under Rule 19b–4(e) (of the Act) to become effective upon filing, subject to the Commission's authority to abrogate such rules pursuant to section 19(b)(3)(C) of the Act."[62] In addition, the commenters believed that "the rule filing process, in general, could be shortened if SRO rules that are submitted to the Commission in proper form were published for notice and comment immediately, or within a set period of time, such as ten business days."[63] On a related issue, at least one commenter believed that amendments to existing derivative securities products, such as splitting an index or changing the exercise style should not require filing a proposed rule change pursuant to section 19(b)(2) of the Act. The same commenter "believe[d] that any modifications to (new) derivative (securities) products should be effective upon filing [an amendment to Form] 19b–4(e)."[64]

IV. Discussion

A. Definition of "New Derivative Securities Product"

In the Proposing Release, the Commission proposed to define "new derivative securities product," for purposes of section 19(b) of the Act and Rule 19b–4 thereunder, to be "any type of option, warrant, hybrid securities product or any other security, the value of which is based upon the performance of an underlying instrument."

As previously noted, at least one commenter requested clarification regarding specific terms used in the definition.[65] Use of such terms in other rules does not govern the terms used in Rule 19b–4(e). The definition of "derivative securities" in Rule 16a–1(c) under the Act "shall apply solely to section 16 and the rules thereunder."[66] Similarly, Rule 12a–4(a) under the Act states that "(w)hen used in this rule, the following terms shall have the meaning indicated." "Warrant" is then defined in Rule 12a–4(a)(1).[67] Finally, the term "underlying instrument" is defined in Rule 15c3–1 for use in computing a broker-dealer's net capital requirements. The Commission also notes that it proposed, and is adopting, the defined term "new derivative securities product" in the amendment to Rule 19b–4 solely for purposes of determining whether an SRO would be required to file a proposed rule change under Section 19(b) of the Act and Rule 19b–4 thereunder.

In response to the Amex's question,[68] the Commission did not intend to include traditional issuer warrants[69] and traditional convertible securities in the definition of new derivative securities product under the amendment to Rule 19b–4.[70] Therefore, SROs that have listing standards, trading rules and procedures approved by the Commission for traditional issuer warrants and traditional convertible securities are not required to submit Form 19b–4(e) when listing specific traditional issuer warrants and traditional convertible securities.

The Commission notes, however, that when CVRs were first developed, the SROs that sought to list them were required to submit for Commission approval CVR listing standards, trading

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[54] Amex Letter at 16.

[55] CME Letter at 2. See also CBOT Letter at 2 and CFTC Letter at 2.

[56] CFTC Letter at 2. See also CME Letter at 2.

[57] For example, the Amex believes "that once a determination is made as to the classification of an index as broad-based or narrow-based, the classification should remain unchanged given the important consequences that flow from the classification." Amex letter at 9.

[58] CME Letter at 3. See also CBOT Letter at 2 noting that the SEC should "independently review a futures exchange's application, not *de facto* abdicate its statutory responsibility to the securities exchanges."

[59] NYSE Letter at 2.

[60] CFTC Letter at 2.

[61] Amex Letter at 19.

[62] CBOE Letter at 12–13. See also Phlx Letter at 2 suggesting that "combined notice and accelerated approval for new [derivative securities] products would further streamline the process by eliminating the time period between notice for comment and approval."

[63] CBOE Letter at 13 and PCX Letter at 2.

[64] Phlx Letter at 2.

[65] See Amex Letter at 3–6, notes 33, 35 and 36, supra.

[66] 17 CFR 240.16a–1 The Commission notes that the definition of "derivative securities" found in Rule 16a–1 is for the purpose of requiring reports disclosing the beneficial ownership of directors, officers and principal stockholders of equity securities registered under 12 of the Act.

[67] Rule 12a–4(a)(1) defines the term "warrant" for purposes of determining whether a warrant is exempt from registration under section 12(a) of the Act.

[68] See Amex Letter at 4, supra note 33.

[69] The Commission believes that traditional issuer warrants do not include such things as third party warrants on individual securities.

[70] In addition, in response to the Amex's request that the Commission define the term "hybrid securities product" (see Amex Letter at 5, note 36, supra), the Commission is aware that the CFTC has issued statements regarding the term "hybrid securities product" for purposes of determining whether a particular product "combines characteristics of futures contracts or commodity options with debt, depository or preferred equity interests." See "Statutory Interpretation Concerning Certain Hybrid Instruments" 55 FR 13582 (April 11, 1990). The Commission understands the Amex's desire to "avoid possible market disruption or uncertainty" (see Amex Letter at 5) when listing new derivative securities products pursuant to the new amendment. The Commission, however, believes that an attempt to establish specific criteria for "hybrid securities products" would unduly limit an SRO's ability to develop new derivative securities products. Rather, the Commission believes that it would be better able to address an SRO's concern regarding the status of a particular "hybrid securities product" if the SRO consulted with the Commission regarding a product's specific characteristics at the time the product is being developed.

rules and procedures.[71] Under the amendment, if an SRO does not have listing standards, trading rules and procedures for CVRs approved by the Commission, such SRO must submit a proposed rule change for Commission approval, under section 19(b), to establish listing standards, trading rules and procedures for the CVR product class, prior to listing CVRs.

The Commission also seeks to clarify that the term "any type of option" is not limited to any type of "standardized option."[72] Rather, the term "any type of option" includes any type of new derivative securities product that is an option such as a third party warrant on an individual security. The Commission also notes that, with the exceptions discussed above, the qualifier "any type of" applies to the entire definition. In addition, the Commission clarifies that the term "based upon" means "based in whole or in part."[73]

The Commission also is revising the proposed definition of new derivative securities product in order to clarify that if a product's value is based, in whole or in part, "upon the interest in" an underlying instrument, such product is included within the term "new derivative securities product." In accordance with these clarifications, the Commission is adopting paragraph (e) of Rule 19b–4 to define "new derivative securities product," for purposes of section 19(b) of the Act and Rule 19b–4 thereunder, to be "any type of option, warrant, hybrid securities product or any other security, the value of which is based, in whole or in part, upon the interest in, or performance of, an underlying instrument."

1. New Derivative Securities Product Must Be a "Security" as Defined in Section 3(a)(10) of the Act

Several commenters expressed concern that the amendment may be interpreted to permit SROs to trade futures contracts.[74] In response, the Commission reiterates its statement that SROs have the authority to list and trade "securities" as defined in section 3(a)(10) of the Exchange Act.[75] The proposed amendment does not provide SROs with any new authority to list a new derivative product that is not a "security." If an SRO sought to trade a new derivative product that is not a "security," such as a futures contract, it would be required to adhere to requirements of the Commodity Exchange Act ("CEA"),[76] or other applicable laws, and the rules and regulations thereunder.[77]

Furthermore, the proposal will only apply to securities SROs. It will not apply to entities that seek designation as contract markets for futures trading on an index or group of securities or to foreign boards of trade that seek to sell their futures contracts to U.S. persons. Under the amendments to the CEA effected by the Futures Trading Act of 1982,[78] section 2(a)(1)(B) of the CEA prohibits any person from offering or selling a futures contract based on "any group or index of such securities or any interest therein based on the value thereof" except as permitted under section 2(a)(1)(B)(ii) of the Act. In response to commenters' suggestions that the Commission develop an expedited procedure for reviewing applications of futures exchanges to trade stock index futures contracts, the Commission will make every effort to continue to review requests in a timely fashion.[79] The CEA requires the CFTC to seek the views of the SEC regarding each such application concerning a stock index and the SEC may object to the designation on the ground that any of the statutory criteria have not been met. Section 2(a)(1)(B) also sets forth a specific timetable for review of contract market designation for index futures by the SEC. These statutory procedures are not affected by the amendment to Rule 19b–4.

2. Scope of the Amendment

An SRO seeking to list a completely new class of derivative securities product must submit a proposed rule change pursuant to section 19(b)(2) of the Act in order to adopt appropriate trading rules, procedures and listing standards for such class. These requirements are intended to promote fair and orderly trading for the class of securities the SRO seeks to trade and protect investors.[80] In response to commenters' concerns that the term "product class" may be interpreted so narrowly that it would prevent effective use of the amendment,[81] the Commission intends that the term be interpreted flexibly. Examples of "product classes" include, but are not limited to: Broad-based index options; broad-based index warrants; narrow-based index options; narrow-based index warrants; foreign currency index options; foreign currency index warrants; PDRs; index fund shares; and ELNs.[82]

An SRO is not required to submit Form 19b–4(e) when listing Market Index Target Term Securities ("MITTS") or Stock Upside Note Securities ("SUNS") overlying an index for which the SRO previously has listed options or warrants pursuant to Rule 19b–4(e) or for which the SRO previously has

[71] See *e.g.* Securities Exchenge Act Release No. 34759 (September 30, 1994) 59 FR 50939 (October 6, 1994) (order approving listing end trading of CVRs, among other things, on the CBOE).

[72] See Section IV. D. *Compliance With Other Federal Securities Laws*, infra, for e more deteiled discussion of "stenderdized options."

[73] As previously steted, the Proposing Release stated that "eny other security, the value of which is besed upon the performence of en underlying instrument" would be defined to be e "new derivative securities product." The Commission believes that inserting the term "in whole or in pert" clarifies the scope of the amendment's coverage.

[74] See note 56, supre.

[75] 15 U.S.C. 78(c)(1)(j). The term "security" as defined in section 3(e)(10) of the Exchange Act, includes, among other instruments, "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or priviiege entered into on a national securities exchange relating to a foreign currency, or in general, any instrument commonly known es a 'security'."

[76] 7 U.S.C. 1 *et seq.*

[77] In response to the CFTC's request that the Commission provide the CFTC with immediate notice of new derivative products listed pursuant to the amendment (see CFTC Letter at 2, supre note 60), the Commission notes, as it previously stated in the Proposing Release, thet when en SRO submits treding rules, procedures end listing stendards for e particular product class to the Commission for approval pursuent to section 19(b) of the Act, the Commission publishes notice of the proposed rule change end provides en opportunity for public comment. It is during this period that interested parties, including the CFTC end futures markets, may comment upon such issues as the characteristics of the specific product class, including whether or not they believe the product class has attributes of e futures contract. In eddition, the Commission reminds commenters that it stated in the Paperwork Reduction Act section of the Proposing Release and the Instructions for Completing Form 19b–4(e) that the public hes eccess to the information conteined in Form 19b–4(e). The Commission now clarifies that upon being filed by en SRO, Form 19b–4(e) will be publicly available through the Commission's Public Reference Room. In addition, the Commission will endeavor to make the Forms evaileble on the Commission's web site (see NYSE Letter at 2, supra note 59 end Proposing Release, supra note 1).

[78] 7 U.S.C. 2(a)(1)(B).

[79] See note 55, supra.

[80] The Commission notes that several exchanges heve edopted listing standard categories termed "other securities." These standards were adopted to ellow the listing of securities that contain features borrowed from more then one category of currently listed securities, such es hybrid new derivative securities products that have characteristics of both common stock end debt securities. The Commission has clearly stated end reiteretes its belief that such standards "are not intended to accommodate the listing of securities that raise significant new regulatory issues, end, therefore, would require a separate filing with the Commission pursuent to Rule 19b–4 under the Act." Securities Exchange Act Release No. 28217 (July 18, 1990) 55 FR 30056 (July 24, 1990). Accordingly, an SRO could not avoid the requirement of edopting appropriate listing stendards in order to rely on the amendment for a novel new derivative securities product by simply listing such product under the "other security" category.

[81] See note 39, supra.

[82] See notes 14, 15, 16, 17, end 18, supra.

received Commission approval under section 19(b) for option or warrant trading, provided that the SRO has received Commission approval under section 19(b) to establish listing standards for "other securities." [83] The listing of MITTS or SUNS on such indices does not raise any new regulatory issues that the Commission had not previously considered. If, however, an SRO sought to list MITTS or SUNS overlying an index for which the SRO had not previously listed options or warrants pursuant to Rule 19b–4(e) or for which the SRO had not previously received Commission approval under section 19(b) for option or warrant trading, such SRO would be required to: Receive Commission approval for trading rules, procedures and listing standards for MITTS or SUNS product classes; or consult with the Commission, prior to listing an individual MITTS or SUNS, in order to determine whether such new individual MITTS [84] or SUNS [85] raised any new regulatory issues that would preclude the SRO from relying on its "other securities" listing standards and therefore require a proposed rule change pursuant to section 19(b).

Commenters sought guidance regarding the specific criteria that should be included in trading rules, procedures and listing standards.[86] The Commission, however, has determined not to specify criteria in this release. Rather, the Commission believes that it would be better able to provide assistance to an SRO in establishing specific criteria after an SRO has considered what trading rules, procedures and listing standards best suit its need and has submitted a proposed rule change under section 19(b) to the Commission for its review.[87]

In addition, several commenters raised concerns regarding how the term existing SRO "trading rules, procedures, surveillance programs and listing standards" should be interpreted. Trading rules, procedures, surveillance programs and listing standards for specific product classes should be flexible enough to permit innovation within a product class while maintaining compliance with section 6(b)(5) of the Act which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, and in general, to protect investors and the public interest. For example, the Commission has approved trading rules, procedures and listing standards for generic narrow-based index options.[88] An SRO can use these trading rules, procedures and listing standards to list and trade narrow-based index options or it can submit new trading rules, procedures and listing standards for narrow-based index options to the Commission for approval pursuant to section 19(b).[89] With regard to product classes that currently do not have trading rules, procedures and listing standards, as one commenter suggests, the Commission generally would encourage SROs to establish ranges or formulas for position limits, margin requirements and other characteristics of new derivative securities products.[90]

Procedures include, but are not limited to, adequate procedures relating to sales practices (including suitability), margin and disclosure requirements. The SRO also must have a surveillance program adequate to monitor for abuses in the trading of the new derivative securities product, including trading in the underlying security or securities. Once an SRO has submitted, and the Commission has approved, a section 19(b)(2) proposal to establish an appropriate regulatory framework for a new class of new derivative securities product, the SRO would qualify under the amendment for further new derivative securities products under the same class. For example, if an exchange without any options rules sought to trade options, it would first need to file a rule change, pursuant to Rule 19b–4, to adopt appropriate trading rules, procedures and listing standards that apply to options. In addition, the amendment does not relieve an SRO from its obligation to submit a proposed rule change when amending existing listing standards for particular classes of securities.

B. Standards for All New Derivative Securities Products

The amendment is based upon the experience that the Commission has obtained through its review of new derivative securities product proposals by the SROs. Over the years, the Commission has identified the criteria it believes new derivative securities product proposals must meet in order to be consistent with the Act.[91] Two commenters were concerned that the standards discussed in the Proposing Release have always been obligations of the SROs generally, and should not be elevated to a special status under the amendment.[92] The Commission does not intend to revise standards that SROs currently are required to maintain, such as adequate systems capacity, to be

[83] See Amex Letter at 6.

[84] See *e.g.*, Securities Exchange Act Release No. 32840 (September 2, 1993) 58 FR 47485 (September 9, 1993) (order approving NYSE proposal to list and trade global telecommunications MITTS). See also, Section 703.19 of the NYSE Listed Company Manual.

[85] See *e.g.*, Securities Exchange Act Release No. 35886 (June 23, 1995) 60 FR 33884 (June 29, 1995) (order approving Amex proposal to list and trade SUNS on the Lehman Brothers European Stock Basket). See also, section 107 of the Amex Company Guide.

[86] See note 40, supra.

[87] The Commission does not believe, however, that the SROs that currently have the authority to list standardized options could list broad-based index options pursuant to Rule 19b–4(e) without first receiving Commission approval under section 19(b) for listing standards for a broad-based index option class. See, Section IV. C. 1. *Designation Of Index As Broad-Based Or Narrow-Based*, infra.

[88] See note 23, supra.

[89] The Commission notes that the Generic Narrow-Based Index Option Approval Order was drafted to require a filing under section 19(b)(3)(A) of the Act for Commission approval if an SRO sought to list and trade options that satisfied the criteria of the Generic Narrow-Based Index Option Approval Order. Therefore, in order to rely on the amendment adopted today and not submit filings pursuant to section 19(b)(3)(A) for options that satisfy the criteria of the Generic Narrow-Based Index Option Approval Order, and SRO could submit a proposed rule change for Commission approval to eliminate the section 19(b)(3)(A) rule filing requirement from its existing rules (see *e.g.* CBOE Rule 24.2). In the alternative, an SRO could submit a proposed rule change to the Commission for approval of completely new listing standards, trading rules and procedures in order to rely on the amendment to Rule 19b–4 for purposes of listing and trading narrow-based index options.

[90] In response to commenters' request that SROs be permitted to submit proposed rule changes that are effective immediately upon filing, pursuant to section 19(b)(3)(A), in order to list and trade new derivative securities that do not satisfy the provisions of Rule 19b–4(e) (see CBOE Letter at 12–13 and Phlx Letter at 2, supra note 62), the Commission must consider investor protection when determining such a request. In order to utilize Rule 19b–4(e), an SRO must have in place adequate trading rules, procedures, surveillance programs and listing standards that pertain to the class of securities covering the new product. Because a proposed rule change submitted pursuant to section 19(b)(3)(A) is effective immediately upon filing and is not subject to Commission review and approval, the Commission is concerned that the approach suggested by commenters could be used as an attempt to list and trade new derivative products without developing adequate listing standards, trading rules and procedures for such products. As a result, the Commission believes that it would not be appropriate in the public interest to permit SROs to submit proposed rule changes that are effective immediately upon filing, pursuant to section 19(b)(3)(A), in order to list and trade new derivative securities that do not satisfy the provisions of Rule 19b–4(e).

[91] The Commission wishes to clarify, in response to commenters' concerns, that the criteria discussed in Section IV. B. *Standards For All New Derivative Securities Products* applies to all new derivative securities products including index based new derivative securities products. The criteria in Section IV. C. *Additional Standards For Index Based New Derivative Securities Products*, infra, applies only to index based new derivative securities products. See Phlx Letter at 2, supra note 50. Accordingly, an SRO can utilize the amendment for non-index based and index-based new derivative securities products provided that the applicable criteria are satisfied.

[92] See note 44, supra.

raised to a more important level under the amendment.

Additionally, these commenters noted that some requirements described in the Proposing Release, such as the functional separation between the trading desk of a broker-dealer and the research persons responsible for maintaining an index underlying a new derivative securities product, extend beyond the control of SROs.[93] As a result, these commenters believe that SROs should not be held to a higher standard than what they are currently held to, for the failure of unaffiliated entities to satisfy certain requirements of the amendment.[94] The Commission does not intend to impose new surveillance requirements on SROs through this amendment. Rather, the Commission believes that SROs should continue to obtain written representations, as they currently do, that the broker-dealer has procedures in place that provide for a functional separation between the trading desk and research department of the broker-dealer and that ensure compliance with the functional separation.

Therefore, in order to rely on the amendment, an SRO should determine, in a manner consistent with the standards that have been required of SROs in the past,[95] that each new derivative securities product meets the criteria for: Design and maintenance of the instruments or index underlying the new derivative securities product; customer protection rules; surveillance of the component securities; and the potential market impact of the new derivative securities product.[96] Specifically, an SRO should determine that it has adequate information sharing agreements, clearance and settlement procedures, systems capacity and transaction reporting procedures for underlying securities.

1. Information Sharing Agreements

In designing a new derivative securities product, the SRO should determine that it has adequate information sharing procedures to detect and deter potential trading abuses. It is essential that the SRO have the ability to obtain the information necessary to detect and deter market manipulation, illegal trading and other abuses involving the new derivative securities product. Specifically, there should be a comprehensive ISA that covers trading in the new derivative securities product and its underlying securities in place between the SRO listing or trading a derivative product and the markets trading the securities underlying the new derivative securities product.[97] Such agreements provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.

For new derivative securities products based upon domestic securities, the SRO should determine that the markets upon which all of the U.S. component securities trade are members of the Intermarket Surveillance Group ("ISG").[98] The ISG was formed to coordinate, among other things, effective surveillance and investigative information sharing arrangements in the stock and options markets.[99] For new derivative securities products based on securities from a foreign market, the SRO should have a comprehensive ISA with the market for the securities underlying the new derivative securities product. The SRO should determine that there are no blocking or secrecy laws in the foreign country that would prevent or interfere with the transfer of information under the comprehensive ISA.[100] If securing a comprehensive ISA is not possible, the SRO should contact the Commission prior to listing the new derivative securities product. In such instances, the Commission may determine that it is appropriate instead to rely on an between the Commission and the foreign regulator.[101]

For a new derivative securities product overlying an instrument with component securities from several countries, the Commission recognizes that it may not be practical in all instances to secure comprehensive ISAs with all of the relevant foreign markets. Foreign countries' securities or ADRs that are not subject to a comprehensive ISA should not represent a significant percentage of the weight of such an underlying instrument.[102] The Commission recognizes that commenters sought guidance regarding the percentage of comprehensive ISA coverage standard for index based new derivative securities products.[103] The Commission is not specifying thresholds for ISA coverage. Rather, the Commission will provide assistance to an SRO in formulating the appropriate percentage of comprehensive ISA coverage after an SRO has considered what standard best suits the needs of a specific product class and has submitted a proposed rule change for Commission approval in order to establish listing

[93] See note 43, supra. See also Section IV. C. 4. *Functional Separation Letter*, infra.

[94] The Proposing Release proposed that SROs "ensure" that the standards discussed below were satisfied in order to rely on the amendment.

[95] The Commission notes that an SRO currently must determine that a new derivative securities product satisfies the SRO's listing standards, trading rules and procedures, prior to listing such new derivative securities product. The Commission seeks to clarify that the standard for listing a new derivative securities product under new Rule 19b–4(e) is no different.

[96] As discussed in Section IV. G. *Compliance With The Proposed Amendment*, if an SRO has not complied with the standards, the SRO will not be permitted to rely on the new rule 19b–4(e).

[97] In response to the Amex's comments regarding an SRO's ability to obtain the identity of the *ultimate* purchasers and sellers of securities pursuant to a comprehensive ISA, (See Amex Letter at 14, supra note 52), the Commission believes that a comprehensive ISA should require that the parties provide each other, upon request, information about market trading, clearing activity and customer identity necessary to conduct an investigation.

[98] See ISG Agreement, dated July 14, 1983, amended January 20, 1990. The ISG members are: the Amex; the Boston Stock Exchange, Incorporated; the CBOE; the Chicago Stock Exchange, Inc.; the Cincinnati Stock Exchange, Incorporated; the NASD; the NYSE; the PCX; and the Phlx. The major stock index futures exchanges joined the ISG as affiliate members in 1990.

[99] The Commission anticipates that systems that currently are not national securities exchanges, or systems that have not yet been developed, may register as national securities exchanges, and therefore be regulated as an SRO, as a result of the companion release adopted today (see Securities Exchange Act Release No. 40760 (December 8, 1998), supra note 30). Therefore, if a new SRO trades component securities underlying a new derivative securities product and is not a member of the ISG, the SRO seeking to list and trade such new derivative securities product pursuant to Rule 19b–4(e) should enter into a comprehensive ISA with the non-ISG SRO. Conversely, if a new SRO seeks to list and trade a new derivative securities product pursuant to Rule 19b–4(e) and is not a member of the ISG, such SRO should enter into a comprehensive ISA with each SRO that trades securities underlying the new derivative securities product.

[100] The Commission believes that in order for an SRO to determine that a foreign country has no blocking or secrecy laws that would prevent or interfere with the transfer of information pursuant to a comprehensive ISA, an SRO can obtain written verification in the comprehensive ISA or in a separate letter.

[101] An MOU provides a framework for mutual assistance in investigatory and regulatory matters. Generally, the Commission has permitted an SRO to rely on an MOU in the absence of a comprehensive ISA only if the SRO receives an assurance from the Commission that such an MOU can be relied on for surveillance purposes and includes, at a minimum, the transaction, clearing and customer information necessary to conduct an investigation. See Securities Exchange Act Release No. 35184 (December 30, 1994) 60 FR 2616 (January 10, 1995) (order approving the listing and trading of warrants on the CBOE overlying the Nikkei Stock Index 300 where there was no comprehensive ISA between the CBOE and the underlying market, the Tokyo Stock Exchange but there was an MOU between the SEC and the Japanese Ministry of Finance). In addition, an SRO should endeavor to develop comprehensive ISAs with foreign exchanges that trade the underlying securities of an index even if the SRO receives prior Commission approval to rely on an MOU in place of a comprehensive ISA.

[102] If, however, a foreign security had more than 50% of its global trading volume in dollar value in U.S. markets, the Commission, in the past, has treated such security as a U.S. security.

[103] See Amex Letter at 16, supra note 54.

standards that includes the percentage of comprehensive ISA coverage.[104]

As previously stated, commenters sought clarification regarding the validity of comprehensive ISAs and MOUs with specific foreign countries in order not to contact the Commission prior to listing new derivative securities products.[105] The Commission notes that a current comprehensive ISA or MOU may not be valid in the future due to political or legal changes in a particular foreign country. Therefore, while the Commission understands the SROs' desire for certainty, it does not believe that it is prudent to provide a list of currently comprehensive ISAs and MOUs that may be invalid at the future time an SRO seeks to list a new derivative securities product.[106] An SRO may, however, contact the Commission, at any time, as it develops new derivative securities products to clarify that relevant comprehensive ISAs and MOUs are still valid and to inquire if any new comprehensive ISAs or MOUs have been determined to be valid. In addition, the Commission will continue to work with the SROs, as it has in the past, to develop MOUs with countries in which SROs are unable to sign comprehensive ISAs.

2. Clearance And Settlement

The calculation of the settlement value for the new derivative securities product should be clear, fixed and objective. In order to minimize market impact concerns, a new derivative securities product overlying an index of U.S. securities generally should be settled based on opening prices of the component stocks. If opening price settlement is not utilized, the settlement value should reflect the last available closing prices prior to settlement for the underlying securities or some alternative objective settlement measurement. If the new derivative securities product is settled in foreign currency, a recognized exchange rate should be used to convert the settlement value into U.S. dollars. In addition, the SRO should determine that adequate clearance procedures have been established for the new derivative securities product.

3. Systems Capacity For New Derivative Securities Products

It is essential that the SRO and the applicable authority responsible for collecting last sale data have adequate systems processing capacity to accommodate the listing and trading of a new derivative securities product. The SRO should, prior to listing a new derivative securities product, determine that it has adequate systems processing capacity to accommodate the new listing and obtain a representation from the applicable authority responsible for collecting "last sale data" that such authority also has adequate systems processing capacity.[107]

In addition, in most circumstances, when the new derivative securities product is index based, an index value should be disseminated frequently and, if based on U.S. equities only, should reflect last-sale prices. If an index is composed of both U.S. and foreign securities, prices for all securities that trade on markets that are open during U.S. trading hours should be disseminated promptly, and if practicable, at least every 15 seconds. Dissemination of an index value based in whole or in part on closing prices of component securities should occur only for those component securities where the underlying markets are closed during U.S. trading hours (the disseminated index value may still be adjusted for currency fluctuations) or the underlying component value itself is not calculated real-time (*e.g.*, indices of open-end mutual funds that report net asset value at the close of trading).[108] Certain indices may use quotes (*e.g.*, a bond index) if last sale prices are unavailable and the quotes are reliable and spread across multiple dealers.

4. Transaction Reporting of Underlying Instruments

In order to prevent manipulation and ensure liquidity of instruments underlying a new derivative securities product, underlying equity securities should be listed on a national securities exchange or traded through the facilities of a national securities association or otherwise subject to real-time public transaction reporting.[109] For securities that are not subject to transaction reporting (*e.g.*, municipal securities), there should be an objective means of capturing price information through disseminated quotations.[110]

In response to the Amex's request for clarification regarding the reporting requirements of underlying instruments, the Commission believes that, in order to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest, underlying foreign securities also should be subject to real-time transaction reporting for an SRO to avail itself of Rule 19b–4(e). For individual foreign securities underlying a new derivative securities product, an SRO should determine that such securities satisfy and maintain all criteria described in this release including the transaction reporting requirement. In the case of multiple foreign securities underlying a new derivative securities product, the Commission believes that no more than a *de minimis* percentage of the weight of the underlying foreign securities should be non-real-time reported. In the case of underlying instruments that are not securities, such as foreign currencies, the Commission believes that the same investor protection concerns are applicable and therefore the SROs should endeavor to satisfy the standards set forth above.[111]

[104] See *e.g.*, Securities Exchange Act Release No. 40157 (July 1, 1998) 63 FR 37426 (July 10, 1998) (order approving the listing and trading of options on PDRs and index fund shares on the Amex) for a discussion of an appropriate percentage of comprehensive ISA coverage for the specific product class of options on PDRs and index fund shares.

[105] See Amex Letter at 16, supra note 53.

[106] In addition, the Commission seeks to clarify that if an SRO lists a new derivative securities product involving a comprehensive ISA that is valid at the time the SRO relies on Rule 19b–4(e) but subsequently becomes invalid due to political or legal changes in the foreign country, the SRO should contact the Commission to determine what actions should be taken.

[107] The Commission notes that the language in the Proposing Release required SROs to obtain representations regarding systems capacity from applicable price reporting authorities. The Commission has revised the language to require an SRO to obtain a representation from the applicable authority responsible for collecting "last sale data," as that term is defined in Rule 11Aa3–1 under the Act. Based on comments received in response to the Proposing Release (see Amex Letter at 10, supra note 47), the Commission believes that the previous language could be interpreted to be limited only to standardized index options. As a result, the Commission believes that this revision is appropriate in order to encompass all new derivative securities products that an SRO may list and under the amendment to Rule 19b–4.

[108] Securities Exchange Act Release No. 39244 (October 15, 1997) 62 FR 55289 (October 23, 1997).

[109] The Commission notes that this section in the Proposing Release generally referred to underlying securities. Based on comments received, the Commission has revised this section to include all underlying instruments, such as foreign currencies underlying a new derivative securities product (see Amex Letter 10, supra note 48).

[110] In the case of securities that are not subject to real-time transaction reporting (*e.g.*, municipal securities), bids and offers disseminated by dealers through electronic means, provided that services are generally used by industry participants and contain a reasonable number of bids and offers entered with reasonable frequency, may be used as an objective means of capturing price information through disseminated quotations (see Amex Letter at 10, supra note 48). See generally, Securities Exchange Act Release No. 39495 (December 29, 1997) 63 FR 585 (January 6, 1998).

[111] See Amex Letter at 10, supra note 48. See also, BEMI Latin America Index Order, supra note 15.

C. Additional Standards for Index Based New Derivative Securities Products

In addition to the items discussed above, in order to rely on Rule 19b–4(e), SROs should determine that if a new derivative securities product is index based: The index is classified properly as broad-based or narrow-based; the index is constructed according to established criteria for initial inclusion of new component securities; the index is maintained so that it measures the same segment of the market as originally intended; the index value is disseminated frequently; component securities that fail to meet the maintenance criteria are replaced according to established policies and procedures; and when the index is maintained by a broker-dealer, a functional separation exists between the broker-dealer's trading desk and research department.

1. Designation of an Index as Broad-Based or Narrow-Based

An SRO should first classify the underlying index as narrow-based (*i.e.*, containing securities from a specific industry sector or comprising a small group of securities) or broad-based (*i.e.*, a larger group of securities that is representative of the entire market or a substantial portion of the entire market).[112] In order to make a determination that an index is broad-based, the SRO should identify how the index represents the overall stock market or a substantial portion thereof. The SRO should undertake an analysis of the basis for such a determination. A mere conclusion by the SRO that an index has been designated as broad-based is not determinative of the status of the index.

For example, SROs need listing standards for broad-based index option classes even if they have been approved previously for a specific broad-based index option. Listing standards for specific broad-based index options have been determined on a case-by-case basis when such an SRO submits a section 19(b) rule filing and the Commission approves such filing.[113] In order for an SRO to avail itself of new Rule 19b–4(e) to trade broad-based index options, an SRO would need to propose general criteria for Commission review and approval for classifying indices as broad-based under Section 19(b) of the Act.[114]

As previously stated, commenters have concerns regarding the implications on the futures markets of a securities exchange categorizing an index as broad-based or narrow-based.[115] The Commission is required, under section 2(a)(1)(B) of the CEA, to analyze the composition of an index underlying a stock future in order to determine whether such index is broad-based. By its own terms, the CEA does not apply to index based derivative securities products that trade on securities SROs. Accordingly, when an SRO utilizes new Rule 19b–4(e) to list an index based new derivative securities product, the CEA will not be applicable. When the Commission reviews proposed listing standards for index based derivative securities products, it must find that such standards are consistent with the Exchange Act. The Commission also notes that, when it reviews a stock index for futures trading, the Commission is not bound by the determination of an SRO regarding the classification of an index as broad-based or narrow-based.

2. Initial Inclusion Standards and Maintenance Criteria for Index Components

The index underlying a new derivative securities product should be constructed according to established criteria for initial inclusion of new component securities. SROs seeking to rely on the proposed amendment should employ objective index construction standards that include a minimum number of component securities and a fixed and objective weighting methodology (*e.g.*, capitalization weighted, price weighted, equal-dollar weighted or modified equal-dollar weighted).[116] In addition, SROs must determine that the index construction standards applied to the underlying securities provide sufficient liquidity to reduce the potential for manipulation of the index's component securities. For example, the index construction criteria should include, among other things, a minimum price, available capitalization, average daily trading volume and value of each component security and establish a maximum relative weight for the top component and the five largest components. Maintenance criteria should be designed to provide that an index that has derivative products overlying it continues to measure the same segment or sector of the market as originally intended, remains composed of liquid securities, and does not become dominated by one (or a few) component(s).[117]

The Commission recognizes that commenters to the Proposing Release sought detailed information regarding the initial inclusion and maintenance of component securities and quantifiable standards regarding the number, weight, and liquidity of component securities that an index should maintain.[118] The Commission, however, has determined not to impose specific criteria on SROs regarding derivative securities products discussed in this release. The specific criteria should be based on the trading rules, procedures and listing standards that best suit the needs of a particular class of new derivative securities products and discussed with the Commission when a proposed rule change is submitted to the Commission for its review.[119]

3. Component Changes

SRO listing standards should provide that component securities that fail to meet the index maintenance standards

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[112] Such a classification is necessary because regulatory requirements such as position limits and margin levels are different for narrow-based and broad-based index options. See *e.g.*, CBOE Rules 24.4, 24.4A and 24.11.

[113] The Commission does not believe, for example, that, absent a Commission approval order under Section 19(b) establishing specific criteria for a particular index, CBOE Rule 24.2 regarding "Designation of an Index" provides adequate listing standards for a broad-based index option class. CBOE Rule 24.2 states that "the component securities of an index option contract need not meet the requirements of Rule 5.3 (Criteria for Underlying Securities). The listing of a class of index options on a new underlying index will be treated by the (CBOE) as a proposed rule change subject to filing with and approval by the (SEC) under section 19(b) of the Act." Similarly, the Commission does not believe that, absent a Commission approval order under section 19(b) establishing specific criteria for a particular index, Amex Rule 901(C) regarding "Designation of Stock Index Options" provides adequate listing standards for a broad-based index option class.

[114] The Commission does not believe that it is "reasonable and appropriate for SROs to employ" the criteria discussed in the Joint Policy Statement (Amex Letter at 6–10, supra note 49) for purposes of classifying an index as broad-based. Rather, the Commission believes that an SRO should develop specific listing standards, trading rules and procedures that the SRO believes adequately address the needs of a particular class of new derivative securities and submit such listing standards, trading rules and procedures as a proposed rule change for Commission review under section 19(b) of the Act. Supra note 87.

[115] See CME Letter at 3, supra note 58 and Amex Letter at 9, supra note 57.

[116] *See* Generic Narrow-Based Index Option Approval Order, supra note 23 and Generic Narrow-Based Index Warrant Approval Orders, supra note 24.

[117] Id.

[118] *See* Amex Letter at 11, supra note 49 and Amex Letter at 12, supra note 50.

[119] If an SRO wanted to ensure that amendments to existing and new derivative securities products, such as splitting an index or changing the exercise style (see Phlx Letter at 2, supra note 64), would not be considered to be proposed rule changes, such SRO could, for example, include such types of amendments as part of its Rule 19b–4 filing for Commission review and approval of the listing standards, trading rules and procedures for the relevant class of derivative securities products. In this way, an SRO could notify the Commission of such changes by submitting Form 19b–4(e).

be replaced within the index according to established policies and procedures for reviewing and replacing such component securities. Automatic rebalancing of index components also should occur according to established policies and procedures *(e.g.,* annually, semi-annually or quarterly). Notice of component changes should be disseminated to news vendors and the public. SROs also should determine that components are replaced promptly in the event of specified circumstances such as corporate mergers or spin-offs.

4. Functional Separation Letter

When the index is maintained by a broker-dealer or an affiliate of a broker-dealer, the SRO's listing standard should include a requirement that the SRO obtain a letter from the broker dealer representing that, prior to the listing of a new derivative securities product, there will be a functional separation, such as a firewall, between the trading desk of the broker-dealer and the research persons responsible for maintaining the index. In addition, the broker-dealer should represent that it has in place procedures to ensure compliance with the functional separation. A fire wall is a mechanism by which employees responsible for constructing and maintaining the index are separated from employees involved in the sale and trading of securities. The persons responsible for maintaining an index should be subject to certain procedures limiting the dissemination of index information within the broker-dealer and particularly should be prohibited from relaying any information concerning a potential change to the components of the index to anyone not responsible for maintaining the index, including employees of the sales and trading department.[120]

D. Compliance With Other Federal Securities Laws

The Commission notes that the amendment does not relieve SROs from any obligation under the federal securities laws, or rules or regulations thereunder, except the requirement of filing a proposed rule change pursuant to section 19(b) of the Act and Rule 19b–4 thereunder. For example, Form S–20 [121] under the Securities Act of 1933, as amended ("Securities Act"),[122] and Rule 9b–1 [123] under the Exchange Act establish a disclosure framework specifically tailored to the informational needs of investors in "standardized options" [124] that are traded on an "options market".[125] Under Rule 9b–1, broker-dealers must provide an updated copy of the options disclosure document ("ODD") [126] to each customer at or prior to the approval of the customer's account for trading in standardized options.[127] Accordingly, when trading a new standardized option, an SRO must determine if it should change the ODD to reflect specific characteristics and risks associated with the new derivative securities product not currently set forth in the ODD and submit such changes to the Commission. In addition, a particular new derivative securities product may need to be designated as a standardized option under Rule 9b–1 in order to use the ODD.[128] If the proposing SRO and the issuer of the new derivative securities product determine that such steps are necessary, they are required to submit proposals to the Commission, under Rule 9b–1, prior to listing the new derivative securities product.

The Commission notes that the amendment to Rule 19b–4 may still be available if an SRO determines that the above steps are necessary. So long as all conditions to the amendment are met, including the existence of appropriate current listing standards for the new product, the SRO may immediately list the new derivative securities product without a Section 19(b) rule filing after the Commission designates the particular new product as a "standardized option" and approves the Rule 19b–1 filing of amendments to the ODD.

In addition to Form S–20 and Rule 9b–1, the Commission notes that other federal securities laws must be complied with even when an SRO relies on the amendment to Rule 19b–4. For example, issuers of new derivative securities products must continue to comply with, among other things, the registration requirements of the Securities Act and in addition, if a product is an investment company [129] regulated under the Investment Company Act of 1940, as amended ("ICA"),[130] the product must comply with the ICA.

E. Existing Trading Rules, Procedures, Surveillance Programs and Listing Standards

An SRO wishing to list a new derivatives securities product should have in place trading rules, procedures, a surveillance program and listing standards that pertain to the class of securities covering the new product.[131] The Amex, CBOE, NYSE,[132] PCX, and Phlx are the only SROs that currently have in place trading rules, position limits, margin requirements and internal surveillance programs that pertain to the listing and trading of narrow-based stock index options.[133] Should another exchange desire to trade narrow-based index options, it would first have to submit a proposed rule change to the Commission adding relevant trading rules, procedures and listing standards to its rules. Procedures include, but are not limited to, adequate procedures relating to sales practices (including suitability), margin and disclosure requirements. Otherwise, the SRO would be in violation of sections 6(b) and 19(b) of the Act which are intended to ensure fair and orderly trading markets. The SRO also must have a surveillance program adequate to monitor for abuses in the trading of the new derivative securities product,

[120] Supra notes 43 and 93. See also, Section IV. B. *Standards For All New Derivative Securities Products,* supra.

[121] 17 CFR 239.20. Form S–20 is used to register classes of options under the Securities Act.

[122] 15 U.S.C. 77a *et seq.*

[123] 17 CFR 240.9b–1.

[124] "Standardized options" are options contracts trading on a national securities exchange, an automated quotation system of a registered securities association or a foreign securities exchange which relate to options classes the terms of which are limited to specific expiration dates and exercise prices or such other securities as the Commission may, by order, designate. 17 CFR 240.9b–1(a)(4).

[125] "Options market" means a national securities exchange, an automated quotation system of a registered securities association or a foreign securities exchange on which standardized options are traded. 17 CFR 240.9b–1(a)(1).

[126] The ODD identifies the issuer and describes the uses, mechanics and risks of options trading and other matters in language that can be easily understood by the general investing public

[127] The ODD may be used as a substitute for the traditional prospectus.

[128] See Securities Exchange Act Release No. 31920 (February 24, 1993) 58 FR 12280 (March 3, 1993) (order approving CBOE proposal to list and trade FLEX Options based on the S&P's 500 and 100 Stock Indices).

[129] See *e.g.,* Investment Company Act Release No. 21979 (December 30, 1997) (exemptive order under the ICA permitting the trading of a PDR on the Amex based on the Dow Jones Industrial Average known as DIAMONDS℠ Trust).

[130] 15 U.S.C. 80a *et seq.*

[131] The Commission notes that in the companion release adopted today (supra note 30), SROs are permitted to operate pilot trading systems, subject to certain conditions, for up to two years, without submitting a Rule 19b–4 filing to establish, among other things, trading rules and procedures for the pilot trading system. The Commission believes that it would not be appropriate in the public interest to permit an SRO to list and trade new derivative securities products that either have not been approved under section 19(b) of the Act or do not meet the criteria of Rule 19b–4(e).

[132] Although the NYSE transferred its options business to the CBOE, supra note 23, the NYSE still has listing standards for narrow-based index options in its rules. See also note 89, supra.

[133] See e.g., Amex Rules 900c through 980C; CBOE Rules 24.1 through 24.8; and PCX Rules 7.1 through 7.18.

including trading in the underlying security or securities.[134]

SROs that have the appropriate regulatory framework in place for a specific class of new derivative securities product could immediately list such class of new derivative securities product, provided the particular SRO satisfies the conditions of Rule 19b–4(e).[135] In response to Proposing Release comments, if an SRO sought to alter position limits, margin requirements, or any other rules or procedures for a new derivative securities product class, however, it would be required to submit a section 19(b)(2) rule filing for Commission review.[136] The SRO could apply such proposed rule changes to a new product only after the Commission has reviewed and approved the proposal pursuant to section 19(b). This framework would not prevent an SRO from using the amendment to immediately list a new derivative securities product under its existing rules, and then, after the Commission has approved a section 19(b) rule filing proposing new position limits or margin requirements for the relevant product class, impose new position limits or margin requirements for the new derivative securities product.[137]

Commenters suggest that amendments to existing derivative securities products, or amendments to new derivative securities products that are listed pursuant to the amendment to Rule 19b–4, such as splitting an index or changing the exercise style, should not require a proposed rule change pursuant to section 19b(2) of the Act.[138] The Commission believes that if the trading rules, procedures and listing standards for the product class include criteria regarding splitting an index, changing the exercise style or changing the composition of the index, such changes would be permitted without being considered a material change to the derivative securities product and a proposed rule change pursuant to Section 19(b) would not be required.

F. Form of Notification to the SEC of New Derivative Securities Product Listing Pursuant to the Amendment

In order for the Commission to maintain an accurate record of all new derivative securities products traded on the SROs, it is adopting a new form, Form 19b–4(e), to be filed by an SRO in order to notify the Commission when an SRO begins to trade a new derivative securities product that is not required to be submitted as a proposed rule change to the Commission for approval. Proposed Form 19b–4(e) should be submitted within five business days after an SRO begins trading a new derivative securities product that is not the subject of a proposed rule change.[139]

G. Compliance With the Proposed Amendment

The Commission will review SRO compliance with the proposed amendment through its routine inspections of the SROs. In order for the Commission to determine whether an SRO has properly availed itself of the proposed amendment, the SRO must maintain, on-site, relevant records and information pertaining to each new derivative securities product for which the SRO relied on the proposed amendment. Such records should be maintained for a period of not less than five years, the first two years in an easily accessible place, according to the recordkeeping requirements set forth in Rule 17a–1 under the Act.[140]

Such records available for Commission review for each new derivative securities product would include, but are not limited to, a copy of proposed Form 19b–4(e) under the Act, the information circular distributed to members and the product description distributed to investors (if such documents were distributed) and documentation of the factual and numerical information regarding the new derivative securities product's characteristics that meet the conditions of the proposed amendment. The SRO should be able to provide the listing standard under which the new derivative securities product falls as well as, but not limited to, such other things as the details of its surveillance program, records of adequate information sharing procedures and index construction and maintenance standards.[141] In short, the Commission believes that when an SRO relies on the amendment, such SRO should determine that its regulatory framework adequately supports the listing and trading of any new derivative securities product. Failure to comply with this requirement could mean that the SRO may be in violation of the Act.[142] If so, appropriate measures would be taken, including, but not limited to, ordering

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[134] In response to comments from the Proposing Release (CBOE Letter at 11, supra note 50), the Commission believes that current surveillance programs are appropriate for existing classes of new derivative securities products. New classes of derivative securities products, however, may present unique issues that would require different or additional surveillance programs. The Commission does not believe that it would be appropriate to establish such standards before the classes of derivative securities products have been developed. Rather, the Commission believes that an SRO should consult with the Commission when new classes of derivative securities products are developed in order to formulate appropriate surveillance programs.

[135] The Commission notes that if an SRO does not have an appropriate regulatory framework in place for a specific class of new derivative securities product, the SRO would have to submit a section 19(b)(2) rule filing. In response to commenters' request for publication of a rule filing within 10 days of its submission to the Commission if it is in proper form (see CBOE Letter at 13 and PXC Letter at 2, supra note 63), the Commission will endeavor to continue to review rule filings in a timely fashion.

[136] See CBOE Letter at 7 and PCX Letter at 2, supra note 38.

[137] The Commission does not anticipate that every proposed change in an SRO's existing trading rules to accommodate a new derivatives securities product will require a section 19(b)(2) rule filing. An SRO will not be required to submit a rule filing for a stated policy, practice or interpretation of the SRO that is reasonably or fairly implied by an existing rule of the SRO or its concerned solely with the administration of the SRO and is not a stated policy, practice or interpretation with respect to the meaning, administration or enforcement of an existing rule of the SRO. 17 CFR 240.19b–4(c), supra note 7. For example, if an SRO has rules that merely delineate each new derivative securities product covered by a particular existing trading rule, the SRO need not submit a rule filing pursuant to section 19(b) of the Act and Rule 19b–4 thereunder merely because it is adding a new derivative securities product to the list. See *e.g.*, CBOE Rule 24.9(a)(3) and (4).

[138] Supra note 64.

[139] The Commission seeks to clarify that, upon being filed by an SRO, Form 19b–4(e) will be publicly available through the Commission's Public Reference Room. In addition, the Commission will endeavor to make the Forms available on the Commission's web site, supra note 77. See also, NYSE Letter at 2, supra note 59.

[140] 17 CFR 240.17a–1. SROs may also destroy or otherwise dispose of such records at the end of five years according to Rule 17a–6 under the Act, 17 CFR 240.17a–6.

[141] SROs have had over twenty years of experience undergoing Commission inspections that have included examination of derivative securities products. As such, the Commission believes that SROs are familiar with the types of materials that should be available during a Commission inspection. See Amex Letter at 18, supra note 50. If an SRO desired to establish a list of the specific information it would provide to the Commission upon inspection, the SRO may submit such list for Commission review as part of its proposed rule change under section 19(b) of the Act to establish listing standards, trading rules and procedures for each product class.

[142] The Commission notes that the amendment should eliminate approximately 45 SRO rule filings each year. The Commission believes that the determination as to whether or not a specific previous SRO rule filing for a derivative securities product would have satisfied the conditions of the amendment is based upon the listing standards, trading rules and procedures that an SRO may develop in response to the adoption of the amendment (see Amex Letter at 19, supra note 34). The Commission reiterates that examples of classes of new derivative securities products are: Broad-based index options; broad-based index warrants; narrow-based index options; narrow-based index warrants; foreign currency index options; foreign currency index warrants; PDRs; index fund shares; and ELNs. Supra notes 14, 15, 16, 17 and 18. Some classes may not currently satisfy the requirements of new Rule 19b–4(e). Supra Section IV. C. 1. *Designation Of Index As Broad-Based Or Narrow-Based.*

the SRO to remediate the deficiency or prohibiting opening transactions in or discontinuing the listing of new derivative securities products.[143]

V. Technical Changes

Because the Commission is adopting a new paragraph (e) to Rule 19b–4 under the Act, Form 19b–4 under the Act[144] is amended by revising the phrase "subparagraph (e) of Rule 19b–4" to read "subparagraph (f) of Rule 19b–4" and the phrase "subparagraph (e) of Securities Exchange Act Rule 19b–4" to read "subparagraph (f) of Securities Exchange Act Rule 19b–4" in Exhibit 1, III. (B); and is amended by revising the first sentence in Exhibit 1, IV to read "Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act."

VI. Conclusion

For the reasons discussed above, the Commission believes that amending Rule 19b–4 under the Act will reduce signficantly the SROs' regulatory burden and help SROs maintain their competitive balance with the overseas and OTC derivatives markets. The amendment to Rule 19b–4 provides guidelines for SROs seeking to rely on it but removes the need for Commission review, notice and approval prior to an SRO trading a new derivative securities product pursuant to existing SRO trading rules, procedures, surveillance programs and listing standards.[145] Furthermore, the Commission will maintain regulatory oversight over the SROs' new derivative securities product listing, trading and surveillance through its routine inspection process. Thus, while the amendment reduces the recordkeeping and reporting obligations of the SROs, investor protection is maintained through regular inspection oversight.

The Commission believes that the amendment offers benefits for investors. The amendment will facilitate the listing and trading of new derivative securities products by permitting SROs to bring such products to market quickly to provide investors with tailored products that directly meet their evolving investment needs. The Commission believes that the amendment will not result in any additional costs for U.S. investors or others. The amendment should reduce the cost of offering new derivative securities products to investors because it will foster innovation and create a streamlined process for SROs to list and trade such new derivative securities products subject to existing trading rules, procedures, surveillance programs and listing standards. Thus, the Commission has considered the amendment's impact on efficiency, competition and capital formation and believes that it would promote these three objectives.[146] Finally, the Commission believes that the SROs will spend significantly less time filling out the form to be used under the amendment than they do now when submitting a complete proposed rule change for Commission review, notice and approval pursuant to Rule 19b–4 under the Act.[147]

VII. Costs and Benefits of the Amendment

A. Benefits

To assist the Commission in its evaluation of the costs and benefits that may result from the amendment, commenters were requested to provide analysis and data, if possible, relating to costs and benefits associated with the proposal herein. No comments were received regarding this request. The Commission believes that the amendment will reduce SRO compliance burdens under Rule 19b–4. The amendment should reduce significantly the SROs' regulatory burden and help SROs maintain their competitive balance with the overseas and OTC derivative markets. Moreover, the Commission believes that the amendment will foster innovation and create a streamlined procedure for SROs to list promptly new derivative securities products subject to appropriate listing standards.

The Commission believes that the amendment would be considered a "major" rule because it is anticipated to result in an annual beneficial effect on the economy of $100 million or more. The Commission estimates that because SROs will, on average, list and trade 45 new derivative securities products per year 90 days sooner under the amendment, broker-dealers and investors will, on average, have 90 additional days per new derivative securities product to derive significant financial benefits. The Commission has collected data on the first 90 days of trading activity, including share volume and dollar volume, from several currently trading SRO new derivative securities products that could have relied on new Rule 19b–4(e), had the amendment been in effect when the SRO sought to list and trade such new derivative securities products.[148] Based on an analysis of this data, the Commission believes that increased transaction volumes from new derivative securities products could exceed $100 million each year.

B. Costs

The Commission notes that the amendment provides an alternative approach for SROs to list and trade new derivative securities products. The Commission is not requiring SROs to incur any additional costs as a result of the amendment. An SRO may continue to operate under the current regulatory framework and submit a proposed rule change under section 19(b) of the Act to list and trade every new derivative securities products. If an SRO chooses to avail itself of the amendment, the Commission notes that most SROs already have in place appropriate listing standards, trading rules, procedures and surveillance programs for certain product classes such as PDRs and index fund shares and therefore would not incur any costs by relying on the

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[143] See section 19(h) of the Act, 15 U.S.C. 78s(h). The Commission could also use its inspection authority to review whether an SRO has established appropriate procedures.

[144] 17 CFR 249.819.

[145] As previously stated, the Commission anticipates that the amendment will eliminate approximately 45 SRO filings each year pursuant to Rule 19b–4 and Form 19b–4, supra note 142. In addition, the Commission believes that the amendment reduces the recordkeeping and reporting requirements, pursuant to Rule 19b–4 and Form 19b–4, on the SROs by permitting them to submit a one page summary form after they list a new derivative securities product instead of filing a complete proposed rule change for Commission review prior to listing such new derivative securities product.

[146] Section 3(f) of the Act, 15 U.S.C. 78c(f), requires the Commission, when it is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

[147] Because the amendment constitutes a "major rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et seq.*, the amendment will take effect 60 days after the date of publication in the **Federal Register**.

[148] For example, during the fist 90 days of trading, DIAMONDS℠ Trust (supra note 129) (Securities Exchange Release No. 39525 (January 8, 1998) 63 FR 2438 (January 15, 1998)) traded a total of 52,672,500 shares valued at $4,452,065,077 or an average of 741,866 shares per day valued at an average of $62,705,142 per day. During the first 90 days of trading, SPDRs (supra note 16) traded a total of 12,138,900 shares valued at $540,575,938 or an average of 183,923 shares per day valued at an average of $8,190,545 per day. In addition, the Commission analyzed data on: Market Index Target Term Securities on the S&P 500 Index trading on the Amex; Lehman Brothers European Stock Basket Stock Upside Note Securities trading on the Amex (supra note 85); and options on The Tobacco Index trading on the Amex (Securities Exchange Act Release No. 38693 (May 29, 1997) 62 FR 30914 (June 5, 1997)).

amendment for these products. The Commission believes that an SRO could use its past experience with listing and trading new derivative securities products in order to establish listing standards, trading rules, procedures and surveillance programs for product classes that currently would not be covered by the amendment, such as broad-based index options. Consequently, the Commission believes that an SRO would incur nominal costs associated with developing and receiving Commission approval for listing standards, trading rules, procedures and surveillance programs for product classes that currently would not be covered by the amendment.

VIII. Effects on Competition, Efficiency and Capital Formation

Section 23(a)(2)[149] of the Act requires that the Commission, when promulgating rules under the Exchange Act, to consider the impact any rule would have on competition and to not adopt any rule that would impose a burden on competition that is not necessary or appropriate in the public interest. In the Proposing Release, the Commission solicited comments on the effects on competition, efficiency and capital formation of the amendment, in general, and the potential competitive effects across markets, in particular. Specifically, the Commission requested commenters to address whether the proposed amendment would generate the anticipated benefits or impose any costs on U.S. investors or others. The Commission received no comments regarding these issues. The Commission has considered the amendment in light of the standards cited in section 23(a)(2) of the Act and believes that it would not impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act.

Securities SROs potentially compete with futures markets when a securities SRO seeks to list and trade a broad-based index option and a futures market seeks contract market designation for a futures contract overlying the same broad-based index. This constitutes only a small portion of the new derivative securities products that Rule 19b–4(e) will cover. While utilizing Rule 19b–4(e) may result in the securities SROs providing broad-based index options to investors more quickly than they currently do, it is not certain whether the effect of Rule 19b–4(e) would result in the securities SROs listing broad-based index options sooner than the futures markets listing similar broad-based index futures. Nevertheless, to the extent that it could be argued that this may be a possible effect of Rule 19b–4(e) in a particular case, the Commission notes that its jurisdiction over stock index futures is limited to reviewing such products under the criteria set forth in section 2(a)(1)(B) of the CEA. Stock index futures must be approved by the CFTC, not the Commission. To the extent that the Commission does review such products under the requirements of the CEA, the Commission must adhere to the 45 day time period set forth in the statute. Despite the Commission's lack of jurisdiction in actually approving such products for trading on a futures market, the Commission has committed to be sensitive to the time involved in its review and has stated in this release that it will make every effort to continue to review requests in a timely fashion. As a result, the Commission believes that the ability of a securities SRO to use the new regulatory framework of Rule 19b–4(e) will not impose a burden on competition but will instead promote competition because securities SROs can choose to provide new derivative securities products to investors more quickly than under the current regulatory framework. This will allow securities SROs to list and trade new derivative securities products, on average, 90 days earlier than under the current regulatory framework.

The Commission also notes that generally OTC derivatives can begin trading sooner than exchange traded new derivative securities products because there is no prior Commission approval required for OTC derivatives as there is for exchange traded new derivative securities products under section 19(b) of the Act. The Commission believes that because OTC derivatives are highly customized among individual parties, exchange traded new derivative securities products do not always compete with OTC derivatives. Nonetheless, Rule 19b–4(e) may potentially have a competitive impact in this area because an SRO will be able to list a new derivative securities product, pursuant to Rule 19b–4(e), more quickly than under the existing regulatory framework. The Commission believes that the ability of an SRO to use the new regulatory framework of Rule 19b–4(e) will not impose a burden on competition but will instead promote competition because SROs could provide new derivative securities products to investors more quickly than under the current regulatory framework. This will allow securities SROs to compete more equally with the OTC market.

Finally, the Commission believes that the amendment will reduce SRO compliance costs and will enable SROs to compete more effectively with overseas derivative markets. The Commission believes that SROs should be able to bring new derivative securities products to market more quickly to provide investors with tailored products that directly meet their evolving investment needs.[150] SROs have had over 20 years of experience with Commission review of new derivative securities product proposals. SROs that have sought approval from the Commission to list and trade such new derivative securities products should be familiar with the factors discussed in this release that the Commission believes must be considered when listing and trading such new derivative securities products. Thus, the Commission believes that there is less need for its review, notice and approval prior to an SRO listing and trading a particular new derivative securities product pursuant to existing SRO trading rules, procedures, surveillance programs and listing standards. Furthermore, the Commission believes that the procedures discussed in this release will enable the Commission to continue effectively protect investors and promote the public interest.

IX. Summary of Final Regulatory Flexibility Act Analysis

In the Proposing Release, the Commission prepared an Initial Regulatory Flexibility Act Analysis ("IRFA") an accordance with 5 U.S.C. 605(b) regarding the amendment to Rule 19b–4 and Form 19b–4(e) under the Exchange Act. No comments were received in response to the IRFA. In addition, the Commission notes that Form 19b–4(e) is being adopted without any changes and Rule 19b–4(e) is being adopted in substantially the same format that it was proposed.[151] As a result, the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") in substantially the same form as the IRFA. The following summarizes the FRFA.

The FRFA sets forth the statutory authority for the proposed amendment

[149] See 15 U.S.C. 78w(a)(2).

[150] The Commission also believes that the amendment will benefit broker-dealers. See IX. *Summary of Final Regulatory Flexibility Act Analysis*, infra.

[151] See IV.A. *Definition of "New Derivative Securities Product"*, supra, for a complete discussion of the technical changes to the definition of new derivative securities product in response to commenters' requests for clarification.

to Rule 19b–4. The FRFA also discusses the effect of the proposed amendment on broker-dealers that are small entities as defined in Rule 0–10 under the Exchange Act.[152] A broker-dealer that has 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 prepare such statements, a broker-dealer that had total capital of less than $500,000 on the last business day of the preceding fiscal year is deemed to be a small entity for purposes of the FRFA.[153] The FRFA states that the proposed amendment would enable broker-dealers that are small entities (such as certain options market makers and options specialists) to trade new derivative securities products pursuant to existing trading rules, procedures, surveillance programs and listing standards approximately 90 days earlier, on average, because the proposed amendment will permit SROs to immediately list these new derivative securities product without prior Commission approval.[154] As a result, broker-dealers will have additional days to earn income through trading such new derivative securities products. As of December 31, 1997, the Commission estimated that there were over 870 options market makers and specialists that may be considered small entities.[155]

As previously stated, the Commission estimates that new Rule 19b–4(e) will eliminate approximately 45 SRO filings each year pursuant to Rule 19b–4 and Form 19b–4. The Commission has collected data on the first 90 days of trading activity, including share volume and dollar volume, from several currently trading SRO new derivative securities products that could have relied on new Rule 19b–4(e), had the amendment been in effect when the SROs sought to list and trade such new derivative securities products.[156] Based on this data, the Commission believes that broker-dealer small entities will benefit substantially from new Rule 19b–4(e).

The FRFA states that the amendment would not impose any new reporting, recordkeeping or compliance requirements on broker-dealer small entities. Any new reporting, recordkeeping or compliance burdens will rest with the SROs, not broker-dealer small entities.

The FRFA discusses the various alternatives considered by the Commission in connection with the amendment that might minimize the effect on small entities, including: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources of small entities; (b) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the proposed rule amendment, or any part thereof, for small entities. The Commission believes that different compliance or reporting requirements for small entities are not necessary because the amendment does not establish any new reporting, recordkeeping or compliance requirements for small entities. In addition, the Commission has concluded that it is not feasible to further clarify, consolidate or simplify the amendment for small entities. The Commission also believes that it would be inconsistent with the purposes of the Exchange Act to use performance standards to specify different requirements for small entities or to exempt broker-dealer small entities from being able to trade new derivative securities products that are covered by the proposed rule amendments.

The FRFA includes quantifiable information concerning the number of small entities that would be affected by the proposed rule amendment. A copy of the FRFA may be obtained by contacting Marianne H. Duffy, Special Counsel, (202) 942–4163 at Office of Market Supervision, Division of Market Regulation, SEC, Mail Stop 10–1, 450 Fifth Street, NW, Washington, DC 20549

X. Paperwork Reduction Act

The amendment contains a "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Accordingly, the Commission submitted the collection of information requirements contained in the amendment to the Office of Management and Budget ("OMB") for review and were approved by OMB which assigned Form 19b–4(e) control number 3235–0504. The collection of information is in accordance with Section 3507 of the PRA.[157]

The collection of information obligations imposed by the amendment is mandatory. The information filed pursuant to the amendments will not be kept confidential and therefore will be available to the public. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number.

The collection of information is necessary for persons to obtain certain benefits or to comply with certain requirements. The amendment to which the collection of information relates is necessary as a means for the Commission to maintain accurate records of new derivative securities products that are traded. The Commission solicited public comment on the collection of information requirements contained in the Proposing Release. The Commission received no comments that addressed the PRA portion of the release.

The title for the collection of information is: "Form 19b–4(e) Under the Securities Exchange Act of 1934." The collection of information requires SROs to prepare a one-page summary sheet of nine questions that requests factual information regarding the characteristics of the new derivative securities product and the underlying securities. Such questions do not require any analysis or exhibits. The amendment may be used by any SRO. currently, there are ten such SROs for which it is estimated that the proposed amendment would be used, in the aggregate, approximately 45 times a year.

In order for the Commission to maintain an accurate record of all new derivative securities products traded on the SROs and to determine whether an SRO has properly relied on the proposed amendment, however, it is necessary that the SRO file proposed Form 19b–4(e) with the Commission when such SRO begins trading a new derivative securities product pursuant to the proposed amendment. In addition, an SRO must maintain, on-site, a copy of proposed Form 19b–4(e). The SROs are required to retain records of the collection of information for a period of not less than five years, the first two years in an easily accessible place, according to the current

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[152] 17 CFR 240.0–10(c). The Commission notes that SROs and most issuers listed on a national securities exchange or The Nasdaq Stock Market would not be considered "small entities" under Rule 0–10.

[153] The Commission recently amended its small business definition for broker-dealers. See Securities Exchange Act Release No. 40122 (June 24, 1998) 63 FR 35508 (June 30, 1998) at note 32. Because the IRFA for this proposal relied on the old definition, which is broader, the FRFA also relies on the old definition.

[154] See note 148, supra.

[155] The Commission bases its estimate on the information provided in Form X–17A–5—Financial and Operational Combined Uniform Single Reports pursuant to Section 17 of the Act and rule 17a–5 thereunder.

[156] See note 148, supra.

[157] 44 U.S.C. 3507.

recordkeeping requirements set forth in Rule 17a–1 under the Act.[158]

XI. Statutory Basis

The amendment to Rule 19b–4(e) under the Exchange Act is being adopted pursuant to 15 U.S.C. 78a *et seq.*, particularly sections 3(a)(27), 3(b), 19(b), 23(a) and 36(a) of the Act, unless otherwise noted.

Text of the Final Rule

List of Subjects 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2. Section 240.19b–4 is amended by redesignating paragraphs (e), (f), (g), and (h) as paragraphs (f), (g), (h) and (i) and adding new paragraph (e) to read as follows:

[158] SROs may also destroy or otherwise dispose of such records at the end of five years according to Rule 17a–6 under the Act, supra note 140.

§ 240.19b–4 Filings with respect to proposed rule changes by self-regulatory organizations.

* * * * *

(e) For the purposes of this paragraph, *new derivative securities product* means any type of option, warrant, hybrid securities product or any other security whose value is based, in whole or in part, upon the performance of, or interest in, an underlying instrument.

(1) The listing and trading of a new derivative securities product by a self-regulatory organization shall not be deemed a proposed rule change, pursuant to paragraph (c)(1) of this section, if the Commission has approved, pursuant to section 19(b) of the Act (15 U.S.C. 78s(b)), the self-regulatory organization's trading rules, procedures and listing standards for the product class that would include the new derivative securities product and the self-regulatory organization has a surveillance program for the product class.

(2) Recordkeeping and reporting:

(i) Self-regulatory organizations shall retain at their principal place of business a file, available to Commission staff for inspection, of all relevant records and information pertaining to each new derivative securities product traded pursuant to this paragraph (e) for a period of not less than five years, the first two years in an easily accessible place, as prescribed in § 240.17a–1.

(ii) When relying on this paragraph (e), a self-regulatory organization shall submit Form 19b–4(e) (17 CFR 249.820) to the Commission within five business days after commencement of trading a new derivative securities product.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

4. Form 19b–4 (referenced in § 249.819) is amended by revising the phrase "subparagraph (e) of Rule 19b–4" to read "subparagraph (f) of Rule 19b–4" and the phrase "subparagraph (e) of Securities Exchange Act Rule 19b–4" to read "subparagraph (f) of Securities Exchange Act Rule 19b–4" in Exhibit 1, III. (B); and in Exhibit 1, IV. revise the first sentence to read "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."

5. Section 249.820 and Form 19b–4(e) are added to read as follows:

§ 249.820 Form 19b–4(e) for the listing and trading of new derivative securities products by self-regulatory organizations that are not deemed proposed rule changes pursuant to Rule 19b–4(e) (§ 240.19b–4(e)).

This form shall be used by all self-regulatory organizations, as defined in section 3(a)(26) of the Act, to notify the Commission of a self-regulatory organization's listing and trading of a new derivative securities product that is not deemed a proposed rule change, pursuant to Rule 19b–4(e) under the Act (17 CFR 240.19b–4(e)).

BILLING CODE 8010–01–M

[Note: Form 19b-4(e) will not appear in the Code of Federal Regulations.]

For Internal Use Only Sec File No. 91 -	Submit 1 Original And 9 Copies	OMB Approval No.: 3235 - 0504 Expires: 07/31/2001 Estimated average burden hours per response: 2.00

U.S. SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 19b-4(e)

Information Required of a Self-Regulatory Organization Listing and Trading a New Derivative Securities Product Pursuant to Rule 19b-4(e) Under the Securities Exchange Act of 1934

READ ALL INSTRUCTIONS PRIOR TO COMPLETING FORM
Part I **Initial Listing Report**
1. Name of Self-Regulatory Organization Listing New Derivative Securities Product:
2. Type of Issuer of New Derivative Securities Product (e.g., clearinghouse, broker-dealer, corporation, etc.):
3. Class of New Derivative Securities Product:
4. Name of Underlying Instrument:
5. If Underlying Instrument is an Index, State Whether it is Broad-Based or Narrow-Based:
6. Ticker Symbol(s) of New Derivative Securities Product:
7. Market or Markets Upon Which Securities Comprising Underlying Instrument Trades:
8. Settlement Methodology of New Derivative Securities Product:
9. Position Limits of New Derivative Securities Product (if applicable):
Part II **Execution**
The undersigned represents that the governing body of the above-referenced Self-Regulatory Organization has duly approved, or has duly delegated its approval to the undersigned for, the listing and trading of the above-referenced new derivative securities product according to its relevant trading rules, procedures, surveillance programs and listing standards. Name of Official Responsible for Form:
Title:
Telephone Number:
Manual Signature of Official Responsible for Form:
Date:

Instructions for Completing Form 19b-4(e)

I. Terms. Unless the context clearly indicates otherwise, terms used in this Form have the meaning ascribed to them in the Securities Exchange Act of 1934, as amended, and Rule 19b-4 thereunder.

II. Who Must File; When to File. Rule 19b-4(e) requires every self-regulatory organization (SRO) seeking to rely on Rule 19b-4(e) to file Form 19b-4(e) with the Securities and Exchange Commission (SEC) at least 5 business days after commencement of trading a new derivative securities product that is not deemed to be a proposed rule change. Each time an SRO files Form 19b-4(e), the execution page must be completed.

III. Number of Copies; How and Where to File. File an original and 9 copies of each Form 19b-4(e) with the SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. The SRO must keep an exact copy of the filing for its records. All copies must be legible. The filing date of Form 19b-4(e) is the date of actual receipt by the SEC, provided that the filing complies with applicable requirements.

IV. Format of Filing. An SRO may use the printed Form 19b-4(e) or a reproduction of it.

V. Paperwork Reduction Act Disclosure.

Form 19b-4(e) requires an SRO filing the Form to provide the SEC with certain information concerning the nature of the new derivative securities product it intends to list and/or trade.

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. Sections 3(a)(26), 3(a)(27), 3(a)(28), 3(b), 19(b), 23(a) and 36(a) of the Securities Exchange Act of 1934 authorize the SEC to collect information on Form 19b-4(e) from SROs. See 15 U.S.C. §§78c(a)(26), 78c(a)(27), 78c(a)(28), 78c(b), 78s(b), 78w(a), 78mm(a).

Any member of the public may direct to the SEC any comments concerning the accuracy of the burden estimate on the facing page of Form 19b-4(e) and any suggestions for reducing this burden.

The principal purpose of Form 19b-4(e) is to enable the SEC to maintain an accurate record of all new derivative securities products on the SROs not deemed to be proposed rule changes pursuant to Rule 19b-4(e).

It is estimated SROs will spend approximately 2 hours completing each Form 19b-4(e).

It is mandatory that an SRO file Form 19b-4(e) with the SEC at least 5 business days after commencement of trading a new derivative securities product that is not deemed to be a proposed rule change.

No assurance of confidentiality is given by the SEC with respect to the responses made in the Form. The public has access to the information contained in the Form.

This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. The applicable Privacy Act system of records is SEC-2 and the routine uses of records are set forth at 40 FR 39255 (August 27, 1975) and 41 FR 5318 (February 5, 1976).

By the Commission.

Dated: December 8, 1998.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–33300 Filed 12–21–98; 8:45 am]

BILLING CODE 8010–01–C

federal register

Tuesday
December 22, 1998

Part III

Department of Education

Women's Educational Equity Act Program (WEEA); Inviting Applications for New Awards for Fiscal Year (FY) 1999; Notice

DEPARTMENT OF EDUCATION

[CFDA No.: 84.083 A and B]

Women's Educational Equity Act Program (WEEA); Notice Inviting Applications for New Awards for Fiscal Year (FY) 1999

Purpose of Program: To promote gender equity in education; to promote equity in education for women and girls who suffer from multiple forms of discrimination based on sex and race, ethnic origin, limited English proficiency, disability or age; and to provide financial assistance to enable educational agencies to meet the requirements of title IX of the Education Amendments of 1972.

Eligbile Applicants: Public agencies, private nonprofit agencies, organizations, institutions, student groups, community groups, and individuals.

Deadline for Transmittal of Applications: February 19, 1999.

Deadline for Intergovernmental Review: April 19, 1999.

Applications Available: December 22, 1999.

Available Funds: $600,000.

Estimated Range of Awards: Implementation Grants: $90,000-$200,000; Research and Development Grants: $15,000-$38,000.

Estimated Average Size of Awards: Implementation Grants: $178,000; Research and Development Grants: $26,000.

Estimated Number of Awards: Implementation Grants: 4–6; Research and Development Grants: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months. Funds available under this competition would be used for the first 12 months of a project.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 85, and 86.

Supplementary Information: The Department will award two types of grants: (1) grants for the *implementation* of gender equity programs in schools; and (2) *research and development* grants to develop model equity programs. Examples of authorized activities under the program include—

Implementation Grants

(a) Assisting educational agencies and institutions to implement policies and practices to comply with title IX of the Education Amendments of 1972;

(b) Training for teachers, counselors, administrators, and other school personnel, especially preschool and elementary school personnel, in gender-equitable teaching and learning practices;

(c) Leadership training for women and girls to develop professional and marketable skills to compete in the global marketplace, improve self-esteem, and benefit from exposure to positive role models;

(d) School-to-work transition programs, guidance and counseling activities, and other programs to increase opportunities for women and girls to enter a technologically demanding workplace and, in particular, to enter highly skilled, high-paying careers in which women and girls have been underrepresented;

(e) Enhancing educational and career opportunities for those women and girls who suffer multiple forms of discrimination, based on sex and on race, ethnic origin, limited-English proficiency, disability, socioeconomic status, or age;

(f) Assisting pregnant students and students rearing children to remain in or to return to secondary school, graduate, and prepare their preschool children to start school;

(g) Evaluating exemplary model programs to assess the ability of such programs to advance educational equity for women and girls;

(h) Introduction into the classroom of textbooks, curricula, and other materials designed to achieve equity for women and girls;

(i) Programs and policies to address sexual harassment and violence against women and girls and to ensure that educational institutions are free from threats to the safety of students and personnel;

(j) Nondiscriminatory tests of aptitude and achievement and of alternative assessments that eliminate biased assessment instruments from use;

(k) Programs to increase educational opportunities, including higher education, vocational training, and other educational programs for low-income women, including underemployed and unemployed women, and women receiving Aid to Families with Dependent Children benefits;

(l) Programs to improve representation of women in educational administration at all levels; and

(m) Planning, development, and initial implementation of—

(i) Comprehensive institution- or districtwide evaluation to assess the presence or absence of gender equity in educational settings;

(ii) Comprehensive plans for implementation of equity programs in State and local educational agencies and institutions of higher education, including community colleges; and

(iii) Innovative approaches to school-community partnerships for educational equity.

Research and Development Activities

(a) Research and development of innovative strategies and model training programs for teachers and other education personnel;

(b) The development of high-quality and challenging assessment instruments that are nondiscriminatory;

(c) The development and evaluation of model curricula, textbooks, software, and other educational materials to ensure the absence of gender stereotyping and bias;

(d) The development of instruments and procedures that employ new and innovative strategies to assess whether diverse educational settings are gender equitable;

(e) The development of instruments and strategies for evaluation, dissemination, and replication of promising or exemplary programs designed to assist local educational agencies in integrating gender equity in their educational policies and practices;

(f) Updating high-quality educational materials previously developed through Women's Educational Equity Act (WEEA) grants;

(g) The development of policies and programs to address and prevent sexual harassment and violence to ensure that educational institutions are free from threats to safety of students and personnel;

(h) The development and improvement of programs and activities to increase opportunity for women, including continuing educational activities, vocational education, and programs for low-income women, including underemployed and unemployed women, and women receiving Aid to Families with Dependent Children; and

(i) The development of guidance and counseling activities, including career education programs, designed to ensure gender equity.

Priority for Implementation Grants: Under 34 CFR 75.105(b) and (c), the Secretary gives a competitive preference to applications that meet the following priority found in 20 U.S.C. 7235(b) by awarding bonus points depending on the extent to which the applicant meets the priority:

Projects submitted by applicants that have not received assistance under the WEEA Program (5 points).

Invitational Priority for Implementation Grants: Under 34 CFR

75.105(b) and (c), the Secretary invites and encourages applications that meet the following invitational priority for implementation grants: Projects that develop and implement welfare-to-work transition programs, including guidance and counseling activities, in higher education, vocational training, and other educational programs for low-income and unemployed women and women receiving Aid to Families with Dependent Children benefits. The Secretary is particularly interested in applications that meet this priority. However, an application that meets this invitational priority does not receive competitive or absolute preference over other applications.

Selection Criteria for Implementation Grants: The Secretary evaluates applications for implementation grants on the basis of the following criteria. The maximum possible score for each criterion is indicated in parentheses with the criterion. The Secretary awards up to 100 points for all of the criteria.

(1) *Effectively achieving the purposes of WEEA* (20 points)

Under 34 CFR 75.209 and 20 U.S.C. 7235(a), the Secretary reviews each application to determine how well the project will effectively achieve the purposes of the WEEA Program.

Note: Applicants should consider the following statutory provisions when responding to this criterion. Under 20 U.S.C. 7232, the purpose of the WEEA program is: (a) to promote gender equity in education in the United States; (b) to provide financial assistance to enable educational agencies and institutions to meet the requirements of title IX of the Educational Amendments of 1972; and (c) to promote equity in education for women and girls who suffer from multiple forms of discrimination based on sex, race, ethnic origin, limited-English proficiency, disability, or age.

(2) *Project as a component of a comprehensive plan* (5 points).

Under 34 CFR 75.209 and 20 U.S.C. 7235(a)(2)(C), the Secretary reviews each application to determine the extent to which the project is a significant component of a comprehensive plan for educational equity and compliance with title IX of the Educational Amendments of 1972 in the particular school district, institution of higher education, vocational-technical institution, or other educational agency or institution.

(3) *Implementing an institutional change strategy* (5 points).

Under 34 CFR 75.209 and 20 U.S.C. 7235(a)(2)(D), the Secretary reviews each application to determine the extent to which the project implements an institutional change strategy with long-term impact that will continue as a central activity of the applicant after the WEEA grant has been terminated.

(4) *Need for project* (10 points).

The Secretary considers the need for the proposed project. In determining the need for the proposed project, the Secretary considers the following factors:

a. The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.

b. The extent to which the proposed project will enhance educational and career opportunities for those women and girls who suffer multiple forms of discrimination based on sex and race, ethnic origin, limited English-proficiency, disability, socioeconomic status, or age.

(5) *Significance* (5 points).

The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

a. The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.

b. The likely utility of the products (such as information, materials, processes, or techniques) that will result from the proposed project, including the potential for their being used effectively in a variety of other settings.

c. The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in employment, independent living, or both, as appropriate.

(6) *Quality of the project design* (15 points).

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

a. The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

b. The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

c. The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice.

(7) *Quality of project services* (10 points).

The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

a. The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

b. The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(8) *Quality of Project Personnel* (5 points).

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

a. The qualifications, including relevant training and experience, of the project director or principal investigator.

b. The qualifications, including relevant training and experience, of key project personnel.

c. The qualifications, including relevant training and experience, of project consultants or subcontractors.

(9) *Adequacy of resources* (5 points).

The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

a. The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

b. The extent to which the budget is adequate to support the proposed project.

(10) Quality of the management plan (10 points).

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

a. The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, time lines, and

milestones for accomplishing project tasks.

b. The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

c. How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

(11) *Quality of the project evaluation* (10 points)

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

a. The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

b. The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

c. The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

Note: Applicants should consider the following statutory provision when responding to this criterion. Under 20 U.S.C. 7234 (1), applicants for WEEA funds are required to set forth policies and procedures that will ensure a comprehensive evaluation of the grant activities, including an evaluation of the practices, policies, and materials used by the applicant and an evaluation or estimate of the continued significance of the work of the project following completion of the award period.

Priority for Research and Development Grants

Under 34 CFR 75.105(b) and (c), the Secretary gives a competitive preference to applications that meet the following priority found in 20 U.S.C. Sec. 7235(b) by awarding bonus points depending on the extent to which the applicant meets the priority:

Projects submitted by applicants that have not received assistance under the WEEA Program (5 points).

Selection Criteria for Research and Development Grants: The Secretary evaluates applications for research and development grants on the basis of the following criteria. The maximum possible score for each criterion is indicated in parentheses with the criterion. The Secretary awards up to 100 points for all of the criteria.

(1) *Effectively achieving the purposes of WEEA (20 points).*

Under 34 CFR 75.209 and 20 U.S.C. 7235(a), the Secretary reviews each application to determine how well the project will effectively achieve the purposes of the WEEA Program.

Note: Applicants should consider the following statutory provisions when responding to this criterion. Under 20 U.S.C. 7232, the purpose of the WEEA program is: (a) to promote gender equity in education in the United States; (b) to provide financial assistance to enable educational agencies and institutions to meet the requirements of title IX of the Educational Amendments of 1972; and (c) to promote equity in education for women and girls who suffer from multiple forms of discrimination based on sex, race, ethnic origin, limited-English proficiency, disability, or age.

(2) *Addressing multiple discrimination* (5 points)

Under 34 CFR 75.209 and 20 U.S.C. 7235(a)(2)(A), the Secretary reviews each application to determine the quality of the applicant's plan for addressing the needs of women and girls of color and women and girls with disabilities.

(3) *Need for project* (10 points).

The Secretary considers the need for the proposed project. In determining the need for the proposed project, the Secretary considers the following factors:

a. The magnitude or severity of the problem to be addressed by the proposed project.

b. The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(4) *Significance* (10 points)

The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

a. The national significance of the proposed project.

b. The potential contribution of the proposed project to increased knowledge or understanding of educational problems, issues, or effective strategies.

c. The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(5) *Quality of the project design* (20 points).

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

a. The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

b. The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

c. The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice.

d. The quality of methodology to be employed in the proposed project.

(6) *Quality of Project Personnel* (10 points).

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

a. The qualifications, including relevant training and experience, of the project director or principal investigator.

b. The qualifications, including relevant training and experience, of key project personnel.

c. The qualifications, including relevant training and experience, of project consultants or subcontractors.

(7) *Adequacy of resources* (5 points).

The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

a. The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

b. The extent to which the budget is adequate to support the proposed project.

(8) *Quality of the management plan* (10 points).

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

a. The adequacy of the management plan to achieve the objectives of the

proposed project on time and within budget, including clearly defined responsibilities, time lines, and milestones for accomplishing project tasks.

b. The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

c. How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

(9) *Quality of the project evaluation* (10 points).

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

a. The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

b. The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

c. The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

Note: Applicants should consider the following statutory provision when responding to this criterion. Under 20 U.S.C. 7234 (1), applicants for WEEA funds are required to set forth policies and procedures that will ensure a comprehensive evaluation of the grant activities, including an evaluation of the practices, policies, and materials used by the applicant and an evaluation or estimate of the continued significance of the work of the project following completion of the award period.

FOR APPLICATIONS OR INFORMATION CONTACT: Madeline Baggett, U.S. Department of Education, 400 Maryland Avenue S.W., Room 3E228, Washington, D.C. 20202–6140. Telephone (202) 260–2502. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

Individuals with disabilities may obtain a copy of the application package in an alternate format, also, by contacting that person. However, the Department is not able to reproduce in an alternate format the standard forms included in the application package.

Note: The official application notice for a discretionary grant competition is the notice published in the **Federal Register**.

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Program Authority: 20 U.S.C. 7231–7238.

Dated: December 15, 1998.

Gerald N. Tirozzi,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 98–33793 Filed 12–21–98; 8:45 am]

BILLING CODE 4000–01–P

federal register

Tuesday
December 22, 1998

Part IV

Department of Education

Technology Innovation Challenge Grants; Inviting Applications for New Awards for Fiscal Year 1999; Notice

DEPARTMENT OF EDUCATION

[CFDA No. 84.303A]

Technology Innovation Challenge Grants; Notice Inviting Applications for New Awards for Fiscal Year (FY) 1999

Purpose of Program: The Technology Innovation Challenge Grant Program provides grants to consortia that are working to improve and expand new applications of technology to strengthen school reform efforts, improve student achievement, and provide for sustained professional development of teachers, administrators, and school library media personnel.

Eligible Applicants: Only consortia may receive grants under this program. A consortium must include at least one local educational agency (LEA) with a high percentage or number of children living below the poverty line. A consortium may also include other LEAs, private schools, State educational agencies, institutions of higher education, businesses, academic content experts, software designers, museums, libraries, and other appropriate entities.

Note: In each consortium a participating LEA shall submit the application on behalf of the consortium and serve as a fiscal agent for the grant.

Applications Available: January 12. 1999.

Deadline for Receipt of Applications: March 12, 1999.

Note: All applications must be received on or before the deadline date unless one of the mailing conditions noted in the notice of final selection criteria, selection procedures, and application procedures for Technology Innovation Challenge Grants published in the **Federal Register** on May 12, 1997 (62 FR 26175) applies. This requirement takes exception to the Education Department General Administrative Regulations (EDGAR), 34 CFR 75.102. In accordance with the Administrative Procedure Act (5 U.S.C. 553), it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. However, this amendment to EDGAR makes procedural changes only and does not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), proposed rulemaking is not required.

Deadline for Intergovernmental Review: May 12, 1999.

Estimated Available Funds: $22,000,000.

Estimated Range of Awards: $500,000–$2,000,000 per year.

Estimated Average Size of Awards: $1,000,000 per year.

Maximum Award: The Secretary will not consider an application that proposes a budget exceeding $2,000,000 for any one of the 12-month budget periods.

Estimated Number of Awards: 22.

Project Period: 5 years. Please note that all applicants for multi-year awards are required to provide detailed budget information for the total grant period requested. The Department will negotiate at the time of the initial award the funding levels for each year of the grant award.

Note: The Department of Education is not bound by any estimates in this notice.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 85, and 86, and (b) the regulations in 34 CFR part 299.

Other Requirements

In prior fiscal years, applications for awards under this program were evaluated and selected in accordance with procedures established in the notice of final selection criteria, selection procedures, and application procedures for Technology Innovation Challenge Grants published in the **Federal Register** on May 12, 1997 (62 FR 26175). This year, however, these procedures for "evaluation and selection of applications" will not apply to this program. Instead, the Department will, except as indicated above, follow the procedures in 34 CFR part 75.

Selection Criteria

The Secretary uses two of the selection criteria in the notice of final selection criteria, selection procedures, and applications procedures published in the **Federal Register** on May 12, 1997 (62 FR 26176) and other selection criteria in 34 CFR 75.210 to evaluate applications for new grants under this program. Under 75.201 (a) and (b), the Secretary announces in the application package the selection criteria selected for this competition and the maximum weight assigned to each criterion.

SUPPLEMENTARY INFORMATION: The Technology Innovation Challenge Grant Program is authorized under Title III, section 3136, of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 6846). The statute authorizes the use of funds for activities similar to the following activities:

(a) Developing, adapting, or expanding existing and new applications of technology to support the schools reform effort.

(b) Providing ongoing professional development in the integration of quality educational technologies into school curriculum and long-term planning for implementing educational technologies.

(c) Funding projects of sufficient size and scope to improve student learning and, as appropriate, support professional development, and provide administrative support.

(d) Acquiring connectivity linkages, resources, and services, including the acquisition of hardware and software, for use by teachers, students, and school library media personnel in the classroom or in school library media centers, in order to improve student learning by supporting the instructional program offered and to ensure that students in schools will have meaningful access on a regular basis to such linkages, resources, and services.

(e) Acquiring connectivity with wide area networks for purposes of accessing information and educational programming sources, particularly with institutions of higher education and public libraries.

(f) Providing educational services for adults and families.

Note: Section 14503 of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 8893), is applicable to the Technology Innovation Challenge Grant Program. Section 14503 requires that an LEA, SEA, or educational service agency receiving financial assistance under this program must provide private school children and teachers, on an equitable basis, special educational services or other program benefits under this program. The section further requires SEAs, LEAs, and educational service agencies to consult with private school officials during the design and development of the Technology Innovation Challenge Grant projects. Each application must describe the ways in which the proposed project will address the needs of private school children and teachers.

For Applications or Information Contact: For applications, telephone 1–800–USA–LEARN (1–800–872–5327) or fax requests to (202) 208–4042. The application package is also available from the Technology Innovation Challenge Grant web site at: http://www.ed.gov/Technology/chalgrnt.html. For information contact Elizabeth Payer, Technology Innovation Challenge Grants, U.S. Department of Education, Washington, DC 20208–5544. Telephone: (202) 208–3882. E-mail__address is: elizabeth--payer@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person identified in this notice.

Individuals with disabilities may obtain a copy of the application package in an alternate format, also, by contacting that person. However, the Department is not able to reproduce in an alternate format the standard forms included in the application package.

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Telephone: (202) 219–1511 or, toll free, 1–800–222–4922. The documents are located under Option G—Files/ Announcements, Bulletins and Press Releases.

Note: The official version of a document is the document published in the **Federal Register**. Program Authority: 20 U.S.C. 6846.

Dated: December 17, 1998.

C. Kent McGuire,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 98–33828 Filed 12–21–98; 8:45 am]

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federal register

Tuesday
December 22, 1998

Part V

Department of Housing and Urban Development

Fair Housing Enforcement—Occupancy Standards; Statement of Policy; Notice; Republication

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4405–N–01]

Fair Housing Enforcement—Occupancy Standards; Notice of Statement of Policy

Note: This document, FR Doc. 98–33568, was originally published on December 18, 1998 at 63 FR 70256–70257. It is being republished to reproduce the camera copy of the appendix furnished by the agency.

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice of Statement of Policy.

SUMMARY: This statement of policy advises the public of the factors that HUD will consider when evaluating a housing provider's occupancy policies to determine whether actions under the prov der's policies may constitute discriminatory conduct under the Fair Housing Act on the basis of familial status (the presence of children in a family). Publication of this notice meets the requirements of the Quality Housing and Work Responsibility Act of 1998.

DATES: Effective date: December 18, 1998.

FOR FURTHER INFORMATION CONTACT: Sara Pratt, Director, Office of Investigations, Office of Fair Housing and Equal Opportunity, Room 5204, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 708–2290 (not a toll-free number). For hearing- and speech-impaired persons, this telephone number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1–800–877–8339 (toll-free).

SUPPLEMENTARY INFORMATION:

Statutory and Regulatory Background

Section 589 of the Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105–276, 112 Stat. 2461, approved October 21, 1998, "QHWRA") requires HUD to publish a notice in the **Federal Register** that advises the public of the occupancy standards that HUD uses for enforcement purposes under the Fair Housing Act (42 U.S.C. 3601–3619). Section 589 requires HUD to publish this notice within 60 days of enactment of the QHWRA, and states that the notice will be effective upon publication. Specifically, section 589 states, in relevant part, that:

> [T]he specific and unmodified standards provided in the March 20, 1991, Memorandum from the General Counsel of [HUD] to all Regional Counsel shall be the policy of [HUD] with respect to complaints of discrimination under the Fair Housing Act * * * on the basis of familial status which involve an occupancy standard established by a housing provider.

The Fair Housing Act prohibits discrimination in any aspect of the sale, rental, financing or advertising of dwellings on the basis of race, color, religion, national origin, sex or familial status (the presence of children in the family). The Fair Housing Act also provides that nothing in the Act "limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The Fair Housing Act gave HUD responsibility for implementation and enforcement of the Act's requirements. The Fair Housing Act authorizes HUD to receive complaints alleging discrimination in violation of the Act, to investigate these complaints, and to engage in efforts to resolve informally matters raised in the complaint. In cases where the complaint is not resolved, the Fair Housing Act authorizes HUD to make a determination of whether or not there is reasonable cause to believe that discrimination has occurred. HUD's regulations, implementing the Fair Housing Act (42 U.S.C. 3614) are found in 24 CFR part 100.

In 1991, HUD's General Counsel, Frank Keating, determined that some confusion existed because of the absence of more detailed guidance regarding what occupancy restrictions are reasonable under the Act. To address this confusion, General Counsel Keating issued internal guidance to HUD Regional Counsel on factors that they should consider when examining complaints filed with HUD under the Fair Housing Act, to determine whether or not there is reasonable cause to believe discrimination has occurred.

This Notice

Through this notice HUD implements section 589 of the QHWRA by adopting as its policy on occupancy standards, for purposes of enforcement actions under the Fair Housing Act, the standards provided in the Memorandum of General Counsel Frank Keating to Regional Counsel dated March 20, 1991, attached as Appendix A.

Authority: 42 U.S.C. 3535(d), 112 Stat. 2461.

Dated: December 14, 1998.

Eva M. Plaza,

Assistant Secretary for Fair Housing and Equal Opportunity.

BILLING CODE 4210–28–P

U. S. Department of Housing and Urban Development
Washington, D.C. 20410-0500

APPENDIX A

March 20, 1991

OFFICE OF GENERAL COUNSEL

MEMORANDUM FOR: All Regional Counsel

FROM: /s/ Frank Keating, G

SUBJECT: Fair Housing Enforcement Policy: Occupancy Cases

On February 21, 1991, I issued a memorandum designed to facilitate your review of cases involving occupancy policies under the Fair Housing Act. The memorandum was based on my review of a significant number of such cases and was intended to constitute internal guidance to be used by Regional Counsel in reviewing cases involving occupancy restrictions. It was not intended to create a definitive test for whether a landlord or manager would be liable in a particular case, nor was it intended to establish occupancy policies or requirements for any particular type of housing.

However, in discussions within the Department, and with the Department of Justice and the public, it is clear that the February 21 memorandum has resulted in a significant misunderstanding of the Department's position on the question of occupancy policies which would be reasonable under the Fair Housing Act. In this respect, many people mistakenly viewed the February 21 memorandum as indicating that the Department was establishing an occupancy policy which it would consider reasonable in any fair housing case, rather than providing guidance to Regional Counsel on the evaluation of evidence in familial status cases which involve the use of an occupancy policy adopted by a housing provider.

For example, there is a HUD Handbook provision regarding the size of the unit needed for public housing tenants. See Handbook 7465.1 REV-2, Public Housing Occupancy Handbook: Admission, revised section 5-1 (issued February 12, 1991). While that Handbook provision states that HUD does not specify the number of persons who may live in public housing units of various sizes, it provides guidance about the factors public housing agencies may consider in establishing reasonable occupancy policies. Neither this memorandum nor the memorandum of February 21, 1991 overrides the guidance that Handbook provides about program requirements.

As you know, assuring Fair Housing for all is one of Secretary Kemp's top priorities. Prompt and vigorous enforcement of all the provisions of the Fair Housing Act, including the protections in the Act for families with children, is a critical responsibility of mine and every person in the Office of General Counsel. I expect Headquarters and Regional Office staff to continue their vigilant efforts to proceed to formal enforcement in all cases in which there is reasonable cause to believe that a discriminatory housing practice under the Act has occurred or is about to occur. This is particularly important in cases where occupancy restrictions are used to exclude families with children or to unreasonably limit the ability of families with children to obtain housing.

In order to assure that the Department's position in the area of occupancy policies is fully understood, I believe that it is imperative to articulate more fully the Department's position on reasonable occupancy policies and to describe the approach that the Department takes in its review of occupancy cases.

Specifically, the Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act. The Department of Justice has advised us that this is the general policy it has incorporated in consent decrees and proposed orders, and such a general policy also is consistent with the guidance provided to housing providers in the HUD handbook referenced above. However, the reasonableness of any occupancy policy is rebuttable, and neither the February 21 memorandum nor this memorandum implies that the Department will determine compliance with the Fair Housing Act based solely on the number of people permitted in each bedroom. Indeed, as we stated in the final rule implementing the Fair Housing Amendments Act of 1988, the Department's position is as follows:

> [T]here is nothing in the legislative history which indicates any intent on the part of Congress to provide for the development of a national occupancy code. . . .
>
> On the other hand, there is no basis to conclude that Congress intended that an owner or manager of dwellings would be unable to restrict the number of occupants who could reside in a dwelling. Thus, the Department believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit. In this regard, it must be noted that, in connection with a complaint alleging discrimination on the basis of familial status, the Department will carefully examine any such

nongovernmental restriction to determine whether it operates unreasonably to limit or exclude families with children.

24 C.F.R. Chapter I, Subchapter A. Appendix I at 566-67 (1990).

Thus, in reviewing occupancy cases, HUD will consider the size and number of bedrooms and other special circumstances. The following principles and hypothetical examples should assist you in determining whether the size of the bedrooms or special circumstances would make an occupancy policy unreasonable.

Size of bedrooms and unit

Consider two theoretical situations in which a housing provider refused to permit a family of five to rent a two-bedroom dwelling based on a "two people per bedroom" policy. In the first, the complainants are a family of five who applied to rent an apartment with two large bedrooms and spacious living areas. In the second, the complainants are a family of five who applied to rent a mobile home space on which they planned to live in a small two-bedroom mobile home. Depending on the other facts, issuance of a charge might be warranted in the first situation, but not in the second.

The size of the bedrooms also can be a factor suggesting that a determination of no reasonable cause is appropriate. For example, if a mobile home is advertised as a "two-bedroom" home, but one bedroom is extremely small, depending on all the facts, it could be reasonable for the park manager to limit occupancy of the home to two people.

Age of children

The following hypotheticals involving two housing providers who refused to permit three people to share a bedroom illustrate this principle. In the first, the complainants are two adult parents who applied to rent a one-bedroom apartment with their infant child, and both the bedroom and the apartment were large. In the second, the complainants are a family of two adult parents and one teenager who applied to rent a one-bedroom apartment. Depending on the other facts, issuance of a charge might be warranted in the first hypothetical, but not in the second.

Configuration of unit

The following imaginary situations illustrate special circumstances involving unit configuration. Two condominium associations each reject a purchase by a family of two adults and three children based on a rule limiting sales to buyers who satisfy a "two people per bedroom" occupancy policy. The first association manages a building in which the family of the five sought to purchase a unit consisting of two bedrooms plus a den or

study. The second manages a building in which the family of five sought to purchase a two-bedroom unit which did not have a study or den. Depending on the other facts, a charge might be warranted in the first situation, but not in the second.

Other physical limitations of housing

In addition to physical considerations such as the size of each bedroom and the overall size and configuration of the dwelling, the Department will consider limiting factors identified by housing providers, such as the capacity of the septic, sewer, or other building systems.

State and local law

If a dwelling is governed by State or local governmental occupancy requirements, and the housing provider's occupancy policies reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to indicate that the housing provider's occupancy policies are reasonable.

Other relevant factors

Other relevant factors supporting a reasonable cause recommendation based on the conclusion that the occupancy policies are pretextual would include evidence that the housing provider has: (1) made discriminatory statements; (2) adopted discriminatory rules governing the use of common facilities; (3) taken other steps to discourage families with children from living in its housing; or (4) enforced its occupancy policies only against families with children. For example, the fact that a development was previously marketed as an "adults only" development would militate in favor of issuing a charge. This is an especially strong factor if there is other evidence suggesting that the occupancy policies are a pretext for excluding families with children.

An occupancy policy which limits the number of children per unit is less likely to be reasonable than one which limits the number of people per unit.

Special circumstances also may be found where the housing provider limits the total number of dwellings he or she is willing to rent to families with children. For example, assume a landlord owns a building of two-bedroom units, in which a policy of four people per unit is reasonable. If the landlord adopts a four person per unit policy, but refuses to rent to a family of two adults and two children because twenty of the thirty units already are occupied by families with children, a reasonable cause recommendation would be warranted.

If your review of the evidence indicates that these or other special circumstances are present, making application of a "two people per bedroom" policy unreasonably restrictive, you should prepare a reasonable cause determination. The Executive Summary should explain the special circumstances which support your recommendation.

[FR Doc. 98–33568 Filed 12–17–98; 8:45 am]
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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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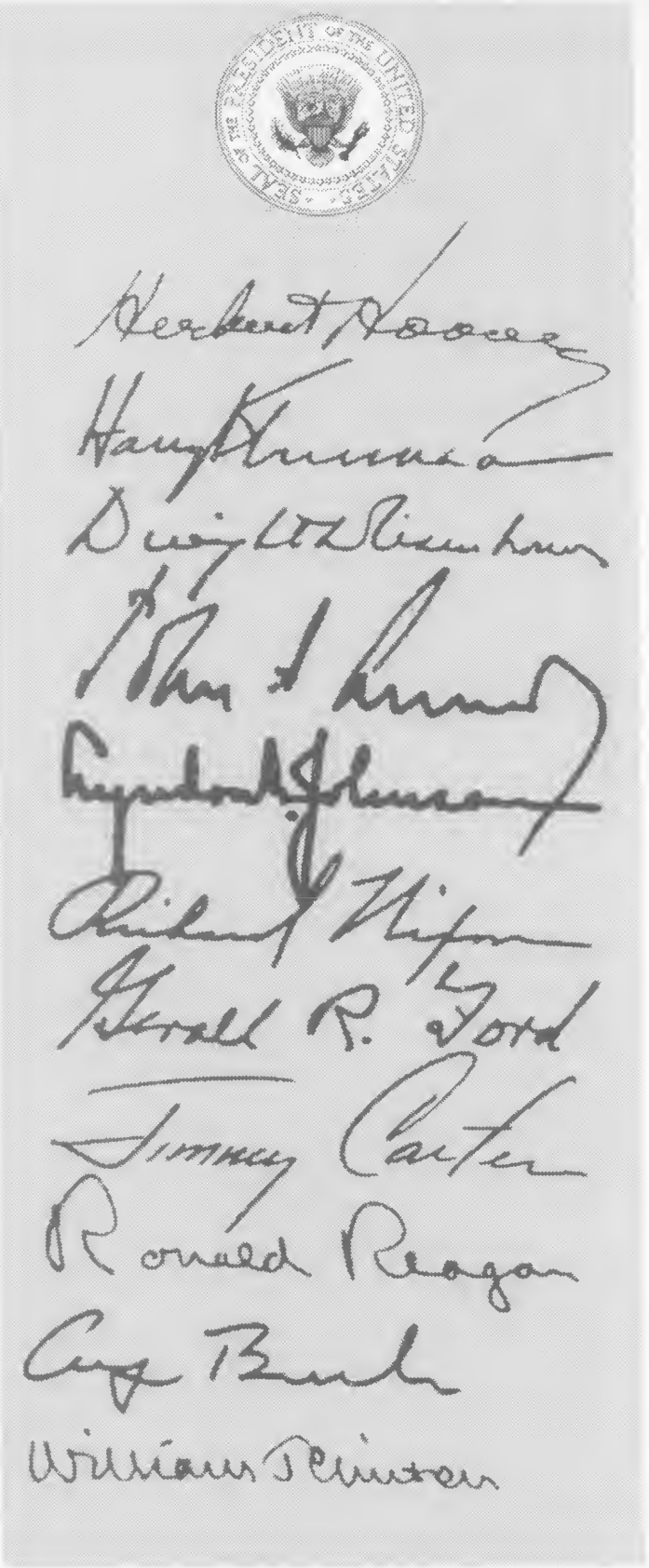

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