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DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1776

RIN 0572–AB93

Withdrawal of Direct Final Rule for the Household Water Well System Grant Program

AGENCY: Rural Utilities Service, USDA.

ACTION: Withdrawal of direct final rule.

SUMMARY: The Rural Utilities Service (RUS) is withdrawing the direct final rule for the Household Water Well System Grant Program that was published on October 6, 2004 (69 FR 59764). RUS stated in the direct final rule that if it received adverse comment by November 5, 2004, the agency would publish a timely notice of withdrawal in the **Federal Register**. RUS subsequently received adverse comments and, therefore, is withdrawing the direct final rule. RUS will address those comments in a subsequent final action based on the parallel proposal also published on October 6, 2004 (69 FR 59836). As stated in the parallel proposal, RUS will not institute a second comment period on this action.

DATES: Effective Date: The direct final rule published on October 6, 2004, at 69 FR 59764 is withdrawn as of November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Cheryl Francis, Loan Specialist, Water Programs Division, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 2239–S, Stop 1570, Washington, DC 20250–1570. Telephone (202) 720–1937. E-Mail: *Cheryl.Francis@usda.gov.*

SUPPLEMENTARY INFORMATION: RUS published a direct final rule on October 6, 2004, to issue regulations to establish the Household Water System Program as authorized by section 306E of the Consolidated Farm and Rural Development Act (CONACT). The direct final rule was to establish a lending program for the construction, refurbishing, and servicing of individually-owned household water well systems in rural areas that are or will be owned by the eligible individuals. In addition, the rule outlined the process by which applicants could apply for the program and how RUS would administer the grant program.

RUS published a companion proposed rule on the same day as the direct final rule. The proposed rule invited comment on the substance of the direct final rule. The proposed rule stated that if RUS received adverse comment by November 5, 2004, the direct final rule would not take effect, and RUS would withdraw the direct final rule before the November 22, 2004, effective date. RUS subsequently received adverse comments on the direct final rule. RUS plans to address those comments in a subsequent action. Today's action withdraws the direct final rule. The regulations addressing the Household Water Well System Grant Program will not take effect on November 22, 2004.

List of Subjects in 7 CFR Part 1776

Agriculture, Community development, Community facilities, Credit, Grant programs—housing and community development, Nonprofit organizations, Reporting and recordkeeping requirements, Rural areas, Waste treatment and disposal, Water pollution control, Water resources, Water supply, Watersheds.

Dated: November 9, 2004.

Hilda Gay Legg,

Administrator, Rural Utilities Service.

[FR Doc. 04–25491 Filed 11–16–04; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Decoquinate; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule, technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending its animal drug regulations to more accurately describe the approved feeding instructions for decoquinate Type C medicated feeds for cattle and calves, including nonruminating veal calves, and for young sheep and young goats. This action is being made to improve the accuracy of the regulations.

DATES: This rule is effective November 17, 2004.

FOR FURTHER INFORMATION CONTACT: George K. Haibel, Center for Veterinary Medicine (HFV 6), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–4567, e-mail: *george.haibel@fda.gov.*

SUPPLEMENTARY INFORMATION: FDA has found that the April 1, 2004, edition of the Code of Federal Regulations part 500 to 599 (21 CFR 500 to 599) does not reflect the feeding instructions for decoquinate in Type C medicated feeds for cattle and calves, including nonruminating veal calves, and for young sheep and young goats approved under NADA 39–417 (67 FR 72370, December 5, 2002). At this time, FDA is amending the regulations to correct this error in § 558.195. An inaccurate and unnecessary description of a Type B medicated feed is also being removed. These changes are being made to improve the accuracy of the regulations.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner

of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 2. Section 558.195 is amended by revising paragraphs (e)(2)(i), (e)(2)(ii), and (e)(3)(ii) in the table to read as follows:

§ 558.195 Decoquinate.

* * * * *

(e) * * *

(2) * * *

Decoquinate in grams/ton	Combination in grams/ton	Indications for use	Limitations	Sponsor
(i) 12.9 to 90.8		Cattle (including ruminating and nonrumi nating calves and veal calves): For prevention of coccidiosis caused by *Eimeria bovis* and *E. zuernii*	Feed Type C feed or milk replacer to provide 22.7 milligrams (mg) per 100 pounds (lb) of body weight (0.5 mg/kg) per day. Feed at least 28 days during periods of exposure to coccidiosis or when it is likely to be a hazard. Do not feed to cows producing milk for food. See paragraph (d)(3) of this section	046573
(ii) 90.9 to 535.7		Cattle (including ruminating and nonrumi nating calves and veal calves): As in paragraph (e)(2)(i) of this section	Feed Type C medicated feed supplements as a top dress or mix into the daily ration to provide 22.7 mg per 100 lb of body weight (0.5 mg/kg) per day. Feed at least 28 days during periods of exposure to coccidiosis or when it is likely to be a hazard. Do not feed to cows producing milk for food. See paragraph (d)(3) of this section	046573
*	*	* *	*	*

(3) * * *

Decoquinate in grams/ton	Combination in grams/ton	Indications for use	Limitations	Sponsor
*	*	* *	*	*
(ii) 90.9 to 535.7		1. Young sheep: As in item 1 of paragraph (e)(3)(i) of this section	Feed Type C medicated feed supplements as a top dress or mix into the daily ration to provide 22.7 mg per 100 lbs of body weight (0.5 mg per kg) per day; feed for at least 28 days during periods of exposure to coccidiosis or when it is likely to be a hazard. Do not feed to sheep producing milk for food	046573
		2. Young goats: As in item 2 of paragraph (e)(3)(i) of this section	Feed Type C medicated feed supplements as a top dress or mix into the daily ration to provide 22.7 mg per 100 lbs of body weight (0.5 mg per kg) per day; feed for at least 28 days during periods of exposure to coccidiosis or when it is likely to be a hazard. Do not feed to goats producing milk for food	
*	*	* *	*	*

Dated: November 4, 2004.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine .

[FR Doc. 04–25441 Filed 11–16–04; 8:45 am]

BILLING CODE 4160–01–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3443; MB Docket No. 04–213, RM–10991; MB Docket No. 04–216, RM–10994]

Radio Broadcasting Services; Boligee, AL and Vaiden, MS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Greene County Broadcasting, allots Channel 297A at Boligee, Alabama, as the community's first local aural transmission service. *See* 69 FR 35564, published June 25, 2004. Channel 297A can be allotted to Boligee in compliance with the Commission's minimum distance separation requirements, provided there is a site restriction of 9.5 kilometers (5.9 miles) northwest of the community. The reference coordinates for Channel 297A at Boligee are 32–48–34 North Latitude and 88–06–27 West Longitude. The Audio Division, at the request of Team Broadcasting Co., Inc., allots Channel 271A at Vaiden, Mississippi, as the community's first local aural transmission service. *See* 69 FR 35564, published June 25, 2004. Channel 271A can be allotted to Vaiden in compliance with the Commission's minimum distance separation requirements, provided there is a site restriction of 4.4 kilometers (2.7 miles) southeast of the community. The reference coordinates for Channel 271A at Vaiden are 33–18–03 North Latitude and 89–42–54 West Longitude. Filing windows for Channel 297A at Boligee, Alabama and Channel 271A at Vaiden, Mississippi will not be opened at this time. Instead, the issue of opening a filing window for these channels will be addressed by the Commission in a subsequent order.

DATES: Effective December 13, 2004.

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

FOR FURTHER INFORMATION CONTACT: Helen McLean, Media Bureau, (202) 418–2738.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket Nos. 04–213 and 04–216, adopted October 27, 2004, and released October 29, 2004. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by adding Boligee, Channel 297A.

■ 3. Section 73.202(b), the Table of FM Allotments under Mississippi, is amended by adding Vaiden, Channel 271A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–25511 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3445; MB Docket No. 04–69; RM–10859]

Radio Broadcasting Services; Dexter, GA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a *Notice of Proposed Rule Making*, 69 FR 16512 (March 30, 2004), this *Report and Order* allots Channel 276A to Dexter, Georgia, as its first local aural transmission service. The coordinates for Channel 276A at Dexter, Georgia, are 32–25–59 NL and 83–01–33 WL, with a site restriction of 3.3 kilometers (2.1 miles) east of Dexter.

DATES: Effective December 13, 2004.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order* in MB Docket No. 04–69, adopted October 27, 2004, and released October 29, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by adding Dexter, Channel 276A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–25512 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3447; MB Docket No. 04–195, RM–10975; MB Docket No. 04–196, RM–10970; MB Docket No. 04–197, RM–10971; MB Docket No. 04–198, RM–10977; MB Docket No. 04–199, RM–10978; MB Docket No. 04–200, RM–10979]

Radio Broadcasting Services; Cross City, FL, Key Largo, FL, and McCall, ID

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants six proposals allotting new channels to Cross City, Florida, Key Largo, Florida and McCall, Idaho. The Audio Division, at the request of Paul B. Christensen, allots Channel 249C3 at Cross City, Florida, as its second FM commercial aural transmission service. *See* 69 FR 34115, June 18, 2004. Channel 249C3 can be allotted to Cross City in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.2 kilometers (6.9 miles) north to avoid a short-spacing to the license sites of Station WSKY–FM, Channel 247C2, Micanopy, Florida and FM Station WXTB, Channel 250C, Clearwater, Florida. The reference coordinates for Channel 249C3 at Cross City are 29–44–07 North Latitude and 83–08–42 West Longitude. See **SUPPLEMENTARY INFORMATION**, infra.

DATES: Effective December 13, 2004. The window period for filing applications for these allotments will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent order.

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

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket Nos. 04–195, 04–196, 04–197, 04–198, 04–199, 04–200, adopted October 27, 2004 and released October 29, 2004. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

The Audio Division, at the request of Paul B. Christensen, allots Channel 237C3 at Key Largo, Florida, as its second FM commercial aural transmission service. Channel 237C3 can be allotted to Key Largo in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The reference coordinates for Channel 237C3 at Key Largo are 25–05–24 North Latitude and 80–26–36 West Longitude.

The Audio Division, at the request of McCall Broadcasting Company, allots Channel 228C3 at McCall, Idaho, as the community's third FM commercial aural transmission service. Channel 228C3 can be allotted to McCall in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The reference coordinates for Channel 228C3 at McCall are 44–54–30 North Latitude and 116–06–00 West Longitude.

The Audio Division, at the request of Brundage Broadcasting Company, allots Channel 238C3 at McCall, Idaho, as the community's fourth FM commercial aural transmission service. Channel 238C3 can be allotted to McCall in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The reference coordinates for Channel 238C3 at McCall are 44–54–30 North Latitude and 116–06–00 West Longitude.

The Audio Division, at the request of Long Valley Broadcasting Company, allots Channel 275C3 at McCall, Idaho, as the community's fifth FM commercial aural transmission service. Channel 275C3 can be allotted to McCall in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The reference coordinates for Channel 275C3 at McCall are 44–54–30 North Latitude and 116–06–00 West Longitude.

The Audio Division, at the request of King's Pines Broadcasting Company, allots Channel 293C3 at McCall, Idaho, as the community's sixth FM commercial aural transmission service. Channel 293C3 can be allotted to McCall in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) northeast of McCall. The reference coordinates for Channel 293C3 at McCall are 44–57–54 North Latitude and 116–03–00 West Longitude.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Idaho, is amended by adding Channel 228C3, Channel 238C3, Channel 275C3, and Channel 293C3 at McCall.

■ 3. Section 73.202(b), the Table of FM Allotments under Florida, is amended by adding Channel 249C3 at Cross City and Channel 237C3 at Key Largo.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–25514 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3442; MB Docket No. 04–169, RM–10760]

Radio Broadcasting Services; El Indio, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Charles Crawford, allots Channel 236A to El Indio, Texas, as the community's first local aural transmission service. *See* 69 FR 29253, May 21, 2004. Channel 236A can be allotted to El Indio, in compliance with the Commission's minimum distance separation requirements, provided there is a site restriction of 1.3 kilometers (0.8 miles) southeast of the community at coordinates 28–30–22 North Latitude and 100–18–03 West Longitude. A filing window for Channel 236A at El Indio, Texas, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

DATES: Effective December 13, 2004.

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

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 04–169, adopted October 27, 2004, and released October 29, 2004. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding El Indio, Channel 236A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–25515 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[I.D. 110904H]

Fraser River Sockeye Salmon Fisheries; Inseason Orders

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

ACTION: Inseason orders.

SUMMARY: NMFS publishes the Fraser River salmon inseason orders regulating salmon fisheries in U.S. waters. The orders were issued by the Fraser River Panel (Panel) of the Pacific Salmon Commission (Commission) and subsequently approved and issued by NMFS during the 2004 salmon fisheries within the U.S. Fraser River Panel Area. These orders established fishing times and areas for the gear types of U.S. treaty Indian and all-citizen fisheries during the period the Panel exercised jurisdiction over these fisheries.

DATES: Each of the following inseason actions was effective upon announcement on telephone hotline numbers as specified at 50 CFR 300.97(b)(1); those dates and times are listed herein. Comments will be accepted through December 2, 2004.

ADDRESSES: Comments may be mailed to D. Robert Lohn, Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way N.E., BIN C15700–Bldg. 1, Seattle, WA 98115–0070. Information relevant to this document is available for public review during business hours at the office of the Regional Administrator, Northwest Region, NMFS.

Comments can also be submitted via e-mail at the *Fraser2004salmon@noaa.gov*, or through the internet at the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments and include the I.D. number in the subject line of the message. Information relevant to this document is available for public review during business hours at the Office of the Regional Administrator, Northwest Region, NMFS.

FOR FURTHER INFORMATION CONTACT: David Cantillon, (206) 526–4140.

SUPPLEMENTARY INFORMATION: The Treaty between the Government of the United States of America and the Government of Canada concerning Pacific Salmon was signed at Ottawa on January 28, 1985, and subsequently was given effect in the United States by the Pacific Salmon Treaty Act (Act) at 16 U.S.C. 3631–3644.

Under authority of the Act, Federal regulations at 50 CFR part 300, subpart F provide a framework for implementation of certain regulations of the Commission and inseason orders of the Commission's Fraser Panel for U.S. sockeye and pink salmon fisheries in the Fraser River Panel Area.

The regulations close the U.S. portion of the Fraser River Panel Area to U.S. sockeye and pink salmon fishing unless opened by Panel orders which are given effect by inseason regulations published by NMFS. During the fishing season, NMFS may issue regulations that establish fishing times and areas consistent with the Commission agreements and inseason orders of the Panel. Such orders must be consistent with domestic legal obligations. The Regional Administrator, Northwest Region, NMFS, issues the inseason orders. Official notification of these inseason actions of NMFS is provided by two telephone hotline numbers described at 50 CFR 300.97(b)(1). Inseason orders must be published in the **Federal Register** as soon as practicable after they are issued. Due to the frequency with which inseason orders are issued, publication of individual orders is impractical. Therefore, the 2004 orders are being published in this single document to avoid fragmentation.

The following inseason orders were adopted by the Panel and issued for U.S. fisheries by NMFS during the 2004 fishing season. The times listed are local times, and the areas designated are Puget Sound Management and Catch Reporting Areas as defined in the Washington State Administrative Code at Chapter 220–22:

Order No. 2004–01: **Issued 1 p.m., July 16, 2004.**

Treaty Indian Fisheries

Areas 4B, 5, and 6C: Open period for drift gill nets from 12 p.m. (noon), Sunday, July 18, 2004, to 12 p.m. (noon), Wednesday, July 21, 2004.

Order No. 2004–02: **Issued 1 p.m., July 20, 2004.**

Treaty Indian Fisheries

Areas 4B, 5, and 6C: Open period for drift gill nets from 12 p.m. (noon), Wednesday, July 21, 2004, to 12 p.m. (noon), Saturday, July 24, 2004.

Order No. 2004–03: **Issued 2:00 p.m., July 23, 2004.**

Treaty Indian Fisheries

Areas 4B, 5, and 6C: Open for drift gillnets from 12 p.m. (noon) Saturday, July 24, 2004, to 12 p.m. (noon), Wednesday, July 28, 2004.

Areas 6, 7, and 7A: Open to net fishing from 4 a.m., Monday, July 26, 2004, to 8 a.m., Wednesday, July 28, 2004.

All Citizen Fisheries

Areas 7 and 7A Gillnet: Open to fishing from 8 a.m. until 11:59 p.m.. (midnight), both July 28 and July 29, 2004.

Areas 7 and 7A Purse Seine: Open to fishing from 5 a.m. until 9 p.m., both July 28 and July 29, 2004.

Areas 7 and 7A Reef Net: Open to fishing from 5 a.m. until 9 p.m., both July 28 and July 29, 2004.

Order No. 2004–04: **Issued 5 p.m., July 27, 2004.**

Treaty Indian Fisheries

Areas 4B, 5, and 6C: Open for drift gillnets from 12 p.m. (noon) Wednesday, July 28, 2004, to 12 p.m. (noon), Saturday, July 31, 2004.

Areas 6, 7, and 7A: Open to net fishing from 4 a.m., Thursday, July 29, 2004, to 8 a.m., Saturday, July 31, 2004.

All Citizen Fisheries

Areas 7 and 7A Gillnet: Open to fishing from 8 a.m. until 11:59 p.m. (midnight), July 30, 2004.

Areas 7 and 7A Purse Seine: Open to fishing from 5 a.m. until 9 p.m., July 30, 2004.

Areas 7 and 7A Reef Net: Open to fishing from 5 a.m. until 9 p.m., both July 30 and August 1, 2004.

Order No. 2004–05: **Issued 5 p.m., July 30, 2004.**

Treaty Indian Fisheries

Areas 4B, 5, and 6C: Open for drift gillnets from 12 p.m. (noon) Saturday, July 31, 2004, to 12 p.m. (noon), Saturday, August 7, 2004.

Areas 6, 7, and 7A: Open to net fishing from 4 a.m., Sunday, August 1, 2004, to 11:59 p.m., Friday, August 6, 2004.

All Citizen Fisheries

Areas 7 and 7A Gillnet: Open to fishing from 8 a.m. until 11:59 p.m. on the following dates: August 3 through August 6, 2004.

Areas 7 and 7A Purse Seine: Open to fishing from 5 a.m. until 9 p.m. on the following dates: August 3 through August 6, 2004.

Areas 7 and 7A Reef Net: Open to fishing from 5 a.m. until 9 p.m. on the following dates: July 31, and August 3 through August 6, 2004.

Order No. 2004–06: Issued 3 p.m., August 6, 2004.

Treaty Indian Fisheries

Areas 4B, 5, and 6C: Open for drift gillnets from 12 p.m. (noon) Saturday, August 7, 2004, to 12 p.m. (noon), Saturday, August 14, 2004.

Areas 6, 7, and 7A: Open to net fishing from 12:01 a.m., Saturday, August 7, 2004 to 11:59 p.m., Friday, August 13, 2004.

All Citizen Fisheries

Areas 7 and 7A Gillnet: Open to fishing from 8 a.m. until 11:59 p.m. on the following dates: August 10 through August 13, 2004.

Areas 7 and 7A Purse Seine: Open to fishing from 5 a.m. until 9 p.m. on the following dates: August 10 through August 13, 2004.

Areas 7 and 7A Reef Net: Open to fishing from 5 a.m. until 9 p.m. on the following dates: August 10 through August 13, 2004.

Order No. 2004–07: **Issued 2 p.m., August 13, 2004.**

Treaty Indian Fisheries

Areas 4B, 5, and 6C: Open for drift gillnets from 12 p.m. (noon) Saturday, August 14, 2004, to 11:59 p.m., Saturday, August 14, 2004.

Areas 6, 7, and 7A: Open to net fishing from 12:01 a.m., Saturday, August 14, 2004, to 11:59 p.m., Saturday, August 14, 2004.

The Assistant Administrator for Fisheries NOAA (AA), finds that good cause exists for the inseason orders to be issued without affording the public prior notice and opportunity for comment under 5 U.S.C. 553(b)(B) as such prior notice and opportunity for comments is impracticable and contrary to the public interest. Prior notice and opportunity for public comment is impracticable because NMFS has insufficient time to allow for prior notice and opportunity for public comment between the time the stock abundance information is available to determine how much fishing can be allowed and the time the fishery must open and close in order to harvest the appropriate amount of fish while they are available.

Moreover, such prior notice and opportunity for public comment is impracticable because not closing the fishery upon attainment of the quota would allow the quota to be exceeded and thus compromise the conservation objectives established preseason, and it does not allow fishers appropriately controlled access to the available fish at the time they are available.

The AA also finds good cause to waive the 30–day delay in the effective date, required under 5 U.S.C. 553(d)(3), of the inseason orders. A delay in the effective date of the inseason orders would not allow fishers appropriately controlled access to the available fish at that time they are available.

This action is authorized by 50 CFR 300.97, and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 3636(b).

Dated: November 10, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–25524 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 635

[Docket No. 040316092–4312–02; I.D.103003A]

RIN 0648–AQ37

International Fisheries; Atlantic Highly Migratory Species

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

ACTION: Final rule.

SUMMARY: This final rule implements international trade tracking recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the Inter-American Tropical Tuna Commission (IATTC) for bluefin tuna, swordfish, and frozen bigeye tuna, regardless of ocean area of origin. Trade monitoring requirements for species covered under the recommendations and for southern bluefin tuna are established by this rule, including: a highly migratory species (HMS) international trade permit; statistical documents and re-export certificates; and recordkeeping, reporting, and inspection requirements.

DATES: Effective July 1, 2005.

ADDRESSES: Copies of the supporting documents, including the regulatory impact review/final Regulatory Flexibility Act analysis (RIR/FRFA) and the original ICCAT and IATTC recommendations, are available by sending your request to Dianne Stephan, Highly Migratory Species Management Division, NMFS, 1 Blackburn Drive, Gloucester, MA 01930.

Bluefin tuna, southern bluefin tuna, bigeye tuna, and swordfish statistical documents, re-export certificates, and biweekly trade reports may be obtained from:

Atlantic coast: NMFS, HMS, ATTN: Kathy Goldsmith, 1 Blackburn Drive, Gloucester, MA 01930–2298;

Gulf coast: NMFS, National Seafood Inspection Laboratory, ATTN: Lori Robinson, 705 Convent St, Pascagoula, MS 39568–1207;

West coast: NMFS, Southwest Region, Sustainable Fisheries Division, ATTN:

Pat Donley, 501 West Ocean Blvd. Suite 4200, Long Beach, CA 90802–4213; and, *Western Pacific:* NMFS, Pacific Islands Regional Office, ATTN: Raymond Clarke, 1601 Kapiolani Blvd, Suite 1110, Honolulu, HI 96814–4700.

FOR FURTHER INFORMATION CONTACT: Dianne Stephan (Atlantic coast), 978–281–9397; Raymond Clarke (Western Pacific), 808–973–2935; Lori Robinson (Gulf coast), 228–769–8964; or Patricia J. Donley (West coast), 562–980–4033.

SUPPLEMENTARY INFORMATION:

Background

The proposed rule for this action (69 FR 16211, March 29, 2004) provided substantial background information which has been summarized as follows.

The United States is authorized under the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971(d)(3)) to promulgate regulations as necessary and appropriate to implement conservation and management recommendations that have been adopted by the International Commission for the Conservation of Atlantic Tuna (ICCAT). Likewise, the Tuna Conventions Act (TCA; 16 U.S.C. 955) authorizes rulemaking to carry out recommendations of the Inter-American Tropical Tuna Commission (IATTC).

ICCAT has determined that Atlantic stocks of bigeye tuna (*Thunnus obesus*), bluefin tuna (*Thunnus thynnus*), and swordfish (*Xiphias gladius*) are overfished in the Atlantic Ocean. Large scale longline vessels from ICCAT member and non-member nations alike have been reported to operate in a manner that diminishes the effectiveness of previously-implemented ICCAT measures designed, in part, to prevent overfishing and rebuild stocks of these species. At its 2000 meeting, ICCAT recommended the implementation of trade monitoring programs which would address illegal, unreported and unregulated (IUU) catches in the Convention Area. During 2001, programs for bigeye tuna (frozen) and swordfish statistical documents and re-export certificates were officially adopted. In addition, a recommendation to add a re-export certificate to the bluefin tuna program was adopted by ICCAT in 1997.

ICCAT member nations are now required to implement these recommendations. As with ICCAT's previously-required bluefin tuna statistical document program, Pacific stocks are also included in order to establish an enforceable program. In addition, IATTC member nations are implementing a Pacific area program based on a 2003 IATTC resolution for a frozen Pacific bigeye tuna statistical document program. The Commission for the Conservation and Management of HMS stocks in the Western and Central Pacific Ocean (WCPFC) may consider a similar measure for frozen bigeye tuna.

NMFS is creating an international trade monitoring program for bigeye tuna (frozen) and swordfish to comply with recommendations from ICCAT and IATTC. A statistical document program for southern bluefin tuna is also being established to improve compliance with the previously implemented ICCAT bluefin tuna statistical document program. Southern bluefin tuna (*Thunnus maccoyii*) are virtually indistinguishable from bluefin tuna and Pacific bluefin tuna (*Thunnus orientalis*). Currently, it is possible for bluefin tuna or Pacific bluefin tuna to be mislabeled as southern bluefin to circumvent statistical document reporting requirements. This confounds the established trade tracking program. Moreover, the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) has requested that the United States take part in its statistical document program to further conservation efforts for this species.

Provisions of the Final Rule

This rule requires that importers and exporters of bluefin tuna, southern bluefin tuna, swordfish and frozen bigeye tuna obtain a HMS International Trade Permit (ITP) on an annual basis. Only those importers who are entering product for consumption need to have an ITP.

Permit holders are required to comply with documentation, reporting, recordkeeping, and inspection requirements including the preparation of a species-specific statistical document or re-export certificate to accompany export or re-export shipments of southern bluefin tuna, frozen bigeye tuna, and swordfish. Re-export certificates are also required for re-exports of bluefin tuna. Statistical documents for exports and re-export certificates must be validated by NMFS or a NMFS-authorized official, and a copy of each document must be provided to NMFS. Likewise, all imports of swordfish, southern bluefin tuna, and frozen bigeye tuna must be accompanied by a validated statistical document or re-export certificate. For those imports entered for consumption, the original statistical document for each shipment must be submitted to NMFS once the shipment reaches its final destination. Each permit holder must prepare and submit a biweekly activity report to NMFS.

The final rule provides for certain exemptions to its requirements. First, trade documentation in this rule does not apply to frozen bigeye tuna caught by purse seiners or baitboats and destined principally for canneries of the United States or a U.S. insular possession. Second, re-export certificates are not required for re-export shipments that have not been consolidated or subdivided, and for which the shipment contents remain true to the information on the original statistical document. In addition, validation is not required for re-exports that do not require a re-export certificate. Third, importers of entries other than entries for consumption (e.g., shipments on a through bill of lading, destined from one foreign country to another) are not required to obtain the HMS ITP and are not subject to the reporting requirements. However, these shipments are subject to the documentation requirements, and must be accompanied by a correctly completed, validated statistical document. Fourth, trade-tracking documentation is not required for shipments between the United States and U.S. insular possessions.

Documentation, reporting, recordkeeping, and inspection requirements that were previously in effect for import and export of bluefin tuna remain in effect; however, NMFS has moved the relevant regulatory text from 50 CFR. 635.41 through 635.43 to 50 CFR 300.183 through 300.189 and consolidated it with regulatory text implementing trade tracking requirements for the other species covered by this rule. In addition, the statistical document for swordfish implemented by this rule will replace the swordfish certificate of eligibility. Upon implementation of this rule, the certificate of eligibility will no longer be required. This final rule also corrects several cross-references in 50 CFR parts 300 and 635.

Implementation Date

NMFS recognizes that the implementation of a new permit program must be accompanied by a period of outreach to affected constituents. In addition, NMFS is initiating an electronic permitting and reporting system for the HMS ITP. Therefore, to provide for sufficient time for implementation and outreach, this final rule will go into effect on July 1, 2005.

Changes from the Proposed Rule

As reflected in the Comments and Responses below, several commenters raised concerns regarding the burden and costs of this trade tracking program. In response to public comments, NMFS

has made clarifications to the final rule to minimize its potential impact to the extent practicable, consistent with regional fishery management organization (RFMO) recommendations. With regard to imports, the final rule provides that not all imports are subject to reporting requirements, and limits reporting requirements to those shipments that are entered for consumption. To make this narrower requirement clear, the final rule adds definitions for "entry for consumption," "entered for consumption," "entry number," and "exportation," and refines the definitions of "import" and "export" to be more consistent with U.S. Customs and Border Protection (CBP; 19 CFR parts 101, 141, 144, and 146) and U.S. Census Bureau (15 CFR part 30) regulations. As in the proposed rule, the final rule continues to require documentation for all imports of products identified in § 300.184 into the Customs territory of the United States. Such imports must be accompanied by validated statistical documents and are subject to inspection by authorized NMFS personnel. The final rule excludes this requirement for insular possessions with customs territories separate from the Customs territory of the United States. Such entities may make individual determinations regarding the need for documentation of entries other than entries for consumption. A definition for "separate customs territory of a U.S. insular possession" was added to improve the clarity of these provisions.

The final rule clarifies the definitions of "importer" and "exporter" to specify that the party responsible for obtaining the HMS ITP and fulfilling the reporting requirements is the consignee for imports and the U.S. principal party in interest (USPPI) for exports. Currently, for importers in the United States, the consignee is identified on CBP Forms 7512, 3461, and 7501 or on the electronic Automated Commercial System (ACS). Exporters are identified as the USPPI on the Shippers Export Declaration (SED) and in the Automated Export System (AES), and as the "exporter" on the Canada Customs Invoice. Documentation and reporting requirements of this rule apply to all exports described in § 300.185(b), regardless of whether those shipments are exempt from SED and AES documentation and reporting requirements. Additionally, customs brokers or freight forwarders may obtain a HMS ITP or submit documentation for the consignee or USPPI; however, the individual identified as the importer or exporter, as defined in the rule, are the parties legally responsible for the permitting, documentation, reporting, and recordkeeping requirements of this rule.

While the proposed rule required the HMS ITP for all importers, the final rule clarifies that the permit is only required for importers who enter for consumption products regulated by this rule. Although not all importers are required to have a HMS ITP, section 300.185(e) clarifies that anyone responsible for importing, exporting, storing, packing, or selling fish or fish products regulated under this subpart, in addition to HMS ITP holders, is subject to the inspection provisions at ' 300.183(d).

The final rule clarifies the documentation requirements for re-exports (i.e., product that is entered for consumption then subsequently exported). If a shipment entered for consumption remains true to the contents listed on the original statistical document, then, upon re-export, the importers certification on the statistical document is completed in lieu of a re-export certificate. If the shipment is subdivided or consolidated, then a re-export certificate identifying the complete contents of the shipment must be completed and validated for each re-export shipment. The original or a copy of the original statistical document must be attached to each re-export certificate.

The final rule adds a new paragraph under ' 300.185(b) which clarifies that the export documentation and reporting requirements of that paragraph apply to exports of fish or fish products that were harvested by U.S. vessels and first landed in the United States, or harvested by vessels of a U.S. insular possession. Thus, these export provisions would not be required for tuna transshipments in the customs territory of Guam.

The final rule clarifies the applicability of the trade monitoring program to products of an American fishery landed overseas. When such products are shipped from a foreign port and entered into the United States under heading 9815 of the Harmonized Tariff Schedule of the United States (HTS), the trade monitoring requirements in this rule for imports into the United States do not apply. However, if such products are so entered into the United States and then exported, trade monitoring requirements would apply for the export of the product from the United States. Likewise, if products from an American fishery landed overseas were exported directly from a foreign nation to another foreign nation, the trade monitoring program requirements would apply. For such transactions, NMFS should be contacted for assistance with documentation and validation requirements.

To improve clarity, the final rule removes the definition of "foreign trade dealer" and adds additional clarification regarding the use of statistical documents and re-export certificates by foreign businesses at § 300.186(h). Further, minor revisions to improve clarity and consistency in the regulatory text include replacing the term "dealer" with "permit holder," "dealer permit" with "trade permit," and "international commission" with "regional fishery management organization (RFMO)." The final rule clarifies that other government agencies may be authorized to provide validation services. The final rule also corrects cross-references in §§ 635.20 and 635.31; adjusts the definitions of "import," "export," "importer," and "exporter" in § 635.2 to be consistent with § 300.182 and CBP and Census Bureau regulations, adds a definition for "exportation," and removes the definition of "Swordfish Certificate of Eligibility (COE)" from § 635.2.

Comments and Responses

Scope

Comment 1: Supporting and opposing comments were received for the proposal to include fresh bigeye tuna in the statistical document program. Commenters that opposed including fresh bigeye tuna in the program stated the following: that they primarily deal in fresh bigeye tuna; that a fresh bigeye tuna program should be delayed until the statistical document program for frozen bigeye tuna has been implemented and evaluated to determine whether including fresh bigeye tuna is necessary; and that including fresh bigeye tuna would be more expensive than a program solely for frozen bigeye tuna. Commenters that supported including fresh bigeye tuna in the program stated that it would be less confusing to implement a comprehensive bigeye tuna trade program from the onset. Another commenter suggested including fresh bigeye tuna after a defined time period. One commenter requested that all fresh products be exempted, and another commenter noted that the rationale for including bigeye tuna in the proposed rule was unclear.

Response: The trade monitoring program in the final rule does not include fresh bigeye tuna. Current ICCAT and IATTC recommendations apply only to frozen bigeye tuna, because both organizations recognize that numerous implementation issues

require resolution prior to the establishment of a statistical document program for fresh bigeye tuna. For the sake of comprehensiveness, NMFS requested comment on the inclusion of fresh bigeye tuna to inform the public of potential future actions by ICCAT, IATTC, or other RFMO, and to identify public concerns. A similar approach was taken in the 1993 ICCAT recommendation for a bluefin tuna statistical document program. After implementation issues regarding the trade of fresh bluefin tuna had been further discussed and resolved, ICCAT adopted a recommendation extending the program to include fresh product the following year. Since NMFS implemented a certificate of eligibility (COE) for fresh and frozen swordfish imports in 1999, and U.S. export of swordfish and trade of southern bluefin tuna is limited, NMFS does not anticipate implementation issues for fresh products other than bigeye tuna. The new statistical document program applies to fresh and frozen swordfish and southern bluefin tuna and frozen bigeye tuna, and will replace the swordfish COE.

Comment 2: Several commenters supported implementing statistical document programs for all the species identified in the proposed rule, and one noted that the proposed approach of including similar species from all ocean areas is a critical factor in providing complete and comprehensive data for this program.

Response: The final rule establishes a trade monitoring program for fresh and frozen swordfish, southern bluefin tuna, and frozen bigeye tuna from all ocean areas. Swordfish and frozen bigeye tuna are included in the program in direct response to ICCAT and IATTC recommendations. Southern bluefin tuna is included to ensure the effectiveness of the program by eliminating potential mislabeling and to support the Commission for the Conservation of Southern Bluefin Tuna's (CCSBT) statistical document program. These fish from all ocean areas are included to ensure effective implementation of the RFMO recommendations since each species is geographically indistinguishable and similar species can be difficult to discern based on external examination.

Comment 3: One commenter congratulated NMFS for developing a comprehensive approach to enhance the tracking of HMS from all ocean areas and to promote the international objective of eliminating illegal, unregulated, and unreported (IUU) fishing.

Response: International statistical document programs have been effectively employed to reduce IUU fishing, which is an important goal of RFMOs such as ICCAT and IATTC. Although these programs place an administrative burden on U.S. businesses, the success of these programs will benefit the future of the impacted stocks as well as the businesses that rely on those resources. NMFS appreciates the cooperation of all U.S. businesses affected by this final rule, and will continue to work to minimize the impact of reporting requirements while implementing an effective trade monitoring program.

Comment 4: A commenter expressed concern that some of these requirements might be passed on to vessel owners, and asked how this rule might impact vessel owners. The commenter also asked whether the statistical document program could negatively affect future quota allocations.

Response: The permitting and reporting requirements apply in general to businesses involved in international trade of HMS species. Vessel owners who also export or import HMS species would need to comply with requirements specified in the rule. Quota allocations are determined after extensive deliberations using numerous sources of data and public input. It is premature to speculate what impact, if any, a statistical document program could have on future quota allocations. None the less, experience has shown that more data and information proves to be of greater benefit in determining the equitable size and allocation of quotas as opposed to less or limited data.

Economic Impacts and Reporting Burden

Comment 5: Several commenters expressed concern over the potential impact of validation on product quality and export opportunities. Commenters noted that travelling to reach a government office for validation could be time consuming, and that export and re-export shipments could be delayed since government validation has not been available on a 24 hour/7 days per week basis for similar programs. In particular, numerous commenters expressed concern about the effect of the validation requirement on airfreight exports, which is of special concern for island businesses that rely upon limited air transportation schedules. Commenters stated that validation should be expedient and efficient so as not to interfere with meeting limited and inflexible airfreight schedules, and that it should be inexpensive or free. Several commenters suggested options for meeting the proposed validation requirements, including: validation of exports after they are shipped; on-line validation; use of a HACCP (hazard analysis and critical control point) type of program where exporters validate their own shipments; annual issuance of dealer validation authority similar to the process for shellfish validation with monthly renewal unless the validating official failed a spot-check inspection; use of a domestic smart tag program that could include barcodes and computer radio tags with processing and temperature data; and having a government officer stationed at each U.S. Customs and Border Patrol (CBP) port 7 days per week to provide validation services. A commenter stated that there is a need to balance the need for third-party validation and the credibility of the program data carefully, and that a continuous review of compliance and data accuracy would strengthen program credibility.

Response: Government or government-authorized validation is required to ensure that the trade of covered species includes explicit government involvement, so that nations are able to accurately report trade activity to RFMOs. In order to address validation time and dollar cost concerns, statistical documents and re-export certificates may be validated by either NMFS or another entity authorized by NMFS. A non-government organization (e.g., industry group) or other government agency may obtain authorization to validate documents, at no cost, from NMFS by submitting a written description of the procedures to be used for verification of information to be validated, a list of names addresses, and telephone/fax numbers of individuals to perform validation, and an example of the stamp or seal to be used. NMFS must respond within 30 days, and if approved by NMFS, the authorization would take effect after the relevant RFMOs are notified. NMFS appreciates and fully considered the comments that were provided in efforts to produce a validation system that is both cost-efficient and effective. In this rule, NMFS has attempted to minimize costs to the industry and government associated with validation while fulfilling the requirements of the RFMOs' recommendations. Implementation of the regulatory requirements in this final rule will provide further opportunities for collaboration with interested parties to develop a program that is both efficient for all parties involved and provides the required trade data.

Comment 6: A number of commenters stated that the proposed reporting

requirements would negatively impact their businesses. One commenter stated that he had discontinued shipments of frozen bigeye tuna to Japan because of the reporting burden that had recently been required by Japan and is being proposed in this rule. Another commenter stated that it will be infeasible for his business to export swordfish for the same reason. A commenter stated that additional staff would be required for his business to fulfill the proposed reporting requirements. A commenter noted that the current fiscal climate within the industry made this a particularly bad time to impose costly reporting requirements. A commenter stated that any financial burden associated with this rule should be on the Federal government. Several commenters stated that the proposed reporting requirements were inevitable and not of concern.

Response: NMFS' intent with this final rule is to meet the mandated requirements while providing continued opportunities for trade of the covered species with the minimum required reporting burden. The use of statistical documents and re-export certificates (including document validation) for international trade of bluefin tuna, bigeye tuna, and swordfish are explicitly required by RFMOs such as ICCAT and IATTC. This final rule is intended to facilitate trade of the covered species, particularly to other RFMO member nations. Without this program, U.S. trade could be severely limited, which would negatively impact U.S. businesses.

NMFS made a number of clarifications to the final rule with the intent, in part, to reduce reporting burden in response to public comments. Permitting, documentation, reporting and recordkeeping requirements for bigeye tuna are limited to frozen products in the final rule rather than fresh and frozen products as indicated in the proposed rule. Permitting, reporting, and recordkeeping requirements for imports are reduced to apply only to entries for consumption rather than all imports. In addition, re-export certificates and subsequent validation in the final rule are only required for re-exports of products that have either been split or consolidated for re-export. NMFS also recognizes that during the initial start-up period, dollar and time costs for industry implementation of the rule will be slightly higher, and NMFS included a protracted implementation date for effectiveness of the final rule in part to help address this issue. The extended implementation date will provide time for authorization of entities to provide validation and for all affected businesses to adjust their business processes and incorporate the documentation, reporting, and recordkeeping requirements in the most efficient manner. NMFS also intends to design the implementation program to minimize associated reporting costs.

Comment 7: A commenter stated that the IRFA understates time and cost burdens associated with the action, and that the impact of the reporting requirements on some participants has not been analyzed. The commenter stated that the supporting documentation fails to assess the cost of private vendors for validation, or the impact of a lack of timely validations on Pacific exporters, and that the use of biweekly reports is contrary to the Paperwork Reduction Act.

Response: NMFS estimated the time and cost burden associated with the rule based on costs associated with similar programs including the bluefin tuna statistical document program and the swordfish import monitoring program. Both of these programs require dealer permits and reporting similar to those included in this program. For example, the cost of the options available for validation are assessed relative to the programs that are currently in place, which do not include a fee for use of an authorized validation service. Exact estimates of numbers of transactions (particularly exports) are difficult to ascertain prior to implementation of this rule, although existing Census Bureau export data and U.S. Customs and Border Protection import data help provide estimates of magnitude for and number of shipments over recent years. Overall burden estimates associated with these regulations are expected to be an overestimate, given that the calculations included fresh bigeye tuna which has been excluded in the final rule. In addition, the reduction of reporting requirements to apply only to consumption entries, and limiting of re-export documentation requirements as indicated in the previous response, are also expected to reduce reporting burden. Each reporting requirement implemented by this rule was assessed by the U.S. Office of Management and Budget (OMB) for compliance with the Paperwork Reduction Act. A 60-day public comment period was provided (February 12, 2003, 68 FR 7107; March 12, 2003, 68 FR 11809) and the impact of the reporting burden was analyzed and provided in the supporting documents for the proposed rule (March 29, 2004, 69 FR 16211). OMB approved implementation of the permitting and reporting requirements on July 1, 2004, and June 25, 2004, respectively. In addition, as discussed under a previous response, this final rule allows for the authorization of non-government or other government entities to provide validation services in order to provide flexibility for industry operations. These potential impacts are expected to be minimal once businesses have incorporated the requirements into their business processes, and slightly higher during the start-up phase of implementation.

Program Implementation

Comment 8: Commenters asked several questions relative to the proposed HMS ITP, including when the permit would go into effect, how much it would cost, whether the permit would need to be purchased annually, and under which circumstances it would be required. Several commenters noted that it is unclear who the responsible party would be for preparing and submitting the proposed reporting documentation. A commenter asked whether customs brokers could sign statistical documents. Several commenters requested that electronic reporting be available, and that documents and instructions be provided on an internet website. A commenter requested that an appropriate level of outreach to Caribbean fish dealers be implemented regarding the proposed permitting and reporting requirements, and that a calendar renewal date for the proposed permit be implemented in order to help facilitate reminder notices from the agency and trade associations.

Response: The final rule provides for an extended implementation period for the permitting, documentation, reporting, and recordkeeping requirements which will go into effect on July 1, 2005. The preferred approach, currently in the design phase, is to use electronic permitting and reporting processes on the internet, as much as possible, to minimize the reporting burden. Some specific details, including how much a permit will cost, how a permit can be obtained, and where reports will be submitted will be determined during development of the implementation plan (note that the estimate of a permit cost used in calculations of public reporting burden under the Paperwork Reduction Act was $100 based on similar NMFS programs). The HMS ITP must be obtained by individuals or businesses that are classified as the consignee as identified on documentation required by CBP for entries for consumption, or the U.S. principal party in interest for shipment export. An agent such as a customs broker or freight forwarder may obtain

an HMS ITP and submit required documentation. Alternatively, an agent may act on behalf of a permit holder; however, the importer or exporter, as defined in the rule, is the party legally responsible for the documentation, reporting, and recordkeeping requirements of this rule.

NMFS will provide educational information to dealers currently permitted by NMFS for purchase or trade of tunas and swordfish, and will work with states, commonwealths, and governments of insular possessions to provide information to other interested parties regarding implementation requirements and procedures. It is intended that the HMS ITP be obtained annually on a calendar year basis, and expire each year on December 31.

Comment 9: Several commenters noted that some of the information proposed to be collected under this rule is already collected by other agencies including NMFS, FDA, CBP, U.S. Census Bureau, and the government of Guam. Commenters requested that NMFS coordinate both interagency and intra-agency and that the reporting burden on impacted businesses be reduced.

Response: NMFS continues to coordinate both internally and with other government agencies to eliminate unnecessary duplication of reporting by individuals affected by this final rule. The use of statistical documents and re-export certificates (including document validation) for international trade of bluefin tuna, bigeye tuna, and swordfish is explicitly required by ICCAT and IATTC. Without the requirements implemented under this final rule, international trade of these species, particularly exports to other RFMO member nations, could be negatively impacted. NMFS' intent with this final rule is to provide continuing opportunities for trade of the covered species with the minimum required reporting burden. As noted in the response to Comment 7, NMFS modified the final rule to reduce the reporting burden as much as possible.

Comment 10: Several commenters requested that biweekly reports only be required during reporting periods with activity while one commenter requested that negative reporting be implemented. A commenter suggested that the average weight of individual fish be used for reporting bulk shipments of bigeye tuna on the biweekly reporting form, and another commenter requested that individual weights be used for swordfish.

Response: NMFS will not require negative biweekly reporting. In several NMFS programs, negative reporting is used to verify whether the absence of information for a reporting period is the result of a missing report or inactivity. However, in this program, NMFS has several options for verifying reporting data, including comparison of CBP's entry data and comparison of statistical document data from other member nations. Based on responses from dealers that have participated in the swordfish import program and in an effort to minimize reporting burden, NMFS determined that negative reporting was not necessary for satisfactory implementation of this program. Some specific details, including how to record the weight of fish on individual forms, will be determined during the development of the implementation plan.

Comment 11: A commenter noted that each member country of IATTC and ICCAT is implementing a statistical document program, and asked whether the United States might be able to learn from the way other countries were implementing their programs.

Response: Sharing of ideas and approaches to fishery management challenges among member nations is an essential underpinning of the RFMO process. The United States has met with other nations to discuss implementation issues such as harmonizing different reporting forms and providing data in consistent electronic formats, and continues to welcome the opportunity to discuss program objectives and implementation strategies at annual RFMO meetings as well as interim meetings with delegates of other nations.

Comment 12: Several commenters suggested that the statistical documents be modified so that one form addressed all species.

Response: ICCAT convened an international meeting of technical experts in 2001 to consider and resolve technical issues related to the implementation of the recommended swordfish and bigeye tuna statistical document programs. At that meeting, the United States proposed a single, harmonized document to track bluefin tuna, bigeye tuna, and swordfish trade. Although this proposal was consistent with ICCAT's directive to endeavor to harmonize all statistical documents under its purview, it was rejected by the technical experts due to differences in trade patterns and practices relative to the three species, and potential impacts to the effectiveness of the current bluefin tuna statistical document program if it was altered to include additional species. As a result, ICCAT developed separate species-specific forms for bigeye tuna and swordfish. Harmonizing these individual forms is a long-term goal of NMFS.

Comment 13: A commenter asked how shipments of more than one species would be addressed. Another commenter asked whether statistical documents would be required at entry into the customs territory of the United States.

Response: The final rule requires that species-specific statistical documents accompany imports into the United States of fresh or frozen swordfish, frozen bigeye tuna, and fresh or frozen Southern bluefin tuna shipments and that documentation be available at the time of entry. If a shipment contains more than one species, then a species specific statistical document would be required for each covered species in the shipment.

Comment 14: A commenter stated that dealers should be required to keep records for seven years rather than two years.

Response: Dealers are required to keep submitted and supporting records for a period of two years. This information must be made available to authorized personnel upon request. The two year timeframe establishes a balance between the burden on dealers and the recordkeeping, reporting, and the data collection needs of the agency.

Comment 15: A commenter noted that non-participating nations could have trouble exporting covered species into the United States. For example, shipments from nations with unstable or disorganized governments could be delayed because of the government validation clause in the proposed rule. A commenter requested that statistical documents and instructions be easily accessible for exporters from other nations.

Response: Nations that are members of ICCAT, IATTC, IOTC, and/or the CCSBT will be familiar with statistical document programs, and are expected to have the infrastructure to support the necessary reporting requirements. Nations or businesses of nations that are not members of an RFMO can contact the appropriate RFMO for approved statistical documents and validation requirements. The required statistical documents are currently accessible on the websites of the RFMOs (iccat.es; iattc.org; ccsbt.org; iotc.org).

Guam Transshipments

Comment 16: Numerous commenters questioned the applicability of the proposed statistical document programs to Guam's transshipment industry in which foreign flag longline vessels land fresh product on Guam that is graded, packaged and shipped by air to that

vessels' country of origin or a foreign nation. A commenter stated that Guam has few opportunities for economic development and that the transshipment industry has helped the local economy. A commenter noted that it is important to be certain that Guam shipments are ultimately accepted in Japan, and another commenter stated that Guam agents should not be responsible for submitting the proposed documentation.

Response: The trade monitoring program established by the final rule will not apply to HMS transshipped through Guam from one foreign nation to another, including transshipments landed on Guam by foreign vessels. However, any covered HMS landed in Guam by foreign vessels and entered into the customs territory of Guam for consumption (e.g., sold in Guam's domestic market) would be subject to these regulations. As defined in the final rule, a transshipment is not considered an entry for consumption into the customs territory of Guam and does not require a U.S. statistical document or re-export certificate. However, any importing nation, such as Japan, may require that transshipments be accompanied by statistical documents from the appropriate nation. As indicated in the RFMO recommendations, statistical documents must be validated by the country of the vessel that landed the fish, therefore, the statistical document would originate and be validated by the flag nation of the vessel landing the fish in Guam. Guam is a separate customs territory from the customs territory of the United States with its own customs regulations. NMFS will continue to work with the Government of Guam to determine appropriate implementation of the requirements of this rule.

Regulatory Process

Comment 17: Several commenters expressed concern about the completeness of the regulatory measures in the proposed rule, noting a need for clarification in the process to be used for validation and the definition of a dealer. A commenter stated that the public should be able to comment again once these measures were further clarified.

Response: In response to public comments, NMFS made several clarifications to the final rule, including a number of changes which reduced the reporting burden (see previous responses regarding reporting burden). Since many of the changes provide clarification of terms and concepts used in the original rulemaking rather than new rule provisions, it is not necessary to again solicit public comment. Specific details of program implementation, for example, the addresses to which reports must be submitted and the cost of the permit (which will be based on the overall cost of the program) will be determined during the implementation period and are not required to be codified in regulatory text. The extended period of implementation will allow adjustments as specific details and processes of the program are developed.

Comment 18: A commenter stated that the IRFA should have included the following: management objective and underlying rationale; alternatives such as using the council process, exempting fresh fish, reducing redundant requirements, or including catches from purse seine vessels. A commenter requested that the supporting documentation be expanded to address the offloading of IUU frozen fish in Japan. Another commenter asked whether an analysis of alternatives to this rule was prepared.

Response: A combined RIR/ IRFA was prepared for this rulemaking, which analyzed a number of alternatives to the proposed rule and supported these analyses with a description of the management objective, statement of the problem, and description of the fisheries in addition to other information. One of the requirements of an IRFA is to describe any alternatives to the final rule which accomplish the stated objectives and which minimize any significant economic impacts. The alternatives suggested by the commenter either did not meet the objectives of the rulemaking or did not minimize impacts on affected constituents. Since the purpose of the rulemaking is to establish programs under international agreement, NMFS coordinated with regional fishery management councils and provided opportunities for public comment. NMFS carefully analyzed the alternatives and the potential impact of each alternative when selecting the preferred alternative and final action. The selected alternative is the alternative that reduced the complexity of the reporting requirements without compromising the effectiveness of the trade monitoring program. The final action does not include permitting or reporting requirements for fresh bigeye tuna.

Ports of Entry

Comment 19: Many commenters stated that limiting trade to certain ports of entry could have a tremendous economic impact on local industries. A number of commenters requested that all Hawaii ports remain open. A commenter stated that ports of entry should be chosen through a proposed rule process rather than being designated by the Assistant Administrator for Fisheries. Another commenter suggested that ports of entry be considered separately through the fishery management council process.

Response: This rule does not limit trade to any ports. Should designation of entry ports be necessary to further facilitate enforcement or administrative procedures, NMFS intends to use a rulemaking process in order to facilitate public participation consistent with the Administrative Procedures Act.

Enforcement

Comment 20: A number of commenters raised enforcement issues, and noted that a fee structure and an appeal process for violations were not included in the proposed rule. One commenter stated that NMFS enforcement has been inconsistent in what it chooses to enforce. Another commenter requested that more funding be provided for enforcement. A commenter requested that a 90-day trial period be instituted before regulations are enforced.

Response: NOAA's Civil Procedure regulations, which can be found at 15 CFR part 904, include the procedures for contesting Notices of Violation and Assessment (NOVAs). Maximum civil penalty amounts are established by statute; the penalty in any particular case is assessed at the discretion of the prosecuting attorney from the Office of General Counsel for Enforcement and Litigation, after consulting NOAA's civil administrative penalty schedule. Consideration is given to many factors including, but not limited to, respondent's ability to pay, the severity of the violation based on its impact on the resource, and whether or not the respondent has prior violations. While enforcement priorities exist, and may vary by region, National Marine Fisheries Service Office for Law Enforcement is committed to a comprehensive program of enforcing all of the statutes administered by NOAA. Funding for enforcement of these, and any regulations, is by statutory appropriation. All regulations are enforceable as of their effective date.

Other Comments

Comment 21: Several commenters stated that purse seiners should not be exempt from the proposed rule, noting that the rationale for exemption in the proposed rule was unclear and that the United States should oppose the exemptions identified in the ICCAT recommendation, unless mandatory

observer coverage is implemented to determine the amount of tuna harvested by these fisheries.

Response: Both the ICCAT and IATTC recommendations provide exemptions for purse seine and baitboat catches bound for canneries. The RFMOs have determined that the tuna landings and catch data collected by canneries is adequate for the purposes of these recommendations.

Comment 22: Several commenters perceived that U.S. fishermen were subject to greater restrictions and reporting requirements than fishermen from other nations.

Response: NMFS recognizes that reporting of HMS by fishing nations has been variable throughout the world's oceans and that the standards applied to U.S. fishermen are often considered to be a benchmark for responsible fishing. The United States continues to work actively with respective RFMOs to provide leadership and support to conserve and manage HMS in the Atlantic, Pacific, and Indian Oceans.

Comment 23: A commenter asked whether bluefin tuna that are caught off the United States and sent to Mexico for cage culture were affected by this proposed rule. Another commenter asked whether the proposed rule applies to farmed bluefin tuna.

Response: This final rule includes a provision for a bluefin tuna re-export certificate which must accompany re-exported shipments of bluefin tuna regardless of whether they have been farmed or raised in cage culture. In addition, the previously implemented ICCAT bluefin tuna statistical document program would also apply to farmed bluefin tuna.

Comment 24: One commenter requested that commercial fishing vessels of fishermen that violate quotas be seized.

Response: This rule regulates the trade of swordfish, bigeye tuna, southern bluefin tuna and bluefin tuna and addresses HMS dealers, not vessels.

Comment 25: A commenter requested that the final regulations stress application to all products "in any form" rather than relying on harmonized tariff schedule (HTS) codes.

Response: The final rule applies to all products of the covered species (including chunks, fillets, and airtight containers) except fish parts other than meat (e.g., heads, eyes, roe, guts, and tails). The rule also identifies products by description in conjunction with currently available HTS codes.

Classification

This final rule is published under the authority of the ATCA, 16 U.S.C. 971 *et seq.*, the Magnuson-Stevens Fishery Management and Conservation Act (16 U.S.C. 1801 *et seq.*) and the TCA (16 U.S.C. 955 *et seq.*). The AA has determined that this final rule is necessary to implement the recommendations of ICCAT and IATTC and is necessary for the management of bluefin tuna, bigeye tuna and swordfish.

NMFS has prepared a RIR/FRFA that examines the impacts of the alternatives for implementing the ICCAT and IATTC recommendations for international trade monitoring programs. The objectives of the final rule, its legal basis, and reasons for its implementation are summarized in this preamble and are also set forth in the Summary and Supplementary Information sections of the preamble to the proposed rule. The final rule would affect approximately 1,890 (930 foreign and 960 domestic) seafood businesses that participate in international trade of swordfish, bluefin tuna, southern bluefin tuna and bigeye tuna, all of which are considered small entities. Impacts to businesses would occur in two areas - permitting and reporting (reporting includes documentation and recordkeeping). NMFS expects only minor negative economic impacts from the final rule because the regulatory measures only involve adjusting permitting and reporting requirements. The following paragraphs describe the alternatives considered, compare the potential permitting and reporting impacts of each alternative, and explain why NMFS selected the final action and rejected the other alternatives.

The no action/status quo alternative (alternative 2) would make no changes to current programs. The remaining three alternatives would implement the recommended trade programs for swordfish, bigeye tuna, and bluefin tuna. The final action (alternative 1) and alternative 4 would implement the recordkeeping requirements by linking them to the HMS international dealer trade permit. The final action differs from alternative 4 by requiring trade monitoring for southern bluefin tuna in addition to the other species, in order to facilitate program effectiveness, whereas alternative 4 would not require the use of southern bluefin tuna statistical documents or require a trade permit for trading in southern bluefin tuna. Alternative 3 would implement the trade program by building onto existing dealer permits (e.g., expanding the Atlantic tunas dealer permit to include trade of frozen bigeye tuna) and associated recordkeeping requirements rather than implementing a new, separate permit for international trade. Overall, the immediate costs associated with the final action and alternatives 3 and 4 are expected to be greater than for alternative 2 (no action); however, access to international markets could be reduced under the status quo, which is expected to have much greater negative economic impacts in the long term.

The initial cost of obtaining the permit for each U.S. business under the final action and alternative 4 is expected to be $100 plus the time to fill out the form and the cost of postage, which would be approximately $2. NMFS expects this amount to be a minor negative impact for the affected businesses. The permit-associated cost for the final action and alternative 4 differs from building onto existing systems (alternative 3) in an amount between $0 to $100 per business, depending upon the other permits held by the business. Under alternative 3, if the business were required to have an Atlantic or Pacific tuna permit to trade in bigeye tuna or southern bluefin tuna, there would be no associated cost since these permits are issued free of charge. However, if the business were required to have a swordfish permit for importing or exporting swordfish, the cost could be either $25 or $100, depending upon whether the business has another permit issued by the Southeast Region of NMFS. NMFS estimates that approximately 960 businesses would be impacted by the final action and alternative 3. Alternative 4 would entail similar costs per business as alternative 1; however, slightly fewer businesses would be impacted since businesses trading in southern bluefin tuna without trade in any of the other covered species would not be required to purchase a permit.

Impacts of reporting for the final action and alternatives 3 and 4 are expected to be approximately the same since all businesses must submit the required reports, regardless of whether the permitting is accomplished through the HMS ITP or by adding on to other permitting programs. The professional skills necessary to complete the reporting requirements are equivalent to an educational level of high school completion. The annual economic impacts of the reporting requirements, in addition to the potential costs of the HMS ITP discussed in the previous paragraph, would be approximately $386 per permit holder, including statistical document and re-export certificate opportunity costs ($285) and mailing ($2), biweekly opportunity cost ($90) and mailing ($9). This amount will vary depending on the volume of HMS imported or exported or the number of forms submitted. Alternative 4 would eliminate the need for reporting southern bluefin tuna trade, so costs

would be slightly reduced. Finally, permit holders could be negatively impacted if the time burden interferes with how they conduct their business; however, NMFS does not expect the direct or indirect costs or associated time burden of additional reporting to be more than a minor negative impact for the affected constituents.

NMFS chose alternative one as the final action for implementation because it was the most effective alternative for satisfying the RFMO recommendations while minimizing the reporting burden on the public and providing NMFS with a manageable permitting and reporting infrastructure. Alternative two was rejected because it would not have implemented the RFMO recommendations. Alternative three was not chosen because it would have increased the complexity associated with monitoring imports and exports for both NMFS and businesses involved in trade, and would have increased the number of permits required for many businesses. Alternative four was rejected because it would have compromised the effectiveness of the United States' implementation of the statistical document program for bluefin tuna.

NMFS received one comment specifically addressing the IRFA and several comments addressing economic concerns. The primary economic concern identified by the public was the potential impact of the validation requirement, including the potential dollar cost of validation and the time cost of validation procedures. Of particular concern to island businesses on Guam and Hawaii was the potential that validation procedures could delay shipments significantly enough to impact shipment schedules. Other economic concerns expressed by the public included general concern about the costs of the reporting requirements.

NMFS has determined that the provisions for validation by non-government organizations (including industry organizations) or other government agencies in the final rule will provide the industry with sufficient flexibility to establish validation programs which will both satisfy documentation requirements and minimize industry costs. This conclusion is based in part on NMFS' experience with other trade monitoring programs. In addition, the final rule reduces the validation burden associated with re-exports so that re-exported shipments which are not subdivided or consolidated with other shipments require neither re-export certificates nor validation. The final rule also clarifies that re-export certificates would only be required for re-exports that first entered the United States (or insular possession) as an entry for consumption, which may reduce the reporting burden associated with re-exports. NMFS recognizes that there will be an initial start-up period during which dollar and time costs will be slightly higher, and has included a protracted implementation date for the final rule in part to help address this issue. The extended implementation date will provide time for authorization of entities to provide validation and for all affected businesses to adjust their business processes and incorporate the documentation, reporting, and recordkeeping requirements in the most efficient manner. The final rule has also eliminated the permitting, documentation, reporting, and recordkeeping requirements associated with fresh bigeye tuna. Overall cost estimates will be lower than estimated for the proposed rule since fresh bigeye tuna is excluded from these requirements. Please see comments 5 through 7 and comment 18 for specific public comments on the IRFA and economic concerns.

NMFS does not believe that this action will conflict with any relevant regulations, Federal or otherwise. To avoid duplication with the requirements of this trade monitoring program, the rule removes the international components of the existing swordfish and Atlantic tuna dealer permits, and eliminates the swordfish certificate of eligibility.

This rule has been determined to be not significant for the purposes of Executive Order 12866.

NMFS has determined that the final rule would be implemented in a manner consistent to the maximum extent practicable with the enforceable provisions of the coastal zone management programs of those Atlantic, Gulf of Mexico, Pacific and Caribbean coastal states that have approved coastal zone management programs. The proposed rule was submitted in April 2004 to the responsible state agencies for their review under Section 307 of the CZMA. As of October 17, 2004, NMFS has received 5 responses, all concurring with NMFS' consistency determination. Because no responses were received from other states, their concurrence is presumed.

This rule contains new and revised collection-of-information requirements subject to review and approval by OMB under the Paperwork Reduction Act. The permitting requirements were available for an initial 60 day public comment period beginning February 12, 2003 (68 FR 7107) and were approved by the U.S. Office of Management and Budget (OMB) on July 1, 2004 under collection 0648–0327. The reporting requirements were available for an initial 60 day public comment period on March 12, 2003 (68 FR 11809) and were approved by OMB on June 25, 2004, under collection 0648–0040. During the public comment period for the proposed rule, one specific comment was received regarding the reporting burden (see comment 7). The commenter stated that the time and cost burdens were underestimated, and that the cost of private vendors for validation was not included. NMFS estimated the time and cost burden associated with the rule based on costs associated with similar programs including the bluefin tuna statistical document program and the swordfish import monitoring program. Both of these programs require dealer permits and reporting similar to those included in this program. For example, the cost of the options available for validation are assessed relative to the programs that are currently in place, which do not include a fee for use of an authorized validation service. Overall burden estimates associated with these regulations are expected to be an overestimate since the calculations included fresh bigeye tuna which has been excluded in the final rule. Each reporting requirement implemented by this rule was assessed by OMB for compliance with the Paperwork Reduction Act.

The public reporting burden for completing an application for the HMS ITP is estimated at 0.08 hours (5 minutes) per response. The public reporting burden for permit holders for collection-of-information on required reports is estimated at 0.08 hours (5 minutes) each for statistical documents and re-export certificates; 2 hours for validation; 2 hours for authorization for non-governmental validation; 0.25 hours (15 minutes) for international trade biweekly report; 0.02 hours (1 minute) for tagging. The rule also addresses previously approved requirements for domestic dealer permits as follows: a swordfish dealer permit and shark dealer permit have been approved under collection 0648–0205 and an Atlantic tuna dealer permit has been approved under collection 0648–0202. The response time for each of these domestic permits is 5 minutes. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

List of Subjects

50 CFR Part 300

Fisheries, Reporting and recordkeeping requirements, Treaties.

50 CFR Part 635

Fisheries, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: November 10, 2004.

Rebecca J. Lent

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR parts 300 and 635 are amended to read as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart C—Pacific Tuna Fisheries

■ 1. The authority citation for subpart C is revised to read as follows:

Authority: 16 U.S.C. 951–961 *et seq.*

■ 2. Revise § 300.20 to read as follows:

§ 300.20 Purpose and scope.

The regulations in this subpart are issued under the authority of the Tuna Conventions Act of 1950 (Act). The regulations implement recommendations of the Inter-American Tropical Tuna Commission (IATTC) for the conservation and management of highly migratory fish resources in the Eastern Tropical Pacific Ocean so far as they affect vessels and persons subject to the jurisdiction of the United States.

■ 3. In § 300.21, remove the definitions for "Bluefin tuna," "Pacific bluefin tuna," and "Tag," and revise the introductory paragraph to read as follows:

§ 300.21 Definitions.

In addition to the terms defined in § 300.2, in the Act, and in the Convention for the Establishment of an Inter-American Tropical Tuna Commission (Convention), the terms used in this subpart have the following meanings. If a term is defined differently in § 300.2. in the Act, or in the Convention, the definition in this section shall apply.

* * * * *

§§ 300.24 and 300.25 [Removed]

■ 4. Remove §§ 300.24 and 300.25.

§§ 300.28 and 300.29 [Redesignated as §§ 300.24 and 300.25]

■ 5. Redesignate §§ 300.28 and 300.29 as §§ 300.24 and 300.25, respectively.

■ 6. In newly redesignated § 300.24, remove paragraphs (e) through (g); redesignate paragraphs (h) through (l) as paragraphs (e) through (i), respectively; and revise paragraph (b) and newly redesignated paragraphs (h) and (i) to read as follows:

§ 300.24 Prohibitions.

* * * * *

(b) Fish on floating objects in the Convention Area using any gear type specified by the Regional Administrator's notification of closure issued under § 300.25;

* * * * *

(h) Fail to use the sea turtle handling, release, and resuscitation procedures in § 300.25(e); or

(i) Fail to report information when requested by the Regional Administrator under § 300.22.

§§ 300.26 and 300.27 [Removed]

■ 7. Remove §§ 300.26 and 300.27.

■ 8. Subpart M is added to read as follows:

Subpart M—International Trade Documentation and Tracking Programs for Highly Migratory Species

Sec.

Subpart M—International Trade Documentation and Tracking Programs for Highly Migratory Species

Authority: 16 U.S.C. 951–961 and 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

§ 300.180 Purpose and scope.

The regulations in this subpart are issued under the authority of the Atlantic Tunas Convention Act of 1975 (ATCA), Tuna Conventions Act of 1950, and Magnuson-Stevens Act. The regulations implement the recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT) for the conservation and management of tuna and tuna-like species in the Atlantic Ocean and of the Inter-American Tropical Tuna Commission (IATTC) for the conservation and management of highly migratory fish resources in the Eastern Tropical Pacific Ocean, so far as they affect vessels and persons subject to the jurisdiction of the United States.

§ 300.181 Definitions.

Atlantic bluefin tuna means the species *Thunnus thynnus* found in the Atlantic Ocean.

Bigeye tuna means the species *Thunnus obesus* found in any ocean area.

Bluefin tuna, for purposes of this subpart, means Atlantic and Pacific bluefin tuna, as defined in this section.

BSD tag means a numbered tag affixed to a bluefin tuna issued by any country in conjunction with a catch statistics information program and recorded on a bluefin tuna statistical document (BSD).

CBP means the U.S. Customs and Border Protection.

CCSBT means the Commission for the Conservation of Southern Bluefin Tuna established pursuant to the Convention for the Conservation of Southern Bluefin Tuna.

Customs territory of the United States has the same meaning as in 19 CFR 101.1 and includes only the States, the District of Columbia, and Puerto Rico.

Dealer tag means the numbered, flexible, self-locking ribbon issued by NMFS for the identification of Atlantic bluefin tuna sold to a dealer permitted under § 635.4 of this title as required under § 635.5(b) of this title.

Entered for consumption has the same meaning as in 19 CFR 141.0a(f) and generally refers to the filing of an entry summary for consumption with customs authorities, in proper form, with estimated duties attached.

Entry for consumption, for purposes of this subpart, has the same meaning as entry for consumption, withdrawal from warehouse for consumption, or entry for consumption of merchandise from a foreign trade zone, as provided under 19 CFR parts 101.1, 141, 144, and 146. For purposes of this subpart, "entry for consumption" generally means an import into the Customs territory of the United States or the separate customs territory of a U.S. insular possession, for domestic use, that is classified for customs purposes in the "consumption" category (entry type codes 00–08) or withdrawal from warehouse or foreign trade zone for consumption category (entry type codes 30–34 and 38). For purposes of this subpart, HMS destined from one foreign country to another, which transits the Customs territory of the United States or the separate customs territory of a U.S. insular possession, and is not classified as an entry for consumption upon release from CBP or other customs custody, is not an entry for consumption under this definition.

Entry number, for purposes of this subpart, means the unique number/identifier assigned by customs

authorities for each entry into a customs territory. For CBP, the entry number is assigned at the time of filing an entry summary (CBP Form 7501 or equivalent electronic filing) for entries into the Customs territory of the United States.

Export, for purposes of this subpart, means to effect exportation.

Exportation has the same general meaning as 19 CFR 101.1 and generally refers to a severance of goods from the mass of things belonging to one country with the intention of uniting them to the mass of things belonging to some foreign country. For purposes of this subpart, a shipment between the United States and its insular possessions is not an export.

Exporter, for purposes of this subpart, is the principal party in interest, meaning the party that receives the primary benefit, monetary or otherwise, of the export transaction. For exports from the United States, the exporter is the U.S. principal party in interest, as identified in Part 30 of title 15 of the CFR. An exporter is subject to the requirements of this subpart, even if exports are exempt from statistical reporting requirements under Part 30 of title 15 of the CFR.

Finlet means one of the small individual fins on a tuna located behind the second dorsal and anal fins and forward of the tail fin.

Fish or fish products regulated under this subpart means bluefin tuna, frozen bigeye tuna, southern bluefin tuna and swordfish and all such products of these species except parts other than meat (e.g., heads, eyes, roe, guts, and tails).

IATTC means the Inter-American Tropical Tuna Commission, established pursuant to the Convention for the Establishment of an Inter-American Tropical Tuna Commission.

ICCAT means the International Commission for the Conservation of Atlantic Tunas established pursuant to the International Convention for the Conservation of Atlantic Tunas.

Import, for purposes of this subpart, generally means the act of bringing or causing any goods to be brought into the customs territory of a country with the intent to unlade them. For purposes of this subpart, goods brought into the United States from a U.S. insular possession, or vice-versa, are not considered imports.

Importer, for purposes of this subpart, means the principal party responsible for the import of product into a country. For imports into the United States, and for purposes of this subpart, "importer" means the consignee as identified on entry documentation or any authorized, equivalent electronic medium required for release of shipments from the customs authority of the United States or the separate customs territory of a U.S. insular possession. If a consignee is not declared, then the importer of record is considered to be the consignee.

Insular possession of the United States or U.S. insular possession, for purposes of this subpart, means the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, and other possessions listed under 19 CFR 7.2, that are outside the customs territory of the United States.

Intermediate country means a country that exports to another country HMS previously imported as an entry for consumption by that nation. A shipment of HMS through a country on a through bill of lading, or in another manner that does not enter the shipment into that country as an entry for consumption, does not make that country an intermediate country under this definition.

IOTC means the Indian Ocean Tuna Commission established pursuant to the Agreement for the Establishment of the Indian Ocean Tuna Commission approved by the Food and Agriculture Organization (FAO) Council of the United Nations.

Pacific bluefin tuna means the species *Thunnus orientalis* found in the Pacific Ocean.

Permit holder, for purposes of this subpart, means, unless otherwise specified, a person who obtains a trade permit under § 300.182.

Re-export, for purposes of this subpart, means the export of goods that were previously entered for consumption into the customs territory of a country.

RFMO, as defined under this subpart, means regional fishery management organization, including CCSBT, IATTC, ICCAT, or IOTC.

Separate customs territory of a U.S. insular possession means the customs territory of a U.S. insular possession when that possession's customs territory is not a part of the Customs territory of the United States.

Southern bluefin tuna means the species *Thunnus maccoyii* found in any ocean area.

Swordfish means the species *Xiphias gladius* that is found in any ocean area.

Tag means either a dealer tag or a BSD tag.

Trade permit means the HMS international trade permit under § 300.182.

§ 300.182 HMS international trade permit.

(a) *General.* A person entering for consumption, exporting, or re-exporting fish or fish products regulated under this subpart from any ocean area must possess a valid trade permit issued under this section. Importation of fish or fish products regulated under this subpart by nonresident corporations is restricted to those entities authorized under 19 CFR 141.18.

(b) *Application.* A person must apply for a permit in writing on an appropriate form obtained from NMFS. The application must be completed, signed by the applicant, and submitted with required supporting documents, at least 30 days before the date upon which the permit is made effective. Application forms and instructions for their completion are available from NMFS.

(c) *Issuance.* (1) Except as provided in subpart D of 15 CFR part 904, NMFS will issue a permit within 30 days of receipt of a completed application.

(2) NMFS will notify the applicant of any deficiency in the application, including failure to provide information or reports required under this subpart. If the applicant fails to correct the deficiency within 30 days following the date of notification, the application will be considered abandoned.

(d) *Duration.* Any permit issued under this section is valid until December 31 of the year for which it is issued, unless suspended or revoked.

(e) *Alteration.* Any permit that is substantially altered, erased, or mutilated is invalid.

(f) *Replacement.* NMFS may issue replacement permits. An application for a replacement permit is not considered a new application. An appropriate fee, consistent with paragraph (j) of this section, may be charged for issuance of a replacement permit.

(g) *Transfer.* A permit issued under this section is not transferable or assignable; it is valid only for the permit holder to whom it is issued.

(h) *Inspection.* The permit holder must keep the permit issued under this section at his/her principal place of business. The permit must be displayed for inspection upon request of any authorized officer, or any employee of NMFS designated by NMFS for such purpose.

(i) *Sanctions.* The Assistant Administrator may suspend, revoke, modify, or deny a permit issued or sought under this section. Procedures governing permit sanctions and denials are found at subpart D of 15 CFR part 904.

(j) *Fees.* NMFS may charge a fee to recover the administrative expenses of permit issuance. The amount of the fee is calculated, at least annually, in accordance with the procedures of the NOAA Finance Handbook, available from NMFS, for determining administrative costs of each special product or service. The fee may not

exceed such costs and is specified on each application form. The appropriate fee must accompany each application. Failure to pay the fee will preclude issuance of the permit. Payment by a commercial instrument later determined to be insufficiently funded shall invalidate any permit.

(k) *Change in application information.* Within 30 days after any change in the information contained in an application submitted under this section, the permit holder must report the change to NMFS in writing. If a change in permit information is not reported within 30 days, the permit is void as of the 31st day after such change.

(l) *Renewal.* Persons must apply annually for a trade permit issued under this section. A renewal application must be submitted to NMFS, at an address designated by NMFS, at least 30 days before the permit expiration date to avoid a lapse of permitted status. NMFS will renew a permit provided that: the application for the requested permit is complete; all reports required under the Magnuson-Stevens Act, ATCA, and the Tuna Conventions Act of 1950 have been submitted, including those required under §§ 300.183, 300.185, 300.186, and 300.187 and § 635.5 of this title; and the applicant is not subject to a permit sanction or denial under paragraph (i) of this section.

§ 300.183 Permit holder reporting and recordkeeping requirements.

(a) *Biweekly reports.* Any person issued a trade permit under § 300.182 must submit to NMFS, on forms supplied by NMFS, a biweekly report of imports entered for consumption, exports, and re-exports of fish or fish products regulated under this subpart.

(1) The report required to be submitted under paragraph (a) of this section must be postmarked within 10 days after the end of each biweekly reporting period in which fish or fish products regulated under this subpart were entered for consumption, exported, or re-exported. The bi-weekly reporting periods are defined as the first day to the 15th day of each month and the 16th day to the last day of each month.

(2) Each report must specify accurately and completely the requested information for each shipment of fish or fish products regulated under this subpart that is entered for consumption, exported, or re-exported.

(b) *Recordkeeping.* Any person issued a trade permit under § 300.182 must retain at his/her principal place of business a copy of each biweekly report and supporting records for a period of 2 years from the date on which each report was submitted to NMFS.

(c) *Other reporting and recordkeeping requirements.* Any person issued a trade permit is also subject to the reporting and recordkeeping requirements identified in § 300.185.

(d) *Inspection.* Any person authorized to carry out the enforcement activities under the regulations in this subpart has the authority, without warrant or other process, to inspect, at any reasonable time: fish or fish products regulated under this subpart, biweekly reports, statistical documents, re-export certificates, relevant sales receipts, import and export documentation, or other records and reports required by this subpart to be made, retained, or submitted. A permit holder must allow NMFS or an authorized person to inspect and copy, for any fish or fish products regulated under this subpart, any import and export documentation and any reports required under this subpart, and the records, in any form, on which the completed reports are based, wherever they exist. Any agent of a person issued a trade permit under this part, or anyone responsible for importing, exporting, storing, packing, or selling fish or fish products regulated under this subpart, shall be subject to the inspection provisions of this section.

§ 300.184 Species subject to documentation requirements.

The following fish or fish products are subject to the documentation requirements of this subpart regardless of ocean area of catch.

(a) *Bluefin tuna.* (1) Documentation is required for bluefin tuna products including those identified by the following subheading numbers from the Harmonized Tariff Schedule of the United States (HTS):

(i) Fresh or chilled bluefin tuna (No. 0302.35.00.00) excluding fillets and other fish meat of HTS heading 0304.

(ii) Frozen bluefin tuna (No. 0303.45.00.00), excluding fillets and other fish meat of HTS heading 0304.

(2) In addition, bluefin tuna products in other forms (e.g., chunks, fillets, and products in airtight containers) that may be classified under any other HTS heading/subheading numbers are subject to the documentation requirements of this subpart, except that fish parts other than meat (e.g., heads, eyes, roe, guts, and tails) may be imported without said documentation.

(b) *Southern bluefin tuna.* (1) Documentation is required for southern bluefin tuna products including those identified by the following subheading numbers from the HTS:

(i) Fresh or chilled southern bluefin tuna (No. 0302.36.00.00), excluding fillets and other fish meat of HTS heading 0304.

(ii) Frozen southern bluefin tuna (No. 0303.46.00.00), excluding fillets and other fish meat of HTS heading 0304.

(2) In addition, southern bluefin tuna products in other forms (e.g., chunks, fillets, products in airtight containers) that may be classified under any other HTS heading/subheading numbers are subject to the documentation requirements of this subpart, except that fish parts other than meat (e.g., heads, eyes, roe, guts, and tails) may be imported without said documentation.

(c) *Bigeye tuna.* (1) Documentation is required for frozen bigeye tuna products including those identified by the following subheading numbers from the HTS:

(i) Frozen bigeye tuna (No. 0303.44.00.00), excluding fillets and other fish meat of HTS heading 0304.

(ii) [Reserved]

(2) In addition, frozen bigeye tuna products in other forms (e.g., chunks and fillets) that may be classified under any other HTS heading/subheading numbers are subject to the documentation requirements of this subpart, except that frozen fish parts other than meat (e.g., heads, eyes, roe, guts, and tails), may be imported without said documentation.

(3) Bigeye tuna caught by purse seiners and pole and line (bait) vessels and destined for canneries within the United States, including all U.S. commonwealths, territories, and possessions, may be imported without the documentation required under this subpart.

(d) *Swordfish.* (1) Documentation is required for swordfish products including those identified by the following subheading numbers from the HTS:

(i) Fresh or chilled swordfish, steaks (No. 0302.69.20.41).

(ii) Fresh or chilled swordfish, excluding fish fillets, steaks, and other fish meat (No. 0302.69.20.49).

(iii) Frozen swordfish, steaks (No. 0303.79.20.41).

(iv) Frozen swordfish, excluding fillets, steaks and other fish meat (No. 0303.79.20.49).

(v) Fresh, chilled or frozen swordfish, fillets and other fish meat (No. 0304.20.60.92).

(2) In addition, swordfish products in other forms (e.g., chunks, fillets, and products in airtight containers) that may be classified under any other HTS heading/subheading numbers, are subject to the documentation requirements of this subpart, except that

fish parts other than meat (e.g., heads, eyes, roe, guts, tails) may be allowed entry without said statistical documentation.

§ 300.185 Documentation, reporting and recordkeeping requirements for statistical documents and re-export certificates.

(a) *Imports*—(1) *Applicability of requirements.* The documentation requirements in paragraph (a)(2) of this section apply to all imports of fish or fish products regulated under this subpart into the Customs territory of the United States, except when entered as a product of an American fishery landed overseas (HTS heading 9815). For insular possessions with customs territories separate from the Customs territory of the United States, documentation requirements in paragraph (a)(2) of this section apply only to entries for consumption. The reporting requirements of paragraph (a)(3) of this section do not apply to fish products destined from one foreign country to another which transit the United States or a U.S. insular possession and are designated as an entry type other than entry for consumption as defined in § 300.181.

(2) *Documentation requirements.* (i) All fish or fish products regulated under this subpart, imported into the customs territory of the United States or entered for consumption into a separate customs territory of a U.S. insular possession, must, at the time of presenting entry documentation for clearance by customs authorities (e.g., CBP Forms 7533 or 3461 or other documentation required by the port director) be accompanied by an original, completed, approved, validated, species-specific statistical document with the required information and exporter's certification completed as specified in § 300.186. Customs forms can be obtained by contacting the local CBP port office; contact information is available at *www.cbp.gov.* For a U.S. insular possession, contact the local customs office for any forms required for entry.

(ii) The statistical document must be validated as specified in § 300.187 by a responsible government official of the country whose flag vessel caught the fish (regardless of where the fish are first landed).

(iii) For fish products entered for consumption, the permit holder must provide on the original statistical document that accompanied the import shipment the correct information and importer's certification specified in § 300.186, and must note on the top of the statistical document the entry number assigned at the time of filing an entry summary (e.g., CBP Form 7501 or electronic equivalent) with customs authorities.

(iv) Bluefin tuna, imported into the Customs territory of the United States or entered for consumption into the separate customs territory of a U.S. insular possession, from a country requiring a BSD tag on all such bluefin tuna available for sale, must be accompanied by the appropriate BSD tag issued by that country, and said BSD tag must remain on any bluefin tuna until it reaches its final destination. If the final import destination is the United States, which includes U.S. insular possessions, the BSD tag must remain on the bluefin tuna until it is cut into portions. If the bluefin tuna portions are subsequently packaged for domestic commercial use or re-export, the BSD tag number and the issuing country must be written legibly and indelibly on the outside of the package.

(3) *Reporting requirements.* For fish or fish products regulated under this subpart that are entered for consumption and whose final destination is within the United States, which includes a U.S. insular possessions, a permit holder must submit to NMFS the original statistical document that accompanied the fish product as completed under § 300.186 and paragraph (a)(2) of this section. A copy of the original completed statistical document must be postmarked and mailed, or faxed, by said permit holder to NMFS at an address designated by NMFS within 24 hours of the time the fish product was entered for consumption into the Customs territory of the United States or the separate customs territory of a U.S. insular possession.

(b) *Exports*—(1) *Applicability of requirements.* The documentation and reporting requirements of this paragraph apply to exports of fish or fish products regulated under this subpart that were harvested by U.S. vessels and first landed in the United States, or harvested by vessels of a U.S. insular possession and first landed in that possession. This paragraph also applies to products of American fisheries landed overseas.

(2) *Documentation requirements.* A permit holder must complete an original, numbered, species-specific statistical document issued to that permit holder by NMFS for each export referenced under paragraph (b)(1) of this section. Such an individually numbered document is not transferable and may be used only once by the permit holder to which it was issued to report on a specific export shipment. A permit holder must provide on the statistical document the correct information and exporter certification specified in § 300.186. The statistical document must be validated, as specified in § 300.187, by NMFS, or another official authorized by NMFS. A list of such officials may be obtained by contacting NMFS. A permit holder requesting U.S. validation for exports should notify NMFS as soon as possible after arrival of the vessel to avoid delays in inspection and validation of the export shipment.

(3) *Reporting requirements.* A permit holder must ensure that the original statistical document as completed under paragraph (b)(2) of this section accompanies the export of such products to their export destination. A copy of the statistical document must be postmarked and mailed by said permit holder to NMFS, at an address designated by NMFS, within 24 hours of the time the fish product was exported from the United States or a U.S. insular possession.

(c) *Re-exports*—(1) *Applicability of requirements.* The documentation and reporting requirements of this paragraph apply to exports of fish or fish products regulated under this subpart that were previously entered for consumption into the customs territory of the United States or the separate customs territory of a U.S. insular possession through filing the documentation specified in paragraph (a) of this section. The requirements of this paragraph do not apply to fish products destined from one foreign country to another which transit the United States or a U.S. insular possession and which are designated as an entry type other than entry for consumption as defined in § 300.181.

(2) *Documentation requirements.* (i) If a permit holder subdivides or consolidates a shipment that was previously entered for consumption as described in paragraph (c)(1) of this section, the permit holder must complete an original, individually numbered, species-specific re-export certificate issued to that permit holder by NMFS for each such re-export shipment. Such an individually numbered document is not transferable and may be used only once by the permit holder to which it was issued to report on a specific re-export shipment. A permit holder must provide on the re-export certificate the correct information and re-exporter certification specified in § 300.186. The permit holder must also attach the original statistical document that accompanied the import shipment or a copy, and provide the correct information and intermediate importer's certification specified in § 300.186, and must note on the top of both the

statistical documents and the re-export certificates the entry number assigned by customs authorities at the time of filing the entry summary.

(ii) If a shipment that was previously entered for consumption as described in paragraph (c)(1) of this section is not subdivided into sub-shipments or consolidated, for each re-export shipment, a permit holder must complete the intermediate importer's certification on the original statistical document and note the entry number on the top of the statistical document. Such re-exports do not need a re-export certificate and the re-export does not require validation.

(iii) Re-export certificates must be validated, as specified in § 300.187, by NMFS or another official authorized by NMFS. A list of such officials may be obtained by contacting NMFS. A permit holder requesting validation for re-exports should notify NMFS as soon as possible to avoid delays in inspection and validation of the re-export shipment.

(3) *Reporting requirements.* For each re-export, a permit holder must submit the original of the completed re-export certificate (when required) and the original or a copy of the original statistical document completed as specified under paragraph (c)(2) of this section, to accompany the shipment of such products to their re-export destination. A copy of the completed statistical document and re-export certificate (when required) must be postmarked and mailed by said permit holder to NMFS, at an address designated by NMFS, within 24 hours of the time the shipment was re-exported from the United States.

(d) *Recordkeeping.* A permit holder must retain at his or her principal place of business, a copy of each statistical document and re-export certificate required to be submitted to NMFS pursuant to this section, and supporting records for a period of 2 years from the date on which it was submitted to NMFS.

(e) *Inspection.* Any person responsible for importing, exporting, storing, packing, or selling fish or fish products regulated under this subpart, including permit holders, consignees, customs brokers, freight forwarders, and importers of record, shall be subject to the inspection provisions at § 300.183(d).

§ 300.186 Contents of documentation.

(a) *Statistical documents.* To be deemed complete, all statistical documents must state:

(1) The document number assigned by the country issuing the document.

(2) The name of the country issuing the document, which must be the country whose flag vessel harvested the fish, regardless of where it is first landed.

(3) The name of the vessel that caught the fish, the vessel's length (in meters), the vessel's registration number, and the ICCAT record number, if applicable.

(4) The point of export, which is the city, state or province, and country from which the fish is first exported.

(5) The product type (fresh or frozen), time of harvest (month/year), and product form (round, gilled and gutted, dressed, fillet, or other).

(6) The method of fishing used to harvest the fish (e.g., purse seine, trap, rod and reel).

(7) The ocean area from which the fish was harvested.

(8) The weight of each fish (in kilograms for the same product form previously specified) or the net weight of each product type, as applicable.

(9) The name and license number of, and be signed and dated in the exporter's certification block by, the exporter.

(10) If applicable, the name and title of, and be signed and dated in the validation block by, a responsible government official of the country whose flag vessel caught the fish (regardless of where the fish are first landed) or by an official of an institution accredited by said government, with official government or accredited institution seal affixed, thus validating the information on the statistical document.

(11) If applicable, the name(s) and address(es), including the name of the city and state or province of import, and the name(s) of the intermediate country(ies) or the name of the country of final destination, and license number(s) of, and be signed and dated in the importer's certification block by, each intermediate and the final importer.

(b) *Bluefin tuna statistical documents.* Bluefin tuna statistical documents, to be deemed complete, in addition to the elements in paragraph (a) of this section, must also state:

(1) Whether the fish was farmed or captured.

(2) The name and address of the owner of the trap that caught the fish, or the farm from which the fish was taken, if applicable.

(3) The identifying tag number, if landed by vessels from countries with BSD tagging programs, or tagged pursuant to § 300.187(d) or § 635.5(b) of this title.

(c) *Southern bluefin tuna statistical documents.* To be complete, southern bluefin tuna statistical documents must, in addition to the elements in § 300.186(a), also state:

(1) The name and address of the processing establishment, if applicable.

(2) [Reserved]

(d) *Bigeye tuna statistical documents.* To be deemed complete, bigeye tuna statistical documents must, in addition to the elements in paragraph (a) of this section, also state:

(1) The name of the owner of the trap that caught the fish, if applicable.

(2) The net weight of product for each product type (in kilograms for the same product form previously specified).

(e) *Swordfish statistical documents.* To be deemed complete, swordfish statistical documents must, in addition to the elements in paragraph (a) of this section, also state:

(1) Certification by the exporter that, for swordfish harvested from the Atlantic Ocean, each individual Atlantic swordfish included in the shipment weighs at least 15 kilograms (33 lb) dressed weight, or if pieces, that the pieces were derived from a swordfish that weighed at least 15 kilograms (33 lb) dressed weight. Import provisions pertaining to swordfish minimum size are provided at § 635.20(f) of this title.

(2) [Reserved]

(f) *Re-export certificates.* To be deemed complete, all re-export certificates, must state:

(1) The document number assigned by the country issuing the document.

(2) The name of the country issuing the document, which must be the country through which the product is being re-exported.

(3) The point of re-export, which is the city, state, or province, and country from which the product was re-exported.

(4) The description of the fish product as imported, including the product type (fresh or frozen), product form (round, gilled and gutted, dressed, fillet, or other), the net weight, flag country of the vessel that harvested the fish in the shipment, and the date of import to the country from which it is being re-exported.

(5) The description of the fish product as re-exported, including the product type (fresh or frozen), product form (round, gilled and gutted, dressed, fillet, or other) and the net weight.

(6) The name and license number (if applicable) of, and be signed and dated in the re-exporter's certification block by, the re-exporter.

(7) If applicable, the name and title of, and be signed and dated in the validation block by, a responsible government official of the re-exporting country appearing on the certificate, or

by an official of an institution accredited by said government, with official government or accredited institution seal affixed, thus validating the information on the re-export certificate.

(8) If applicable, the name(s) and address(es), including the name of the city and state or province of import, and the name(s) of the intermediate country(ies) or the name of the country of final destination, and license number(s) of, and be signed and dated in the importer's certification block by each intermediate and the final importer.

(g) *Bluefin tuna re-export certificates.* To be deemed complete, Bluefin tuna re-export certificates must, in addition to the elements in paragraph (f) of this section, also state:

(1) Whether the fish for re-export was farmed.

(2) The name and address of the farm from which the fish was taken.

(h) *Approved statistical documents and re-export certificates.* (1) An approved statistical document or re-export certificate may be obtained from NMFS to accompany exports of fish or fish products regulated under this subpart from the customs territory of the United States or the separate customs territory of a U.S. insular possession.

(2) A nationally approved form from another country may be used for exports to the United States if that document strictly conforms to the information requirements and format of the applicable RFMO documents. An approved statistical document or re-export certificate for use in countries without a nationally approved form may be obtained from the following websites, as appropriate: *www.iccat.org*, *www.iattc.org*, *www.ccsbt.org*, or *www.iotc.org* to accompany exports to the United States.

§ 300.187 Validation requirements.

(a) *Imports.* The approved statistical document accompanying any import of any fish or fish product regulated under this subpart must be validated by a government official from the issuing country, unless NMFS waives this requirement pursuant to an applicable RFMO recommendation. NMFS will furnish a list of countries for which government validation requirements are waived to the appropriate customs officials. Such list will indicate the circumstances of exemption for each issuing country and the non-government institutions, if any, accredited to validate statistical documents and re-export certificates for that country.

(b) *Exports.* The approved statistical document accompanying any export of fish or fish products regulated under this subpart must be validated, except pursuant to a waiver described in paragraph (d) of this section. Validation must be made by NMFS or another official authorized by NMFS.

(c) *Re-exports.* The approved re-export certificate accompanying any re-export of fish or fish products regulated under this subpart, as required under § 300.185(c), must be validated, except pursuant to a waiver described in paragraph (d) of this section. Validation must be made by NMFS or another official authorized by NMFS.

(d) *Validation waiver.* Any waiver of government validation will be consistent with applicable RFMO recommendations concerning validation of statistical documents and re-export certificates. If authorized, such waiver of government validation may include exemptions from government validation for Pacific bluefin tuna with individual BSD tags affixed pursuant to paragraph (f) of this section or for Atlantic bluefin tuna with tags affixed pursuant to § 635.5(b) of this title. Waivers will be specified on statistical documents and re-export certificates or accompanying instructions, or in a letter to permit holders from NMFS.

(e) *Authorization for non-NMFS validation.* An official from an organization or government agency seeking authorization to validate statistical documents or re-export certificates accompanying exports or re-exports from the United States, which includes U.S. commonwealths, territories, and possessions, must apply in writing, to NMFS, at an address designated by NMFS for such authorization. The application must indicate the procedures to be used for verification of information to be validated; list the names, addresses, and telephone/fax numbers of individuals to perform validation; procedures to be used to notify NMFS of validations; and an example of the stamp or seal to be applied to the statistical document or re-export certificate. NMFS, upon finding the applicant capable of verifying the information required on the statistical document or re-export certificate, will issue, within 30 days, a letter specifying the duration of effectiveness and conditions of authority to validate statistical documents or re-export certificates accompanying exports or re-exports from the United States. The effectiveness of such authorization will be delayed as necessary for NMFS to notify the appropriate RFMO of other officials authorized to validate statistical document or re-export certificates. Non-government organizations given authorization to validate statistical documents or re-export certificates must renew such authorization on a yearly basis.

(f) *BSD tags*—(1) *Issuance.* NMFS will issue numbered BSD tags for use on Pacific bluefin tuna upon request to each permit holder.

(2) *Transfer.* BSD tags issued under this section are not transferable and are usable only by the permit holder to whom they are issued.

(3) *Affixing BSD tags.* At the discretion of permit holders, a tag issued under this section may be affixed to each Pacific bluefin tuna purchased or received by the permit holder. If so tagged, the tag must be affixed to the tuna between the fifth dorsal finlet and the keel.

(4) *Removal of tags.* A tag, as defined in this subpart and affixed to any bluefin tuna, must remain on the tuna until it is cut into portions. If the bluefin tuna or bluefin tuna parts are subsequently packaged for transport for domestic commercial use or for export, the number of each dealer tag or BSD tag must be written legibly and indelibly on the outside of any package containing the bluefin tuna or bluefin tuna parts. Such tag number also must be recorded on any document accompanying the shipment of bluefin tuna or bluefin tuna parts for commercial use or export.

(5) *Labeling.* The tag number of a BSD tag affixed to each Pacific bluefin tuna under this section must be recorded on NMFS reports required by § 300.183, on any documents accompanying the shipment of Pacific bluefin tuna for domestic commercial use or export as indicated in §§ 300.185 and 300.186, and on any additional documents that accompany the shipment (e.g., bill of lading, customs manifest, etc.) of the tuna for commercial use or for export.

(6) *Reuse.* BSD tags issued under this section are separately numbered and may be used only once, one tail tag per Pacific bluefin tuna, to distinguish the purchase of one Pacific bluefin tuna. Once affixed to a tuna or recorded on any package, container or report, a BSD tag and associated number may not be reused.

§ 300.188 Ports of entry.

NMFS shall monitor the importation of fish or fish products regulated under this subpart into the United States. If NMFS determines that the diversity of handling practices at certain ports at which fish or fish products regulated under this subpart are being imported into the United States allows for circumvention of the statistical document requirement, NMFS may undertake a rulemaking to designate, after consultation with the CBP, those

ports at which fish or fish products regulated under this subpart from any ocean area may be imported into the United States.

§ 300.189 Prohibitions.

In addition to the prohibitions specified in § 300.4, and §§ 600.725 and 635.71 of this title, it is unlawful for any person subject to the jurisdiction of the United States to violate any provision of this part, the Atlantic Tunas Convention Act, the Magnuson-Stevens Act, the Tuna Conventions Act of 1950, or any other rules promulgated under those Acts. It is unlawful for any person or vessel subject to the jurisdiction of the United States to:

(a) Falsify information required on an application for a permit submitted under § 300.182.

(b) Import as an entry for consumption, purchase, receive for export, export, or re-export any fish or fish product regulated under this subpart without a valid trade permit issued under § 300.182.

(c) Fail to possess, and make available for inspection, a trade permit at the permit holder's place of business, or alter any such permit as specified in § 300.182.

(d) Falsify or fail to record, report, or maintain information required to be recorded, reported, or maintained, as specified in § 300.183 or § 300.185.

(e) Fail to allow an authorized agent of NMFS to inspect and copy reports and records, as specified in § 300.183 or § 300.185.

(f) Fail to comply with the documentation requirements as specified in § 300.185, § 300.186 or § 300.187, for fish or fish products regulated under this subpart that are imported, entered for consumption, exported, or re-exported.

(g) Fail to comply with the documentation requirements as specified in § 300.186, for the importation, entry for consumption, exportation, or re-exportation of an Atlantic swordfish, or part thereof, that is less than the minimum size.

(h) Validate statistical documents or re-export certificates without authorization as specified in § 300.187.

(i) Validate statistical documents or re-export certificates as provided for in § 300.187 with false information.

(j) Remove any NMFS-issued numbered tag affixed to any Pacific bluefin tuna or any tag affixed to a bluefin tuna imported from a country with a BSD tag program before removal is allowed under § 300.187; fail to write the tag number on the shipping package or container as specified in § 300.187; or reuse any NMFS-issued numbered tag affixed to any Pacific bluefin tuna, or any tag affixed to a bluefin tuna imported from a country with a BSD tag program, or any tag number previously written on a shipping package or container as prescribed by § 300.187.

(k) Import, or attempt to import, any fish or fish product regulated under this subpart in a manner inconsistent with any ports of entry designated by NMFS as authorized by § 300.188.

(l) Ship, transport, purchase, sell, offer for sale, import, enter for consumption, export, re-export, or have in custody, possession, or control any fish or fish product regulated under this subpart that was imported, entered for consumption, exported, or re-exported contrary to this subpart.

(m) Fail to provide a validated statistical document for imports at time of entry into the customs territory of the United States of fish or fish products regulated under this subpart, regardless of whether the importer, exporter, or re-exporter holds a valid trade permit issued pursuant to § 300.182 or whether the fish products are imported as an entry for consumption.

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 9. The authority citation for 50 CFR part 635, continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

■ 10. In 635.2, remove the definition for "Intermediate country" and "Swordfish Certificate of Eligibility (COE);" add a definition for "Exportation" in alphabetical order; and revise the definitions for "Export," "Exporter," "Import," and "Importer" as follows:

§ 635.2 Definitions.

* * * * *

Export, for purposes of this subpart, means to effect exportation.

Exportation has the same general meaning as 19 CFR 101.1 and generally refers to a severance of goods from the mass of things belonging to one country with the intention of uniting them to the mass of things belonging to some foreign country. For purposes of this subpart, a shipment between the United States and its insular possessions is not an export.

Exporter, for purposes of this subpart, is the principal party in interest, meaning the party that receives the primary benefit, monetary or otherwise, of the export transaction. For exports from the United States, the exporter is the U.S. principal party in interest, as identified in Part 30 of title 15 of the CFR. An exporter is subject to the requirements of this subpart, even if exports are exempt from statistical reporting requirements under Part 30 of title 15 of the CFR.

* * * * *

Import, for purposes of this subpart, generally means the act of bringing or causing any goods to be brought into the customs territory of a country with the intent to unlade them. For purposes of this subpart, goods brought into the United States from a U.S. insular possession, or vice-versa, are not considered imports.

Importer, for purposes of this subpart, means the principal party responsible for the import of product into a country. For imports into the United States, and for purposes of this subpart, "importer" means the consignee as identified on entry documentation or any authorized, equivalent electronic medium required for release of shipments, or any authorized equivalent entry documentation from the customs authority of the United States or the separate customs territory of a U.S. insular possession. If a consignee is not declared, then the importer of record is considered to be the consignee.

* * * * *

■ 11. In § 635.4 revise paragraph (g) to read as follows:

§ 635.4 Permits and fees.

* * * * *

(g) *Dealer permits*—(1) *Atlantic tunas.* A person that receives, purchases, trades for, or barters for Atlantic tunas from a fishing vessel of the United States, as defined under § 600.10 of this chapter, must possess a valid dealer permit.

(2) *Shark.* A person that receives, purchases, trades for, or barters for Atlantic sharks from a fishing vessel of the United States, as defined under § 600.10 of this chapter, must possess a valid dealer permit.

(3) *Swordfish.* A person that receives, purchases, trades for, or barters for Atlantic swordfish from a fishing vessel of the United States, as defined under § 600.10 of this chapter, must possess a valid dealer permit.

* * * * *

■ 12. In § 635.5, remove paragraph (b)(1)(ii); redesignate paragraphs (b)(1)(iii) through (b)(1)(v) as (b)(1)(ii) through (b)(1)(iv), respectively; and revise newly redesignated paragraph (b)(1)(ii) and paragraph (b)(2)(i)(B) to read as follows:

§ 635.5 Recordkeeping and reporting.

* * * * *

(b) * * *

(1) * * *

(ii) Reports of Atlantic tunas, Atlantic swordfish, and/or Atlantic sharks

received by dealers from U.S. vessels, as defined under § 600.10 of this chapter, on the first through the 15th of each month, must be postmarked not later than the 25th of that month. Reports of such fish received on the 16th through the last day of each month must be postmarked not later than the 10th of the following month. If a dealer issued an Atlantic tunas, swordfish or sharks dealer permit under § 635.4 has not received any Atlantic HMS from U.S. vessels during a reporting period as specified in this section, he or she must still submit the report required under paragraph (b)(1)(i) of this section stating that no Atlantic HMS were received. This negative report must be postmarked for the applicable reporting period as specified in this section. This negative reporting requirement does not apply for bluefin tuna.

* * * * *

(2) * * *

(i) * * *

(B) *Bi-weekly reports.* Each dealer issued an Atlantic tunas permit under § 635.4 must submit a bi-weekly report on forms supplied by NMFS for BFT received from U.S. vessels. For BFT received from U.S. vessels on the first through the 15th of each month, the dealer must submit the bi-weekly report form to NMFS postmarked not later than the 25th of that month. Reports of BFT received on the 16th through the last day of each month must be postmarked not later than the 10th of the following month.

* * * * *

■ 13. In § 635.20, paragraph (f)(2) is revised to read as follows:

§ 635.20 Size limits.

* * * * *

(f) * * *

(2) Except for a swordfish landed in a Pacific state and remaining in the state of landing, a swordfish, or part thereof, weighing less than 33 lb (15 kg) dressed weight will be deemed to be an Atlantic swordfish harvested by a vessel of the United States and to be in violation of the minimum size requirement of this section unless such swordfish, or part thereof, is accompanied by a swordfish statistical document attesting that the swordfish was lawfully imported. Refer to § 300.186 of this title for the requirements related to the swordfish statistical document.

* * * * *

■ 14. In § 635.31 paragraphs (a)(3) and (a)(4)(ii) are revised to read as follows:

§ 635.31 Restrictions on sale and purchase.

* * * * *

(a) * * *

(3) Dealers or seafood processors may not purchase or sell a BFT smaller than the large medium size class unless it is lawfully imported and is accompanied by a bluefin tuna statistical document, as specified in § 300.185(a) of this title.

(4) * * *

(ii) It is accompanied by a bluefin tuna statistical document, as specified in § 300.185(a) of this title.

* * * * *

§ 635.41 [Removed]

■ 15. Section 635.41 is removed.

§ 635.45 [Redesignated as § 635.41]

■ 16. Section 635.45 is redesignated as § 635.41.

§§ 635.42, 635.43, 635.44, 635.46, and 635.47 [Removed]

■ 17. Sections 635.42, 635.43, 635.44, 635.46, and 635.47 are removed.

■ 18. In § 635.71, paragraphs (b)(2), (b)(25), (e)(10) and (e)(12) are removed and reserved and paragraphs (a)(24), (b)(26) and (e)(1) are revised to read as follows:

§ 635.71 Prohibitions.

* * * * *

(a) * * *

(24) Import, or attempt to import, any fish or fish products regulated under this part in a manner contrary to any import requirements or import restrictions specified at § 635.40 or § 635.41.

* * * * *

(b) * * *

(26) Import a bluefin tuna or bluefin tuna product into the United States from Belize, Panama, or Honduras other than as authorized in § 635.41.

* * * * *

(e) * * *

(1) Purchase, barter for, or trade for a swordfish from the north or south Atlantic swordfish stock without a dealer permit as specified in § 635.4(g).

* * * * *

[FR Doc. 04–25523 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 021101264–3016–02; I.D. 111004D]

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Total Allowable Catch Harvested for Period 2 Management Area 1A

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

ACTION: Closure of directed fishery for Management Area 1A.

SUMMARY: NMFS announces that 95 percent of the Atlantic herring total allowable catch (TAC) allocated to Management Area 1A (Area 1A) for 2004 is projected to be harvested by November 19, 2004. Therefore, effective 0001 hours, November 19, 2004, federally permitted vessels may not fish for, catch, possess, transfer or land more than 2,000 lb (907.2 kg) of Atlantic herring in or from Area 1A per trip or calendar day until January1, 2005, when the 2005 period TAC becomes available, except for transiting purposes as described in this notice. Regulations governing the Atlantic herring fishery require publication of this notification to advise vessel and dealer permit holders that no TAC is available for the directed fishery for Atlantic herring harvested from Area 1A.

DATES: Effective 0001 hrs local time, November 19, 2004, through 2400 hrs local time, December 31, 2004.

FOR FURTHER INFORMATION CONTACT: Don Frei, Fisheries Management Specialist, at (978) 281–9221.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic herring fishery are found at 50 CFR part 648. The regulations require annual specification of optimum yield, domestic and foreign fishing, domestic and joint venture processing, and management area TACs. The 2004 TAC allocated to Area 1A (69 FR 17980, April 6, 2004) is 60,000 mt (132,277,621 lb).

The regulations at 50 CFR 648.202 require the Administrator, Northeast Region, NMFS (Regional Administrator) to monitor the Atlantic herring fishery in each of the four management areas designated in the Fishery Management Plan for the Atlantic Herring Fishery and, based upon dealer reports, state data, and other available information, to

determine when the harvest of Atlantic herring is projected to reach 95 percent of the TAC allocated. When such a determination is made, NMFS is required to publish notification in the **Federal Register** notifying vessel and dealer permit holders that, effective upon a specific date, vessels may not fish for, catch, possess, transfer or land more than 2,000 lb (907.2 kg) of herring per trip or calendar day in or from the specified management area for the remainder of the closure period.

The Regional Administrator has determined, based upon dealer reports and other available information, that 95 percent of the total Atlantic herring TAC allocated to Area 1A for the 2004 fishing year is projected to be harvested by November 19, 2004. Therefore, effective 0001 hrs local time, November 19, 2004, federally permitted vessels may not fish for, catch, possess, transfer or land more than 2,000 lb (907.2 kg) of Atlantic herring in or from Area 1A per trip or calendar day through December 31, 2004; except a vessel may transit , or land herring in Area 1A with more than 2,000 lb (907.2 kg) of herring on board, provided such herring were not caught in Area 1A, and provided all fishing gear is stowed and not available for immediate use as required by § 648.23(b). Effective November 19, 2004, federally permitted dealers are also advised that they may not purchase Atlantic herring from federally permitted Atlantic herring vessels that harvest more than 2,000 lb (907.2 kg) of Atlantic herring from Area 1A through December 31, 2004, 2400 hrs local time.

Classification

This action is required by 50 CFR part 648 and is exempt from review under E.O. 12866.

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

Dated: November 12, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–25505 Filed 11–12–04; 3:59 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 031216314–4118–03; I.D. 111004E]

Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Whiting Closure for the Catcher-processor Sector

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

ACTION: Fishing restrictions; request for comments.

SUMMARY: NMFS announces closure of the 2004 catcher-processor fishery for Pacific whiting (whiting) at 0001 local time (l.t.) November 11, 2004, because the allocation for the catcher-processor sector will be reached by that time. This action is intended to keep the harvest of whiting within the 2004 allocation levels.

DATES: Effective from 0001 l.t. November 11, 2004, until the effective date of the 2005 primary season for the catcher-processor sector, which will be published in the **Federal Register**. Comments will be accepted through December 2, 2004.

ADDRESSES: You may submit comments, by any of the following methods:

- E-mail: *WhitingCPclosure.nwr@noaa.gov*: identified by [I.D. 111004E] in the subject line of the message.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Fax: 206–526–6736, Attn: Becky Renko.
- Mail: D. Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070, Attn: Becky Renko.

FOR FURTHER INFORMATION CONTACT: Becky Renko at 206–526–6110.

SUPPLEMENTARY INFORMATION: This action is authorized by regulations implementing the Pacific Coast Groundfish Fishery Management Plan (FMP), which governs the groundfish fishery off Washington, Oregon, and California.

The 2004 non-tribal commercial OY for whiting is 215,500 mt (this is calculated by deducting the 32,500–mt tribal allocation and 2,000 mt for research catch and bycatch in non-groundfish fisheries from the 250,000 mt total catch OY). Regulations at 50 CFR 660.323(a) divide the commercial whiting OY into separate allocations for the catcher-processor, mothership, and shore-based sectors. The catcher-processor sector is composed of vessels that harvest and process whiting. The mothership sector is composed of motherships and catcher vessels that harvest whiting for delivery to motherships. Motherships are vessels that process, but do not harvest, whiting. The shore-based sector is composed of vessels that harvest whiting for delivery to land-based processors. Each commercial sector receives a portion of the commercial OY. For 2004 the catcher-processors received 34 percent (73,270 mt), motherships received 24 percent (51,720 mt), and the shore-based sector received 42 percent (90,510 mt).

Regulations at 50 CFR 660.323(a)(3)(i) describe the primary season for catcher-processors as the period(s) when at-sea processing is allowed and the fishery is open for the catcher-processor sector. When each sector's allocation is reached, the primary season for that sector is ended.

NMFS Action

This action announces achievement of the allocation for the catcher-processor sector only. The best available information on November 10, 2004, indicated that the catcher-processor allocation would be reached by 0001 l.t. November 11, 2004, at which time the primary season for the catcher-processor sector ends.

For the reasons stated here and in accordance with the regulations at 50 CFR 660.323(b)(1) and (e), NMFS herein announces: Effective 0001 l.t. November 11, 2004, further taking and retaining, receiving or at-sea processing of whiting by a catcher-processor is prohibited. No additional unprocessed whiting may be brought on board after at-sea processing is prohibited, but a catcher-processor may continue to process whiting that was on board before at-sea processing was prohibited.

Classification

This action is authorized by the regulations implementing the FMP. The determination to take this action is based on the most recent data available. The Assistant Administrator for Fisheries, NOAA, finds good cause to waive the requirement to provide prior notice and opportunity for comment on this action pursuant to 5 U.S.C. 553 (3)(b)(B), because providing prior notice and opportunity would be impracticable. It would be impracticable because if this closure were delayed in

order to provide notice and comment, the fishery would be expected to greatly exceed the sector allocation. A delay to provide a cooling off period also would be expected to cause the fishery to exceed its allocation. Therefore, good cause also exists to waive the 30-day delay in effectiveness requirement of 5 U.S.C. 553 (d)(3). The aggregate data upon which the determination is based are available for public inspection at the Office of the Regional Administrator (see **ADDRESSES**) during business hours. This action is taken under the authority of 50 CFR 660.323(b)(1) and (e) and is exempt from review under Executive Order 12866.

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

Dated: November 10, 2004.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–25504 Filed 11–12–04; 4:10 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 221
Wednesday, November 17, 2004

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

FEDERAL TRADE COMMISSION

RIN 3084–0098

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") addresses three issues. First, the Commission seeks comment on a proposed amendment of the Telemarketing Sales Rule ("TSR") to create an additional call abandonment safe harbor to allow telemarketing calls that deliver a prerecorded message to consumers with whom the seller on whose behalf the calls are made has an established business relationship. Second, the Commission announces that, pending completion of this proceeding, the Commission will forbear from bringing any enforcement action for violation of the TSR's call abandonment prohibition, 16 CFR 310.4(b)(1)(iv), against a seller or telemarketer that places telephone calls to deliver prerecorded telephone messages to consumers with whom the seller on whose behalf the telemarketing calls are made has an established business relationship, as defined in the TSR, *provided* the seller or telemarketer conducts this activity in conformity with the terms of the proposed amended call abandonment safe harbor. Third and finally, the Commission seeks comment on a petition submitted by the Direct Marketing Association ("DMA") to amend the TSR's call abandonment safe harbor provision that currently requires use of "technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, *measured per day per calling campaign*" [1] substituting instead the phrase "*measured over a 30-day period.*"

[1] 16 CFR 310.4(b)(4)(i) (emphasis supplied).

DATES: Written comments must be received by January 10, 2005.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "Prerecorded Message EBR Telemarketing, Project No. R411001" to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex K), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the **SUPPLEMENTARY INFORMATION** section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be submitted by clicking on the following Weblink: *https://secure.commentworks.com/ftc-tsr* and following the instructions on the Web-based form.

To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the *https://secure.commentworks.com/ftc-tsr* Weblink. You may also visit *http://www.regulations.gov* to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/Privacy.htm*.

FOR FURTHER INFORMATION CONTACT: Michael Goodman, (202) 326–3071, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

Section 310.4(b)(1)(iv) of the amended Telemarketing Sales Rule ("TSR" or "Rule") prohibits telemarketers from abandoning calls. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting.[2]

Call abandonment is an unavoidable consequence of using "predictive dialers"—telemarketing equipment that increases telemarketers' productivity by calling multiple consumers for every available sales representative. Doing so maximizes the amount of time representatives spend speaking with consumers and minimizes the time representatives spend waiting to reach a prospective customer. An inevitable side effect of predictive dialers' functionality, however, is that the dialer will reach more consumers than can be connected to available sales representatives. In those situations, the dialer will either disconnect the call (resulting in a "hang-up" call) or keep the consumer connected with no one on the other end of the line in case a sales representative becomes available (resulting in "dead air"). The call abandonment provision is designed to remedy these abusive practices.

Notwithstanding the prohibition on call abandonment, the TSR contains a safe harbor designed to preserve telemarketers' ability to use predictive dialers. The safe harbor is available if the telemarketer or seller: abandons no more than three percent of all calls answered by a person; allows the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, plays a prerecorded message stating the name and telephone number of the seller on whose behalf the call was

[2] 16 CFR 310.4(b)(1)(iv).

placed; and maintains records documenting compliance.[3] Thus, to comply with this provision of the TSR, at least ninety-seven percent of a telemarketer's calls that are answered by a person (rather than an answering machine) must be connected to a live sales representative. A telemarketing campaign that consists solely of prerecorded messages, therefore, would violate § 310.4(b)(1)(iv) and would not satisfy the safe harbor.

II. Voice Mail Broadcasting Corporation's Submission Regarding the TSR's Treatment of Telemarketing Calls To Deliver a Prerecorded Message to Consumers With Whom the Seller Has an Established Business Relationship

Voice Mail Broadcasting Corporation ("VMBC") submitted a request for an advisory opinion on the permissibility of prerecorded message telemarketing to consumers with whom the seller has an established business relationship.[4] The Commission has decided to treat VMBC's request as a petition to amend the TSR under § 1.25 of the FTC's Rules of Practice.[5]

VMBC's submission pertains to the impact of § 310.4(b)(1)(iv) on a telemarketer using a particular business model. As indicated above, that business model involves delivery of prerecorded telephone messages solely to consumers with whom the seller on whose behalf the telemarketing calls are performed has an "established business relationship."[6] Additionally, under the business model in question, the prerecorded messages would give the called party an opportunity to assert an entity-specific Do Not Call request by speaking to a sales representative. The messages would either allow the called party to speak to a sales representative by pressing a button on the telephone keypad during the message, or, in the alternative, they would provide a toll-free number that the called party may call to speak to a sales representative.

VMBC asserts that the harms that prompted inclusion of the call abandonment provisions in the TSR would not be present in campaigns conducted according to the business model described above. Those harms were (1) "dead air" calls, in which there is a prolonged period of silence between a consumer answering a call and the connection of that call to a sales representative; and (2) "hang-up" calls, in which telemarketers hang up on consumers whom they have called without speaking to them.[7] Nothing inherent in telemarketing calls that deliver prerecorded messages to consumers with whom the seller has an established business relationship would cause "dead air"; nor would such calls necessarily result in any "hang-ups" on consumers. In fact, it appears that using prerecorded messages to consumers with whom the seller has an established business relationship would enable a telemarketer to preclude completely some of the odious side effects of predictive dialers. For instance, using a prerecorded message would make it unnecessary to subject a consumer who has answered a call to "dead air" time while waiting for a live sales representative to become available, or to a hang-up because no sales representative becomes available.

Moreover, the prerecorded messages in the business model VMBC describes would disclose the seller's identity in every call, so the seller would not be engaging in recorded message telemarketing under the cloak of anonymity. In fact, according to VMBC, because the messages in question would be delivered only to existing customers, the "strong incentive to protect the goodwill of customers" would serve as a check on the potential for abuse.[8]

VMBC points out that the Federal Communications Commission ("FCC") telemarketing rules under the Telephone Consumer Protection Act ("TCPA")—which largely parallel the Do Not Call and certain other of the TSR's provisions—have since the early 1990s permitted prerecorded message telemarketing to consumers with whom a seller has an established business relationship.[9] In virtually all other circumstances, the TCPA rules broadly prohibit prerecorded message telemarketing.[10]

VMBC points out that the FTC, in its *Report to Congress Pursuant to the Do Not Call Implementation Act*[11] ("DNCIA Report"), discussed the difference between the TSR and the TCPA regulations with respect to the treatment of prerecorded message telemarketing in instances where the seller has an established business relationship with the called consumer. In its DNCIA Report, the Commission suggested that "the incentive to nurture established business relationships may provide an adequate restraint on the growth of recorded message telemarketing."[12]

A. The Importance of Preserving the Consumer's Ability To Assert a Do Not Call Request When Receiving a Prerecorded Message Telemarketing Call

It appears that "dead air" and "hang-up" calls are unlikely to result from the business model VMBC describes. At the same time, the Commission recognizes that it may be more economical for companies to contact consumers via prerecorded messages rather than using live telemarketers, so the volume of commercial calls that consumers receive may increase. Accordingly, the Commission believes that, if allowed, telemarketing calls that deliver prerecorded messages to consumers with whom a seller has an established business relationship must preserve the ability of those consumers to assert their Do Not Call rights quickly, effectively,

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[3] The safe harbor provision is 16 CFR 310.4(b)(4).

[4] Starz Encore Group, The Spoken Hub, Copilevitz & Canter, and SoundBite Communications also have written to the Commission seeking compliance advice about this issue.

[5] 16 CFR 1.25.

[6] 16 CFR 310.2(n). Under this definition, "'[e]stablished business relationship' means a relationship between a seller and a consumer based on: (1) The consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call."

[7] *Statement of Basis and Purpose for the Amended TSR*, 68 FR 4580, 4641 (Jan. 29, 2003).

[8] To support its assertion that consumers do not object to prerecorded message telemarketing when they have an established business relationship with the seller, VMBC states that in one typical campaign conducted for a major retailer, only .02 of 1% of the nearly 5.8 million calls resulted in the consumer asserting an entity-specific Do Not Call request.

[9] *See* 47 CFR 64.1200(a)(2)(iv). The FCC stated its rationale for retaining the established business relationship exemption when it revised its TCPA regulations last year, pursuant to the Do Not Call Implementation Act: "We believe that while consumers may find prerecorded voice messages intrusive, such messages do not necessarily impose the same costs on the recipients as, for example, unsolicited facsimile messages. Therefore, we retain the exemption for established business relationship calls from the ban on prerecorded messages." 68 FR 44158 (¶80) (July 25, 2003).

[10] The only other circumstance in which the TCPA permits prerecorded message telemarketing is in instances where the consumer has given prior consent. 47 CFR 64.1200(a)(6)(i).

[11] Public Law No. 108–10, 117 Stat. 557. Section 4 of the DNCIA required, *inter alia*, that within 45 days after the promulgation of final revised TCPA regulations by the FCC, the FTC and the FCC each transmit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation a report to include: an analysis of the telemarketing rules promulgated by the FTC; an analysis of the telemarketing rules promulgated by the FCC; a discussion of inconsistencies between the rules promulgated by the FTC and the FCC; a discussion of the effect of any inconsistencies on consumers, and persons paying for access to the registry; and proposals to remedy any such inconsistencies. The FTC's Report is accessible online at *http://www.ftc.gov/os/2003/09/dnciareport.pdf*.

[12] DNCIA Report, p. 35.

and efficiently, so that consumers retain an effective right to decide whether to receive commercial calls, including prerecorded messages. Asserting an entity-specific Do Not Call request should be no more difficult in the case of prerecorded message telemarketing than it is in the case of telemarketing that uses live sales representatives. Although consumers who have placed their telephone numbers on the National Do Not Call Registry may receive telemarketing calls from sellers with whom they have an established business relationship, consumers may immediately request that their number be placed on the seller's entity-specific do not call list. This request prevents future calls from that seller. Consumers should have the same ability to immediately assert a Do Not Call request when they receive a prerecorded telemarketing call pursuant to the established business relationship exemption.

When a consumer is contacted by a live sales representative, the consumer may interrupt the sales pitch immediately to make a Do Not Call request, and the sales representative must take that request without delay. The Commission believes that, similarly, prerecorded messages must present an entity-specific Do Not Call option immediately after the prompt disclosures required by § 310.4(d) and (e) are delivered at the outset of the call.[13] Nevertheless, the Commission seeks information and data about the costs and benefits of requiring that the disclosure of how to make a Do Not Call request be made at the outset of the call. The Commission also seeks information about alternative approaches that the Commission might use in this area and the costs and benefits of these alternatives.

Moreover, the Commission believes that the Do Not Call option should allow consumers to assert their Do Not Call rights during the message. Although FCC rules allow prerecorded messages to provide a toll-free number that consumers may call to make a Do Not Call request,[14] this requires consumers to be prepared with pen and paper at the ready when they answer the phone, to take down the number, and to place a separate call in order to assert a Do Not Call request. This approach encumbers consumers' assertions of company-specific Do Not Call rights.

The business model described in VMBC's letter contemplates some prerecorded messages that would enable consumers to speak with a sales representative during the call by pressing a button on their telephone keypads. The Commission believes this type of interactive feature (pressing a button during the message to connect to a sales representative or an automated system to make a Do Not Call request) would be ideal in the established business relationship prerecorded message context as a means to protect consumers' Do Not Call rights under the TSR.

The Commission has, therefore, incorporated this feature into the proposed amendment to the call abandonment safe harbor provision that would permit telemarketing calls to consumers with whom a seller has an established business relationship to deliver a prerecorded message. Nevertheless, the Commission seeks information and data about the technical feasibility and costs of implementing such a feature in outbound telemarketing calls that deliver prerecorded messages to established customers. The Commission also seeks comment on alternative methods of preserving the consumer's ability to assert a Do Not Call request when receiving a prerecorded message telemarketing call.

B. The Commission's Proposal To Amend the TSR's Call Abandonment Safe Harbor Provision To Permit Prerecorded Message Telemarketing to Consumers With Whom a Seller Has an Established Business Relationship

Because the harms that the call abandonment provisions were intended to remedy seem unlikely to arise from calls made pursuant to the business model at issue in VMBC's petition, the Commission proposes to amend the TSR to add a new call abandonment safe harbor, as indicated below:

(5) A seller or telemarketer initiating an outbound telephone call that delivers a prerecorded message to a person with whom the seller has an established business relationship will not be liable for violating 310.4(b)(1)(iv) if:

(i) The seller or telemarketer, for each such telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(ii) Within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a prerecorded message that:

(a) Presents an opportunity to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at the outset of the message, with only the prompt disclosures required by §§ 310.4(d) or (e) preceding such opportunity; and

(b) Complies with all other requirements of this Rule and other applicable federal and state laws.

Proposed § 310.4(b)(5) would create a new safe harbor for sellers and telemarketers calling consumers with whom the seller has an established business relationship for the purpose of delivering a prerecorded message. There are four criteria that a seller or telemarketer placing such calls would be required to meet to take advantage of the safe harbor and avoid liability for violating the TSR's prohibition against call abandonment in § 310.4(b)(1)(iv). The first criterion is that the seller or telemarketer (1) must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call. This "ring time" element is identical to the analogous element of the existing safe harbor in § 310.4(b)(4)(ii). The ring time standard is intended to give consumers, including the elderly or infirm who may struggle to get to the telephone, a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted by ringing phones with no caller present on the other end of the line. The ring time standard is modeled on DMA's ethical guidelines for its members.[15]

The second criterion of the proposed safe harbor is that the seller or telemarketer must play the prerecorded message within two seconds after the person's completed greeting. The purpose of this element of the safe harbor is to minimize "dead air." This element follows the analogous element in § 310.4(b)(4)(iii), allowing no more than two seconds of dead air. As noted, where there is no wait for a live sales representative because a prerecorded message is being delivered by a

[13] Section 310.4(d) requires the following prompt oral disclosures in outbound commercial telemarketing calls: (1) The identity of the seller; (2) that the purpose of the call is to sell goods or services; (3) the nature of the goods or services; and (4) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. Section 310.4(e) requires the following oral disclosures in outbound charitable solicitation calls: (1) The identity of the charitable organization on behalf of which the request is being made; and (2) that the purpose of the call is to solicit a charitable contribution.

[14] *See* 47 CFR 64.1200(b)(2).

[15] Prior to adoption of the amended TSR, Article #38 of DMA's ethical guidelines recommended allowing the phone to ring at least four times or for twelve seconds before disconnecting a call. 68 FR 4580, 4644 (Jan. 29, 2003). Since adoption of the amended TSR, DMA has issued revised guidelines. Article #45 of these revised ethical guidelines now tracks the TSR in urging that "[m]arketers using automated dialing equipment should allow 15 seconds or 4 rings before disconnecting an unanswered call." *http://www.the-dma.org/guidelines/ethicalguidelines.shtml#tele.*

machine, telemarketers should have no problem meeting this standard. The Commission, however, specifically seeks information on whether the maximum amount of dead air should be *less* than two seconds in the new safe harbor, since the rationale for allowing two seconds may be inapposite to telemarketing that uses prerecorded messages rather than live sales representatives. The Commission also seeks information on the relative costs and benefits of a standard that would set the maximum amount of dead air at a level lower than two seconds.

The third criterion of the proposed new safe harbor is self-explanatory. Its purpose is to ensure the same Do Not Call rights for consumers receiving telemarketing calls that deliver a prerecorded message that are enjoyed by consumers receiving telemarketing calls from live sales representatives. It requires that the prerecorded message present, "at the outset," preceded only by the prompt oral disclosures required by the TSR, an opportunity for the called party to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A).

Under the business model VMBC describes, some telemarketing campaigns would employ messages with an entity-specific Do Not Call mechanism, providing the called party with an opportunity to speak to a sales representative during the message by pressing a button on the telephone keypad. This approach allows consumers to exercise their Do Not Call rights in a manner that closely tracks consumers' experience when called by a live sales representative, and would therefore satisfy the proposed safe harbor. The Commission seeks information about the costs to industry of requiring this mechanism in each message, and whether the costs are outweighed by the benefits to consumers who want to assert an entity-specific Do Not Call request immediately, without having to write down a toll-free number and call back.

The fourth and final element of the proposed new safe harbor provision makes it explicit that it does not obviate or negate any other provision of the TSR or other federal or state laws. This proposed safe harbor provision would preserve consistency with the existing TSR safe harbor governing predictive dialers [16] and put sellers and telemarketers on notice that other applicable regulations may be stricter than what the Commission's proposal provides.

C. FTC Enforcement Policy Pending Completion of This Proceeding

In consideration of VMBC's petition and similar requests from other parties, the Commission now believes that, under certain limited circumstances, enforcement of the call abandonment provision would serve only to deter conduct that does not cause the harms to consumers that prompted adoption of that provision. Therefore, the Commission has determined that, pending completion of this proceeding, the Commission will forbear from bringing any enforcement action for violation of the TSR's call abandonment prohibition, 16 CFR 310.4(b)(1)(iv), against a seller or telemarketer that places telephone calls to deliver prerecorded telemarketing messages to consumers with whom the seller on whose behalf the telemarketing calls are placed has an established business relationship, as defined in the TSR, provided the seller or telemarketer conducts this activity in conformity with the terms of the proposed amended call abandonment safe harbor. In the event the record that develops in this proceeding tends to disprove the Commission's tentative conclusions regarding prerecorded message telemarketing to consumers with whom the seller has an established business relationship, the Commission will announce a revised enforcement policy that will apply to subsequent enforcement actions.

III. DMA's Petition

On May 18, 2004, DMA submitted a petition asking that the Commission "revise its current method for calculating abandoned calls from a per day, per calling campaign measurement * * * to the per 30 day measurement adopted by the Federal Communications Commission (FCC) in its revisions to its telemarketing rules * * *."[17] DMA states that "meeting the 3% benchmark under the FTC's per day, per calling campaign standard presents a much greater compliance obstacle than meeting the FCC's abandoned call standard. Marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% standard." DMA's letter does not explain why this would be so. The letter, however, does quote a DMA member as follows:

> The FTC requires the 3% abandon average per campaign per day, which is virtually impossible for vendors who run multiple campaigns each day. On a typical day, we may run more than 100 individual client campaigns. The system manages the efficiency as an average of all campaigns per day, so it is inevitable that certain logins would end the day at say, 3.1% and others at 2.9%, yet the overall average would still be 3% or less.

Nevertheless, DMA's letter does not explain why a telemarketer's system cannot dynamically maintain a steady level of no more than three percent call abandonment for all calls being placed. In fact, the paragraph quoted above suggests that telemarketers engage in precisely the practice the Commission was concerned about when it adopted the "per day, per campaign" method of calculating the maximum level of abandoned calls. The Commission stated:

> The "per day per campaign" unit of measurement is consistent with DMA's guidelines addressing its members' use of predictive dialer equipment. Under this standard, a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the Rule's safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.[18]

DMA's petition concedes that "the former DMA Guidelines for Ethical Business Practices (The DMA Guidelines) used the per day standard for the maximum number of abandoned calls per campaign that companies who use predictive dialing equipment must satisfy as a condition of membership in the DMA." DMA points to the fact that the permissible abandonment rate in the DMA Guidelines was five percent, instead of the three percent level incorporated in the TSR's call abandonment safe harbor. Nevertheless, DMA provides no facts to support the proposition that the per day per campaign method was feasible at a five percent level, but not at the three percent level.

DMA mentions two other factors in support of its petition. The first factor is that the California Public Utilities Commission—whose three percent call abandonment rate the Commission cited in adopting the TSR's call abandonment safe harbor—measures abandoned calls on a per 30-day basis, according to DMA. Second, DMA argues the FTC

[16] Footnote 7 of the amended TSR states: "This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200." The final element of the proposed new safe harbor incorporates the same concept without duplicating this footnote.

[17] DMA petition at 1 (available at *http://www.ftc.gov/os/2004/10/041019dmapetition.pdf*).

[18] 68 FR 4643 (Jan. 29, 2003) (footnotes omitted).

should defer to the FCC's determination on how the permissible call abandonment rate should be calculated, because the issue "lies closer to the core expertise of the FCC than of the FTC." The Commission does not believe these factors are sufficient to require the requested change in the TSR. It is not impossible for entities subject to both the TSR and either the FCC's TCPA rules or the California Public Utilities Commission's rules to comply with both; compliance with the FTC's more precise standard would constitute acceptable compliance with either or both of those other sets of regulations. Moreover, recent court decisions controvert DMA's argument that the FTC's expertise or legal authority regarding the acceptable level of call abandonment is inferior to that of the FCC.[19]

DMA provides no information that would tend to counter the concern about the shortcomings of a "per 30-day" standard that the Commission set forth at length in its DNCIA Report.[20] The concern is that the FCC's approach to measuring the three percent call abandonment rate over a 30-day period could enable telemarketers to target call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls. Under such a scenario, predictive dialers could be set to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population. For example, a telemarketer could offset a high abandonment rate in a multi-day cold-call campaign to persons who never previously purchased from the seller, and make up the difference by abandoning no calls in a subsequent campaign targeting its most valued existing customers. Telemarketers could also offset a high abandonment rate in low income zip codes and make up the difference by abandoning no calls in affluent ones. The FTC's per day per campaign measure reduces the potential for concentrating abuse by ensuring an even distribution of abandoned calls to all segments of the public, regardless of their purchasing history or demographic characteristics. Given the detrimental impact of call abandonment on consumers, the FTC does not believe that variations in telemarketing campaigns (such as calling times, number of operators available, and the number of telephone lines used by the call centers) justify allowing call abandonment to fall disproportionately on particular groups of consumers.

Therefore, the Commission believes that DMA has not provided an adequate factual basis that would compel modification of the TSR's method for measuring the maximum allowable abandonment rate. Nonetheless, the Commission is receptive to any factual information that would establish that such a change is warranted, and encourages commenters to include such information in their submissions. In particular, the Commission is interested in any elaboration on the problems telemarketers who are running multiple campaigns at the same time face in attempting to comply with the current requirement. The Commission is also interested in any information demonstrating that callers who make a relatively small number of calls per day may be differentially disadvantaged by the current requirements. Finally, the Commission seeks information and data demonstrating that it need not be concerned that, if additional flexibility were provided, telemarketers would intentionally set the abandonment rates above 3 percent on some campaigns or on calls directed to certain consumers and use lower rates of abandonment on other campaigns or calls to satisfy the overall 3 percent requirement.

IV. Invitation To Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this Notice. Written comments must be received on or before January 10, 2005. Comments should refer to: "Prerecorded Message EBR Telemarketing, Project No. R411001" to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/ Office of the Secretary, Room H–159 (Annex K), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled "Confidential."[21] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the *https://secure.commentworks.com/ftc-tsr* Weblink. You may also visit *http://www.regulations.gov* to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

V. Communications by Outside Parties to Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. *See* 16 CFR 1.26(b)(5).

VI. Paperwork Reduction Act

The information collection requirements contained in the TSR were reviewed by OMB under the Paperwork Reduction Act and cleared on July 24, 2003, under OMB Control Number 3084–0097. The proposed rule amendment, as discussed above, provides a safe harbor from the TSR's prohibition on call abandonment for sellers and telemarketers that call only

[19] *Mainstream Mktg. Serv., Inc.* v. *FTC*, 283 F. Supp. 2d 1151, 1170 (D. Colo. 2003) ("[T]he court finds no basis to conclude that the FCC has exclusive jurisdiction to regulate the practice of abandoning calls"); *U.S. Security* v. *FTC*, 282 F. Supp. 2d 1285, 1292 (W.D. Okla. 2003) ("The [TSR's] restriction on abandoned calls is a permissible regulation of this most (and undisputedly) invasive and abusive practice, and its promulgation, which is in no way hindered or hobbled by the FCC's grant of authority, has carried into effect congressional intent as expressed by the [Telemarketing Act]"); *Nat'l. Fed'n. of the Blind* v. *FTC*, 303 F. Supp. 2d 707 at 716 (D. Md. 2004).

[20] DNCIA Report, p. 31.

[21] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record.

consumers with whom the seller has an established business relationship, as defined in the Rule. Thus, the proposed rule amendment does not impose any new, or affect any existing, record submission, recordkeeping, or public disclosure requirement that would be subject to review and approval by OMB pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501–3520.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601–612, requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") with a proposed rule and a Final Regulatory Flexibility Analysis ("FRFA") with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603–605.

The Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed rule on small entities. Therefore, the Commission has prepared the following analysis.

A. Reasons for the Proposed Rule

The proposed modification of the TSR, discussed above, responds to requests from the telemarketing industry to provide a safe harbor to allow sellers and telemarketers calling persons with whom the seller has an established business relationship to deliver a prerecorded message.

B. Statement of Objectives and Legal Basis

The objectives of the proposed rule are discussed above. The legal basis for the proposed rule is the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6102.

C. Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

This proposed rule will impact sellers that make interstate telephone calls to consumers (outbound calls) with whom the seller has an established business relationship for the purpose of delivering a prerecorded message in an attempt to sell their products or services. Also affected may be firms that provide prerecorded message telemarketing services to others on a contract basis. For the majority of entities subject to the proposed rule, a small business is defined by the Small Business Administration as one whose average annual receipts do not exceed $6 million or that has fewer than 500 employees.[22]

In the proceedings to amend the TSR in 2002, the Commission sought public comment and information on the number of small business sellers and telemarketers that would be impacted by those amendments, which were broader in scope than those at issue in the instant proceeding. In its requests, the Commission noted the lack of publicly available data regarding the number of small entities that might be impacted by the proposed Rule.[23] The Commission received no information in response to its requests.[24]

The requests for clarification regarding the operation of the abandoned call provision of the TSR that have led to this rulemaking proceeding provide no data regarding the number of small entities that may be affected by the outcome of the proceeding. Based on the absence of available data in this and related proceedings, the Commission believes that a precise estimate of the number of small entities that fall under the proposed rule is not currently feasible, and specifically requests information or comment on this issue.

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

The proposed rule does not impose any new, or affect any existing, reporting, disclosure, or specific recordkeeping requirements within the meaning of the Paperwork Reduction Act. The Commission does not believe that modifying the Rule to create a safe harbor that would allow sellers and telemarketers calling to deliver a prerecorded message to persons with whom they have an established business relationship will create a significant burden on sellers or telemarketers that have already established systems to comply with the existing TSR. The Commission also does not believe that this modification of the Rule will increase or otherwise modify any existing compliance costs, and may in fact reduce them for small entities that are able to take advantage of the safe harbor.

E. Identification of Other Duplicative, Overlapping, or Conflicting Federal Rules

The FTC has not identified any other federal statutes, rules, or policies that would conflict with the proposed safe harbor that would allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship. The FCC rules pursuant to the TCPA contain a safe harbor that allows telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship. The FTC's proposed modification would harmonize the TSR to the FCC's TCPA rules on this issue. With respect to the issue of calculating callers' abandonment rate on a "per day" or "per 30-day" basis, the FTC does not propose to modify its Rule to make it consistent with the relevant FCC TCPA rule. As explained in Section III above, compliance with the FTC's more precise standard would constitute acceptable compliance with the FCC rule, so there is no conflict between these rules.

F. Discussion of Significant Alternatives to the Proposed Rule That Would Accomplish the Stated Objectives and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The proposed safe harbor would allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship, but require that the prerecorded message include an opportunity during the call for the recipient of the call to assert an entity-specific Do Not Call request. Other regulatory options under consideration include requiring instead that the prerecorded message include a toll-free number that call recipients could contact to assert an entity-specific Do Not Call request. Also, the proposed safe harbor requires that the prerecorded message begin within two seconds after the recipient of the call completes his or her greeting. Other regulatory options under consideration include requiring that the prerecorded message begin sooner than two seconds after the recipient of the call completes his or her greeting. The proposed safe harbor is intended to be available to all entities subject to the Rule, and it does not

[22] These numbers represent the size standards for most retail and service industries ($6 million total receipts) and manufacturing industries (500 employees). A list of the SBA's size standards for all industries can be found at *http://www.sba.gov/size/summary-whatis.html.*

[23] *See* 68 FR 4580, 4667 (Jan. 29, 2003) (noting that Census data on small entities conducting telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that receive inbound calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not accounted for in the Census data.).

[24] *See* 68 FR 4580, 4667 (Jan. 29, 2003); 68 FR 45134, 45143 (July 31, 2003) (noting, in the final amended rules, that comment was requested, but not received, regarding the number of small entities subject to the National Do Not Call Registry provisions of the amended TSR).

appear that a delayed effective date for small entities or other alternatives to the current proposal would either be appropriate or necessarily result in any further reduction in the compliance burdens of the Rule for small entities. The Commission nonetheless seeks comments and information on what other alternative formulations, if any, of the proposed safe harbor might further minimize compliance burdens for small entities, without compromising the intent and purpose of the Rule to prevent abusive telemarketing practices.

VIII. Specific Issues for Comment

The Commission seeks comment on various aspects of the proposed amendment to the call abandonment safe harbor provision of the TSR. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

A. General Questions for Comment

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on (a) the proposed safe harbor to allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship, and (b) DMA's request to substitute a "per 30-day period" for the current "per day per campaign" method of measuring the maximum allowable rate of call abandonment under the existing safe harbor in 16 CFR 310.4(b)(4)(i). Please include answers to the following questions:

1. What is the effect (including any benefits and costs), if any, on consumers?
2. What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?
3. What is the impact (including any benefits and costs), if any, on industry, including those who may be affected by these proposals but not obligated to comply with the Rule?
4. What changes, if any, should be made to the proposed Rule to minimize any cost to industry, individual firms that must comply with the Rule, or consumers?
5. How would each suggested change affect the benefits that might be provided by the proposed Rule to industry, individual firms that must comply with the Rule, or consumers?
6. How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

B. Questions on Proposed Specific Provisions

In response to each of the following questions, please provide: (1) Detailed comment, including data, statistics, consumer complaint information, and other evidence, regarding the issue referred to in the question; (2) comment as to whether the proposed changes do or do not provide an adequate solution to the problems they were intended to address, and why; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on industry.

1. Are "hang-up" calls and "dead air"—the two harms that prompted adoption of the current call abandonment provisions—likely to arise from telemarketing calls that deliver a prerecorded message to consumers with whom the seller has an established business relationship? Are there other consumer harms that may result from such calls, and if so, what are they? Could the proposed safe harbor be crafted to eliminate such harms, and if so, how? If not, why not?
2. What are the costs and benefits to consumers of receiving telemarketing calls from companies with whom they have an established business relationship via prerecorded messages as opposed to live sales representatives? Is there any data as to how many consumers choose to act on the telemarketing calls that they receive via prerecorded messages? Is it likely that consumers will receive more telemarketing calls under this proposed new safe harbor in § 310.4(b)(5)? Is it likely that consumers will receive more unwanted telemarketing calls under this proposed new safe harbor?
3. What are the costs and benefits of obtaining consumers' prior consent before contacting them with prerecorded telemarketing messages?
4. Is there any data as to how many consumers choose to opt out of prerecorded telemarketing calls currently? What mechanisms are used to allow consumers to opt out of prerecorded telemarketing messages? At what point in the course of the message are consumers given the opportunity to opt out? Does the industry follow a standard practice as to when in the call a consumer must be given the opportunity to opt out?
5. How much, if any, "dead air" should be permitted between the completion of the answering consumer's greeting and the beginning of the prerecorded message in the proposed new call abandonment safe harbor for telemarketing calls delivering a prerecorded message to consumers with whom the seller has an established business relationship? Because using prerecorded messages obviates the need to wait for an available live sales representative, is there any reason that the prerecorded message could not start less than two seconds after completion of the answering consumer's greeting? What would be the costs and benefits of starting the prerecorded message less than two seconds after completion of the answering consumer's greeting?
6. What would be the costs to industry of requiring that each prerecorded message include a mechanism that would enable the consumer receiving the call to assert a Do Not Call request during the call, for example, by pressing a number on the keypad, or by stating aloud the wish not to receive future calls? Specifically, what would be the incremental expense of such a requirement? What would be the overall costs and benefits to consumers of such a requirement? What would be the comparative costs and benefits to industry and consumers of providing a toll-free number in a prerecorded message that call recipients could call to assert a Do Not Call request? Are there other alternative means of preserving the consumer's ability to assert a Do Not Call request that would strike a better balance of costs and benefits than requiring an opportunity during the prerecorded message to assert a Do Not Call request?
7. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must use a prerecorded message that presents an opportunity to assert an entity-specific Do Not Call request at the outset of the message, with only the prompt disclosures required by § 310.4(d) or (e) preceding it? Why or why not? What are the costs and benefits of this approach? In the alternative, would it be better to specify that the information about how to assert an entity-specific Do Not Call request be given within a certain length of time after the beginning of the pre-recorded message? If so, how much time should be allowed before the information must be given? What are the costs and benefits of this approach?
8. Does the proposed new safe harbor in § 310.4(b)(5) provide industry with sufficient guidance as to the circumstances under which prerecorded message telemarketing calls would be permissible? If not, how could the provision be crafted to accomplish that purpose more effectively?
9. Would the proposed new safe harbor in § 310.4(b)(5) complicate

enforcement efforts against a seller or telemarketer who violates the TSR and claims falsely that it has an established business relationship with called consumers?

10. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call? If not, is there some other more appropriate element that should be included in the safe harbor to preclude the problem of premature "hang-ups" before consumers can reach the telephone?

11. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must comply with all other requirements of the TSR and other applicable federal and state laws? If not, why not?

12. Is the burden on telemarketers in meeting the three percent maximum abandoned call level per day per telemarketing campaign outweighed by benefits to consumers in having call abandonment distributed evenly at a uniformly low level to all called consumers? What, if any, characteristics of the telemarketing equipment currently in use might make compliance with the "per day per campaign" standard problematic? What, if any, costs would result from having the equipment adjusted or replaced to eliminate problems?

13. According to DMA, "marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% [maximum abandoned call] standard." Is this statement accurate? If so, why? And if so, how widespread is this difficulty? If this statement is not accurate, why not? Were similar problems encountered in meeting the DMA's former guideline of no more than five percent of calls abandoned per day per telemarketing campaign? Why or why not?

14. If the three percent maximum call abandonment rate were measured over a 30-day period, instead of per day per telemarketing campaign, what effect, if any, would this change have on actual call abandonment rates? What would prevent a telemarketer from targeting call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls? What would prevent setting predictive dialers to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population? Is it appropriate that some segments of the population should be subjected to a higher rate of call abandonment than other segments of the population? If so, why?

15. Can telemarketing equipment be programmed to dynamically maintain a steady level of no more than three percent call abandonment for all calls being placed? What, specifically, is the equipment that has that capacity to be programmed in such a manner, if any? What are the costs associated with this equipment?

IX. Proposed Rule

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

Accordingly, the Commission proposes to amend title 16, Code of Federal Regulations, as follows:

PART 310—TELEMARKETING SALES RULE

1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101–6108.

2. Amend § 310.4 by adding a new paragraph (b)(5).

§ 310.4 Abusive telemarketing acts or practices.

* * *

(b) * * *

(5) A seller or telemarketer initiating an outbound telephone call that delivers a prerecorded message to a person with whom the seller has an established business relationship will not be liable for violating § 310.4(b)(1)(iv) if:

(i) The seller or telemarketer, for each such telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(ii) Within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a prerecorded message that:

(A) Presents an opportunity to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at the outset of the message, with only the prompt disclosures required by § 310.4(d) or (e) preceding such opportunity; and

(B) Complies with all other requirements of this part and other applicable federal and state laws.[8] * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 04–25470 Filed 11–16–04; 8:45 am]

BILLING CODE 675–01–P

[8] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–04–042]

RIN 1625–AA09

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Cypremort, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulation governing the operation of the State Route 319 (Louisa) bridge across the Gulf Intracoastal Waterway, mile 134.0 west of Harvey Lock, near Cypremort, Louisiana. A new high-level, double-leaf bascule bridge that will require limited openings is replacing the low-level swing bridge across the waterway. This proposed regulation change would remove the regulation governing the to-be-removed bridge and replace it with a regulation for the operation of the new bascule bridge.

DATES: Comments and related material must reach the Coast Guard on or before January 18, 2005.

ADDRESSES: You may mail comments and related material to Commander (obc), Eighth Coast Guard District, 500 Poydras Street, New Orleans, Louisiana 70130–3310. The Commander, Eighth Coast Guard District, Bridge Administration Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Bridge Administration office between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David Frank, Bridge Administration Branch, telephone 504–589–2965.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD08–04–042),

indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. You may submit a request for a meeting by writing to Commander, Eighth Coast Guard District, Bridge Administration Branch at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The U. S. Coast Guard, at the request of the State of Louisiana, Department of Transportation and Development (LDOTD), and supported by the Port of West St. Mary, proposes to establish a schedule of operation for the new SR 319 movable bridge and eliminate the schedule of operation of the old SR 319 bridge. Currently, the bridge opens on signal; except that from 15 August to 5 June, the draw need not be opened from 6:55 to 7:10 a.m. and from 3:50 to 4:10 p.m. Monday through Friday except holidays.

The new bridge is presently under construction and should be completed by the end of January 2005. Upon completion of the new bridge and the relocation of traffic to the new bridge, the old bridge will be removed. Removal of the old bridge should be completed within 90 days after the new bridge has been opened to traffic. The existing regulation will no longer be required.

The new bridge will provide mariners with 73 feet of vertical clearance above mean high water in the closed to navigation position. The new bridge will only be required to open for vessels with vertical clearances of greater than 73 feet. Gulf Intracoastal Waterway bridges to the east and to the west of this bridge are fixed bridges providing only 73 feet of vertical clearance. Only vessels wishing to transit to the Port of West St. Mary will require openings as this facility is currently the only facility or waterway between the SR 319 bridge at mm 134.0 and the Bayou Sale bridge at mm 113.0.

In an effort to assess and accurately determine the opening requirements of the new bridge, LDOTD supplied opening data for the present bridge and identified the number of openings that would have been required if the new bridge with 73 feet of vertical clearance were operating. In 2003, the existing bridge opened for the passage of vessels approximately 12,800 times. During that time period, the new bridge would have been required to open for marine traffic three times. Through mid-October of 2004, the existing bridge opened for the passage of vessels approximately 11,000 times. In 2004, during the final phases of construction of the new bridge (with the bascule leaves for the new bridge in place), vessels transiting the waterway only required 5 openings.

Based upon the existing statistics for bridge openings and the limited number of openings that will be required for the passage of traffic for the new bridge, LDOTD has requested that the new bridge be required to open on signal if at least 24-hours advanced notice is given. The Port of West St. Mary is the only facility known to be affected by the new advanced notice requirement. They have stated by letter that this requirement is reasonable and have no objections.

Navigation at the site of the bridge consists primarily of tugboats with barges. Alternate routes to the Port of West St. Mary are not available to marine traffic requiring vertical clearances of greater than 73 feet.

Discussion of Proposed Rule

The proposed rule change to 33 CFR 117.451.d would require the SR 319 (Louisa) bridge across the Gulf Intracoastal Waterway, mile 134.0, near Cypremort to open on signal if at least 24-hours' notice is given. This change would allow for the unimpeded flow of all vessels with vertical clearance requirements of less than 73 feet while providing for vessels with vertical clearances of greater than 73 feet.

Regulatory Evaluation

This proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security. We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

This proposed rule provides advanced notification of opening requirements for vessels wishing to transit to the Port of West St. Mary. The facility has no objections to the requirement as vessel arrivals and departures are scheduled and the advanced notification requirement of the bridge will not affect these vessel movements.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities: The owners or operators of vessels with vertical clearance requirements of greater than 73 feet.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Eighth Coast Guard District Bridge Administration Branch at the address above. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this proposed rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation. Paragraph (32)(e) excludes the promulgation of operating regulations or procedures for drawbridges from the environmental documentation requirements of NEPA. Since this proposed rule will alter the normal operating conditions of the drawbridges, it falls within this exclusion.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. In § 117.451, paragraph (d) is revised to read as follows:

§ 117.451 Gulf Intracoastal Waterway.

* * * * *

(d) The draw of the SR 319 (Louisa) bridge across the Gulf Intracoastal Waterway, mile 134.0, near Cypremort, shall open on signal if at least 24 hours notice is given.

* * * * *

Dated: November 8, 2004.

J.W. Stark,

Captain, U. S. Coast Guard, Acting Commander, 8th Coast Guard Dist.

[FR Doc. 04–25490 Filed 11–16–04; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3446; MB Docket No. 04–194, RM–10729]

Radio Broadcasting Services; Creede, CO

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: The Audio Division dismisses a Petition for Rule Making filed by Jacor Broadcasting of Colorado, Inc., requesting the allotment of Channel 261C2 to Creede, Colorado, as its first local service. *See* 67 FR 69703, November 19, 2002. Jacor Broadcasting of Colorado, Inc., or no other party, filed comments in support of the allotment of Channel 261C2 to Creede, Colorado. It is the Commission's policy to refrain from making a new allotment to a community absent an expression of interest.

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

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–194, adopted October 27, 2004, and released October 29, 2004. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http:www.BCPIWEB.com*. This document is not subject to the Congressional Review Act. (The Commission is, therefore, not required to submit a copy of this Report and Order to GAO, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A) because the proposed rule was dismissed.)

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–25510 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3444; MB Docket No. 04–378; RM–11079]

Radio Broadcasting Services; Lake Charles, LA and West Orange, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: At the request of Apex Broadcasting, Inc., the Audio Division dismisses the petition for rule making proposing the reallotment of Channel 258C0 from Lake Charles, Louisiana to West Orange, Texas, and the modification of Station KBXG(FM)'s license accordingly. *See* 69 FR 60344, October 8, 2004. A showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Therefore, we will grant the request to withdraw the instant proposal.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–378, adopted October 27, 2004, and released October 29, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *www.BCPIWEB.com*. This document is not subject to the Congressional Review Act. (The Commission is, therefore, not required to submit a copy of this Report and Order to GAO, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A) because the proposed rule was dismissed.)

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–25513 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 69, No. 221
Wednesday, November 17, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 10, 2004.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@ OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: School Nutrition Dietary Assessment Study–III.

OMB Control Number: 0584–NEW.

Summary of Collection: The School Nutrition Dietary Assessment Study–III (SNDA–III) will provide data from a nationally representative sample of public schools participating in the National School Lunch Program (NSLP) to federal, state, and local policymakers with information on how the school meal programs have changed. The study will determine students' dietary intake, nutrition content and the impact of USDA meals and total intake over a twenty-four hour period and compare the finding to previously conducted studies on schools meals.

Need and Use of the Information: The Food and Nutrition Service will collect data to examine the school environment, food service operating practices, student participation and other characteristics of schools and School Food Authorities in the NSLP and School Breakfast Program.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 8,737.

Frequency of Responses: Report: Other (One time).

Total Burden Hours: 8,309.

Agricultural Marketing Service

Title: Quality Through Verification (QTV) Program.

OMB Control Number: 0581–NEW.

Summary of Collection: The Agricultural Marketing Act of 1946 (7 U.S.C. 1622—*et seq.*) authorizes the USDA to develop standards to carry out voluntary inspection and grading services, on a fee for service basis. Quality Through Verification (QTV) is a voluntary audit and verification services using science-based techniques that help maintain public confidence in the wholesomeness of minimally processed fruits and vegetables. Minimally processed fruits and vegetables are products that have been freshly cut, washed, packaged and maintained with refrigeration. The QTV is directed only toward the fresh-cut produce industry.

Need and Use of the Information: Agriculture Marketing Service will collect the data for the administration of QTV Program and perform systems audits, verification and reviews of the QTV plans. All applicants requesting service must submit the required information to AMS.

Description of Respondents: Business or other for-profit; farms.

Number of Respondents: 20.

Frequency of Responses: Recordkeeping; reporting: On occasion.

Total Burden Hours: 6,372.

Sondra Blakey,

Departmental Information Collection Clearance Officer.

[FR Doc. 04–25456 Filed 11–16–04; 8:45 am]

BILLING CODE 3410–30–P; 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Farm Service Agency

The Fair and Equitable Tobacco Reform Act of 2004

AGENCY: Commodity Credit Corporation and Farm Service Agency, USDA.

ACTION: Notice of meeting.

SUMMARY: The Department of Agriculture (USDA) will conduct a public meeting to solicit comments regarding the implementation of the assessment provisions of the Fair and Equitable Tobacco Reform Act of 2004 (the Act). The meeting will be open to the public, with attendance limited to available space on a first-come basis. No fee will be required.

DATES: The meeting is scheduled for November 22, 2004, from 9 a.m. to 4 p.m. Requests to address the meeting and written comments on the subject of assessments must be submitted by November 18, 2004. To the extent possible, we will consider late-filed submissions.

ADDRESSES: The meeting will be held in USDA's Jefferson Auditorium, South Building, 1400 Independence Avenue, SW., Washington, DC 20250.

Requests to address the meeting and written comments may be submitted by any of the following methods:

- E-Mail: Send to *tob_comments@wdc.usda.gov.*
- Fax: Send to (202) 720–6426.
- Mail: Send to Director, Tobacco Division, Farm Service Agency, United States Department of Agriculture (USDA), STOP 0514, Room 4080–S,

1400 Independence Ave., SW., Washington, DC 20250–0514.

• Hand Delivery or Courier: Deliver to the above address.

FOR FURTHER INFORMATION CONTACT: Mary Tjeerdsma by phone at: (202) 690–2524; by fax at (202) 720–6426 or by e-mail at *mary.tjeerdsma@usda.gov*.

Persons with disabilities who require special accommodation to attend or participate in the meeting should contact Mary Tjeerdsma by November 18, 2004.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair and Equitable Tobacco Reform Act of 2004 (Pub. L. 108–357) (the Act) was enacted on October 22, 2004. The Act terminated the Federal Tobacco Marketing Quota and Price Support Loan Programs beginning with the 2005 crop year and provided that USDA will offer to enter into contracts with tobacco quota holders and producers for transitional payments.

In order to enter into a contract to receive these payments, a person must submit an application containing sufficient information to determine eligibility. For each of the 10 fiscal years beginning with 2005, a payment will be made to each eligible quota holder or producer. Total payments of up to $7.00 per pound to quota holders and up to $3.00 per pound to quota producers will be paid over the 10-year period, not to exceed $10,140,000,000.

In order to fund the contract payments to quota holders and producers, the Secretary is required to impose quarterly assessments on each manufacturer and importer of tobacco products sold in the United States. Assessments will be deposited in a revolving trust fund within the Commodity Credit Corporation, to be known as the Tobacco Trust Fund. Beginning with the calendar quarter ending on December 31 of each of the fiscal years 2005 through 2014, the assessment payments for each of the four calendar-quarter periods must be sufficient to cover contract payments to quota holders and producers and other expenditures from the Tobacco Trust Fund that correspond to that period.

The Act provided the percentages of the total amount to be paid in fiscal year 2005 by manufacturers and importers of each class of tobacco product as follows:

- Cigarette—96.331%.
- Cigar—2.783%.
- Snuff—0.539%.
- Roll-your-own—0.171%.
- Pipe—0.066%.

The percentages for subsequent fiscal years will be adjusted to reflect any change in the share of gross domestic sales volume held by each class of product.

The quarterly assessment to be paid by each manufacturer or importer of a class of tobacco product will be determined by the manufacturer's or importer's market share of that class of tobacco product for the quarter.

The full text of the Act is available at *http://www.fsa.usda.gov/buyout/*.

II. Registration

Registration may be by e-mail at *tob_comments@wdc.usda.gov* or you may contact the Public Meeting Coordinator, Mary Tjeerdsma, to register by phone at (202) 690–2524 or by fax at (202) 720–6426. The following information must be provided when registering to attend the meeting: Name, company name and address, telephone and fax numbers, e-mail addresses and special needs information. A staff member will confirm your registration by e-mail, fax, or phone. You may also register in person at the meeting.

III. Presentations and Comment Format

A. Primary Speaker Presentations

Persons who wish to be primary speakers must register to attend the meeting before the day of the meeting using the registration procedures described above. At the time of registration, primary speakers must provide a brief, written statement regarding the nature of the information they intend to provide. In addition, on the day of the meeting, primary speakers must provide a written summary of their comments to the Public Meeting Coordinator.

B. "5-Minute" Speaker Presentations

Other attendees will be permitted to sign up at the meeting, on a first-come, first-served basis, to make 5-minute presentations on individual agenda items. Based on the number of items on the agenda and the progress of the meeting, a determination will be made at the meeting by the Public Meeting Coordinator and the meeting moderator regarding how many 5-minute speakers can be accommodated. In order to offer the same opportunity to all attendees, there is no pre-registration for 5-minute speakers. Attendees may sign up only on the day of the meeting to make a 5-minute presentation. They must provide their name, company name and address, contact information as specified on the sign up sheet, and identify the specific agenda item that will be addressed.

C. Written Comments

We welcome written comments from anyone, whether or not they have had the opportunity to make an oral presentation. Written comments may be submitted at the meeting or, by December 10, 2004 by the following methods:

- E-Mail: Send comments to *tob_comments@wdc.usda.gov*.
- Mail: Send comments to Director, Tobacco Division, Farm Service Agency, United States Department of Agriculture (USDA), STOP 0514, Room 4080–S, 1400 Independence Avenue, SW., Washington, DC 20250–0514.

IV. General Information

The meeting will be held in a Federal government building. Therefore, Federal security measures will be in force. In planning your arrival, we recommend allowing extra time to clear security. Entry to the building will be at the 4th Wing entrance on Independence Avenue. In order to enter the building, participants must bring a government-issued photo identification. Entry may be denied to persons without proper identification.

In addition, all persons entering the building must pass through a metal detector. All items brought to the meeting, whether personal or for the purposes of demonstration or support of a presentation, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for demonstration or support of a presentation.

Signed at Washington, DC, November 11, 2004.

James R. Little,

Administrator, Farm Service Agency, and Executive Vice-President, Commodity Credit Corporation.

[FR Doc. 04–25526 Filed 11–12–04; 3:50 pm]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

California Coast Provincial Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The California Coast Provincial Advisory Committee (PAC) will meet on December 9, 2004, in Eureka, California. The purpose of the meeting is to discuss issues relating to implementing the Northwest Forest Plan (NWFP).

DATES: The meeting will be held from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Six Rivers National Forest Supervisor's Office, 1330 Bayshore Way, Eureka.

FOR FURTHER INFORMATION CONTACT: Phebe Brown, Committee Coordinator, USDA, Mendocino National Forest, 825 N. Humboldt Avenue, Willows, CA 95988, (503) 934–1137; E-MAIL *pybrown@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Regional Exosystem Office (REO) update; (2) Provincial Interagency Executive Committee (PIEC) feedback to the PAC regarding their. recommendations on watershed analyses and Healthy Forest Restoration Act projects; (3) Report on the Province 2004 Implementation Monitoring activity held in September; (4) Continue panel discussion concerning options for silvicultural treatments on federal lands; (5) Presentation on the NWFP 10-year monitoring program; (6) Presentation on Bureau of Land Management/ Department of Fish and Game research on impacts of fall, winter and spring prescribed burning on avian and terrestrial species; and (7) Public comment. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: November 9, 2004.

Phebe Y. Brown,

Committee Staff Coordinator.

[FR Doc. 04–25482 Filed 11–16–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Southwest Idaho Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393), the Boise and Payette National Forests' Southwest Idaho Resource Advisory Committee will conduct a business meeting, which is open to the public.

DATES: Wednesday, December 1, 2004, beginning at 10:30 a.m.

ADDRESSES: Idaho Counties Risk Management Program Building, 3100 South Vista Avenue, Boise, Idaho.

SUPPLEMENTARY INFORMATION: Agenda topics will include review and approval of project proposals, and is an open public forum.

FOR FURTHER INFORMATION CONTACT: Doug Gochnour, Designated Federal Officer, at 208–392–6681 or e-mail *dgouchnour@fs.fed.us.*

Dated: November 12, 2004.

Bruce A. Waite,

Acting Forest Supervisor, Boise National Forest.

[FR Doc. 04–25592 Filed 11–16–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Household Water Well System Program; Notice of Finding of No Significant Impact

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of finding of no significant impact.

SUMMARY: Notice is hereby given that the Rural Utilities Service (RUS) has made a finding of no significant impact (FONSI) for a new grant program that will implement the Household Water Well System Program (HWWSP) lending program.

FOR FURTHER INFORMATION CONTACT: Mark S. Plank, Senior Environmental Scientist, RUS, Water and Environmental Programs, Engineering and Environmental Staff, 1400 Independence Avenue, SW., Stop 1571, Washington, DC 20250–1571, telephone: (202) 720–1649 or email: *mark.plank@usda.gov.*

SUPPLEMENTARY INFORMATION: On May 13, 2002, the Farm Security and Rural Investment Act of 2002 (Farm Bill) was signed into law as Public Law 107–171. Section 6012 of the Farm Bill amended Section 306E of the Consolidated Farm and Rural Development Act (CONACT) by adding a grant program to establish a lending program. The program will provide grants to private nonprofit organizations for the purpose of providing loans to eligible individuals for the construction, refurbishing, and servicing of individual household water well systems in rural areas that are or will be owned by the eligible individuals. The program is called the Household Water Well System Program (HWWSP). This program was authorized to appropriate up to $10,000,000 for Fiscal Years (FY) 2003 through 2007. There was no funding appropriated in FY 2003. However, the Consolidated Appropriations Act, 2004 (Pub. L. 108–199), includes $1,000,000 for the program.

The USDA, Rural Utilities Service issued proposed regulations to implement the HWWSP (69 FR 59836, October 6, 2004). The final rule outlines the procedures for providing grants to eligible applicants to establish a revolving loan fund and to pay reasonable administrative expenses. The revolving loan fund will be used to make loans to eligible applicants for the construction, refurbishing, and servicing of individual household water well systems in rural areas that are or will be owned by the eligible individuals. The CONACT defines an "eligible individual" as a person who is a member of a household in which all members have a combined income that is 100 percent or less of the median non-metropolitan household income for the State or territory in which the person resides. The combined household income must be for the most recent 12-month period for which the information is available, according to the most recent decennial census of the United States. The maximum statutory limit per loan per household water well system is $8,000.

Due to similar project activities and a limited area of potential effect of most HWWSP loan approval actions, RUS prepared and published, on September 30, 2004 (69 FR 58389), a Programmatic Environmental Assessment (PEA) to evaluate two Federal actions related to the HWWSP:

(1) Grants awarded by RUS to eligible grant recipients; and (2) Loans made by the grant recipient to eligible loan recipients using the direct or indirect proceeds of a HWWSP grant awarded under this program.

The PEA was available for a 30-day review and comment period; only one comment was received. The comment related to loan recipients and potential construction (as defined in the HWWSP) in special flood hazard areas identified as Zone A or V by the Federal Emergency Management Agency Flood Insurance Rate Maps. The commenter was concerned whether loan proceeds could be used in conjunction with the construction of new homes and, if so, that the construction should be evaluated in accordance with Executive Order 11988, Floodplain Management and other applicable requirements. The HWWSP's authorizing legislative is clear that eligible individuals are limited by definition to the following: 7 CFR 1776.3, "Construction means building or assembling a water well system or portion thereof that is *not a water well system or portion thereof being constructed in connection with a*

new building (emphasis added)." In addition, 7 CFR 1776.14(d), states that "The water well system being funded from the proceeds of the HWWS loan may not be associated with the construction of a new dwelling." RUS feels that language in the HWWSP is adequate to preclude the construction of new houses in special flood hazard areas.

RUS has determined that the PEA was prepared and reviewed in accordance with the National Environmental Policy Act, as amended (42 U.S.C. 6941 *et seq.*); the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR part 1500); and 7 CFR 1794, RUS' Environmental Policies and Procedures and that the HWWSP will not have a significant impact on the human environment and for which an Environmental Impact Statement will not be prepared.

The mitigation measures identified in the PEA will be incorporated in executed grant agreements. The mitigation measures are as follows:

1. Floodplains

The grant recipient will complete FEMA Form 81–93, Standard Flood Hazard Determination Form for all loans. If a household is located in a special flood hazard area (Code A and V), the revolving loan fund recipient must have flood insurance and the grantee shall obtain flood insurance certifications as part of the revolving loan fund closing process.

2. Water Quality Issues

HWWSP funded projects will be built by contractors that are appropriately licensed to do the work in the State where the project is located. Water withdrawal permits will be obtained as required by the appropriate State or local regulatory agency.

3. Coastal Resources

The grant recipient will obtain written approval from the U.S. Fish and Wildlife Service before approving any proposed loans located in Coastal Barrier Resources System units.

Gary J. Morgan,

Assistant Administrator, Water and Environmental Programs, Rural Utilities Service.

[FR Doc. 04–25447 Filed 11–16–04; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 041103305–4305–01]

National Defense Stockpile Market Impact Committee Request for Public Comments on the Potential Market Impact of Proposed Stockpile Disposals In FY 2005 and FY 2006

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Notice of inquiry.

SUMMARY: The purpose of this notice is to advise the public that the National Defense Stockpile Market Impact Committee (co-chaired by the Departments of Commerce and State) is seeking public comments on the potential market impact of proposed changes in the disposal levels of excess materials under the Fiscal Year 2005 Annual Materials Plan and proposed disposal levels under the Fiscal Year 2006 Annual Materials Plan. Comments received in response to this notice will be taken into consideration by the National Defense Stockpile Market Impact Committee when it meets to discuss recommendations to the National Defense Stockpile Manager regarding the disposition of materials in the National Defense Stockpile.

DATES: Comments must be received by December 17, 2004.

ADDRESSES: Written comments should be sent to William J. Denk, Co-chair, Stockpile Market Impact Committee, Office of Strategic Industries and Economic Security, Room 3876, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; fax: (202) 482–5650; e-mail: *wdenk@bis.doc.gov*.

FOR FURTHER INFORMATION CONTACT: Contact either Eddy Aparicio, Office of Strategic Industries and Economic Security, Bureau of Industry and Security, U.S. Department of Commerce, telephone: (202) 482–8234; e-mail: *eaparici@bis.doc.gov*; or E. James Steele, Co-chair, Stockpile Market Impact Committee, Office of Bilateral Trade Affairs, Bureau of Economic and Business Affairs, U.S. Department of State, fax: (202) 647–8758; e-mail: *steeleej2@state.gov*.

SUPPLEMENTARY INFORMATION: Under the authority of the Strategic and Critical Materials Stock Piling Act of 1979, as amended, (50 U.S.C. 98 *et seq.*), the Department of Defense ("DOD"), as National Defense Stockpile Manager, maintains a stockpile of strategic and critical materials to supply the military, industrial, and essential civilian needs of the United States for national defense. Section 3314 of the Fiscal Year ("FY") 1993 National Defense Authorization Act ("NDAA") (50 U.S.C. 98h–1) formally established a Market Impact Committee ("the Committee") to "advise the National Defense Stockpile Manager on the projected domestic and foreign economic effects of all acquisitions and disposals of materials from the stockpile * * *." The Committee must also balance market impact concerns with the statutory requirement to protect the Government against avoidable loss.

The Committee is comprised of representatives from the Departments of Commerce, State, Agriculture, Defense, Energy, Interior, Treasury, and Homeland Security, and is co-chaired by the Departments of Commerce and State. The FY 1993 NDAA directs the Committee to "consult from time to time with representatives of producers, processors and consumers of the types of materials stored in the stockpile."

In Attachment 1, the Defense National Stockpile Center (DNSC) lists the current quantities in the stockpile inventory, the previously approved FY 2005 AMP quantities for five materials, and the proposed revisions to the FY 2005 AMP for five materials. In Attachment 2, the proposed quantities for the FY 2006 AMP are enumerated. The Committee is seeking public comments on the potential market impact of the sale of these materials.

The quantities listed in Attachments 1 and 2 are not disposal or sale target quantities. They are only a statement of the proposed maximum disposal quantity of each listed material that may be sold in a particular fiscal year by the DNSC. The quantity of each material that will actually be offered for sale will depend on the market for the material at the time of the offering as well as on the quantity of each material approved for disposal by Congress.

The Committee requests that interested parties provide written comments, supporting data and documentation, and any other relevant information on the potential market impact of the sale of these commodities. Although comments in response to this Notice must be received by December 17, 2004 to ensure full consideration by the Committee, interested parties are encouraged to submit comments and supporting information at any time thereafter to keep the Committee informed as to the market impact of the sale of these commodities. Public comments are an important element of the Committee's market impact review process.

Public comments received will be made available at the Department of Commerce for public inspection and copying. Anyone submitting business confidential information should clearly identify the business confidential portion of the submission and also provide a non-confidential submission that can be placed in the public record. The Committee will seek to protect such information to the extent permitted by law.

The records related to this Notice will be made accessible in accordance with the regulations published in part 4 of title 15 of the Code of Federal Regulations (15 CFR 4.1, *et seq.*). Specifically, the Bureau of Industry and Security's Freedom of Information Act (FOIA) reading room is located on its Web site found at *http://www.bis.doc.gov/foia/default.htm.* Copies of the public comments received will be maintained on the Web site. If requesters cannot access the Web site, they may call (202) 482–2165 for assistance.

Dated: November 12, 2004.

Peter Lichtenbaum,

Assistant Secretary for Export Administration.

Attachment 1

PROPOSED REVISIONS TO FY 2005 ANNUAL MATERIALS PLAN

Material	Unit	Current FY 2005 (quantity)	Previously approved FY 2005 (quantity)	Proposed revised FY 2005 (quantity)
Aluminum Oxide, Abrasive	ST	6,000		
Bauxite, Metallurgical Jamaican	LDT	0	[3] 2,000,000	
Bauxite, Metallurgical Surinam	LDT	0		[3] 400,000
Bauxite, Refractory	LCT	[1] 43,000		
Beryl Ore	ST	[1] 4,000		
Beryllium Metal	ST	40		
Beryllium Copper Master Alloy	ST	[1] 1,200		
Cadmium	LB	[1] 0		
Celestite	SDT	6,000		
Chromite, Chemical	SDT	[2] 100,000		
Chromite, Refractory	SDT	[2] 100,000		
Chromium, Ferro	ST	110,000		
Chromium, Metal	ST	500		
Cobalt	LB Co	6,000,000		
Columbium Concentrates	LB Cb	[2] 560,000		
Columbium Metal Ingots	LB Cb	[2] 20,000		
Diamond Stone	ct	[2] 400,000		[1 2] 520,000
Fluorspar, Acid Grade	SDT	12,000		
Fluorspar, Metallurgical Grade	SDT	60,000		
Germanium	Kg	[2] 8,000		
Graphite	ST	0		[1] 60
Iodine	LB	1,000,000		
Jewel Bearings	PC	[1] 82,051,558		
Kyanite	SDT	0		
Lead	ST	[1] 60,000		
Manganese, Battery Grade, Natural	SDT	30,000		
Manganese, Battery Grade, Synthetic	SDT	[1] 3,011		
Manganese, Chemical Grade	SDT	[1] 40,000		
Manganese, Ferro	ST	50,000	[2] 100,000	
Manganese, Metal, Electrolytic	ST	[1] 2,000		
Manganese, Metallurgical Grade	SDT	250,000	[3] 500,000	
Mica, All	LB	[1] 1,000,000		
Palladium	Tr Oz	[2] 100,000		
Platinum	Tr Oz	[2] 25,000		
Platinum—Iridium	Tr Oz	6,000		
Quartz Crystals	Lb	[1] 25,000		
Quinidine	OZ	0		[4] 21,000
Sebacic Acid	LB	[1] 600,000		
Talc	ST	[1] 1,000		
Tantalum Carbide Powder	LB Ta	[2] 4,000		
Tantalum Metal Ingots	LB Ta	[1] 40,000		
Tantalum Metal Powder	LB Ta	[2] 40,000		
Tantalum Minerals	LB Ta	[2] 500,000		
Tantalum Oxide	LB Ta	[2] 20,000		
Thorium	LB	7,100,000		
Tin	MT	12,000		
Titanium Sponge	ST	[1] 7,000		
Tungsten Ferro	LB W	[2] 300,000		
Tungsten Metal Powder	LB W	[2] 300,000		
Tungsten Ores & Concentrates	LB W	[2] 4,000,000	[2] 5,000,000	
VTE, Chestnut	LT	[1] 250		[1] 500
VTE, Quebracho	LT	20,000	6,000	
VTE, Wattle	LT	[1] 6,500		
Zinc	ST	50,000		

[1] Actual quantity will be limited to remaining inventory.

[2] Actual quantity will be limited to remaining sales authority. Additional sales authority is pending with Congress.
[3] Represents inventory sold by DNSC, but not yet shipped.
[4] Proposed for disposal by DNSC.

Attachment 2

PROPOSED FY 2006 ANNUAL MATERIALS PLAN

Material	Unit	FY2006 (quantity)
Aluminum Oxide, Abrasive	ST	[1] 6,000
Bauxite, Metallurgical Jamaican	LDT	[3] 2,000,000
Bauxite, Metallurgical Surinam	LDT	[3] 400,000
Bauxite, Refractory	LCT	[3] 43,000
Beryl Ore	ST	[3] 4,000
Beryllium Metal Vacuum Cast	ST	[3] 40
Beryllium Copper Master Alloy	ST	[3] 1,200
Celestite	SDT	6,000
Chromite, Chemical	SDT	[3] 100,000
Chromite, Refractory	SDT	[3] 100,000
Chromium, Ferro	ST	110,000
Chromium, Metal	ST	500
Cobalt	LB Co	[1] 6,000,000
Columbium Concentrates	LB Cb	[2] 560,000
Columbium Metal Ingots	LB Cb	[2] 20,000
Diamond Stone	ct [1 2]	520,000
Fluorspar, Acid Grade	SDT	[1] 12,000
Fluorspar, Metallurgical Grade	SDT	[1] 60,000
Germanium	Kg	8,000
Graphite	ST	[1] 60
Iodine	LB	1,000,000
Jewel Bearings	PC	[1] 82,051,558
Lead	ST	[1] 60,000
Manganese, Battery Grade, Natural	SDT	[1] 30,000
Manganese, Battery Grade, Synthetic	SDT	[1] 3,011
Manganese, Chemical Grade	SDT	[1] 40,000
Manganese, Ferro	ST	[2] 100,000
Manganese, Metal, Electrolytic	ST	[3] 2,000
Manganese, Metallurgical Grade	SDT	500,000
Mica, All	LB	[1] 1,000,000
Palladium	Tr Oz	[1] 100,000
Platinum	Tr Oz	[1] 25,000
Platinum—Iridium	Tr Oz	6,000
Quartz crystals	Lb	[3] 25,000
Quinidine	OZ	[4] 21,000
Talc	ST	[1] 1,000
Tantalum Carbide Powder	LB Ta	[2] 4,000
Tantalum Metal Ingots	LB Ta	[1] 40,000
Tantalum Metal Powder	LB Ta	[1] 40,000
Tantalum Minerals	LB Ta	[2] 500,000
Tantalum Oxide	LB Ta	[2] 20,000
Thorium	LB	7,100,000
Tin	MT	12,000
Titanium Sponge	ST	7,000
Tungsten Ferro	LB W	[2] 300,000
Tungsten Metal Powder	LB W	[2] 300,000
Tungsten Ores & Concentrates	LB W	[2] 5,000,000
VTE, Chestnut	LT	[1] 500
VTE, Quebracho	LT	6,000
VTE, Wattle	LT	[1] 6,500
Zinc	ST	50,000

[1] Actual quantity will be limited to remaining inventory.
[2] Actual quantity will be limited to remaining sales authority. Additional sales authority is pending with Congress.
[3] Represents inventory sold, but not yet shipped.
[4] Proposed for disposal by DNSC.

[FR Doc. 04–25492 Filed 11–16–04; 8:45 am]
BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–892]

Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final determination of sales at less than fair value.

EFFECTIVE DATE: November 17, 2004.

SUMMARY: We determine that carbazole violet pigment 23 (CVP–23) from the People's Republic of China (PRC) is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are shown in the *Final Determination of Investigation* section of this notice.

FOR FURTHER INFORMATION CONTACT: Tisha Loeper–Viti or Marin Weaver at (202) (202) 482–7425 or (202) 482–2336, respectively; AD/CVD Operations, Office 8, China/NME Unit, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Case History

The preliminary determination in this investigation was published on June 24, 2004. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Carbazole Violet Pigment 23 from the People's Republic of China*, 69 FR 35287 (June 24, 2004) (*Preliminary Determination*). Since the preliminary determination, the following events have occurred.

We conducted verification of the questionnaire responses of GoldLink Industries Co., Ltd. (GoldLink), Nantong Haidi Chemical Co., Ltd. (Haidi), Trust Chem Co., Ltd. (Trust Chem) and Tianjin Hanchem Int'l Trading Co., Ltd. (Hanchem)[1] from August 2 through August 24, 2004. The petitioners[2] filed surrogate value information and data on August 10, 2004, and the respondents collectively filed surrogate value information and data on August 17, 2004.

On October 8, 2004, the respondents, the petitioners, Clariant Corporation (Clariant) and Colors LLC (Colors), domestic interested parties, filed case briefs. The respondents, the petitioners, and Clariant filed rebuttal briefs on October 13, 2004. Colors requested a public hearing on July 26, 2004. It retracted its request for a public hearing on October 13, 2004.

Scope of Investigation

The merchandise covered by this investigation is carbazole violet pigment 23 identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of *diindolo [3,2–b:3',2'-m]triphenodioxazine, 8,18–dichloro–5, 15–diethy–5,15–dihydro-*, and molecular formula of $C_{34}H_{22}C_{12}N_4O_2$.[3] The subject merchandise includes the crude pigment in any form (*e.g.*, dry powder, paste, wet cake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.*, pigments dispersed in oleoresins, flammable solvents, water) are not included within the scope of the investigation.

The merchandise subject to this investigation is classifiable under subheading 3204.17.9040 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Period of Investigation

The POI is April 1, 2003, through September 30, 2003. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, November 2003). *See* 19 CFR 351.204(b)(1).

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this proceeding and to which we have responded are listed in the *Appendix* to this notice and addressed in the Issues and Decision Memorandum, which is hereby adopted by this notice. Parties can find a complete discussion of the issues raised in this investigation and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit (CRU), room B–099 of the main Department building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at http://ia.ita.doc.gov. The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Non–Market Economy

The Department has treated the PRC as a non–market economy (NME) country in all its previous antidumping investigations. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Non–Malleable Cast Iron Pipe Fittings from the People's Republic of China*, 68 FR 7765 (February 18, 2003); and *Notice of Final Determination of Sales at Less Than Fair Value: Barium Carbonate From the People's Republic of China*, 68 FR 46577 (August 6, 2003). In accordance with section 771(18)(C) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked. No party in this investigation has sought revocation of the NME status of the PRC. Therefore, pursuant to section 771(18)(C) of the Act, the Department will continue to treat the PRC as an NME country.

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs the Department to base normal value (NV) on the NME producer's factors of production, valued in a market economy at a comparable level of development that is a significant producer of comparable merchandise. The sources of individual factor prices are discussed under the *Normal Value* section, below. For further details, see the *Preliminary Determination*.

Separate Rates

In our *Preliminary Determination*, we found that GoldLink, Haidi, and Trust Chem met the criteria for the application of a separate, company–specific antidumping duty rate. We have not received any other information since the preliminary determination which would warrant reconsideration of our separates rates determination with respect to these companies. For a complete discussion of the Department's determination that the respondents are

[1] Hanchem was established subsequent to the period of investigation (POI) out of the U.S. sales department of a company named Tianjin Heng An Trading Co., Ltd. (Heng An). During the POI, sales of subject merchandise to the United States were made by Heng An. We have determined that it is appropriate to treat Heng An and Hanchem as a single entity for the purposes of the margin calculations for this antidumping duty investigation and for the application of the antidumping law.

[2] The petitioners are Sun Chemical Corporation and Nation Ford Chemical Company.

[3] Please note that the bracketed section of the product description, *[3,2-b:3',2'-m]*, is not business proprietary information. In this case, the brackets are simply part of the chemical nomenclature. *See* December 4, 2003, amendment to petition at 8.

entitled to a separate rate, see the *Preliminary Determination.*

The PRC–Wide Rate

In the *Preliminary Determination*, we found that the use of the PRC–wide rate was appropriate for other exporters in the PRC based on our presumption that those exporters who did not submit a response to the Department's questionnaire, and hence failed to demonstrate entitlement to a separate rate, constitute a single enterprise under common control by the Chinese government. We applied adverse facts available to determine the single antidumping duty rate, the PRC–wide rate, applicable to the PRC exporters that comprise this single enterprise. *See, e.g., Final Determination of Sales at Less Than Fair Value: Synthetic Indigo from the People's Republic of China*, 65 FR 25706, 25707 (May 3, 2000). In addition, while information provided by Hanchem and verified by the Department supports Hanchem's claim that it is not part of the PRC entity, we applied as adverse facts available to Hanchem the same rate as that applied to the PRC entity due to Hanchem's verification failure. To calculate the PRC–wide rate, we relied on information in the petition, as amended, which we were able to corroborate.

Since the preliminary determination, we have obtained new information regarding several surrogate values and the respondents' consumption factors. Based on this new information, we find we are no longer able to corroborate the petition margin. See Memorandum to Laurie Parkhill, Antidumping Duty Investigation of Carbazole Violet Pigment 23 from the People's Republic of China (PRC) Recalculated PRC–Wide Rate (November 8, 2004). Instead, we have recalculated the PRC–wide rate using information otherwise available. The PRC–wide rate is, for the final determination, 217.94 percent.

Surrogate Country

For purposes of the final determination, we continue to find that India remains the appropriate primary surrogate country for the PRC. For further discussion and analysis regarding the surrogate country selection for the PRC, see the *Preliminary Determination.*

Verification

As provided in section 782(i) of the Act, we verified the information submitted by the respondents for use in our final determination. We used standard verification procedures including examination of relevant accounting and production records, and original source documents provided by the respondents. For changes from the *Preliminary Determination* as a result of verification, see the *Changes Since the Preliminary Determination* section, below. *See also* Memorandum from Marin Weaver and Christopher Welty, International Trade Compliance Analysts to the File: Antidumping Investigation of Carbazole Violet Pigment 23 from the PRC - Verification of Nantong Haidi Chemical Co., Ltd., dated September 30, 2004; Memorandum from Marin Weaver and Christopher Welty, International Trade Compliance Analysts to the File: Antidumping Investigation of Carbazole Violet Pigment 23 from the People's Republic of China - GoldLink Industries, Inc., dated September 29, 2004; Memorandum from Marin Weaver and Christopher Welty, International Trade Compliance Analysts to the File: Antidumping Investigation of Carbazole Violet Pigment 23 from the People's Republic of China - Verification of Tianjin Hanchem International Trading Co., Ltd., dated September 28, 2004; Memorandum from Marin Weaver and Christopher Welty, International Trade Compliance Analysts to the File: Antidumping Investigation of Carbazole Violet Pigment 23 from the PRC - Verification of Nantong Longteng Chemical Co., Ltd., dated September 29, 2004; Memorandum from Marin Weaver and Christopher Welty, International Trade Compliance Analysts to the File: Antidumping Investigation of Carbazole Violet Pigment 23 from the PRC - Verification of Jiangsu Multicolor Fine Chemical Co., Ltd., dated October 1, 2004; Memorandum from Marin Weaver and Christopher Welty, International Trade Compliance Analysts to the File: Antidumping Investigation of Carbazole Violet Pigment 23 from the People's Republic of China - Verification of Trust Chem Co., Ltd., dated September 28, 2004; Memorandum from Marin Weaver and Christopher Welty, International Trade Compliance Analysts to the File: Antidumping Investigation of Carbazole Violet Pigment 23 from the PRC - Calculation of Jiangsu Multicolor Fine Chemical Co., Ltd.'s Utility and Labor Factors of Production, dated September 30, 2004.

Changes Since the Preliminary Determination

Based on our findings at verification and on our analysis of the comments received, we have made certain adjustments to the calculation methodologies used in the preliminary determination. These adjustments are discussed in detail in the Issues and Decision Memorandum and in the Memorandum to Laurie Parkhill, Director, China/NME Group, Office 8, from Tisha Loeper–Viti, International Trade Compliance Analyst, Re: Factors of Production Valuation for Final Determination, dated November 8, 2004 (Factors of Production Memorandum).

Critical Circumstances

On June 18, 2004, at the Preliminary Determination, we made a preliminary finding of critical circumstances with respect to Haidi, and Hanchem on the basis of massive imports of the subject merchandise over a relatively short period. We received comments from interested parties on this issue, and they are discussed in detail in the accompanying Issues and Decision Memorandum at Comment 2. Based on our final determination of sales at less than fair value, pursuant to section 735(a)(3)(A)(i) and (B), we determine that critical circumstances exist with respect to Haidi and Hanchem. *See* Memo from Jeffrey A. May, Deputy Assistant Secretary for Import Administration to James J. Jochum, Assistant Secretary for Import Administration, Antidumping Duty Investigation of Carbazole Violet Pigment 23 from the People's Republic of China Final Determination on Critical Circumstances.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B)(ii) of the Act, we are directing U.S. Customs and Border Protection (CBP) to continue the suspension of liquidation of entries of subject merchandise from the PRC, that are entered, or withdrawn from warehouse, for consumption on or after June 24, 2004, (the date of publication of the *Preliminary Determination* in the **Federal Register**). For Haidi and Hanchem, we will instruct CBP to suspend liquidation of unliquidated entries that are entered, or withdrawn from warehouse, for consumption on or after the date that is 90 days prior to the date publication of the preliminary determination. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted–average amount by which NV exceeds the U.S. price, as indicated in the chart below. These suspension of liquidation instructions will remain in effect until further notice.

Final Determination of Investigation

We determine that the following weighted–average percentage margins exist for the period April 1, 2003, through September 30, 2003:

Manufacturer/exporter	Weighted–Average Margin
GoldLink Industries Co.,Ltd.	5.51%
Nantong Haidi Chemical Co., Ltd.	44.50%
Trust Chem Co., Ltd.	27.19%
Tianjin Hanchem International Trading Co.	217.94%
PRC–Wide Rate.	217.94%

The PRC–wide rate applies to all entries of the merchandise under investigation except for entries from the four exporters listed above.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our determination. As our final determination is affirmative, the ITC will determine, within 45 days, whether these imports are materially injuring, or threaten material injury to, the U.S. industry. If the ITC determines that material injury, or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or cancelled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP officials to assess antidumping duties on all imports of subject merchandise entered for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding Administrative Protective Order (APO)

This notice also serves as a reminder to parties subject to APO of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: November 8, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix Decision Memorandum

I. ISSUES RELATED TO MULTIPLE RESPONDENTS

Comment 1: Financial Ratios
Comment 2: Critical Circumstances
Comment 3: Surrogate Value Sources
Comment 4: HTS Classification
Comment 5: Chemical Concentration Levels
Comment 6: Ethyl Alcohol
Comment 7: Hydrochloric Acid and Nitric Acid
Comment 8: Calcium Chloride
Comment 9: Ethyl Bromide
Comment 10: Ethanolamine Solvent
Comment 11: Steam
Comment 12: Electricity
Comment 13: Import Brokerage and Terminal Charges

II. ISSUES SPECIFIC TO INDIVIDUAL RESPONDENTS

Comment 14: Multicolor Tolling
Comment 15: Application of Adverse Facts Available to Multicolor
Comment 16: Application of Adverse Facts Available to Haidi
Comment 17: Haidi Factors of production
Comment 18: Application of Adverse Facts Available to Trust Chem
Comment 19: Application of Adverse Facts Available to Hanchem
Comment 20: Application of Adverse Facts Available to Longteng
Comment 21: General Issues Raised by Colors LLC

[FR Doc. E4–3197 Filed 11–16–04; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–838]

Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 From India

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

DATES: Effective November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Lyn Johnson or Richard Rimlinger, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5287 or (202) 482–4477, respectively.

SUPPLEMENTARY INFORMATION:

Final Determination

The Department of Commerce (the Department) has conducted this antidumping investigation in accordance with section 735 of the Tariff Act of 1930, as amended (the Act). We have determined that carbazole violet pigment 23 (CVP–23) from India is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 735 of the Act. The estimated margins for sales at LTFV are shown in the "Final Determination Margins" section of this notice.

Background

The preliminary determination of sales at LTFV in this investigation was issued on June 24, 2004. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Carbazole Violet Pigment 23 From India*, 69 FR 35293 (June 24, 2004) (*Preliminary Determination*).

Since the *Preliminary Determination* the following events have occurred. From August 23 through August 27, 2004, we conducted verification of Pidilite Industries Ltd. (Pidilite), and from August 30 through September 2, 2004, we conducted verification of Alpanil Industries (Alpanil). On October 1, 2004, we received a joint case brief from Alpanil and Pidilite and a case brief from the Clariant Corporation (Clariant), a domestic interested party. On October 6, 2004, we received a joint rebuttal brief from Alpanil and Pidilite, a rebuttal brief from Clariant, and a rebuttal brief from the petitioners (Sun Chemical Corporation and Nation Ford Chemical Company).

Period of Investigation

The period of investigation (POI) is October 1, 2002, through September 30, 2003, which corresponds to the four most recent fiscal quarters prior to the month of filing of the petition.

Scope of Investigation

The merchandise covered by this investigation is CVP–23 identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of *diindolo [3,2-b:3',2'-m]triphenodioxazine, 8,18-dichloro-5, 15-diethy-5, 15-dihydro-*, and molecular formula of $C_{34}H_{22}Cl_2N_4O_2$.[1] The subject merchandise includes the crude pigment in any form (*e.g.*, dry powder, paste, wet cake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.* pigments dispersed in oleoresins, flammable solvents, water) are not included within the scope of the investigation.

The merchandise subject to this investigation is classifiable under subheading 3204.17.9040 of the Harmonized Tariff Schedule of the

[1] The bracketed section of the product description, *[3,2-b:3',2'-m]*, is not business proprietary information. In this case, the brackets are simply part of the chemical nomenclature. *See* December 4, 2003, amendment to petition at 8.

United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this antidumping investigation are addressed in the November 8, 2004, "Issues and Decision Memorandum" from Jeffrey May, Deputy Assistant Secretary, Import Administration, to James J. Jochum, Assistant Secretary for Import Administration (*Decision Memorandum*). Parties can find a complete discussion of all issues raised in this investigation and the corresponding recommendations in this public memorandum which is on file in Import Administration's Central Records Unit at Room B099, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the Web at *http://ia.ita.doc.gov/frn/index.html*. The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Verification

In accordance with section 782(i) of the Act, we verified the information submitted by the respondents for use in our final determination. We used standard verification procedures which included the examination of original source documents provided by respondents. *See* the September 20, 2004, memorandum from Susan Lehman entitled "Sales Verification Report: Antidumping Duty Investigation of Carbazole Violet Pigment 23 From India, Pidilite Industries Ltd." (Pidilite Verification Report) and the September 23, 2004, memorandum from Yang Jin Chun entitled "Antidumping Duty Investigation of Carbazole Violet Pigment 23 From India: Sales Verification Report for Alpanil Industries." (Alpanil Verification Report).

Changes Since the Preliminary Determination

We have made the following changes to our margin calculations since the preliminary determination:

Alpanil

(1) Based on findings during verification, the Department requested that Alpanil submit updated home-market and U.S. sales listings. *See* the September 10, 2004, memorandum from Yang Jin Chun to the File. It did so on September 21, 2004. Except for the requested changes involving level of trade, we implemented all other corrections and findings which resulted from verification by using Alpanil's updated home-market and U.S. sales listings. *See* the Alpanil Verification Report for a list and description of these changes. *See also* the November 8, 2004, memorandum from Yang Jin Chun entitled "Antidumping Duty Investigation of Carbazole Violet Pigment 23 From India: Final Determination Analysis Memorandum for Alpanil Industries."

(2) Regarding levels of trade, we no longer find that there are two levels of trade in the home-market. Instead we determine that all home-market sales were made at a single level of trade which is equivalent to the U.S. level of trade. *See* Comment 2 of the *Decision Memorandum* for a discussion of this issue.

Pidilite

Based on findings during verification, the Department requested that Pidilite submit updated home-market and U.S. sales listings. *See* the September 10, 2004, memorandum from Susan Lehman to the File. It did so on September 29, 2004. We incorporated all of the corrections and findings which resulted from verification by using Pidilite's updated home-market and U.S. sales listings. *See* the Pidilite Verification Report for a list and description of these changes. *See also* the November 8, 2004, memorandum from Susan Lehman entitled "Antidumping Duty Investigation of Carbazole Violet Pigment 23 From India: Final Determination Analysis Memorandum for Pidilite Industries Ltd."

Continuation of Suspension of Liquidation

Pursuant to 735(c)(1)(B) of the Act, we will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of subject merchandise from India, entered, or withdrawn from warehouse, for consumption on or after June 24, 2004, the date of publication of our preliminary determination. CBP shall require a cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown below, adjusted for export subsidies found in the final determination of the companion countervailing duty investigation of this merchandise. Specifically, consistent with our practice, where the product under investigation is also subject to a concurrent countervailing duty investigation, we instruct CBP to require a cash deposit or posting of a bond equal to the amount by which the normal value exceeds the EP, as indicated below, less the amount of the countervailing duty determined to constitute an export subsidy. Accordingly, for cash deposit purposes, we are subtracting from the applicable cash deposit rate that portion of the rate attributable to the export subsidies found in the affirmative countervailing duty determination for each respondent (*i.e.*, 17.57 percent for Alpanil, 17.02 percent for Pidilite). After the adjustment for the cash deposit rates attributed to export subsidies, the resulting cash deposit rates will be 9.66 percent for Alpanil, 52.21 percent for Pidilite. We also calculated a weighted-average all-others cash deposit rate of 28.66 percent after adjusting Alpanil's and Pidilite's cash deposit rates for export subsidies. See the All-Others Rate memorandum to the file from Lyn Johnson dated November 8, 2004. These instructions suspending liquidation will remain in effect until further notice.

Final Determination Margins

The weighted-average margins are as follows:

Producer/exporter	Weighted-average margin percentage
Alpanil Industries	27.23
Pidilite Industries Ltd	69.23
All Others	45.98

Disclosure

In accordance with 19 CFR 351.224(b), the Department will disclose to interested parties within five days of the date of publication of this notice the calculations performed in the final determination.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our determination of sales at LTFV. As our final determination is affirmative, and in accordance with section 735(b) of the Act, the ITC will determine within 45 days whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports, or sales (or the likelihood of sales) for importation, of the subject merchandise. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or

canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding APO

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

November 8, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Issues Appendix

Comment 1—Duty Revenue
Comment 2—Level of Trade
Comment 3—Reporting Errors

[FR Doc. E4–3198 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–337–804, A–570–851, A–533–813, A–560–802]

Continuation of Antidumping Duty Orders on Certain Preserved Mushrooms From Chile, the People's Republic of China, India, and Indonesia

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of continuation of antidumping duty orders on certain preserved mushrooms from Chile, the People's Republic of China, India, and Indonesia.

SUMMARY: The Department of Commerce ("the Department") has determined that revocation of the antidumping duty orders on certain preserved mushrooms ("mushrooms") from Chile, the People's Republic of China ("China"), India, and Indonesia, would likely lead to continuation or recurrence of dumping. On November 1, 2004, the International Trade Commission ("ITC"), pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act"), determined that revocation of the antidumping duty orders on certain preserved mushrooms from Chile, China, India, and Indonesia would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Therefore, pursuant to 19 CFR 351.218(f)(4), the Department is publishing notice of the continuation of the antidumping duty orders on mushrooms from Chile, China, India, and Indonesia.

DATES: Effective November 17, 2004.

Contact Information: Martha V. Douthit, Office of Policy, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW., Washington, DC 20230; telephone: (202) 482–5050.

SUPPLEMENTARY INFORMATION:

Background

On November 3, 2003, the Department initiated, and the ITC instituted, sunset reviews of the antidumping duty orders on mushrooms from Chile, China, India, and Indonesia, pursuant to section 751(c) of the Act.[1] As a result of its review, the Department found that revocation of the antidumping duty orders would likely lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margins likely to prevail were the order revoked.[2] On November 1, 2004, the ITC determined pursuant to section 751(c) of the Act, that revocation of the antidumping duty orders on mushrooms would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[3]

Scope of Orders

The products subject to these orders are imported certain preserved mushrooms whether imported whole, sliced, diced, or as stems and pieces. The preserved mushrooms covered under the orders are the species *Agaricus bisporus* and *Agaricus bitorquis*. "Preserved mushrooms" refer to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including, but not limited to, cans or glass jars, in a suitable liquid medium including, but not limited to, water, brine, butter or butter sauce. Included within the scope of these orders are "brined" mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing. Also included within the scope of these orders, as of June 19, 2000, are marinated, acidified, or pickled mushrooms containing less than 0.5 percent acetic acid. Excluded from the scope of these orders are the following: (1) All other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including "refrigerated" or "quick blanched mushrooms"; (3) dried mushrooms; and (4) frozen mushrooms. The merchandise subject to these orders were previously classifiable under subheadings 2003.10.0027, 2003.10.0031, 2003.10.0037, 2003.10.0043, 2003.10.0047, 2003.10.0053, and 0711.90.4000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these orders is dispositive. As of January 1, 2002, the HTSUS codes are as follows: 2003.10.0127, 2003.10.0131, 2003.10.0137, 2003.10.0143, 2003.10.0147, 2003.10.0153, 0711.51.0000.

Determination

As a result of the determinations by the Department and ITC that revocation of these antidumping duty orders would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty orders on mushrooms from Chile, China, India, and Indonesia. The effective date of continuation of these orders will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to sections 751(c)(2) and 751(c)(6) of the Act, the Department intends to initiate the next five-year reviews of these orders not later than October 2009.

The five-year ("sunset") reviews and notice are published in accordance with sections 751(c), 752 and 777(i)(1) of the Act.

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[1] *See Initiation of Five-year ("Sunset") Reviews*, 68 FR 62280 and 68 FR 62322 (November 3, 2003).

[2] *See Certain Preserved Mushrooms from Chile, India, Indonesia and The People's Republic of China; Final Results of Expedited Sunset Reviews of Antidumping Duty Orders*, 69 FR 11384 (March 10, 2004).

[3] *See Certain Preserved Mushrooms from Chile, China, India, and Indonesia*, 69 FR 63408 (November 1, 2004), and USITC Publication 3731, Investigation Nos. 731–TA–776–779 (November 1, 2004) (Review).

Dated: November 8, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E4–3175 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–829]

Stainless Steel Bar From Italy; Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Melanie Brown, AD/CVD Enforcement, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone (202) 482–4987.

Background

On May 27, 2004, the Department of Commerce ("the Department") published a notice of initiation of administrative review of the antidumping duty order on stainless steel bar from Italy covering the period March 1, 2003, through February 29, 2004 (69 FR 30282). The preliminary results in the antidumping duty administrative review of stainless steel bar from Italy are currently due no later than December 1, 2004.

Extension of Time Limits for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930 ("the Act") requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an antidumping duty order for which a review is requested and issue the final results within 120 days after the date on which the preliminary results are published. However, if the Department finds it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

The Department finds that it is not practicable to complete the preliminary results in this administrative review of stainless steel bar from Italy within the originally anticipated time limit. Additional time is needed due to complex verification and affiliation issues in this case.

Therefore, the Department is extending the time limit for completion of the preliminary results to February 1, 2005, in accordance with section 751(a)(3)(A) of the Act.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 8, 2004.

Jeffrey A. May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E4–3176 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–822]

Certain Stainless Steel Sheet and Strip in Coils From Mexico; Preliminary Results of the Sunset Review of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of antidumping duty order of sunset review on certain stainless steel sheet and strip in coils from Mexico; preliminary results.

SUMMARY: On June 1, 2004, the Department of Commerce ("the Department") initiated a sunset review of the antidumping duty order of certain stainless steel sheet and strip in coils from Mexico.[1] On the basis of the notice of intent to participate, adequate substantive responses and rebuttal comments filed on behalf of the domestic and respondent interested parties, the Department is conducting a full sunset review of the antidumping duty order pursuant to section 751(e)(3)(B) of the Tariff Act of 1930, as amended ("the Act") and section 351.218(e)(2)(i) of the Department's regulations. As a result of this sunset review, the Department preliminarily finds that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping at the levels listed below in the section entitled "Preliminary Results of Review".

DATES: *Effective Date:* November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Martha V. Douthit, Office of Policy, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC, 20230; telephone: (202) 482–5050.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2004, the Department published its notice of initiation of the first sunset review of the antidumping duty order on stainless steel sheet and strip in coils from Mexico, in accordance with section 751(c) of the Act. *See Initiation of Five-Year ("Sunset") Reviews*, 69 FR 30874 (June 1, 2004).

The Department received Notices of Intent to Participate on behalf of Allegheny Ludlum Corporation, North America Stainless, Nucor Corporation, Local 3303 United Auto Workers (formerly Butler Armco Independent Union), the United Steelworkers of America, AFL–CIO/CLC, and the Zanesville Armco Independent Organization, Inc, (collectively, "domestic interested parties"), within the applicable deadline specified in section 351.218(d)(1)(i) of the Department's regulations. Domestic interested parties claimed interested party status pursuant to sections 771(9)(C) and (D) of the Act. The Department received a complete substantive response to the notice of initiation from the domestic interested parties within the 30-day deadline specified in the Department's regulations under section 351.218(d)(3)(i). The Department received a complete substantive response from respondent interested parties, ThyssenKrupp Mexinox S.A. de C.V. ("Mexinox") and Mexinox USA, Inc. ("Mexinox USA"), (collectively, "respondent"), within the applicable deadline specified in section 351.218(d)(3)(i).

On July 2, 2004, the Department received a request from domestic interested parties for an extension of the deadline for filing rebuttal comments to the substantive response. Pursuant to Section 351.302(b) of the Department's regulations, domestic and respondent parties were granted an extension to file rebuttal comments to the substantive responses until July 9, 2004. On July 9, 2004, the Department received rebuttal comments to the substantive response from the domestic interested parties and the respondent.

On September 27, 2004, the Department published a notice of extension of time limits for its preliminary results of review until

[1] *See Initiation of Five-Year ("Sunset") Reviews*, 69 FR 30874 (June 1, 2004) ("Notice of Initiation").

November 4, 2004.[2] Final results in the full sunset review of this antidumping duty order is scheduled for April 27, 2005.

Section 351.218(e)(1)(ii)(A) of the Department's regulations provides that the Secretary normally will conclude that respondent interested parties have provided adequate response to a notice of initiation where it receives complete substantive responses from respondent interested parties accounting on average for more than 50 percent, by volume, or value basis, if appropriate, of the total exports of the subject merchandise to the United States over the five calender years preceding the year of publication of the notice of initiation. On July 21, 2004, the Department determined that Mexinox's response constituted an adequate response to the notice of initiation. In accordance with section 351.218(e)(2)(i) of the Department's regulations, the Department determined to conduct a full sunset review of this antidumping duty order.

Scope of the Order

For purposes of this sunset review, the products covered are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*i.e.*, cold-rolled, polished, aluminized, coated, etc.) provided that it maintains the specific dimensions of sheet and strip following such processing.

The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States ("HTS") at subheadings: 7219.13.00.31, 7219.13.00.51, 7219.13.00.71, 7219.13.00.81, 7219.14.00.30, 7219.14.00.65, 7219.14.00.90, 7219.32.00.05, 7219.32.00.20, 7219.32.00.25, 7219.32.00.35, 7219.32.00.36, 7219.32.00.38, 7219.32.00.42, 7219.32.00.44, 7219.33.00.05, 7219.33.00.20, 7219.33.00.25, 7219.33.00.35, 7219.33.00.36, 7219.33.00.38, 7219.33.00.42, 7219.33.00.44, 7219.34.00.05, 7219.34.00.20, 7219.34.00.25, 7219.34.00.30, 7219.34.00.35, 7219.35.00.05, 7219.35.00.15, 7219.35.00.30, 7219.35.00.35, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.12.10.00, 7220.12.50.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.20.70.05, 7220.20.70.10, 7220.20.70.15, 7220.20.70.60, 7220.20.70.80, 7220.20.80.00, 7220.20.90.30, 7220.20.90.60, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under review is dispositive.

Excluded from the scope of this order are the following: (1) Sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled; (2) sheet and strip that is cut to length; (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more); (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm); and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades.[3]

In response to comments by interested parties, the Department has determined that certain specialty stainless steel products are also excluded from the scope of this order. These excluded products are described below.

Flapper valve steel is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulfide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves for compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of this order. his stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of between 0.002 and 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of this order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as "Arnokrome III."[4]

Certain electrical resistance alloy steel is also excluded from the scope of this order. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials (ASTM) specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its

[2] *See Stainless Steel Sheet & Strip in Coils from Mexico; Extension of Time Limits for Preliminary and Final Results of Full ("Sunset") Review of Antidumping Duty Order*, 69 FR 57673 (September 27, 2004).

[3] *See* Chapter 72 of the HTSUS, "Additional U.S. Note" 1(d).

[4] "Arnokrome III" is a trademark of the Arnold Engineering Company.

resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as "Gilphy 36." [5]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of this order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System (UNS) as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as "Durphynox 17." [6]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of this order. These include stainless steel strip in coils used in the production of textile cutting tools (*i.e.*, carpet knives).[7] This steel is similar to ASTM grade 440F, but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. The second excluded stainless steel strip in coils is similar to AISI 420–J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per square micron. An example of this product is "GIN5" steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, "GIN6." [8]

[5] "Gilphy 36" is a trademark of Imphy, S.A.

[6] "Durphynox 17" is a trademark of Imphy, S.A.

[7] This list of uses is illustrative and provided for descriptive purposes only.

[8] "GIN4 Mo", "GIN5" and "GIN6" are the proprietary grades of Hitachi Metals America, Ltd.

Analysis of Comments Received

All issues raised in this sunset review are addressed in the "Issues and Decision Memorandum ("Decision Memo") from Ronald K. Lorentzen, Acting Director, Office of Policy, Import Administration, to Jeffrey A. May, Acting Assistant Secretary for Import Administration, dated November 4, 2004, which is hereby adopted by this notice. The issues discussed in the Decision Memo include the likelihood of continuation or recurrence of dumping and the magnitude of the margin likely to prevail if the antidumping duty order were revoked. Parties can find a complete discussion of all issues raised in this sunset review and the corresponding recommendations in this public memo, which is on file in room B–099 of the main Commerce Building.

In addition, a complete version of the Decision Memo can be accessed directly on the Web at *http://ia.ita.doc.gov/frn*, under the heading "November 2004". The paper copy and electronic version of the Decision Memo are identical in content.

Preliminary Results of Review

The Department preliminarily determines that revocation of the antidumping duty order on certain stainless steel sheet and strip in coils from Mexico is likely to lead to continuation or recurrence of dumping at the following weighted-average margins:

Manufacturers/producers/exporter's	Weighted-average margin (percent)
Mexinox	30.85
All Others	30.85

Any interested party may request a hearing within 30 days of publication of this notice in accordance with 19 CFR 351.310(c). Any hearing, if requested, will be held on January 10, 2005, in accordance with 19 CFR 351.310(d). Interested parties may submit case briefs no later than January 3, 2005, in accordance with 19 CFR 351.309(c)(1)(i). Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than January 7, 2005. The Department will issue a notice of final results of this sunset review, which will include the results of its analysis of issues raised in any such briefs, no later than January 27, 2005.

This five-year ("sunset") review and notice are in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: November 4, 2004.

Jeffrey A. May,

Assistant Secretary for Import Administration.

[FR Doc. E4–3174 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–831]

Notice of Amended Final Determination In Accordance With Court Decision of the Antidumping Duty Investigation of Stainless Steel Sheet and Strip in Coils From Taiwan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Robert Bolling, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: 482–3434.

SUMMARY: On January 15, 2004, the United States Court of Appeals for the Federal Circuit ("CAFC") sustained the final remand determination of the Department of Commerce ("the Department"). *See Tung Mung Development Co., Ltd. v. U.S.*, 354 F.3d 1371, C.A.Fed (Jan. 15, 2004) ("*Tung Mung III*"), and the Department's *Final Results of Redetermination Pursuant to Court Remand* in *Tung Mung Development Co., Ltd. v. United States*, Consol. Court No. 99–06–00457 (CIT July 3, 2001). As there is now a final and conclusive court decision in this case, we are amending our final determination of sales at less than fair value.

SUPPLEMENTARY INFORMATION:

Background

On June 8, 1999, the Department published the *Final Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils From Taiwan*, 64 FR 30592 (June 8, 1999) (*"Final Determination"*), covering the period of investigation ("POI") of April 1, 1997 through March 31, 1998. This investigation involved three Taiwanese producers/exporters, Tung Mung, Yieh United Steel Corporation ("YUSCO"), Chang Mien Industries Co., Ltd. ("Chang Mien"), and a Taiwanese middleman, Ta Chen Stainless Pipe Company Ltd. ("Ta Chen"). Tung Mung and YUSCO contested various aspects of the *Final Determination*. On July 3, 2001, the Court of International Trade ("CIT") issued slip opinion 01–83 in *Tung Mung Development Co., Ltd. v. United States*, Consol. Court No. 99–06–00457 (CIT July 3, 2001) (*"Tung Mung I"*). The Court ordered the Department to reconsider its determination to apply single weighted–average cash- deposit rates for U.S. sales of subject merchandise made by Tung Mung and YUSCO and ordered the Department to "provide a reasonable explanation and substantial evidence for its change in practice" or "apply a combination rate, consistent with its prior practice." *See Tung Mung I* at 33.

On remand, the Department determined that it was appropriate to apply the middleman- dumping computation using the combination rates for producers and middlemen, and the domestic producers appealed. On August 22, 2002, the CIT found that the Department's remand determination was in accordance with the law when it applied a combination rate consistent with its prior practice. *See Tung Mung Development Co., Ltd. v. U.S.*, 219 F.Supp.2d 1333 (CIT Aug. 22, 2002) (*"Tung Mung II"*).

The domestic industry appealed this decision. In a separate proceeding, the domestic industry's representatives sought review of the antidumping determination involving stainless steel plate in coils ("SSPC") from Taiwan. *See Allegheny Ludlum Corp. v. U.S.*, 215 F.Supp.2d 1322 (CIT Dec. 28, 2000). On remand in SSPC, the Department determined that it was appropriate to apply the middleman–dumping computation using combination rates for producers and middlemen, and domestic producers appealed. The appeal for stainless steel sheet and strip in coils was consolidated before the CAFC with the appeal in the SSPC case.

On January 15, 2004, the CAFC ruled that the Department's decision to calculate middleman antidumping rates using combination rates was not arbitrary and capricious and affirmed the CIT's affirmance of the Department's redetermination.

As the litigation in this case is final and conclusive, we are amending our final determination of sales at less than fair value. As a result of the remand redetermination, we have recalculated the dumping margins for stainless steel sheet and strip in coils from Taiwan for YUSCO and Tung Mung based upon whether the merchandise is exported through Ta Chen or through other commercial transactions to the United States. The recalculated margins are as follows:

YUSCO	21.10 percent
YUSCO/Ta Chen	36.44 percent
Tung Mung	00.00 percent
Tung Mung/Ta Chen	15.40 percent

The Department will issue appraisement instructions for Tung Mung directly to U.S. Customs and Border Protection ("CBP"). The Department will instruct CBP to liquidate entries from Tung Mung without regard to antidumping duties because Tung Mung is excluded from the antidumping duty order, effective October 16, 2002, the date on which the Department published a notice of the Court decision (see Stainless Steel Sheet and Strip in Coils from Taiwan: Notice of Court Decision, 67 FR 63887 (October 16, 2002)).

This notice is issued and published in accordance with section 751(a)(1) of Act.

Dated: November 8, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E4–3199 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–831]

Stainless Steel Sheet and Strip in Coils From Taiwan: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Karine Gziryan or Melissa Blackledge, AD/CVD Operations, Office IV, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–4081 or (202) 482–3518, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 19, 2004, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Taiwan, covering the period July 1, 2002, through June 30, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 FR 50750 (August 22, 2003); *see* also *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review*, 68 FR 56262 (September 30, 2003) (which was issued to initiate a review of the instant antidumping duty order with respect to one manufacturer/exporter that was inadvertently omitted from the earlier notice of initiation).

On August 9, 2004, the Department published in the **Federal Register** the preliminary results of review. *See Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 FR 48212. The final results of review are currently due no later than December 7, 2004.

Statutory Time Limits

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to make a preliminary determination in an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary determination is published. However, if it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days (or 300 days if the Department does not extend the time limit for the preliminary determination), respectively.

Extension of Time Limit for Final Results of Review

We have determined that it is not practicable to complete the final results of this review within the original time limit. *See* the memorandum from Holly A. Kuga, Senior Director, Office IV, AD/CVD Operations to Jeffrey A. May, Deputy Assistant Secretary for Import Administration, which is dated concurrently with this notice, and is on

file in the Central Records Unit, room B–099 of the Department's main building. Therefore, the Department is extending the time limit for completion of the final results by 60 days. We intend to issue the final results of review no later than February 5, 2005.

This extension is in accordance with section 751(a)(3)(A) of the Act.

Dated: November 8, 2004.

Jeffrey A. May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E4–3200 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final determination of sales at less than fair value.

SUMMARY: On June 24, 2004, the Department of Commerce published its preliminary determination of sales at less than fair value in the antidumping investigation of wooden bedroom furniture from the People's Republic of China. On August 5, 2004, the Department of Commerce published an amended preliminary determination of sales at less than fair value. On September 9, 2004, the Department of Commerce published an amended preliminary determination of sales at less than fair value. The period of investigation is April 1, 2003, through September 30, 2003. The investigation covers seven manufacturers/exporters which are mandatory respondents and 115 Section A respondents. We invited interested parties to comment on our preliminary determination of sales at less than fair value. Based on our analysis of the comments we received, we have made changes to our calculations for all mandatory respondents. The final dumping margins for this investigation are listed in the "Final Determination Margins" section below.

DATES: Effective November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Catherine Bertrand or Robert Bolling, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3207 and (202) 482–3434, respectively.

Final Determination

We determine that wooden bedroom furniture from the People's Republic of China ("PRC") is being, or is likely to be, sold in the United States at Less Than Fair Value ("LTFV") as provided in section 735 of Tariff Act of 1930 ("the Act"). The estimated margins of sales at LTFV are shown in the "Final Determination Margins" section of this notice.

Case History

The Department of Commerce ("the Department") published its preliminary determination of sales at LTFV on June 24, 2004. See *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Wooden Bedroom Furniture from the People's Republic of China*, 69 FR 35312 (June 24, 2004) ("*Preliminary Determination*"). The Department conducted verification of the mandatory respondents in both the PRC and the United States (where applicable), with the exception of Tech Lane Wood Mfg. and Kee Jia Wood Mfg. ("Tech Lane"), and certain Section A respondents' data in the PRC. See the *Verification Section* below for additional information. On August 5, 2004, the Department published an amended preliminary determination. See *Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China*, 69 FR 47417 (August 5, 2004) ("*Amendment 1*"). On August 17, 2004, parties submitted surrogate-value information. On August 30, 2004, the Department issued a memorandum regarding the request for treatment of the Chinese wooden bedroom furniture industry as market-oriented. See *Memorandum to James J. Jochum from Jeffrey May, Request for Market-Oriented Industry ("MOI") Treatment*, dated August 30, 2004 ("*MOI Memorandum*"), and MOI section below. On August 31, 2004, the Department released a clarification regarding the scope of this investigation and explained that jewelry armoires and cheval mirrors are not within the scope of the investigation. See *Issue and Decision Memorandum Concerning Jewelry Armoires and Cheval Mirrors*, dated August 31, 2004. On September 9, 2004, the Department published another amended preliminary determination. See *Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value and Amendment to the Scope: Wooden Bedroom Furniture From the People's Republic of China*, 69 FR 54643 (September 9, 2004) ("*Amendment 2*"). On September 28, 2004, the Department issued a memorandum clarifying which types of mirrors are within the scope of this investigation. See *Issue and Decision Memorandum Concerning Mirrors*, dated September 28, 2004.

On September 16, 2004, the Department issued a memorandum in which it explained that it rejected the request by Decca Furniture Ltd. for a separate rate because its request for such treatment was untimely. See *Memorandum from Jeffrey May to James J. Jochum, Untimely Section A Questionnaire Submission of Decca Furniture Ltd.*, dated September 16, 2004. Additionally, on September 16, 2004, the Department issued a memorandum which stated that the Department rejected numerous potential Section A respondents' Section A submissions because they were untimely. See *Memorandum from James J. Jochum from Jeffrey May, Untimely Request for Separate-Rates Status of Certain PRC Exporters*, dated September 16, 2004.

We invited parties to comment on the *Preliminary Determination*. We received comments from the Petitioners, the mandatory respondents, the Section A respondents, and other interested parties to this investigation.

On October 6, 2004, parties submitted case briefs. On October 14, 2004, parties submitted rebuttal briefs. On October 19, 2004, the Department held a public hearing on MOI and Section A issues. On October 20, 2004, the Department held a public hearing on issues concerning the selection of a surrogate country, financial ratios, surrogate values, and mandatory respondents. On October 27, 2004, the Department held a public hearing on scope comments.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this investigation are addressed in the Issues and Decision Memorandum, dated November 8, 2004, which is hereby adopted by this notice ("*Decision Memorandum*"). A list of the issues which parties raised and to which we respond in the Decision Memorandum is attached to this notice as an Appendix. The Decision Memorandum is a public document and is on file in the Central Records Unit ("*CRU*"), Main Commerce Building, Room B–099, and is accessible on the Web at *http://ia.ita.doc.gov*. The paper copy and electronic version of the memorandum are identical in content.

Scope of Investigation

For purposes of this investigation, the product covered is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, oriented strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non-wood components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.

The subject merchandise includes the following items: (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests,[1] highboys,[2] lowboys,[3] chests of drawers,[4] chests,[5] door chests,[6] chiffoniers,[7] hutches,[8] and armoires;[9] (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

The scope of the Petition excludes the following items: (1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate;[10] (9) jewelry armories;[11] (10) cheval mirrors[12] and (11) certain metal parts.[13]

Imports of subject merchandise are classified under statistical category 9403.50.9040 of the HTSUS as "wooden * * * beds" and under statistical category 9403.50.9080 of the HTSUS as "other * * * wooden furniture of a kind used in the bedroom." In addition, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds may also be entered under statistical category 9403.50.9040 of the HTSUS as "parts of wood" and framed glass mirrors may also be entered under statistical category 7009.92.5000 of the HTSUS as "glass mirrors * * * framed." This investigation covers all wooden bedroom furniture meeting the above description, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Scope Comments

In the *Preliminary Determination* we stated that, due to the extraordinary detail and length of comments we had received to date, we would analyze scope comments we received for the final determination. As part of this process, the Department had summarized all of the comments it had received as of June 17, 2004, in a memorandum to the file. See *Memorandum to the File from Laurel LaCivita, Analyst, to Laurie Parkhill, Office Director, Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China: Summary on Comments to the Scope* (June 17, 2004). Thus, we afforded interested parties an opportunity to address only the comments summarized in our memorandum and, as announced in the *Preliminary Determination*, 69 FR 35318, we provided interested parties until July 30, 2004, to submit additional comments on scope topics in this memorandum.

As of July 30, 2004, we had received scope comments reflecting issues in our memorandum and we had received scope comments on issues not discussed in our memorandum. Therefore, consistent with our *Preliminary Determination*, we clarified for all interested parties in a letter dated October 25, 2004, that for the final determination we would only address comments we received by July 30, 2004,

[1] A chest-on-chest is typically a tall chest-of-drawers in two or more sections (or appearing to be in two or more sections), with one or two sections mounted (or appearing to be mounted) on a slightly larger chest; also known as a tallboy.

[2] A highboy is typically a tall chest of drawers usually composed of a base and a top section with drawers, and supported on four legs or a small chest (often 15 inches or more in height).

[3] A lowboy is typically a short chest of drawers, not more than four feet high, normally set on short legs.

[4] A chest of drawers is typically a case containing drawers for storing clothing.

[5] A chest is typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid.

[6] A door chest is typically a chest with hinged doors to store clothing, whether or not containing drawers. The piece may also include shelves for televisions and other entertainment electronics.

[7] A chiffonier is typically a tall and narrow chest of drawers normally used for storing undergarments and lingerie, often with mirror(s) attached.

[8] A hutch is typically an open case of furniture with shelves that typically sits on another piece of furniture and provides storage for clothes.

[9] An armoire is typically a tall cabinet or wardrobe (typically 50 inches or taller), with doors, and with one or more drawers (either exterior below or above the doors or interior behind the doors), shelves, and/or garment rods or other apparatus for storing clothes. Bedroom armoires may also be used to hold television receivers and/or other audio-visual entertainment systems.

[10] As used herein, bentwood means solid wood made pliable. Bentwood is wood that is brought to a curved shape by bending it while made pliable with moist heat or other agency and then set by cooling or drying. See Customs' Headquarters' Ruling Letter 043859, dated May 17, 1976.

[11] Any armoire, cabinet or other accent item for the purpose of storing jewelry, not to exceed 24″ in width, 18″ in depth, and 49″ in height, including a minimum of 5 lined drawers lined with felt or felt-like material, at least one side door lined with felt or felt-like material, with necklace hangers, and a flip-top lid with inset mirror. See Memorandum from Laurel LaCivita to Laurie Parkhill, Office Director, Issues and Decision Memorandum Concerning Jewelry Armoires and Cheval Mirrors in the Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China dated August 31, 2004.

[12] Cheval mirrors, *i.e.*, any framed, tiltable mirror with a height in excess of 50″ that is mounted on a floor-standing, hinged base.

[13] Metal furniture parts and unfinished furniture parts made of wood products (as defined above) that are not otherwise specifically named in this scope (*i.e.*, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds) and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form. Such parts are usually classified in subheading 9403.90.7000, HTSUS.

which concerned issues we identified in our June 17, 2004, memorandum.

We have addressed these comments in our final scope memorandum. See *Memorandum to Laurie Parkhill, Office Director, from Erol Yesin, Case Analyst, Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China: Summary on the Scope of the Investigation* (November 8, 2004).

Verification

As provided in section 782(I) of the Act, we verified the information submitted by the mandatory respondents, with the exception of Tech Lane as discussed below, and certain Section A respondents for use in our final determination. See the Department's verification reports on the record of this investigation in the CRU with respect to Rui Feng Woodwork Co., Ltd., Rui Feng Lumber Development Co., Ltd. and Dorbest Limited ("Dorbest"), Lacquer Craft Mfg. Co., Ltd. ("Lacquer Craft"), Dongguan Lung Dong Furniture Co., Ltd., and Dongguan Dong He Furniture Co., Ltd., ("Lung Dong"), Markor International Furniture (Tianjin) Manufacturing Company, Ltd. ("Markor"), Shing Mark Enterprise Co., Ltd., Carven Industries Limited (BVI), Carven I Industries Limited (HK), Dongguan Zhenxin Furniture Co., Ltd., and Dongguan Yongpeng Furniture Co., Ltd. ("Shing Mark"), Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., and Shanghai Starcorp Furniture Co., Ltd. ("Starcorp"), Dalian Huafeng Furniture Co., Ltd. ("Dalian"), Locke Furniture Factory, or Kai Chan Furniture Co., Ltd., or Kai Chan (Hong Kong) Enterprise Ltd., or Taiwan Kai Chan Co., Ltd. ("Locke"), and Fine Furniture (Shanghai) Limited ("Fine Furniture"). For all verified companies, we used standard verification procedures, including examination of relevant accounting and production records, as well as original source documents provided by respondents.

Market-Oriented Industry

In the *Preliminary Determination*, we stated that, because we received an MOI allegation filed by the Furniture Subchamber of the China Chamber of Commerce for Import & Export of Light Industrial Products and Arts-Crafts ("CCCLA") and the China National Furniture Association ("CNFA") with supporting information so recently and so close (*i.e.*, May 28, 2004) to the fully extended due date of the preliminary determination, we did not have adequate time to consider the information. Thus, we indicated that we would continue to evaluate the request and address it as soon as possible. On August 30, 2004, we issued a memorandum regarding the request by CCCLA and CNFA for an MOI inquiry. See *MOI Memorandum*. In this memorandum, we stated that, due to the timing of the MOI request filing, we determined that we would not incorporate an MOI inquiry into this antidumping investigation. In addition, we explained that, in the event we publish an antidumping duty order as a result of an affirmative determination by the U.S. International Trade Commission ("ITC"), the Chinese wooden bedroom furniture industry will have an opportunity to request an MOI inquiry in a future segment of this proceeding. See *MOI Memorandum* and Comment 1 in the Issues and Decision Memorandum.

Surrogate Country

In the *Preliminary Determination*, we stated that we had selected India as the appropriate surrogate country to use in this investigation for the following reasons: (1) India is at a level of economic development comparable to the PRC; (2) Indian manufacturers produce comparable merchandise and are significant producers of wooden furniture; (3) India provides the best opportunity to use appropriate, publicly available data to value the factors of production. See *Preliminary Determination*, 69 FR at 35319. We received comments from interested parties during the briefing stage of this investigation and have evaluated these comments. For the final determination we have determined to continue to use India as the surrogate country and, accordingly, we have calculated normal value using Indian prices to value the respondents' factors of production, when available and appropriate. We have obtained and relied upon publicly available information wherever possible. For a detailed description of the surrogate values that have changed as a result of comments the Department has received, see the company-specific Analysis Memoranda dated November 8, 2004.

Separate Rates

In the *Preliminary Determination* and the amendments to the *Preliminary Determination* the Department found that several companies which provided responses to Section A of the antidumping questionnaire were eligible for a rate separate from the PRC-wide rate. For the final determination, we have determined that additional companies have qualified for separate-rate status. For a complete listing of all the companies that received a separate rate, see the Final Determination Margins section below.

As discussed below, the Department has determined to apply adverse facts available with respect to Tech Lane. In addition, we have determined that there is no reliable basis for granting Tech Lane a separate rate. Accordingly, Tech Lane has not overcome the presumption that it is part of the PRC-wide entity and therefore, will be subject to the PRC-wide rate.

The margin we calculated in the *Preliminary Determination* for these companies was 10.92 percent and was changed in *Amendment 2* to 12.91 percent. Because the rates of the selected mandatory respondents have changed since the *Preliminary Determination* and the *Amendment 2*, we have recalculated the rate for Section A respondents. The rate is 8.64 percent. See Memorandum to the File from Eugene Degnan, *Calculation of Section A Rate*, dated November 8, 2004.

Additionally, at the *Preliminary Determination*, we determined preliminarly that Shanghai Aosen Furniture Co., Ltd. ("Shanghai Aosen"), had satisfied our criteria for a separate rate. During the week of July 12, 2004, we informed Shanghai Aosen that we would verify its submitted data on or about August 13, 2004. On August 3, 2004, Shanghai Aosen informed the Department that it had decided not to participate in its verification which was scheduled to take place on August 13, 2004. See Memorandum to the File from Katharine Huang, *Shanghai Aosen's Withdrawal from the Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China ("PRC")* dated August 3, 2004. Because Shanghai Aosen refused to allow the Department to verify its submissions, the Department has determined that Shanghai Aosen has not cooperated to the best of its ability and that as adverse facts available, we determine that Shanghai Aosen is the part of the PRC-wide entity and therefore, does not qualify for a separate rate. Thus, effective the date of publication in the **Federal Register** of this determination, Shanghai Aosen will be subject to the PRC-wide rate.

Adverse Facts Available

Section 776(a)(2) of the Act provides that the Department shall apply "facts otherwise available" if, *inter alia*, an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form or manner requested by the Department, subject to

subsections (c)(1) and (e) of section 782, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act provides further that the Department may use an adverse inference when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority" if the information is timely, can be verified, and is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information if it can do so without undue difficulties.

In the *Preliminary Determination*, we determined a dumping margin of 9.36 percent for Tech Lane based on partial facts available for certain unreported surrogate values. See *Preliminary Determination*. On June 29, 2004, the Petitioners submitted allegations that the Department made various ministerial errors in calculating the dumping margin for Tech Lane. As a result of our correction of ministerial errors, we determined a corrected margin of 29.72 percent for Tech Lane in *Amendment 1*. We also stated in *Amendment 1* that we would not conduct a verification of Tech Lane due to the fact Tech Lane did not provide financial statements covering reported subject merchandise and because Tech Lane did not submit a reconciliation of sales it made during the period of investigation ("POI") as we requested. We indicated that, as a result, the rate for Tech Lane might change for purposes of the final determination. See *Amendment 1*, 69 FR at 47417, footnote 1.

Based on the record evidence and pursuant to the statutory requirements of the Act, the Department has determined that Tech Lane impeded this investigation, provided unverifiable information, and did not cooperate to the best of its ability to comply with the Department's requests for information. Therefore, we find that the use of adverse facts available to determine the margin for Tech Lane is proper for the final determination in this investigation. See Comment 4 in the Issues and Decision Memorandum for a further discussion of this issue.

Partial Adverse Facts Available

We have determined that the use of a partial adverse inference is warranted for certain constructed export price ("CEP") sales Shing Mark made.

We have determined that Shing Mark did not act to the best of its ability with respect to a CEP control-number error, nor did it act the best of its ability in reporting the sales information with respect to certain CEP sales and the corrected data. At the verification of Shing Mark's U.S. affiliate, Homerica Inc., we discovered that Shing Mark had mis-coded a portion of its reported CEP control numbers. The Department had indicated earlier in its April 28, 2004, supplemental questionnaire and again in its June 4, 2004, supplemental questionnaire that it had found problems with certain reported control numbers and, within these control numbers, price variations of CEP sales that Shing Mark never addressed fully or in a timely manner. At the very least, even if wide price variations are normal within a control number, such price variations should have caused Shing Mark to at least check the accuracy of the information it reported to the Department. Additionally, we find that, at a minimum, before the first CEP verification, Shing Mark should have reviewed our pre-selected sales invoices which would have also alerted Shing Mark to the above problems. Further, the Department alerted the respondent on several different occasions either explicitly (through its supplemental questionnaires) or implicitly (the very reason for the Department's selection of certain CEP sales for verification was due to wide price variations) to the problems with certain sales. Thus, because Shing Mark was in the best position to check and report its own information accurately plus the fact that Shing Mark reported continually that it had corrected its information or that there were no problems, we relied upon its reported information until we discovered the errors at the first CEP verification. Additionally, the Department did everything it could to alert Shing Mark to the problem. Consequently, in accordance with section 776 of the Act, the Department has applied adverse facts available for certain CEP sales whose control numbers Shing Mark reported incorrectly because the U.S. sales data that Shing Mark submitted to correct the errors is unverifiable, the U.S. sales data remains so incomplete that it cannot be used as a reliable basis for reaching an accurate margin in this investigation, and Shing Mark did not act to the best of its ability to find and correct the errors. Therefore, for the aforementioned reasons, the Department has applied the adverse facts available rate of 198.08 percent (see below) to all of Shing Mark's CEP sales where the control-number misclassification occurred. See the Issues and Decision Memorandum at Comment 63 and the Shing Mark Final Analysis Memorandum, dated November 8, 2004.

Adverse Facts-Available Rate

In the *Preliminary Determination*, in accordance with sections 776(b) and (c) of the Act, to corroborate the adverse facts-available margin (*i.e.*,198.08 percent), we compared that margin to the margins we found for the mandatory respondents. See *Memorandum to the File from Brian Ledgerwood, Analyst, through Robert Bolling, Program Manager, and Laurie Parkhill, Office Director, Preliminary Determination in the Investigation of Wooden Bedroom Furniture from the People's Republic of China, Corroboration Memorandum*, dated June 17, 2004.

At the *Preliminary Determination*, in accordance with section 776(c) of the Act, we corroborated our adverse facts-available margin using information submitted by Tech Lane and Kee Jia Wood Mfg. For the final determination, we are no longer using the information submitted by Tech Lane to corroborate our adverse facts-available margin (see Adverse Facts Available section above).

To assess the probative value of the total adverse facts-available rate it has chosen, the Department compared the final margin calculations of other respondents in this investigation with the rate of 198.08 percent from the petition. We find that the rate is within the range of the highest margins we have determined in this investigation. See *Memorandum to the File from Catherine Bertrand, Analyst, through Robert Bolling, Program Manager, and Laurie Parkhill, Office Director, Final Determination in the Investigation of Wooden Bedroom Furniture from the People's Republic of China, Corroboration Memorandum ("Final Corroboration Memo")*, dated November 8, 2004. Since the record of this

investigation contains margins within the range of the petition margin, we determine that the rate from the petition continues to be relevant for use in this investigation.

As discussed therein, we found that the margin of 198.08 percent has probative value. See *Final Corroboration Memo*. Accordingly, we find that the rate of 198.08 percent is corroborated within the meaning of section 776(c) of the Act.

The PRC-Wide Rate

Because we begin with the presumption that all companies within a non market-economy ("NME") country are subject to government control and because only the companies listed under the Final Determination Margins below have overcome that presumption, we are applying a single antidumping rate—the PRC-wide rate—to all other exporters of subject merchandise from the PRC. Such companies did not demonstrate entitlement to a separate rate. See, *e.g.*, *Final Determination of Sales at Less Than Fair Value: Synthetic Indigo from the People's Republic of China*, 65 FR 25706 (May 3, 2000). The PRC-wide rate applies to all entries of subject merchandise except for entries from the respondents which are listed in the Final Determination Margins section below (except as noted).

Final Determination Margins

We determine that the following percentage weighted-average margins exist for the POI:

Company	Weighted-average margin (percent)
Dongguan Lung Dong Furniture Co., Ltd., or Dongguan Dong He Furniture Co., Ltd	2.22
Rui Feng Woodwork Co., Ltd., or Rui Feng Lumber Development Co., Ltd. or Dorbest Limited	16.70
Lacquer Craft Mfg. Co., Ltd	6.95
Markor International Furniture (Tianjin) Manufacturing Company, Ltd	0.79
Shing Mark Enterprise Co., Ltd., or Carven Industries Limited (BVI), or Carven I Industries Limited (HK), or Dongguan Zhenxin Furniture Co., Ltd., or Dongguan Yongpeng Furniture Co., Ltd	5.07
Starcorp Furniture (Shanghai) Co., Ltd., or Orin Furniture (Shanghai) Co., Ltd., or Shanghai Starcorp Furniture Co., Ltd	15.24
Tech Lane Wood Mfg. or Kee Jia Wood Mfg *	198.08
Alexandre International Corp., or Southern Art Development Ltd., or Alexandre Furniture (Shenzhen) Co., Ltd., or Southern Art Furniture Factory	8.64
Art Heritage International, Ltd., or Super Art Furniture Co., Ltd., or Artwork Metal & Plastic Co., Ltd., or Jibson Industries Ltd., or Always Loyal International	8.64
Billy Wood Industrial (Dong Guan) Co., Ltd., or Great Union Industrial (Dongguan) Co., Ltd., or Time Faith Ltd	8.64
Changshu HTC Import & Export Co., Ltd	8.64
Cheng Meng Furniture (PTE) Ltd., or China Cheng Meng Decoration & Furniture Co., Ltd	8.64
Chuan Fa Furniture Factory	8.64
Classic Furniture Global Co., Ltd	8.64
Clearwise Co., Ltd	8.64
COE Ltd	8.64
Dalian Guangming Furniture Co., Ltd	8.64
Dalian Huafeng Furniture Co., Ltd	8.64
Dongguan Cambridge Furniture Co., or Glory Oceanic Co., Ltd	8.64
Dongguan Chunsan Wood Products Co., Ltd	8.64
Dongguan Creation Furniture Co., Ltd., or Creation Industries Co., Ltd	8.64
Dongguan Grand Style Furniture, or Hong Kong Da Zhi Furniture Co., Ltd	8.64
Dongguan Great Reputation Furniture Co., Ltd	8.64
Dongguan Hero Way Woodwork Co., Ltd., or Dongguan Da Zhong Woodwork Co., Ltd., or Hero Way Enterprises Ltd., or Well Earth International Ltd	8.64
Dongguan Hung Sheng Artware Products Co., Ltd., or Coronal Enterprise Co., Ltd	8.64
Dongguan Kin Feng Furniture Co., Ltd	8.64
Dongguan Kingstone Furniture Co., Ltd., or Kingstone Furniture Co., Ltd	8.64
Dongguan Liaobushangdun Huada Furniture Factory, or Great Rich (HK) Enterprise Co. Ltd	8.64
Dongguan Qingxi Xinyi Craft Furniture Factory (Joyce Art Factory)	8.64
Dongguan Singways Furniture Co., Ltd	8.64
Dongguan Sunrise Furniture Co., or Taicang Sunrise Wood Industry Co., Ltd., or Shanghai Sunrise Furniture Co., Ltd., or Fairmont Designs	8.64
Dongying Huanghekou Furniture Industry Co., Ltd	8.64
Dream Rooms Furniture (Shanghai) Co., Ltd	8.64
Eurosa (Kunshan) Co., Ltd., or Eurosa Furniture Co., (PTE) Ltd	8.64
Ever Spring Furniture Co. Ltd., or S.Y.C. Family Enterprise Co., Ltd	8.64
Fine Furniture (Shanghai) Ltd	8.64
Foshan Guanqiu Furniture Co., Ltd	8.64
Fujian Lianfu Forestry Co., Ltd., or Fujian Wonder Pacific Inc	8.64
Gaomi Yatai Wooden Ware Co., Ltd., or Team Prospect International Ltd., or Money Gain International Co	8.64
Garri Furniture (Dong Guan) Co., Ltd., or Molabile International, Inc., or Weei Geo Enterprise Co., Ltd	8.64
Green River Wood (Dongguan) Ltd	8.64
Guangming Group Wumahe Furniture Co., Ltd	8.64
Hainan Jong Bao Lumber Co., Ltd., or Jibbon Enterprise Co., Ltd	8.64
Hamilton & Spill Ltd	8.64
Hang Hai Woodcraft's Art Factory	8.64
Hualing Furniture (China) Co., Ltd., or Tony House Manufacture (China) Co., Ltd., or Buysell Investments Ltd., or Tony House Industries Co., Ltd	8.64
Jardine Enterprise, Ltd	8.64
Jiangmen Kinwai Furniture Decoration Co., Ltd	8.64
Jiangmen Kinwai International Furniture Co., Ltd	8.64
Jiangsu Weifu Group Fullhouse Furniture Manufacturing Corp	8.64

Company	Weighted-average margin (percent)
Jiangsu Yuexing Furniture Group Co., Ltd	8.64
Jiedong Lehouse Furniture Co., Ltd	8.64
King's Way Furniture Industries Co., Ltd., or Kingsyear Ltd	8.64
Kuan Lin Furniture (Dong Guan) Co., Ltd., or Kuan Lin Furniture Factory, or Kuan Lin Furniture Co., Ltd	8.64
Kunshan Lee Wood Product Co., Ltd	8.64
Kunshan Summit Furniture Co., Ltd	8.64
Langfang Tiancheng Furniture Co., Ltd	8.64
Leefu Wood (Dongguan) Co., Ltd., or King Rich International, Ltd	8.64
Link Silver Ltd. (V.I.B.), or Forward Win Enterprises Co. Ltd., or Dongguan Haoshun Furniture Ltd	8.64
Locke Furniture Factory, or Kai Chan Furniture Co., Ltd., or Kai Chan (Hong Kong) Enterprise Ltd., or Taiwan Kai Chan Co., Ltd	8.64
Longrange Furniture Co., Ltd	8.64
Nanhai Baiyi Woodwork Co., Ltd	8.64
Nanhai Jiantai Woodwork Co., Ltd	8.64
Nantong Dongfang Orient Furniture Co., Ltd	8.64
Nantong Yushi Furniture Co., Ltd	8.64
Nathan International Ltd., or Nathan Rattan Factory	8.64
Orient International Holding Shanghai Foreign Trade Co., Ltd	8.64
Passwell Corporation, or Pleasant Wave Ltd	8.64
Perfect Line Furniture Co., Ltd	8.64
Prime Wood International Co., Ltd., or Prime Best International Co., Ltd., or Prime Best Factory, or Liang Huang (Jiaxing) Enterprise Co., Ltd	8.64
PuTian JingGong Furniture Co., Ltd	8.64
Qingdao Liangmu Co., Ltd	8.64
Restonic (Dongguan) Furniture Ltd., or Restonic Far East (Samoa) Ltd	8.64
RiZhao SanMu Woodworking Co., Ltd	8.64
Season Furniture Manufacturing Co., or Season Industrial Development Co	8.64
Sen Yeong International Co., Ltd., or Sheh Hau International Trading Ltd	8.64
Shanghai Jian Pu Export & Import Co., Ltd	8.64
Shanghai Maoji Imp and Exp Co., Ltd	8.64
Sheng Jing Wood Products (Beijing) Co., Ltd., or Telstar Enterprises Ltd	8.64
Shenyang Shining Dongxing Furniture Co., Ltd	8.64
Shenzhen Forest Furniture Co., Ltd	8.64
Shenzhen Jiafa High Grade Furniture Co., Ltd., or Golden Lion International Trading Ltd	8.64
Shenzhen New Fudu Furniture Co., Ltd	8.64
Shenzhen Wonderful Furniture Co., Ltd	8.64
Shenzhen Xiande Furniture Factory	8.64
Shenzhen Xingli Furniture Co., Ltd	8.64
Shun Feng Furniture Co., Ltd	8.64
Songgang Jasonwood Furniture Factory, or Jasonwood Industrial Co., Ltd. S.A	8.64
Starwood Furniture Manufacturing Co. Ltd	8.64
Starwood Industries Ltd	8.64
Strongson Furniture (Shenzhen) Co., Ltd., or Strongson Furniture Co., Ltd., or Strongson (HK) Co	8.64
Sunforce Furniture (Hui-Yang) Co., Ltd., or Sun Fung Wooden Factory, or Sun Fung Co., or Shin Feng Furniture Co., Ltd., or Stupendous International Co., Ltd	8.64
Superwood Co., Ltd., or Lianjin Zongyu Art Products Co., Ltd	8.64
Tarzan Furniture Industries Ltd., or Samso Industries Ltd	8.64
Teamway Furniture (Dong Guan) Ltd., or Brittomart Inc	8.64
Techniwood Industries Ltd., or Ningbo Furniture Industries Limited, or Ningbo Hengrun Furniture Co., Ltd	8.64
Tianjin Fortune Furniture Co., Ltd	8.64
Tianjin Master Home Furniture	8.64
Tianjin Phu Shing Woodwork Enterprise Co., Ltd	8.64
Tianjin Sande Fairwood Furniture Co., Ltd	8.64
Tube-Smith Enterprise (ZhangZhou) Co., Ltd., or Tube-Smith Enterprise (Haimen) Co., Ltd., or Billonworth Enterprises Ltd	8.64
Union Friend International Trade Co., Ltd	8.64
U-Rich Furniture (Zhangzhou) Co., Ltd., or U-Rich Furniture Ltd	8.64
Wanhengtong Nueevder (Furniture) Manufacture Co., Ltd., or Dongguan Wanengtong Industry Co., Ltd	8.64
Woodworth Wooden Industries (Dong Guan) Co., Ltd	8.64
Xiamen Yongquan Sci-Tech Development Co., Ltd	8.64
Jiangsu XiangSheng Bedtime Furniture Co., Ltd	8.64
Xingli Arts & Crafts Factory of Yangchun	8.64
Yangchun Hengli Co. Ltd	8.64
Yeh Brothers World Trade, Inc	8.64
Yichun Guangming Furniture Co., Ltd	8.64
Yida Co., Ltd., or Yitai Worldwide, Ltd., or Yili Co., Ltd., or Yetbuild Co., Ltd	8.64
Yihua Timber Industry Co., Ltd	8.64
Zhang Zhou Sanlong Wood Product Co., Ltd	8.64
Zhangjiagang Zheng Yan Decoration Co., Ltd	8.64
Zhangjiagang Daye Hotel Furniture Co., Ltd	8.64
Zhangzhou Guohui Industrial & Trade Co. Ltd	8.64
Zhanjiang Sunwin Arts & Crafts Co., Ltd	8.64
Zhong Shan Fullwin Furniture Co., Ltd	8.64

Company	Weighted-average margin (percent)
Zhongshan Fookyik Furniture Co., Ltd	8.64
Zhongshan Golden King Furniture Industrial Co., Ltd	8.64
Zhoushan For-Strong Wood Co., Ltd	8.64
PRC-Wide Rate	198.08

*Not a separate rate. Tech Lane and Kee Jia Wood Mfg. are subject to the PRC-wide rate.

Continuation of Suspension of Liquidation

Pursuant to 735(c)(1)(B) of the Act, we will instruct U.S. Customs and Border Protection ("CBP") to continue to suspend liquidation of all entries of subject merchandise from the PRC (except for entries of Markor because this company has a *de minimis* margin) entered, or withdrawn from warehouse, for consumption on or after June 24, 2004, the date of publication of the *Preliminary Determination*. In accordance with 19 CFR 351.204(e)(3), the exclusion only applies to merchandise produced and exported by Markor. CBP shall continue to require a cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. These instructions suspending liquidation will remain in effect until further notice.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our final determination of sales at LTFV. As our final determination is affirmative with the exception of Markor Tianjin, in accordance with section 735(b)(2) of the Act, within 45 days the ITC will determine whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of the subject merchandise. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing the CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation (*i.e.*, June 24, 2004), with the exception of merchandise produced and exported by Markor Tianjin.

Notification Regarding APO

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 735(d) and 777(I)(1) of the Act.

Dated: November 8, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix

Issues in the Decision Memorandum

I. General Issues

Comment 1: Market-Oriented Industry
Comment 2: Surrogate-Country Selection
Comment 3: Surrogate Financial Ratios
Comment 4: Tech Lane
Comment 5: Tech Lane Rate/Section A Rate
Comment 6: Treatment of Abrasives
Comment 7: Brokerage and Handling
Comment 8: Treatment of Non-Dumped Sales
Comment 9: Russian Timber Prices
Comment 10: Use of Infodrive and IBIS Data
Comment 11: Sets Reported by Markor and Lacquer Craft
Comment 12: Electricity for Factory Overhead and SG&A
Comment 13: *Sigma* Freight Rule and Market-Economy Purchases
Comment 14: Furniture Parts
Comment 15: Valuation of NME Self-Made, Semi-Finished, or Subcontracted Parts

II. Surrogate Values

Comment 16: Surrogate Value—General
Comment 17: Purchase Price Information
Comment 18: Exclusion of Aberrational Data
Comment 19: Dorbest
Comment 20: Lung Dong
Comment 21: Markor
Comment 22: Starcorp
Comment 23: Labor Surrogate Value and Calculation of Expected NME Wages
Comment 24: Reliability of Data
Comment 25: Mirror, Glass, *Glass Yug*
Comment 26: Paint-General
Comment 27: The Asian Paints Price List
Comment 28: Packing Cardboard
Comment 29: Packing Materials (Cardboard)

III. Mandatory Respondents—Company-Specific Issues

A. Dorbest

Comment 30: Commissions
Comment 31: Cheval mirrors
Comment 32: Brokerage and handling
Comment 33: Offset adjustment for by-products
Comment 34: Direct selling expenses
Comment 35: Conversion factors
Comment 36: Contemporaneity of surrogate-value data
Comment 37: Free-of-charge merchandise
Comment 38: Wood inputs
Comment 39: Cardboard and Wood Scrap figures
Comment 40: Diesel Fuel
Comment 41: Packing labor
Comment 42: Factors information for a certain item

B. Lacquer Craft

Comment 43: Rubberwood and Marupa
Comment 44: CEP offset
Comment 45: Negative Allowances
Comment 46: Market Economy Purchases for Paint Inputs
Comment 47: Overhead Expenses
Comment 48: Warehousing Expenses

C. Lung Dong

Comment 49: Surrogate Value for Medium-Density Fiberboard
Comment 50: Minor Corrections from Verification
Comment 51: Clerical-Error Allegations
Comment 52: Exclusion of Potentially Non-Subject Merchandise
Comment 53: Correction of Reported Control Number for Certain Product Codes
Comment 54: Conversion Ratios for Veneer, Polyester Fabric, and Glass
Comment 55: Medium-Density Fiberboard used for Packing
Comment 56: Lung Dong's Market-Economy Purchases of Adhesives and Other Inputs
Comment 57: Weight-Averaging the Factors of Production

D. Markor

Comment 58: Affiliation

E. Shing Mark

Comment 59: Ministerial Errors
Comment 60: U.S. Movement Expense
Comment 61: Market Economy Purchases
Comment 62: Transportation Distances
Comment 63: Control-Number Errors

[FR Doc. 04–25507 Filed 11–16–04; 8:45 am]
BILLING CODE 3510–25–P

DEPARTMENT OF COMMERCE

International Trade Administration

Texas A&M Research Foundation; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 04–019.

Applicant: Texas A&M Research Foundation.

Instrument: Scanning Hall Probe Microscope.

Manufacturer: NanoMagnetics Instruments, Ltd., The United Kingdom.

Intended Use: See notice at 69 FR 62435, October 26, 2004.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States.

Reasons: The foreign instrument provides: characterization of micron and submicron scale magnetic structures under changing magnetic fields and temperatures with operability to 7T and to 2K.

A domestic manufacturer of similar equipment advises that (1) these capabilities are pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. E4–3202 Filed 11–16–04; 8:45 am]
BILLING CODE 3510–P

DEPARTMENT OF COMMERCE

International Trade Administration

Applications for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 04–018.

Applicant: University of California, Los Alamos National Laboratory, PO Box 1663, Los Alamos, New Mexico 87545.

Instrument: Hydraulic Press.

Manufacturer: Osterwalder AG, Switzerland.

Intended Use: The instrument is intended to be used to compress ceramic and metallic powders of actinide elements into fissile cylindrical pellets which are irradiated and then evaluated for linear heat generation, thermal conductivity, mechanical integrity and radiation tolerance in conjunction with research on suitability as nuclear fuels.

Application accepted by Commissioner of Customs: October 12, 2004.

Docket Number: 04–020.

Applicant: Johns Hopkins University, 3400 N. Charles Street, Baltimore, MD 21218.

Instrument: Dual-beam Focused Ion Beam System, Model Number Nova 600 NanoLab (FP 22067/31).

Manufacturer: FEI Company, The Netherlands.

Intended Use: The instrument is intended to be used to study:

1. New microcircuitry that employs spin currents and conventional electrical currents to carry and store information,

2. Development of new stencil mask methods of lateral nanostructure fabrication,

3. Fabrication of high performance cantilevers for atomic force and magnetic force microscopy,

4. The mechanisms of cell adhesion and growth on nonoengineered surfaces,

5. The dynamics of materials' surfaces.

Application accepted by Commissioner of Customs: October 20, 2004.

Docket Number: 04–021.

Applicant: The J. David Gladstone Institutes, 365 Vermont Street, San Francisco, CA 94103.

Instrument: Electron Microscope, Model JEM–1230.

Manufacturer: JEOL Ltd., Japan.

Intended Use: The instrument is intended to be used to examine biological samples from mice and tissue culture to study the effects of manipulating specific genes in genetically altered mice to determine specific cellular pathways and their relevance to human disease and the consequence of altering these pathways. It will also be used as a quality control check for the homogeneity of generated protein-lipid complexes.

Application accepted by Commissioner of Customs: October 29, 2004.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. E4–3201 Filed 11–16–04; 8:45 am]
BILLING CODE 3510–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–839]

Final Affirmative Countervailing Duty Determination: Carbazole Violet Pigment 23 From India

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has reached a final determination that countervailable subsidies are being provided to producers/exporters of carbazole violet pigment 23 (CVP–23) from India. For information on the estimated countervailable subsidy rates, please see the "Suspension of Liquidation" section of this notice.

EFFECTIVE DATE: November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Sean Carey or Addilyn Chams-Eddine, Office of AD/CVD Operations, Office VI, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3964 and (202) 482–0648 respectively.

SUPPLEMENTARY INFORMATION:

Case History

The petition in this investigation was filed November 21, 2003, by Nation Ford Chemical and Sun Chemical Company (collectively, the petitioners). On December 11, 2003, we initiated the investigation. *See Notice of Initiation of Countervailing Duty Investigation: Carbazole Violet Pigment 23 (CVP–23) from India*, 68 FR 70778 (December 19, 2003). On April 27, 2004, the Department published its affirmative preliminary determination and, in accordance with section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), we aligned the final determination in this countervailing duty investigation with the final determination in the antidumping duty investigation of CVP–23 from India. *See Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment with Final Antidumping Duty Determination: Carbazole Violet Pigment 23 from India*, 69 FR 22763 (April 27, 2004) *(Preliminary Determination)*.

Since the *Preliminary Determination*, the following events have occurred. Alpanil Industries Ltd. (Alpanil) provided a response on April 30, 2004, for its trading company, Meghmani Organics Ltd. (Meghmani), and its use of the subsidy programs under investigation. We issued supplemental questionnaires to the Government of India (GOI) on May 11, 2004, and to Alpanil and Pidilite Industries Ltd. (Pidilite) on May 18, 2004. The GOI filed its response on May 25, 2004, and Alpanil and Pidilite filed their responses on June 7, 2004. On June 14, 2004, Alpanil submitted additional information that was inadvertently omitted from its June 7, 2004, response. In the Department's June 23, 2004, memorandum to the file, we noted our request to Alpanil to provide Meghmani's tax return filed during the POI. Alpanil provided this information in its June 30, 2004, submission.

From July 12 through July 31, 2004, the Department conducted verification of the questionnaire responses provided by the GOI, Alpanil and Pidilite. The Department issued the GOI and Pidilite verification reports on September 29, 2004. *See* Memorandum to the File from Sean M. Carey to Dana Mermelstein, *Countervailing Duty Investigation of Carbazole Violet Pigment 23 (CVP–23) from India: Verification of the Government of India's (GOI) Subsidy Programs*; Memorandum to the File from Addilyn P. Chams-Eddine to Barbara E. Tillman, *Countervailing Duty Investigation of Carbazole Violet Pigment 23 from India: Verification of the Pidilite Industries Ltd., located in Mumbai, India*. The Alpanil verification report was issued on October 8, 2004. *See* Memorandum to the File from Sean M. Carey and Addilyn Chams-Eddine to Dana Mermelstein, *Countervailing Duty Investigation of Carbazole Violet Pigment 23 from India: Verification of Alpanil Industries Ltd.* In addition, on October 8, 2004, we issued a memorandum containing our preliminary analysis of the Central Value Added Tax Program (CENVAT) which we had listed in the *Preliminary Determination* as a program for which additional information was needed. *See* Memorandum to the File from Barbara E. Tillman, Director, Office of AD/CVD Enforcement VI, to Jeffrey A. May, Deputy Assistant Secretary, Import Administration, *Countervailing Duty Investigation of Carbazole Violet Pigment-23 from India: Preliminary Analysis of the Central Value Added Tax (CENVAT) Program*, (*CENVAT Memorandum*).

On October 7, 2004, case briefs were filed by Alpanil and Pidilite, by the petitioners, and by Clariant, a domestic producer which supports the petition. On October 12, 2004, these parties filed rebuttal briefs. We allowed parties a separate opportunity to file comments and rebuttal comments on our *CENVAT Memorandum*. No parties provided direct comments, however, the GOI provided rebuttal comments on October 18, 2004. The Department allowed parties an opportunity to respond to the GOI's rebuttal brief. No parties provided comments.

Period of Investigation

The investigation covers all producers/exporters of subject merchandise in India for the period April 1, 2002, through March 31, 2003.

Scope of the Investigation

The merchandise covered by this investigation is CVP–23 identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of *diindolo [3,2-b:3',2'-m] triphenodioxazine, 8,18-dichloro-5,15-diethy-5,15-dihydro-*, and molecular formula of $C_{34}H_{22}Cl_2N_4O_2$.[1] The subject merchandise includes the crude pigment in any form (*e.g.*, dry powder, paste, wetcake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.*, pigments dispersed in oleoresins, flammable solvents, water) are not included within the scope of the investigation.

Analysis of Comments Received

All issues raised by the interested parties in their case and rebuttal briefs, and comments on our *CENVAT Memorandum* are addressed in the "Issues and Decision Memorandum" (*Decision Memorandum*) dated November 8, 2004, which is hereby adopted by this notice. A list of the issues which parties have raised is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in this investigation and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit (CRU). This public memorandum also contains the recommended adverse facts available program rates and the total countervailable subsidy rate for the non-responding company, AMI. A complete version of the *Decision Memorandum* is available at *http://www.ia.ita.doc.gov* under the heading **Federal Register** Notices. The paper copy and the electronic version of the *Decision Memorandum* are identical in content.

Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i) of the Act, we have

[1] The bracketed section of the product description, [3,2-b:3',2'-m], is not business propietary information. In this cae, the brackets are simply part of the chemical nomenclature. *See* December 4, 2003, amendment to petition (supplementary petition) at 8.

determined individual rates for Alpanil, Pidilite and AMI Pigments Pvt. Ltd. (AMI). Because AMI's rate is based on partial facts available rather than on total facts available, we are including its rate in the calculation of the "all others" rate in accordance with section 705(c)(5)(A)(i) of the Act. To calculate the "all others" rate, we weight-averaged the individual company rates by each company's respective sales of subject merchandise made to the United States during the POI. These rates are summarized in the table below:

Producer/ exporter	Net subsidy rate (percent ad valorem)
Alpanil Industries Ltd	17.57
Pidilite Industries Ltd	17.33
AMI Pigments Pvt. Ltd	33.61
All Others	20.55

In accordance with our preliminary affirmative determination, we instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of CVP–23 from India, which were entered or withdrawn from warehouse, for consumption on or after April 27, 2004, the date of the publication of our preliminary determination in the **Federal Register**. In accordance with section 703(d) of the Act, we instructed CBP to discontinue the suspension of liquidation for merchandise entered on or after August 26, 2004, but to continue the suspension of liquidation of entries made between April 27, 2004, through August 25, 2004.

If the International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a countervailing duty order, reinstate suspension of liquidation under section 706(a) of the Act for all entries, and require a cash deposit of estimated countervailing duties for such entries of merchandise at the rates indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided that the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Import Administration.

Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO.

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act.

November 8, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix I: Issues and Decision Memorandum

Summary

[FR Doc. E4–3196 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 111004G]

North Pacific Fishery Management Council; Notice of Public Meeting

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

ACTION: Meeting of the North Pacific Fishery Management Council's Pacific Northwest Crab Industry Advisory Committee.

SUMMARY: The Pacific Northwest Crab Industry Advisory Committee will meet to develop summary comments and recommendationsregarding the NOAA proposed rule for implementing the BSAI Crab Rationalization Program, Amendments 18 and 19 to the Fishery Management Plan for Bering Sea Aleutian King and Tanner Crabs.

DATES: November 29, 2004, from 9 a.m. to 2 p.m.

ADDRESSES: The meeting will be held at 2245 NW 57th Street, Seattle, WA 98107 (at the Leif Erickson Hall in Ballard).

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Stram, Council staff, phone: 907–271–2809.

SUPPLEMENTARY INFORMATION:

Agenda

The purpose of the meeting is to develop summary comments and recommendations regarding the NOAA proposed rule for implementing the BSAI Crab Rationalization Program, Amendments 18 and 19 to the Fishery Management Plan for Bering SeaAleutian King and Tanner Crabs.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at 907–271–2809 at least seven working days prior to the meeting date.

Dated: November 10, 2004.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–25506 Filed 11–12–04; 3:58 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 111204A]

Pacific Fishery Management Council; Notice of Public Meeting

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

ACTION: Notice of the Pacific Fishery Management Council's Ad Hoc Groundfish Habitat Technical Review Committee.

SUMMARY: The Pacific Fishery Management Council's (Council) Ad Hoc Groundfish Habitat Technical Review Committee will hold a working meeting on December 7–8, 2004. The meeting is open to the public.

DATES: The Ad Hoc Groundfish Habitat Technical Review Committee working meeting will begin Tuesday, December 7, 2004, at 10 a.m. and may go into the evening until business for the day is completed. The meeting will reconvene from 8–4 p.m., Wednesday, December 8, 2004.

ADDRESSES: The meeting will be at the following address: Hotel Vintage Plaza, Burgundy Room, 422 SW Broadway Avenue, Portland, OR 97205, telephone 800–243–0555.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR, 97220–1384.

FOR FURTHER INFORMATION CONTACT: Dr. Christopher Dahl, National Environmental Policy Analyst, 503–820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the Ad Hoc Groundfish Habitat Technical Review Committee meeting is to provide a technical review of the range of alternatives in a preliminary draft Environmental Impact Statement to designate and conserve Essential Fish Habitat for Pacific Coast groundfish. By holding a public meeting, the committee will provide opportunity for public participation in the review process. The committee will only consider technical and scientific questions and will not engage in policy discussions as part of its mission.

Although non-emergency issues not contained in this notice may come before this Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at 503–820–2280 at least 7 days prior to the meeting date.

Dated: November 12, 2004.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–25525 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 110904I]

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notification of a proposal for a permit to conduct experimental fishing; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator) has made a preliminary determination that the subject Exempted Fishing Permit (EFP) application contains all the required information and warrants further consideration. The Assistant Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Northeast (NE) Multispecies Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue the EFP. Therefore, NMFS announces that the Assistant Regional Administrator proposes to issue an EFP that would allow three vessels to conduct fishing operations that are otherwise restricted by the regulations governing the fisheries of the Northeastern United States. The EFP would allow for

exemptions from the NE multispecies closed area restrictions and the NE multispecies minimum fish size requirements. The applicant proposes to conduct a study of an experimental haddock separator trawl, a bycatch reduction device, in order to examine the effectiveness of this type of gear at reducing the catch of Atlantic cod, and other similarly behaving groundfish, when targeting haddock. The EFP would allow these exemptions for three commercial vessels for a combined total of 50 days at sea. All experimental work would be monitored by Gulf of Maine Research Institute (GMRI) personnel. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments must be received on or before December 2, 2004.

ADDRESSES: Comments on this notice may be submitted by e-mail. The mailbox address for providing e-mail comments is *DA676@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: "Comments on GMRI EFP Proposal for Haddock Separator Trawl Study (DA–676)." Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on GMRI EFP Proposal for Haddock Separator Trawl Study (DA–676)." Comments may also be sent via fax to (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Peter Cooper, Fishery Management Specialist, phone: 978–281–9122, fax: 978–281–9135.

SUPPLEMENTARY INFORMATION: An application for an EFP was submitted by GMRI on August 26, 2004. The EFP would exempt three federally permitted commercial fishing vessels from the following requirements in the FMP: NE multispecies closed area restrictions specified at §§ 648.81(a) and 648.81(b) to provide an optimum mixture of cod and haddock for testing the experimental gear; and the NE multispecies minimum fish size requirements specified at § 648.83(a) in order to allow weighing and measuring of the entire catch.

The goal of this study is to assess the selectivity of a bycatch reduction device in Closed Area (CA) I and CA II of the NE groundfish fishery. Three factors are proposed to be examined in this study: (1) Net Selectivity - examination of the catch composition in the experimental net; (2) Environmental Factors - air and water temperature, wind, sea state, and weather data would be collected at every station; and (3) Seasonal Variation - the study would be conducted over 10 months to determine if there are any seasonal differences in catch or fish behavior. The specific trawl design to be tested is referred to as a haddock separator trawl, which consists of a separation panel comprised of 6.5–inch (16.5–cm) diamond mesh integrated horizontally into a conventional trawl net designed with 6.5–inch (16.5–cm) mesh in the fishing circle and 6.5–inch (16.5–cm) mesh in the codend. The codend would be further modified to create an upper and lower codend.

The study would be conducted from November 2004 through February 2005, and from May 2005 through October 2005. Separator trawl gear testing would take place aboard three different fishing vessels totaling 220, 20-minute trawls conducted over 50 days at sea. All of the trawls are expected to take place inside portions of CA I and CA II. The proposers are requesting access to CA II only if the Eastern U.S./Canada Haddock Special Access Program (SAP) Pilot Program that is proposed in Framework 40–A to the FMP is not approved. The areas to be trawled are within 19 defined 5–square-nautical mile areas, all at least partially within the central portion of CA I, the area that lies outside of the CA I Habitat Closure Area (HCA); and within three defined 5–square-nautical mile areas, all at least partially within the Eastern U.S./Canada Haddock SAP Pilot Program that is proposed in Framework 40–A to the FMP. One trawl per month would be randomly conducted in each cell. Tows in cells that partially overlap the HCA in CA I and CA II would be conducted only in areas of the cells that are not within the HCA. All fish retained by the upper and lower codends would be counted, weighed, and measured. All legal catch would be landed and sold, consistent with the current daily and trip possession and landing limits. Current regulations restrict vessels fishing on Georges Bank to landing no more than 1,000 lb (454 kg) of cod per day-at-sea (DAS), up to a maximum of 10,000 lb (4,536 kg) per trip, and no more than 3,000 lb (1,361 kg) of haddock per DAS, up to a maximum of 30,000 lb (13,608 kg) per trip from May 1 to September 30; and no more than 5,000 lb (2,268 kg), up to a maximum of 50,000 lb (22,680 kg) per trip from October 1 to April 30. Undersized fish would be returned to the sea as quickly as possible after measurement. The participating vessels would be required to report all landings in their Vessel Trip Reports.

The target fishery is the groundfish mixed-species fishery; the target species is haddock. Estimates of the total amount of the primary species that are expected to be caught under this EFP are: 210,000 lb (95,254 kg) of haddock; 21,000 lb (9,525 kg) of Atlantic cod; 250 lb (113 kg) of pollock; and 250 lb (113 kg) yellowtail flounder. Other commercially important fish commonly found in the groundfish mixed-species fishery are expected to be caught incidentally. The incidental catch is expected to be comprised of American plaice, monkfish, skates, spiny dogfish, white hake, winter flounder, and witch flounder.

The applicant is preparing an Environmental Assessment (EA) that will analyze the impacts of the proposed experimental fishery on the human environment. This EA will examine whether the proposed activities are consistent with the goals and objectives of the FMP, whether they would be detrimental to the well-being of any stocks of fish harvested, and whether they would have any significant environmental impacts. The EA will also examine whether the proposed experimental fishery would be detrimental to essential fish habitat, marine mammals, or protected species.

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

Dated: November 10, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E4–3190 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–08–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 110904B]

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notification of a proposal for permits to conduct experimental fishing; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator) has made a preliminary determination that the

subject Exempted Fishing Permit (EFP) application contains all the required information and warrants further consideration. The Assistant Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Northeast (NE) Multispecies Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue the EFP. Therefore, NMFS announces that the Assistant Regional Administrator proposes to recommend that an EFP be issued that would allow one commercial fishing vessel to conduct fishing operations that are otherwise restricted by the regulations governing the fisheries of the Northeastern United States. The EFP would allow for exemptions from the FMP as follows: The Gulf of Maine (GOM) Rolling Closure Areas, the NE multispecies days-at-sea (DAS) effort control program, the NE multispecies DAS notification requirement, and the minimum mesh size for trawl gear. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments must be received on or before December 2, 2004.

ADDRESSES: Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on the GOM High Opening Raised Footrope Trawl for Haddock and Pollock." Comments may also be sent via fax to (978) 281–9135, or be submitted via e-mail to the following address: *da702@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Karen Tasker, Fishery Management Specialist, phone 978–281–9273.

SUPPLEMENTARY INFORMATION: An application for an EFP was submitted on October 12, 2004, by Dr. Pingguo He of the University of New Hampshire (UNH) for a Northeast Consortium contract project. The primary goal of the research is to design and test a high opening haddock raised footrope trawl for potential use in B DAS programs in the GOM.

The project, which is anticipated to be two years in duration, would include flume tank trials and 10 days of at-sea trials, per year. At-sea trials would consist of three to four 1-hour tows per sea day. Additionally, researchers would use remote underwater video observation and acoustic gear geometry monitoring to assess the success of the net during at-sea trials. The experimental net would consist of long drop-chains hanging between the fishing line and the sweep (raised footrope), creating a space for cod, flounders, and other benthic animals to escape or fall under the fishing line. The trawl would incorporate large meshes in the wings and belly, and kites in the square near the headline. Kites may also be used near the wingends to expand the trawl. Researchers have requested a small mesh exemption to allow for the use of a second codend or a small mesh cover to collect fish released from the trawl to assess the effectiveness of the separator trawl.

All specimens caught would be sampled and measured. All undersized fish will be returned to the sea as quickly as practical after measurement and examination. The overall fishing mortality is estimated to be 30 percent of the average commercial fishing mortality on a DAS. The researcher anticipates that a total of 5,217 lb (2,366.4 kg) of fish, including 1,300 lb (589.7 kg) of cod, would be harvested throughout the course of the study. Other species that are anticipated to be caught are haddock, dab, yellowtail flounder, winter flounder, grey sole, white hake, and pollock. All legal-sized fish, within the possession limit, would be sold, with the proceeds returned to the project for the purpose of enhancing future research.

Year one of the study would take place from May 1, 2005, to April 30, 2006. All at-sea research during year one would be conducted from one fishing vessel. During the second year of the project, two vessels would conduct at-sea research. The trials would occur in the area north of 43°00′ N. lat. and west of 69°00′ W. long., especially in the inshore GOM, excluding the Western GOM Closure Area. Researchers have asked for an exemption to the regulations establishing the Western GOM Rolling Closure Areas because they believe that an optimal mixture of haddock and cod for testing this gear is present in the Western GOM waters during May and June. Because the aim of the project is to develop gear that could separate haddock and cod before the fish are brought onboard, an exemption from the Western GOM Rolling Closure Areas is important to the success of the study. Exemption from 10 DAS is also requested to conduct the experiment because a commercial DAS level of effort would not likely be realized due to the additional time that would be necessary to weigh, measure, and sort the catch, and to adjust underwater video and acoustic monitoring systems.

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

Dated: November 10, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E4–3191 Filed 11–16–04; 8:45 am]

BILLING CODE 3510–08–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in the Arab Republic of Egypt

November 10, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection adjusting limits.

EFFECTIVE DATE: November 16, 2004

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Bureau of Customs and Border Protection website (http://www.cbp.gov), or call (202) 344-2650. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limits for certain categories are being adjusted for swing and carryover.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 69 FR 4926, published on February 2, 2004). Also

see 68 FR 59916, published on October 20, 2003.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 10, 2004.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on October 14, 2003, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products in the following categories, produced or manufactured in Egypt and exported during the twelve-month period which began on January 1, 2004 and extends through December 31, 2004.

Effective on November 16, 2004, you are directed to adjust the limits for the following categories, as provided for under the Uruguay Round Agreement on Textiles and Clothing:

Category	Adjusted twelve-month limit [1]
Fabric Group 218–220, 224–227, 313–O [2], 314–O [3], 315–O [4], 317–O [5] and 326–O [6], as a group	205,897,117 square meters.
Level not in a group 448	24,939 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 2003.

[2] Category 313–O: all HTS numbers except 5208.52.3035, 5208.52.4035 and 5209.51.6032.

[3] Category 314–O: all HTS numbers except 5209.51.6015.

[4] Category 315–O: all HTS numbers except 5208.52.4055.

[5] Category 317–O: all HTS numbers except 5208.59.2085.

[6] Category 326–O: all HTS numbers except 5208.59.2015, 5209.59.0015 and 5211.59.0015.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,
D. Michael Hutchinson,
Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E4–3177 Filed 11–17–04; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Pakistan

November 10, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection adjusting limits.

EFFECTIVE DATE: November 16, 2004.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Bureau of Customs and Border Protection website (http://www.cbp.gov), or call (202) 344-2650. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limits for certain categories are being adjusted for special shift.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 69 FR 4926, published on February 2, 2004). Also see 68 FR 68599, published on December 9, 2003.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 10, 2004.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 3, 2003, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton and man-made fiber textile products produced or manufactured in Pakistan and exported during the twelve-month period which began on January 1, 2004 and extends through December 31, 2004.

Effective on November 16, 2004, you are directed to adjust the limits for the following categories, as provided for under the Uruguay Round Agreement on Textiles and Clothing:

Category	Twelve-month restraint limit [1]
Specific limits	
360	10,504,819 numbers.
361	11,557,218 numbers.
666–P [2]	1,414,684 kilograms.
666–S [3]	7,072,067 kilograms.

[1] The limits have not been adjusted to account for any imports exported after December 31, 2003.

[2] Category 666–P: only HTS numbers 6302.22.1010, 6302.22.1020, 6302.22.2010, 6302.32.1010, 6302.32.1020, 6302.32.2010 and 6302.32.2020.

[3] Category 666–S: only HTS numbers 6302.22.1030, 6302.22.1040, 6302.22.2020, 6302.32.1030, 6302.32.1040, 6302.32.2030 and 6302.32.2040.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,
D. Michael Hutchinson,
Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E4–3178 Filed 11–16–04 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF DEFENSE

Notice of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), Public Law 96–463, notice is hereby given that the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies will hold an open meeting at The Thayer Hotel, 674 Thayer Road, West Point, New York 10996, on December 3, 2004 from 11 a.m. to 12 p.m.

Purpose

The Task Force will meet on December 3, 2004, from 11 a.m. until 12 p.m., and this session will be open to the public, subject to the availability of space. In keeping with the spirit of Federal Advisory Committee Act, it is the desire of the Task Force to provide the public with an opportunity to ask questions of the Task Force or to make comment regarding the current work of the Task Force. No internal Task Force meeting will be conducted at this time nor will the Task Force receive any briefings. Any interested citizens are encouraged to attend.

DATES: December 3, 2004/11 a.m.–12 p.m.

Location: The Thayer Hotel, 674 Thayer Road, West Point, New York 10996.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this meeting or wishing to submit comments must contact: Mr. William Harkey, Public Affairs Officer, Task Force on Sexual Harassment and Violence at the Military Service Academies, 2850 Eisenhower Ave., Suite 100, Alexandria, Virginia 22314, Telephone: (703) 325–6640, DSN# 221–6640, Fax: (703) 325–6710/6711, *william.harkey.CTR@wso.whs.mil.*

Interested persons may submit a written statement for consideration by the Task Force and make an oral presentation of such. Persons desiring to make an oral presentation or submit a written statement to the Committee must notify the point of contact listed above no later than 5 p.m., November 19, 2004. Oral presentations by members of the public will be permitted only on December 3, 2004, from 11 a.m. until 12 p.m. before the full Task Force. Presentations will be limited to five minutes each. Number of oral presentations to be made will depend on the number of requests received from members of the public and the time allotted. Each person desiring to make an oral presentation must provide the point of contact listed above with one (1) written copy of the presentation by 5 p.m., November 19, 2004 and bring 15 written copies of any material that is intended for distribution at the meeting. Persons submitting a written statement must submit 15 written copies of the statement to the Task Force staff by 5 p.m. on November 22, 2004.

General Information: Additional information concerning the Defense Task Force on Sexual Harassment and Violence at The Military Service Academies, its structure, function, and composition, may be found on the DTFSH and VTMA Web site (*http://www.dtic.mil/dtfs*).

Dated: November 9, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–25442 Filed 11–16–04; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Notice of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies

AGENCY: Department of Defense.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), Public Law 96–463, notice is hereby given that the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies will hold an open meeting at The O'Callaghan Hotel Annapolis, 174 West Street, Annapolis, Maryland 21401, on December 1, 2004 from 11 a.m. to 12 p.m.

Purpose

The Task Force will meet on December 1, 2004 from 11 a.m. until 12 p.m., and this session will be open to the public, subject to the availability of space. In keeping with the spirit of Federal Advisory Committee Act, it is the desire of the Task Force to provide the public with an opportunity to ask questions of the Task Force or to make comment regarding the current work of the Task Force. No internal Task Force meeting will be conducted at this time nor will the Task Force receive any briefings. Any interested citizens are encouraged to attend.

DATES: December 1, 2004 at 11 a.m.–12 p.m.

ADDRESSES: The O'Callaghan Hotel Annapolis, 174 West Street, Annapolis, Maryland 21401.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this meeting or wishing to submit comments must contact: Mr. William Harkey, Public Affairs Officer, Task Force on Sexual Harassment and Violence at the Military Service Academies, 2850 Eisenhower Ave, Suite 100, Alexandria, Virginia 22314, Telephone: (703) 325–6640, DSN# 221–6640, Fax: (703) 325–6710/6711, *william.harkey.CTR@wso.whs.mil.*

Interested persons may submit a written statement for consideration by the Task Force and make an oral presentation of such. Persons desiring to make an oral presentation or submit a written statement to the Committee must notify the point of contact listed above no later than 5 p.m., November 19, 2004. Oral presentations by members of the public will be permitted only on December 1, 2004, from 11 a.m. until 12 p.m. before the full Task Force.

Presentations will be limited to five minutes each. Number of oral presentations to be made will depend on the number of requests received from members of the public and the time allotted. Each person desiring to make an oral presentation must provide the point of contact listed above with one (1) written copy of the presentation by 5 p.m., November 19, 2004 and bring 15 written copies of any material that is intended for distribution at the meeting. Persons submitting a written statement must submit 15 written copies of the statement to the Task Force staff by 5 p.m. on November 22, 2004.

General Information

Additional information concerning the Defense Task Force on Sexual Harassment and Violence at The Military Service Academies, its structure, function, and composition, may be found on the DTFSH and VTMA Web site (*http://www.dtic.mil/dtfs*).

Dated: November 9, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–25632 Filed 11–15–04; 1:29 p.m.]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 18, 2005.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5)

respondents and frequency of collection; and (6) reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 10, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: Revision of a currently approved collection.

Title: Education Longitudinal Study of 2002, Second Follow-up.

Frequency: One time.

Affected Public: Individuals or household , Not-for-profit institutions, State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 987. Burden Hours: 576.

Abstract: The ELS:2002 second follow-up is the third time this cohort of students who were in 10th grade in 2002 will be interviewed and assessed. Data will be collected from students, dropouts, and school administrators. The field test for this study will be conducted in spring 2005. The full-scale first follow-up study will be conducted in spring 2006. This longitudinal study is intended to measure school effectiveness and impact on postsecondary and labor market outcomes.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2638. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at 540–776–7742 or *Kathy.Axt@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 04–25448 Filed 11–16–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments December 17, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment.

Dated: November 10, 2004.

Angela C. Arrington,

Leader Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Vocational and Adult Education

Type of Review: New Collection.

Title: Annual Performance Report for Grants under the Smaller Learning Communities Program—Cohort 2 (SC).

Frequency: Annually.

Affected Public: State, local, or tribal government, SEAs or LEAs (primary).

Reporting and Recordkeeping Hour Burden Responses: 181.

Burden Hours: 1448.

Abstract: The Annual Performance Report form requests information from grantees regarding progress made in achieving the objectives identified in the grantee's application including student outcome data and program implementation information.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2612. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to (202) 245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at (202) 245–6432 or *Sheila.Carey@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E4–3171 Filed 11–16–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 18, 2005.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 10, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: Reinstatement.

Title: 2004/06 Beginning Postsecondary Students Longitudinal Study (BPS:04/06).

Frequency: One time.

Affected Public: Individuals or household, Businesses or other for-profit, Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 1000.

Burden Hours: 523.

Abstract: The 2004/06 Beginning Postsecondary Students Longitudinal Study (BPS:04/06) is being conducted to continue the series of longitudinal data collection efforts started in 1990 with the National Postsecondary Students Aid Study to enhance knowledge concerning progress and persistence in postsecondary education for new entrants. The study will address issues such as progress, persistence, and completion of postsecondary education programs, entry into the workforce, the relationship between experiences during postsecondary education and various societal and personal outcomes, and returns to the individual and to society on the investment in postsecondary education.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2643. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at 540 776–7742 or *Kathy.Axt@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E4–3173 Filed 11–16–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services, Overview Information; National Institute on Disability and Rehabilitation Research (NIDRR)—Field Initiated (FI) Projects; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2005

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133G–1 (Research) and 84.133G–2 (Development)

DATES:

Applications Available: November 17, 2004. Deadline for Transmittal of Applications: January 18, 2005.

Eligible Applicants: States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; institutions of higher education; and Indian tribes and tribal organizations.

Estimated Available Funds: $3,750,000. The Administration has requested $3,750,000 for this program for FY 2005. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $145,000–$150,000.

Estimated Average Size of Awards: $147,500.

Maximum Award: We will reject any application that proposes a budget exceeding $150,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Note: The maximum amount includes direct and indirect costs.

Estimated Number of Awards: 25.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of this program is to further one or both of the following: (a) Develop methods, procedures, and rehabilitation technology that maximize the full inclusion and integration into society, employment, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities; or (b) improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended (Act). FI projects carry out either research activities or development activities.

In carrying out a research activity, a grantee must identify one or more hypotheses and, based on the hypotheses identified, perform an intensive, systematic study directed toward new scientific knowledge or better understanding of the subject, problem studied, or body of knowledge.

In carrying out a development activity, a grantee must use knowledge and understanding gained from research to create materials, devices, systems, or methods beneficial to the target population, including design and development of prototypes and

processes. Target population means the group of individuals, organizations, or other entities expected to be affected by the project. More than one group may be involved since a project may affect those who receive services, provide services, or administer services.

Note: NIDRR supports the goals of President Bush's New Freedom Initiative (NFI). The NFI can be accessed on the Internet at the following site: *http://www.whitehouse.gov/infocus/newfreedom/*.

The FI projects are in concert with NIDRR's Long-Range Plan (Plan). The Plan is comprehensive and integrates many issues relating to disability and rehabilitation research and development topics. The Plan can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html*.

Through the implementation of the Plan, NIDRR seeks to: (1) Improve the quality and utility of disability and rehabilitation research; (2) foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) determine best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) identify research gaps; (5) identify mechanisms of integrating research and practice; and (6) disseminate findings.

Program Authority: 29 U.S.C. 764.

Applicable Regulations: (a) The EDUCATION DEPARTMENT General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97 and (b) the regulations for this program in 34 CFR part 350.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $3,750,000. The Administration has requested $3,750,000 for this program for FY 2005. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $145,000–$150,000.

Estimated Average Size of Awards: $147,500.

Maximum Award: We will reject any application that proposes a budget exceeding $150,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Note: The maximum amount includes direct and indirect costs.

Estimated Number of Awards: 25.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; institutions of higher education; and Indian tribes and tribal organizations.

2. *Cost Sharing or Matching:* This program does not involve cost sharing or matching.

IV. Other Submission Requirements

1. Address to Request Application Package: You may obtain an application package via Internet or from the ED Publications Center (ED Pubs). To obtain a copy via Internet use the following address: *http://www.ed.gov/fund/grant/apply/grantapps/index.html*.

To obtain a copy from ED Pubs, write or call the following: ED Pubs, PO Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA Number 84.133G.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed under section VII of this notice.

2. *Content and Form of Application Submission:* An applicant for assistance under this program must demonstrate in its application how it will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds (34 CFR 350.40(a)). All other requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit Part III to the equivalent of no more than 50 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, you must include all of the application narrative in Part III.

3. *Submission Dates and Times:*

Applications Available: November 17, 2004. Deadline for Transmittal of Applications: January 18, 2005.

We do not consider an application that does not comply with the deadline requirements.

Applications for grants under this competition may be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants system, or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery, please refer to Section IV. 6. *Other Submission Requirements* in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

If you submit your application to us electronically, you must use e-Application available through the Department's e-Grants system, accessible through the e-Grants portal page at: *http://e-grants.ed.gov*.

While completing your electronic application, you will be entering data

online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- Your participation in e-Application is voluntary.
- You must complete the electronic submission of your grant application by 4:30 p.m., Washington, DC time, on the application deadline date. The e-Application system will not accept an application for this competition after 4:30 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The regular hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until midnight Saturday, Washington, DC time. Please note that the system is unavailable on Sundays, and between 7 p.m. on Wednesdays and 6 a.m. on Thursdays, Washington, DC time, for maintenance. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- You must submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to download it and print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgement that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the ED 424 to the Application Control Center after following these steps:

1. Print ED 424 from e-Application.
2. The applicant's Authorizing Representative must sign this form.
3. Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the ED 424.
4. Fax the signed ED 424 to the Application Control Center at (202) 245–6272.

- We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of System Unavailability: If you are prevented from electronically submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

1. You are a registered user of e-Application and you have initiated an electronic application for this competition; and
2. (a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system is unavailable for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (*see* VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930.

Extensions referred to in this section apply only to the unavailability of the Department's e-Application system. If the e-Application system is available, and, for any reason, you are unable to submit your application electronically or you do not receive an automatic acknowledgement of your submission, you may submit your application in paper format by mail or hand delivery in accordance with the instructions in this notice.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must send the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133G), 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

1. A legibly dated U.S. Postal Service postmark;
2. A legible mail receipt with the date of mailing stamped by the U.S. Postal Service;
3. A dated shipping label, invoice, or receipt from a commercial carrier; or
4. Any other proof of mailing acceptable to the U.S. Secretary of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

1. A private metered postmark, or
2. A mail receipt that is not dated by the U.S. Postal Service.

If your application is post-marked after the application deadline date, we will not consider your application.

Note: Applicants should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must hand deliver the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133G), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays. A person delivering an application must show photo identification to enter the building.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

1. You must indicate on the envelope and—if not provided by the Department—in Item 4 of the ED 424 the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.
2. The Application Control Center will mail a Grant Application Receipt Acknowledgment to you. If you do not receive the notification of application receipt within 15 days from the mailing of your application, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are in 34 CFR 75.210 of EDGAR and 34 CFR 350.54. There are two different sets of

selection criteria for FI projects: one set to evaluate applications proposing to carry out research activities, and a second set to evaluate applications proposing to carry out development activities. The set of FI selection criteria that will be used to evaluate an application will be based on the applicant's designation of the type of activity (*i.e.*, research or development) that the application proposes to carry out. The specific selection criteria are in the application package.

The Secretary is interested in outcomes-oriented research and development projects that use rigorous scientific methodologies. To address this interest it is expected that applicants will articulate goals, objectives, and expected outcomes for the proposed research and development activities. It is critical that proposals describe how results and planned outputs are expected to contribute to advances in knowledge, improvements in policy and practice, and eventually to public benefits for individuals with disabilities, and propose projects that are optimally designed to be consistent with these goals. Applicants are encouraged to include information describing how they will measure progress towards achievement of anticipated outcomes, the mechanisms that will be used to evaluate outcomes associated with specific problems or issues, and how the proposed activities will support new intervention approaches and strategies, including a discussion of measures of effectiveness. Submission of this information is voluntary except where required by the selection criteria listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

Note: NIDRR will provide information by letter to grantees on how and when to submit the report.

4. *Performance Measures:* To evaluate the overall success of its research program, NIDRR assesses the quality of its funded projects through review of grantee performance and products. Each year, NIDRR and an expert panel examines, through formative and summative review, a portion of grantees to examine the quality of research and development activities and outcomes, including:

- The number of discoveries, analyses, and standards developed or tested with NIDRR funding that have been judged by expert panels to advance understanding of key concepts, issues, and emerging trends and strengthen the evidence-base for disability and rehabilitation policy, practice, and research;
- The number of new or improved tools and methods developed or tested with NIDRR funding that have been judged by expert panels to improve measurement and data collection procedures and enhance the design and evaluation of disability and rehabilitation interventions, products and devices;
- The number of new and improved interventions, programs, and devices developed or tested with NIDRR funding that have been judged by expert panels to be successful in improving individual outcomes and increasing access;
- The number of tools, methods, interventions, programs, and devices, developed or validated with NIDRR funding that meet the standards for review by independent scientific collaborations and registries; and
- The number of new or improved assistive and universally designed technologies, products, and devices developed by grantees that are judged by an expert panel to be effective in improving outcomes and have potential to be transferred to industry for commercialization.

To evaluate the overall success of individual grantee research and development activities, NIDRR assesses the quality of its funded projects through review of grantee performance and products. NIDRR uses information submitted by grantees as part of their Annual Performance Reports (APRs) for these reviews. NIDRR also determines, using information submitted as part of the APR, the number of publications in refereed journals that are based on NIDRR-funded research and development activities.

Department of Education program performance reports, which include information on NIDRR programs, are available on the Department of Education Web site: *http://www.ed.gov/offices/OUS/PES/planning.html.*

Updates on the GPRA indicators, revisions, and methods appear in the NIDRR Program Review Web site: *http://www.cessi.net/pr/grc/index.htm.*

Grantees should consult these sites, on a regular basis, to obtain details and explanations on how NIDRR programs contribute to the advancement of the Department's long-term and annual performance goals.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6030, Potomac Center Plaza, Washington, DC 20202. Telephone: (202) 245–7462 or via Internet: *donna.nangle@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 245–7317 or the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed in this section.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: November 10, 2004.

Troy R. Justesen,

Acting Deputy Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E4–3203 Filed 11–16–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Docket No. EA–206–B]

Application To Export Electric Energy; Frontera Generation Limited Partnership and TECO EnergySource, Inc. for Transfer of Authorization

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: Frontera Generation Limited Partnership (Frontera) and TECO EnergySource, Inc. (TES) have jointly applied to transfer TES's authority to transmit electric energy from the United States to Mexico from TES to Frontera, pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests or requests to intervene must be submitted on or before December 17, 2004.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Systems (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–287–5736).

FOR FURTHER INFORMATION CONTACT: Steven Mintz (Program Office) 202–586–9506 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On July 12, 1999, the Office of Fossil Energy (FE) of the Department of Energy (DOE) issued Presidential Permit PP–206 authorizing Frontera to construct, operate, maintain, and connect a 230,000-volt electric transmission line that extends from the Frontera powerplant in Mission, Texas, across the U.S. border with Mexico, and connecting to similar facilities owned by the Comision Federal de Electricidad (CFE), the national electric utility of Mexico. In a related proceeding, on July 20, 1999, in Docket EA–206, FE authorized Frontera to transmit electric energy from the United States to Mexico using the electric transmission facilities authorized in PP–206.

On May 21, 2002, Frontera and TES jointly applied to DOE to have Frontera's export authority transferred to TES. The transfer of authorization was granted by FE on August 6, 2002, in Docket No. EA–206–A.

On October 1, 2004, Frontera and TES jointly applied to DOE to have TES's export authority transferred back to Frontera. The applicants make this request in order to facilitate a planned restructuring of the applicants' parent company, TECO Energy Inc., which is exiting the merchant energy business and thus is contemplating the sale or assignment of Frontera to an unaffiliated party. One of the terms of the sale or assignment would be that the authority to export electric energy from the Frontera powerplant reside with the project entity.

Procedural Matters: Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with the DOE on or before the dates listed above.

Comments on the application to transfer the export authorization from TES to Frontera should be clearly marked with Docket EA–206–B. Additional copies are to be filed directly with David A. Crabtree, Director, Regulatory & Governmental Affairs, TECO Energy, Inc., P.O. Box 111, 702 North Franklin Street, Tampa FL 33602 and Jerry L. Pfeffer, Energy Industries Advisor, Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Avenue, NW., Washington DC 20005–2111.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy Home Page at *http://www.fe.doe.gov.* Upon reaching the Fossil Energy Home page, select "Electricity Regulation," and then "Pending Proceedings" from the options menus.

Issued in Washington, DC, on November 10, 2004.

Anthony J. Como,

Deputy Director, Electric Power Regulation, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 04–25472 Filed 11–16–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–1215–000]

Anthracite Power and Light Company; Notice of Issuance of Order

November 8, 2004.

Anthracite Power and Light Company (APL) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of energy and capacity at market-based rates. APL also requested waiver of various Commission regulations. In particular, APL requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by APL.

On October 29, 2004, the Commission granted the request for blanket approval under part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by APL should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Anthracite Power and Light Company, 109 FERC ¶ 61,106 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is November 29, 2004.

Absent a request to be heard in opposition by the deadline above, APL is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of APL, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of APL's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket

number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3186 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP05–15–000, CP05–16–000, and CP05–17–000]

Caledonia Energy Partners, Notice of Application

November 8, 2004.

Take notice that on October 26, 2004, Caledonia Energy Partners, L.L.C. (Caledonia), 3700 Forums Drive, Suite 104, Flower Mound, Texas, 75028, filed with the Federal Energy Regulatory Commission an application pursuant to section 7 of the Natural Gas Act (NGA) to construct and operate an underground natural gas storage facility in Lowndes and Monroe Counties, Mississippi. Specifically Caledonia proposes to convert a depleted natural gas reservoir, the Caledonia Field, into a high deliverability multi-cycle gas storage field capable of storing 11.7 Bcf of working gas with a maximum withdrawal capacity of 330,000 MMcf per day. The initial interconnect with Tennessee Gas Pipeline Company (Tennessee) will be at its Zone-1 500 Leg Mainline. Caledonia seeks to charge market based rates for its services which will include firm and interruptible storage services, as well as an interruptible loan service. The project will include the construction of eight horizontal injection/withdrawal wells, three 3550 horsepower compressors and approximately 1.98 miles of pipe to connect the wells, and to connect the compression facility to the Tennessee interconnect, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be also viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call (202) 502–8659 or TTY, (202) 208–3676.

Any questions regarding this application should be directed to Jim Goetz, Caledonia Energy Partners, L.L.C., 3700 Forums Drive, Suite 104, Flower Mound, Texas, 75028, at (972) 691–3332 or fax (972) 874–8743.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: November 29, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3189 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–1220–000]

Caprock Wind LLC; Notice of Issuance of Order

November 8, 2004.

Caprock Wind LLC (Caprock) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of energy and capacity at market-based rates. Caprock also requested waiver of various Commission regulations. In particular, Caprock requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Caprock.

On October 29, 2004, the Commission granted the request for blanket approval under part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Caprock should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Caprock Wind LLC, 109 FERC ¶ 61,107 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is November 29, 2004.

Absent a request to be heard in opposition by the deadline above, Caprock is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some

lawful object within the corporate purposes of Caprock, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Caprock's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3187 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–1022–000]

Choice Energy Services, L.P.; Notice of Issuance of Order

November 8, 2004.

Choice Energy Services, L.P. (Choice Energy) filed an application for market-based rate authority, with an accompanying rate schedule. The proposed rate schedule provides for wholesale sales of energy and capacity at market-based rates. Choice Energy also requested waiver of various Commission regulations. In particular, Choice Energy requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Choice Energy.

On October 29, 2004, the Commission granted the request for blanket approval under part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Choice Energy should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Choice Energy Services, 109 FERC ¶ 61,102 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protests, is December 1, 2004.

Absent a request to be heard in opposition by the deadline above, Choice Energy is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of DB Energy, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Choice Energy's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3182 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–1222–000]

DB Energy Trading LLC; Notice of Issuance of Order

November 8, 2004.

DB Energy Trading LLC (DB Energy) filed an application for market-based rate authority, with an accompanying rate schedule. The proposed rate schedule provides for wholesale sales of energy and capacity at market-based rates. DB Energy also requested waiver of various Commission regulations. In particular, DB Energy requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by DB Energy.

On November 1, 2004, the Commission granted the request for blanket approval under part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by DB Energy should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

DB Energy Trading LLC, 109 FERC ¶ 61,125 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is December 1, 2004.

Absent a request to be heard in opposition by the deadline above, DB Energy is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of DB Energy, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of DB Energy's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The

Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3188 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–1245–000]

Fibrominn LLC; Notice of Issuance of Order

November 8, 2004.

Fibrominn LLC (Fibrominn) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of energy and capacity at market-based rates. Fibrominn also requested waiver of various Commission regulations. In particular, Fibrominn requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Fibrominn.

On November 1, 2004, the Commission granted the request for blanket approval under part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Fibrominn should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Fibrominn LLC, 109 FERC ¶ 61,123 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is December 1, 2004.

Absent a request to be heard in opposition by the deadline above, Fibrominn is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Fibrominn, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Fibrominn's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3181 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–1113–000]

Pythagoras Global Investors, L.P.; Notice of Issuance of Order

November 8, 2004.

Pythagoras Global Investors, L.P. (Pythagoras) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of energy and capacity at market-based rates. Pythagoras also requested waiver of various Commission regulations. In particular, Pythagoras requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Pythagoras.

On October 29, 2004, the Commission granted the request for blanket approval under part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Pythagoras should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Pythagoras Global Investors, L.P., 109 FERC ¶ 61,109 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is November 29, 2004.

Absent a request to be heard in opposition by the deadline above, Pythagoras is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Pythagoras, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Pythagoras' issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3183 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–1194–000]

SESCO Enterprises Canada Ltd.; Notice of Issuance of Order

November 8, 2004.

SESCO Enterprises Canada Ltd. (SESCO) filed an application for market-base rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of energy and capacity at market-based rates. SESCO also requested waiver of various Commission regulations. In particular, SESCO requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by SESCO.

On November 1, 2004, the Commission granted the request for

blanket approval under part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by SESCO should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

SESCO Enterprises Canada Ltd., 109 FERC ¶ 61,128 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is December 1, 2004.

Absent a request to be heard in opposition by the deadline above, SESCO is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of SESCO, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of SESCO's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3185 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–1131–000]

Starlight Energy, LP; Notice of Issuance of Order

November 8, 2004.

Starlight Energy, LP (Starlight) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of energy and capacity at market-based rates. Starlight also requested waiver of various Commission regulations. In particular, Starlight requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Starlight.

On October 29, 2004, the Commission granted the request for blanket approval under part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Starlight should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Starlight Energy, LP, 109 FERC ¶ 61,100 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is November 29, 2004.

Absent a request to be heard in opposition by the deadline above, Starlight is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Starlight, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Starlight's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3184 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER95–1739–022, et al.]

Cogentrix Energy Power Marketing, Inc., et al.; Electric Rate and Corporate Filings

November 8, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Cogentrix Energy Power Marketing, Inc., Cogentrix Lawrence County, LLC, Green Country Energy, LLC, Quachita Power, LLC, Rathdrum Power, LLC, Southaven Power, LLC

[Docket Nos. ER95–1739–022, ER01–1819–003, ER99–2984–004, ER02–2026–002, ER99–3320–002, and ER03–922–003]

Take notice that on November 1, 2004, Cogentrix Energy Power Marketing, Inc., Cogentrix Lawrence County, LLC, Green Country Energy, LLC, Quachita Power, LLC, Rathdrum Power, LLC, and Southaven Power, LLC filed with the Federal Energy Regulatory Commission a combined triennial updated market analysis. In addition, Cogentrix Lawrence County, LLC, Green Country Energy, LLC, Quachita Power, LLC, and Rathdrum Power, LLC tendered for filing revised market-based rate tariffs incorporating the Market Behavior Rules set forth in the Commission's November 17, 2003, and May 19, 2004, orders in Docket Nos. EL01–118–000, EL01–118–001, and EL01–118–003, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

Comment Date: 5 p.m. eastern time on November 22, 2004.

2. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER02–2595–006]

Take notice that, on November 1, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a compliance filing pursuant to the Commission's September 16, 2004 Order in *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,235 (2004).

Comment Date: 5 p.m. eastern time on November 22, 2004.

3. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER04–961–002]

Take notice that, on November 1, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a compliance filing pursuant to the Commission's October 1, 2004, Order in *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,005 (2004).

Comment Date: 5 p.m. eastern time on November 22, 2004.

4. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER04–1093–001]

Take notice that on November 1, 2004, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a withdrawal of its August 3, 2004, filing of the Facilities Construction Agreement between Minnesota Power and the Midwest ISO in Docket No. ER04–1093–000.

Comment Date: 5 p.m. eastern time on November 22, 2004.

5. ISO New England Inc.

[Docket No. ER05–134–000]

Take notice that on November 1, 2004, ISO New England Inc. (ISO) filed revised tariff sheets for recovery of its administrative costs for 2005. The ISO requests an effective date of January 1, 2005.

The ISO states that copies of the transmittal letter were served upon all Participants in the New England Power Pool (NEPOOL) and all non-Participant entities that are customers under the NEPOOL Open Access Transmission Tariff, as well as on the governors and utility regulatory agencies of the six New England States, and the New England Conference of Public Utility Commissioners. The ISO also states that the Participants were served with the entire filing electronically. The ISO further states that the entire filing is posted on the ISO's Web site (*http://www.iso-ne.com*).

Comment Date: 5 p.m. eastern time on November 22, 2004.

6. ISO New England, Inc.

[Docket No. ER05–135–000]

Take notice that on November 1, 2004, ISO New England Inc. (the ISO) tendered for filing changes to its Capital Funding tariff. The ISO requests an effective date of January 1, 2005.

The ISO states that copies of the transmittal letter were served upon all Participants in the New England Power Pool (NEPOOL), as well as on the governors and utility regulatory agencies of the six New England States, and the New England Conference of Public Utility Commissioners. The ISO also states that the entire filing is posted on the ISO's Web site (*http://www.iso-ne.com*).

Comment Date: 5 p.m. eastern time on November 22, 2004.

7. Southern Company Services, Inc.

[Docket No. ER05–136–000]

Take notice that on November 1, 2004, Southern Company Services, Inc. (SCS), acting on behalf of Alabama Power Company (APC), Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively referred to as Southern Companies), filed two agreements for network integration transmission service between Southern Companies and Generation and Energy Marketing, a department of SCS, as agent for APC, under the Open Access Transmission Tariff of Southern Companies (FERC Electric Tariff, Fourth Revised Volume No. 5). SCS states that pursuant to these agreements, power will be delivered to Tombigbee EMC and to Black Warrior EMC at the delivery points specified in the agreements.

Comment Date: 5 p.m. eastern time on November 22, 2004.

8. Reliant Energy Bighorn, LLC

[Docket No. ER05–137–000]

Take notice that on November 1, 2004, Reliant Energy Bighorn, LLC (Bighorn) submitted for filing a Notice of Cancellation of its FERC Electric Tariff, Original Volume No. 1. Bighorn requests an effective date of November 1, 2004.

Comment Date: 5 p.m. eastern time on November 22, 2004.

9. Reliant Energy Etiwanda, Inc.

[Docket No. ER05–138–000]

Take notice that on November 1, 2004, Reliant Energy Etiwanda. Inc. (Etiwanda) tendered for filing revised pages for its Rate Schedule FERC No. 2, Must-Run Service Agreement. Etiwanda states that the revised pages contain revisions and updates to the schedules to the Must-Run Service Agreement, in light of the California Independent System Operator Corporation (CAISO) extension of the Must-Run Service Agreement through December 31, 2005. Etiwanda requests an effective date of January 1, 2005.

Etiwanda states that this filing has been served upon the CAISO, the California Public Utilities Commission, the California Electricity Oversight Board and Southern California Edison Company.

Comment Date: 5 p.m. eastern time on November 22, 2004.

10. Reliant Energy Choctaw County, LLC

[Docket No. ER05–139–000]

Take notice that on November 1, 2004, Reliant Energy Choctaw County, LLC (Choctaw) submitted for filing a Notice of Cancellation of its FERC Electric Tariff, Original Volume No. 1. Choctaw requests an effective date of October 1, 2004.

Comment Date: 5 p.m. eastern time on November 22, 2004.

11. Reliant Energy Osceola, LLC

[Docket No. ER03–140–000]

Take notice that on November 1, 2004, Reliant Energy Osceola, LLC (Osceola) submitted for filing a Notice of Cancellation of its FERC Electric Tariff, Revised Volume No. 1. Osceola requests an effective date of October 1, 2004.

Comment Date: 5 p.m. eastern time on November 22, 2004.

12. American Electric Power Service Corporation

[Docket No. ER05–141–000]

Take notice that on November 1, 2004, American Electric Power Service Corporation (AEPSC), on behalf of AEP Generating Company (AEG) and Kentucky Power Company (KPC), tendered for filing a proposed extension of the term of an agreement for the sale of power by AEG to KPC. AEPSC seeks an effective date of January 1, 2005.

AEPSC states that copies of the filing have been served on the state public utility commissions in Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia.

Comment Date: 5 p.m. eastern time on November 22, 2004.

13. ONEOK Energy Services, L.P.

[Docket No. ER05–142–000]

Take notice that on November 1, 2004, ONEOK Energy Services, L.P.,

(OESC) filed a Notice of Succession to adopt ONEOK Energy Marketing and Trading, L.P's market-based rate authorization and amendment to its FERC Electric Tariff, Original Volume No. 1. OESC requests an effective date of August 24, 2004.

Comment Date: 5 p.m. eastern time on November 22, 2004.

14. Reliant Energy Florida, LLC

[Docket No. ER05–143–000]

Take notice that on November 1, 2004, Reliant Energy Florida, LLC (Reliant Florida) submitted a Notice of Succession to the FERC Electric Tariff, Original Volume No. 1 of Reliant Energy Indian River, LLC. Reliant Florida requests an effective date of October 1, 2004.

Comment Date: 5 p.m. eastern time on November 22, 2004.

15. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER05–144–000]

Take notice that on November 1, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), and International Transmission Company (International Transmission), filed First Revised Sheet No. 399L.27 and First Revised Sheet No. 399L.35 to amend that part of Attachment O of the Midwest ISO's Open Access Transmission Tariff (OATT) that governs the rates in International Transmission's rate zone to correct an inconsistency with respect to the treatment of long-term interest as described in the Commission Uniform System of Accounts. Midwest ISO and International Transmission request effective dates of June 1, 2005, for First Revised Sheet No. 399L.27 and June 1, 2006, for First Revised Sheet No. 399L.35.

Midwest ISO and International Transmission state that they have electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region and that the filing has been electronically posted on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading "Filings to FERC" for other interested parties in this matter. The Midwest ISO and International Transmission state that they will provide hard copies to any interested parties upon request.

Comment Date: 5 p.m. eastern time on November 22, 2004.

16. Wayne-White Counties Electric Cooperative

[Docket No. ER05–145–000]

Take notice that on November 1, 2004, Wayne-White Counties Electric Cooperative (Wayne-White) submitted a Notice of Cancellation of Wayne-White Counties First Revised Rate Schedule FERC No. 2, an Operations Agreement between Wayne-White and the City of Fairfield, Illinois. Wayne-White requests an effective date of January 1, 2005.

Wayne-White states that a copy of this filing has been served on the Illinois Commerce Commission and the City of Fairfield, Illinois, the sole customer under the Operations Agreement.

Comment Date: 5 p.m. eastern time on November 22, 2004.

17. Virginia Electric and Power Company

[Docket No. ER05–146–000]

Take notice that on November 1, 2004, Virginia Electric and Power Company (Dominion Virginia Power) tendered for filing Appendix B to the original terms of the Service Agreement for Network Integration Transmission Service under its Open Access Transmission Tariff, FERC Electric Tariff, Second Revised Volume No. 5, between Dominion Virginia Power and Old Dominion Electric Cooperative. Dominion Virginia Power requests an effective date of November 2, 2004. In the alternative, Dominion Virginia Power requests an effective date of November 30, 2004, which is the day before Dominion's scheduled date to be integrated into PJM pending in Docket No. ER04–829–000.

Dominion Virginia Power states that copies of the filing were served upon Old Dominion Electric Cooperative, the Virginia State Corporation Commission, and the North Carolina Utilities Commission.

Comment Date: 5 p.m. eastern time on November 22, 2004.

18. Southern California Edison Company

[Docket No. ER05–148–000]

Take notice that on November 1, 2004, Southern California Edison Company (SCE) submitted revised rate sheets and Notices of Cancellation for the following agreements between SCE and the Department of Water Resources of the State of California (CDWR):

Agreement	Rate schedule FERC No.	Effective date
Power Contract	112	April 1, 1983.
Operating Procedures for SCE/CDWR Power Contract and SCE/CDWR Agreement for Emergency Services.	464	April 1, 1983.
Agreement for Emergency Services	122	December 14, 1980.
Capacity Exchange Agreement	148	April 2, 1987.

SCE states that copies of the filing were served upon the Public Utilities Commission of the State of California, the California Independent System Operator Corporation, and CDWR.

Comment Date: 5 p.m. eastern time on November 22, 2004.

19. California Independent System Operator Corporation

[Docket No. ER05–149–000]

Take notice that on November 1, 2004, the California Independent System Operator Corporation (ISO) tendered for filing Amendment No. 2 to the Interconnected Control Area Operating Agreement between the ISO and the Sacramento Municipal Utility District (SMUD) to accommodate a planned change in control area boundaries related to the decision of the Western Area Power Administration—Sierra Nevada Region to join SMUD's Control Area. The ISO requests an effective date of January 1, 2005.

The ISO states that this filing has been served on SMUD, the California Public Utilities Commission, the California Electricity Oversight Board, and all entities that are on the official service list for Docket Nos. ER02–1641, ER03–1155 and ER04–690.

Comment Date: 5 p.m. eastern time on November 22, 2004.

20. California Independent System Operator Corporation

[Docket No. ER05–150–000]

Take notice that on November 1, 2004, the California Independent System Operator Corporation (ISO), tendered for filing a Utility Distribution

Company Operating Agreement between the ISO and Trinity Public Utility District (Trinity) to accommodate a planned change in control area boundaries related to the decision of Western Area Power Administration—Sierra Nevada Region to join the Control Area of Sacramento Municipal Utility District. The ISO requests an effective date of January 1, 2005.

The ISO states that this filing has been served on Trinity, the California Public Utilities Commission, the California Electricity Oversight Board and all entities that are on the official service list for Docket No. ER04–690.

Comment Date: 5 p.m. eastern time on November 22, 2004.

21. California Independent System Operator Corporation

[Docket No. ER05–151–000]

Take notice that on November 1, 2004, the California Independent System Operator Corporation (ISO) tendered for filing a non-conforming Operating Agreement between the ISO and Western Area Power Administration—Sierra Nevada Region (Western) and revisions to the Meter Service Agreement for Scheduling Coordinators between the ISO and Western to accommodate a planned change in control area boundaries related to the decision of the Western to join the Control Area of the Sacramento Municipal Utility District. The ISO requests an effective date of January 1, 2005.

The ISO states that this filing has been served on Western, the Sacramento Municipal Utility District, the California Public Utilities Commission, the California Electricity Oversight Board, and all entities that are on the official service list for Docket No. ER04–690.

Comment Date: 5 p.m. eastern time on November 22, 2004.

22. California Independent System Operator Corporation

[Docket No. ER05–152–000]

Take notice that on November 1, 2004, the California Independent System Operator Corporation (ISO), tendered for filing revisions to the Participating Generator Agreement and the Responsible Participating Transmission Owner Agreement between the ISO and Pacific Gas and Electric Company (PG&E). The ISO requests that the revisions be made effective as of January 1, 2005.

The ISO states that this filing has been served on PG&E, the California Public Utilities Commission, the California Electricity Oversight Board, and all entities that are on the official service list for Docket No. ER04–690.

Comment Date: 5 p.m. eastern time on November 22, 2004

23. California Independent System Operator Corporation

[Docket No. ER05–153–000]

Take notice that on November 1, 2004, the California Independent System Operator Corporation (ISO) tendered for filing Notices of Cancellation of the Metered Subsystem Agreement between the ISO and the City of Roseville (Roseville) to accommodate a planned change in Control Area boundaries related to the decision of the Western Area Power Administration-Sierra Nevada Region to join the Control Area of the Sacramento Municipal Utility District planned for January 1. 2005.

The ISO states that this filing has been served on Roseville, the California Public Utilities Commission, the California Electricity Oversight Board, and all entities that are on the official service list for Docket No. ER04–690.

Comment Date: 5 p.m. eastern time on November 22, 2004.

24. California Independent System Operator Corporation

[Docket No. ER05–154–000]

Take notice that on November 1, 2004, the California Independent System Operator Corporation (ISO), tendered for filing a Dynamic Scheduling Agreement between the ISO and Calpine Energy Services, LP (Calpine). In addition, ISO tendered for filing notices of cancellation and service agreement cover sheets announcing the cancellation of the Participating Generator Agreement and the Meter Service Agreement for ISO Metered Entities between the ISO and Calpine Construction Finance Company, LP. ISO states that the purpose of these filings is to accommodate a planned change in Control Area boundaries related to the decision of the Western Area Power Administration-Sierra Nevada Region to join the Control Area of Sacramento Municipal Utility District. The ISO requests an effective date of January 1, 2005.

The ISO states that this filing has been served on Calpine, Calpine Construction Finance Company, LP, the California Public Utilities Commission, the California Electricity Oversight Board, and all entities that are on the official service list for Docket No. ER04–690.

Comment Date: 5 p.m. eastern time on November 22, 2004.

25. California Independent System Operator Corporation

[Docket No. ER05–155–000]

Take notice that on November 1, 2004, California Independent System Operator Corporation (ISO), tendered for filing the PACI—W Operating Agreement between the ISO and the Western Area Power Administration (Western) and the Interim COTP Operations Agreement between the ISO and the Transmission Agency for Northern California (TANC). The ISO requests an effective date of January 1, 2005.

The ISO states that this filing has been served on Western, TANC, Pacific Gas and Electric Company, the California Public Utilities Commission, the California Electricity Oversight Board, and all entities that are on the official service list for Docket No. ER04–693.

Comment Date: 5 p.m. eastern time on November 22, 2004.

26. Southwest Power Pool, Inc.

[Docket No. ER05–156–000]

Take notice that on November 1, 2004, Southwest Power Pool, Inc. (SPP) submitted to the Commission a new Attachment AD to its regional Open Access Transmission Tariff (OATT). SPP states that it submitted this revision in order to provide it and the Southwestern Power Administration (SWPA) additional time to reach an agreement governing the relationship between the two entities once SPP begins operations as a regional transmission organization (RTO). SPP requested an effective date of November 1, 2004.

SPP states that it has served a copy of its transmittal letter on each of its Members and Customers. A complete copy of this filing will be posted on the SPP Web site *http://www.spp.org*, and is also being served on all affected state commissions.

Comment Date: 5 p.m. eastern time on November 22, 2004.

27. Milford Power Company, LLC

[Docket No. ER05–163–000]

Take notice that on November 1, 2004, Milford Power Company, LLC (Milford) tendered for filing its proposed tariff and supporting cost data for its Cost-of-Service Agreement in order to receive compensation for provision of reliability service to ISO-New England, Inc. (ISO–NE). Milford requests an effective date of November 2, 2004. Milford states that it has served a copy of the filing on ISO–NE.

Comment Date: 5 p.m. eastern time on November 22, 2004.

28. Wisconsin Public Service Corporation

[Docket No. ER05–164–000]

Take notice that on November 1, 2004, Wisconsin Public Service Corporation (WPSC) filed a contract (PPA 2) for service to its affiliate Upper Peninsula Power Company (UPPCO) to replace the existing Purchased Power Agreement (PPA 1) between WPSC and UPPCO the term of which was to extend through December 31, 2007. WPSC requests an effective date of January 1, 2005. Also, contingent upon the January 1, 2005, effective date for PPA 1, WPSC submits, on behalf of itself and UPPCO, notices of cancellation for PPA 1.

WPSC states that this filing was served on the Public Service Commission of Wisconsin, the Michigan Public Service Commission and affected customers.

Comment Date: 5 p.m. eastern time on November 22, 2004.

29. New England Power Pool

[Docket No. ER05–165–000]

Take notice that on November 1, 2004, the New England Power Pool (NEPOOL) Participants Committee filed changes to NEPOOL Market Rule 1 Appendix F, which modify eligibility criteria for Operating Reserve Credit and clarify other Operating Reserve accounting language. The Participants Committee requests an effective date of January 1, 2005.

The Participants Committee states that copies of these materials were sent to the New England state governors and regulatory commissions and the Participants in NEPOOL.

Comment Date: 5 p.m. eastern time on November 22, 2004.

30. New England Power Pool

[Docket No. ER05–166–000]

Take notice that on November 1, 2004, the New England Power Pool (NEPOOL) Participants Committee submitted for filing acceptance materials to permit NEPOOL to expand its membership to include Direct Commodities Trading Inc. (DCT). The Participants Committee requests November 1, 2004, for the commencement of participation in NEPOOL by DCT.

NEPOOL and The Participants Committee state that the copies of these materials were sent to the New England state governors and regulatory commissions and the Participants in NEPOOL.

Comment Date: 5 p.m. eastern time on November 22, 2004.

31. East Texas Electric Cooperative, Inc.

[Docket No. ES04–41–001]

Take notice that on November 1, 2004, East Texas Electric Cooperative, Inc. (ETEC) submitted an application pursuant to section 204 of the Federal Power Act. The application requests that the Commission amend the authorization previously granted by the Commission in Docket No. ES04–41–000 so ETEC may assume secured or unsecured debt from the National Rural Utilities Cooperative Finance Corporation (CFC) in an amount up to $91,432,000. The instant application also seeks to increase the amount ETEC is authorized to borrow under the Equity Loan from $11,000,000 to $11,432,000.

Comment Date: 5 p.m. eastern time on November 17, 2004.

32. Energy West Development

[Docket No. TS05–2–000]

Take notice that on October 15, 2004, Energy West Development tendered for filing a request for a waiver or exemption from the requirements of Order No. 2004, FERC Stats. & Regs. ¶ 31,355 (2003).

Comment Date: 5 p.m. eastern time on November 15, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E4–3180 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–10–000, et al.]

Reliant Energy Electric Solutions, L.L.C., et al.; Electric Rate and Corporate Filings

November 5, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Reliant Energy Electric Solutions, LLC

[Docket No. EC05–10–000]

Take notice that on October 28, 2004, Reliant Energy Electric Solutions, LLC, (REES) submitted an application pursuant to Section 203 of the Federal Power Act, seeking authorization for the disposition of Applicant's jurisdictional assets that would result from a proposed restructuring of certain affiliates of Reliant Energy, Inc. (REI). REES states that the proposed restructuring involves a solely internal corporate reorganization. REES further states that under the proposed restructuring it will be a direct subsidiary of Reliant Energy Retail Holdings, LLC (RERH) and an owner of jurisdictional facilities in the form of market-based rate authority, will become a direct subsidiary of REI, thereby effecting an indirect change in control of a jurisdictional entity.

Comment Date: 5 p.m. eastern time on November 18, 2004.

2. Invenergy TN LLC

[Docket No. EC05–11–000]

Take notice that on October 28, 2004, Invenergy TN LLC (Invenergy) tendered for filing pursuant to section 203 of the Federal Power Act (FPA), 16 U.S.C. 824b, and part 33 of the Commission's regulations, 18 CFR part 33, an application requesting authorization to transfer passive, non-voting ownership of jurisdictional facilities associated with Invenergy's 27 MW wind generator

located in Anderson County, Tennessee to passive investors who would make an equity investment in the Invenergy and who would have no operational control over the company. Invenergy states that the transaction will result in no change in control over the facility or have an adverse effect on competition, rates or regulation.

Comment Date: 5 p.m. eastern time on November 18, 2004.

3. USGen New England, Inc. TransCanada Hydro Northeast Inc.

[Docket No. EC05–12–000]

Take notice that on October 29, 2004, USGen New England, Inc. (USGenNE) and TransCanada Hydro Northeast Inc. (TC Hydro NE) filed with the Commission an application pursuant to section 203 of the Federal Power Act (FPA) requesting the Commission authorize the sale and transfer from USGenNE to TC Hydro NE of certain FPA-jurisdictional assets associated with hydroelectric generating assets.

Comment Date: 5 p.m. eastern time on November 19, 2004.

4. National Power of America, Inc.

[Docket No. EC05–13–000]

Take notice that on October 29, 2004, National Power of America, Inc. (NPAI) filed an application requesting authorization to convert its form of business organization from a Delaware corporation to a Delaware limited liability company.

Comment Date: 5 p.m. eastern time on November 19, 2004.

5. Entergy Corporation

[Docket No. EC05–14–000]

Take notice that on November 1, 2004, Entergy Corporation, on behalf of itself, Entergy International Holdings Ltd., Entergy Global Investments, Inc., Entergy Global Trading Holdings, Ltd., Entergy International Holdings Ltd. LLC, Entergy-Koch Trading, LP, Entergy Power International Holdings Corporation, Entergy Power Gas Holdings Corporation, Entergy Power Gas Operations Corporation, Entergy Power Ventures, L.P., EWO Marketing, LP., Llano Estacado Wind, LP, Northern Iowa Windpower, LLC, and Warren Power, LLC (collectively, Applicants) submitted an application requesting all necessary authorizations under section 203 of the Federal Power Act for the Applicants to engage in a corporate reorganization that will alter the upstream ownership of certain facilities subject to the Commission's jurisdiction.

Applicants state that copies of this filing have been served on the Arkansas Public Service Commission, the Louisiana Public Service Commission, the City Council of New Orleans, the Mississippi Public Service Commission, and the Texas Public Utility Commission.

Comment Date: 5 p.m. eastern time on November 22, 2004.

6. Sithe Energies, Inc., Dynegy New York Holdings Inc., Exelon SHC, Inc., Exelon New England Power, Marketing, L.P., RCSE, LLC, ExRes SHC, Inc., AG-Energy, L.P., Power City Partners, L.P., Seneca Power Partners, L.P., Sterling Power Partners, L.P., Sithe/ Independence Power Partners, L.P., and Sithe Energy Marketing, L.P.

[Docket No. EC05–15–000]

Take notice that on November 3, 2004, Sithe Energies, Inc. (Sithe), Dynegy New York Holdings Inc. (Dynegy), Exelon SHC, Inc. (Exelon SHC), Exelon New England Power Marketing, L.P. (Exelon NEPM), RCSE, LLC (RCSE), and ExRes SHC, Inc. (collectively, the Applicants) submitted an application pursuant to section 203 of the Federal Power Act for authorization of a disposition of jurisdictional facilities whereby Dynegy would acquire a 100 percent ownership interest in Sithe, currently held jointly by Exelon SHC and RCSE.

Comment Date: 5 p.m. eastern time on December 16, 2004.

7. PJM Interconnection, L.L.C.

[Docket No. EL03–236–003]

Take notice that on November 2, 2004, PJM Interconnection, L.L.C. (PJM), in compliance with the Commission's order in *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 (2004), submitted amendments to the PJM Open Access Transmission Tariff (PJM Tariff) and the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement) to address compensation for frequently mitigated units and generation deactivations. PJM also reported on the results of its investigation regarding the expected impacts on its overall market design of adopting pricing that reflects real-time shortages of operating reserves.

PJM states that copies of the filing were served upon all PJM Members each entity designated on the official service list in this proceeding and each state electric utility regulatory commission in the PJM region.

Comment Date: 5 p.m. eastern time on November 23, 2004.

8. Buckeye Power, Inc.

[Docket No. EL05–20–000]

Take notice that on November 3, 2004, Buckeye Power, Inc. (Buckeye) filed a petition for Commission approval of its monthly revenue requirement for reactive supply and voltage control from generation sources service from the Cardinal Generating Station Units Nos. 2 and 3 in Brilliant, Ohio, to PJM Interconnection, L.L.C. (PJM) for use in PJM's control area.

Buckeye states that a copy of the petition has been served on PJM.

Comment Date: 5 p.m. eastern time on November 24, 2004.

9. Dow Pipeline Company

[Docket Nos. ER00–2529–002]

Take notice that on November 1, 2004, Dow Pipeline Company (DPL), submitted for filing its triennial updated market analysis and revisions to its FERC Rate Schedule No. 1 to incorporate the Market Behavior Rules set forth in the Commission's orders issued November 17, 2003, and May 19, 2004, in Docket Nos. EL01–118–000, EL01–118–001, and EL01–118–003, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004). DPL requests an effective date of November 1, 2004.

Comment Date: 5 p.m. eastern time on November 22, 2004.

10. California Electric Marketing, LLC

[Docket No. ER01–2690–003]

Take notice that on November 1, 2004, California Electric Marketing, LLC, submitted for filing with the Federal Energy Regulatory Commission an amendment to its September 21, 2004, filing of its triennial updated market analysis filed in accordance with the Commission's rules and regulations and its revised Rate Schedule FERC No. 1 incorporating the Market Behavior Rules set forth in the Commission's November 17, 2003, and May 19, 2004, orders in Docket Nos. EL01–118–000, EL01–118–001, and EL01–118–003, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

Comment Date: 5 p.m. eastern time on November 22, 2004.

11. PJM Interconnection, L.L.C.

[Docket No. ER02–1326–009]

Take notice that on November 1, 2004, PJM Interconnection, L.L.C. tendered for filing a report entitled "Compliance Report to the Federal Energy Regulatory Commission Docket No. ER02–1326–006 Assessment of PJM Load Response Programs" prepared by the PJM Market Monitoring Unit in

compliance with the Commission's order in *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,188 (2003).

Comment Date: 5 p.m. eastern time on November 22, 2004.

12. Entergy Services, Inc.

[Docket No. ER03–599–004]

Take notice that on November 1, 2004, Entergy Services, Inc., on behalf of Entergy Arkansas, Inc., tendered for filing a refund report in accordance with the Commission's letter order issued September 16, 2004, in Docket No. ER03–599–000, *et al.*, 108 FERC ¶ 61,238 (2004).

Comment Date: 5 p.m. eastern time on November 22, 2004.

13. California Independent System Operator Corporation

[Docket No. ER04–1087–002]

Take notice that on November 1, 2004, the California Independent System Operator Corporation (ISO) submitted a filing in compliance with the Commission's order issued October 1, 2004, in Docket No. ER04–1087–000, 109 FERC ¶ 61,006.

The ISO states that this filing has been served upon all parties on the official service list for the captioned docket. In addition, the ISO states that it has posted this filing on the ISO home page.

Comment Date: 5 p.m. eastern time on November 22, 2004.

14. The Dayton Power and Light Company

[Docket No. ER04–1256–001]

Take notice that on November 1, 2004, The Dayton Power and Light Company (Dayton) tendered for filing an amendment to its September 30, 2004, filing in Docket No. ER04–1256–000 of a Local Delivery Service Agreement with Buckeye Power, Inc.

Comment Date: 5 p.m. eastern time on November 22, 2004.

15. Pacific Gas and Electric Company

[Docket No. ER05–116–000]

Take notice that on November 1, 2004, Pacific Gas and Electric Company (PG&E) tendered for filing customer specific rates for wholesale distribution service between PG&E and Western Area Power Administration (Western). PG&E states that the customer specific rates are submitted pursuant to the PG&E Wholesale Distribution Tariff and permit PG&E to recover the ongoing costs for service required over PG&E's distribution facilities.

PG&E states that copies of this filing have been served upon Western, California Independent System Operator Corporation, the California Public Utilities Commission, and the parties to Docket No. ER04–690–000.

Comment Date: 5 p.m. eastern time on November 22, 2004.

16. PJM Interconnection, L.L.C.

[Docket No. ER05–120–000]

Take notice that on November 1, 2004, PJM Interconnection, L.L.C. (PJM) submitted for filing amendments to the PJM Amended and Restated Operating Agreement to modify the default allocation methodology applicable to its membership. PJM requests an effective date of January 1, 2005.

PJM states that copies of this filing have been served on all PJM members and the utility regulatory commissions in the PJM region.

Comment Date: 5 p.m. eastern time on November 22, 2004.

17. Pacific Gas and Electric Company

[Docket No. ER05–133–000]

Take notice that on November 1, 2004, Pacific Gas and Electric Company (PG&E) tendered for filing two Large Facilities Agreements and six Small Facilities Agreements, submitted pursuant to the Procedures for Implementation of section 3.3 of the 1987 Agreement between PG&E and the City and County of San Francisco (City) (Procedures) that were approved by this Commission in FERC Docket No. ER99–2532–000 and recently updated in a negotiated Clarifying Supplement thereto. PG&E states that this is its seventh quarterly filing submitted pursuant to section 4 of the Procedures, and the first filing of executed agreements pursuant to the Clarifying Supplement.

PG&E states that copies of this filing have been served upon City, the California Independent System Operator Corporation, and the California Public Utilities Commission.

Comment Date: 5 p.m. eastern time on November 22, 2004.

18. California Power Exchange Corporation

[Docket No. ER05–167–000]

Take notice that on November 1, 2004, the California Power Exchange Corporation (CalPX) tendered for filing its rate schedule for Rate Period 6, the period from January 1, 2005, through June 30, 2005. CalPX filed this rate schedule pursuant to the Commission's Orders of August 8, 2002 (100 FERC ¶ 61,178), in Docket No. ER02–2234–000, and April 1, 2003 (103 FERC ¶ 61,001), issued in Docket Nos. EC03–20–000 and EC03–20–001, which require CalPX to make a new rate filing every six months to recover current expenses. CalPX states that the rate schedule therefore covers expenses projected for the period January 1, 2005. CalPX also proposes a methodology to allocate CalPx's expenses for both Rate Period 6 and retroactively for Rate Periods 1 through 5, or alternatively, proposes that the Commission defer the issue of an allocation methodology after a determination of who owes what to whom in the refund processing.

CalPX states that it has served copies of the filing on its participants, the California Independent System Operator, the California Public Utilities Commission, and the California Electricity Oversight Board.

Comment Date: 5 p.m. eastern time on November 15, 2004.

19. Southwest Power Pool, Inc.

[Docket Nos. RT04–01–006 and ER04–48–006]

Take notice that on November 1, 2004, Southwest Power Pool, Inc. (SPP) tendered for filing tariff revisions and other materials in compliance with the Commission's order issued October 1, 2004, in *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 (2004).

SPP states it has served a copy of this filing upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Comment Date: 5 p.m. eastern time on November 22, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for

review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Linda Mitry,

Deputy Secretary.

[FR Doc. E4–3192 Filed 11–16–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Notice

November 10, 2004.

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

DATE AND TIME: November 18, 2004, 10 a.m.

PLACE: Room 2C, 888 First Street, NE., Washington DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

***Note**—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Magalie R. Salas, Secretary, Telephone (202) 502–8400. For a recorded listing of items stricken from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Public Reference Room.

874th—Meeting Regular Meeting November 18, 2004 10 a.m.

Administrative Agenda

A–1.
AD02–1–000, Agency Administrative Matters

A–2.
AD02–7–000, Customer Matters, Reliability, Security and Market Operations*

A–3.
2004–2005, Winter Energy Market Assessment

Markets, Tariffs, and Rates—Electric

E–1.
OMITTED

E–2.
OMITTED

E–3.
ER04–1252–000, Midwest Independent Transmission System, Inc. and Ameren Services Company

E–4.
ER05–6–000, Midwest Independent Transmission System Operator, Inc.
EL02–111–010, Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, LLC, *et al.*
EL02–111–011, Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, LLC, *et al.*
EL02–111–014, Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, LLC, *et al.*
EL02–111–015, Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, LLC, *et al.*
EL02–111–016, Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, LLC, *et al.*
EL02–111–019, Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, LLC, *et al.*
EL04–135–000, Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, LLC, *et al.*
EL03–212–005, Ameren Services Company, *et al.*
EL03–212–006, Ameren Services Company, *et al.*
EL03–212–007, Ameren Services Company, *et al.*
EL03–212–009, Ameren Services Company, *et al.*
EL03–212–011, Ameren Services Company, *et al.*
EL03–212–013, Ameren Services Company, *et al.*
EL03–212–014, Ameren Services Company, *et al.*
EL03–212–016, Ameren Services Company, *et al.*

E–5.
ER03–262–016, New PJM Companies American Electric Power Service Corp. On behalf of its operating companies Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company
Commonwealth Edison Company, and Commonwealth Edison Company of Indiana, Inc.
The Dayton Power and Light Company, and PJM Interconnection, LLC
ER03–262–010, New PJM Companies American Electric Power Service Corp. On behalf of its operating companies Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company
Commonwealth Edison Company, and Commonwealth Edison Company of Indiana, Inc.
The Dayton Power and Light Company, and PJM Interconnection, LLC
ER03–262–016, New PJM Companies American Electric Power Service Corp. On behalf of its operating companies Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company
Commonwealth Edison Company, and Commonwealth Edison Company of Indiana, Inc.
The Dayton Power and Light Company, and PJM Interconnection, LLC
EC98–40–010, New PJM Companies American Electric Power Service Corp. On behalf of its operating companies Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company
Commonwealth Edison Company, and Commonwealth Edison Company of Indiana, Inc.
The Dayton Power and Light Company, and PJM Interconnection, LLC
ER98–2770–011, New PJM Companies American Electric Power Service Corp. On behalf of its operating companies Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company
Commonwealth Edison Company, and Commonwealth Edison Company of Indiana, Inc.
The Dayton Power and Light Company, and PJM Interconnection, LLC
ER98–2786–011, New PJM Companies American Electric Power Service Corp. On behalf of its operating companies Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company
Commonwealth Edison Company, and Commonwealth Edison Company of Indiana, Inc.
The Dayton Power and Light Company, and PJM Interconnection, LLC

E–6.
OMITTED

E–7.
OMITTED

E–8.
OMITTED

E–9.
OMITTED

E–10.
ER04–1254–000, Illinois Power Company
ER04–1239–000, Midwest Independent Transmission System Operator, Inc.

E–11.
ER04–1244–000, NorthPoint Energy Solutions Inc.

E–12.
ER05–12–000, PJM Interconnection L.L.C.

E–13.
OMITTED

E–14.

ER05–26–000, Mirant Kendall, LLC and Mirant Americas Energy Marketing, L.P.
E–15.
OMITTED
E–16.
ER05–41–000, Oasis Power Partners, LLC
E–17.
EL04–128–000, Sulphur Springs Valley Electric Cooperative, Inc.
E–18.
ER98–3760–000, California Independent System Operator Corporation
E–19.
ER01–751–006, Mountain View Power Partners, LLC
ER01–751–001, Mountain View Power Partners, LLC
E–20.
OMITTED
E–21.
ER01–1559–002, PPL Wallingford Energy LLC
ER01–1559–003, PPL Wallingford Energy LLC
E–22.
OMITTED
E–23.
ER04–510–002, Central Vermont Public Service Corporation
ER04–510–003, Central Vermont Public Service Corporation
EL04–88–001, Central Vermont Public Service Corporation
EL04–88–002, Central Vermont Public Service Corporation
E–24.
OMITTED
E–25.
QF92–156–006, Pasco Cogen, Ltd.
EL04–140–000, Pasco Cogen, Ltd.
E–26.
EL04–90–000, Nevada Power Company
E–27.
EL04–120–000, Exelon Corporation
E–28.
OMITTED
E–29.
EL04–136–000, MGE Energy, Inc., MGE Power LLC, and MGE Power Elm Road LLC
E–30.
OMITTED
E–31.
EL04–137–000, Cabazon Wind Partners, LLC v. Southern California Edison Company
E–32.
EL04–126–000, PSEG Power In-City I, LLC v. Consolidated Edison Company of New York, Inc.
E–33.
EL04–139–000, California Electricity Oversight Board v. California Independent System Operator Corporation
E–34.
EL04–130–000, Duke Energy Moss Landing, LLC v. California Independent System Operator Corporation
E–35.
EL04–122–000, PPL University Park, LLC v. Commonwealth Edison Company
E–36.
EL03–27–000, Niagara Mohawk Power Corporation v. Huntley Power LLC, NRG Huntley Operations, Inc., Dunkirk Power LLC, NRG Dunkirk Operations, Inc., Oswego Harbor Power LLC, and NRG Oswego Operations, Inc.
E–37.
EL04–100–000, Colorado River Commission of Nevada v. Nevada Power Company
E–38.
EL04–134–000, East Texas Electric Cooperative, Inc. v. Entergy Arkansas, Inc.
E–39.
OMITTED
E–40.
PL05–3–000, Order on Electric Creditworthiness
E–41.
OMITTED
E–42.
OMITTED
E–43.
ER04–132–000, Wolverine Power Supply Cooperative, Inc.
EL04–38–000, Wolverine Power Supply Cooperative, Inc.
E–44.
ER03–606–000, Wisconsin Public Service Corp
E–45.
ER04–375–010, PJM Interconnection LLC
ER04–521–006, Midwest Independent Transmission System Operator
ER04–718–005, PJM Interconnection LLC and Commonwealth Edison Company
ER04–364–002, Commonwealth Edison Company, Commonwealth Edison Company of Indiana, Inc., and American Electric Power Service Corporation
E–46.
ER04–446–002, Midwest Independent Transmission System Operator, Inc.
E–47.
ER04–14–000, Detroit Edison Company
EL04–29–000, Detroit Edison Company
E–48.
ER04–215–000, Pacific Gas and Electric Company
E–49.
OMITTED
E–50.
ER03–405–001, PJM Interconnection L.L.C.
ER03–405–002, PJM Interconnection L.L.C.
ER03–405–003, PJM Interconnection L.L.C.
E–51.
EL03–216–001, Northeast Utilities Service Company and Select Energy, Inc., v. ISO New England Inc., and New England Power Pool
E–52.
ER04–375–007, Midwest Independent Transmission System Operator, Inc., and PJM Interconnection L.L.C.
E–53.
NJ04–3–001, South Carolina Public Service Authority
E–54.
ER04–35–001, Entergy Services, Inc
ER04–35–002, Entergy Services, Inc
E–55.
ER03–194–003, PJM Interconnection L.L.C.
ER03–309–003, Allegheny Power
ER03–194–004, PJM Interconnection L.L.C.
ER03–194–005, PJM Interconnection L.L.C.
ER03–309–007, Allegheny Power
E–56.
OMITTED
E–57.
EL00–95–100, San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange
EL00–98–088, Investigation of Practices of the California Independent System Operator and the California Power Exchange
E–58.
OMITTED
E–59.
ER03–872–004, Southern Company Services, Inc.
ER05–13–000, Southern Company Services, Inc
E–60.
ER04–564–000, Wayne-White Counties Electric Cooperative
E–61.
ER03–600–003, Cross-Sound Cable Company, LLC
ER03–600–002, Cross-Sound Cable Company, LLC
ER03–600–004, Cross-Sound Cable Company, LLC

Miscellaneous Agenda

M–1.
PL03–3–005, Price Index Monitoring and Use in Tariffs
AD03–7–005, Natural Gas Price Formation
ER03–1271–000, Aquila, Inc.
CP03–7–000, Colorado Interstate Gas Company
CP03–301–000, Colorado Interstate Gas Company
CP03–302–000, Cheyenne Plains Gas Pipeline Company
CP03–302–001, Cheyenne Plains Gas Pipeline Company
CP03–302–002, Cheyenne Plains Gas Pipeline Company
CP03–303–000, Cheyenne Plains Gas Pipeline Company
CP03–304–000, Cheyenne Plains Gas Pipeline Company
RP03–245–000, Kinder Morgan Interstate Gas Transmission LLC
RP99–176–089, Natural Gas Pipeline Company of America
RP99–176–094, Natural Gas Pipeline Company of America
RP02–363–002, North Baja Pipeline, LLC
RP03–533–000, Northern Natural Gas Company
RP03–70–003, PG&E Gas Transmission, Northwest Corporation
RP03–70–002, PG&E Gas Transmission, Northwest Corporation
CP01–421–000, Portland General Electric Company
CP01–421–001, Portland General Electric Company
RP03–540–000, Transcontinental Gas Pipe Line Corporation
ER04–439–001, PacifiCorp
RP03–398–000, Northern Natural Gas Company
CP01–418–000, B–R Pipeline Company

Markets, Tariffs, and Rates—Gas

G–1.
RP04–97–003, Equitrans, L.P.
RP04–203–001, Equitrans, L.P.

RP04–203–002, Equitrans, L.P.
RP04–97–001, Equitrans, L.P.
RP04–97–005, Equitrans, L.P.
CP05–18–000, Equitrans, L.P.

G–2
RM05–2–000, Policy for Selective Discounting by Natural Gas Pipelines

G–3.
OR96–2–010, ARCO Products Co., a Division of Atlantic Richfield Company, Texaco Refining and Marketing Inc., and Mobil Oil Corporation v. SFPP
OR96–10–007, ARCO Products Co., a Division of Atlantic Richfield Company, Texaco Refining and Marketing Inc., and Mobil Oil Corporation v. SFPP
OR96–10–009, ARCO Products Co., a Division of Atlantic Richfield Company, Texaco Refining and Marketing Inc., and Mobil Oil Corporation v. SFPP
OR98–1–009, ARCO Products Co., a Division of Atlantic Richfield Company, Texaco Refining and Marketing Inc., and Mobil Oil Corporation v. SFPP
OR98–1–011, ARCO Products Co., a Division of Atlantic Richfield Company, Texaco Refining and Marketing Inc., and Mobil Oil Corporation v. SFPP
OR00–4–002, ARCO Products Co., a Division of Atlantic Richfield Company, Texaco Refining and Marketing Inc., and Mobil Oil Corporation v. SFPP
OR00–4–004, ARCO Products Co., a Division of Atlantic Richfield Company, Texaco Refining and Marketing Inc., and Mobil Oil Corporation v. SFPP
OR92–2–003, Ultramar Diamond Shamrock Corporation, Ultramar, Inc. v. SFPP
OR92–2–004, Ultramar Diamond Shamrock Corporation, Ultramar, Inc. v. SFPP
OR96–15–008, Ultramar Diamond Shamrock Corporation, Ultramar, Inc. v. SFPP
OR96–15–009, Ultramar Diamond Shamrock Corporation, Ultramar, Inc. v. SFPP
OR96–17–004, Ultramar Diamond Shamrock Corporation, Ultramar, Inc. v. SFPP
OR96–17–006, Ultramar Diamond Shamrock Corporation, Ultramar, Inc v. SFPP
OR97–2–004, Ultramar Diamond Shamrock Corporation, Ultramar, Inc v. SFPP
OR97–2–005, Ultramar Diamond Shamrock Corporation, Ultramar, Inc v. SFPP
OR98–2–005, Ultramar Diamond Shamrock Corporation, Ultramar, Inc v. SFPP
OR98–2–007, Ultramar Diamond Shamrock Corporation, Ultramar, Inc v. SFPP
OR00–8–005, Ultramar Diamond Shamrock Corporation, Ultramar, Inc v. SFPP
OR00–8–007, Ultramar Diamond Shamrock Corporation, Ultramar, Inc v. SFPP
OR98–13–005, Tosco Corporation v SFPP
OR98–13–007, Tosco Corporation v SFPP
OR00–9–005, Tosco Corporation v SFPP
OR00–9–007, Tosco Corporation v SFPP
OR00–7–005, Navajo Refining Corporation v. SFPP
OR00–7–006, Navajo Refining Corporation v. SFPP
OR00–10–005, Refinery Holding Company v. SFPP
OR00–10–006, Refinery Holding Company v. SFPP
IS98–1–001, SFPP, L.P.
IS98–1–002, SFPP, L.P.
OR92–8–024, SFPP, L.P.
OR93–5–015, SFPP, L.P.
OR94–3–014, SFPP, L.P.
OR94–4–016, SFPP, L.P.
OR95–5–013, Mobil Oil Corporation v. SFPP, L.P.
OR95–34–012, Tosco Corporation v. SFPP, L.P.

G–4.
OMITTED

G–5.
RP05–29–000, Florida Gas Transmission Company

G–6.
RP04–25–002, Texas Eastern Transmission, L.P.

G–7.
RP97–13–011, East Tennessee Natural Gas, LLC

G–8.
OMITTED

G–9.
RP03–620–001, Portland Natural Gas Transmission System
RP03–620–000, Portland Natural Gas Transmission System

G–10.
PR04–8–001, Arkansas Oklahoma Gas Corporation

G–11.
RP04–91–001, Questar Pipeline Company
RP04–91–000, Questar Pipeline Company
RP04–91–002, Questar Pipeline Company

G–12.
RP95–197–050, Transcontinental Gas Pipe Line Corporation
RP97–71–041, Transcontinental Gas Pipe Line Corporation

G–13.
RP04–378–000, Gas Technology Institute

G–14.
TS04–283–000, Central New York Oil and Gas Company, LLC
TS05–2–000, Energy West Development
TS04–150–001, Granite State Gas Transmission, Inc.
TS04–277–000, Green Mountain Power Corporation
TS04–284–000, Ozark Gas Transmission, L.L.C.
TS04–274–001, Shell Gas Transmission, L.L.C.

G–15.
RP04–254–000, City of Hamilton, Ohio v. Texas Eastern Transmission, L.P.

G–16.
RP00–332–009, ANR Pipeline Company

G–17.
RP04–405–001, Northern Natural Gas Company

G–18.
RP05–35–000, Transcontinental Gas Pipe Line Corporation

Energy Projects—Hydro

H–1.
P–516–388, South Carolina Electric & Gas Company
P–516–394, South Carolina Electric & Gas Company

H–2.
P–11810–006, City of Augusta, Georgia

H–3.
P–2016–086, City of Tacoma, Washington

H–4.
P–2145–062, Public Utility District No. 1 of Chelan County, Washington
P–943–089, Public Utility District No. 1 of Chelan County, Washington
P–2149–113, Public Utility District No. 1 of Douglas County, Washington

H–5.
P–2436–187, Consumers Energy Company
P–2448–186, Consumers Energy Company
P–2452–162, Consumers Energy Company
P–2447–178, Consumers Energy Company
P–2449–160, Consumers Energy Company
P–2450–158, Consumers Energy Company
P–2451–154, Consumers Energy Company
P–2453–186, Consumers Energy Company
P–2468–160, Consumers Energy Company
P–2580–216, Consumers Energy Company
P–2599–178, Consumers Energy Company

H–6.
OMITTED

H–7.
P–2816–031, North Hartland, LLC

H–8.
P–2004–160, City of Holyoke Gas and Electric Department

H–9.
P–77–127, Pacific Gas and Electric Company

H–10.
P–2576–040, Northeast Generation Company
P–2597–025, Northeast Generation Company

Energy Projects—Certificates

C–1.
RM05–1–000, Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transmission Projects

C–2.
CP04–13–001, Saltville Gas Storage Company, LLC
CP04–14–002, Saltville Gas Storage Company, LLC
CP04–13–002, Saltville Gas Storage Company, LLC

C–3.
RP04–616–000, Northern Natural Gas Company v. ANR Pipeline Company

C–4.
CP04–379–000, Pine Prairie Energy Center, LLC
CP04–380–000, Pine Prairie Energy Center, LLC
CP04–381–000, Pine Prairie Energy Center, LLC

C–5.
CP04–76–000, Equitrans, L.P.

C–6.
CP04–105–000, CMS Gas Transmission Company and Bluewater Gas Storage, L.L.C.

C–7.
CP04–404–000, Tennessee Gas Pipeline Company

C–8.
CP04–102–001, CenterPoint Energy Gas Transmission Company

Linda Mitry,

Deputy Secretary.

The Capitol Connection offers the opportunity for remote listening and viewing of the meeting. It is available for a fee, live over the Internet, via C-

Band Satellite. Persons interested in receiving the broadcast, or who need information on making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection (703–993–3100) as soon as possible or visit the Capitol Connection Web site at *http://www.capitolconnection.gmu.edu* and click on "FERC".

[FR Doc. 04–25556 Filed 11–12–04; 4:18 pm]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Meeting, Notice of Vote, Explanation of Action Closing Meeting and List of Persons To Attend

November 10, 2004.

The following notice of meeting is published pursuant to section 3(a) of the Government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY: Federal Energy Regulatory Commission.

DATE AND TIME: November 18, 2004 (Within a relatively short time after the Commission's open meeting on November 18).

PLACE: Room 3M 4A/B, 888 First Street, NE., Washington, DC 20426.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Non-Public Investigations and Inquiries, Enforcement Related Matters, and Security of Regulated Facilities.

FOR FURTHER INFORMATION CONTACT: Magalie R. Salas, Secretary, Telephone (202) 502–8400.

Chairman Wood and Commissioners Brownell, Kelliher, and Kelly voted to hold a closed meeting on November 18, 2004. The certification of the General Counsel explaining the action closing the meeting is available for public inspection in the Commission's Public Reference Room at 888 First Street, NE., Washington, DC 20426.

The Chairman and the Commissioners, their assistants, the Commission's Secretary and her assistant, the General Counsel and members of her staff, and a stenographer are expected to attend the meeting. Other staff members from the Commission's program offices who will advise the Commissioners in the matters discussed will also be present.

Linda Mitry,

Deputy Secretary.

[FR Doc. 04–25557 Filed 11–12–04; 4:18 pm]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7838–4]

Proposed Settlement Agreement, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Settlement Agreement; Request for Public Comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended ("Act"), 42 U.S.C. 7413(g), notice is hereby given of a proposed settlement agreement, to address a lawsuit filed by Louisiana Environmental Action Network ("LEAN"): *LEAN* v. *Leavitt*, 04–CV–370 (M.D. La.). On or about June 4, 2004, LEAN filed a complaint alleging that LEAN had submitted a petition to EPA seeking an objection to permits issued by Louisiana's Department of Environmental Quality to Dow Chemical Company for two plants located in Plaquemine, Louisiana, and that the Administrator has failed to perform his nondiscretionary duty to respond to the petition within sixty days of the date it was filed. Under the terms of the proposed settlement agreement, EPA has agreed to respond to the petition by December 22, 2004, and LEAN has agreed to dismiss its suit with prejudice. In addition, under the proposed settlement, EPA would pay LEAN $1641.50 in settlement of its claims for attorneys' fees in this matter.

DATES: Written comments on the proposed settlement agreement must be received by December 17, 2004.

ADDRESSES: Submit your comments, identified by docket ID number OGC–2004–0010, online at *http://www.epa.gov/edocket* (EPA's preferred method); by e-mail to *oei.docket@epa.gov*; mailed to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Wordperfect or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: David Orlin, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone: (202) 564–1222.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement

This settlement would resolve a lawsuit seeking a response to a petition to object to Title V permits issued by Louisiana's Department of Environmental Quality to Dow Chemical for modifications to Dow's Cellulose plant (permit 2227–V2) and Light Hydrocarbon plant (permit 2024–V2), which are located in Plaquemine, Louisiana. Under the proposed settlement, the parties would seek to stay the pending litigation, and LEAN would dismiss its lawsuit if the Administrator issues a response to the petition by December 22, 2004. The settlement does not require the Administrator to respond to the petition in any particular way. If the settlement becomes final and the Administrator issues a response to the petition by December 22, 2004, then EPA will pay LEAN $1641.50 in settlement of LEAN's claims for attorneys' fees.

For a period of thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the proposed settlement agreement from persons who were not named as parties or interveners to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determine, based on any comment which may be submitted, that consent to the settlement agreement should be withdrawn, the terms of the agreement will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement

A. How Can I Get a Copy of the Settlement ?

EPA has established an official public docket for this action under Docket ID No. OGC–2004–0010 which contains a copy of the settlement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday

through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in EPA's electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to Whom Do I Submit Comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD–ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: November 9, 2004.

Lisa K. Friedman,

Associate General Counsel, Air and Radiation Law Office, Office of General Counsel.

[FR Doc. 04–25500 Filed 11–16–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0361; FRL–7685–5]

Red Cabbage Color; Notice of Filing a Pesticide Petition to Establish a Tolerance Exemption for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2004–0361, must be received on or before December 17, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Keri Grinstead, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8373; e-mail address:*grinstead.keri@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

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

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0361. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's

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

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

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

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets a*thttp://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0361. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0361. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0361.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2004–0361. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public

docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

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

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 4, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Colarome Inc.

PP 4E6851

EPA has received a pesticide petition (4E6851) from Colarome Inc., 5132 Bombardier Street, St. Hubert (Quebec), Canada J3Z1H1 proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180, to establish an exemption from the requirement of a tolerance for Red Cabbage Color when used as an inert ingredient (visual pH indicator) in pesticide formulations applied to growing crops or raw agricultural commodities after harvest (§ 180.910), animals (§ 180.930) and, antimicrobial formulations (food-contact surface sanitizing solutions; § 180.940a). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

Colarome believes that the information described below is adequate to ascertain the toxicology and characterize the risk associated with the use of red cabbage color as an inert ingredient in pesticide formulations applied to growing crops and raw agricultural commodities after harvest, animals and antimicrobial formulations (food-contact surface sanitizing solutions).

1. *Intended use of the red cabbage color concentrate*: The red cabbage color will be used as an inert ingredient (visual pH indicator) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest. It is manufactured as a concentrate with a minimal color value of 1,600 absorbency units (determined by spectrophotometry at 535 nm after the appropriate dilution in McIlvaine buffer at pH 3.0). The recommended usage level of the red cabbage color concentrate is less than 1%, *i.e.*, less than 16 absorbency units. The red cabbage color concentrate contains diluents to ensure stability of the color principles and to prevent microbial spoilage. All formulations contain 2% citric acid and 18% of propylene glycol or glycerine or ethyl alcohol depending on user preference.

2. *Technical background information*: The coloring principles of red cabbage heads belong to a class of plant pigments called anthocyanins. Anthocyanins are almost ubiquitous in the plant kingdom, being responsible for most of the red, blue and purple colors of fruits, flowers and vegetables. It is a very diverse class of molecules with over 300 structures having been identified to date. The anthocyanin molecule consists of two or three portions: a flavilium nucleus (the chromophore), a group of sugars and, sometimes, a group of acyl acids. In red cabbage heads, the flavilium nucleus of anthocyanins is cyanidin. Most contain two sugar moieties, *i.e.*, glucose or sophorose in position 3 of cyanidin and glucose in position 5 of cyanidin. A substantial proportion of red cabbage anthocyanins possess a sugar moiety in position 3 which is acylated with one or two acyl radicals. The large proportion of mono- and di-acylated anthocyanins of red cabbage is responsible for the exceptionally-high shelf stability and for providing a wide array of hues depending on the pH from pinkish red at acidic pH to blue at neutral pH. More information on red cabbage color is publicly available at *www.colarome.com*. Owing to their unique properties, red cabbage anthocyanins can serve as a visual pH indicator of natural origin for various plant-applied products.

3. *Safety*: Cabbage (*Brassica oleracea L.*) is a common vegetable which is eaten safely as fresh, cooked, marinated in vinegar (cole slaw) or fermented (sauerkraut). The red cabbage color concentrate to be utilized as a visual pH indicator, is obtained from fresh, edible heads and is manufactured under conditions which minimize the alteration of cabbage components and which prevent microbial spoilage. The stability of the red cabbage color concentrate has been demonstrated for periods of more than 2 years in a cold room.

Results of microbiological analysis are:

- Total aerobic count / grams (g): < 50 Colony Forming Units (CFU)

- Yeasts / g: < 10 CFU
- Molds / g: < 10 CFU
- Coliforms / g most probable number (MPN): < 3 CFU
- *E. coli* / g (MPN): < 3 CFU
- *Staphylococcus aureus* / 10 g: < 10 CFU
- *Salmonella* / 25 g: absent

The recommended usage level of the red cabbage color as a visual pH indicator is less than 1%. The color value of a 1% solution of the red cabbage color is 16 absorbency units (determined by spectrophotometry at 535 nm after dilution in McIlvaine buffer at pH 3.0). Here, the color principles (and other red cabbage components) are less than those which are typically contained in an unprocessed red cabbage juice.

At a 1% usage level of the red cabbage color concentrate, the level of solvents and citric acid that are contained in the color concentrate are in line with current good manufacturing practice (cGMP) for foods. In particular, propylene glycol is at a level or 0.18%, *i.e.*, more than 10-fold lower than the level set by cGMP for foods other than alcoholic beverages, confectionery and frostings, seasoning and flavouring, nuts and nut products for which higher levels are permitted.

[FR Doc. 04–25502 Filed 11–16–04; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0357; FRL–7686–6]

Fenbuconazole; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for extending time-limited tolerances for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2004–0357, must be received on or before December 17, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: J. R. Tomerlin, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–0598; e-mail address: *tomerlin.bob@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

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

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0357. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

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

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or

delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

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

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0357. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID number OPP–2004–0357. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2004–0357.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID number OPP–2004–0357. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

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

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 3, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Dow AgroSciences LLC

PP 1F3989, 1F3995, and 2F4154.

EPA has received pesticide petitions (1F3989, 1F3995, and 2F4154) from Dow AgroSciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268 proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180.480 by extending the time-limited tolerances for the combined residues of fenbuconazole (alpha-(2-(4-chlorophenyl)-ethyl)-alpha-phenyl-3-(1H-1,2,4-triazole)-1-propanenitrile) and its metabolites cis-and trans-5-(4-chlorophenyl)-dihydro-3-phenyl-3-(1H-1,2,4-triazole-1-ylmethyl)-2-3H-furanone in or on the raw agricultural commodity fruit, stone, group 12 (except plum, prune) at 2.0 parts per million (ppm); pecan at 0.1 ppm; banana at 0.3 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism.* The metabolism of fenbuconazole in plants is adequately understood for the purpose of these tolerances. Plant metabolism was evaluated in three diverse crops - wheat, peaches and peanuts. The route of metabolism is similar in all crop groups and proceeds with three main pathways. Oxidation at the benzylic carbon (pathway 1) led to the ketone and the lactone as metabolites. Oxidation or nucleophilic substitution on the carbon next to the triazole ring (pathway 2) led to triazole alanine (TA) and triazole acetic acid (TAA) presumably through free triazole. Metabolic pathway 3 produced the phenolic metabolite RH-4911, and led to the glucose conjugates found in all crops.

2. *Analytical method.* An adequate enforcement method is available for the established and proposed tolerances. Quantitation of fenbuconazole residues (and lactones RH-9129 and RH-9130) at an analytical sensitivity of 0.01 milligrams/kilogram (mg/kg) is accomplished by soxhlet extraction of samples in methanol, partitioning into methylene chloride, redissolving in toluene, cleanup on silica gel, and gas liquid chromatography using nitrogen specific thermionic detection.

3. *Magnitude of residues*—i. *Stone fruit-peaches.* Ten field trials were conducted on peaches. Seven to 10 applications were made at the maximum use rate of 0.1 pounds of active ingredient per acre (lb ai/acre) per application, and fruit was harvested on the last day of application. The highest field residue value was 0.51 ppm, and the average field residue value was 0.36 ppm.

ii. *Stone fruit-cherries.* Eleven field trials were conducted on cherries. Five to 6 applications were made at the maximum use rate of 0.1 lb ai/acre per application, and fruit was harvested on the last day of application. The highest field residue value was 0.63 ppm, and the average field residue value was 0.43 ppm.

iii. *Stone fruit-apricots.* Four field trials were conducted on apricots. Six applications were made at the maximum use rate of 0.125 lb ai/acre per application, and fruit was harvested on the last day of application. The field residue values in four samples measured were 0.17, 0.23, 0.27, and 0.28 ppm.

iv. *Pecans.* Four field trials were conducted in pecans. Eight to 10 applications were made at the maximum use rate of 0.125 lb ai/acre per application, and nuts were harvested 28 days after the last application. Field residue values in nutmeat for all four trials were <0.01 ppm.

v. *Bananas.* Eighteen field trials were conducted on bagged bananas, which are typically used in commerce. Eight applications (5 and 7 applications in two trials) were made at the maximum use rate of 0.09 lb ai/acre per application and bananas were harvested on the last day of application. The highest field residue value in whole fruit or in pulp and peel combined was 0.062 ppm. The average field residue value in whole fruit or in pulp and peel combined was 0.03 ppm. The results of these studies support the proposed permanent tolerances for fenbuconazole on stone fruit, pecans, and bananas.

B. Toxicological Profile

1. *Acute toxicity.* Fenbuconazole is practically non-toxic after administration by the oral and dermal routes, and was not significantly toxic to rats after a 4 hour inhalation exposure. Fenbuconazole is classified as not irritating to skin and inconsequentially irritating to the eyes. It is not a skin sensitizer.

2. *Genotoxicty.* Fenbuconazole was negative (non-mutagenic) in an Ames assay with and without hepatic enzyme activation. Fenbuconazole was negative in a hypoxanthine guanine phosphoribosyl transferase (HGPRT) gene mutation assay using Chinese hamster ovary (CHO) cells in culture when tested with and without hepatic enzyme activation. In isolated rat hepatocytes, fenbuconazole did not induce unscheduled DNA synthesis (UDS) or repair. Fenbuconazole did not produce chromosome effects in rats *in vivo*. On the basis of the results from this battery of tests, it is concluded that fenbuconazole is not mutagenic or genotoxic.

3. *Reproductive and developmental toxicity.*—i. *Developmental toxicity in the rat.* In the developmental study in rats, the maternal (systemic) no observed adverse effect level (NOAEL) was 30 (mg/kg/day) based on decreases in body weight and body weight gain at the lowest observed adverse effect level (LOAEL) of 75 mg/kg/day. The developmental (fetal) NOAEL was 30 mg/kg/day based on an increase in post implantation loss and a significant decrease in the number of live fetuses per dam at the LOAEL of 75 mg/kg/day.

ii. *Developmental toxicity in the rabbit.* In the developmental study in rabbits, the maternal (systemic) NOAEL was 10 mg/kg/day based on decreased body weight gain at the LOAEL of 30 mg/kg/day. The developmental (fetal) NOAEL was 30 mg/kg/day based on increased resorptions at the LOAEL of 60 mg/kg/day.

iii. *Reproductive toxicity.* In the 2-generation reproduction toxicity study in rats, the maternal (systemic) NOAEL was 4 mg/kg/day based on decreased body weight and food consumption, increased number of dams delivering nonviable offspring, and increases in adrenal and thyroid weights at the LOAEL of 40 mg/kg/day. The reproductive (pup) NOAEL was 40 mg/kg/day, the highest dose tested.

4. *Subchronic toxicity.*—i. *Rat 90-day oral study.* A subchronic feeding study in rats conducted for 13 weeks resulted in a NOAEL of 80 ppm (5.1 and 6.3 mg/

kg/day in males and females, respectively). The only effect observed at 80 ppm was minimal centrilobular hypertrophy (seen in one male) and hepatocytic centrilobular vacuolation (3 males) with no concomitant increase in liver weight or clinical chemistry correlates and no analogous effects in females. As such, these observations are not considered to be adverse. Increased liver weight, hepatic hypertrophy, thyroid hypertrophy, and decreased body weight were observed at the higher doses of 400 and 1,600 ppm.

ii. *Dog 90-day oral study.* A subchronic feeding study in dogs conducted for 13 weeks resulted in a NOAEL of 100 ppm (3.3 and 3.5 mg/kg/day in males and females, respectively). At the LOAEL of 400 ppm, increased liver weight, clinical chemistry parameters, and liver hypertrophy (males) were observed.

iii. *Rat 4-week dermal study.* In a 21-day dermal toxicity in the rat study, the NOAEL was greater than 1,000 mg/kg/day, with no effects seen at this limit dose.

5. *Chronic toxicity.*—i. *Dog.* A 1-year feeding study in dogs resulted in a NOAEL of 15 ppm (0.62 mg/kg/day) for females and 150 ppm (5.2 mg/kg/day) for males. Decreased body weight, increased liver weight, liver hypertrophy, and pigment in the liver were observed at the LOAEL of 150 and 1,200 ppm in females and males, respectively.

ii. *Mouse.* A 78-week chronic/oncogenicity study was conducted in male and female mice at 0, 10, 200 (males only), 650, and 1,300 ppm (females only). The NOAEL was 10 ppm (1.4 mg/kg/day), and the LOAEL was 200 ppm (26.3 mg/kg/day) for males and 650 ppm (104.6 mg/kg/day) for females based on increased liver weight and histopathological effects on the liver, which were consistent with chronic enzyme induction. There was no statistically significant increase of any tumor type in males. However, there was a statistically significant increase in combined liver adenomas and carcinomas in females at the high dose only (1,300 ppm; 208.8 mg/kg/day). There were no liver tumors in the control females, and liver tumor incidences in the high-dose females just exceeded the historical control range. In ancillary mode-of-action studies in female mice, the increased tumor incidence was associated with changes in several parameters in mouse liver following high doses of fenbuconazole, including an increase in P450 enzymes (predominately of the CYP 2B type), an increase in cell proliferation, an increase in hepatocyte hypertrophy, and an increase in liver weight. Changes in these liver parameters, as well as the occurrence of the low incidence of liver tumors, were non-linear with respect to dose (i.e., effects were observed only at high dietary doses of fenbuconazole). Similar findings have been shown with several pharmaceuticals, including phenobarbital, which is not carcinogenic in humans. The non-linear dose response relationship observed with respect to liver changes (including the low incidence of tumors) in the mouse indicates that these findings should be carefully considered in deciding the relevance of high-dose animal tumors to human dietary exposure.

iii. *Rat.* A 24-month chronic/oncogenicity study in male and female rats was conducted at 0, 8, 80, and 800 ppm fenbuconazole, and a second 24-month chronic/oncogenicity study was conducted in male rats at 0, 800, and 1,600 ppm. The NOAEL was 80 ppm (3 and 4 mg/kg/day in males and females, respectively), and the LOAEL was 800 ppm (31 and 43 mg/kg/day in males and females, respectively) based on decreased body weight, increased liver and thyroid weights, and liver and thyroid hypertrophy. Fenbuconazole produced a minimal but statistically significant increase in the incidence of combined thyroid follicular cell benign and malignant tumors. These findings occurred only in male rats following life-time ingestion of very high levels (800 and 1,600 ppm in the diet) of fenbuconazole.

iv. *Carcinogenicity.* The Agency has concluded that the available data provide limited evidence of the carcinogenicity of fenbuconazole in both mice and rats and has classified fenbuconazole as a Group C carcinogen (possible human carcinogen with limited evidence of carcinogenicity in animals) in accordance with Agency guidelines, published in the **Federal Register** (51 FR 33992, September 24, 1986), and recommended that for the purpose of risk characterization a low-dose extrapolation model applied to the experimental animal tumor data should be used for quantification of human risk (Q1*). EPA's 26Feb98 Hazard Identification Assessment Review Committee (HIARC) report concluded that 0.00359 $(mg/kg/day)^{-1}$ is the appropriate q* for fenbuconazole; this q* is based on the fenbuconazole mouse liver tumor data, along with a power surface area scaling factor.

6. *Animal metabolism.* The absorption, distribution, excretion, and metabolism of fenbuconazole in rats, goats, and hens were investigated. Following oral administration, fenbuconazole was completely and rapidly absorbed, extensively metabolized by oxidation/hydroxylation and conjugation, and rapidly and essentially completely excreted, predominately in the feces. Fenbuconazole did not accumulate in tissues.

7. *Metabolite toxicology.* There are no toxicological concerns for fenbuconazole based on differential metabolic pathways in plants and animals. Triazole fungicides are known to produce three common metabolites, 1,2,4-triazole, triazolylalanine and triazole acetic acid. To support the extension of existing parent triazole-derivative fungicide tolerances, EPA conducted an interim human health assessment for aggregate exposure to 1,2,4-triazole. This interim assessment was summarized in the **Federal Register** notice of August 4, 2004 (69 FR 47005) (FRL–7352–1) and titled Propiconazole; Time-Limited Pesticide Tolerances. EPA concluded that for all exposure durations and population subgroups, aggregate exposures to 1,2,4-triazole are not expected to exceed its level of concern.

8. *Endocrine disruption.* The mammalian endocrine system includes estrogen and androgens as well as other hormonal systems. Fenbuconazole is not known to interfere with reproductive hormones; thus, fenbuconazole should not be considered to be estrogenic or androgenic. There are no known instances of proven or alleged adverse reproductive or developmental effects to people, domestic animals, or wildlife as a result of exposure to fenbuconazole or its residues.

C. Aggregate Exposure

1. *Dietary exposure*—i. *Food.* Dietary exposure assessments for fenbuconazole were conducted using the Dietary Exposure Evaluation Model (DEEM) software with the Food Commodity Intake Database (DEEM-FCID, version 2) which incorporates food consumption data as reported in the Continuing Survey of Food Intake by Individuals (CSFII) Survey 1994–1996, and 1998. These exposure assessments include all existing uses under section 3 registrations (stone fruit except plums or prunes, pecans and bananas) and section 18 registrations (grapefruit, blueberry, and meat and meat by-products resulting from grapefruit pulp as animal feedstuff). The assessments were performed in two levels. In the first assessment (Level 1), a Tier 1 analysis was conducted with the assumption that 100% of the crops would be treated with fenbuconazole and that residues would be present at

the tolerance levels. In the second assessment (Level 2), residues at tolerance levels were still assumed but the percent crop treated (PCT) was adjusted using the 4 or 5 year average for chronic assessment and the highest PCT for acute assessment. PCT values were based on data available for apricot, cherry, peach, grapefruit and pecan from the Doane database. Additionally, the default processing factors were used for all processed commodities except citrus oil. The tolerance of 35 ppm was used for citrus oil based on the residue data in grapefruit.

a. *Acute dietary exposure.* Although no acute adverse effect was observed as a result of exposure to a single dose, EPA has established an acute reference dose (aRfD) for the purpose of the acute dietary assessment. This aRfD was set at 0.3 mg/kg/day for females 13+ years old, the population sub-group of concern. This was based on the developmental rat toxicity study with a NOAEL of 30 mg/kg/day and an uncertainty factor of 100. The 100-fold safety factor includes intraspecies and interspecies variations. Using the above assumptions for Level 1 assessment, the food exposure for females 13+ years old at the 95th percentile was estimated to be less than 0.005 mg/kg/day which utilized less that 2% of the aRfD. For the level 2 assessment, the estimated food exposure at the 99.99*th* percentile was less than 0.003 mg/kg/day which utilizes less than 1.0% of the RfD.

b. *Chronic dietary exposure.* EPA has established a chronic reference dose (cRfD) for fenbuconazole at 0.03 mg/kg/day for all population subgroups. The cRfD is based on the 2-year combined chronic feeding-carcinogenicity study in rats with a NOAEL of 3.03 and 4.02 mg/kg/day in males and females respectively, and an uncertainty factor of 100. The 100-fold safety factor includes intraspecies and interspecies variations. No additional FQPA safety factor is required. The food exposure for the overall U.S. population was estimated to be 0.000552 mg/kg/day which utilizes less then 2% of the cRfD. The population subgroup with the highest potential for exposure was non-nursing infants at 10.6% of the cRfD with estimated food exposure of 0.003185 mg/kg/day. For the level 2 assessment, the estimated food exposure drops to 0.6% of the cRfD for the general population and 2.8% of the cRfD for non-nursing infants.

c. *Cancer dietary exposure.* EPA has classified fenbuconazole as a Group C carcinogen (possible human carcinogen with limited evidence of carcinogenicity in animals) and has established a Q1* of 0.00359 (mg/kg/day)$^{-1}$ in human equivalents. Using the above assumptions for Level 1 assessment, the food exposure was estimated to be 0.00552 mg/kg/day with a cancer risk estimate of 1.98 x 10^{-6}. Using the refinements of PCT in the Level 2 assessment results in a more realistic cancer risk assessment of 6.9 x 10^{-7} and a food exposure of 0.000191 mg/kg/day.

ii. *Drinking water.* The estimated drinking water concentration was calculated using the Pesticide Root Zone/Exposure Analysis Modeling System (PRZM/EXAMS) which predicts and annual average of 0.22 ppb. These results are considered a conservative assessment of possible concentration of fenbuconazole in drinking water. Using this value of 0.22 ppb, for dietary consumption of water in the DEEM-FCID chronic analysis results in the exposure from drinking water to be insignificant at <0.1% of the cRfD for all population subgroups. Additionally in a later assessment the Agency used (Generic Estimated Environmental Concentration) GENEEC and (Screening Concentration in Ground Water) SCI-GROW models to estimate the environmental concentrations (EECs) for surface water and ground water. The EECs for fenbuconazole are 6.7 ppb for acute and 3.6 ppb for chronic exposure. Since the EECs in ground water are much lower than the EECs in surface water, conservatively only the surface water EECs were used for comparison with the drinking water levels of comparison (DWLOC). DWLOC is a theoretical upper limit on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. DWLOC is not a regulatory standard for drinking water, but is used as a point of comparison against the estimated potential concentrations in groundwater or surface water. It is calculated by subtracting the food dietary exposure (from DEEM analysis) from the RfD and then expressed as µg/L using default body weights (70 kg for adult and 10 kg for infants) and drinking water consumption (2 L/day for adults and 1 L/day for children). The acute DWLOC for females 13 years and older (population sub-group of concern) was calculated to be 8,915 µg/L. The chronic DWLOC for the general U.S. population and non-nursing infants (population sub-group of concern) was calculated to be 1,043 µg/L and 292 µg/L, respectively. The cancer DWLOC is the concentration in drinking water that results in a negligible cancer risk of 1 x 10^{-6}. Using the Level 2 assessment, the estimated chronic food exposure is 0.000191 mg/kg/day for the general U.S. population. Assuming a negligible cancer risk of 1 x 10^{-6} and the Q1* of 0.00359 (mg/kg/day)$^{-1}$, the maximum allowable water exposure is 0.00009 mg/kg/day resulting in a calculated cancer DWLOC of 3 µg/L. When comparing the EEC to the cancer DWLOC, the Agency policy states that a factor of 3 will be applied to GENEEC modeled values because the estimated environmental concentration is derived from a 56-day average value and not a longer-term average. Applying a factor of 3, the EEC is 1.2 µg/L which is less than the calculated cancer DWLOC of 3 µg/L. The DWLOCs are substantially greater than the estimated residue concentration in ground water or surface water, therefore, exposure to fenbuconazole would not result in unacceptable levels of aggregate human health risk.

2. *Non-dietary exposure.* Fenbuconazole is not currently registered for use on any sites that would result in residential exposure. Thus, the risk from non-dietary exposure would be considered negligible.

D. Cumulative Effects

Fenbuconazole is a member of the triazole class of fungicides. At this time, EPA does not have available data to determine whether fenbuconazole exhibits a common mechanism of toxicity with other triazole fungicides. For purposes of this tolerance action, it is assumed that fenbuconazole does not have a mechanism of toxicity common with other substances and no cumulative risk is required.

E. Safety Determination

1. *U.S. population.* Using the conservative exposure assumptions (Level 1/Tier 1) and taking into account the completeness and reliability of the toxicity data, the chronic dietary food exposure from all supported section 3 and section 18 registered uses will utilize 1.8% of the cRfD for the U.S. population. The major identifiable sub-group with the highest chronic food exposure is non-nursing infants at 10.6% of the cRfD. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Thus, there is a reasonable certainty that no harm will result from aggregate exposure to fenbuconazole residues from the proposed uses. The acute dietary food exposure at the 95th percentile for females 13+ years, the population sub-group of concern, is <2% of the aRfD. Therefore, there is no

concern for acute exposure because the acute RfD represents the level at or below which a single daily exposure will not pose appreciable risk to human health. Additionally, the potential contribution of fenbuconazole residues in drinking water is expected to be minimal. Using a slight refinement for PCT, the cancer risk assessment is 6.9×10^{-7}. Generally the Agency has no concern for exposures that result in a cancer risk estimate below 1×10^{-6}. Including the potential for exposure in drinking water, the cancer risk is not expected to exceed 1×10^{-6} for the U.S. population as a whole.

2. *Infants and children.* In assessing the potential for additional sensitivity of infants and children to residues of fenbuconazole, data from developmental toxicity studies in rats and rabbits and a 2-generation reproduction study in the rat are considered. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from pesticide exposure during prenatal development. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability and potential systemic toxicity of mating animals and on various parameters associated with the well-being of offspring. The completeness and adequacy of the toxicity database is also considered. No indication of increased susceptibility to infants and children was noted in these studies for fenbuconazole. EPA has previously determined that no additional safety factor to protect infants and children is necessary for fenbuconazole and that the RfD of 0.03 mg/kg/day is appropriate for assessing risk to infants and children.

F. International Tolerances

International CODEX values are established for apricot, banana, barley, barley straw and fodder, cattle fat, meat, milk and edible offal, cherries, cucumber, eggs, grapes, melon except watermelon, peach, plum, pome fruits, poultry fat, meat and edible offal, rape seed, rye, summer squash, sunflower, and wheat.

[FR Doc. 04–25501 Filed 11–16–04; 8:45 am]
BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority.

November 9, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction (PRA) comments should be submitted on or before January 18, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at 202–418–2918 or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0216.

Title: Section 73.3538, Application to Make Changes in an Existing Station.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents: 50.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 50 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On February 14, 2001, the Commission adopted a *Report and Order,* In the Matter of An Inquiry Into the Commission's Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification, MM Docket No. 93–177. This *Report and Order* relaxed the technical requirements for AM stations using directional antennas. Among other things, this *Report and Order* eliminated the need to file an informal application to specify new AM station directional antenna field monitoring points. 47 CFR Section 73.3538(b) requires a broadcast station to file an informal application to modify or discontinue the obstruction marking or lighting of an antenna supporting structure. The requirement to file an informal application to relocate the main studio outside the principal community contour has approval under 47 CFR Section 73.1125 (3060–0171). The data is used by FCC staff to ensure that the modification or discontinuance of the obstruction marking or lighting will not cause a menace to air navigation.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–25518 Filed 11–16–04; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) being Reviewed by the Federal Communications Commission, Comments Requested

November 9, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control

number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 18, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918 or via the Internet at Cathy.Williams@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0652.

Title: Section 76.309, Customer Service Obligations; Section 76.1602, Customer Service—General Information; Section 76.1603, Customer Service—Rate and Service Changes—General Information, and Section, 76, 1619, Information on Subscriber Bills.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; State, Local or Tribal Government.

Number of Respondents: 10,410.

Estimated Time per Response: 10 minutes to 1.0 hour.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 32,527 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR Section 76.1602 states that franchise authorities must provide affected operators 90 days written notice of its intent to enforce customer service standards. 47 CFR Sections 76.1603 and 76.309 set forth various customer service obligations and notification requirements for changes in rates, programming services and channel positions. In addition, Sections 76.1603 states that cable operators shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request: (1) Products and services offered; (2) Prices and options for programming services and conditions of subscription to programming and other services; (3) Installation and service maintenance policies; (4) Instructions on how to use the cable service; (5) Channel positions programming carried on the system; and (6) Billing complaint procedures, including the address and telephone number of the local franchise authority's cable office. Section 76.1603 states that customers will be notified of any changes in rates, programming services or channel positions as soon as possible in writing. Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator. In addition, the cable operator shall notify subscribers 30 days in advance of any significant changes in the other information required by section 76.1603. Section 76.1603 states that in addition to the requirements regarding advanced notification to customers of any changes in rates, programming services or channel positions, cable systems shall give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change. Such notice shall state the precise amount of any rate change and briefly explain in readily understandable fashion the cause of the rate change (*e.g.* inflation, changes in external costs or the addition/deletion of channels). When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified. Notices to subscribers shall inform them of their right to file complaints about changes in cable programming service tier rates and services, shall state that the subscriber may file the complaint within 90 days of the effective date of the rate change, and shall provide the address and phone number of the local franchising authority. 47 CFR 76.1619 states that in case of a billing dispute, the cable operator must respond to a written complaint from a subscriber within 30 days. The Commission requires the various disclosure and notifications contained in this collection as a means of consumer protection to ensure that subscribers and franchising authorities are knowledgeable of cable operators' business practices, current rates, rate changes for programming service and equipment, and channel line-up changes.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–25519 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) being Reviewed by the Federal Communications Commission

November 9, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 17, 2004. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1039.

Title: Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act—Review Process, WT Docket No. 03–128.

Form Nos.: FCC Forms 620 and 621.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, state, local or tribal government.

Number of Respondents: 12,000 respondents; 7,800 responses.

Estimated Time Per Response: .5–10 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement, and third party disclosure requirement.

Total Annual Burden: 123,888 hours.

Total Annual Cost: $9,225,000.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission is revising FCC Forms 620 and 621 to request additional information and attachments for Indian tribes and Native Hawaiian organizations involvement and other criteria concerning the applicant and the applicant's consultant. The Commission is also clarifying the instructions for both forms. The data is used by FCC staff, State Historic Preservation Officers ("SHPO"), Tribal Historic Preservation Officers ("THPO"), and the Advisory Council on Historic Preservation ("ACHP") to take such action as may be necessary to ascertain whether a proposed action may affect historic properties that are listed or eligible for listing in the National Register as directed by Section 106 of the National Historic Preservation Act of 1996 ("NHPA").

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–25520 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 8, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 18, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0767.

Title: Auction Forms and License Transfer Disclosures—Supplement For the Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order in WT Docket No. 97–82.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 22,000.

Estimated Time Per Response: 5.25 hours.

Frequency of Response: On occasion reporting requirement, third party disclosure requirement and recordkeeping requirement.

Total Annual Burden: 770,250 hours.

Total Annual Cost: $47,452,000.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission will amend the eligibility criteria for rural telephone cooperatives seeking the narrow exemption from the requirement that the gross revenues of all affiliates of an applicant are attributed to the applicant. As a result of this action, auction applicants seeking an exemption from this requirement must provide different information to establish eligibility for this exemption, on the FCC Form 601, based on the revised three factors listed under 47 CFR 1.2110. The information requirement will enable the Commission to ensure that no bidder gains an unfair advantage over other bidders in its spectrum auctions and thus enhance the competitiveness and fairness of its auctions. The information collected will be reviewed, and if warranted, referred to the Commission's Enforcement Bureau for possible investigation and administrative action. The Commission may also refer allegations of anticompetitive auction conduct to the Department of Justice for investigation.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–25521 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Federal Advisory Committee Act

AGENCY: Federal Communications Commission.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons that the Advisory Committee on Diversity for Communications in the Digital Age will

hold its fifth meeting on December 10, 2004, in Miami, Florida.

DATES: December 10, 2004, 1 p.m.–4 p.m.

ADDRESSES: Florida Memorial College, 15800 NW., 42nd Ave., Miami, FL 33054–6155.

FOR FURTHER INFORMATION CONTACT: Linda Blair, Designated Federal Officer of the Committee on Diversity, or Maureen C. McLaughlin, Alternate Designated Federal Officer of the Committee on Diversity, 202–418–2030, e-mail *Linda.Blair@fcc.gov, Maureen.Mclaughlin@fcc.gov*. Press Contact, Audrey Spivak, Office of Public Affairs, 202–418–0512, *Audrey.Spivak@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Diversity Committee was established by the Federal Communications Commission to examine current opportunities and develop recommendations for policies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries. The Diversity Committee will prepare periodic and final reports to aid the FCC in its oversight responsibilities and its regulatory reviews in this area. In conjunction with such reports and analyses, the Diversity Committee will make recommendations to the FCC concerning the need for any guidelines, incentives, regulations or other policy approaches to promote diversity of participation in the communications sector. The Diversity Committee will also develop a description of best practices within the communications sector for promoting diversity of participation.

Agenda

At the December 10, 2004 meeting, the Committee will discuss recommendations from the subcommittees. The Subcommittee on Career Advancement will propose, for approval of the full Advisory Committee, a regulatory initiative for career advancement, diversity resource directory, and further report on the best of the Best Practices as identified in the survey, "Workplace Diversity: A Global Necessity and an Ongoing Commitment." The Transactional Transparency and Outreach Subcommittee will present, for approval of the full Advisory Committee, a recommendation on Merger Review. The Financial Issues Subcommittee will present, for approval of the full Advisory Committee, a Community Reinvestment Act recommendation and Foreign Ownership Rule proposal.

Information concerning the activities of the Diversity Committee can be reviewed at the Committee's Web site *http://www.fcc.gov/DiversityFAC*. Material relevant to the December 10th meeting will be posted there. Members of the general public may attend the meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. A live RealAudio feed over the Internet will not be available.

The public may submit written comments to the Committee's Designated Federal Officer before the meeting. Members of the Advisory Committee and the public may submit written comments at any time by following the instructions on the Web site.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–25516 Filed 11–16–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notice

DATE AND TIME: Thursday, November 18, 2004, 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (ninth floor).

STATUS: This meeting will be open to the Public.

The following item has been added to the agenda: Final Rules: Technical amendments to BCRA and explanation and justification.

FOR FURTHER INFORMATION CONTACT: Robert Biersack, Acting Press Officer, Telephone (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 04–25646 Filed 11–15–04; 2:38 pm]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may obtain copies of agreements by contacting the Commission's Office of Agreements at 202–523–5793 or via e-mail at *tradeanalysis@fmc.gov*. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 011756–002.

Title: New World Alliance/Evergreen Slot Exchange Agreement.

Parties: APL Co. Pte. Ltd. and American President Lines, Ltd.; Mitsui O.S.K. Lines, Ltd.; Hyundai Merchant Marine Co., Ltd.; and Evergreen Marine Corp. (Taiwan) Ltd.

Filing Party: Eliot J. Halperin, Esq.; Manelli, Denison & Selter PLLC; 2000 M Street, NW.; 7th Floor; Washington, DC 20036.

Synopsis: The modification would permit greater flexibility in allocating space under the agreement. The parties request expedited review.

Dated: November 12, 2004.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. 04–25488 Filed 11–16–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 30, 2004.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. CM/FS Reeves Investment, L.P.; Frances Skiller Reeves; Charles Monroe Reeves; all of West Point, Georgia, and Steven deRalph Townson, Chelsea, Alabama; to acquire voting shares of Frontier National Corporation, Sylacauga, Alabama, and thereby indirectly acquire voting shares of Frontier Bank, La Grange, Georgia.

Board of Governors of the Federal Reserve System, November 10, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–25454 Filed 11–16–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 04-24999) published on pages 65195 and 65196 of the issue for Wednesday, November 10, 2004.

Under the Federal Reserve Bank of St. Louis heading, the entry for Charles Keith Akin, is revised to read as follows:

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. Charles Keith Akin, Clinton, Kentucky; and the Akin Control Group, which consists of Charles Keith Akin; Anita Akin; Burkley Investments, Inc.; Parkway Manor – KY; and Parkway Manor – TN, all of Clinton, Kentucky; and Bruce Akin, Paducah, Kentucky; to acquire additional voting shares of Purchase Area Bancorp, Bardwell, Kentucky, and thereby indirectly acquire voting shares of Bardwell Deposit Bank, Bardwell, Kentucky.

Comments on this application must be received by November 24, 2004.

Board of Governors of the Federal Reserve System, November 10, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–25455 Filed 11–16–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 10, 2004.

A. Federal Reserve Bank of Chicago (Patrick Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. QCR Holdings, Inc., Moline, Illinois; to acquire 100 percent of the voting shares of Rockford Bank and Trust Company, Rockford, Illinois (in organization).

Board of Governors of the Federal Reserve System, November 10, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–25453 Filed 11–16–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research And Quality

Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

A Special Emphasis panel is a group of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ), and agree to be available, to conduct on an as needed basis, scientific reviews of applications of AHRQ support. Individual members of the Panel do not attend regularly-scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Peer Review of a Research Grant application (R03) will be discussed at this meeting. These discussions are likely to reveal personal information concerning individuals associated with the applications. This information is exempt from mandatory disclosure under the above-cited statutes.

SEP Meeting on: AHRQ Research Grant Application (R03).

Date: November 17, 2004 (Open November 17 from 1:30 p.m. to 1:45 p.m. and closed for the remainder of the teleconference meeting).

Place: John M. Eisenberg Building, AHRQ Conference Center, 540 Gaither Road, Rockville, Maryland 20850.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the nonconfidential portions of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Room 2038, Rockville, Maryland 20850, telephone (301) 427–1554.

Agenda items for this meeting are subject to change as priorities dictate.

This notice is being published less than 15 days prior to the November 17 meeting, due to the time constraints of reviews and funding cycles.

Dated: November 8, 2004.

Carolyn M. Clancy, M.D.,

Director.

[FR Doc. 04–25474 Filed 11–16–04; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004D–0499]

Compliance Policy Guide; Radiofrequency Identification Feasibility Studies and Pilot Programs for Drugs; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a new compliance policy guide (CPG) Sec. 400.210 entitled

"Radiofrequency Identification Feasibility Studies and Pilot Programs for Drugs." The CPG describes the agency's intent to exercise enforcement discretion, until December 31, 2007, concerning certain regulatory requirements to facilitate the performance of feasibility studies and pilot programs involving Radiofrequency Identification (RFID) tags for drugs. The goal of the CPG is to allow industry to gain experience with the use of RFID technology to ensure the long-term safety and integrity of the U.S. drug supply.

DATES: You may submit written or electronic comments at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Division of Compliance Policy (HFC–230), Office of Enforcement, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the guidance may be sent.

Submit written comments on the guidance to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Paul Rudolf, Office of Policy (HF–11), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3360.

SUPPLEMENTARY INFORMATION:

I. Background

On February 18, 2004, FDA published a report entitled "Combating Counterfeit Drugs" which is available on the FDA Web site at *http://www.fda.gov/oc/initiatives/counterfeit*. In that report the agency identified RFID technology as the cornerstone in the fight against counterfeit drugs and announced our intention to facilitate the adoption of RFID technology by participants in the pharmaceutical supply chain. We also stated that widespread adoption of RFID technology was feasible by 2007.

Recently, FDA has received inquiries focusing on whether certain regulatory requirements, including those related to labeling, electronic records, and product quality, apply to pharmaceutical manufacturers, repackagers, relabelers, distributors, retailers, or others who participate in feasibility studies and pilot programs (collectively "a study" or "studies") using RFID tags for drugs. This CPG describes how we intend to exercise our enforcement discretion regarding such studies. The exercise of such enforcement discretion expires on December 31, 2007. The goal of this CPG is to facilitate the performance of RFID studies and allow industry to gain experience with the use of RFID.

FDA is issuing this document as a level 1 guidance consistent with FDA's good guidance practices regulation (§ 10.115 (21 CFR 10.115)). The new CPG Sec. 400.210 is being implemented immediately without prior public comment under § 10.115(g)(2), because the agency has determined that prior public participation is not feasible or appropriate, but comments are welcome at any time. The agency also thinks that use of RFID technology is critical to ensuring the long-term safety and integrity of the U.S. drug supply and immediate guidance is needed to facilitate studies of RFID.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the guidance document. Submit two copies of written comments, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

An electronic version of this guidance is available on the Internet at *http://www.fda.gov/ora* under "Compliance Reference."

Dated: November 10, 2004.

John Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 04–25527 Filed 11–15–04; 9:19 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Federal Law Enforcement Training Center

Notice of meeting

AGENCY: Federal Law Enforcement Training Center (FLETC), Department of Homeland Security.

ACTION: Notice of Meeting.

SUMMARY: The Advisory Committee to the National Center for State and Local Law Enforcement Training (National Center) at the Federal Law Enforcement Training Center will meet on December 1, 2004, beginning at 8 a.m.

ADDRESSES: Federal Law Enforcement Training Center, 1131 Chapel Crossing Road, Glynco, GA 31524.

FOR FURTHER INFORMATION CONTACT: Reba Fischer, Designated Federal Officer, National Center for State and Local Law Enforcement Training, Federal Law Enforcement Training Center, Glynco, GA 31524, 912–267–2343, *reba.fischer@dhs.gov*.

SUPPLEMENTARY INFORMATION: The agenda for this meeting includes remarks by the Committee Co-Chairs, Randy Beardsworth, Director of Operations, Border and Transportation Security, Department of Homeland Security, and Deborah Daniels, Assistant Attorney General, Office of Justice Programs, Department of Justice; an update on current training initiatives of the National Center; and planning of strategic goals. This meeting is open to the public. Anyone desiring to attend must contact Reba Fischer, the Designated Federal Officer, no later than November 20, 2004, at (912) 267–2343, to arrange clearance. This meeting was originally scheduled for September 14, 2004, but was cancelled due to Hurricane Ivan.

Dated: November 5, 2004.

Stanley Moran,

Director, National Center for State and Local Law Enforcement Training.

[FR Doc. 04–25545 Filed 11–12–04; 4:32 pm]

BILLING CODE 4810–32–U

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services Bureau

[CIS No. 2331–04]

RIN 1615–ZA68

Extension of Honduras for Temporary Protected Status; Correction

AGENCY: Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice of correction.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS) is correcting a notice that was published in the **Federal Register** on November 3, 2004 at 69 FR 64084 which announced the extension of the designation of Honduras for Temporary Protected Status (TPS). In the supplemental information to the notice, USCIS inadvertently misstated that only Form I–821 with Revision Date 7/30/04 will

be accepted. However, the Form I–821 Instructions were revised on November 5, 2004 and are now consistent with the filing instructions in the aforementioned **Federal Register** notice. Therefore, USCIS is notifying affected nationals of Honduras (or aliens with no nationality who last habitually resided in Honduras) that Form I–821 with Revision Date 11/05/04 will be accepted until further notice, and Form I–821 with Revision Date 7/30/04 will be accepted through January 3, 2005. All applicants are required to follow the same filing requirements as listed in the notice at 69 FR 64084 regardless of the version of the Form I–821 submitted.

DATES: This correction is effective November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Colleen Cook, Residence and Status Services, Office of Programs and Regulations Development, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Ave., NW., 3rd floor, Washington, DC 20529, telephone (202) 514–4754.

SUPPLEMENTARY INFORMATION:

Need for Correction

As published in the **Federal Register** on November 3, 2004 (69 FR 64084), the notice contains an error that is in need of correction.

Correction of Publication

Accordingly, the publication on November 3, 2004 (69 FR 64084), of the notice that was the subject of FR Doc. 04–24608 is corrected as follows:

1. On page 64086, beginning on the 8th line in the first column, the sentences "Please note that Form I–821 has been revised and only the new form with Revision Date 7/30/04 will be accepted. Submissions of older versions of Form I–821 will be rejected." is corrected to read: "Please note that Form I–821 has been revised and the new form with Revision Date 11/05/04 will be accepted until further notice. The previous version of Form I–821 with Revision Date 7/30/04 will be accepted through January 3, 2005."

Dated: November 12, 2004.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 04–25468 Filed 11–16–04; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services Bureau

[CIS No. 2332–04]

RIN 1615–ZA09

Extension of Nicaragua for Temporary Protected Status; Correction

AGENCY: Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice of correction.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS) is correcting a notice that was published in the **Federal Register** on November 3, 2004 at 69 FR 64088 which announced the extension of the designation of Nicaragua for Temporary Protected Status (TPS). In the supplemental information to the notice, USCIS inadvertently misstated that only Form I–821 with Revision Date 7/30/04 will be accepted. However, the Form I–821 Instructions were revised on November 5, 2005 and are now consistent with the filing instructions in the aforementioned **Federal Register** notice. Therefore, USCIS is notifying affected nationals of Nicaragua (or aliens with no nationality who last habitually resided in Nicaragua) that Form I–821 with Revision Date 11/05/04 will be accepted until further notice, and Form I–821 with Revision Date 7/30/04 will be accepted through January 3, 2005. All applicants are required to follow the same filing requirements as listed in the notice at 69 FR 64088 regardless of the version of the Form I–821 submitted.

DATES: This correction is effective November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Colleen Cook, Residence and Status Services, Office of Programs and Regulations Development, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Ave., NW., 3rd floor, Washington, DC 20529, telephone (202) 514–4754.

SUPPLEMENTARY INFORMATION:

Need for Correction

As published in the **Federal Register** on November 3, 2004 (69 FR 64088), the notice contains an error that is in need of correction.

Correction of Publication

Accordingly, the publication on November 3, 2004 (69 FR 64088), of the notice that was the subject of FR Doc. 04–24607 is corrected as follows:

1. On page 64089, in the third column, beginning on the third line of the second paragraph, the sentences "Please note that Form I–821 has been revised and only the new form with Revision Date 7/30/04 will be accepted. Submissions of older versions of Form I–821 will be rejected." is corrected to read: "Please note that Form I–821 has been revised and the new form with Revision Date 11/05/04 will be accepted until further notice. The prior version of Form I–821 with Revision Date 7/30/04 will be accepted through January 3, 2005."

Dated: November 12, 2004.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 04–25467 Filed 11–16–04; 8:45 am]

BILLING CODE 4410–10–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–505]

Certain Gun Barrels Used in Firearms Training Systems; Notice of Request for Written Submissions on Remedy, the Public Interest, and Bonding With Respect to Respondents Found in Default

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Commission is requesting briefing on remedy, public interest, and bonding with respect to the respondents found in default in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Michael Haldenstein, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3041. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by

contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: This patent-based section 337 investigation was instituted by the Commission based on a complaint filed by Beamhit, LLC, and Safeshot, LLC, both of Columbia, Maryland, and Safeshot, Inc., of New York, New York. 69 FR 12346 (March 16, 2004). The complainants alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain gun barrels used in firearms training systems by reason of infringement of claims 1, 2, 4, 5, 8, 15, 21, 22, and 26 of U.S. Patent No. 5,829,180 and claims 1–3, 7, 9, 14–18, 20, 24, 27, 32, 33, 37–40, 44, 45, 49–51, and 54 of U.S. Patent No. 6,322,365. The complaint named Widec S.A. Décolletage ("Widec"), of Moutier, Switzerland, AMI Corp. SA ("AMI"), of Moutier Switzerland, Crown AirMunition Holding, of Hilversum, The Netherlands, AirMunition International Corp. of Hilversum, The Netherlands, AirMunition Industries S.A., of Belprahon-Moutier, Switzerland, and AirMunition North America, Inc., of Norcross Georgia as respondents.

On April 27, 2004, complainants filed a motion, pursuant to Commission Rule 210.16, for an order to show cause and entry of a default judgement against Crown AirMunition Holding, AirMunition International Corp., AMI Corp. SA, and AirMunition North America (collectively "the AirMunition respondents"). The Commission investigative attorney ("IA") supported the motion. None of the respondents filed a response to the motion. On May 12, 2004, the administrative law judge ("ALJ"), issued a show cause order (Order No. 6). The order required the AirMunition respondents to show cause why they should not be held in default, having not responded to either the complaint or the notice of investigation. The respondents did not respond to the show cause order. On August 16, 2004, complainants filed a motion for an order finding the AirMunition respondents in default due to the respondents' failure to respond to the ALJ's show cause order.

On September 2, 2004, the complainants and respondents Widec and AMI filed a joint motion to terminate the investigation as to Widec and AMI. The joint motion was based on a proposed consent order, filed pursuant to a settlement agreement and a limited license. The IA filed a response in support of the motion on September 13, 2004. The ALJ issued an initial determination ("ID") on September 21, 2004, terminating the investigation as to Widec and AMI. No petitions for review of this ID were filed. On October 12, 2004, the Commission issued a notice indicating that it would not review the ID, thereby making the ALJ's ID the Commission's final determination

On September 21, 2004, the ALJ issued an ID finding the AirMunition respondents in default. Pursuant to Commission Rule 210.16(b)(3), the ALJ also found that the AirMunition respondents had waived their right to appear, be served with documents or contest the allegations in the complaint. No petitions for review of this ID were filed. On October 12, 2004, the ALJ's ID became the Commission's final determination after the Commission issued a notice indicating that it would not review the ID.

On October 12, 2004, pursuant to Commission Rule of Practice and Procedure 210.16(c)(1), 19 CFR § 210.16(c)(1), complainants filed a declaration seeking immediate entry of relief against the AirMunition respondents.

Section 337(g)(1), 19 U.S.C. 1337(g)(1), and Commission Rule 210.16(c), 19 CFR 210.16(c), authorizes the Commission to order limited relief against a respondent found in default unless, after consideration of public interest factors, it finds that such relief should not issue. The Commission may issue an order that could result in the exclusion of the AirMunition respondents' products from entry into the United States, and/or issue one or more cease and desist orders that could result in the AirMunition respondents being required to cease and desist from engaging in unfair acts in the importation and sale of their products. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background, see In the Matter of Certain Devices for Connecting Computers via Telephone Lines, Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

Written Submissions: The parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. The written submissions and proposed remedial orders must be filed no later than close of business on November 22, 2004. Reply submissions must be filed no later than the close of business on November 30, 2004. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* section 201.6 of the Commission's Rules of Practice and Procedure, 19 CFR § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All non-confidential written submissions will be available for

public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in section 210.16(c) of the Commission's Rules of Practice and Procedure (19 CFR § 210.16(c)).

Issued: November 10, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–25499 Filed 11–16–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–512]

Certain Light-Emitting Diodes and Products Containing Same; Notice of Commission Decision not to Review an Initial Determination Amending the Complaint and Notice of Investigation

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ's") initial determination ("ID") (Order No. 13) amending the complaint and notice of investigation to add additional claims of three asserted patents.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3090. Copies of the public version of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 10, 2004, based on a complaint filed by OSRAM GmbH and OSRAM Opto Semiconductors GmbH, both of Germany. 69 FR 32609 (June 10, 2004). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light-emitting diodes and products containing same by reason of infringement of claims 1, 3, 6, 7, and 10–13 of U.S. Patent No. 6,066,861; claims 1, 3, 6, 7, 10–13, and 15 of U.S. Patent No. 6,245,259; claims 1–2, 6–7, 11–12, and 15 of U.S. Patent No. 6,277,301 ("the '301 patent"); claims 1, 5–10, and 13–16 of U.S. Patent No. 6,376,902; claims 1 and 5–8 of U.S. Patent No. 6,469,321; claims 1, 5–8, 10–13, and 16–19 of U.S. Patent No. 6,573,580; claim 4 of U.S. Patent No. 6,576,930 ("the '930 patent"); claims 2–5, 7, and 10 of U.S. Patent No. 6,592,780; and claims 1, 3, 6–7, 10, 12–15, 17, and 21 of U.S. Patent No. 6,613,247 ("the '247 patent"). The complaint and notice of investigation named three respondents, including respondent Dominant Semiconductors Sdn. Bhd. ("Dominant"). The investigation has been terminated as to the other two respondents.

On August 11, 2004, the Commission issued notice that it had determined not to review the ALJ's initial determination amending the complaint and notice of investigation to assert claims 1–3 and 5 of U.S. Patent No. 6,716,673 against Dominant.

On October 5, 2004, complainants filed a motion pursuant to Commission rule 210.14 to amend the complaint and notice of investigation to assert claims 2–3 of the '930 patent, claim 14 of the '301 patent, and claims 11 and 20 of the '247 patent against Dominant, representing that Dominant did not oppose the motion. The Commission investigative attorney supported the motion. On October 19, 2004, the ALJ issued the subject ID granting complainants' motion. No petitions for review of the ID were filed.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: November 12, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–25498 Filed 11–16–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–438 (Final) and 731–TA–1076 (Final)]

Live Swine From Canada

AGENCY: United States International Trade Commission.

ACTION: Scheduling of the final phase of countervailing duty and antidumping investigations.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of countervailing duty investigation No. 701–TA–438 (Final) under section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) (the Act) and the final phase of antidumping investigation No. 731–TA–1076 (Final) under section 735(b) of the Act (19 U.S.C. 1673d(b)) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of less-than-fair-value and allegedly subsidized imports from Canada of live swine, provided for in subheadings 0103.91.00 and 0103.92.00 of the Harmonized Tariff Schedule of the United States (HTS).[1]

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

DATES: Effective October 20, 2004.

FOR FURTHER INFORMATION CONTACT: Michael Szustakowski (202–205–3188), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://*

[1] For purposes of these investigations, the Department of Commerce has defined the subject merchandise as all live swine from Canada except breeding swine. Live swine are defined as four-legged, monogastric (single-chambered stomach), and litter-bearing (litters typically range from 8 to 12 animals), of the species *sus scrofa domesticus*. This merchandise is currently provided for in HTS statistical reporting numbers 0103.91.0010, 0103.91.0020, 0103.91.0030, 0103.92.0010, and 0103.92.0090.

www.usitc.gov). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background. The final phase of these investigations is being scheduled as a result of an affirmative preliminary determination by the Department of Commerce that live swine are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigations were requested in a petition filed on March 5, 2004, by the National Pork Producers Council and numerous state associations and individual pork producers.

Although the Department of Commerce has preliminarily determined that imports of live swine from Canada are not being and are not likely to be subsidized, for purposes of efficiency the Commission hereby waives rule 207.21(b)[2] so that the final phase of the investigations may proceed concurrently in the event that Commerce makes a final affirmative determination with respect to such imports.

Participation in the investigations and public service list. Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report. The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on February 22, 2005, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing. The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on March 8, 2005, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before February 25, 2005. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on March 2, 2005, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written submissions. Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is March 1, 2005. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is March 15, 2005; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before March 15, 2005. On March 30, 2005, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before April 1, 2005, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

Issued: November 12, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–25496 Filed 11–16–04; 8:45 am]

BILLING CODE 7020–02–P

[2] Section 207.21(b) of the Commission's rules provides that, where the Department of Commerce has issued a negative preliminary determination, the Commission will publish a Final Phase Notice of Scheduling upon receipt of an affirmative final determination from Commerce.

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–439–440 (Final) and 731–TA–1077–1080 (Final)]

Polyethylene Terephthalate Resin From India, Indonesia, Taiwan, and Thailand

AGENCY: United States International Trade Commission.

ACTION: Scheduling of the final phase of countervailing duty and antidumping investigations.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of countervailing duty investigations Nos. 701–TA–439–440 (Final) under section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) (the Act) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of subsidized and allegedly subsidized imports from India and Thailand respectively of polyethylene terephthalate (PET) resin.[1] The Commission also hereby gives notice of the scheduling of the final phase of antidumping investigations Nos. 731–TA–1077–1080 (Final) under section 735(b) of the Act (19 U.S.C. 1673d(b)) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of less-than-fair-value (LTFV) imports from India, Indonesia, and Thailand and alleged LTFV imports from Taiwan of PET resin.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

DATES: Effective October 28, 2004.

FOR FURTHER INFORMATION CONTACT: Russell Duncan (202–708–4727), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background. The final phase of these investigations is being scheduled as a result of an affirmative preliminary determination by the Department of Commerce that certain benefits which constitute subsidies within the meaning of section 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in India of PET resin, and that such products from India, Indonesia, and Thailand are being sold in the United States at LTFV within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigations were requested in a petition filed on March 24, 2004, by the PET Resin Producers' Coalition, Washington, DC.

Although the Department of Commerce has preliminarily determined that imports of PET resin from Thailand are not being and are not likely to be subsidized, and that imports of PET resin from Taiwan are not being and are not likely to be sold in the United States at LTFV, for purposes of efficiency the Commission hereby waives rule 207.21(b)[2] so that the final phase of the investigations may proceed concurrently in the event that Commerce makes final affirmative determinations with respect to such imports.

Participation in the investigations and public service list. Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report. The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on March 1, 2005, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing. The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on March 15, 2005, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before March 9, 2005. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on March 11, 2005, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written submissions. Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the

[1] For purposes of these investigations, the Department of Commerce has defined the subject merchandise as bottle-grade polyethylene terephthalate ("PET") resin, defined as having an intrinsic viscosity of at least 0.68 deciliters per gram but not more than 0.86 deciliters per gram. The scope includes bottle-grade PET resin that contains various additives introduced in the manufacturing process. The scope does not include post-consumer recycle ("PCR") or post-industrial recycle ("PIR") PET resin; however, included in the scope is any bottle-grade PET resin blend of virgin PET bottle-grade resin and recycled PET ("RPET"). Waste and scrap PET are outside the scope of the investigation. Fiber-grade PET resin, which has an intrinsic viscosity of less than 0.68 deciliters per gram, is also outside the scope of the investigations." 69 FR 62852, 62857, 62862, and 62869. The merchandise subject to these investigations is reported under statistical reporting number 3907.60.0010 of the Harmonized Tariff Schedule of the United States ("HTSUS"); however, merchandise classified under HTSUS statistical reporting number 3907.60.0050 that otherwise meets the written description of the scope is also subject to these investigations.

[2] Section 207.21(b) of the Commission's rules provides that, where the Department of Commerce has issued a negative preliminary determination, the Commission will publish a Final Phase Notice of Scheduling upon receipt of an affirmative final determination from Commerce.

provisions of section 207.23 of the Commission's rules; the deadline for filing is March 8, 2005. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is March 22, 2005; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before March 22, 2005. On April 6, 2005, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before April 8, 2005, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

Issued: November 12, 2004

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–25497 Filed 11–16–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Race and National Origin Identification.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until January 18, 2005. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Dennis Snyder, Employment Branch, Room 4100, 650 Massachusetts Avenue, NW., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- 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 agencies 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.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Race and National Origin Identification.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 2931.1. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None. The information collection is used to maintain Race and National Origin data on all employees and new hires to meet diversity/EEO goals and act as a component of a tracking system to ensure that personnel practices meet the requirements of Federal law.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 10,000 respondents will complete a 3-minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There is an estimated 500 annual total burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: November 10, 2004.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 04–25443 Filed 11–16–04; 8:45 am]

BILLING CODE 4410–FY–P

MARINE MAMMAL COMMISSION

Committee Management; Notice of Public Meeting; Advisory Committee on Acoustic Impacts on Marine Mammals

AGENCY: Marine Mammal Commission.

ACTION: Notice of advisory committee meeting.

SUMMARY: The Marine Mammal Commission (Commission) will hold the fourth meeting of its Advisory

Committee on Acoustic Impacts on Marine Mammals (Committee) 30 November–2 December 2004 in New Orleans, LA.

DATES: The Committee will meet Tuesday, November 30, 2004, from 9 a.m. to 5 p.m.; Wednesday, December 1, from 8:30 a.m. to 5 p.m.; and Thursday, December 2, from 8:30 a.m. to 5 p.m. This meeting is open to the public. These times and the agenda topics described below are subject to change. Please refer to the Commission's Web site (*www.mmc.gov*) for the most up-to-date meeting information. The Committee's fifth public meeting is tentatively scheduled for 1–3 March 2005 in the Washington, DC metropolitan area. Further information on that meeting will be published in the **Federal Register** and posted on the Commission's Web site.

ADDRESSES: The 30 November–2 December meeting will be held at the Bourbon Orleans Hotel, 717 Orleans Street, New Orleans, Louisiana 70116, phone 504–523–2222, fax 504–571–4666, *http://www.wyndham.com/hotels/MSYBO/main.wnt.*

FOR FURTHER INFORMATION CONTACT: Erin Vos, Sound Project Manager, Marine Mammal Commission, 4340 East-West Hwy., Rm. 905, Bethesda, MD 20814, e-mail: *evos@mmc.gov*, tel.: (301) 504–0087, fax: (301) 504–0099; or visit the Commission's Web site at *www.mmc.gov.*

SUPPLEMENTARY INFORMATION: This meeting is to be held pursuant to the directive in the Omnibus Appropriations Act of 2003 (Pub. L. 108–7) that the Commission convene a conference or series of conferences to "share findings, survey acoustic 'threats' to marine mammals, and develop means of reducing those threats while maintaining the oceans as a global highway of international commerce." The meeting agenda includes presentations and discussions related to (1) progress made by the Subcommittee on Synthesis of Current Knowledge; (2) a draft report from the Subcommittee on Management and Mitigation; (3) proposals from the Working Group on Integrity and Balance in Research, Working Group on Animal Welfare Ethics, and Working Group on Research Permitting and Incidental Harassment Authorizations; (4) potential recommendations concerning research priorities, and others developed by the Subcommittees and Working Groups; (5) a report from the International Policy Workshop on sound and marine mammals; (6) how scientific uncertainty and disagreement will be handled in the Committee's final products, (7) the outline of the final Advisory Committee report; and (8) the consideration of appointing a drafting Subcommittee. The agenda also includes two public comment sessions. Guidelines for making public comments, background documents, and the meeting agenda, including the specific times of public comment periods, will be posted on the Commission's Web site prior to the meeting. Written comments may be submitted at the meeting.

Dated: November 10, 2004.

David Cottingham,

Executive Director.

[FR Doc. 04–25439 Filed 11–16–04; 8:45 am]

BILLING CODE 6820–31–M

NATIONAL SCIENCE FOUNDATION

NSB Programs and Plans Committee; Notice of Meeting

AGENCY HOLDING MEETING: National Science Foundation, National Science Board, Committee on Programs and Plans.

DATE AND TIME: November 19, 2004 2 p.m.–2:45 p.m. Open Session Teleconference.

PLACE: The National Science Foundation, Stafford One Building, 4201 Wilson Boulevard, Room 220, Arlington, VA 22230.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Friday, November 19, 2004

Open Session (2 to 2:45 p.m.)

1. Approval on behalf of the NSB [as delegated] NSF management's response to the OIG Semiannual Report to Congress.

2. Report on A&O recommended Board responses to IPA-related questions from staff of House. Appropriations Subcommittee for VA, HUD and Independent agencies.

3. Report on draft Board position statements on issues in NAPA recommendations.

FOR FURTHER INFORMATION CONTACT: Dr. Michael P. Crosby, Executive Officer and NSB Office Director, (703) 292–7000, *http://www.nsf.gov/nsb.*

Michael P. Crosby,

Executive Officer and NSB Office Director.

[FR Doc. 04–25458 Filed 11–16–04; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–498 and 50–499]

STP Nuclear Operating Company, et al.; South Texas Project, Units 1 and 2; Notice of Consideration of Approval of Application Regarding Proposed Acquisition and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an order under Section 50.80 of Title 10 of the Code of Federal Regulations (10 CFR) approving the indirect transfer of Facility Operating License Nos. NPF–76 and NPF–80 for South Texas Project (STP), Units 1 and 2, respectively, to the extent held by Texas Genco, LP (Texas Genco).

The application requests the consent of the NRC to the proposed indirect transfer of control of the STP, Units 1 and 2, licenses to the extent held by Texas Genco by virtue of the transfer of ownership of approximately 81 percent of the stock of Texas Genco's indirect parent company, Texas Genco Holdings Inc. (TGN), from CenterPoint Energy, Inc., (CenterPoint Energy) to GC Power Acquisitions, LLC (GC Power). Texas Genco is an indirect subsidiary of TGN and TGN is an indirect subsidiary of CenterPoint Energy. The transaction would result in the indirect transfer of control of Texas Genco's 30.8 percent undivided ownership interest in STP, Units 1 and 2. In addition to its 30.8 percent undivided ownership interest in STP, Units 1 and 2, Texas Genco holds a corresponding 30.8 percent interest in STP Nuclear Operating Company (STPNOC), a not-for-profit Texas corporation, which is the licensed operator of STP, Units 1 and 2. The application further requests, as necessary, approval of the indirect transfer of control of this 30.8 percent interest in STPNOC, to the extent such indirect transfer would result in an indirect transfer of the licenses as held by STPNOC, thereby requiring NRC approval.

(According to the application, Texas Genco's 30.8 percent ownership interest is expected to increase as a result of Texas Genco's exercising its right of first refusal under the Amended and Restated South Texas Project Participation Agreement, pursuant to which Texas Genco has entered into a Purchase and Sale Agreement dated September 3, 2004, to acquire an additional 13.2 percent undivided ownership interest in STP, Units 1 and 2, from AEP Texas Central Company. This acquisition would result in an

increase in Texas Genco's ownership interest in STP, Units 1 and 2, and related interest in STPNOC to 44 percent. This transaction will be addressed in a separate application and is not the subject of this notice.)

Pursuant to 10 CFR 50.80, no license shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission gives its consent in writing. The Commission will approve an application for the indirect transfer of a license, if the Commission determines that the proposed transaction effectuating the indirect transfer will not affect the qualifications of the holder of the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto. Before issuance of the proposed Order, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The filing of requests for hearing and petitions for leave to intervene with regard to the license transfer application, are discussed below.

Within 20 days after the date of publication of this notice, 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 petitions for leave to intervene shall be filed in accordance with the Commission's rules of practice set forth in Subpart M, "Hearing Requests and Procedures for Hearings on License Transfer Applications," of 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. (**Note:** Public access to ADAMS has been temporarily suspended so that security reviews of publicly available documents may be performed and potentially sensitive information removed. Please check the NRC Web site for updates on the resumption of ADAMS access.) If a request for a hearing or petition for leave to intervene is filed within 20 days after the date of publication of this notice, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, 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 general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestors/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner/requestor is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include 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/requestor to relief. A petitioner/requestor who fails to satisfy 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.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff; (3) e-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV*; or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to Mr. John E. Matthews, Morgan, Lewis, & Bockius, LLP, 1111 Pennsylvania Avenue, NW., Washington, DC 20004, attorney for the licensee.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held, and designating the presiding officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

For further details with respect to this action, see the application dated October 12, 2004, of which a nonproprietary version is available for public inspection at the Commission's PDR, located at One White Flint North,

Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and accessible electronically through the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams/html.* (**Note:** Public access to ADAMS has been temporarily suspended so that security reviews of publicly available documents may be performed and potentially sensitive information removed. Please check the NRC Web site for updates on the resumption of ADAMS access.) Persons who don't have access to ADAMS or who encounter problems accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland this 10th day of November 2004.

For the Nuclear Regulatory Commission.

David H. Jaffe,

Senior Project Manager, Section 1, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–25459 Filed 11–16–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–05235]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for the Exxon Mobil Research and Engineering Company's Facility in Paulsboro, NJ

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: Judy Joustra, Materials Security & Industrial Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania, 19406, telephone (610) 337–5355, fax (610) 337–5269, or by e-mail: *JAJ@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is terminating Materials License No. 29–00505–02 issued to The Exxon Mobil Research and Engineering Company (Exxon) and authorizing release of its facility in Paulsboro, New Jersey for unrestricted use. NRC has prepared an Environmental Assessment (EA) in support of this action in accordance with the requirements of 10 CFR part 51. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate. The license will be terminated following the publication of this notice.

II. EA Summary

The purpose of the action is to terminate the license and authorize the release of the licensee's Paulsboro, New Jersey facility for unrestricted use. Exxon has been authorized by NRC since November 1, 1956 to use radioactive materials for research and development purposes at the site. On February 10, 2004, Exxon requested that NRC release the facility for unrestricted use. Exxon has conducted surveys of the facility and provided information to the NRC to demonstrate that the site meets the license termination criteria in subpart E of 10 CFR part 20 for unrestricted use.

The NRC staff has prepared an EA in support of the license termination. The facility was remediated and surveyed prior to the licensee requesting the termination of the license. The NRC staff has reviewed the information and final status survey submitted by Exxon. Based on its review, the staff has determined that there are no additional remediation activities necessary to complete the proposed action. Therefore, the staff considered the impact of the residual radioactivity at the facility and concluded that since the residual radioactivity meets the requirements in subpart E of 10 CFR part 20, a Finding of No Significant Impact is appropriate.

III. Finding of No Significant Impact

The staff has prepared the EA (summarized above) in support of the license termination and release the facility for unrestricted use. The NRC staff has evaluated Exxon's request and the results of the surveys and has concluded that the completed action complies with subpart E of 10 CFR part 20. The staff has found that the environmental impacts from the action are bounded by the impacts evaluated by NUREG–1496, Volumes 1–3, "Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities" (ML042310492, ML042320379, and ML042330385). On the basis of the EA, the NRC has concluded that the environmental impacts from the action are expected to be insignificant and has determined not to prepare an environmental impact statement for the action.

IV. Further Information

Documents related to this action, including the application for the license amendment and supporting documentation, are available electronically at NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this Notice are: The Environmental Assessment (ML043130124), Letter dated February 10, 2004 requesting termination of the license (ML040630698), Letter dated May 13, 2004 providing additional information (ML041730600), Letter dated August 23, 2004 providing additional information (ML042450527), E-mail dated October 6, 2004 providing additional information (ML042870539), and Letter dated October 18, 2004 from New Jersey Department of Environmental Protection (ML042990034). Please note that on October 25, 2004, the NRC terminated public access to ADAMS and initiated an additional security review of publicly available documents to ensure that potentially sensitive information is removed from the ADAMS database accessible through the NRC's Web site. Interested members of the public may obtain copies of the referenced documents for review and/or copying by contacting the Public Document Room pending resumption of public access to ADAMS. The NRC Public Documents Room is located at NRC Headquarters in Rockville, MD, and can be contacted at (800) 397–4209, (301) 415–4737 or by "e-mail to: *pdr@nrc.gov.*"

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee. The PDR is open from 7:45 a.m. to 4:15 p.m., Monday through Friday, except on Federal holidays.

Dated at King of Prussia, Pennsylvania this 9th day of November, 2004.

For the Nuclear Regulatory Commission.

John D. Kinneman,

Chief, Materials Security & Industrial Branch, Division of Nuclear Materials Safety Region I.

[FR Doc. 04–25461 Filed 11–16–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–312]

Sacramento Municipal Utility District; Rancho Seco Nuclear Generating Station; Environmental Assessment and Finding of No Significant Impact

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: John B. Hickman, Project Manager, Reactor Decommissioning Section, Decommissioning Directorate, Division of Waste Management and Environmental Protection, Office of Nuclear Material and Safeguards Information, U.S. Nuclear Regulatory Commission, Washington, DC, 20555. Telephone: 301–415–3017; fax number: (301) 415–5397; e-mail: *jbh@nrc.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Nuclear Regulatory Commission (NRC) is considering granting a partial exemption from the Recordkeeping requirements of Title 10 of the Code of Federal Regulations (10 CFR) part 50.71(c); 10 CFR part 50, Appendix A; 10 CFR part 50, Appendix B, for the Rancho Seco Generating Station (Rancho Seco) as requested by Sacramento Municipal Utility District (SMUD) on September 2, 2004. An environmental assessment (EA) was performed by the NRC staff in support of its review of the exemption request.

I. Introduction

SMUD is the licensee and holder of Facility Operating License No. DPR–54 for Rancho Seco, a permanently shutdown decommissioning nuclear plant. Although permanently shutdown, this facility is still subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC).

SMUD shut down Rancho Seco permanently on June 7, 1989, after approximately 15 years of operation. On August 29, 1989, SMUD formally informed the NRC that the plant was shut down permanently. On May 20, 1991, SMUD submitted the Rancho Seco decommissioning plan and on March 20, 1995, the NRC issued an Order approving the decommissioning plan and authorizing the decommissioning of Rancho Seco.

II. Environmental Assessment Summary

Identification of Proposed Action

The exemption will allow the disposal of records, prior to termination of the Rancho Seco Possession Only License No. DPR–54, that (1) are associated with the operation, design, fabrication, erection, and testing of structures, systems, and components that are no longer quality-related and/or important to safety or have been removed from the plant for disposal, and (2) require storage in their original hardcopy format due to practical and feasibility limitations associated with transferring them to microfilm or microfiche.

Need for Proposed Action

The requested exemption and application of the exemption will eliminate the requirement to maintain records that are no longer necessary due to the permanently shutdown status of the facility and thereby reduce the financial burden on ratepayers associated with the storage of a large volume of hardcopy records.

The Affected Environment and Environmental Impacts

The proposed action is purely administrative in nature and will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released off site and there is no significant increase in the amount of any effluent released offsite. There is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not have a potential to affect any historic sites. It does not affect nonradiological plant effluents, and it has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that the proposed action will have no significant effect on the environment.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.*, the "no-action" alternative). Under this alternative Rancho Seco would continue to store the records in question until license termination which would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Agencies and Persons Contacted

None.

III. Finding of No Significant Impact

Based on this review, the NRC staff has concluded that there are no significant impacts on the quality of the human environment. Accordingly, the staff has determined that preparation of an Environmental Impact Statement is not warranted, and a Finding of No Significant Impact is appropriate.

IV. Further Information

For further details with respect to the proposed action, see the licensee's letter dated September 2, 2004 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML042540018). Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's Public Document Room (PDR) Reference staff at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Please note that on October 25, 2004, the NRC suspended public access to ADAMS, and initiated an additional security review of publicly available documents to ensure that potentially sensitive information is removed from the ADAMS database accessible through the NRC's Web site. Interested members of the public may obtain copies of the referenced documents for review and/or copying by contacting the Public Document Room pending resumption of public access to ADAMS. The NRC Public Document Room is located at NRC Headquarters in Rockville, MD, and can be contacted at 800–397–4209 or (301) 415–4737 or *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 9th day of November, 2004.

For the Nuclear Regulatory Commission.

Claudia M. Craig,

Acting Deputy Director, Decommissioning Directorate, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 04–25460 Filed 11–16–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards Meeting of the Subcommittee on Plant License Renewal; Notice of Meeting

The ACRS Subcommittee on Plant License Renewal will hold a meeting on December 1, 2004, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, December 1, 2004—1 p.m. until 4:30 p.m.

The purpose of this meeting is to review the License Renewal Application and associated Draft Safety Evaluation Report (SER) related to the License Renewal of the Arkansas Nuclear One, Unit 2. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, Entergy Operations, Inc., and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Cayetano Santos (telephone 301/415–7270) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4:15 p.m. (e.t.). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: November 9, 2004.

John H. Flack,

Acting Branch Chief, ACRS/ACNW.

[FR Doc. 04–25508 Filed 11–16–04; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Public Availability of Year 2004 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (Pub. L. 105–270) ("FAIR Act")

AGENCY: Office of Management and Budget Executive Office of the President.

ACTION: Notice of public availability of agency inventory of activities that are not inherently governmental and of activities that are inherently governmental.

SUMMARY: In accordance with the "Federal Activities Inventory Reform Act of 1998" (Pub. L. 105–270) ("FAIR Act"), agency inventories of activities that are not inherently governmental are now available to the public from the agencies listed below. The FAIR Act requires that OMB publish an announcement of public availability of agency inventories of activities that are not inherently governmental upon completion of OMB's review and consultation process concerning the content of the agencies' inventory submissions. After review and consultation with OMB, agencies make their inventories available to the public, and these inventories also include activities that are inherently governmental. This is the first release of the 2004 FAIR Act inventories. Interested parties who disagree with the agency's initial judgment can challenge the inclusion or the omission of an activity on the list of activities that are not inherently governmental within 30 working days and, if not satisfied with this review, may demand a higher agency review/appeal.

The Office of Federal Procurement Policy has made available a FAIR Act User's Guide through its Internet site: *http://www.whitehouse.gov/OMB/procurement/fair-index.html.* This User's Guide will help interested parties review 2004 FAIR Act inventories, and gain access to agency inventories through agency Web site addresses.

Joshua B. Bolten,

Director.

Attachment

FIRST FAIR ACT RELEASE 2004

Armed Forces Retirement Home	Mr. Steve McManus, (202) 730–3533 *www.afrh.com.*
Chemical Safety Board	Ms. Bea Robinson, (202) 261–7627 *www.csb.gov.*
Commission on Fine Arts	Mr. Frederick Lindstrom, (202) 504–2200 *www.cfa.gov.*
Committee for Purchase from People Who are Blind or Severely Disabled.	Mr. Leon Wilson, 703–604–7740 *www.jwod.gov.*
Consumer Product Safety Commission	Mr. Edward Quist, (301) 504–7655 *www.cpsc.gov.*
Council on Environmental Quality	Mr. Ted Boling, (202) 395–3449 *www.whitehouse.gov./ceq.*
Department of Energy	Mr. Dennis O'Brien, (202) 586–1690 *www.doe.gov.*
Department of Health and Human Services	Mr. Michael Colvin, (202) 690–7887 *www.hhs.gov./ogam/oam/fair/.*
Department of Transportation	Mr. David Litman, (202) 366–4263 *www.dot.gov.*
Department of Transportation (IG)	Ms. Jackie Weber, (202) 366–1495 *www.oig.dot.gov.*
Federal Communications Commission IG	Mr. Charles Willoughby, (202) 418–0472 *www.fcc.gov/oig.*
Federal Energy Regulatory Commission	Ms. Kimberly Fernandez, (202) 208–1298 *www.ferc.gov.*
Federal Mine Safety and Health Review Commission	Mr. Richard Baker, (202) 434–9905 *www.fmshrc.gov.*
Holocaust Museum	Ms. Helen Shepherd, (202) 314–0396 *www.ushmm.gov.*
Institute of Museum and Library Services	Ms. Teresa LaHaie, (202) 606–8637 *www.imls.gov.*
International Trade Commission	Mr. Stephen McLaughlin, (202) 205–3131 *www.usitc.gov.*
Japan-United States Friendship Commission	Ms. Margaret Mihori, (202) 418–9800 *office.jusfc.gov/commissn/FAIRAct.htm.*
Kennedy Center	Mr. Jared Barlage, (202) 416–8731 *www.kennedy-center.org.*
National Aeronautics and Space Administration	Mr. Kenneth Sateriale, (202) 358–0491 *www.nasa.gov.*
National Commission on Libraries and Information Sciences	Ms. Madeleine McCain, (202) 606–9200 *www.nclis.gov.*
National Council on Disability	Ms. Ethel Briggs, (202) 272–2004 *www.ncd.gov.*
National Gallery of Art	Mr. William Roache, (202) 842–6329 *www.nga.gov.*
National Labor Relations Board	Mr. Emil George, (202) 273–1966 *www.nlrb.gov.*
National Labor Relations Board (IG)	Mr. Emil George, (202) 273–1966 *www.nlrb.gov/ig/igindex.htm.*
National Science Foundation	Mr. Joseph Burt, (703) 292–5034 *www.nsf.gov.*
Nuclear Regulatory Commission	Ms. Kathryn Greene, (301) 415–7305 *www.nrc.gov.*
Nuclear Regulatory Commission (OIG)	Mr. David Lee, (301) 415–5930 *www.nrc.gov/insp-gen.html.*
Occupational Safety and Health Review Commission	Ms. Ledia Bernal, (202) 606–5390 *www.oshrc.gov.*

FIRST FAIR ACT RELEASE 2004—Continued

Office of Navaho and Hopi Indian Relocation	Ms. Nancy Thomas, (928) 779–2721 *www.whitehouse.gov/omb/procurement/fair_list_nosite.html.*
Office of Science and Technology Policy	Ms. Ann Mazur, (202) 456–6001 *www.ostp.gov.*
Railroad Retirement Board	Mr. Henry Valiulius, (312) 751–4520 *www.rrb.gov.*
Railroad Retirement Board (Inspector General)	Ms. Henrietta Shaw, (312) 751–4345 *www.rrb.gov/oig/Rrboig.htm.*
Smithsonian Institution	Ms. Alice Maroni, (202) 275–2020 *www.si.edu.*
Social Security Administration	Mr. Jaime Fisher, (410) 965–7401 *www.ssa.gov.*
White House Commission of National Moment of Remembrance	Ms. Tina Harmon, (512) 460–5220 *www.whitehouse.gov/omb/procurement/fair _list_nosite.html.*

[FR Doc. 04–25471 Filed 11–16–04; 8:45 am]
BILLING CODE 3110–01–P

RAILROAD RETIREMENT BOARD

Sunshine Act Meeting

Notice is hereby given that the Railroad Retirement Board will hold a meeting on November 23, 2004, 9 a.m., at the Board's meeting room on the 8th floor of its headquarters building, 844 North Rush Street, Chicago, Illinois 60611. The agenda for this meeting follows:

(1) Status Report on the Field Service Task Force.

(2) Employer Status Determination, Decision on Reconsideration—American Railroads Corporation.

The entire meeting will be open to the public. The person to contact for more information is Beatrice Ezerski, Secretary to the Board, Phone No. (312) 751–4920.

Dated: November 12, 2004.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 04–25590 Filed 11–15–04; 10:31 am]
BILLING CODE 7905–01–M

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–07635]

Issuer Delisting; Notice of Application of Twin Disc, Incorporated To Withdraw Its Common Stock, No Par Value, and Its Preferred Stock Purchase Rights, From Listing and Registration on the New York Stock Exchange, Inc.

November 10, 2004.

On October 19, 2004, Twin Disc, Incorporated, a Wisconsin corporation ("Issuer"), filed an application with the Securities and Exchange Commission ("Commission"), pursuant to Section 12(d) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, no par value, and its preferred stock purchase rights ("Securities"), from listing and registration on the New York Stock Exchange, Inc. ("NYSE" or "Exchange").

The Board of Directors ("Board") of the Issuer unanimously approved a resolution on April 16, 2004 to withdraw the Issuer's Securities from listing on the NYSE and to list the Securities on the Nasdaq Stock Market ("Nasdaq"). The Board states that the following reason factored into its decision to withdraw the Issuer's Securities from the Exchange and to list on the Nasdaq: In February 2004, the NYSE informed the Issuer of the NYSE's decision to change its continued quantitative listing standards. Among other changes, the NYSE proposed to increase the minimum market capitalization and shareholders' equity requirements of companies listed on the Exchange.[3] The Issuer's Security began trading on the Nasdaq on October 21, 2004.

The Issuer stated in its application that it has complied with all the applicable laws in effect in Wisconsin, in which it is incorporated, and with the NYSE's rules governing an issuer's voluntary withdrawal of a security from listing and registration. The Issuer stated in its application that it has met the requirements of the NYSE rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer's application relates solely to the Securities' withdrawal from listing on the NYSE and from registration under Section 12(b) of the Act,[4] and shall not affect its obligation to be registered under Section 12(g) of the Act.[5]

Any interested person may, on or before December 7, 2004, comment on the facts bearing upon whether the application has been made in accordance with the rules of the NYSE, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Send an e-mail to *rule-comments@sec.gov.* Please include the File Number 1–07635 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number 1–07635. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Jonathan G. Katz,

Secretary.

[FR Doc. E4–3193 Filed 11–16–04; 8:45 am]
BILLING CODE 8010–01–P

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] *See* Securities Exchange Act Release No. 49917 (June 25, 2004), 69 FR 40439 (July 2, 2004) (File No. SR–NYSE–2004–20).

[4] 15 U.S.C. 78*l*(b).

[5] 15 U.S.C. 78*l*(g).

[6] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50651; File No. SR–Amex–2004–89]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 341A Relating to Continuing Education for Registered Persons

November 10, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 3, 2004, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Amex has filed the proposal as a "non-controversial" rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Rule 341A to eliminate the "Grandfather" exemption to the regulatory element of the Continuing Education ("CE") Program. Below is the text of the proposed rule change. Proposed new language is in *italics*. Deletions are in [brackets].

Rule 341A. Continuing Education for Registered Persons

(a) Regulatory Element—No member or member organization shall permit any registered person to continue to, and no registered person shall continue to, perform duties as a registered person, unless such person has complied with the continuing education requirements of Section (a) of this Rule.

Each registered person shall complete the Regulatory Element of the continuing education program on the occurrence of their second registration anniversary date and every three years thereafter, or as otherwise prescribed by the Exchange. On each occasion, the Regulatory Element must be completed within one hundred twenty days after the person's registration anniversary date. A person's initial registration date, *also known as the "base date"*, shall establish the cycle of anniversary dates for purposes of this Rule. The content of the Regulatory Element of the program shall be determined by the Exchange for each registration category of persons subject to the rule.

[(1) Persons Exempted From the Rule—Persons who have been continuously registered for more than ten years on July 1, 1998 shall be exempt from participation in the Regulatory Element programs for registered representatives, provided such persons have not been subject to any disciplinary action within the last ten years as enumerated in subsection (a)(3) of this Rule. A person who has been continuously registered as a principal for more than ten years on July 1, 1998 shall be exempt from participation in the Regulatory Element programs for registered principals, provided such person has not been subject within the last 10 years to any disciplinary action as enumerated in paragraph (a)(3). In the event that a registered representative or principal, who was exempt from participation in Regulatory Element programs subsequently becomes the subject of a disciplinary action as enumerated in paragraph (a)(3), such person shall be required to satisfy the requirements of the Regulatory Element as if the date of such disciplinary action is such persons initial registration date.]

[(2)]*(1)* Failure to Complete—Unless otherwise determined by the Exchange, any registered persons who have not completed the Regulatory Element of the program within the prescribed time frames will have their registration deemed inactive until such time as the requirements of the program have been satisfied. Any person whose registration has been deemed inactive under this Rule shall cease all activities as a registered person and is prohibited from performing any duties and functioning in any capacity requiring registration. The Exchange may, upon application and a showing of good cause, allow for additional time for a registered person to satisfy the program requirements.

[(3)]*(2)* [Re-entry into Program] *Disciplinary Actions*—Unless otherwise determined by the Exchange, a registered person will be required to [re-enter] *re-take* the Regulatory Element of the program and satisfy all of its requirements in the event such person:

(i) Becomes subject to any statutory disqualification as defined in Section 3(a)(39) of the Securities Exchange Act of 1934,

(ii) Becomes subject to suspension or to the imposition of a fine of $5,000 or more for violation of any provision of any securities law or regulation, or any agreement with or rule or standard of conduct of any securities governmental agency, securities self-regulatory organization, or as imposed by any such regulatory or self-regulatory organization in connection with a disciplinary proceeding; or

(iii) Is ordered as a sanction in a disciplinary action to [re-enter] *re-take* the *Regulatory Element* [continuing education program] by any securities governmental agency or securities self-regulatory organization.

[Re-entry] *The re-taking of the Regulatory Element* shall commence with [initial] participation within one hundred and twenty days of the registered person becoming subject to the statutory disqualification, in the case of (i) above, or the disciplinary action becoming final, in the case of (ii) or (iii) above. The date the disciplinary action becomes final shall be treated as such person's [initial registration] *new base* date.

[(4)]*(3)* In-Firm Delivery of the Regulatory Element—Members and member organizations will be permitted to administer the continuing education Regulatory Element program to their registered persons by instituting an in-firm program acceptable to the Exchange.

The following procedures are required:

(A) through (F) No change.

(b) No change.

Commentary

.01 to .02 No change.

.03 Any registered person who has terminated association with a registered broker or dealer and who has, within two years of the date of termination, become reassociated in a registered capacity with a registered broker or dealer shall participate in the Regulatory Element of the continuing education program at such intervals that may apply (second registration anniversary and every three years thereafter) based on the initial registration, *also known as the "base date"*, anniversary date, rather than based on the date of reassociation in a registered capacity.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Amex Rule 341A specifies the CE requirements for registered persons subsequent to their initial qualification and registration with the Central Registration Depository ("CRD"). The CE requirements consist of a Regulatory Element and a Firm Element.[5] The Regulatory Element is a computer-based education program administered by National Association of Securities Dealers, Inc. ("NASD") to help ensure that registered persons are kept up to date on regulatory, compliance and sales practice matters in the industry.[6] Unless exempt, each registered person is required to complete the Regulatory Element initially within 120 days after the person's second anniversary date and, thereafter, within 120 days after every third registration anniversary date.[7] There are three Regulatory Element programs: the S201 Supervisor Program for registered principals and supervisors; the S106 Series 6 Program for Series 6 registered persons; and the S101 General Program for Series 7 and all other registrations.

Approximately 135,000 registered persons currently are exempt from the Regulatory Element. These include registered persons who, when the CE Program was adopted in 1995, had been registered for at least ten years and who did not have a significant disciplinary action[8] in their CRD record for the previous ten years ("grandfathered" persons). These also include those persons who had "graduated" from the Regulatory Element by satisfying their tenth anniversary requirement before July 1998, when Amex Rule 341A was amended and the graduation provision eliminated, and did not have a significant disciplinary action in their CRD record for the previous ten years.[9]

At its December 2003 meeting, the Securities Industry/Regulatory Council on Continuing Education ("Council")[10] discussed the current exemptions from the Regulatory Element and agreed unanimously to recommend that the SROs repeal the exemptions and require all registered persons to participate in the Regulatory Element. In reaching this conclusion, the Council was of the view that there is great value in exposing all industry participants to the benefits of the Regulatory Element, in part because of the significant regulatory issues that have emerged over the past few years. The Regulatory Element programs include teaching and training content that is continuously updated to address current regulatory concerns as well as new products and trading strategies. Exempt persons presently do not have the benefit of this material.

In addition, the Council will introduce a new content module to the Regulatory Element programs that will specifically address ethics and will require participants to recognize ethical issues in given situations. Participants will be required to make decisions in the context of, for example, peer pressure, the temptation to rationalize, or a lack of clear-cut guidelines from existing rules or regulations. The Council strongly believes that all registered persons, regardless of their years of experience in the industry, should have the benefit of this training.

Consistent with the Council's recommendation, the proposed rule change would eliminate the current Regulatory Element exemptions. The other SRO members of the Council also support eliminating the exemptions and are pursuing amendments to their respective rules.

Amex will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 30 days following the proposed rule becoming operative. The effective date will be (1) not more than 30 days following the implementation of necessary changes to Web CRD administered by the NASD, or (2) April 4, 2005, whichever date is the latest to occur.

Following the effective date of the proposed rule change, implementation will be based on the application of the existing requirements of the Regulatory Element (Amex Rule 341A(a)) to all registered persons. The way in which CRD applies these requirements is as follows. CRD establishes a "base date" for each registered person and calculates anniversaries from that date. Usually, the base date is the person's initial securities registration. However, the base date may be revised to be the effective date of a significant disciplinary action in accordance with Amex Rule 341A(a)(3) (which is proposed to be renumbered as Amex Rule 341A(a)(2)) or the date on which a formerly registered person re-qualifies for association with an Amex member by qualification exam. Using the base date, CRD creates a Regulatory Element requirement on the second anniversary of the base date and then every three years thereafter. Beginning on or after the effective date of the proposed rule change, registered persons formerly exempt from the Regulatory Element requirement must satisfy this requirement on the occurrence of a Regulatory Element base date anniversary (*i.e.* the second anniversary of the base date and every three years thereafter) (*see* examples in the Table below).

[5] The Firm Element of the CE Program applies to any registered person who has direct contact with customers in the conduct of the member's securities sales, trading and investment banking activities, and to the immediate supervisors of such persons (collectively called "covered registered persons"). The requirement stipulates that each member firm must maintain a continuing education program for its covered registered persons to enhance their securities knowledge, skill and professionalism. Each firm has the requirement to annually conduct a training needs analysis, develop a written training plan, and implement the plan.

[6] Amex Rule 341A(a)(4), which is proposed to be renumbered Amex Rule 341A(a)(3), permits a member firm to deliver the Regulatory Element to registered persons on firm premises ("In-Firm Delivery") as an alternative to having persons take the training at a designated center provided that firms comply with specific requirements relating to supervision, delivery site(s), technology, administration, and proctoring. In addition, Amex Rule 341A(a)(3)(E)(iii) requires that persons serving as proctors for the purposes of In-Firm Delivery must be registered.

[7] This is the current Regulatory Element schedule, as amended in 1998.

[8] Generally, for purposes of Amex Rule 341A, a significant "disciplinary action" includes a statutory disqualification as defined in Section 3(a)(39) of the Securities Exchange Act of 1934; suspension or imposition of a fine of $5,000 or more, or being subject to an order from a securities regulator to re-take the Regulatory Element. *See* Amex Rule 341A(a)(3)(i)–(iii), which is proposed to be renumbered Amex Rule 341A(a)(2)(i)–(iii).

[9] When Amex Rule 341A was first adopted in 1995, the Regulatory Element schedule required registered persons to satisfy the Regulatory Element on the second, fifth, and tenth anniversary of their initial securities registration. After satisfying the tenth anniversary requirement, a person was "graduated" from the Regulatory Element. A graduated principal re-entered the Regulatory Element if he or she incurred a significant disciplinary action. A graduated person who was not a principal re-entered if he or she acquired a principal registration or incurred a significant disciplinary action.

[10] According to the Council's Charter, the Council is composed of at least nine, but not more than fifteen representatives from securities firms and representatives from six self-regulatory organizations ("SROs") including: the Amex; the Chicago Board Options Exchange ("CBOE"); the Municipal Securities Rulemaking Board ("MSRB"); the NASD, the New York Stock Exchange, Inc. ("NYSE"), and the Philadelphia Stock Exchange ("Phlx"). The SEC and the North American Securities Administrators Associations have liaisons to the Council.

Registered person	Initial registration date	First regulatory element requirement of a registered person formerly exempt from the regulatory element (assuming an effective date of April 4, 2005)
A	[11] 4/4/85	4/4/05
B	7/1/83	7/1/06
C	8/1/84	8/1/07
D	4/3/85	4/3/08

In addition, the proposed rule change would replace references in Amex Rule 341A(a)(2) to "re-entry" into the Regulatory Element with a requirement to "re-take" the Regulatory Element to clarify that the significant disciplinary action provisions apply to all registered persons and not only to currently exempt persons. A person's base date may also be revised to be the date on which a formerly registered person re-qualifies for association with a member or member firm.

2. Statutory Basis

The Amex believes the proposed rule change is consistent with the provisions of Section 6(c) of the Act,[12] in general and furthers the objectives of Section 6(c)(3)(B) of the Act,[13] in particular, since under that section, it is the Exchange's responsibility to prescribe standards of training, experience and competence for persons associated with Exchange members and member organizations.

Additionally, under Section 6(c)(3)(B) of the Act,[14] the Exchange may bar a natural person from becoming a member or person associated with a member, if such natural person does not meet such standards of training, experience and competence as are prescribed by the rules of the Exchange. Pursuant to this statutory obligation, the Exchange is rescinding all currently effective exemptions from required participation in the Regulatory Element programs, as prescribed by Amex Rule 341A.

B. Self-Regulatory Organization's Statement on Burden on Competition

Amex does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Amex has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [15] and subparagraph (f)(6) of Rule 19b–4 thereunder.[16] Because the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [17] and Rule 19b–4(f)(6) thereunder.[18] This proposed rule change will not become operative until 30 days after the date of filing with the Commission. Furthermore, the Commission notes that Amex designates the effective date of the proposed rule change to be the latest to occur of: (1) Not more than 30 days following the implementation of necessary changes to Web CRD administered by the NASD, or (2) April 4, 2005. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[19]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Amex–2004–89 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Amex–2004–89. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at

[11] A registered person with an initial registration date of April 4, 1985 will have a Regulatory Element anniversary date on April 4 of 1987, 1990, 1993, 1996, 1999, 2002 and 2005.

[12] 15 U.S.C. 78f(c).

[13] 15 U.S.C. 78f(c)(3)(B).

[14] *Id.*

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). The Commission notes that the Exchange had satisfied the pre-filing five-day notice requirement.

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6).

[19] *See* Section 19b(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

the principal offices of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2004–89 and should be submitted on or before December 8, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3194 Filed 11–16–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50652; File No. SR–NSCC–2004–04]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval on a Temporary Basis of a Proposed Rule Change To Establish a Confirmation and Matching Service for Over-the-Counter U.S. Equity Options Transactions

November 10, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on August 13, 2004, the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") and on September 15, 2004, and on October 28, 2004, amended the proposed rule change described in Items I and II below, which items have been prepared primarily by NSCC. The Commission is publishing this notice and order to solicit comments from interested persons and to grant accelerated approval of the proposed rule change through May 31, 2005.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NSCC is seeking to add Addendum M to its Rules and Procedures to establish a confirmation and matching service for over-the-counter ("OTC") U.S. equity options transactions ("NSCC Equity Options Service").

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Currently, confirmation of trade details among dealers and the dealers' buy-side customers in the OTC equity options industry is supported largely by faxes and telephone communication. It is widely acknowledged by the industry that this current operational infrastructure, which depends upon nonstandard and manual processing, results in excessive processing costs, delays, and errors. The industry is seeking to reduce the attendant operational risks associated with OTC equity options processing by automating the trade confirmation process for OTC equity options.

In response to similar conditions prevailing in the credit default swaps industry, the corporate parent of NSCC, The Depository Trust & Clearing Corporation ("DTCC") created a subsidiary, DTCC Deriv/SERV LLC ("Deriv/SERV"), in 2003. Deriv/SERV currently offers a confirmation and matching service for OTC credit default swaps transactions and their associated cash flows. This service is now used by approximately 30 entities including all of the largest OTC credit default swaps dealers.

Deriv/SERV has developed a confirmation and matching service for OTC equity options transactions and their associated cash flows ("Deriv/SERV Equity Options Service"). The Deriv/SERV Equity Options Service will provide for confirmation and matching either between two OTC equity options dealers or between an OTC equity options dealer and its buy-side customer. Where either the buyer or the seller of an equity option is a U.S. person and the equity option is issued by a U.S. issuer ("U.S. Equity Option Transaction"), NSCC will provide confirmation and matching services ("NSCC Equity Options Service") to Deriv/SERV pursuant to the NSCC/DTCC Deriv/SERV Service Agreement ("Service Agreement").[3] In connection with the NSCC Equity Options Service, Deriv/SERV will become a Data Services Only Member of NSCC.[4]

The Deriv/SERV Equity Options Service will be operated pursuant to the operating procedures of Deriv/SERV ("Deriv/SERV Operating Procedures"). U.S. Equity Option Transactions will also be subject to NSCC's proposed Addendum M. Therefore, each user of the Deriv/SERV Equity Options Service will enter into an agreement with Deriv/SERV obligating the user to abide by the terms of the Deriv/SERV Operating Procedures and obligating them to abide by Addendum M for any U.S. Equity Option Transactions. Pursuant to the Service Agreement between NSCC/DTCC and Deriv/SERV, NSCC will have the right to require Deriv/SERV to cause Deriv/SERV's users to abide by the terms of Addendum M. In addition, pursuant to the Service Agreement, NSCC and Deriv/SERV have agreed that should the Commission request that NSCC provide to the Commission any information relating to the NSCC Equity Options Service, Deriv/SERV will provide any such information in its possession to NSCC so that NSCC may provide such information to the Commission.

NSCC will neither be responsible for the content of the messages transmitted through the NSCC Equity Options Service nor be responsible for any errors, omissions, or delays that may occur relating to the NSCC Equity Options Service in the absence of gross negligence on NSCC's part. Both the Service Agreement and the Deriv/SERV Operating Procedures will provide that NSCC has no liability in connection with the NSCC Equity Options Service in the absence of gross negligence on NSCC's part. Because the NSCC Equity Options Service does not involve money settlement, securities clearance, or netting through the facilities of NSCC, it will be a nonguaranteed service of NSCC.[5]

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[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by NSCC.

[3] DTC has represented that the processing of Deriv/SERV's transactions will not be a strain on the capacity of DTC's systems. The host computer and other automated facilities associated with the NSCC Equity Options Service will be provided by DTC pursuant to service agreements between NSCC and DTCC and between DTCC and DTC.

[4] NSCC Rules and Procedures, Rule 31.

[5] NSCC offers certain "guaranteed" services through its CNS system in which NSCC acts as a central counterparty and provides settlement-related guarantees regarding certain trades cleared and netted at NSCC. NSCC also offers "nonguaranteed" services, such as NSCC's Mutual

Continued

Deriv/SERV will charge its users fees in connection with the Deriv/SERV Equity Options Service and pursuant to the Service Agreement will make payments to NSCC for the services that NSCC is providing. NSCC will file proposed rule changes under Section 19(b) of the Act for fees that NSCC charges to Deriv/SERV for the NSCC Equity Options Service and for any changes made by NSCC to the Equity Options Service.

NSCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[6] and the rules and regulations thereunder because the implementation of the proposal will provide for the prompt and accurate clearance and settlement of U.S. OTC equity option transactions processed through the NSCC Equity Options Service by facilitating the transmission of standardized information on a centralized communications platform. This will reduce processing errors, delays, and risks that are typically associated with manual processes.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change will impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not solicited or received any written comments on this proposal. NSCC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.[7] The Commission finds that NSCC's proposed rule change is consistent with this obligation under the Act because the NSCC Equity Options Service should reduce manual processing errors, delays, and risks that are typically associated with U.S. OTC equity option transactions by facilitating the transmission of standardized information on a centralized communications platform for all U.S. OTC equity options processed through it.

NSCC has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of the notice of filing. The Commission finds good cause for approving prior to the thirtieth day after publication because by so approving NSCC will be able to implement and firms to begin using the NSCC Equity Options Service before the approaching end of year freeze on systems changes.

The Commission is approving the NSCC Equity Options Service on a temporary basis through May 31, 2005, so that NSCC will have time to evaluate the operations of the service and to report its findings to the Commission before the Commission decides on permanent approval.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NSCC–2004–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NSCC–2004–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *www.nscc.com/legal*. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–NSCC–2004–04 and should be submitted on or before December 8, 2004.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (File No. SR–NSCC–2004–04) be and hereby is approved on an accelerated basis through May 31, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3195 Filed 11–16–04; 8:45 am]

BILLING CODE 8010–01–P

Fund and Insurance Processing Services, in which members do not receive the protections of the NSCC guarantee. Some of NSCC's nonguaranteed services entail settlement of funds through NSCC on a nonguaranteed basis (*i.e.*, NSCC's FundSERV® service). Other nonguaranteed services involve the communication of information only without settlement of transactions or funds through the facilities of NSCC (*i.e.*, NSCC's Profile service). The NSCC Equity Options Service is a nonguaranteed service limited to the matching and communication of information and does not involve settlement of securities transactions or funds through the facilities of NSCC. In its Matching Release, the Commission concluded that matching constitutes a clearing agency function, specifically the "comparison of data respecting the terms of settlement of securities transactions," within the meaning of Section 3(a)(23)(A) of the Exchange Act. Securities Exchange Act Release No. 39829 (April 6, 1998), 63 FR 17943 [File No. S7–10–98].

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3615]

State of Florida; Amendment #4

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective November 3, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to December 31, 2004.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is May 13, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: November 9, 2004.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–25463 Filed 11–16–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3620]

State of Florida; Amendment #7

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective November 3, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to December 31, 2004.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is June 6, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: November 9, 2004.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–25464 Filed 11–16–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3627]

State of Florida; Amendment #2

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective November 3, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to December 31, 2004.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is June 16, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: November 9, 2004.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–25465 Filed 11–16–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3635]

State of Florida; Amendment #2

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective November 3, 2004, the above numbered declaration is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to December 31, 2004.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is June 27, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: November 9, 2004.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–25466 Filed 11–16–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3607]

Commonwealth of Pennsylvania; Amendment #2

In accordance with notices received from the Department of Homeland Security—Federal Emergency Management Agency—effective October 8 and November 8, 2004, the above numbered declaration is hereby amended to reestablish the incident period for this disaster as beginning on July 27, 2004, and continuing through August 25, 2004. The declaration is also amended to extend the deadline for filing applications for physical damages as a result of this disaster to December 8, 2004.

All other information remains the same, *i.e.*, the deadline for filing applications for economic injury is May 6, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: November 10, 2004.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–25462 Filed 11–16–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Investment Companies; Increase in Maximum Leverage Ceiling

13 CFR 107.1150(a) sets forth the maximum amount of Leverage (as defined in 13 CFR 107.50) that a Small Business Investment Company may have outstanding at any time. The maximum Leverage amounts are adjusted annually based on the increase in the Consumer Price Index published by the Bureau of Labor Statistics. The cited regulation states that SBA will publish the indexed maximum Leverage amounts each year in a Notice in the **Federal Register**.

Accordingly, effective the date of publication of this Notice, and until further notice, the maximum Leverage amounts under 13 CFR 107.1150(a) are as stated in the following table:

If your leverageable capital is:	Then your maximum leverage is:
(1) Not over $19,800,000	300 percent of Leverageable Capital.
(2) Over $19,800,000 but not over $39,700,000	$59,400,000 + [2 × (Leverageable Capital − $19,800,000)].
(3) Over $39,700,000 but not over $59,500,000	$99,200,000 + (Leverageable Capital − $39,700,000).
(4) Over $59,500,000	$119,000,000.

(Catalog of Federal Domestic Assistance Program No. 59.011, small business investment companies)

Dated: November 10, 2004.

Harry Haskins,

Acting Associate Administrator for Investment.

[FR Doc. 04–25509 Filed 11–16–04; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information

collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13 effective October 1, 1995, The Paperwork Reduction Act of 1995. The information collection packages that may be included in this notice are for new information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Written comments and recommendations regarding the information collection(s) should be submitted to the OMB Desk Officer and the SSA Reports Clearance Officer.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974.

(SSA), Social Security Administration, DCFAM, Attn: Reports Clearance Officer, Fax: 410–965–6400, E-mail: *OPLM.RCO@ssa.gov*.

The information collections listed below have been submitted to OMB for clearance. In order for your comments to be considered, you must send them by December 17, 2004. You can obtain a copy of the OMB clearance package by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to the e-mail address listed above.

1. Application for Help With Medicare Prescription Drug Plan Costs—0960–NEW

SSA published a notice in the **Federal Register** on September 30 (69 FR 58578) informing the public that OMB is reviewing form SSA–1020, the Application for Help with Medicare Prescription Drug Plan Costs. At the time this notice was published, SSA received public comments and withheld submission of the forms in order to evaluate these comments. As a result, SSA has revised form SSA–1020, submitted it to OMB for its review, and is republishing the Notice below. Comments must be received within 30 days of publication of this Notice in order to be considered.

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173; MMA) establishes a new Medicare Part D program for voluntary prescription drug coverage for premium, deductible and cost-sharing subsidies for certain low-income individuals. The MMA stipulates that subsidies must be available for individuals who are eligible for the program and who meet eligibility criteria for help with premium, deductible, and/or co-payment costs. Form SSA–1020, the Application for Help with Medicare Prescription Drug Plan Costs, collects information about an applicant's resources and is used by SSA to determine eligibility for this assistance. The respondents are individuals who are eligible for enrollment in the new program and are requesting assistance with the related costs.

Note: Since publishing the 60-day **Federal Register** Notice (69 FR 45879), SSA has decided to conduct a pilot test of form SSA–1020 in March 2005. This test is intended to assist SSA in: (1) Determining how eligible individuals will respond to its Part D Subsidy application outreach (scheduled to begin in June 2005) and (2) testing its systems processing of the SSA–1020 application. SSA will use the information to make actual subsidy eligibility determinations. The Agency will conduct the test with approximately 2,000 beneficiaries potentially eligible for Part D cost-sharing subsidies by providing them with copies of form SSA–1020.

Type of Request: New information collection.

Number of Respondents: 5,000,000.

Frequency of Response: 1.

Average Burden Per Response: 35 minutes.

Estimated Annual Burden: 2,916,667 hours.

2. Appeal of Determination for Help With Medicare Prescription Drug Plan Costs—0960–NEW

SSA published a notice in the **Federal Register** on September 30 (69 FR 58578) informing the public that OMB is reviewing form SSA–1021, Appeal of Determination for Help with Medicare Prescription Drug Plan Costs. At the time this notice was published, SSA received public comments and withheld submission of the form in order to evaluate the comments. As a result, SSA has revised form SSA–1021, submitted it to OMB for its review, and is republishing the Notice below. Comments must be received within 30 days of publication of this Notice in order to be considered.

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173; MMA) establishes a new Medicare Part D program for voluntary prescription drug coverage for premium, deductible, and cost-sharing subsidies for certain low-income individuals. The MMA stipulates that subsidies must be available for individuals who are eligible for the program and who meet eligibility criteria for help with premium, deductible, and/or co-payment costs. Form SSA–1021, the Appeal of Determination for Help with Medicare Prescription Drug Plan Costs, was developed to obtain information from individuals who appeal SSA's decisions regarding eligibility or continuing eligibility for a Medicare Part D subsidy. The respondents are applicants who are appealing SSA's eligibility or continuing eligibility decisions.

Type of Request: New information collection.

Number of Respondents: 75,000.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 12,500 hours.

Dated: November 12, 2004.

Elizabeth A. Davidson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 04–25489 Filed 11–16–04; 8:45 am]

BILLING CODE 4191–02–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

North American Free Trade Agreement; Invitation for Applications for Inclusion on the Chapter 19 Roster

AGENCY: Office of the United States Trade Representative.

ACTION: Invitation for applications.

SUMMARY: Chapter 19 of the North American Free Trade Agreement ("NAFTA") provides for the establishment of a roster of individuals to serve on binational panels convened to review final determinations in antidumping or countervailing duty ("AD/CVD") proceedings and amendments to AD/CVD statutes of a NAFTA Party. The United States annually renews its selections for the Chapter 19 roster. Applications are invited from eligible individuals wishing to be included on the roster for the period April 1, 2005 through March 31, 2006.

DATES: Applications should be received no later than December 10, 2004.

ADDRESSES: Comments should be submitted (i) electronically, to *FR0501@ustr.eop.gov*, Attn: "Chapter 19 Roster Applications" in the subject line, or (ii) by fax to Sandy McKinzy at 202–395–3640.

FOR FURTHER INFORMATION CONTACT: Jeffrey G. Weiss, Assistant General Counsel, Office of the United States Trade Representative, (202) 395–4498.

SUPPLEMENTARY INFORMATION:

Binational Panel Reviews Under NAFTA Chapter 19

Article 1904 of the NAFTA provides that a party involved in an AD/CVD proceeding may obtain review by a binational panel of a final AD/CVD determination of one NAFTA Party with respect to the products of another NAFTA Party. Binational panels decide whether such AD/CVD determinations are in accordance with the domestic laws of the importing NAFTA Party, and must use the standard of review that would have been applied by a domestic court of the importing NAFTA Party. A panel may uphold the AD/CVD determination, or may remand it to the national administering authority for action not inconsistent with the panel's decision. Panel decisions may be reviewed in specific circumstances by a three-member extraordinary challenge committee, selected from a separate roster composed of fifteen current or former judges.

Article 1903 of the NAFTA provides that a NAFTA Party may refer an amendment to the AD/CVD statutes of another NAFTA Party to a binational panel for a declaratory opinion as to whether the amendment is inconsistent with the General Agreement on Tariffs and Trade ("GATT"), the GATT Antidumping or Subsidies Codes, successor agreements, or the object and purpose of the NAFTA with regard to the establishment of fair and predictable conditions for the liberalization of trade. If the panel finds that the amendment is inconsistent, the two NAFTA Parties shall consult and seek to achieve a mutually satisfactory solution.

Chapter 19 Roster and Composition of Binational Panels

Annex 1901.2 of the NAFTA provides for the maintenance of a roster of at least 75 individuals for service on Chapter 19 binational panels, with each NAFTA Party selecting at least 25 individuals. A separate five-person panel is formed for each review of a final AD/CVD determination or statutory amendment. To form a panel, the two NAFTA Parties involved each appoint two panelists, normally by drawing upon individuals from the roster. If the Parties cannot agree upon the fifth panelist, one of the Parties, decided by lot, selects the fifth panelist from the roster. The majority of individuals on each panel must consist of lawyers in good standing, and the chair of the panel must be a lawyer.

Upon each request for establishment of a panel, roster members from the two involved NAFTA Parties will be requested to complete a disclosure form, which will be used to identify possible conflicts of interest or appearances thereof. The disclosure form requests information regarding financial interests and affiliations, including information regarding the identity of clients of the roster member and, if applicable, clients of the roster member's firm.

Criteria for Eligibility for Inclusion on Chapter 19 Roster

Section 402 of the NAFTA Implementation Act (Pub. L. 103–182, as amended (19 U.S.C. 3432)) ("Section 402") provides that selections by the United States of individuals for inclusion on the Chapter 19 roster are to be based on the eligibility criteria set out in Annex 1901.2 of the NAFTA, and without regard to political affiliation. Annex 1901.2 provides that Chapter 19 roster members must be citizens of a NAFTA Party, must be of good character and of high standing and repute, and are to be chosen strictly on the basis of their objectivity, reliability, sound judgment, and general familiarity with international trade law. Aside from judges, roster members may not be affiliated with any of the three NAFTA Parties. Section 402 also provides that, to the fullest extent practicable, judges and former judges who meet the eligibility requirements should be selected.

Procedures for Selection of Chapter 19 Roster Members

Section 402 establishes procedures for the selection by the Office of the United States Trade Representative ("USTR") of the individuals chosen by the United States for inclusion on the Chapter 19 roster. The roster is renewed annually, and applies during the one-year period beginning April 1 of each calendar year.

Under Section 402, an interagency committee chaired by USTR prepares a preliminary list of candidates eligible for inclusion on the Chapter 19 Roster. After consultation with the Senate Committee on Finance and the House Committee on Ways and Means, USTR selects the final list of individuals chosen by the United States for inclusion on the Chapter 19 roster.

Remuneration

Roster members selected for service on a Chapter 19 binational panel will be remunerated at the rate of 800 Canadian dollars per day.

Applications

Eligible individuals who wish to be included on the Chapter 19 roster for the period April 1, 2005 through March 31, 2006 are invited to submit applications. Persons submitting applications may either send one copy by fax to Sandy McKinzy at 202–395–3640, or transmit a copy electronically to *FR0501@ustr.eop.gov*, with "Chapter 19 Roster Applications" in the subject line. USTR encourages the submission of documents in Adobe PDF format, as attachments to an electronic mail. Interested persons who make submissions by electronic mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Applications must be typewritten, and should be headed "Application for Inclusion on NAFTA Chapter 19 Roster." Applications should include the following information, and each section of the application should be numbered as indicated:

1. Name of the applicant.
2. Business address, telephone number, fax number, and e-mail address.
3. Citizenship(s).
4. Current employment, including title, description of responsibility, and name and address of employer.
5. Relevant education and professional training.
6. Spanish language fluency, written and spoken.
7. Post-education employment history, including the dates and addresses of each prior position and a summary of responsibilities.
8. Relevant professional affiliations and certifications, including, if any, current bar memberships in good standing.
9. A list and copies of publications, testimony, and speeches, if any, concerning AD/CVD law. Judges or former judges should list relevant judicial decisions. Only one copy of publications, testimony, speeches, and decisions need be submitted.
10. Summary of any current and past employment by, or consulting or other work for, the Governments of the United States, Canada, or Mexico.
11. The names and nationalities of all foreign principals for whom the applicant is currently or has previously been registered pursuant to the Foreign Agents Registration Act, 22 U.S.C. 611 *et seq.*, and the dates of all registration periods.
12. List of proceedings brought under U.S., Canadian, or Mexican AD/CVD law regarding imports of U.S., Canadian, or Mexican products in which the applicant advised or represented (for example, as consultant or attorney) any U.S., Canadian, or Mexican party to

such proceeding and, for each such proceeding listed, the name and country of incorporation of such party.

13. A short statement of qualifications and availability for service on Chapter 19 panels, including information relevant to the applicant's familiarity with international trade law and willingness and ability to make time commitments necessary for service on panels.

14. On a separate page, the names, addresses, telephone and fax numbers of three individuals willing to provide information concerning the applicant's qualifications for service, including the applicant's character, reputation, reliability, judgment, and familiarity with international trade law.

Current Roster Members and Prior Applicants

Current members of the Chapter 19 roster who remain interested in inclusion on the Chapter 19 roster must submit updated applications. Individuals who have previously applied but have not been selected may reapply. If an applicant, including a current or former roster member, has previously submitted materials referred to in item 9, such materials need not be resubmitted.

Public Disclosure

Applications normally will be subject to public disclosure. An applicant who wishes to exempt information from public disclosure should follow the procedures set forth in 15 CFR 2003.6.

False Statements

Pursuant to section 402(c)(5) of the NAFTA Implementation Act, false statements by applicants regarding their personal or professional qualifications, or financial or other relevant interests that bear on the applicants' suitability for placement on the chapter 19 roster or for appointment to binational panels, are subject to criminal sanctions under 18 U.S.C. 1001.

Paperwork Reduction Act

This notice contains a collection of information provision subject to the Paperwork Reduction Act ("PRA") that has been approved by the Office of Management and Budget ("OMB"). Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB number. This notice's collection of information burden is only for those persons who wish voluntarily to apply for nomination to the NAFTA chapter 19 roster. It is expected that the collection of information burden will be under 3 hours. This collection of information contains no annual reporting or record keeping burden. This collection of information was approved by OMB under OMB Control Number 0350–0009. Please send comments regarding the collection of information burden or any other aspect of the information collection to USTR at the above e-mail address or fax number.

Privacy Act

The following statements are made in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a). The authority for requesting information to be furnished is section 402 of the NAFTA Implementation Act. Provision of the information requested above is voluntary; however, failure to provide the information will preclude your consideration as a candidate for the NAFTA Chapter 19 roster. This information is maintained in a system of records entitled "Dispute Settlement Panelists Roster." Notice regarding this system of records was published in the **Federal Register** on November 30, 2001. The information provided is needed, and will be used by USTR, other federal government trade policy officials concerned with NAFTA dispute settlement, and officials of the other NAFTA Parties to select well-qualified individuals for inclusion on the chapter 19 roster and for service on chapter 19 binational panels.

Daniel E. Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 04–25457 Filed 11–16–04; 8:45 am]

BILLING CODE 3190–W5–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

High Density Airports; Notice of Reagan National Airport Lottery Allocation Procedures

AGENCY: Federal Aviation Administration.

ACTION: Notice of lottery and allocation procedures for slots at Washington Reagan National Airport.

SUMMARY: This notice announces a lottery to allocate a limited number of commuter slots at Washington's Reagan National Airport in accordance with Title 14 of the Code of Federal Regulations § 93.225, Lottery of available slots.

DATE/LOCATION OF LOTTERY: The lottery will be held in the Federal Aviation Administration, Conference Room 9 ABC, 800 Independence Avenue, SW., Washington, DC 20591 on December 3, 2004, beginning at 11:30 a.m. Carriers that wish to participate in the lottery must notify, in writing, the FAA Slot Administration Office, Attention: AGC–220, 800 Independence Avenue, SW., Washington, DC 20591, or by facsimile to (202) 267–7277. Notification must be received no later than 5 p.m. e.d.t. on November 18, 2004.

FOR FURTHER INFORMATION CONTACT: Lorelei Peter, Operations and Air Traffic Law Branch, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone number (202) 267–3134.

SUPPLEMENTARY INFORMATION:

Background

The High Density Traffic Airports Rule, or "High Density Rule," 14 CFR part 93, subpart K, was promulgated in 1968 to reduce delays at five congested airports: John F. Kennedy International Airport (JFK), LaGuardia, O'Hare International Airport (O'Hare), Ronald Reagan Washington National Airport (Reagan National) and Newark International Airport (33 FR 17896; December 3, 1968). The regulation limits the number of instrument flight rule (IFR) operations at each airport, during certain hours of the day. It provides for the allocation to carriers of operational authority, in the form of a "slot" for each IFR takeoff or landing during a specific 30- or 60-minute period. The restrictions at Newark were lifted in the early 1970s. The restrictions at O'Hare were lifted in July 2002.

Slots during peak hours and not required for Essential Air Service are allocated by lottery. (*See* CFR 93.225.) the FAA will follow the lottery procedures of 14 CFR § 93.225 and certain special procedures described further in this notice will also apply.

A limited incumbent carrier is now defined as a carrier with fewer than 20 slots and slot exemptions. (49 U.S.C. 41714(h)(5)(A)) (The regulatory definition of a limited incumbent carrier was amended by the above statutory provision.) Also, section 426 of Vision 100—Century of Aviation Reauthorization Act amended the definition of commuter aircraft in 14 CFR 93.123(c)(2), as applied to aircraft operations at Washington's Reagan National Airport, to mean aircraft operations using aircraft having a

certificated maximum seating capacity of 76 or less.

The commuter slots available during the lottery previously were allocated to carriers to provide Essential Air Service and subsequently withdrawn by the FAA for nonuse. (Under 14 CFR 93.227, if slots are not used 80 percent of the time over a two-month reporting period, the slots will be withdrawn.)

A total of six daily commuter slots are available during this lottery. One commuter slot is available in each the 0700 and 0900 hours and two commuter slots are available in each the 1400 and 1900 hours.

Special Procedures

By Order 2004–9–22 issued September 23, 2004, the Office of the Secretary of Transportation directed the FAA to hold a slot lottery for six available commuter slots at Reagan National that had been reserved for Essential Air Service for Clarksburg, Morgantown, and/ or Lewisburg, West Virginia, subject to the conditions described in the order. In summary, the Order provides that the slots may be used to provide service to points other than the above West Virginia communities unless a carrier subsequently requests slots to serve the Reagan National-Clarksburg, Morgantown, and/or Lewisburg markets with specific dates a viable proposal. Under that scenario, the Office of the Secretary would review the proposal and then direct the FAA to recall the reserved Essential Air Service slots that had been allocated by this lottery. The complete text of the Order is available via the Internet at *http://dms.dot.gov* in Docket OST–2003–15886.

Issued on November 10, 2004 in Washington, DC.

James Whitlow,

Deputy Chief Counsel.

[FR Doc. 04–25451 Filed 11–16–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2001–9852]

High Density Traffic Airports; Allocation Procedures for Slot Exemptions at LaGuardia Airport

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition to modify the lottery allocation procedures at LaGuardia Airport.

SUMMARY: Northwest Airlines, Inc. (Northwest) has petitioned the FAA to amend the adopted allocation procedures for allocating AIR–21 slot exemptions at LaGuardia. Specifically, Northwest requests to participate in the allocation of available AIR–21 slot exemptions at LaGuardia for service to small hub/nonhub airports with aircraft with fewer than 71 seats. A copy of Northwest's request has been placed in the docket.

DATES: Comments must be received December 7, 2004.

ADDRESSES: Comments on this notice should be mailed or delivered in duplicate to: U.S. Department of Transportation Dockets, Docket No. FAA–2001–9852, 400 Seventh Street SW., Room Plaza 4001, Washington, DC 20590. Comments may also be sent electronically to the following Internet address: *http://DMS.dot.gov*. Comments may be filed and/or examined in Room Plaza 401 between 10 a.m. and 5 p.m. weekdays except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lorelei Peter, (202) 267–3073, Operations and Air Traffic Law Branch, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned decisions. Communications should identify the docket number and be submitted in duplicate to the above-specified address. All communications and a report summarizing any substantive public contact with FAA personnel on this notice will be filed in the docket. The docket is available for public inspection both before and after the closing date for receiving comments.

Before taking any final action on this petition, the Administrator will consider all comments made on or before the closing date for comments.

The FAA will acknowledge receipt of a comment if the commenter includes a self-addressed, stamped postcard with the comment. The postcard should be marked "Comments to Docket No. FAA–2001–9852." When the FAA receives the comment, the postcard will be dated, time stamped, and returned to the commenter.

Issued in Washington, DC, on November 10, 2004.

James Whitlow,

Deputy Chief Counsel.

[FR Doc. 04–25452 Filed 11–16–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2004–18783]

Agency Information Collection Activities; Request for Comments; Clearance of a New Information Collection; Freight Operations Follow-Up

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection, which is summarized below under Supplementary Information. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by January 18, 2005.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FHWA–2004–18783 by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Julie Strawhorn, 202–366–4415, Office of Freight Management and Operations, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC

20590. Office hours are from 7:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Freight Operations Follow-Up.

Abstract: The Office of Freight Operations is continually receiving inquiries from the public on Federal requirements for commercial motor vehicle size and weight enforcement. In order to better serve the community and ensure that satisfactory resolutions are received regarding the inquiries, a Freight Operations Follow-Up Feedback form has been developed. This feedback will be used to help assess internal strengths and weaknesses of the FHWA Size and Weight Team's customer service activity, and it is necessary for the Office of Freight Operations to better serve the community. The form is brief, simple, and unobtrusive in nature, and consists of the following 5 satisfaction-related questions.

1. The general identity of the respondent, within 14 specified categories (individual citizen, truck or bus driver, representative of truck or bus industry association, public interest group, commercial motor carrier, shipper/receiver, State transportation official, State police or highway patrol, FHWA headquarters staff, FHWA Division staff, other U.S. DOT staff, Congressional staff, other Federal government staff, and other).
2. Reason(s) for contacting the FHWA headquarters Size and Weight Team.
3. The appropriateness, courtesy, and timeliness of the FHWA headquarters Size and Weight Team's response to customer's inquiry.
4. How the FHWA Headquarters Size and Weight Team may better respond to inquiries.
5. Other comments.

This information will be collected by linking the feedback form to the FHWA size and weight Web site. This will enable the public to both pull the form from the Web site should someone need to comment about service, and to receive the form when given a response to an inquiry from the FHWA headquarters Size and Weight Team.

Respondents: Approximately 300 people from the general public who send written, electronic, or telephone inquiries to the FHWA headquarters size and weight team, annually.

Frequency: This feedback will be continually collected to allow the FHWA headquarters size and weight team to monitor customer satisfaction with inquiry responses.

Estimated Average Burden per Response: 5 minutes.

Estimated Total Annual Burden Hours: 25 burden hours annually.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burden; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued on: November 2, 2004.

James R. Kabel,

Chief, Management Programs and Analysis Division.

[FR Doc. 04–25445 Filed 11–16–04; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–2004–18975 (Notice No. 04–06)]

Electronic Submission of Hazardous Materials Incident Report, Form F 5800.1

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of Electronic Hazardous Materials Incident Reporting.

SUMMARY: In conjunction with implementation of the revised Hazardous Materials Incident Report on January 1, 2005, RSPA is making publicly available a programming tool for companies or individuals to use to electronically file hazardous materials incident reports. This new electronic format may only be used for reporting incidents that occur on or after January 1, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Kenny Herzog, Research and Special Programs Administration, U.S. Department of Transportation, Nassif Building, 400 Seventh Street, SW., Washington, DC, 20590–0001; (202) 366–5031; *Kenneth.Herzog@rspa.dot.gov.*

SUPPLEMENTARY INFORMATION: In accordance with requirements in §§ 171.15 and 171.16 of the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180), persons who are in physical possession of a hazardous material that is being transported in commerce must file a Hazardous Materials Incident Report (HMIR), DOT Form F 5800.1 in the event an incident listed in §§ 171.15 or 171.16 occurs. On December 3, 2003, RSPA published a final rule under Docket HM–229 that made revisions to the incident reporting requirements and the HMIR (68 FR 67746).

The HM–229 final rule provides persons subject to the incident reporting requirements with the option of submitting incident reports electronically. Those persons wishing to submit their incident data in an electronic format have two options. Option 1 is to fill out the form online. Option 2 is to submit a data file in an XML format. To facilitate electronic filing, we have developed a programming tool—an XML schema format—and instruction document. The XML schema format establishes a template for data layout to facilitate electronic data submissions by providing for efficient data transmission, validation, and interpretation. The XML schema format and documentation detailing the layout of the schema and field definitions are available on our Web site at: *http://hazmat.dot.gov.* For those companies or individuals who wish to design and utilize their own XML data format, we have developed a schema validating tool, which is also available on our Web site. Using this tool, you can assure that your XML format conforms to the Department's standard for data integrity.

For incidents that occur prior to January 1, 2005, you must continue to use DOT Form 5800.1 (Rev. 6/89). For incidents that occur on or after January 1, 2005, persons must use the new DOT Form 5800.1 (01–2004). Electronic submission of incident data is only authorized for incidents that occur on or after January 1, 2005.

Issued in Washington, DC, on November 9, 2004.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 04–25444 Filed 11–16–04; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34607]

The Burlington Northern and Santa Fe Railway Company—Trackage Rights Exemption—Union Pacific Railroad Company

Union Pacific Railroad Company (UP) has agreed to grant to The Burlington Northern and Santa Fe Railway Company (BNSF) approximately 224.70 miles of overhead trackage rights between Stockton, CA, at UP's milepost 88.90 on UP's Fresno Subdivision, and Bakersfield, CA, at milepost 313.60 on UP's Mojave Subdivision.[1]

The transaction was scheduled to be consummated on November 4, 2004.

The purpose of the trackage rights is to allow BNSF limited use of the joint trackage for the sole purpose of overhead movement of a limited number of BNSF's trains (up to 6 BNSF trains per day or, subject to capacity and fluidity of operations, potentially up to 8 trains per day), to improve operating efficiency and flexibility in the area.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34607, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Sarah W. Bailiff, P.O. Box 961039, Fort Worth, TX 76161–0039.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: November 9, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–25393 Filed 11–16–04; 8:45 am]

BILLING CODE 4915–01–P

[1] The parties entered into a trackage rights agreement on October 27, 2004.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34567]

Arkansas Midland Railroad Company, Inc.,—Change in Operators Exemption—Line of Union Pacific Railroad Company

Arkansas Midland Railroad Company, Inc. (AKMD), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease and operate approximately 39.42 miles of railroad owned by the Union Pacific Railroad Company (UP), known as the Warren Line, extending from a connection with UP at milepost 422.32 in Dermott, AR, to milepost 461.74 at Warren, AR.[1] The lease also includes certain car repair facilities at UP's McGehee, AR yard. AKMD will also obtain approximately 5.56 miles of incidental overhead trackage rights over UP's rail line from milepost 415.26 at Dermott to milepost 409.7 at McGehee, AR.

Because AKMD's projected annual revenues will exceed $5 million, AKMD was required to certify to the Board that it had complied with the requirements of 49 CFR 1150.42(e) by providing notice of the proposed transaction to employees and their labor unions on the affected lines. AKMD filed its certification on October 14, 2004, specifying that it had provided the notice on October 6, 2004. The transaction is scheduled to be consummated on December 13, 2004, which is 60 days after AKMD's certification to the Board.

If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke does not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34567, must be filed with the Surface Transportation Board, 1925 K Street NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on William C. Sippel, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2832.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: November 9, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–25394 Filed 11–16–04; 8:45 am]

BILLING CODE 4915–01–P

[1] AKMD has operated over the Warren Line since April 5, 2004, under emergency service authority issued by the Board pursuant to 49 U.S.C. 11123 and 49 CFR 1146. *See Arkansas Midland Railroad Company, Inc.—Alternative Rail Service—Line of Delta Southern Railroad, Inc.*, STB Finance Docket No. 34479 (STB served Mar. 11, 2004). The emergency service authority was extended through December 13, 2004, by decisions served on May 4, 2004, July 30, 2004, and November 1, 2004. Prior to the issuance of the emergency service authorization, the line was leased and operated by Delta Southern Railroad, Inc. (Delta), which acquired the right to do so from Delta Southern Railroad Company in 1999. *See Delta Southern Railroad, Inc.—Acquisition and Operation Exemption—Delta Southern Railroad Company*, STB Finance Docket No. 33802 (STB served Oct. 20, 1999). Delta has voluntarily terminated its operations over the line so that UP can transfer operations to AKMD. Upon consummation of the change in operators authorized by the exemption here, Delta's authority to lease and operate the line will cease.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1120–SF

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1120–SF, U.S. Income Tax Return for Settlement Funds (Under Section 468B).

DATES: Written comments should be received on or before January 18, 2005 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *R.Joseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: U.S. Income Tax Return for Settlement Funds (Under Section 468B).

OMB Number: 1545–1394.

Form Number: 1120–SF.

Abstract: Form 1120–SF is used by settlement funds to report income and taxes on earnings of the fund. The fund may be established by court order, a breach of contract, a violation of law, an arbitration panel, or the Environmental Protection Agency. The IRS uses Form 1120–SF to determine if income and taxes are correctly computed.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time Per Respondent: 26 hours, 52 minutes.

Estimated Total Annual Burden Hours: 26,880.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 10, 2004.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 04–25522 Filed 11–16–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0355]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to pay benefits to veterans and other eligible persons pursuing approved programs of education.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 18, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–0355" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or Fax (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Verification of Pursuit of Course (Leading to a Standard College Degree Under Chapters 32, 34, and 35, Title 38, U.S.C., and Section 903 of Pub. L. 96–342), VA Form 22–6553.

OMB Control Number: 2900–0355.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 22–6553 is used to verify continued enrollment or report changes in enrollment status of claimants receiving educational benefits in pursuit of a college course. Schools are required to report to VA, when a claimant fails to enroll, has interrupted or terminated a program, or has unsatisfactory progress or conduct. VA uses the information from the current collection to ensure that schools promptly report changes in training and if a claimant's education benefits are to be continued unchanged, increased, decreased, or terminated.

Affected Public: Not-for-profit institutions, and State, Local or Tribal Governments.

Estimated Annual Burden: 14,000 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Estimated Number of Respondents: The number of respondents is arrived at based on the average number of educational institutions using VA Form 22–6553 which had veterans or eligible persons enrolled during the last 12 months, and a projected number of trainees. VA currently has an average of 6,000 active educational institutions (colleges, universities, or other institutions of higher learning).

Estimated Number of Responses: The frequency of responses for each educational institution will vary according to the number of students who receive VA education benefits at that school. VA estimates an annual average of 14 responses per educational institution. The total annual number of response is 84,000.

Dated: November 3, 2004.

By direction of the Secretary.

Cindy Stewart,

Program Analyst, Records Management Service.

[FR Doc. 04–25475 Filed 11–16–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0059]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine relationship as persons who stood in relation of parent to a deceased veteran.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 18, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–0059" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or Fax (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Statement of Person Claiming to Have Stood in Relation of a Parent, VA Form 21–524.

OMB Control Number: 2900–0059.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–524 is used to gather information from claimants seeking service-connected death benefits as persons who stood in the relationship of the natural parent of the deceased veteran. The information is used to determine the claimant's eligibility for such benefits.

Affected Public: Individuals or households.

Estimated Annual Burden: 800 hours.

Estimated Average Burden Per Respondent: 2 hours.

Frequency of Response: One-time.

Estimated Number of Respondents: 400.

Dated: November 3, 2004.

By direction of the Secretary.

Cindy Stewart,

Program Analyst, Records Management Service.

[FR Doc. 04–25476 Filed 11–16–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0130]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine the status on VA-guaranteed loans being foreclosed.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 18, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–0130" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or Fax (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Status of Loan Account—Foreclosure or Other Liquidation, VA Form Letter 26–567.

OMB Control Number: 2900–0130.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form Letter 26–567 is used to obtain information from holders regarding the status of a VA-guaranteed loan account at the time of foreclosure or other liquidation action. VA uses the information to specify amount, if any, to be bid at the foreclosure sale.

Affected Public: Business or other for profit.

Estimated Annual Burden: 20,000 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 40,000.

Dated: November 3, 2004.

By direction of the Secretary.

Cindy Stewart,

Program Analyst, Records Management Service.

[FR Doc. 04–25477 Filed 11–16–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0051]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to accurately reimburse State Approving Agencies (SAAs) for expenses incurred in the approval and supervision of education and training programs.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 18, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–0051" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or Fax (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Quarterly Report of State Approving Agency Activities.

OMB Control Number: 2900–0051.

Type of Review: Extension of a currently approved collection.

Abstract: VA reimburses State Approving Agencies (SAAs) for necessary salary, fringe and travel expenses incurred in the approval and supervision of education and training programs. VA makes reimbursement retrospectively on a monthly or quarterly basis after receiving a request from SAA. Since SAAs submit the information electronically to VA, VA Form 22–7398 is no longer required and will be discontinued; however, SAAs must submit other documents (such as reports of visits to schools and programs approved) to support the electronic request.

Affected Public: Federal Government, and State, Local or Tribal Government.

Estimated Annual Burden: 236 hours.

Estimated Average Burden Per Respondent: 1 hour.

Frequency of Response: Quarterly.

Estimated Number of Respondents: 59.

Estimated Number of Responses: 236.

Dated: November 4, 2004.

By direction of the Secretary.

Cindy Stewart,

Program Analyst, Records Management Service.

[FR Doc. 04–25478 Filed 11–16–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0404]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to apply for increased disability compensation based on unemployability.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 18, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–0404" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or Fax (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Veteran's Application for Increased Compensation Based on Unemployability, VA Form 21–8940.

OMB Control Number: 2900–0404.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–8940 is used to gather information necessary to determine a claimant's eligibility for increased compensation based on unemployability. The claimant is required to provide current medical, educational, and occupational history in order to determine whether he or she is unable to secure or follow a substantially gainful occupation due to service-connected disabilities.

Affected Public: Individuals or households.

Estimated Annual Burden: 18,000 hours.

Estimated Average Burden Per Respondent: 45 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 24,000.

Dated: November 4, 2004.

By direction of the Secretary.

Cindy Stewart,

Program Analyst, Records Management Service.

[FR Doc. 04–25479 Filed 11–16–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0215]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine a schoolchild's eligibility to VA death benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 18, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–0215" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or Fax (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Request for Information to Make Direct Payment to Child Reaching Majority, VA Form Letter 21–863.

OMB Control Number: 2900–0215.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form Letter 21–863 is used to determine a schoolchild's continued eligibility to VA death benefits and eligibility to direct payment at the age of majority. Death pension or dependency and indemnity compensation is paid to an eligible veteran's child when there is not an eligible surviving spouse and the child is between the ages of 18 and 23 and attending school. Until the child reaches the age of majority, payment is made to a custodian or fiduciary on behalf of the child. An unmarried schoolchild, who is not incompetent, is entitled to begin receiving direct payment on the age of majority.

Affected Public: Individuals or households.

Estimated Annual Burden: 3 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 20.

Dated: November 4, 2004.

By direction of the Secretary.

Cindy Stewart,

Program Analyst, Records Management Service.

[FR Doc. 04–25480 Filed 11–16–04; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
November 17, 2004

Part II

Securities and Exchange Commission

17 CFR Parts 228, 229, et al.
Securities Offering Reform; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 230, 239, 240, 243, and 274

[Release Nos. 33–8501; 34–50624; IC–26649; International Series Release No. 1282; File No. S7–38–04]

RIN 3235–AI11

Securities Offering Reform

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing rules that would modify and advance significantly the registration, communications, and offering processes under the Securities Act of 1933. Today's proposals would eliminate unnecessary and outmoded restrictions on offerings. In addition, the proposals would provide more timely investment information to investors without mandating delays in the offering process that we believe would be inconsistent with the needs of issuers for timely access to capital. The proposals also would continue our long-term efforts toward integrating disclosure and processes under the Securities Act and the Securities Exchange Act of 1934. The proposals would accomplish these goals by addressing communications related to registered securities offerings, delivery of information to investors, and procedural restrictions in the offering and capital formation processes.

DATES: Comments should be received on or before January 31, 2005.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–38–04 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number S7–38–04. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Amy M. Starr, Consuelo Hitchcock, Andrew Thorpe, Daniel Horwood, or Anne Nguyen, at (202) 824–5300, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0402 or, with respect to questions regarding investment companies, Kieran Brown in the Division of Investment Management, at (202) 942–0721.

SUPPLEMENTARY INFORMATION: We are proposing to amend Item 512 [1] of Regulation S–B,[2] Item 512 [3] of Regulation S–K,[4] and Rules 134, 137, 138, 139, 153, 158, 174, 401, 405, 408, 412, 413, 415, 418, 424, 430A, 434, 439, 456, 457, 462, 473, and 902 [5] under the Securities Act.[6] We also propose to add Rules 159, 159A, 163, 163A, 164, 168, 169, 172, 173, 430B, 430C, and 433 under the Securities Act. We further propose to amend Forms S–1, S–3, S–4, F–1, F–3, and F–4 and eliminate Forms S–2 and F–2 [7] under the Securities Act; to amend Rule 100 [8] of Regulation FD [9] and Rule 14a–2 [10] under the Securities Exchange Act of 1934; [11] to amend Forms 10, 10–K, 10–Q, 10–KSB, and 20–F [12] under the Exchange Act; and to amend Form N–2 under the Securities Act and the Investment Company Act of 1940.[13]

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[1] 17 CFR 228.512.

[2] 17 CFR 228.10 *et seq.*

[3] 17 CFR 229.512.

[4] 17 CFR 229.10 *et seq.*

[5] 17 CFR 230.134; 17 CFR 230.137; 17 CFR 230.138; 17 CFR 230.139; 17 CFR 230.153; 17 CFR 158; 17 CFR 230, 174; 17 CFR 230.401; 17 CFR 230.405; 17 CFR 230.408; 17 CFR 230.412; 17 CFR 230.413; 17 CFR 230.415; 17 CFR 230.418; 17 CFR 230.424; 17 CFR 430A; 17 CFR 230.434; 17 CFR 230.439; 17 CFR 230.456; 17 CFR 230.457; 17 CFR 230.462; 17 CFR 230.473; and 17 CFR 230.902.

[6] 15 U.S.C. 77a *et seq.*

[7] 17 CFR 239.11; 17 CFR 239.13; 17 CFR 239.25; 17 CFR 239.31; 17 CFR 239.33; 17 CFR 239.34; 17 CFR 239.12; and 17 CFR 239.32.

[8] 17 CFR 243.100.

[9] 17 CFR 243.100 through 243.103.

[10] 17 CFR 240.14a–2.

[11] 15 U.S.C. 78a *et seq.*

[12] 17 CFR 249.210; 17 CFR 249.308a; 17 CFR 249.310; 17 CFR 249.310b; and 17 CFR 249.220f.

[13] 17 CFR 239.14 and 17 CFR 274.11a–1.

I. Introduction

A. Overview of Today's Proposals

In 1998, the Commission proposed new rules under the Securities Act that were intended to modernize the securities offering process to recognize the evolution of the securities markets and securities products since the Securities Act's adoption and to enable market participants to capitalize on new technologies.[14] The underlying premise of those proposals—the need to modernize the securities offering and communications processes—was supported by commenters at the time. However, commenters indicated dissatisfaction with a number of the specifics in the 1998 proposals. We believe that the objectives of the 1998 proposals in reforming the offering process continue to be supported, and merit our attention still.

The 1998 proposals were a step in an evaluation of the offering process under the Securities Act that began as far back as 1966, when Milton Cohen noted the anomaly of the structure of the disclosure rules under the Securities Act and the Exchange Act and suggested the integration of the requirements under the two statutes.[15] Mr. Cohen's

[14] See *The Regulation of Securities Offerings*, Release No. 33–7606A (Nov. 13, 1998 [63 FR 67174] (the "1998 proposals").

The National Securities Markets Improvement Act of 1996 (NSMIA) provided the Commission with general authority to adopt exemptive rules under the Securities Act to the extent that such exemptive action is "necessary or appropriate in the public interest and consistent with the protection of investors." See Securities Act Section 28 [15 U.S.C. 77z–3]. This authority permitted a number of the proposals put forth in our 1998 proposals to go beyond previous modernization efforts.

[15] Milton H. Cohen, *Truth in Securities Revisited*, 79 Harv. L. Rev. 1340 (1966). ("It is my thesis that the combined disclosure requirements of these statutes would have been quite different if the 1933 and 1934 Acts * * * had been enacted in opposite order, or had been enacted as a single, integrated statute—that is, if the starting point had been a statutory scheme of continuous disclosures covering issuers of actively traded securities and the question of special disclosures in connection with public offerings had then been faced in this setting. Accordingly, it is my plea that there now be created a new coordinated disclosure system having as its basis the continuous disclosure system of the 1934 Act and treating the "1933 Act" disclosure needs on this foundation.")

article was followed by a 1969 study led by Commissioner Francis Wheat [16] and the Commission's Advisory Committee on Corporate Disclosure in 1977.[17] These studies eventually led to the Commission's adoption of the integrated disclosure system, short-form registration under the Securities Act, and Securities Act Rule 415 permitting shelf registration of continuous offerings and delayed offerings.[18]

The Commission's attention to the offering and communications processes under the Securities Act has continued more recently. In particular, in March 1996, members of the Commission staff delivered the Report of the Task Force on Disclosure Simplification to the Commission.[19] It recommended a number of areas where simplification and modernization of the registration and offering process could be accomplished. In July 1996, the Advisory Committee on the Capital Formation and Regulatory Processes delivered its report to the Commission.[20] Its principal recommendation was that the Securities Act registration and disclosure processes be more directly tied to the philosophy and structure of the Exchange Act through the adoption of a system of "company registration." Under company registration, the focus of Securities Act and Exchange Act registration and disclosure would move from transactions to issuers and corollary steps would be taken to provide for disclosure and registration of individual offerings within the company registration framework.

Promptly after the Advisory Committee on the Capital Formation and Regulatory Processes delivered its report, the Commission issued a concept release regarding regulation of the securities offering process.[21] The release sought input on a number of significant issues, including:

- Whether the concept of company registration should be pursued;
- Whether other methods of increasing the integration of Securities Act and Exchange Act disclosure and other processes should be considered;
- Whether existing or further reliance on Exchange Act filings should be accompanied by enhancements to Exchange Act reporting;
- Whether companies make information about their public securities offerings available to investors in an appropriate and timely manner, including:
  - At what point in the offering process delivery of, or access to, information should be assured in connection with registered offerings under the Securities Act and whether current requirements ensure timely delivery of information to the secondary market in connection with such offerings;
  - Whether prospectus supplements in shelf offerings should be made part of the registration statement;
  - Whether and, if so, in what circumstances electronic access should replace actual delivery of information in connection with offerings registered under the Securities Act; and
  - Whether restrictions on written offers under the Securities Act should be liberalized and the liability standards that should attach to such communications;
- Whether adjustments to the roles and responsibilities of traditional "gatekeepers" in the Securities Act offering process, such as underwriters and accountants, should be made in light of increases in the speed of and other evolutions in the offering process;
- Whether changes should be made to address evolution in the relationships between the public and private offering processes, including:
  - Whether changes in Rules 144A [22] and 144 [23] under the Securities Act should be considered; and
  - Whether there should be any relaxation in our prohibition against general solicitations of interest or offers in unregistered private offerings; and
- Whether the review process of issuer filings under the Securities Act and the Exchange Act by the staff of the Division of Corporation Finance should be modified to limit the impact of the process on access to capital markets, at least for some category of large seasoned issuers.[24]

While many of the issues cited above remain valid matters for consideration, much of the comment in response to our 1998 proposals suggested that the existing system of regulating capital formation in the registered offering market provides a number of advantages that should be carefully considered and retained if we are to make other changes. In putting forward proposed rules today, we have focused primarily on constructive, incremental changes in our regulatory structure and the offering process rather than the introduction of a far-reaching new system, as we believe that we can best achieve further integration of Securities Act and Exchange Act disclosure and processes by making adjustments in the current integrated disclosure and shelf registration systems. Further, consistent with our belief that investors and the securities markets will benefit from greater permissible communications by issuers while retaining appropriate liability for these communications, we have sought to address the need for timeliness of information for investors by building on current rules and processes without mandating delays in the offering process that we believe would be inconsistent with the needs of issuers for timely access to the securities markets and capital.

We are proposing revisions to the registration, communications, and offering processes under the Securities Act that we believe, while limited in scope, properly address the areas that are in need of modernization. Our proposals involve three main areas:

- Communications related to registered securities offerings;
- Registration and other procedures in the offering and capital formation processes; and

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[16] *See Disclosure to Investors—a Reappraisal of Federal Administrative Policies under the '33 and '34 Acts*, Policy Study (the "Wheat Report"), www.sechistorical.org/museum/Museum_Papers/museum_Papers_Chron.php#1960 (Mar. 27, 1969).

[17] See Report of the Advisory Committee on Corporate Disclosure, Cmte. Print 95–29, House Cmte. On Interstate and Foreign Commerce, 95th Cong., 1st. Sess., Nov. 3, 1977 (Nov. 3, 1977). In addition, beginning in 1968, the American Law Institute ("ALI") began its work on a Federal Securities Code, which was approved in 1978 by the ALI membership. The ALI Federal Securities Code included company registration as a central component. See American L. Inst., Federal Securities Code (1980).

[18] *See Adoption of Integrated Disclosure System*, Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380], *Delayed or Continuous Offering and Sale of Securities*, Release No. 33–6423 (Sept. 2, 1982) [47 FR 39799], and *Shelf Registration*, Release No. 33–6499 (Nov. 17, 1983) [48 FR 52889].

[19] *Report of the Task Force on Disclosure Simplification*, available at *www.sec.gov/news/studies/smpl.htm* (Mar. 5, 1996).

[20] *Report of the Advisory Committee on the Capital Formation and Regulatory Process*, (the "Advisory Committee Report") *www.sec.gov/news/studies/* capform.htm (July 24, 1996).

[21] *Securities Act Concepts and Their Effects on Capital Formation*, Release No. 33–7314 (July 25, 1996) [61 FR 40044] (the "1996 Concept Release").

[22] 17 CFR 230.144A.

[23] 17 CFR 230.144.

[24] In addition, the 1996 Concept Release sought input on a number of items suggested for consideration by the Task Force on Disclosure Simplification, including the following: Allowing smaller issuers that have been reporting for a year to make delayed offerings (without altering the disclosure requirements for permitting forward incorporation by reference); eliminating "at-the-market" offering restrictions; allowing universal shelf registration for secondary offerings; allowing issuers and majority-owned subsidiaries to be named as possible issuers on a shelf registration (without designating the issuer until takedown); allowing reallocation of securities on a shelf registration statement by post-effective amendment; allowing registration by seasoned issuers without any specification of the classes registered; and allowing seasoned issuers to pay registration fees at the time of the takedown.

• Delivery of information to investors, including delivery through access and notice, and timeliness of that delivery.[25]

Today's proposals reflect our view that revisions to the Securities Act registration and offering processes are appropriate in light of significant developments in the offering and capital formation processes and can provide enhanced protection of investors under the statute. This view is based on our belief that today's proposals would:

• Facilitate greater availability of information to investors and the market with regard to all issuers;

• Eliminate barriers to open communications that have been made increasingly outmoded by technological advances;

• Reflect the increased importance of electronic dissemination of information, including the use of the Internet;

• Make the capital formation process more efficient; and

• Define more clearly both the information and the timeliness of the availability of information against which a seller's statements are evaluated for liability purposes.

B. Background

1. Advances in Technology

Significant technological advances over the last three decades have increased both the market's demand for more timely corporate disclosure and the ability of issuers to capture, process, and disseminate this information. Computers, sophisticated financial software, electronic mail, teleconferencing, videoconferencing, webcasting, and other technologies available today have replaced, to a large extent, paper, pencils, typewriters, adding machines, carbon paper, paper mail, travel, and face-to-face meetings relied on previously. Our evaluation of the securities offering process and procedural enhancements seeks to recognize the integral role that technology plays in timely informing the markets and investors about important corporate information and developments.

2. Exchange Act Reporting Standards

A necessary starting point in considering reforms to the securities offering process is the role that a public issuer's Exchange Act reports play in investment decision making. Congress recognized that the ongoing dissemination of accurate information by issuers about themselves and their securities is essential to the effective operation of the trading markets. The Exchange Act and underlying rules have established a system of continuing disclosure about issuers that have offered securities to the public, or that have securities that are listed on a national securities exchange or are broadly held by the public. The Exchange Act rules require public issuers to make periodic disclosures at annual and quarterly intervals, with other important information reported on a more current basis. The Exchange Act specifically provides for current disclosure to maintain the timeliness and adequacy of information disclosed by issuers, and we have significantly expanded our current disclosure requirement consistent with the mandate in the Sarbanes-Oxley Act of 2002[26] that "[e]ach issuer reporting under Section 13(a) or 15(d) * * * disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer * * * as the Commission determines * * * is necessary or useful for the protection of investors and in the public interest."[27]

A public issuer's Exchange Act record provides the basic source of information to the market and to potential purchasers regarding the issuer, its management, its business, its financial condition, and its prospects. Because an issuer's Exchange Act reports and other publicly available information form the basis for the market's evaluation of the issuer and the pricing of its securities, investors in the secondary market use that information in making their investment decisions. Similarly, during a securities offering in which an issuer uses a short-form registration statement, an issuer's Exchange Act record often is the largest part of the information about the issuer in the registration statement.

With the enactment of the Sarbanes-Oxley Act and our recent rulemaking and interpretive actions, we have enhanced significantly the amount of disclosure included in issuers' Exchange Act filings and accelerated the filing deadlines for many issuers. The following are examples of recent regulatory actions that have improved the delivery of timely, high-quality information to the securities markets by issuers under the Exchange Act:

• Requiring the establishment of disclosure controls and procedures;[28]

• Requiring a public issuer's top management to certify the content of periodic reports and highlight their responsibilities for and evaluation of the issuer's disclosure controls and procedures and internal control over financial reporting;[29]

• Modifying the approach to current disclosure by increasing significantly the types of events that must be reported on a current basis and shortening the time for filing current reports;[30]

• Shortening the timeframe for filing annual reports and quarterly reports by accelerated filers;[31]

• Approving listing standard changes intended to improve corporate governance and enhance the role of the audit committee of the issuer's board of directors with regard to financial reporting and auditor independence;[32] and

• Providing further interpretive guidance regarding the content and understandability of Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) "a disclosure item we believe is at the core of a reporting issuer's periodic reports.[33]

Many of the recent changes to the Exchange Act reporting framework provide greater structure and rigor to the process that issuers must follow in preparing their financial statements and Exchange Act reports. Senior management must now certify the material adequacy of the content of periodic Exchange Act reports. Moreover, issuers, with the involvement of senior management, now must implement and evaluate disclosure controls and procedures and internal controls over financial reporting.

[25] While we continue to consider possible modifications to our regulatory framework regarding private offerings and the relationship between the public and private offering processes, we do not address these areas in today's proposals.

[26] Pub. L. 107–204, 116 Stat. 745 (2002).

[27] See Section 409 of the Sarbanes-Oxley Act which added Section 13(l) to the Exchange Act (15 U.S.C. 78m(l)). See also *Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date*, Release No. 33–8400 (Mar. 16, 2004) [69 FR 15594] and *Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date; Correction*, Release No. 33–8400A (Aug. 4, 2004) [69 FR 48370] ("Form 8–K Releases").

[28] See *Certification of Disclosure in Companies' Quarterly and Annual Reports*, Release No. 33–8124 (Aug. 28, 2002) [67 FR 57276] ("Certification Release").

[29] See *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Release No. 33–8238 (June 5, 2003) [68 FR 36636]; Certification Release note 28.

[30] See Form 8–K Releases note 27.

[31] See *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web Site Access to Reports*, Release No. 33–8128 (Sept. 5, 2002) [67 FR 58480].

[32] See *Standards Relating to Listed Company Audit Committees*, Release No. 33–8220 (Apr. 9, 2003) [68 FR 18788].

[33] See *Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33–8350 (Dec. 19, 2003) [68 FR 75056] (the "2003 MD&A Release").

Further, we believe the heightened role of an issuer's board of directors and its audit committee will instill greater confidence in the integrity of the contents of an issuer's Exchange Act reports.

The 1996 Concept Release and the 1998 proposals considered the role of enhanced Exchange Act reporting as an important corollary to reform of the offering process under the Securities Act.[34] We believe that the enhancements to Exchange Act reporting described above enable us to rely on these reports to a greater degree as a cornerstone of our proposals to reform the securities offering process.

II. Well-Known Seasoned Issuers; Other Categories of Issuers

A. Well-Known Seasoned Issuers

Our proposals today modify the framework for communications in connection with public offerings for all issuers and the framework of the registration process for most issuers that report under the Exchange Act. However, we believe that the most far-reaching revisions of our communications rules and registration processes should be considered for issuers that have a reporting history under the Exchange Act and are presumptively the most widely followed in the marketplace.[35] We believe that these issuers have an Exchange Act record, a broad following of their Exchange Act filings, and the contemplated attention directed to their Exchange Act reports by the staff of the Division of Corporation Finance that will produce the greatest likelihood of Exchange Act reports that not only are reliable but also are broadly scrutinized by investors and the markets.

Today, the largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers, large, seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media. The communications of these well-known seasoned issuers are subject to scrutiny by investors, the financial press, analysts, and others who evaluate disclosure when it is made.

We therefore propose to add a new category of issuer "a "well-known seasoned issuer" "that has these characteristics and would be permitted to benefit to the greatest degree from proposed modifications to our rules regarding communications and the registration processes.[36] We are proposing to define a well-known seasoned issuer as an issuer that is required to file reports pursuant to Section 13(a) or Section 15(d) the Exchange Act and satisfies the following requirements: [37]

- The issuer must be current in its reporting obligations under the Exchange Act and timely in satisfying those obligations for the preceding 12 calendar months;
- The issuer must be eligible to register a primary offering of its securities on Form S–3 or Form F–3;
- The issuer either:
- Must have outstanding a minimum $700 million of common equity market capitalization held by non-affiliates; or
- Must have issued $1 billion aggregate amount of debt securities in registered offerings during the past three years and register only debt securities; and
- Neither the offering nor the issuer may be of a type that falls within the category of ineligible issuers or offerings.[38]

A majority-owned subsidiary of a well-known seasoned issuer also may be considered a well-known seasoned issuer in connection with the offer and sale of its own securities if:

- The majority-owned subsidiary itself meets the conditions for eligibility;
- A parent of the majority-owned subsidiary is a well-known seasoned issuer and fully and unconditionally guarantees the subsidiary's non-convertible obligations; [39]
- The majority-owned subsidiary guarantees the obligations of (1) its parent or (2) another majority-owned subsidiary where there is also a full and unconditional guarantee of the same obligation by a parent that is a well-known seasoned issuer and the obligations are non-convertible; or
- The majority-owned subsidiary's non-convertible obligations are fully and unconditionally guaranteed by another majority-owned subsidiary that itself is a well-known seasoned issuer.[40]

Whether an issuer satisfies the requirements for current and timely filing of Exchange Act reports and the general eligibility requirements of Form S–3 or F–3 would be determined at the time of filing of its registration statement and, thereafter, at the time of the update of that registration statement required by Securities Act Section 10(a)(3).[41] For purposes of determining their status as well-known seasoned issuers, issuers would measure their non-affiliate equity market capitalization, or "public float", and the aggregate amount of their debt issuances as of the last business day of their most recently completed second fiscal quarter prior to the date of filing the Form 10–K or Form 20–F.[42]

We believe that the public float of a reporting issuer can be used as a proxy for whether the issuer has a demonstrated market following.[43] The threshold we propose is that an issuer have a public float of $700 million or

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[34] Enhanced Exchange Act reporting was also central to the recommendations of the Advisory Committee. See note 20.

[35] Our proposals would provide a class of well-known seasoned issuers greater flexibility in registering their securities offerings under a more streamlined registration process known as automatic shelf registration. Under the automatic shelf registration process, eligible well-known seasoned issuers could register, on a more flexible basis than is currently the case, offerings of different types of securities using Form S–3 or Form F–3 registration statements that are effective upon filing. See discussion in Section V.B.2. below under "Automatic Shelf Registration for Well-Known Seasoned Issuers."

[36] Our proposals would not change the existing eligibility standards for the use of Form S–3 and Form F–3.

[37] See proposed amendments to Securities Act Rule 405. As later discussed, an issuer that files Exchange Act reports voluntarily would not be a well-known seasoned issuer or a seasoned issuer. Rather, those voluntary filers would be considered unseasoned issuers for purposes of our proposals. In addition, asset-backed issuers would not be well-known seasoned issuers.

[38] See proposed definition of "ineligible issuers" in Securities Act Rule 405 as discussed in Section III.D.3 below under "Ineligible Issuers."

[39] Whether a guarantee is full and unconditional would be analyzed under the same principles as those used under Rule 3–10 of Regulation S–X [17 CFR 210.3–10] and Exchange Act Rule 12h–5 [17 CFR 240.12h–5]. In addition, the guarantee may only be of an obligation that has a limited duration and is not perpetual. This analysis is not different from the current analysis under Form S–3 or Form F–3.

[40] See proposed amendment to Securities Act Rule 405.

[41] The Section 10(a)(3) update generally occurs when the issuer files its Form 10–K containing the issuer's audited financial statements for its most recently completed fiscal year. See 15 U.S.C. 77j(a)(3).

[42] Form 10–K and Form 20–F currently require that the aggregate market value of the voting and non-voting common equity held by non-affiliates be computed as of the last business day of the registrant's most recently completed second fiscal quarter. This is the same date as when issuers would determine their non-affiliate equity market capitalization for assessing their status as "accelerated filers" under Rule 12b–2 [17 CFR 240.12b–2]. This is different than the non-affiliate equity market capitalization used in determining eligibility to use Form S–3 and Form F–3 for primary offerings in reliance on General Instruction I.B.1 of Form S–3 or Form F–3 that is computed as of a day within 60 days of the date of filing (or the date of the Section 10(a)(3) update to the registration statement). We believe it is appropriate to use the same computation for purposes of eligibility as a well-known seasoned issuer.

[43] Public float is also one of the key determinants for eligibility for current short-form registration on Forms S–3 and F–3.

more. We have used market capitalization as a proxy for public float in evaluating this threshold and its implications.

To evaluate the implications of a $700 million public float threshold, staff in our Office of Economic Analysis ("OEA") obtained data on the 9690 registered offerings that were conducted during 1997–2003 by 2784 issuers that had public equity outstanding and were listed on a major exchange or equity market.[44] Of these offerings, 6998 were debt offerings that raised proceeds of $1272 billion, and 2692 were equity offerings that raised proceeds of $477 billion. The average issuer conducted 3.8 debt offerings and 1.1 equity offerings per calendar year, although as many as 157 debt offerings have been conducted by a single issuer within a calendar year.

OEA also analyzed data on the financial market conditions under which these offerings were made. High levels of analyst coverage, institutional ownership, and trading volume are useful indicators of the scrutiny that an issuer receives from the market, although no one statistic can fully capture the extent to which an issuer is well-followed by the market.[45] Issuers with market capitalization in excess of $700 million that conducted offerings in 1997–2003 typically have had an average of 10 analysts following them prior to the offering.[46] This includes only sell-side analysts and is, we believe, a conservative indicator of analyst scrutiny. Institutional investors accounted for an average of 56% of equity ownership prior to offerings by issuers with market capitalization above $700 million. Those issuers had an average daily trading volume of nearly $25 million prior to offerings in this period and accounted for the following percentages of capital raised:

OFFERING PROCEEDS, BY ISSUER CAPITALIZATION PRIMARY SEASONED OFFERINGS, 1997–2003*

[$Billions (%) proceeds from offerings, by issuer capitalization]

	Market capitalization of issuers	
	>$700mm	>$0 (All issuers)
Equity	$373 (78%)	$477 (100%)
Debt	1232 (97%)	1272 (100%)
Total	1606 (92%)	1749 (100%)

* Source: Office of Economic Analysis estimates using Center for Research in Securities Prices at the University of Chicago ("CRSP") and Securities Data Corporation ("SDC") data. The issuers in this table do not reflect issuers meeting the well-known seasoned issuer threshold based on the $1 billion threshold discussed below.

Issuers that do not meet the public equity float test would be considered well-known seasoned issuers solely for purposes of debt offerings if they have sold more than an aggregate of $1 billion in debt through registered offerings over the prior three years. These issuers also would have to satisfy the other conditions of the well-known seasoned issuer definition, such as the reporting history requirement.[47]

We have chosen the $1 billion threshold for issuers of public debt based on an evaluation of statistics on issuers that do not have public equity outstanding. The relevant statistics for these issuers are different from those for issuers that have securities traded on major equity markets.

The issuers of debt that meet the $1 billion threshold account for 23% of the issuers that issued public debt during the period 1997–2003. These issuers account for 72% of debt issued during the same period. None of these issuers' debt offerings were rated below investment grade, and 84% of their debt offerings were rated A or higher by a nationally recognized security rating organization, an NRSRO. This group of issuers also on average had 44 basis points lower yield spread for their issues relative to issuers that had not issued any debt in the past three years. We believe that this lower yield spread reflects lower default risk (higher ratings) and higher liquidity and transparency of the issuers.[48]

Overall, the issuers that would meet our proposed thresholds for well-known seasoned issuers are thus the most active issuers in the U.S. public capital markets. In 2003, those issuers, which represented approximately 30% of listed issuers, accounted for about 95% of U.S. equity market capitalization. They have accounted for 87% of the total debt raised in registered offerings over the past seven years. These issuers accordingly represent the most significant amount of capital raised and traded in the U.S. As a result of the active participation of these issuers in the markets and, among other things, the wide following of these issuers by market participants, the media, and institutional investors, we believe that it is appropriate to provide greater communications and registration flexibilities to these well-known seasoned issuers beyond that provided to other issuers, including other seasoned issuers.

B. Other Categories of Issuers

We also would use existing categories of issuers, including seasoned issuers, unseasoned Exchange Act reporting issuers, and non-reporting issuers, in our proposals, discussed below, regarding communications and the registration process. A seasoned issuer would be an issuer that is eligible to use Form S–3 or Form F–3 to register primary offerings of securities—securities to be sold by or on its behalf, on behalf of its subsidiary, or on behalf of a person of which it is the subsidiary.[49] Majority-owned subsidiaries eligible to use Form S–3 or Form F–3 for offerings of their securities

[44] OEA compiled and analyzed the supporting data for the public float (using market capitalization) and outstanding debt thresholds.

[45] See *e.g.*, Harrison Hong, Terrence Lim and Jeremy C. Stein, *Bad News Travels Slowly: Size, Analyst Coverage and the Profitability of Momentum Strategies*, 55 Journal of Finance 265 (2000); Robert C. Merton, *A Simple Model of Capitol Market Equilibrium with Incomplete Information*, 42 Journal of Finance 483 (1987).

[46] Issuers with a market capitalization of between $75 million and $200 million, in most cases, have between zero to four analysts following them with approximately 50% having zero to one analysts following them. These issuers, therefore, have significantly less analyst coverage than well-known seasoned issuers.

[47] These issuers would only be eligible to register non-convertible obligations on an automatic shelf registration statement. See discussion in Section V.B.2 below under "Automatic Shelf Registration for Well-Known Seasoned Issuers."

[48] See Gordon J. Alexander, William F. Sharpe, and Jeffrey V. Bailey, *Fundamentals of Investments* (2001 ed.) at 530.

[49] Eligibility to register primary offerings of securities on Form S–3 or Form F–3 is based on public float or issuance of investment grade securities. See General Instruction I.B.1 and I.B.2 to Form S–3 and Form F–3.

also would be considered seasoned issuers.[50]

An unseasoned issuer would be an issuer that is required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act, but does not satisfy the requirements of Form S–3 or Form F–3 for a primary offering of its securities. Under the proposal, an issuer that is filing Exchange Act reports voluntarily would be treated as a reporting unseasoned issuer. A non-reporting issuer would be an issuer that is not required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act and is not filing such reports voluntarily.

Request for Comment

- Should we raise the proposed public float test of $700 million (*e.g.*, to $800 million)? If so, why?
- Alternatively, should we lower the public float test (*e.g.*, to $500 million, $400 million, or $300 million)? If so, why? If we were to lower the threshold, how can we ensure that the issuers meeting that threshold would be sufficiently well followed? If we were to lower the threshold, what other characteristics not present in issuers with a lower public float would need to be present to ensure that an issuer would be well followed?
- Is a public float threshold the proper standard, or should we use another standard, such as percentage of institutional ownership, average daily trading volume, asset size, or any combination of these? If so, how would the standard compare to the public float threshold and how could it be readily determined and verified?
- Should we use the same public float calculation as we use for purposes of the cover page of the Form 10–K and Form 20–F? Would another calculation date for the public float be more appropriate? Is there another readily available information source for public floats of issuers that provides the information other than annually?
- Should we have a requirement for the staff to evaluate the eligibility thresholds for well-known seasoned issuers on a periodic basis? If so, how often should we evaluate the thresholds and what factors should we consider? Alternatively, should the definition provide for automatic adjustments in the public float and aggregate debt requirement based on factors such as, for example, analyst coverage, institutional ownership, or average daily trading volume for equity, or changes in debt rating for debt issuers? If yes, how often should adjustments occur, what factors should trigger an adjustment, and why?
- Should eligibility to use the proposals available to well-known seasoned issuers be calculated on the basis of trading conducted on any national securities exchange, any particular national securities exchange, the Nasdaq Stock Market, or any particular portion of the Nasdaq Stock Market (*e.g.*, the National Market System or the SmallCap Market)? If yes, should there be any limitation on the trading location or platform?
- Besides the amount of registered debt sold by the issuer over a three-year period, are there any other bases upon which to determine that issuers eligible based on debt issuances are well-known seasoned issuers? Should investment grade debt ratings be part of the basis for eligibility?
- Is the eligibility threshold of $1 billion of registered debt over the prior three years the appropriate threshold? If not, should the threshold be higher? Should it be lower?
- Should an issuer be eligible to be a well-known seasoned issuer based on debt issuances if it has both publicly held debt and equity securities?
- Should offering participants be required to recalculate an issuer's eligibility at the time of use of a free writing prospectus or should the eligibility determination be done once a year for all purposes?
- Should we permit majority-owned subsidiaries to be considered well-known seasoned issuers under the proposed tests? Should we limit the definition only to wholly-owned subsidiaries? We are proposing conforming changes to Forms S–3 and F–3. Is this appropriate or necessary?
- Our proposed $700 million public float requirement is higher than the current $75 million public float level generally required for short-form and delayed shelf registration. The public float threshold for short-form and delayed shelf registration has not been revised since 1992.[51] While our proposals do not alter that public float threshold for short-form registration, should that threshold be revised upward in light of the length of time since it was last revised, the changes that have occurred in the markets since then, and the underlying rationale that the firms eligible to use short form registration should be sufficiently well-followed? If so, what threshold would be appropriate? Provide empirical data supporting any proposed threshold.
- One disqualification from an issuer being considered a well-known seasoned issuers is that it is an "ineligible issuer", as we propose to define that term. Should well-known seasoned issuers, who otherwise satisfy the eligibility conditions, be disqualified from being a well-known seasoned issuer for all purposes of our proposals if it is an ineligible issuer under the definition? If not, why not?
- Do the categories of seasoned, unseasoned, and non-reporting issuers appropriately describe the issuers that fall into these categories? If not, why not and what would be a more appropriate categorization?

III. Communications Proposals

A. Current Communications Requirements

The Securities Act restricts the types of offering communications that an issuer or other parties subject to the Act's provisions (such as underwriters) may use during a registered public offering. The nature of the restrictions depends on the period during which the communications are to occur. The restrictions do not depend on the accuracy of the information contained in the communication. Before the registration statement is filed, all offers, in whatever form, are prohibited.[52] Between the filing of the registration statement and its effectiveness, offers made in writing (including by e-mail or Internet), by radio, or by television are limited to a "statutory prospectus" that conforms to the information requirements of Securities Act Section 10.[53] As a result, the only written material that is permitted in connection with the offering of the securities during the period between filing and

[50] We propose to expand the majority-owned subsidiary eligibility in Form S–3 and Form F–3 to allow majority-owned subsidiaries to use the forms under the same circumstances in which majority-owned subsidiaries would be well-known seasoned issuers. For example, see General Instruction I.C. to Form S–3.

[51] *See Simplification of Registration Procedures for Primary Securities Offerings*, Release No. 33–6943 (July 16, 1992) [57 FR 32461].

[52] See Securities Act Section 5(c) [15 U.S.C. 77e(c)]. Securities Act Section 2(a)(3) [15 U.S.C. 77b(a)(3)] defines "offer" as any attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The term "offer" has been interpreted broadly and goes beyond the common law concept of an offer. See *Diskin* v. *Lomasney & Co.*, 452 F.2d 871 (2d. Cir. 1971); *SEC* v. *Cavanaugh*, 1 F. Supp. 2d 337 (S.D.N.Y. 1998). The Commission has explained that "the publication of information and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer * * *" *Guidelines for the Release of Information by Issuers Whose Securities are in Registration*, Release No. 33–5180 (Aug. 16, 1971) [36 FR 16506].

[53] See Securities Act Section 5(b)(1) [15 U.S.C. 77e(b)(1)] and Securities Act Section 10 [15 U.S.C.77j].

effectiveness of a registration statement is a preliminary prospectus meeting the requirements of Section 10, which must be filed with the Commission. Even after the registration statement is declared effective, offering participants may still make written offers only through a statutory prospectus, except that they may use additional written offering materials if a final prospectus that meets the requirements of Securities Act Section 10(a) is sent or given prior to or with those materials.[54] Violations of these restrictions are often generally referred to as "gun-jumping", and we use the term "gun-jumping provisions" to describe the statutory provisions of the Securities Act that set forth these restrictions.

B. Need for Modernization of Communications Requirements

1. General

The gun-jumping provisions of the Securities Act were enacted at a time when the means of communications were limited and restricting communications (without regard to accuracy) to the statutory prospectus appropriately balanced available communications and investor protection. They were designed to make the statutorily mandated prospectus the primary means for investors to obtain information regarding a registered securities offering. The capital markets, in the United States and around the world, have changed significantly since those limitations were enacted. Today, issuers engage in all types of communications on an ongoing basis, including, importantly, communications mandated or encouraged by our rules under the Exchange Act. Modern communications technology, including the Internet, provides a powerful, versatile, and cost-effective medium to communicate quickly and broadly.[55] The changes in the Exchange Act disclosure regime and the tremendous growth in communications technology are resulting in more information being provided to the market on a more non-discriminatory, current and ongoing basis. Thus, while the investor protection concerns remain, the gun-jumping provisions of the Securities Act impose substantial and increasingly unworkable restrictions on communications that would be beneficial to investors and markets and consistent with investor protection.

The following factors, combined with the advances in technology described above, lead us to believe that investors and the market would benefit from access to greater permissible communications where protection for investors in connection with these communications is retained through the appropriate liability standards under the Securities Act for materially deficient disclosures in prospectuses and oral communications:

- Much of our recent rulemaking is intended to encourage reporting issuers to provide additional materially accurate and complete information to the market on a more current basis.[56] The Securities Act's constraints on communications during an offering have, however, caused issuers to be concerned about the treatment of their ongoing communications and whether, if they are engaged, or will soon be engaged, in capital raising, their customary disclosures will be considered an impermissible offer of securities;[57]
- The multiplicity of means of communication has led us to recognize that restricting written offers to a statutory prospectus inhibits desirable methods of timely communication of information;
- There are many more offerings of increasingly complex securities where written communications, such as term sheets, would enhance significantly the offering process for the benefit of investors;[58] and
- The continuing trends towards globalization of securities markets and multinationalization of issuers and offerings increase the need for a regulatory framework that accommodates more flexible communications.

When we first proposed a broad relaxation of the gun-jumping provisions during an offering in 1998, the majority of commenters favored the proposals.[59] Commenters raised concerns regarding certain other elements of those proposals, however, and we did not go forward with those proposals. In view of the many recent changes to the Exchange Act reporting system that are designed to produce more timely and extensive disclosures and greater scrutiny of, and confidence in, those reports, it is appropriate at this time to revisit the concept of communications and offering reforms.[60]

2. Definition of Written Communication

As a starting point for reform, we propose to define all methods of communication, other than oral communications, as written communications for purposes of the Securities Act. While we have addressed the issue of electronic communications in a number of different contexts, at this time we are proposing a rule making it clear that all electronic communications (other than telephone as noted below) are graphic and, therefore, written communications for purposes of the Securities Act. In this manner, we intend to encompass new technologies without needing to revisit our rules in the future.

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[54] *See* Securities Act Section 2(a)(10) [15 U.S.C. 77b(a)(10)] and Section 5(b)(1).

[55] For example, the Internet provides a medium through which to deliver electronic documents, to broadcast radio and television programs, to issue press releases or print advertisements, to conduct telephone or videoconferences with investors, prospective investors, and other parties, and to send personal e-mails.

[56] Other recent rulemaking initiatives addressing disclosure issues include those referenced in notes 27 through 33 and those contained in *Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors*, Release No. 33–8340 (Nov. 24, 2003) [68 FR 66992]; and *Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations*, Release No. 34–47264 (Jan. 28, 2003) [68 FR 5982] (the "Off-Balance Sheet Disclosure Release").

[57] See, *e.g.* letter from the American Bar Association Committee on Federal Regulation of Securities to the Director of the Division of Corporation Finance, Aug. 22, 2001 (available at *www.abanet.org*); comment letters in File No. S7–30–98 from Gerald S. Backman, *et al.*; Fried Frank Harris Shriver & Jacobson ("Fried Frank"); Service Employees International Union; and Sullivan & Cromwell. See also Edward F. Greene and Linda C. Quinn, "Building on the International Convergence of the Global Markets: a Model for Securities Law Reform," presented at *A Major Issues Conference: Securities Regulation in the Global Internet Economy*, Washington, DC, Nov. 14–15, 2001 (available at *www.law.northwestern.edu*).

[58] The staff and the Commission have recognized the usefulness of term sheets in some structured finance offerings. See, e.g., Staff no-action letters to Greenwood Trust Co., Discover Master Card Trust I (Apr. 5, 1996); Public Securities Ass'n (Mar. 9, 1995); Public Securities Ass'n (Feb. 17, 1995); Public Securities Ass'n (May 27, 1994); and Kidder Peabody Acceptance Corporation I (May 20, 1994). See also, *Asset-Backed Securities*, Release No. 33–8419 (May 3, 2004) (the "Asset-Backed Securities Proposing Release"); and Securities Act Rule 434 (17 CFR 230.434).

[59] Commenters on the 1998 proposals suggested that both investors and sellers would benefit from loosened restrictions on communications prior to and during an offering, as sellers would be able to use a variety of sales documents and investors would get more timely access to information. See, e.g., comment letters in File No. S7–30–98 from the American Bar Association ("ABA"); American College of Investment Counsel ("ACIC"); American Corporate Counsel Association ("ACCA"); Business Roundtable; Merrill Lynch; and Sullivan & Cromwell.

[60] We have been considering communications reform in other contexts for a number of years. We have recently proposed communications reforms for asset-backed offerings, as well. See the Asset-Backed Securities Proposing Release, note 58. With our adoption of the communications reforms for business combinations in 1999, we reduced the regulation of offers and brought the regulatory structure closer to the practices in those offerings while ensuring continued investor protection. See *Regulation of Takeovers and Security Holder Communications*, Release No. 33–7760 (Oct. 22, 1999) [64 FR 61408] (the "Regulation M–A Release").

Accordingly, we are proposing new definitions of "written communication" and "graphic communication" to ensure consistent understanding of what constitutes such a communication in view of the technological developments since the enactment of the Securities Act and to eliminate any remaining uncertainty regarding the permitted means for delivery of information under the Securities Act.

Under the proposals, "written communication" would mean any communication that is written, printed, broadcast, or a graphic communication. The definition would not cover oral communications, such as live telephone calls (whatever the medium by which they are carried, including the Internet)[61] and other direct oral communications.

We are proposing to amend the definition of "graphic communication" contained in Securities Act Rule 405 to provide that it includes any form of electronic media, such as audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet web sites, and computers, computer networks and other forms of computer data compilation.[62] Because written communications would, therefore, include Internet communications, e-mails and other electronic and web-based communications, electronic postings on web sites—including electronic road shows—would be written communications within the scope of the definition.[63]

Request for Comment

- Does the proposed definition of graphic communication provide a workable framework within which to analyze electronic communications?
- Are there communications not covered by the proposed definitions that should be considered written or graphic? Should we provide that only interactive communications, such as those allowing face-to-face or telephonic interactions, would still be considered oral?
- Although the analysis required for any particular communication would be fact-specific, should we provide further guidance or examples regarding the use of specific technologies? If so, which technologies should we address at this time?

C. Overview of Communications Proposals

In this section of the release, we will discuss proposals that relate to the following:

- Regularly released factual business information;
- Regularly released forward-looking information;
- Communications made more than 30 days before filing a registration statement;
- Communications by well-known seasoned issuers during the 30 days before filing a registration statement;
- Written communications made in accordance with the safe harbor in Securities Act Rule 134; and
- Written communications by any issuer (other than the statutory prospectus) after filing a registration statement.

The following table provides a brief overview of the operation of these proposals. While the table clearly does not include the level of detail necessary to explain the proposals, we have included it to help readers in commenting on the proposals.

	Could it be an "offer" as defined in Section 2(a)(3)?	Is it a "prospectus" as defined in Section 2(a)(10)?	Is it a in prohibited pre-filing offer for purposes of Section 5(c)?	Is it a prohibited prospectus for purposes of Section 5(b)(1)?
Regularly Released Factual Business Information.	Yes	No	Rule would define it as not an offer for Section 5(c) purposes.	Section 5(b)(1) relates only to "prospectuses"—it would not be applicable.
Regularly Released Forward-Looking Information.	Yes	No	Rule would define it as not an offer for Section 5(c) purposes.	Section 5(b)(1) relates only to "prospectuses"—it would not be applicable.
Communications Made More Than 30 Days Before Filing of Registration Statement.	Yes	No	Rule would define it as not an offer for Section 5(c) purposes.	Section 5(b)(1) does not apply in the pre-filing period—it would not be applicable.
Well-Known Seasoned Issuers—Oral Offers Made Within 30 Days of Filing of Registration Statement.	Yes	No	Would be exempted from prohibition of Section 5(c).	Section 5(b)(1) would not be applicable.
Well-Known Seasoned Issuers—Free Writing Prospectuses Used Before Filing of Registration Statement.	Yes	Yes	Would be exempted from prohibition of Section 5(c).	Section 5(b)(1) does not apply in the pre-filing period—it would not be applicable.
Identifying Statements in Accordance with Rule 134.	Yes	No	Section 5(c) is not applicable, as Rule 134 relates only to the period after the filing of a registration statement.	Section 5(b)(1) relates only to "prospectuses"—it would not be applicable.

[61] Written communications would not include individual telephone voice mail messages but would include broadly disseminated or "blast" voice mail messages. The latter would be included in the definition because we believe they are more like broadcasts than oral communications.

[62] The forms of media that would be described in the proposed definition encompass the forms of media that are addressed in our interpretive guidance on the use of electronic media. In recognition of continuing developments in technology, the forms of electronic media described in the proposed definition are intended to be illustrative rather than exhaustive. See *e.g.*, *Use of Electronic Media*, Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843] (the "2000 Electronics Release").

[63] All electronic road shows in registered offerings would be considered written communications, regardless of the audience, but under our proposals would be permissible, subject to conditions. See discussion in Section III.D.3 below under "Electronic Road Shows".

	Could it be an "offer" as defined in Section 2(a)(3)?	Is it a "prospectus" as defined in Section 2(a)(10)?	Is it a in prohibited pre-filing offer for purposes of Section 5(c)?	Is it a prohibited prospectus for purposes of Section 5(b)(1)?
All Eligible Issuers—Free Writing Prospectuses Used After Filing of Registration Statement.	Yes	Yes	Section 5(c) would not be applicable, as it does not apply in the post-filing period.	Section 5(b)(1) would be satisfied, as the free writing prospectus would be a permitted Section 10(b) prospectus.

We are proposing communications rules that recognize the value of ongoing communications as well as the importance of avoiding unnecessary restrictions on offers during a registered offering. In particular, the proposals would eliminate requirements that can interrupt unnecessarily an issuer's normal and routine communications into the market while an issuer is engaging in a securities offering, and would enhance the ability of issuers and other offering participants to make written offers outside the statutory prospectus.

Our proposals contemplate a communications framework that, in some cases, would operate along a spectrum based on the type of issuer, its reporting history, and its equity market capitalization or historical debt issuance. Thus, eligible well-known seasoned issuers would have freedom generally from the gun-jumping provisions to communicate around the time of a registered offering, including by means of a written offer other than a statutory prospectus. Varying levels of restrictions would apply to other categories of issuers. We believe these distinctions are appropriate because the market has more familiarity with large, more seasoned issuers and, as a result of the ongoing market following of their activities, including the role of market participants and the media, these issuers' communications would have less potential for conditioning the market for the issuers' securities to be sold in a registered offering. Disclosure obligations and practices outside the offering process, including under the Exchange Act, also determine the scope of communications flexibility the proposals would give to issuers and other offering participants.[64]

The cumulative effect of the proposals under the gun-jumping provisions would be the following:

- Well-known seasoned issuers would be permitted to engage at any time in oral and written communications, including use at any time of a free writing prospectus,[65] subject to enumerated conditions (including, in specified cases, filing with the Commission).[66]
- All reporting issuers would, at any time, be permitted to continue to publish regularly released factual business information and forward-looking information.[67]
- Non-reporting issuers would, at any time, be permitted to continue to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors.[68]
- Communications by issuers more than 30 days before filing a registration statement would not be considered prohibited offers so long as they did not reference a securities offering.[69]
- Issuers and other offering participants would be permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions (including, in specified cases, filing with the Commission).[70]
- A broader category of routine communications regarding issuers, offerings, and procedural matters, such as communications about the schedule for an offering or about account-opening procedures, would be excluded from the definition of "prospectus".[71]
- The exemptions for research reports would be expanded.[72]

As discussed below, a number of these new proposals would include conditions of eligibility. Most of the proposals, for example, would not be available to blank check companies, penny stock issuers, or shell companies.[73]

Commenters on the 1998 proposals were concerned that increased liability would diminish the utility of the proposed communications reform. Today's proposals would address this concern by ensuring that appropriate liability is maintained for the communications. For example, all free writing prospectuses would have liability under the same provisions as apply today to oral offers and statutory prospectuses.[74] Written communications not constituting prospectuses would not be subject to disclosure liability applicable to prospectuses[75] under Securities Act Section 12(a)(2). This result would not affect their status for liability purposes under other provisions of the federal securities laws, including the anti-fraud provisions.[76]

D. Proposed Rules

1. Permitted Continuation of Ongoing Communications During an Offering

We are proposing two separate safe harbors from the gun-jumping provisions for continuing ongoing business communications.[77] The first safe harbor would permit a reporting issuer's continued publication or dissemination of regularly released factual business and forward-looking information at any time, including around the time of a registered offering.[78] The second safe harbor would permit a non-reporting issuer's publication or dissemination of factual business information that had been regularly released to persons other than

[64] See, *e.g.*, Regulation FD [17 CFR 243.100 *et seq.*], Regulation G [17 CFR 244.100 *et seq.*], and Form 8–K [17 CFR 249.308].

[65] A "free writing prospectus" is proposed to be defined in Securities Act Rule 405. This proposed definition is discussed in Section III.D.3 below under "Definition of Free Writing Prospectus."

[66] *See* proposed Rule 163.

[67] *See* proposed Rule 168.

[68] *See* proposed Rule 169.

[69] *See* proposed Rule 163A.

[70] *See* proposed Rules 164 and 433.

[71] *See* proposed amendments to Securities Act Rule 134.

[72] *See* proposed amendments to Securities Act Rules 137, 138, and 139.

[73] We recently proposed to define shell companies. *See Use of Form S–8 and Form 8–K by Shell Companies*, Release No. 33–8407 (April 15, 2004) (the "Shell Companies Release"). For purposes of today's proposals, such as proposed Rules 163A, 164, 168, 169 and amendments to Securities Act Rule 405, we propose using the definition of shell company proposed in the Shell Companies Release.

[74] These liability provisions include Securities Act Section 12(a)(2) and 17(a) [15 U.S.C. 77*l*(a)(2) and 77q(a)], Exchange Act Section 10(b) [15 U.S.C. 78j(b)], and Exchange Act Rule 10b–5 [17 CFR 240.10b–5].

[75] *See* Securities Act Section 2(a)(10).

[76] *See, e.g.*, Securities Act Section 17(a), Exchange Act Section 10(b) and Exchange Act Rule 10b–5.

[77] These safe harbor provisions would operate by excluding such communications from the definition of offer for purposes of Securities Act Sections 2(a)(10) and 5 (c). *See* proposed Rules 168 and 169.

[78] *See* proposed Rule 168.

in their capacity as investors or potential investors.[79]

Investment companies registered under the Investment Company Act of 1940 and business development companies would be ineligible to use the proposed safe harbors for factual business information and forward-looking information.[80] These issuers are subject to a separate framework governing communications with investors.[81]

a. Regularly Released Factual Business and Forward Looking Information—Reporting Issuers

Our proposals applicable to reporting issuers would provide a safe harbor from the gun-jumping provisions for continued publication or dissemination of regularly released factual business and forward-looking information. Our proposed safe harbor would apply to factual business and forward-looking information that has been regularly released in the ordinary course by or on behalf of a reporting issuer.[82]

i. Factual Business Information

We believe it is important to provide certainty regarding when the gun-jumping provisions would be inapplicable to the continuing ongoing communication of factual business information. We are proposing Securities Act Rule 168, which would provide for such a communication a safe harbor from being an impermissible prospectus and from violating the prohibition on pre-filing offers.[83] We want to encourage reporting issuers to continue to provide this information. For purposes of these proposals, factual business information would be defined as:[84]

- Factual information about the issuer or some aspect of its business;
- Advertisements of, or other information about, the issuer's products or services;
- Factual information about business or financial developments with respect to the issuer;
- Dividend notices; and
- Factual information set forth in the issuer's Exchange Act reports.[85]

ii. Forward-Looking Information

Our view of the value of forward-looking information in the market has evolved through the years. Through the 1970's we were most concerned with the potentially misleading effect that forward-looking information could have on investors.[86] Beginning in the 1980's we have encouraged issuers to disclose forward-looking information and, in some situations (such as the disclosures in MD&A),[87] required them to do so.[88] The existing safe harbors for the content of forward-looking statements are designed to encourage the provision of forward-looking information.[89]

Where an issuer regularly releases forward-looking information in the ordinary course, we believe that the purpose of such communication is to keep the market informed about the issuer and its future prospects and, thus, the continued release or dissemination of this information in the ordinary course is not for the purpose of offering securities or conditioning the market for new issuances of the issuer's securities. We understand that issuers increasingly have been disclosing earnings forecasts and other forward-looking information publicly to provide more information to the markets and to enable them to continue to have discussions to which Regulation FD applies.[90] We do not believe that it is beneficial to investors or the markets to force reporting issuers to suspend their ordinary course communications of this information because they are raising capital in a registered offering.

Our proposals would provide for the use of such a communication a safe harbor from being an impermissible prospectus and from violating the prohibitions on pre-filing offers. Under our proposals, the safe harbor would apply to the release or dissemination of the following forward-looking information if the release or dissemination satisfies the other conditions of the Rule:[91]

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[79] *See* proposed Rule 169.

[80] Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act. *See* Section 2(a)(48) of the Investment Company Act of 1940 [15 U.S.C. 80a–2(a)(48)] defining "business development company").

[81] *See, e.g.*, Securities Act Rules 156, 482, and 498 [17 CFR 230.156; 17 CFR 230.482; 17 CFR 230.498]; Investment Company Act Rule 34b–1 [17 CFR 270.34b–1].

[82] *See* proposed Rule 168.

[83] Our proposed Rule 168 would be a safe harbor from the definition of "prospectus" in Securities Act Section 2(a)(10) and would, therefore, prevent the application of the prohibition in Securities Act Section 5(b)(1) on the use of a prospectus that is not a statutory prospectus. The proposed Rule would also be a safe harbor from the prohibitions on pre-filing "offers" in Securities Act Section 5(c).

In general, as we recognized many years ago, ordinary factual business communications that an issuer regularly releases are not considered an offer of securities. *See, e.g.*, the guidelines contained in the 2000 Electronics Release note 62; *Guidelines for the Release of Information by Issuers Whose Securities ore in Registration*, Release No. 33–5180 (Aug. 16, 1971) [36 FR 16506]; *Publication of Information Prior to or After the Filing and Effective Dote of a Registration Stotement Under the Securities Act of 1933*, Release No. 33–5009 (Oct. 7, 1969) [34 FR 16870]; *Offers and Sales by Underwriters and Dealers*, Release No. 33—After the Effective Date of a Registration Statement, Release No. 33–3844 (Oct. 8, 1957) [22 FR 8359]. The safe harbors we are proposing today, if adopted, would not affect in any way the Securities Act analysis regarding ordinary course business communications that are not within the proposed safe harbors. Such communications would not be presumed to be offers, and whether they were offers would depend on the facts and circumstances.

[84] Regularly released factual business information would not include information about the registered offering or information released as part of the offering activities in the registered offering.

[85] Factual business information that reporting issuers release or disseminate would continue to be subject to the provisions of Regulation FD, Regulation G, Item 10 of Regulation S–K and Regulation S–B, and Item 2.02 of Form 8–K. *See* Regulation FD [17 CFR 243.100 *et seq.*]; Regulation G [17 CFR 244.100 *et seq.*]; Item 10 of Regulation S–K and S–B [17 CFR 229.10 *et seq.* and 17 CFR 228.10 *et seq.*]; and Form 8–K [17 CFR 249.308]. These are essentially the same categories of information discussed in the releases discussed in note 83.

[86] Until the 1970s, the Commission prohibited disclosure of forward-looking information in any disclosure document. In 1979, the Commission adopted a safe harbor for release of forward-looking information. *See Stotement by the Commission on the Disclosure of Projections of Future Economic Performance*, Release No. 33–5362 (Feb. 2, 1973) [38 FR 7220]; *Safe Harbor Rule for Projections*, Release No. 33–6084 (June 25, 1979) [44 FR 38810]. *See* also, the Wheat Report, note 16 at 94.

[87] *See* Item 303 of Regulation S–K and Regulation S–B [17 CFR 229.303 and 17 CFR 228.303].

[88] In our 2003 MD&A Release discussed at note 33, we issued interpretive guidance on management's discussion and analysis which stated:

In addressing prospective financial condition and operating performance, there are circumstances, particularly regarding known material trends and uncertainities, where forward-looking information is required to be disclosed. We also encourage companies to discuss prospective matters and include forward-looking information in circumstances where that information may not be required, but will provide useful material information for investors that promotes understanding * * * [M]aterial forward-looking information regarding known material trends and uncertainties is required to be disclosed as part of the required discussion of those matters and the analysis of their effects. In addition, forward-looking information is required in connection with the disclosure in MD&A regarding off-balance sheet arrangements.

[89] See Securities Act Section 27A [15 U.S.C. 77z–2] and Securities Act Rule 175 [17 CFR 230.175]. Section 27A provides a safe harbor for certain forward-looking statements. See also, the Off-Balance Sheet Disclosure Release at note 56 (stating that any forward-looking information required pursuant to the off-balance sheet arrangement disclosure in Items 303(a)(4) and (a)(5) of Regulation S–K and Regulation S–B would be subject to the statutory safe harbor contained in Sections 27A of the Securities Act and 21E of the Exchange Act [15 U.S.C. 78u–5]). Rule 175 provides a limited safe harbor for the content of forward-looking statements contained in documents filed with us, including in registration statements and periodic reports.

[90] As with factual business information, Regulation FD, Regulation G, Item 10 of Regulation S–K and Regulation S–B, and Item 2.02 of Form 8–K would continue to apply to the release or dissemination of forward-looking information by reporting issuers. See note 86.

[91] Our proposed Rule 168 would be a safe harbor from the definition of "prospectus" in Securities

• Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;

• Statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;

• Statements about the issuer's future economic performance, including statements of the type contemplated by MD&A described in Item 303 of Regulation S–K and Regulation S–B, or Item 5 of Form 20–F; and

• Assumptions underlying or relating to any of the foregoing information.

Given our expressed intention through Item 2.02 of Form 8–K to make such earnings expectations and guidance information public,[92] we believe it is appropriate to include these communications within the scope of the proposed safe harbor if the issuer satisfies the safe harbor's other conditions.

iii. Conditions of Safe Harbors

(A) "By or on Behalf of" the Issuer

As proposed, factual business and forward-looking information would be considered released or disseminated by or on behalf of an issuer if the issuer, an agent of the issuer, or a representative of the issuer authorized and approved its use before its release or dissemination.[93] Satisfaction of this condition is separate from the "regularly released" condition. The proposed safe harbor would not be available for information released in a manner intended to circumvent either the conditions to use or the permitted manner of use of the information.

Request for Comment

• Is the definition of "by or on behalf of an issuer" clear? If not, why not?

• Should we provide more specificity limiting the approval or authorization to specific persons acting for the issuer, whether as an employee, agent, or representative? For example, should we specify that the approval and authorization must be made by persons who regularly provide such approval and authorization? In addressing this question, discuss whether there should be different formulations depending on the applicable contexts for determining whether information is provided or actions are taken "by or on behalf of" a person.

• The "by or on behalf of" condition is included in many of our proposed rules, should we include a general definition of "by or on behalf of" in Securities Act Rule 405?

• Is it clear when communications are made "by or on behalf" of an issuer? If not, what additional conditions should we include?

(B) Regularly Released Information

The purpose of the proposed safe harbor is to enable a reporting issuer to continue its past ordinary course practice of releasing or disseminating publicly factual business and forward-looking information. Communications of both factual business information and forward-looking information must satisfy the same conditions regarding regular release.

As proposed, information will be considered regularly released or disseminated if the issuer has previously released or disseminated the same type of information in the ordinary course of its business, releases or disseminated the information in the ordinary course of its business, and the release or dissemination is materially consistent in timing, manner and form with the issuer's similar past releases or disseminations of such information. The method of releasing or disseminating the information, thus, must also be consistent with prior practice. These conditions seek to ensure that the information is not being released to condition the market for the registered offering of the issuer's securities.

While the proposal does not establish any minimum time period to satisfy the regularly released element, the safe harbor would require the issuer to have a track record of releasing the particular type of information. Issuers should consider the frequency and regularity with which they have released the same type of information. For example, an issuer's release of new types of financial information or projections just before or during a registered offering would likely prevent a conclusion that the issuer regularly released that type of forward-looking information in the ordinary course of its business. As another example, if an issuer has consistently released certain forward-looking information on a quarterly basis through ordinary course press releases, it could not satisfy the condition if it instituted a stepped-up media campaign just before or during an offering to release that type of forward-looking information on a different basis or with different timing.

(C) Non-Offering Related Information

The proposed safe harbor would exclude from its operation any information about the registered offering itself. Publication of information about an offering outside the registration statement would be limited to statements allowed under Rule 134, Rule 135, or other exemptions or safe harbors, or contained in a permissible free writing prospectus, as discussed below.[94]

Because the proposed safe harbor is intended to facilitate continued release or dissemination of regularly released ordinary course factual business and forward-looking communications, it also excludes information released as part of the offering activities in the registered offering. For example, the safe harbor would be unavailable for the text of an Exchange Act report that is incorporated by reference into a registration statement, a copy of a prior release that originally had been regularly released in accordance with the safe harbor but was specifically provided to investors or potential investors as part of offering activities, or disclosure of information at a road show. As another example, as permitted by the "regularly released condition," an issuer would be able to rely on the proposed safe harbor for the publication of an earnings release consistent with past practice, including the posting of and maintaining the release on an issuer's Web site, whether or not located in a separate section of the Web site for historical information. The use of that earnings release (or its contents), however, as part of the marketing activities to potential investors by an underwriter or dealer

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Act Section 2(a)(10) and would therefore disapply the prohibition in Securities Act Section 5(b)(1) on the use of a prospectus that is not a statutory prospectus. The proposed Rule would also be a safe harbor from the prohibitions on pre-filing "offers" in Securities Act Section 5(c).

These are essentially the same categories of statements that are defined as forward-looking statements under the safe harbor in Securities Act Section 27A(i)(1) [15 U.S.C. 77z–2(i)(1)]. The proposed safe harbor covering the release or dissemination would be available for the regular release of earnings expectations and guidance information. At least one commenter on the 1998 proposals requested clarification of this point. *See, e.g.*, comment letter in File No. S7–30–98 from the Association for Investment Management and Research. Proposed Rule 168 would provide a safe harbor for the use of such information, not the content of the communication. An issuer's communications of forward-looking information made in reliance on the proposed safe harbor would still have to satisfy the conditions of Securities Act Section 27A if the issuer wished to rely on the statutory safe harbor for the content of the information.

[92] *See* Exchange Act Form 8–K. In addition, through the operation of Regulation FD, forward-looking information, such as company earnings guidance, provided to persons enumerated in that Regulation must be made public.

[93] We are using the same definition as contained in Securities Act Rule 146 [17 CFR 230.146].

[94] Our other proposals address communications in the offering context. For example, we are proposing amendments to Rule 134 to increase the amount of communication allowed under that rule about a registered offering without it being considered a prospectus.

participating in distribution of the issuer's securities in the registered offering would be outside the scope of the proposed safe harbor.[95]

Commenters on the 1998 proposals, which contained similar provisions, were concerned about staff practice with regard to requiring disclosures of forward-looking information in an issuer's registration statements if such information was provided publicly. Public statements by issuers would not necessarily require that the disclosed information be included in registration statements.[96]

Request for Comment

- Does the safe harbor provide sufficient certainty for issuers as to when particular types of communications can be made? If not, how could additional certainty be provided without opening the door to risks of abuse?
- Are there other categories of factual business information or forward-looking information that should be added to the list of permitted communications within the safe harbor? Should any of the proposed categories be deleted?
- Should we require a particular history, or length of time that the issuer has been regularly releasing this information as a condition to reliance on the exemption? For example, six months; one year; or a different period? What would be an appropriate period?
- Should there be any limitation on the availability of the safe harbor for issuers that have been determined to have not complied with Regulation FD, Regulation G, or any Form 8–K requirements for earnings releases?
- Would reporting issuers involved in registered offerings be reluctant to release ordinary course forward-looking information despite the proposed safe harbors? More or less reluctant than they are today? What other changes could we make to eliminate this reluctance?
- Should there be a specified history of releasing information for only certain categories of forward-looking information, such as financial projections?
- Is the proposal regarding forward-looking information appropriate? Are the risks of this information conditioning the market greater than with the release of factual business information? If so, how? Should there be additional restrictions in this safe harbor?
- Should there be a distinction between releasing such information in the pre-filing and post-filing periods?
- Should the safe harbor identify the specific conditions under which communications would constitute ordinary course communications?
- Should we consider defining what "part of the offering activities" means for purposes of the safe harbors?
- As we note above, a voluntary filer would fall into the category of unseasoned issuers because it is not required to file periodic or current reports under the Exchange Act. Should voluntary filers be permitted to rely on the safe harbor available to reporting issuers even though they are not required to file Exchange Act reports?
- Should registered investment companies and business development companies be eligible to use the proposed safe harbors for factual business information and forward-looking information?

b. Regularly Released Factual Business Information—Non-Reporting Issuers

We are proposing a narrower safe harbor from the gun-jumping provisions for a non-reporting issuer's regularly released factual business information.[97] The proposal would provide a safe harbor for a non-reporting issuer's release or dissemination of regularly released ordinary course factual business information to persons receiving the information other than in their capacity as investors or potential investors, such as customers and suppliers.[98] Because a condition of the proposed Rule involves the manner and timing of the communication, the same issuer employees who have historically been responsible for providing the information to, for example, customers and suppliers, should communicate the information provided in reliance on this safe harbor. As proposed, non-reporting issuers' release or dissemination of factual business information that satisfy the conditions of the proposed Rule would have a safe harbor from being an impermissible prospectus and from violating the prohibition on pre-filing offers.[99]

Under the proposed safe harbor, factual business communications would be defined as:

- Factual information about the issuer or some aspect of its business;
- Advertisements of, or other information about, the issuer's products or services; and
- Factual information about business or financial developments with respect to the issuer.

As with the safe harbor for reporting issuers, the safe harbor requires that the information be regularly released in the ordinary course, disseminated by or on behalf of the issuer, and not include information about the registered offering or information released as part of the offering activities in the registered offering.

Because non-reporting issuers generally are not releasing information in connection with securities market activities, we believe it is appropriate to restrict the scope of the safe harbor to limited regularly released ordinary course factual business information.[100] Further, we are not proposing a safe harbor for forward-looking information for non-reporting issuers because of the lack of such information or history for these issuers in the marketplace. In those circumstances, we believe that the potential for abuse in permitting a safe harbor for the continued release of forward-looking information as a way to condition the market for the issuer's securities outweighs the legitimate utility to the issuer of the safe harbor.

Request for Comment

- We request comment on the same issues regarding the regularly released concept as in the safe harbor for reporting issuers.
- Should the factual business information safe harbor permit some related forward-looking information so long as the information is not projections?
- In initial public offerings by non-reporting issuers, should we consider using our authority, including our exemptive authority in Section 27A, to propose a projections and forward-looking information safe harbor from liability for the forward-looking statements that would be similar to the liability safe harbor for forward-looking statements contained in Securities Act Section 27A?

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[95] In those situations, the earnings release would be considered a free writing prospectus as used by the underwriter or dealer, as discussed below.

[96] The same is true for any public release of information pursuant to Regulation FD and Item 2.02 of Form 8–K. See Regulation S–K [17 CFR 229.10 *et seq.*] and Securities Act Rule 408. See also Exchange Act Rule 12b–20 [17 CFR 240.12b–20]. The information may be required to be included in the registration statement pursuant to some other disclosure obligation.

[97] See proposed Rule 169.

[98] The fact that a customer also may be a potential investor in the issuer's securities would not affect the availability of the safe harbor if the conditions are otherwise satisfied.

[99] Our proposed Rule 169 would be a safe harbor from the definition of "prospectus" in Securities Act Section 2(a)(10) and would therefore disapply the prohibition in Securities Act Section 5(b)(1) on the use of a prospectus that is not a statutory prospectus. The proposed Rule would also be a safe harbor from the prohibitions on pre-filing "offers" in Securities Act Section 5(c).

[100] These issuers would still be able to rely on Securities Act Rules 134 and 135 [17 CFR 230.134 and 230.135] and proposed Rules 163A and 164.

• If we determine to propose a safe harbor of this type for initial public offerings, what kinds of conditions should we consider for its use?

• As a condition for this safe harbor or one for initial public offerings, should we require the issuer to file projections or other forward-looking information as part of the registration statement? Should the projections be required to follow Item 10 of Regulation S–K or S–B as applicable? Should projections be required to be accompanied by an accountant's report on the projections or forecasts? [101]

• Would a liability safe harbor for initial public offerings cause issuers to provide more projections publicly? Would there be concerns about the quality of these projections in light of the safe harbor?

2. Other Permitted Communications Prior To Filing a Registration Statement

Beyond the continuing ongoing release of information discussed above, there is an increased amount of information disseminated to the market about issuers, including through the Internet. We believe that information availability should be encouraged, subject to appropriate standards of liability. At times when the risk of conditioning the market for a securities offering is sufficiently remote, it is important to provide issuers with greater certainty that the release of information would not be considered impermissible offers under the Securities Act. Such an approach would avoid hindering issuer communications except where necessary for investor protection. We are, therefore, proposing rules that would be aimed at communications that might not fall within the proposed safe harbors for regularly released factual business and forward-looking information.

a. 30-Day Bright Line Exclusion From the Prohibition on Offers Prior To Filing a Registration Statement—All Issuers

The proposed rule would provide all issuers a bright-line time period, ending 30 days prior to filing a registration statement, during which issuers may communicate without risk of violating the gun-jumping provisions. Such communications would be excluded from the definition of offer for purposes of Securities Act Section 5(c).[102] A bright-line test would provide greater certainty in the offering process and avoid unnecessary limitations on issuer communications more than 30 days prior to the filing of the registration statement. Further, we believe that the 30-day timeframe adequately assures that these communications would not condition the market for a securities offering by providing a sufficient time period to cool any interest in the offering that might arise from the communication.[103]

As proposed, the 30-day bright line exclusion from the gun-jumping provisions would be subject to the following conditions:

• Communications made in reliance on the proposed rule could not reference a securities offering; [104]

• Communications made in reliance on the proposed rule would have to be made "by or on behalf of the issuer"; [105] and

• The issuer would have to take reasonable steps within its control to prevent further distribution or publication of the information during the 30-day period immediately before the issuer files the registration statement.

We included a similar exclusion in our 1998 proposals. Commenters generally agreed that a bright-line exclusion would be helpful, although they expressed some concerns. Some commenters were concerned that issuers might make misleading statements in connection with a proposed registered offering prior to the 30-day period and claim protection of the exclusion.[106] We believe that our proposals address those concerns in a number of ways. First, the proposals would not permit information about a securities offering so that the communications are less likely to be used to condition the market for the issuer's securities. Second, for all reporting issuers, the communications would still be subject to Regulation FD

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[101] In this regard, see Sections 210 and 316 of the AICPA Guide for Prospective Financial Statements.

[102] While communications made in reliance on the proposed rule could, depending on the particular facts, be an "offer" as defined in Securities Act Section 2(a)(3), the proposal would provide that the communication would not be an "offer" for purposes of Securities Act Section 5(c). See proposed Rule 163A. During the 30-day period immediately prior to registration, issuers would have available, in addition to the other exemptions proposed in this release, communications permitted under Securities Act Rule 135. Rule 135 permits an issuer or a selling security holder (and persons acting on behalf of either of them) to publish a notice of a proposed registered offering of securities containing limited information, without the notice being considered an offer of the securities. As we note above, the 30-day exclusion is available only to the issuer for communications made by it or on its behalf.

For all issuers, the exemption would only apply prior to the filing of a registration statement. This exclusion would thus not apply to issuers with shelf registration statements on file, whether or not effective, to whom the prohibition on all offers in the gun-jumping provisions would not apply.

See also Harold Bloomenthal and Samuel Wolff, *Emerging Trends in Securities Laws* [2003–2004 ed.), "Securities Act Reform—Déjà Vu All Over Again," Commissioner Roel C. Campos (the "Campos Article") at § 1:28.

[103] As we discuss below, the issuer would have to take reasonable steps to avoid redissemination of such information during the 30-day period. We also chose to propose a 30-day timeframe because it is consistent with the timeframe in Securities Act Rule 155 regarding integration of abandoned offering [17 CFR 230.155) and Securities Act Rule 254 regarding pre-filing solicitations of interest in Regulation A offerings [17 CFR 230.254].

[104] Securities Act Rule 155, relating to integration of abandoned offerings, permits issuers to register a securities offering immediately following the abandonment of a private offering made to accredited or sophisticated persons and not involving general solicitation and general advertising. The proposed 30-day exclusion, on the other hand, applies to public communications made prior to a registered offering. Because Rule 155 treats any private offers made in the abandoned private offering as not part of the subsequent registered offering, issuers relying on Rule 155 in connection with a subsequently registered offering would continue to rely on Rule 155 and need not rely on the 30-day bright line exclusion for public communications before a registration statement is filed.

[105] As with proposed Rules 168 and 169, communications could be made under this proposed rule only if the issuer authorized and approved the communication before its use. Other communications, such as those by an underwriter or prospective underwriter, would not be covered by the proposed rule. For a further discussion of the "by or on behalf of the issuer" condition, see the discussion at Section III.D.1 above under "'By or on Behalf of the Issuer".

[106] See, *e.g.*, comment letters in File No. S7–30–98 from the American Association of Retired Persons ("AARP") and the Consumer Federation of America.

Some commenters believed the 30-day period was too short, see, comment letters in File No. S7–30–98 from the North American Securities Administrators Association, Inc. ("NASAA"), while some commenters viewed it as too long, see, *e.g.*, comment letter in File No. S7–30–98 from the American College of Investment Counsel ("ACIC"). As we note above, our proposals are consistent with the 30-day time period we adopted for Rule 155, relating to integration of abandoned offerings.

Commenters also addressed the inclusion in the 1998 proposals of the condition that the issuer take reasonable steps to prevent further distribution of information during the 30-day period immediately before the issuer files a registration statement. These commenters expressed concern that such a condition added uncertainty to the exemption. See, *e.g.*, comment letters in File No. S7–30–98 letters from the Bond Market Association ("TBMA"); American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"); Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank"); Pennsylvania Securities Commission; and Service Employees international Union Master Trust. The 1998 proposals would have permitted other offering participants, in addition to the issuer, to rely on the exclusion. Our proposals would limit the exclusion to issuers. While we would not expect an issuer to be able to control the republication or accessing of previously published press releases, we would expect issuers and persons acting on their behalf to be able to control their own involvement in any subsequent redistribution or publication and, therefore, believe that it is an appropriate condition to the ability to rely on the exclusion. As another example, if an issuer or its representative gave an interview to the press prior to the 30-day period, it would not be able to rely on the exclusion if the interview was published during the 30-day period. We have proposed to address the same issues in the context of free writing prospectuses discussed below.

and other disclosure requirements, as well as the anti-fraud provisions.[107] Third, the proposed safe harbor would be available only for communications made by or on behalf of the issuer so that other potential offering participants could not use the exemption to condition the market for the issuer's securities.

We propose to preclude reliance on the 30-day bright-line exclusion for enumerated categories of offerings and issuers that pose the greatest risk of abuse of that exclusion. Specifically, our proposed rule excluding communications made more than 30 days before filing of the registration statement from the definition of offer would not be available to communications made in connection with:

- Offerings by a blank check company;
- Offerings by a shell company; or
- Offerings of penny stock by an issuer.[108]

We also would exclude communications regarding business combination transactions from being able to rely on the proposed exclusion, as those communications are regulated separately.[109] The proposed rule would also not be available for communications regarding offerings made by a registered investment company or a business development company.[110]

Request for Comment

- Should we restrict the ability to rely on the exclusion only to the issuer or should we allow other offering participants to rely on the exclusion? If so, why?
- Is the 30-day timeframe sufficient? Should it be longer? Should it be shorter?
- Would issuers engage in communications using the exclusion prior to the 30-day period before registration?
- Would issuers be able to establish appropriate procedures to ensure compliance with the "reasonable steps" requirement?
- Does the concept of "reasonable steps" in the proposed rule provide sufficient guidance to issuers? If not, what additional restrictions or provisions should be included?
- If the issuer puts information on its web site or another web site prior to the 30-day period and the information remains on the web site, thus being available during the 30-day period prior to the registration statement being filed, should the issuer be able to rely on the proposed 30-day exclusion for such information?
- Is it clear when communications made in reliance on the 30-day exemption are made "by or on behalf" of an issuer? If not, what additional conditions should we include?
- Are the classes of ineligible issuers and offerings appropriate? Should the exclusion not be available to any other type of issuers or offerings?
- Should the exclusion apply to offerings registered on Form S–8?
- Should the exclusion be available for non-reporting issuers? Would there be greater potential for abuse with this category of issuers?
- Should there be a restriction on inclusion of securities offering-related information in view of Securities Act Rule 135?
- Should we limit the condition restricting any reference to securities offering only to references to registered securities offerings?
- Should communications in offerings relying on Rule 155 be permitted during the 30-day period without further conditions?
- Should Regulation FD continue to apply to these communications, as we propose? If not, why not?

b. Permitted Pre-Filing Offers for Well-Known Seasoned Issuers

As noted above, our proposals taken together are intended to provide exemptions generally from the applicability of the gun-jumping provisions for eligible well-known seasoned issuers. The proposed safe harbors for regularly released factual business and forward-looking information and the exemption from the definition of offer for communications more than 30 days prior to filing of a registration statement would also apply to well-known seasoned issuers. In addition, as discussed below, the proposed broadened exemption for routine offering-related communications and the proposed availability of an exemption for eligible issuers from the gun-jumping provisions for free-writing prospectuses, in both cases after filing of a registration statement, also would be available to well-known seasoned issuers. However, the gun-jumping provisions prohibit all offers—written or oral—before the filing of a registration statement.[111] To address communications made in the 30 days prior to filing a registration statement not otherwise excluded from the gun-jumping provisions and to complete the set of proposals permitting all communications by well-known seasoned issuers under the gun-jumping provisions, we are proposing an exemption from the prohibition on offers before the filing of a registration statement for offers made by or on behalf of eligible well-known seasoned issuers.[112] The proposed exemption would permit these issuers to engage in unrestricted oral and written offers before a registration statement is filed without violating the gun-jumping provisions. As proposed, these communications, while exempt from the gun-jumping provisions, would still be considered offers and subject to liability standards applicable to such offers.[113] In addition, while "offers," all such communications would still be subject to Regulation FD.[114] The anti-fraud provisions of the federal securities laws would also continue to apply to these communications. The exemption would be available only for communications made "by or on behalf of" the issuer. We have included as a condition to

[107] Communications made in reliance on the proposed rule would not be in connection with a registered securities offering for purposes of the exclusion in Regulation FD. See Rule 100(b)(2)(iv) of Regulation FD [17 CFR 243.100(b)(2)(iv)].

[108] See Securities Act Rule 419(a)(2) [17 CFR 230.419(a)(2)], Exchange Act Rule 3a51–1 [17 CFR.240.3a51–1], and proposed amendments to Rule 405 defining "shell company." The proposed rule also would exclude issuers whose predecessors in the prior three years were blank check companies, shell companies, or issuers that issued penny stock and other issuers falling into the category of "ineligible issuers" discussed in Section III.D.3. below under "Ineligible Issuers." The proposed rule also would exclude offerings registered on Form S–8.

[109] See the Regulation M–A Release, note 60. The proposal would exclude any business combination transaction as defined in Rule 165(f)(1) [17 CFR 230.165(f)(1)]. Rule 165(f)(1) defines a business combination transaction to mean any transaction specified in Rule 145(a) [17 CFR 230.145(a)] or exchange offer.

[110] Registered investment companies and business development companies are subject to separate rules regarding their communications.

[111] See Securities Act Section 5(c).

[112] See proposed Rule 163.

[113] Any written offer would be a prospectus under Section 2(a)(10) of the Securities Act relating to a public offering of the securities to be covered by the registration statement to be filed. All oral communications and prospectuses would be subject to liability under Section 12(a)(2). The offers would also be subject to liability under other provisions relating to offers, including Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b–5 under the Exchange Act.

The proposed rule is different from Securities Act Rule 254 [17 CFR 230.254]. Securities Act Rule 254 permits solicitations of interest in Regulation A offerings provided the conditions of the rule, including pre-use submission of the materials to the Commission, are satisfied, and does not treat the materials as prospectuses. Proposed Rule 163 would not require pre-filing of the communications and written offers would be prospectuses.

[114] Communications made in reliance on the proposed rule would not be considered to be in connection with a registered securities offering for purposes of the exclusion from Regulation FD. See Rule 100(b)(2)(iv) of Regulation FD [17 CFR 240.100(b)(2)(iv)].

reliance on this exemption that communications cannot be used as part of a scheme to avoid or evade the requirements of the gun-jumping provisions.

In view of the proposed "automatic shelf" registration process we describe below, we expect that well-known seasoned issuers usually would have a registration statement on file that it could use for any of its registered offerings.[115] Consequently, it would be rare for these issuers to make offers prior to the filing of a registration statement;[116] however, to liberalize communications for these issuers to the appropriate extent, it is appropriate to provide this exemption from the prohibition on pre-filing offers. A written offer made under the proposed exemption would, however, meet our proposed definition of "free writing prospectus"[117] and would need to include a legend and be filed promptly upon the issuer filing its registration statement.[118] Any written communication used in reliance on this proposed exemption would be subject to the same cure and record retention provisions as those applicable to free writing prospectuses used after a registration statement is filed in reliance on our proposed rules governing free writing prospectuses discussed below.[119]

Request for Comment

- Should we permit any written or oral offer to be made by a well-known seasoned issuer before a registration statement is filed?
- In addition to provisions that would allow issuers to cure an omission of the legend, should there be cure provisions in the event that the issuer failed to file the written offer when the registration statement was filed?
- Should the requirement for filing written offers made in reliance on the proposed exemption apply to written offers that only contain a description of the securities being offered?
- Should communications made in reliance on the proposed rule be subject to Regulation FD, as we propose? If not, why not? Or should there be specific exceptions? If so, what type of communications should be excluded?
- Should there be other exclusions from the filing requirement?
- Should the filing obligation apply if the issuer fails to file a registration statement covering the securities offered within a particular time period after the offer? If so, how long?

3. Relaxation of Restrictions on Written Offering Related Communications

Our proposals would expand the amount and types of permitted written offering related communications that may be made by offering participants under the gun-jumping provisions after a registration statement is filed.[120] The two main elements of these proposals are expansion of information that Securities Act Rule 134 permits to be communicated and the permitted use of free writing prospectuses in connection with a registered offering.

a. Rule 134

Rule 134 provides a safe harbor from the gun-jumping provisions for limited public notices about an offering made after an issuer files its registration statement.[121] The Rule was intended originally to provide an "identifying statement" that could be used to locate persons that might be interested in receiving a prospectus.[122] All issuers, including well-known seasoned issuers, are precluded from relying on Rule 134 until the issuer files a registration statement.[123]

i. Expansion of Permitted Information

We are proposing to modify and expand the information permitted under Rule 134 to include information that issuers, underwriters, and investors would find helpful and to permit the types of written communications during an offering that we would not consider to be prospectuses. We propose a limited expansion of the information permitted in the notice about the issuer and the registered offering. The proposed amendments to Rule 134 would:

- Permit increased information about an issuer and its business, including where to contact the issuer;
- Permit more information about the terms of the securities being offered;[124]
- Expand the scope of permissible factual information about the offering itself, including underwriter information, more details about the mechanics of and procedures for transactions in connection with the offering process, the anticipated schedule of the offering, and a description of marketing events;[125]
- Allow more factual information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;[126] and

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[115] As with any other delayed shelf registration statement, issuers using an automatic shelf registration statement would be considered to be offering securities off the shelf registration statement at the time of each takedown of securities.

[116] See the discussion in Section V.B.2 below under "Automatic Shelf Registration for Well-Known Seasoned Issuers," with regard to the proposed availability of an "automatic shelf" registration process for these issuers.

[117] See Section III.D.3 below under "Definition of Free Writing Prospectus" for a discussion of the definition and the circumstances under which media publications (in any form) would be free writing prospectuses.

[118] The legend would be similar to the one we are proposing for free writing prospectuses. See the discussion in Section III.D.3 below under "Legend Condition" with regard to the requirements for use of a "free writing prospectus." Under our proposals, all issuer free writing prospectuses would need to be filed.

[119] See discussion in Section III.D.3 below under "Unintentional Failures to File" and "Record Retention Condition" regarding proposed Rules 164 and 433 with respect to the cure and record retention provisions.

[120] As noted previously, Securities Act Section 5(b)(1) limits the means by which written offers may be made following the filing of a registration statement. Section 5(b)(1) does not include a limitation on oral offers after the filing of a registration statement.

[121] The safe harbor operates by excluding such notices from the definition of prospectus under Securities Act Section 2(a)(10). See Rule 134 [17 CFR 230.134] and *Adoption of Rules 134 and 135*, Release No. 33–3568 (Aug. 29, 1955) [20 FR 6523]. Currently, Rule 134 does not apply to notices relating to a registered investment company or business development company, and under our proposed amendments, this would continue to be the case. 17 CFR 230.134(e).

[122] Rule 134 is available only after the issuer files a registration statement that includes a statutory prospectus. Because a purpose of Rule 134 is to facilitate the dissemination of the full information required in the prospectus, Rule 134 would not be available until a preliminary prospectus, or in the case of shelf registration, a base prospectus, is available. As our proposal makes clear, to satisfy the requirements of Securities Act Section 10 in an initial public offering, a prospectus must include *bona fide* estimates of the offering price range and the maximum amount of securities to be offered. This would not mean, however, that a final prospectus meeting the requirements of Securities Act Section 10(a) including a price would be required as a condition to Rule 134. Further, the prospectus required for reliance on Rule 134(d) is a statutory prospectus, and it need not be a prospectus that satisfies Section 10(a).

Rule 134 requires in some cases that the notice must be accompanied or preceded by a written prospectus meeting the requirements of Section 10 of the Securities Act. The notice cannot, however, otherwise include a hyperlink or uniform resource locator ("URL") for an address containing information beyond that permitted by Rule 134. See the 2000 Electronics Release note 62 at II.B.2.

[123] If a well-known seasoned issuer communicated information of the type covered by Rule 134 in writing prior to filing its registration statement, such that the communication constituted an offer, it would have to rely on proposed Rule 163 excepting pre-filing offers from the gun-jumping provisions, and the communication would be a free writing prospectus.

[124] For example, for fixed income securities, the proposed changes would allow greater information about final interest rates and yield information, including yield information on fixed income securities with comparable maturities and credit ratings.

[125] The information on marketing events, such as road shows, could include greater detail on the date, time, location, and procedures for attending or otherwise accessing the events.

[126] For example, a broker or dealer could inform investors of the procedural aspects of an auction or

Continued

• Expand the disclosure permitted regarding credit ratings to include the security rating that is reasonably expected to be assigned.

While we have proposed to expand the amount of information regarding the terms of an offering that may be included in a Rule 134 notice, the proposed expansion would not permit use of a Rule 134 notice to provide a detailed term sheet for securities being offered. There is increased ability under our proposals to deliver such a term sheet as a free writing prospectus, as discussed below.

ii. Changes to Required Information

We also are proposing to modify the information that must be included in a Rule 134 notice. First, we are proposing to eliminate the reference in the legend to state securities laws, as we believe that other provisions of the Rule already address any state securities law requirements, as applicable.[127] Second, we are proposing to eliminate the requirement to specify whether the financing is a new financing or refunding, as we believe that such information is no longer necessary because such information would, with regard to non-reporting or unseasoned issuers, be provided by the issuer's disclosure of the use of the proceeds of the offering in the filed preliminary prospectus.[128]

Request for Comment

• Is there information that we propose to permit under Rule 134 that should be prohibited or limited because it will further the use of "selling" documents that are not prospectuses?

• Is there other information that we should permit under Rule 134? For example, is there information about the issuer or the offering that should be included in Rule 134 but is not part of these proposals? If so, address whether the additional information might transform the notice into a selling document.

• Should the Rule permit more information about the underwriters or the syndicate, such as information about the allocation of shares among the members of the underwriting syndicate?

• Should we permit more information about allocations and auction mechanics?

• Should we revise the information requirements of Rule 134 with regard to solicitations of offers to buy or indications of interest? If so, would it be appropriate to require a communication containing such a solicitation to describe how and when offers to buy would be accepted, including the methods and timing of notification of the registration statement's effective date, the purchase price of the securities, and how indications of interest would become offers to buy?

• Where Rule 134 requires that a notice be accompanied or preceded by a prospectus, should we permit notification of the location of the prospectus to satisfy this requirement? Should we permit this for a certain class of issuers such as well-known seasoned issuers? Other seasoned issuers?

b. Permissible Use of Free Writing Prospectuses

i. Overview

As discussed above, even after the filing of a registration statement, under the gun-jumping provisions issuers and other offering participants currently may make written offers only in the form of a statutory prospectus. After effectiveness of a registration statement, written offers other than a statutory prospectus may be made if prior to or at the same time as the written offer a final prospectus meeting the requirements of Securities Act Section 10(a) is sent or given.[129] We believe that written communications during the offering process are unnecessarily restricted and that this would be the case even if the substantial relaxations in restrictions on communications that would result from the proposals that we describe above were adopted.

We are proposing to permit written communications that constitute offers, including electronic communications, outside the statutory prospectus beyond those currently permitted by the Securities Act, if certain conditions are met. We are proposing to define such a written offer outside of the statutory prospectus, beyond those currently permitted by the Securities Act, as a "free writing prospectus."[130]

Our proposals would not affect the statutory framework allowing written offers after effectiveness if prior to or at the same time as the written offer is made a final prospectus meeting the requirements of Section 10(a) is sent or given. Those written offers would not be prospectuses and therefore would not be free writing prospectuses.[131]

As proposed, a free writing prospectus that satisfies specified conditions could be used by a well-known seasoned issuer at any time. Further, as proposed, a free writing prospectus that satisfies specified conditions could be used by any other issuer or offering participant after a registration statement has been filed and, in some cases, as discussed below, if a statutory prospectus precedes or accompanies the free writing prospectus or if a statutory prospectus is available.[132] A free writing prospectus used after a registration statement is filed and that satisfies specified conditions could be used without violation of the gun-jumping provisions.[133] A free writing prospectus could take any form and would not be required to meet the informational requirements otherwise applicable to prospectuses.[134] In general, our proposals would allow offering participants to use free writing prospectuses in conjunction with most registered capital formation transactions, although we do not treat all issuers and offerings the same.[135]

The issuer and any other offering participant satisfying the conditions of our proposed rules could use a free writing prospectus after a registration

a directed share program. The proposed changes would not include written notices of allocations of securities, including those delivered electronically. These notices would be a type of written confirmation of sale and, thus, prospectuses. Our proposals regarding prospectus delivery reforms, as discussed later, would apply to these notices.

[127] See paragraphs (a)(11) and (a)(14) of our proposed amendments to Rule 134.

[128] For seasoned issuers and well-known seasoned issuers, evaluation of an issuer's capital resource needs would be included in its MD&A discussion in its periodic reports.

[129] See Securities Act Section 2(a)(10).

[130] We are proposing to include this definition in Securities Act Rule 405.

[131] See Securities Act Section 2(a)(10).

[132] As we discuss above, a free writing prospectus used by a well-known seasoned issuer prior to filing pursuant to proposed Rule 163 would be a prospectus for purposes of Securities Act Section 2(a)(10).

[133] Our proposals would provide that such a free writing prospectus is a permitted prospectus for purposes of Securities Act Section 10(b) [15 U.S.C. 77j(b)] and, as such, could be used without violating Securities Act Section 5(b)(1).

[134] As we discuss in more detail below, we are proposing to permit a free writing prospectus used after a registration statement is filed meeting the conditions of proposed Rule 433 to be a Securities Act Section 10(b) prospectus without requiring that the free writing prospectus contain any particular information, including information contained in the prospectus that is part of the registration statement, other than a legend.

[135] Our proposals relate only to capital formation transactions and do not extend to business combination transactions, for which we have already adopted rules. See Securities Act Rule 162 [17 CFR 230.162], Rule 165 [17 CFR 230.165], Rule 166 [17 CFR 230.166], and Rule 425 [17 CFR 230.425]. Rule 162 relates to submission of tenders in registered exchange offers. Communications relating to business combinations are covered by Rule 165 and Rule 166. Rule 425 relates to the filing of certain prospectuses and communications in connection with business combination transactions. *See* also, the Regulation M–A Release note 60; and *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Release No. 33–7759 (Oct. 22, 1999) (exemptive rules for cross-border tender and exchange offers, business combinations, and rights offerings relating to the securities of foreign issuers).

statement is filed to communicate information about a registered offering of securities.[136] This would permit affiliates, underwriters, dealers, and others acting on behalf of the parties to the transaction to use a free writing prospectus without violating the gun-jumping provisions. A free writing prospectus would not be part of a registration statement subject to liability under Securities Act Section 11, unless the issuer elected to file it as a part of the registration statement. We propose to condition the use of free writing prospectuses prepared by an issuer or containing information provided by an issuer on filing, as a free writing prospectus, but not as part of the registration statement. We generally would not condition the use of free writing prospectuses prepared by other persons, such as underwriters, not containing such information on filing. Regardless of whether a free writing prospectus is filed, any person using the free writing prospectus would be subject to liability for prospectuses under Securities Act Section 12(a)(2) and liability under the anti-fraud provisions of the federal securities laws.[137]

ii. Definition of Free Writing Prospectus

(A) General

We are proposing to define "free writing prospectus" to include, except as otherwise provided specifically or otherwise required by the context, any written communication that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement that is not a prospectus satisfying the requirements of Securities Act Section 10(a) or our rules permitting the use of preliminary or summary prospectuses or prospectuses subject to completion, or that, by virtue of the exception in clause (a) of Section 2(a)(10), is not a prospectus because, at or prior to that time, a final prospectus meeting the requirements of Section 10(a) was sent or given.[138] The proposed definition would make clear that, although a free writing prospectus would not be filed as part of a registration statement, regardless of the method of its use or distribution, it would still be considered to be used in connection with a public offering of securities that is or would be the subject of a registration statement.[139]

A communication would be a free writing prospectus only where it constituted an offer of a security under the Securities Act. Whether a particular communication constituted such an offer would, as today, be determined based on the particular facts and circumstances. Communications that would not be considered offers or prospectuses for purposes of the gun-jumping provisions, such as Rule 134 notices, Rule 135 communications, regularly released factual business information and forward-looking information falling within our proposed safe harbors, and research reports falling within the safe harbors provided by our rules, would not be free writing prospectuses.[140]

(B) Media Publications

We believe it is important to identify the circumstances under which information released or disseminated to the media by an issuer or offering participant in connection with a registered offering would be considered the use of a free writing prospectus under our proposals. We recognize that the financial news media are a valuable source of information about issuers to the public at large. Issuers and offering participants use the media to disseminate important information about themselves, such as through the use of press releases and interviews. The media plays an integral role, therefore, in providing information about issuers to the market.

While we want to encourage the continued role of the media as an important communicator of information, we do not want issuers and offering participants to use the media to avoid our current or proposed communications rules. Under our proposals, if an issuer or any offering participant provided information about the issuer or the offering that constituted an offer, whether orally or in writing, to a member of the press or other media that was published (in any form), where dissemination in writing by the issuer or offering participant would constitute a free writing prospectus, we would consider the publication to be a free writing prospectus that would have been made by or on behalf of the issuer or offering participant. If the communication occurred after the filing of the registration statement, it would be subject to the requirements of proposed Rule 433.[141]

The treatment of a media publication that constituted a free writing prospectus under our proposed rules would depend on whether the issuer or other offering participant prepared the publication or broadcast or paid for or provided other consideration for the publication or broadcast, or whether independent media prepared and published or broadcast the communication for no consideration or payment from an issuer or offering participant. If an issuer or offering participant prepared, paid, or gave consideration for, a published article, broadcast, or advertisement, the issuer would have to satisfy the conditions to the use of a free writing prospectus at the time of the publication or broadcast. For example, in the case of a non-reporting issuer a statutory prospectus would have to precede or accompany the communication.[142] As a consequence of this requirement, in offerings by non-reporting and unseasoned issuers, issuers and offering participants would not be able to

[136] Prior to filing a registration statement, only a well-known seasoned issuer would be able to use a free writing prospectus in reliance on proposed Rule 163.

[137] After effectiveness of a registration statement free writing prospectuses would not be the exclusive means by which participants could make a written offer outside of the statutory prospectus. Under current requirements which our proposals would not affect, any written offer that is accompanied or preceded by a final prospectus that meets the requirements of Securities Act Section 10(a) (such as sales literature used after effectiveness) would continue to be permitted without having to satisfy the requirements of any safe harbor or other rule permitting its use or proposed Rule 433. This is because such a written offer is excluded from the definition of "prospectus" under the Securities Act by reason of clause (a) of Securities Act Section 2(a)(10), if a final prospectus meeting the Section 10(a) information requirements is sent or given before or at the same time as the written offer. A base prospectus included in a shelf registration statement that omits information is not a final prospectus meeting the requirements of Section 10(a).

[138] The definition would include free writing prospectuses used pursuant to proposed Rule 433 and Rule 163 because these would not be summary prospectuses.

[139] Under our proposal, a free writing prospectus used after a registration statement is filed that satisfies the conditions in proposed Rule 433 would be a permitted prospectus for purposes of Securities Act Section 10(b). A free writing prospectus used other than in accordance with our proposed rules would continue to be a prospectus for Section 12(a)(2) and the anti-fraud provisions of the federal securities laws, and its use would violate Section 5.

[140] Written communications of a well-known seasoned issuer that are exempt pursuant to proposed Rule 163 would be within the definition of free writing prospectus. A free writing prospectus used in reliance on Rule 163 would not be a Section 10(b) prospectus because it would be used prior to the filing of a registration statement.

[141] Except in the case of a well-known seasoned issuer, if the communication occurred prior to the filing of the registration statement, it would violate Section 5 unless it fell within one of the existing or proposed safe harbors or exemptions.

[142] Base prospectuses, preliminary prospectuses and prospectuses subject to completion that are permitted under our rules are statutory prospectuses that satisfy the requirements of Securities Act section 10 but are not prospectuses that satisfy the requirements of Securities Act section 10(a). Where a final prospectus satisfying the requirements of Securities Act section 10(a) is sent or delivered prior to or with written offering materials, that communication would fall within the exception from the definition of prospectus in clause (a) of Securities Act section 2(a)(10).

publish or broadcast written advertisements, "infomercials," or broadcast spots about the issuer, its securities, or the offering that included information beyond that permitted by Rule 134. For seasoned issuers, the most recent statutory prospectus would have to be on file with us and the issuer or offering participant would have to file the free writing prospectus with us not later than the date of first use.

Where, however, the free writing prospectus is prepared by persons in the media business that are unaffiliated [143] with and not paid for by the issuer or offering participants, our proposed rules would make certain accommodations that would, we believe, permit the publication by the media under the gun-jumping provisions.[144] In those cases, the statutory prospectus would not be required to precede or accompany the media communication, although a filed registration statement and availability of a statutory prospectus would be conditions. Therefore, an interview or other media publication or broadcast where an issuer or offering participant participates (but does not prepare or pay for the event) could be a free writing prospectus, but because of the media intervention, we are prepared to conclude that its use should not be conditioned on prior or simultaneous delivery of the statutory prospectus. In addition, any such free writing prospectus would be subject to filing by the issuer or offering participant involved within one business day after first publication or first broadcast. Persons in the media would have no filing or other obligations under these provisions. For example, unlike today, an underwriter or issuer would be permitted to invite the press to a live road show or an electronic road show, but we would consider an article including information obtained at that road show to be a free writing prospectus of the issuer or underwriter and subject to the proposed rules.[145] As another example, if a chief executive of a non-reporting issuer gave an interview to a financial news magazine without payment to the magazine for the article, the publication of the article after the filing of the registration statement would be a free writing prospectus of the issuer that would have to be filed by the issuer after publication. In that case, there would be no requirement that a statutory prospectus precede or accompany the article at the time of the publication.

Request for Comment

- Does the proposed definition cover all the types of communications that issuers and other persons participating in the offer and sale of the issuer's securities would use outside the statutory prospectus?
- Do our proposals regarding information provided to the media by or on behalf of the issuer or other offering participants provide enough guidance for issuers and other offering participants to determine when such a communication is a free writing prospectus?
- Should the free writing prospectus be considered part of the registration statement?
- Should the issuer have to approve every free writing prospectus before its use?

iii. Permitted Use of a Free Writing Prospectus After the Filing of a Registration Statement Under Proposed Rule 433

Proposed Rule 164 would permit the use of a free writing prospectus where an eligible issuer has filed a registration statement and the conditions of proposed Rule 433 are satisfied.[146] The proposed rules permitting the use of free writing prospectuses would not be available for any communication that, while in technical compliance with the rule, was part of a plan or scheme to evade the requirements of Section 5 of the Act.

(A) Conditions to Permitted Use of a Free Writing Prospectus

Proposed Rule 164 provides that, after the filing of a registration statement, a free writing prospectus that satisfies the conditions of proposed Rule 433 would be a permitted prospectus under Section 10(b) for purposes of Securities Act Section 5(b)(1). Proposed Rule 433 sets out eligibility, information, legend, filing, and record retention conditions for the use of free writing prospectuses after the filing of the registration statement.

(1) Prospectus Delivery and/or Availability

The ability of any person participating in the offer and sale of the securities to use free writing prospectuses under proposed Rules 164 and 433 would be conditioned on availability of the issuer's most recently filed statutory prospectus (other than a summary prospectus) satisfying the requirements of Securities Act Section 10 and, in certain cases, on prior or concurrent delivery of the issuer's most recently filed statutory prospectus.

(a) Non-Reporting Issuers and Unseasoned Issuers

In offerings of securities of an eligible non-reporting issuer, including initial public offerings, or offerings of securities of an eligible unseasoned issuer, use by offering participants of free writing prospectuses would be conditioned on filing of the registration statement for the offering. If the free writing prospectus was prepared by or on behalf of an issuer or offering participant, if consideration was or would be given by the issuer or an offering participant for the publication or broadcast (in any format) of any free writing prospectus (including any published article, publication or advertisement), or if Securities Act Section 17(b) [147] required disclosure that consideration was or would be given by the issuer or an offering participant for any activity described therein, then the use of the free writing prospectus would be conditioned on its being accompanied or preceded by the most recent statutory prospectus that satisfied the requirements of Section 10.[148] If a final prospectus satisfying the requirements of Section 10(a) is sent or given with or prior to the written offer, proposed Rules 164 and 433 would not apply, but the written offer is not a prospectus under the exception in clause (a) of Section 2(a)(10) and would be permitted.

The result of this framework would be that these categories of issuers and offering participants would have to

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[143] The term "affiliate" is defined in Securities Act Rule 405.

[144] See discussion in Section III.D.3. below under "Permissible Use of Free Writing Prospectuses."

[145] Unlike an article published based on information obtained from a road show with a limited audience, an article published based on information provided at a readily accessible electronic road show open to an unrestricted audience would not be treated as a free writing prospectus of the issuer or offering participant due to the unrestricted and available nature of the electronic road show. See discussion in Section III.D.3 below under "Electronic Road Shows."

[146] The discussion in this section relates to the use of free writing prospectuses after the filing of a registration statement. For a discussion of the use of free writing prospectuses by well-known seasoned issuers prior to filing a registration statement, see the discussion in Section III.D.2 above under "Permitted Pre-Filing Offers for Well-Known Seasoned Issuers".

[147] For purposes of Rule 433, as well as for proposed Rule 163, communications for which disclosure would be required under Securities Act Section 17(b) would be deemed a free writing prospectus. In these situations, we believe that an issuer's or offering participant's payment for or other consideration given for publications covered by Section 17(b) would raise the same types of concerns as an issuer or offering participant paid interview.

[148] Proposed Rule 433 would provide that a prospectus would be deemed to accompany an electronic free writing prospectus if the latter contained a hyperlink to the former. In initial public offerings, a preliminary prospectus that does not contain a price range does not satisfy our rules or, therefore, the requirements of Section 10.

assure that the most recent statutory prospectus was actually provided to people who might receive a free writing prospectus. Thus, in the following situations, for example, use of the free writing prospectus would be conditioned on the most recent statutory prospectus preceding or accompanying the free writing prospectus or the communication could not be made in reliance on proposed Rules 164 and 433:

- A direct written communication by an issuer or offering participant;
- An interview in print or broadcast given or prepared by an issuer, its officers, directors or representatives or an offering participant, the publication or broadcast (in any format) of any free writing prospectus (including any published article, publication or advertisement) for which consideration was or would be given by the issuer or an offering participant, or for which Securities Act Section 17(b) required disclosure of a payment made or consideration given by an issuer or other offering participant;
- A press release disseminated by an issuer or offering participant and rebroadcast by the media; or
- A paid advertisement, in any format, by an issuer or offering participant.[149]

In these situations, following effectiveness of a registration statement, if a final prospectus meeting the requirements of Section 10(a) was previously or at the same time sent or given to each person to whom the written offer was made, proposed Rules 164 and 433 would not apply, but, as is currently the case, a written offer is permitted.

As we discuss above, in cases where a free writing prospectus is prepared by a person in the media business that is not affiliated with or paid by the issuer or an offering participant, the statutory prospectus would not be required to precede or accompany the media communication.[150] The issuer or other offering participant would be required to file the article within one business day following publication or broadcast.

In offerings of securities of eligible non-reporting or unseasoned issuers, where a free writing prospectus was prepared by or on behalf of, or paid for by, an issuer or offering participant, or Securities Act Section 17(b) required disclosure that a payment was made or consideration was given for distribution or publication of the free writing prospectus,[151] we believe it is important to deliver the preliminary prospectus to the recipient of the free writing prospectus. Conditioning use of the free writing prospectus on the fact that a statutory prospectus precede or accompany the free writing prospectus will assure that an investor has a balanced disclosure document of an issuer with no or limited reporting history against which to evaluate the free writing prospectus and to place the statements made in context. Although unseasoned issuers are reporting issuers, we believe that there is less reason to assume that the issuer would be well followed and thoroughly scrutinized or that plentiful issuer information would exist. The existing statutory provisions of Section 2(a)(10) would produce substantially the same result after effectiveness by requiring that the final prospectus meeting Securities Act Section 10(a) be sent or given prior to or at the same time as a written offer.

The condition that the statutory prospectus accompany or precede the free writing prospectus would not require that it be provided through the same medium, so long as it was provided at the required time. Although the prospectus would not have to be sent by the same means (paper or electronic) as the free writing prospectus, merely referring to its availability would not satisfy this condition.

Once the required statutory prospectus was sent or given to an investor, additional free writing prospectuses could be provided without having to send or give an additional statutory prospectus, unless there were material changes in the most recent statutory prospectus from the provided prospectus.[152] For example, once an investor had been sent a preliminary prospectus, absent a material change, the proposed rule would permit subsequent e-mail communications by an offering participant that constitute free writing prospectuses without the user having to hyperlink to or otherwise redeliver a statutory prospectus with each communication. After effectiveness and availability of a final prospectus meeting the requirements of Securities Act Section 10(a), no earlier statutory prospectus may be provided, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier statutory prospectus had been previously provided to the recipient.[153]

We believe that in a situation where a written communication is not prepared or paid for by an offering participant but rather by independent media, it still may be an offer and thus a free writing prospectus. There is less need in this situation, however, to have a statutory prospectus precede or accompany the free writing prospectus if a registration statement containing a statutory prospectus is on file with us and available.

(b) Seasoned Issuers and Well-Known Seasoned Issuers

In offerings of securities of eligible seasoned issuers and eligible well-known seasoned issuers, we propose that issuers and other offering participants could use a free writing prospectus after the filing of a registration statement containing a statutory prospectus. For shelf offerings, this preliminary prospectus could be a base prospectus that satisfied our requirements.[154] For offerings of securities of eligible seasoned issuers, we would not propose to condition use of the free writing prospectus on actual delivery of the preliminary prospectus. Instead, we would propose that the user of the free writing prospectus notify the recipient, through a required legend, of where the recipient can access or hyperlink to the preliminary or base prospectus by providing the URL for the prospectus.[155]

In addition, in offerings of securities of eligible well-known seasoned issuers, we are proposing that free writing

[149] We understand that using broadly disseminated free writing prospectuses in this category may not be feasible unless they are in electronic form and contain a hyperlink to the statutory prospectus. We believe that this is an appropriate result because additional assurance should exist that free writing prospectuses prepared by or paid for by non-reporting or unseasoned issuers or offering participants are considered by investors in the context of the statutory prospectus.

[150] See discussion in Section III.D.3. above under "Media Publications."

[151] Our proposals would provide that materials for which Securities Act Section 17(b) [15 U.S.C. 77q(b)] requires disclosure would be treated as free writing prospectuses of the issuer or other offering participant on whose behalf the payment was made or consideration given.

[152] If there were material changes in a preliminary prospectus, or preliminary prospectus supplement, the issuer and offering participants would generally recirculate the revised preliminary prospectus or supplement to potential purchasers.

[153] If a final prospectus is given or sent prior to or with a written offer, under the exception in clause (a) of Securities Act Section 2(a)(10), the written offer is not a prospectus and therefore would not be a free writing prospectus and proposed Rules 164 and 433 would not apply.

[154] See proposed Rule 430B, described below, which is intended, among other things, to locate within one rule the information requirements for a base prospectus in a shelf registration statement.

[155] Our existing rules do not require delivery of preliminary prospectuses in offerings involving reporting issuers. Thus, notification of availability of the preliminary or base prospectus on our Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system would allow recipients of the free writing prospectus the opportunity to evaluate the free writing prospectus against the filed materials.

prospectuses may be used by issuers at any time before or after the filing of a registration statement, and by any other offering participants after the filing of a registration statement containing a preliminary or base prospectus that satisfies our requirements, as detailed above.[156]

Instead of relying on Rules 164 and 433, the issuer or offering participant can, as is currently the case, make a written offer in reliance on the exception to the definition of prospectus contained in clause (a) of Securities Act Section 2(a)(10) if a final prospectus meeting the requirements of Securities Act Section 10(a) is previously sent or given to the person receiving the written offer. If the provisions of Section 2(a)(10) are followed, the written offer is not a prospectus.

Request for Comment

- Should the proposed rule make the proposed distinctions among the types of issuers?
- Should the proposed rule's distinction in methods of providing the preliminary prospectus apply to different issuers?
- For initial public offerings or offerings by unseasoned issuers, should the proposed rules provide as a condition to use of a free writing prospectus that a copy of the prospectus be delivered at or before access to a free writing prospectus, or should it suffice that the preliminary prospectus has been filed with us before then and is available?
- For all other issuers, should availability of a prospectus on file with us be sufficient when a free writing prospectus is used or should there be a delivery obligation?
- Rule 434 permits the use of term sheets together with prospectuses in certain types of offerings. Should we retain Rule 434 in light of the free writing prospectus proposals? If so, how and when would the rule be used and for what types of offerings?
- Should the proposed rule include additional limitations or restrictions for free writing prospectuses that are broadcast over television or radio?

(2) Ineligible Issuers

For any offering participant to use free writing prospectuses the issuer may not be an ineligible issuer.[157] As proposed, ineligible issuers are: [158]

- Reporting issuers who are not current in their Exchange Act reports;
- Issuers who are (or were, or their predecessors were, in the past three years) blank check issuers;
- Issuers who are (or were, or their predecessors were, in the past three years) shell companies;
- Issuers who are (or were, or their predecessors were, in the past three years) penny stock issuers;
- Issuers who are limited partnerships offering and selling their securities other than in a firm commitment underwriting; [159]
- Issuers who have received a "going concern" opinion from their auditors for the most recent fiscal year;
- Issuers who have filed for bankruptcy or insolvency during the past three years;
- Issuers who have been or are the subject of refusal or stop orders under the Securities Act; or
- Issuers who, or whose subsidiaries, have been found to have violated the federal securities laws, have entered into a settlement with any government agency involving allegations of violations of federal securities laws, or have been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the federal securities laws [160] during the past three years.[161]

The proposed new rule also would not apply to offerings by registered investment companies or business development companies or offerings that are exchange offers or business combination transactions that are subject to Regulation M–A.

The categories of ineligible issuers include issuers that are not compliant with their Exchange Act reporting obligations, issuers that may raise greater potential for abuse, and issuers that have violated the federal securities laws previously. Certain of these issuers have been viewed historically as unsuited for short-form registration or ineligible for disclosure-related relief. For instance, we have repeatedly stated our belief that penny stock and blank check offerings and shell companies may give rise to disclosure abuses.[162] In addition, Congress determined not to extend the safe harbors for forward-looking statements to issuers of blank check and penny stock securities offerings, as well as issuers previously convicted of certain felonies and misdemeanors and issuers subject to a decree or order involving a violation of the securities laws.[163]

We propose to exclude registered investment companies and business development companies from eligibility for use of proposed Rules 164 and 433 because they are already subject to separate rules permitting use of a Section 10(b) prospectus. Securities Act Rule 482 [164] permits investment companies to advertise investment performance data and other information, and Securities Act Rule 498 [165] permits open-end management investment companies to use a profile.

Request for Comment

- Should other categories of issuers also be precluded from reliance on our communications and automatic shelf registration proposals? For example, is there any reason we should disqualify offerings by certain types of entities, such as limited partnerships or limited liability companies?
- On the other hand, should any of the offerings we propose to disqualify instead be permitted to use our proposed communications and automatic shelf registration process if

[156] In the event that a well-known seasoned issuer did not have a registration statement on file, proposed Rule 163 would provide that an eligible well-known seasoned issuer's written offers would be exempt from Section 5(c). While it would be exempt from the requirements of Section 5(c), a written offer made under the exemption in proposed Rule 163 would fall within our proposed definition of "free writing prospectus." Rule 163 would condition the Section 5(c) exemption for that free writing prospectus on the satisfaction of the conditions in the Rule including filing, legend, and record retention conditions.

[157] Issuers or offerings falling within the described categories would also be considered ineligible for use of the communications safe harbors, exemptions, and exclusions and the automatic shelf registration statement procedure.

[158] We are proposing to include a waiver provision to allow us to waive a issuer's ineligibility if we find good cause to provide the waiver. Registered investment companies and business development companies would not be eligible for waivers of ineligibility.

[159] These issuers are in the category of issuers that are subject to our interpretations in *Limited Partnership Reorganizations and Public Offerings of Limited Partnership Interests*, Release No. 33–6900 (June 17, 1991) [56 FR 28979].

[160] The covered decrees or orders would be prohibitions on future violations of the federal securities laws, orders requiring issuers to cease and desist from violating the federal securities laws, and determinations of violations of the federal securities laws. The settlements would include settlements in which the issuer or its subsidiary neither admits nor denies that it violated the federal securities laws.

[161] See proposed amendments to Securities Act Rule 405.

[162] See, *e.g.*, *Penny Stock Definition for Purposes of Blank Check Rule*, Release No. 33–7024 (Oct. 25, 1993) [58 FR 58099] (the Commission stated that Congress found blank check companies to be common vehicles for fraud and manipulation in the penny stock market, and concluded that the Commission's disclosure-based regulation and review of such offerings protects investors); *Delayed Pricing for Certain Registrants*, Release No. 33–7393 (Feb. 20, 1997) [62 FR 9276] (blank check and penny stock issuers would be ineligible to use proposed rule providing for delayed pricing because of "prior substantial abuses"); and the Shell Companies Release note 73.

[163] See Securities Act Section 27A and Exchange Act Section 21E [15 U.S.C. 78u–5].

[164] 17 CFR 230.482.

[165] 17 CFR 230.498.

they are otherwise eligible? For example, are there other ways to distinguish penny stock offerings that should be disqualified from those involving legitimate capital raising?

• Should issuers be required to have filed their Exchange Act reports timely for the preceding 12 months as well as being current in their Exchange Act reports for purposes of relying on the new proposed communications rules?

• Should we extend or shorten the look-back periods used to disqualify issuers in any category?

• Would disqualification from our proposals on the basis of a "going concern" opinion from the issuer's independent auditor cause undue pressure to be placed on auditors not to issue those opinions? Should we replace that disqualification with one dependent on whether the issuer had: (1) Net losses or negative cash flows from operations for two or more of the past three annual fiscal periods; or (2) a deficit in net worth at the date of the most recent balance sheet?

• Should an issuer's disclosure of a material weakness in its internal controls over financial reporting make an issuer ineligible for purposes of the proposals?

• Should blank check companies, penny stock issuers or shell companies be able to rely on some aspect of our proposals for capital-raising transactions?

• Are there other types of offerings that also should be excluded from our proposals?

• Should an issuer be considered an ineligible issuer if it or its subsidiary were found to have violated, entered into a settlement with a state agency or another governmental agency with regard to, or been made the subject of a judicial or administrative order or decree, for violating or allegedly violating state securities laws or any securities laws? Should an issuer be considered ineligible if an affiliate of an issuer were found to have violated, settled allegations of violations of, or been made the subject of a judicial or administrative order or decree for violating or alleged violations of securities laws?

• Should registered investment companies or business development companies be able to rely on our proposed rules permitting use of a free-writing prospectus?

• Certain of today's proposals regarding communications apply to certain types of communications made around the time of registered business combination transactions as defined in Rule 165(f)(1), while others are not available to registered business combination transactions. As a result, the rules and regulations adopted pursuant to Regulation M–A will continue to apply to business combination transactions. We request comment as to whether the inclusions and exclusions of business combination transactions in the proposed amendments and rules are proper and whether such inclusions and exclusions are clear and unambiguous. Should we make any modifications to the Regulation M–A model in light of our proposals?

• Should an issuer that undertakes a registered capital formation transactions at the same time as it engages in a business combination transaction be eligible to rely on our communications proposals for the capital formation transaction? If yes, should any limitations be placed on the communications or should the issuer, if otherwise eligible, be able to use the proposals for free writing prospectuses or our other proposals?

(3) Filing Conditions

(a) General Conditions

Under our proposal, use of a free writing prospectus would be conditioned on filing of that prospectus or information contained in that prospectus in the following circumstances: [166]

• Where a free writing prospectus is prepared by or on behalf of the issuer, known as an "issuer free writing prospectus," and used by any person, the issuer shall file that free-writing prospectus; [167]

• Where a free writing prospectus prepared by a party participating in the offering other than the issuer contains material information about the issuer or its securities that has been provided by or on behalf of an issuer, known as "issuer information," that is not already contained or incorporated in the registration statement or a filed free writing prospectus, the issuer shall file that information;

• Where a free writing prospectus is prepared by a party other than the issuer and is distributed in a manner reasonably designed by such party to lead to its broad unrestricted dissemination, the other party shall file the free writing prospectus, unless it has already been filed; and

• Where a free writing prospectus prepared by any person contains only a description of the terms of the issuer's securities, the issuer must file the free writing prospectus that contains the final terms of the issuer's securities.[168]

The conditions would provide that the issuer file the issuer-prepared free writing prospectus or material issuer information on or before the date of first use, except in the case of final terms of securities. Because the free writing prospectus would be either that of the issuer or would contain material issuer information, we believe the proposed timing is appropriate. The issuer would have control over the use or would know that it provided the information for use. Issuer information contained in free writing prospectuses would be publicly available on our EDGAR system [169] as a result of the proposed rule's filing condition.[170]

In most cases, there would be no condition that underwriters and participating dealers file the free writing prospectuses that they prepare. This would include information prepared by underwriters and others on the basis of, but not containing, issuer information.[171] Examples of this information would include information prepared by underwriters that could be, but would not be limited to, information that is proprietary to an underwriter.

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[166] See proposed Rule 433(d). Unlike Securities Act Rule 425 applicable to business combination transactions which covers all communications, including Securities Act Rule 135 notices, under proposed Rule 433, Rule 135 notices and Securities Act Rule 134 notices would not be considered free writing prospectuses and would, therefore, not be subject to the conditions to use in the proposed Rule. Electronic road shows would not be subject to the filing condition in certain circumstances. See Section III.D.3 below under "Electronic Road Shows".

[167] As we discuss above, under our proposed Rule 163, a well-known seasoned issuer could use an issuer-prepared free writing prospectus before the shelf registration statement was filed or before a class of securities was included in the effective shelf registration statement. In this case, use of the free writing prospectus would be conditioned on filing when the registration statement was filed or amended to include the class not yet included.

[168] The final terms of the issuer's securities would either be contained in an issuer free writing prospectus or, if contained in another party's free writing prospectus, would be issuer information.

[169] We maintain an Internet site at *www.sec.gov* that contains reports, proxy and information statements, and other information regarding issuers that file electronically with us through EDGAR.

[170] As today, oral communications would not be subject to any filing condition but would still be subject to liability under Securities Act Section 12(a)(2) and the anti-fraud provisions of the federal securities laws.

[171] We are attempting to ensure that issuer information made available to any party in a written offer in connection with the registered offering would be filed and made publicly available. As we note earlier, the proposed exclusions from restrictions on free writing under proposed Rules 163 and 164 would not be available for any plan or scheme to evade the requirements of Section 5. This would include situations in which issuer provided information, such as issuer prepared projections or forward-looking information, is characterized as underwriter or participating dealer information in order for the issuer to avoid filing the information.

Our proposals contain an exception to the general principle that underwriter free writing prospectuses would not need to be filed. If any person, other than the issuer, participating in the offer or sale of the securities distributed a free writing prospectus in a manner that was reasonably designed to achieve broad unrestricted dissemination, such use would be conditioned on such person filing the free writing prospectus on or before the date of first use.[172] For example, the filing condition would apply where:[173]

- An underwriter included a free writing prospectus on an unrestricted Web site or hyperlinked from an unrestricted Web site to information that would be a free writing prospectus[174] or if a dealer or other offering participant released or gave a copy of its free writing prospectus to a newspaper or other media; or
- An underwriter or other offering participant sent out a press release regarding the issuer or the offering that would be a free writing prospectus.

A free writing prospectus including information about the issuer, its securities, or the offering, provided by or on behalf of the issuer or an offering participant that is prepared by persons in the media business who are not affiliated with or paid by the issuer or an offering participant would be subject to filing by the issuer or offering participant involved within one business day after first publication or first broadcast. Persons in the media would have no filing or other obligations under these provisions.

A free writing prospectus that contained only a description of the securities offered, regardless of whether the issuer or other offering participant prepared or used it, would be subject to filing only if it reflected the final terms of the securities being offered. The issuer would have to file the free writing prospectus within two days after the later of the date such terms became final or the date of first use.[175] We believe this filing condition is appropriate for free writing prospectuses that contain only a description of the final terms of a security. Preliminary term sheets and other descriptive material containing only the terms of the securities that do not reflect final terms of securities or transactions would not be subject to filing. All such written offering materials, whether or not filed, would be free writing prospectuses.

The 1998 proposals would have required all free writing to be filed, regardless of whose communications were involved. This filing condition caused commenters to raise concerns that participants might be liable for communications they had not made or used.[176] By providing that the filing condition applies only to an issuer free writing prospectus and issuer information, whether contained in an issuer free writing prospectus or in another participant's free writing prospectus, or to information in a free writing prospectus broadly disseminated, we believe we have addressed the concerns about cross-liability under Securities Act Section 12(a)(2) for other participants' free writing materials.[177] Comments regarding the 1998 proposals also expressed concern that the public filing would cause competitive harm to underwriters by making their confidential proprietary products public.[178] The filing condition in proposed Rule 433 would not extend to a free writing prospectus prepared by an underwriter, including information prepared on the basis of issuer information that does not include issuer information, unless the free writing prospectus fell into the "broad dissemination" category. Free writing prospectuses sent directly to customers of an offering participant, without regard to number, would not be broadly disseminated.

Request for Comment

- Is it appropriate to distinguish between issuer information and information prepared by an underwriter on the basis of issuer information for purposes of filing? If not, why not? Should the proposed rule provide additional specificity regarding the determination of whether a free writing prospectus is prepared on the basis of issuer information but does not include issuer information? If so, please describe the manner in which the proposed rule should provide that specificity.
- Should all offering participants free writing prospectuses be required to be filed?
- Have the proposals to limit filing to issuer free writing prospectuses, issuer information in any other person's free writing prospectus and broadly disseminated free writing prospectuses of other participants alleviated concerns about cross-liability for free writing prospectuses used by other offering participants?
- Is the phrase "manner reasonably designed to lead to broad dissemination" clear enough or should we consider a more precise definition? If yes, then what definition should be used?
- Should we define issuer information differently? If yes, how should we define it?
- Should we require free writing prospectuses that contain only preliminary terms of a securities offering to be filed? If yes, why?

(b) Electronic Road Shows

Issuers and underwriters frequently conduct presentations known as "road shows" to market their offerings to the public. These road shows are a primary means by which issuers are involved directly and actively with investors in the selling effort. Historically, these presentations were conducted in person and limited to institutional investors. Today, due to advances in electronic media, road shows also are being conducted or re-transmitted over the Internet or other electronic media.

We intend to make clear that electronic communications, including electronic road shows, are graphic communications that fall within our proposed definition of written

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[172] An underwriter, dealer, or other offering participant would be considered to have made such a distribution of a free writing prospectus if the dissemination was made by or on its behalf. As with an issuer free writing prospectus, "by or on behalf of" an underwriter, dealer, or other offering participant would mean that the particular underwriter, dealer, or other offering participant, its agent or representative authorized and approved the use of the free writing prospectus before its dissemination. Thus, an issuer, underwriter, dealer, or other offering participant could not indirectly disseminate information through the press or otherwise without complying with the conditions of proposed Rule 433. In that case, the materials provided to the press would be a free writing prospectus of the underwriter, dealer, or other offering participant.

[173] Where an issuer distributed a free writing prospectus prepared by an underwriter, dealer or other offering participant, that free writing prospectus would be an issuer free writing prospectus for purposes of the filing condition.

[174] On the other hand, a Web site with access restricted to customers or a subset of customers would not require filing. (Neither would an e-mail by an underwriter to its customers, regardless of the number of customers.)

[175] As proposed, the filing condition under this provision of proposed Rule 433 would not be satisfied by the timely filing of a prospectus supplement under Rule 424.

[176] See, *e.g.*, comment letters in File No. S7–30–98 from the ABA; Ford Motor Credit Company; Investment Company Institute ("ICI"); Merrill Lynch; and Sullivan & Cromwell.

[177] Commenters were also concerned that underwriters and participating dealers would not be able to satisfy their suitability determination obligations if underwriter or participating dealer materials were publicly filed, because they might be considered to be offering the issuer's securities to a potentially anonymous group of investors. We believe that our proposal addresses these concerns as well by, among other things, providing that free writing prospectuses prepared and used by offering participants sent directly to their customers would not be considered broadly disseminated. See note 174.

[178] See comment letters in File No. S7–30–98 from Credit Suisse First Boston Corporation ("CSFB"); J.C. Bradford & Co.; and Morgan Stanley Dean Witter ("Morgan Stanley").

communication.[179] Thus, under our proposed rules, an electronic road show would be a written offer and a prospectus, but it would also be a free writing prospectus. It would therefore be permitted if the conditions of proposed Rule 433 were satisfied. Issuer involvement or participation in an electronic road show would make it an issuer free writing prospectus.[180] Our proposals would apply to electronic road shows in all registered securities offerings, not just initial public offerings.[181]

Electronic road shows—those road shows transmitted electronically by the Internet, videos, e-mail, CD–ROM or any other medium—have to date proceeded in reliance on a series of no-action letters granted by the staff of the Division of Corporation Finance.[182] Our proposals would permit the use of electronic road shows without many of the conditions in the electronic road show no-action letters,[183] provided the issuer satisfies the conditions of Rule 433.[184] We believe that, once we categorize electronic road shows as graphic communications and thus as written communications and free writing prospectuses, we should not subject them to additional conditions. Indeed, we believe broadly available electronic road shows treated as free writing prospectuses should be encouraged. Therefore, our proposals would provide that an electronic road show or its script would not be subject to filing, except for material issuer information not previously included (including by incorporation by reference) in the registration statement or in a free writing prospectus related to the offering, if the issuer does the following:

- Makes at least one version of a *bona fide* electronic road show [185] readily available electronically to any potential investor at the same time as the electronic road show; and
- Files any issuer free writing prospectus or material issuer information used at an electronic road show (other than the road show itself).

We believe that our proposed treatment of electronic road shows would strike the appropriate balance between the need to market an issuer's securities to institutional investors and the desires of retail and other investors to have access to issuer information, such as management presentations, that are normally available only at road shows that often have not been open to retail investors generally. We also believe that our proposal would address concerns that important information about an issuer or an offering can be communicated at electronic (as well as live) road shows, rather than in the statutory prospectus. In this regard, the Report and Recommendations of the NASD/NYSE IPO Advisory Committee recommended that issuers be required to make a version of their IPO road show available electronically to unrestricted audiences.[186] While we are not proposing to require that road shows be made available to unrestricted audiences, issuers and underwriters would be free to open road shows to all investors, and we believe that our proposal will encourage issuers to do so.

Request for Comment

- Should we include a definition of road show to describe these activities? If so, what should the description cover? That the road show be made to more than a specified number of persons?
- Will our proposal, if adopted, lead to more widespread use of electronic road shows? To such road shows being available to all potential investors? Should we make it a condition that electronic road shows be available to all potential investors?
- Should we consider including any of the conditions in the electronic road show no-action letters that we are not including in our proposals? If so, which ones and why?
- Is our proposed definition of what constitutes a "*bona fide* electronic road show" adequate? Is there any reason to discourage transmission of different versions of a road show? For example, could an issuer prepare a road show for some investors and a second, less-informative version for others? Should we otherwise limit this possibility?
- Should an issuer be permitted to edit a retransmitted road show? Should the rule expressly permit editing?
- Should visual presentations such as slides or power point presentations used but not distributed at live road shows be considered free writing prospectuses? Should we consider the use of electronic media to transmit an otherwise oral presentation to an audience overflow room as a written communication and an electronic road show, even if the presentation to the overflow room is not interactive?
- Should electronic road shows transmitted over the television or radio be treated differently from electronic road shows transmitted through the Internet?
- Should electronic road shows in business combination transactions be treated in the same manner as proposed Rule 433? If so, should there be a filing obligation similar to that in Securities

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[179] All electronic communications would be written communications due to their character as graphic communications, not because they fall within the concept of broadcast. See proposed amendments to the definition of "graphic communication" in Securities Act Rule 405.

[180] Live road shows would continue to be considered oral communications.

[181] We recognize that road shows may be used in marketing the issuer's securities in certain private placement transactions, as well. Our proposals do not address those offerings, although the inclusion of electronic communications in the definition of written communication would apply to private placement transactions. For example, in an offering made in reliance on Securities Act Rule 505 or Rule 506 of Regulation D [17 CFR 230.505 and 17 CFR 230.506], an electronic road show or other written communication would implicate the provisions of Securities Act Rule 502 [17 CFR 230.502] regarding information that must be provided to non-accredited investors and restrictions on general solicitation and general advertising.

[182] See Staff no-action letters to *Private Financial Network* (Mar. 12, 1997); *Net Roadshow, Inc.* (July 30, 1997); *Bloomberg L.P.* (Oct. 22, 1997); *Thompson Financial Services, Inc.* (Sep. 4, 1998); *Activate.net Corporation* (June 3, 1999); *Charles Schwab & Co., Inc.* (Nov. 15, 1999); and *Charles Schwab & Co., Inc.* (Feb. 9, 2000).

[183] For example, the road show audience would not have to be limited in any way, and the road show need not be the re-transmission of a live presentation in front of an audience. In addition, those distributing the road show would not have to limit viewers to seeing it either within a 24-hour period or twice. They could also allow viewers to copy, print or download the road show. Multiple versions of the electronic road show would be permitted. Each would be a separate free writing prospectus. If we adopt our proposals, the electronic road show no-action letters for registered public offerings would be withdrawn at that time. See discussion of Staff no-action letters in note 182.

[184] Electronic road shows would have to satisfy the legend condition discussed in Section III.D.3. above under "Permitted Use of a Free Writing Prospectus After the Filing of a Registration Statement under Proposed Rule 433" and, for road shows involving a non-reporting or unseasoned issuer, would be subject to the condition that the issuer's statutory prospectus accompany or precede the electronic road show. As such, those issuers would have to include in the electronic road show a hyperlink to the issuer's filed statutory prospectus in its registration statement.

[185] We propose to define "*bona fide* electronic road show," for purposes of the proposed rule, as a version of an electronic road show (one that is provided or made available by means of graphic communication) that contains a presentation by some members of an issuer's management and that, where the issuer is using more than one version of an electronic road show, covers the same general areas regarding the issuer, its management, and the securities being offered as the other versions. To be *bona fide*, the version need not address all of the same subjects or provide the same information as the other versions of an electronic road show. It also need not provide an opportunity for questions and answers or other interaction, even if other versions of the electronic road show do provide such opportunities.

[186] *Report and Recommendations of a Committee Convened by the New York Stock Exchange, Inc. and NASD at the Request of the U.S. Securities and Exchange Commission*, available at *www.nasdr.com/pdf-text/iporeport.pdf* (May 29, 2003). Consistent with the Committee's suggestion, different versions of electronic road shows would be permitted for different audiences under the filing exemption, so long as at least one version of a *bona fide* electronic road show was available to all potential investors.

Act Rule 425? If not, what filing and other disclosure requirements should apply?

(c) Unintentional Failures To File

Comments in response to the 1998 proposals regarding free writing materials expressed the concern that the failure to file all free writing materials would result in a Section 5 violation. We propose to address this concern by providing the ability to cure any unintentional failure to file free writing materials.[187] The proposal provides that the material must be filed as soon as practicable after discovery of the failure to file.

Proposed Rule 164 would allow an issuer and any other person relying on the proposed Rule the ability to cure any immaterial or unintentional failure to file or delay in filing the free writing prospectus, without losing the ability to rely on the Rule. This cure provision would be available if a good faith and reasonable effort was made to comply with the filing condition and the free writing prospectus was filed as soon as practicable after the discovery of the failure to file.[188]

As in the business combination rules, we are proposing the cure provision to avoid potential chilling of communications due to uncertainty over a filing status. Any attempt to avoid complying with the filing conditions of Rule 433 as a plan or scheme to evade Section 5 would make the proposed exclusion and permitted use unavailable.

Request for Comment

- Is a cure provision on filing necessary?
- Are there other concerns about the filing obligations not addressed by the cure provision? If yes, then what are they and how can they be remedied without eliminating a filing obligation?
- Should we specify what persons at an issuer or offering participant, such as any senior officer, must discover the failure to file?
- Should free writing prospectus filing obligations be part of an issuer's disclosure controls and procedures?
- If there is a failure to file, should there be any cooling off period before which an issuer could complete a transaction?

[187] Such a "cure" provision is included in Regulation M–A. See Securities Act Rule 165(e) [17 CFR 230.165(e)]. See also the Campos Article, note 102, at § 1:30.

[188] Underwriter materials subject to the filing condition would need to be filed on or before the date of first use and would have to include the proposed Rule 433 legend.

(d) Filed Free Writing Prospectus Not Part of Registration Statement

A free writing prospectus used after a registration statement is filed complying with Rule 433 would be governed by the provisions of Securities Act Section 10(b), which provides that a prospectus permitted under that section is filed as part of the registration statement, but is not subject to Section 11 liability. We are proposing to modify the Section 10(b) filing requirement to provide that a free writing prospectus filed pursuant to proposed Rule 433 shall identify the registration statement to which it relates, but would not have to be filed as part of the registration statement. We believe that the modified filing condition will enhance investor protection because it should facilitate filing of the free writing prospectus on a timely basis and more readily identify the filed information, whether an issuer or another party's free writing prospectus or issuer information in a free writing prospectus, as a free writing prospectus.[189] Any free writing prospectus that is used, regardless of whether it is filed, would be subject to liability under Securities Act Section 12(a)(2) and the anti-fraud provisions of the federal securities laws.[190]

Request for Comment

- Should we require free writing prospectuses to be filed as part of the registration statement? If yes, would the filing obligation affect whether parties use free writing prospectuses?

(4) Information in a Free Writing Prospectus

We are proposing to permit a free writing prospectus meeting the conditions of Rule 433 to be a Section 10(b) prospectus without having line item disclosure requirements or otherwise requiring that the free writing prospectus contain any particular information, other than the legend. The proposed rule would permit information in a free writing prospectus to go beyond information the substance of which is contained in the prospectus included in the registration statement. We believe that exempting free writing prospectuses meeting the conditions of the proposed rule from limitations on any particular content should not diminish investor protection. In that regard, we believe that the liability provisions applicable to free writing prospectuses, particularly Securities Act Section 12(a)(2) and the anti-fraud provisions of the federal securities laws, provide protection against material misstatements in and material omissions from information contained in a statutory prospectus.

Treating a free writing prospectus satisfying the conditions of proposed Rule 433 as a Section 10(b) prospectus would provide for additional continuing Commission oversight and enforcement authority over the contents and use of the free writing prospectus. We would retain the ability to halt the use of any materially false or misleading free writing prospectus in accordance with Section 10(b). Under proposed amendments to Securities Act Rule 418, our staff would be able to request any free writing prospectus that had been used in connection with a securities offering to enable the staff to monitor its use.[191] We believe that the proposals balance the expressed needs of issuers and market participants to communicate more freely during an offering while protecting investors and the market from offering communications that contain fraudulent or misleading statements.

Request for Comment

- Should we require that free writing prospectuses contain particular information in addition to the legend? If yes, what information?
- Should we limit the type of information that can be included in a free writing prospectus? If yes, what should the limitations be?
- Should we require explicitly that a free writing prospectus contain a balanced presentation of the information or is the required legend recommending that potential investors read the prospectus, including the risk factors, sufficient?
- Should we amend Rule 418 to permit the staff to request copies of all free writing prospectuses that are used, whether or not they are required to be filed? If no, why not?

(a) Legend Condition

We are not proposing any content requirement for free writing prospectuses other than to condition the use of a free writing prospectus on inclusion of a legend indicating where a prospectus is available, recommending

[189] The free writing prospectus could also be filed as part of the registration statement or, where permitted, included in an Exchange Act report incorporated by reference into the registration statement. In such case, the free writing prospectus would be subject to Securities Act Section 11 liability [15 U.S.C 77r].

[190] The treatment of a free writing prospectus as a permitted prospectus under Securities Act Section 10(b) would be the same as sales literature used by investment companies and business development companies under Securities Act Rule 482 [17 CFR 230.482].

[191] See proposed amendment to Securities Act Rule 418 [17 CFR 230.418].

that potential investors read the prospectus, including Exchange Act documents incorporated by reference, including risk factors, if any, and stating that the communication constitutes a written offer pursuant to a free writing prospectus.[192] In addition, the legend also would advise investors that they can obtain the registration statement including the prospectus and any incorporated Exchange Act documents for free through the Commission's Web site at *www.sec.gov,* and that they may request the prospectus from the issuer, any underwriter or dealer by calling a toll-free number. The proposal also provides that the legend indicate that the free writing prospectus is part of a public offering. Because in most, if not all cases, the legend provided by the proposed rule would not be included in published articles, the filing of a published article with us as a free writing prospectus including the legend would satisfy the condition of proposed Rule 164.[193]

Proposed Rule 164 would permit a user to cure an unintentional failure to include the legend in any free writing prospectus, as long as a good faith and reasonable effort was made to comply with the condition and the free writing prospectus is amended to include the legend as soon as practicable after discovery of the omitted legend.[194] In addition, if a free writing prospectus has been transmitted to potential investors without the legend, in order to fall under the cure provision, the free writing prospectus must be retransmitted, with the appropriate legend, to all investors who originally received it.[195]

Our proposed legend condition is intended to identify more clearly materials as free writing prospectuses used in connection with a registered offering. We believe that this legend would assist investors in evaluating the content and would provide a record of the free writing materials the issuer prepared and used or issuer information included in free writing prospectuses used in connection with the offering.

We understand that issuers or other users of written communications that are permissible in connection with registered offerings may sometimes include legends or disclaimers in those materials. Several of these additional legends or disclaimers are inappropriate. In particular, disclaimers of responsibility or liability that would be impermissible in a statutory prospectus or registration statement also would be impermissible in free writing prospectuses. Examples of impermissible legends or disclaimers that would cause the materials to not be free writing prospectuses that could be used in reliance on the proposed exclusion include:

- Disclaimers regarding accuracy or completeness;
- Statements requiring investors to read or acknowledge that they have read any disclaimers or legends or the registration statement; and
- Language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy.[196]

Request for Comment

- Should the legend contain other information?
- Are there any other legends that should be ineligible? Should the proposed rule include specific language regarding legends that are ineligible?
- Should we require inclusion of the legend with published articles when they are filed by the issuer or other offering participants?
- Should we specify who at an issuer or offering participant , such as any senior officer, must discover the failure to include the legend? If yes, why?
- Securities Act Rule 425, which contains similar cure provisions, does not contain any more specificity than we are proposing. Should cure provisions in capital formation transactions contain different provisions? If so, why?
- Instead of, or in addition to, the toll free number, should the legend provide an e-mail address to be contacted to request the prospectus?

(b) Proposed Amendment to Rule 408

Finally, we are proposing to amend Securities Act Rule 408 to make clear that a failure to include information that is included in a free writing prospectus in a prospectus filed as part of a registration statement would not, solely by virtue of inclusion of the information in a free writing prospectus, be considered an omission of material information required to be included in the registration statement.[197]

Request for Comment

- Should we amend Rule 408 as proposed?

(5) Record Retention Condition

Proposed Rule 433 would condition the use of a free writing prospectus on issuers and offering participants retaining for three years any free writing prospectuses they have used from the date of the initial *bona fide* offering of the securities in question. This record retention condition would apply to all offering participants and would apply regardless of whether the free writing prospectus was filed.[198] We are proposing a three-year retention period because that timeframe is consistent with retention periods for brokers and dealers to retain securities sale confirmations.

We believe this record retention condition is appropriate for several reasons. First, it would give us the ability to review free writing prospectuses used in reliance on proposed Rules 164 and 433 under our authority in Securities Act Section 10(b) and the proposed amendments to Rule 418, among other rules. Second, offering participants and purchasers would benefit from the availability of the free writing prospectuses.

Request for Comment

- Should the record retention condition apply to all users, including issuers as well as brokers and dealers?
- Should record retention be a condition for free writing prospectuses that are filed? If yes, then would it be difficult to determine when the retention condition would apply?
- Should we have a record retention condition? If yes, is three years enough? Should it be shorter such as two years or longer such as five years?
- For issuers, rather than conditioning the use of a free writing prospectus on specific record retention in proposed Rule 433, should retention of the free writing prospectus used by issuers be mandated as part of an issuer's disclosure controls and procedures?

(B) Treatment of Communications on Web Sites and Other Electronics Issues

(1) General

The proposed communications rules would enable issuers and market participants to take significantly greater advantage of the Internet and other electronic media to communicate and deliver information to investors. We have addressed previously the

[192] See proposed Rule 433(c).

[193] See proposed Rule 433(d).

[194] See proposed Rule 164(c)(2).

[195] Proposed Rule 163 contains similar cure provisions.

[196] See proposed Rule 164. See also the Asset-Backed Securities Proposing Release at note 58.

[197] The general anti-fraud provisions would of course apply to free writing prospectuses.

[198] For example, the record retention policy would apply to free writing prospectuses prepared by underwriters and not containing issuer information and to electronic road shows and term sheets not reflecting final terms not required to be filed.

circumstances under which an issuer retains responsibility for information included on its Web site;[199] however, today's proposals could raise new issues in this regard due to the ability to communicate outside the statutory prospectus, including posting information on Web sites that will be free writing prospectuses. As such, proposed Rule 433 would make clear that an offer of an issuer's securities that is contained on an issuer's Web site or hyperlinked by the issuer from the issuer's Web site to a third party Web site is considered a written offer of such securities made by the issuer and, unless otherwise exempt, would be a free writing prospectus of the issuer.[200] The same would be true of information contained on or hyperlinked to an offering participant's Web site. Accordingly, the requirements of Rule 433 would apply to these free writing prospectuses. For example, if an issuer or other offering participant included a hyperlink within a written communication used to offer the issuer's securities, such as an electronic free writing prospectus, to another Web site or to other information, the hyperlinked information would be considered part of that written communication.[201]

(2) Historical Information on an Issuer Web Site

We recognize the importance of an issuer's Web site as a means to communicate with the public, not just with potential investors, about their business. Commenters on our 2000 Electronics Release expressed concerns regarding the possibility that historical issuer information on an issuer's Web site that is accessed at a later time would be considered "republished" at that later date, with attendant securities law liability.[202] Historical information that is not an offer, including for example, regularly released information that would fall within one of our proposed safe harbors, would not become an offer if accessed at a later time, unless it was updated or otherwise modified or used or referred to (by hyperlink or otherwise) in connection with the offering. We also believe that issuers in registration should be able to segregate historical information on their Web site so that it remains accessible to the public but will not be presumed to be reissued or republished for purposes of the Securities Act.

Proposed Rule 433 would not apply to historical issuer information that otherwise could be considered an offer but that is properly identified as such and located in a separate section of the issuer's Web site containing historical issuer information, sometimes known as archives, as that information would not be considered a current offer of the issuer's securities. This historical information could include, but would not be limited to, regularly released information that would fall within our proposed safe harbors.[203]

The proposed exclusion in Rule 433 for historical archived information would cover information that could be demonstrated to be previously published (for example, by being dated). The information could not be incorporated or otherwise included in a prospectus or used, identified, updated or modified in connection with the offering or otherwise. We believe that the availability of historical issuer information also would provide investors with more readily accessible information about the issuer. Under our proposal, issuers would need to review information on their Web sites to determine, for example, whether information constituted an offer or was archived properly.

Request for Comment

- Should any issuer hyperlink to a third party Web site be permitted for purposes of the exclusions for historical issuer information? If so, should the exclusion be limited to hyperlinks to an issuer's Exchange Act reports and other filings with us?
- Are there circumstances under which a hyperlink embedded in a free writing prospectus or other material should not be deemed to have been adopted by, or be treated as part of the free writing prospectus of, the issuer?

c. Interaction of Communications Proposals With Regulation FD

As a consequence of our proposals to liberalize communications during the offering process and encourage continuing ongoing regular communications by reporting issuers, we believe it is necessary to revisit the exclusions from Regulation FD for communications made during a registered offering of securities.[204] The communications regime that we are proposing contemplates that certain material non-public issuer information could be made public through the prospectus filed as part of a registration statement, the issuer's filing obligation for free writing prospectuses, or, in the case of reporting issuers, through the satisfaction of Regulation FD. Oral communications of an issuer made in connection with a registered offering would continue not to be subject to any filing or public disclosure requirement. We continue to believe that subjecting oral communications that occur as part of a registered offering process in a capital formation transaction to a public disclosure requirement could adversely affect the capital formation process.

We are proposing to amend Regulation FD to specify the circumstances, both in terms of the type of offering and the means of communication, in which issuer communications would be excluded from the operation of that Regulation in connection with a registered securities offering. The effect of our amendments would be to identify the types of communications that would continue to be excluded from the Regulation in connection with registered securities offerings.

As amended, Regulation FD would not apply to disclosures made in the following communications in connection with a registered securities offering that is of the type excluded from the Regulation:

- A registration statement filed under the Securities Act, including a prospectus contained therein;
- A free writing prospectus used after filing of the registration statement for the offering and satisfying the requirements of proposed Rule 433, or to a communication falling within the

[199] In our 2000 Electronics Release, we noted that the federal securities laws apply equally to information contained on an issuer's Web site as they do to other communications made by or attributed to the issuer. Web site content differs from traditional methods of distribution, however, in several important aspects. First, information that is placed on a Web site can be continuously accessed as long as the information remains posted. Second, issuers are able to hyperlink to other documents, information, and Web sites, thereby allowing instant access to such documents, information, and Web sites.

[200] The issuer would have to assess whether an available exemption for such offer existed under any other rule. This approach is consistent with our interpretations on the use of electronic media in our 2000 Electronics Release. See the 2000 Electronics Release at note 62. Hyperlinks from a third party Web site to an issuer's Web site may be a free writing prospectus of the third party with regard to the issuer's securities, depending on the facts and circumstances.

[201] For example, while a research report published or distributed by a broker or dealer may not be considered an offer by the broker or dealer under Rule 139, an issuer hyperlinking to that research report would not be able to rely on Rule 139 and the research report would be a free writing prospectus of the issuer, and the conditions of Rule 433, including the filing requirements, would have to be satisfied. See the 2000 Electronics Release note 62 at II.B.2.

[202] See, *e.g.*, comment letters in File No. S7–11–00 from the ACCA; The Council of Infrastructure Financing Authorities; and the Florida Division of Bond Finance.

[203] See discussion in Section III.D.1 above under "Permitted Continuation of Ongoing Communications During an Offering" regarding proposed Rules 168 and 169.

[204] See 17 CFR 243.100(b)(2).

exception to the definition of prospectus contained in clause (a) of Securities Act Section 2(a)(10);

- Any other Section 10(b) prospectus;
- A notice permitted by Securities Act Rule 135;
- A communication permitted by Securities Act Rule 134; and
- An oral communication made in connection with the registered offering after filing of the registration statement for the offering under the Securities Act.

The proposals also would narrow the types of registered offerings eligible for the exclusion to those involving capital formation for the account of the issuer and underwritten offerings that are both an issuer capital formation and a selling security holder offering, in addition to the existing exclusion for registered business combination transactions.[205]

In view of our proposals to expand permissible communications, we believe it is appropriate to clarify that the communications excluded from the operation of Regulation FD are, in fact, those communications that are directly related to a registered capital raising securities offering. Communications made during or in connection with a registered offering and not contained in our enumerated list of exceptions from Regulation FD—for example, the publication of regularly released factual business information or regularly released forward-looking information or pre-filing communications—would be subject to Regulation FD.

Request for Comment

- Are the proposed exclusions appropriate?
- Are there other or different exclusions relating to registered securities offerings that would be appropriate?
- Should we retain the exclusion from Regulation FD for oral communications made in connection with the registered offerings? For purposes of the exclusion, should we consider defining oral communications as relating to the registered securities offering? If yes, describe the types of oral communications in connection with registered offerings that should be subject to Regulation FD. If no, describe the effects, if any, on capital formation transactions if we were to eliminate the exclusion from Regulation FD of oral communications made in connection with certain registered offerings.
- Should we continue to exclude from Regulation FD communications made in reliance on the exception to the definition of prospectus in clause (a) of Section 2(a)(10) where a final prospectus meeting the requirements of Section 10(a) is sent or given prior to or with the written communication? If such communications are in connection with the type of registered securities offering excluded from Regulation FD, discuss why such communications should now be made subject to the provisions of Regulation FD.

4. Use of Research Reports

a. Current Regulatory Treatment of Research Reports

The veracity and reliability of research reports, particularly those issued by full service broker-dealers, have received tremendous attention in recent years. The Sarbanes-Oxley Act,[206] our rules regarding analyst certification,[207] the self-regulatory organization rules we approved,[208] and the global research analyst settlement[209] have addressed many of the abuses identified with analyst research and have required structural reforms and increased disclosures.[210] As a direct result of these initiatives and actions, we expect that analyst research reports used by market participants will be more useful and will disclose conflicts of interest relating to research of which investors should be aware.

The value of research reports in continuing to provide the market and investors with information about reporting issuers cannot be disputed. Research analysts study publicly traded issuers and provide information about the securities of those issuers, often through the issuance of research reports.

Especially in light of the recent reforms and limitations on abusive conduct by analysts in connection with offerings, we believe it is appropriate to limit the restrictions on research as written offers under the Securities Act to those we believe are appropriate to avoid offering abuses. Given the ongoing flow of information into the market, particularly with respect to reporting issuers and the enhancements to the environment for research imposed by recent statutory, regulatory and enforcement developments, we believe it is appropriate to make measured revisions to the research rules that would not jeopardize investor protection but that would permit dissemination of research around the time of an offering under a broader range of circumstances than is currently the case. We also are cognizant of information suggesting declines in research coverage[211] and seek to avoid Securities Act restrictions that discourage research coverage or

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[205] Currently, Regulation FD excludes from its operation any disclosure made in connection with a securities offering under the Securities Act, whether oral or written, other than an offering of the type described in Securities Act Rule 415(a)(1)(i)–(vi) [17 CFR 230.415(a)(1)(i)–(vi)]. As compared to our proposal, Regulation FD currently does not limit the exclusion based on the means of communication, nor does it limit the exclusion based on whether capital formation offerings are involved. The existing exclusion in Regulation FD for registered business combination transactions would not be affected by our proposed changes.

We also have proposed inclusion of a proviso that would bring within Regulation FD any offering that includes an issuer capital formation offering if it is being registered for the purpose of evading the requirements of Regulation FD. This would cover the situation, for example, where a *de minimis* issuer participation was included in what was otherwise entirely a selling security holder offering in an attempt to exclude communications in the offering from the application of Regulation FD.

[206] See Section 501 of the Sarbanes-Oxley Act [15 U.S.C. 78o–6(a)(2)].

[207] See 17 CFR 242.500 through 505. Regulation Analyst Certification ("Regulation AC") requires, among other things, that brokers, dealers and certain persons associated with a broker or dealer include in research reports certifications by the research analyst that the views expressed in the report accurately reflect his or her personal views, and disclose whether or not the analyst received compensation or other payments in connection with his or her specific recommendation or views. See *Order Approving Proposed Rule Changes Relating to Research Analyst Conflicts of Interest*, Release No. 34–48252 (Aug. 4, 2003) [68 FR 45875] ("SRO Rule Approval Order").

[208] See *Order Approving Proposed Rule Changes Regarding Analyst Conflicts of Interest*, Release No. 34–45908 (May 16, 2002) [67 FR 34968]; SRO Rule Approval Order note 207.

[209] See Lit. Rel. 18438 (Oct. 31, 2003); Press Release 2004–120 (August 26, 2004).

[210] The settlement, which involved twelve brokerage firms and two individuals, requires the settling firms to, among other things, adopt structural changes designed to ensure that there is a structural separation between the firm's analysts and investment bankers. The firms are required to include enhanced disclosures, including disclosure of potential conflicts of interests and disclosure of their analysts' quarterly performance. The firms are also required to pay for independent research for a five-year period and to make this research available to the firm's customers.

The self regulatory organizations, the National Association of Securities Dealers and the New York Stock Exchange adopted rules requiring, among other things, separating analyst compensation from investment banking influence, prohibiting analysts from issuing research reports around the expiration of a lock-up agreement (sometimes called "booster shot" research reports), imposing quiet periods around the issuance of research reports for offering participants, prohibiting analysts from participating in "pitches" or other communications for the purpose of soliciting investment banking business, restricting prepublication review of research reports by non-research personnel, prohibiting retaliation by investment banking against analysts whose reports or public appearances may affect an investment banking relationship, requiring disclosure of any compensation from an issuer or other relationships with clients, and requiring additional registration, qualification, and continuing education requirements on research analysts. See SRO Rule Approval Order note 207.

[211] See *e.g.*, *Analyst Stock Ownership, Declining Coverages, 'Settlement' Consequences Outlined*, FinancialWire, February 26, 2004; Bob Tedeschi, *Can the Dot-Coms Still Standing Reclaim the Attention of Analysts Still Employed? Stay Tuned*, the N.Y. Times, Apr. 21, 2003 at C10.

dissemination where they are not necessary to protect investors.

b. Proposals Amending Exemptions for Research

Rules 137, 138, and 139 under the Securities Act describe circumstances in which a broker or dealer may publish research constituting an offer around the time of a registered offering without violating the Section 5 prohibition on pre-filing offers and impermissible prospectuses. We are proposing measured amendments that would make incremental modifications to these rules.[212] Our proposed rules would also, for the first time, contain a definition of research report. The proposals would also expand the circumstances in which offering and non-offering participants could disseminate research reports during a registered offering.[213]

We proposed revisions to Rules 137, 138 and 139 in the 1998 proposals and most commenters addressing that aspect of the 1998 proposals expressed general approval for the proposals.[214] Our current proposals take a similar approach, while being designed to ensure that appropriate investor protections are maintained. The 1998 proposals also would have changed Rules 138 and 139 to provide that research provided under those safe harbors would no longer be excluded from the definition of "prospectus" in Section 2(a)(10). Many commenters opposed this change and believed that this would result in brokers and dealers being less likely to publish research even in situations where they would be permitted to do so under the Rules.[215] We believe that this change is not necessary to protect investors and have, therefore, maintained our current approach with respect to liability for research, which includes general anti-fraud liability, used in reliance on these Rules.[216]

i. Definition of Research Report

To assure consistency between Regulation AC and the research safe harbors contained in Rules 137, 138, and 139, we are proposing to include a definition of research report that will be the same as the definition of "research report" in Regulation AC and would also include media broadcasts.[217] Under our proposals, "research report" would be defined as a written communication, as defined in Securities Act Rule 405, that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision. This definition is intended to encompass all types of research reports, whether issuer specific or industry compendiums separately identifying the issuer.

While we are generally proposing the same definition of "research report" as in Regulation AC, for purposes of Rule 139, it is possible that particular documents, such as industry reports, would be research reports under our proposal, even if they fall outside of Regulation AC.[218] We believe that it is appropriate to maintain this distinction because of the different purposes of the rules. Industry reports that fall within the Rule 139 safe harbor provisions would be considered research reports under the proposed definition, even though Regulation AC may not require them to contain a certification. The proposed definition of research report would not include confirmations or account statements that contain rating information provided in accordance with the requirements of the global research analyst settlement.[219]

ii. Rule 137

Rule 137 provides that a broker or dealer that is not an offering participant in a registered offering but publishes or distributes research will not be considered to be engaged in a distribution of the issuer's securities and would therefore not be an underwriter in the offering.[220]

We are proposing to expand the exemption to apply to securities of any issuer, including non-reporting issuers, with exceptions for blank check companies, shell companies, and penny stock issuers. Rule 137 would continue to be available only to brokers and dealers who are not participating in the registered offering of the issuer's securities, have not received compensation from the issuer, its affiliates, participants in the securities

[212] The safe harbor provisions of Securities Act Rules 137, 138, and 139 would continue to be available only to brokers and dealers. Issuers could not use the safe harbor provisions or research reports prepared or distributed by brokers or dealers in reliance on the rules to directly or indirectly communicate with potential investors about an issuer's offering. For example, a hyperlink on an issuer's web site during its registered offering to a research report would raise these concerns. Issuers using research reports in this manner could be deemed to have adopted the contents of such reports and, under our proposals, the reports would be considered free writing prospectuses.

[213] The proposed changes to the rules would continue to permit the distribution of independent research within the safe harbor provisions. Our current research rules permit the distribution of independent research provided the distribution satisfies the conditions of the rules. For brokers and dealers subject to the global research analyst settlement, their ability to continue to distribute independent research during a registered securities offering would depend on whether the independent research distribution by the broker or dealer satisfied the conditions of the research rule at the time of the distribution. If a broker or dealer would not be able to rely on any of the research safe harbors for their own research, they similarly could not distribute independent research. For example, independent research that is prepared by an entity not participating in an offering but paid for by a broker or dealer participating in an offering would be distributed by an offering participant and thus would not satisfy the requirements of Securities Act Rule 137 and could not be used in reliance on the safe harbor. Such research could continue to be distributed by the entity not participating in the offering that prepared it, but such distribution could not be used to evade the prohibitions of the Securities Act. A research report constituting an offer and not falling within a safe harbor would be considered a free writing prospectus. Our research rules also do not supersede the requirements of any applicable rule of a self-regulatory organization regarding the timing of the distribution of research reports.

[214] See, *e.g.*, comment letters in File No. S7–30–98 from the ABA; ACCA; ACIC; Business Roundtable; Fried Frank; J.C. Bradford & Co.; Merrill Lynch; New York State Bar Association; Sullivan & Cromwell; the Securities Industry Association ("SIA"); and TMBA.

[215] See, *e.g.*, comment letters in File No. S7–30–98 from the ABA; TBMA; Merrill Lynch; Morgan Stanley; Bar Association of the City of New York ("New York City Bar"); and Sullivan & Cromwell.

[216] Research reports published or distributed in reliance on Rules 138 and 139 are not offers for purposes of Securities Act Section 2(a)(10) and Section 5(c). Brokers or dealers publishing or distributing research in reliance on Rule 137 are not considered underwriters of the securities.

[217] As in Regulation AC and existing Rules 137, 138 and 139, communications considered research reports would not need to include recommendations. Regulation AC contains a separate definition for public appearance that includes research that is broadcast. Our new proposed definition of written communications, however, encompasses electronic (through the definition of graphic communication) as well as broadcast communications. Thus, because broadcast is already encompassed in the definition of research report, a separate definition for broadcast or public appearance would be unnecessary for purposes of relying on the safe harbors.

[218] In the release adopting Regulation AC, we stated that it was not possible, for purposes of that rule, to provide a complete list of all types of communications that would or would not fall within the definition of "research report," but that, in general, certain communications specified in the release would not be research reports for Regulation AC purposes. Because of the different purposes of the rules, including the fact that the Securities Act is aimed at addressing all communications, both written and oral, whether a communication is a research report would be a facts and circumstances determination.

[219] The twelve brokerage firms that were part of the global research analyst settlement agreed to disclose, on trade confirmations and on account statements, as well as on the firms' Web sites, their ratings, along with the ratings of the independent research providers who cover the security. We do not believe that the continued publication of these ratings on trade confirmations and on account statements, as required by the settlement, would raise concerns in that they would be provided in the ordinary course, and as to confirmations, after the sale of the securities. We would, however, as we note above, be concerned about the continued inclusion of ratings of either the firm or the independent research provider on the firms' Web sites if the conditions to the safe harbors in Rules 137, 138, or 139 were not available to the firm at that time.

[220] 17 CFR 230.137.

distribution, among others, and publish or distribute the research report in the regular course of business. Permitting research on non-reporting issuers in reliance on Rule 137 would make clear when research can be provided on these issuers. These proposed provisions would not, due to the other limitations of the Rule, however, enable offering participants to rely on the Rule to publish research about the non-reporting issuer.

Request for Comment

- Should the type of eligible issuer be expanded or limited beyond blank check companies, shell companies, and penny stock issuers?
- Should Rule 137 be expanded to include research on issuers other than those eligible to use Forms S–2 or F–2 (which we propose to eliminate) or Forms S–3 or F–3? If not, why not?
- Securities Act Section 4(3) affects the ability of dealers to publish research on non-reporting issuers following effectiveness of the registration statement. Are there reasons to discourage publication of research by non-participating dealers in the aftermarket of an IPO?
- Would the publication of timely research by entities, including dealers, not involved in the initial offering enhance investor protection in the aftermarket? Would it have other effects? If so, what would those effects be?

iii. Rule 138

Rule 138 permits a broker or dealer participating in a distribution of an issuer's common stock and similar securities to publish or distribute research that is confined, for example, to that issuer's fixed income securities, and vice versa, if it publishes or distributes the research in the regular course of its business.[221] The underlying premise of Rule 138 is that there is less opportunity to condition the market when a broker or dealer is underwriting one type of security but providing regular course research on the other type (for example, underwriting an offering of equity securities while providing research on debt securities).

We are proposing to amend Rule 138 to expand the categories of eligible issuers. As proposed, the Rule generally would cover research reports on all reporting issuers that are current in their periodic Exchange Act reports on Forms 10–K, 10–KSB, 10–Q, 10–QSB and 20–F at the time of reliance on the exemptions, rather than only issuers who are Form S–3 or Form F–3 eligible, as is currently the case.[222] As we note above, we believe it is appropriate to permit research on a broader group of reporting issuers under Rule 138 in view of the regulatory reforms and the role of independent research. We believe the current limitation on the type of issuers under this Rule is no longer necessary to protect investors due to the enhanced Exchange Act reporting obligations. Like the proposals regarding Rules 137 and 139, the Rule would exclude issuers that have historically posed certain risks of abuse, including blank check companies, shell companies and penny stock issuers.

We also are proposing to require that as a condition to the exemption the broker or dealer have previously published or distributed research reports on the types of securities that are the subject of the reports in the regular course of its business.[223] We believe that it is appropriate to include this condition, because it is important that the broker or dealer have a history of publishing or distributing a particular type of research. If a broker or dealer began publishing research about a different type of an issuer's security around the time of public offering of an issuer's security and did not have a history of publishing research of that type, we would be concerned that such publication or distribution might be a way to provide information about the publicly offered securities in order to circumvent the provisions of Section 5 and the proposed permissible free writing rules.

Request for Comment

- Should the type of eligible issuer be limited beyond blank check companies, shell companies, and penny stock issuers?
- Is the requirement that the broker or dealer must have published or distributed research in the regular course of its business on the same types of securities appropriate?
- Should the proposed rule contain a condition that the broker or dealer must have published or distributed research on the securities of the particular issuer? If yes, why?
- Should the Rule 138 safe harbor be available if the issuer is a business development company filing periodic reports on Forms 10–K and 10–Q?

iv. Rule 139

Rule 139 permits a broker or dealer participating in a distribution of securities by a seasoned issuer or a larger foreign private issuer publicly traded abroad to publish research concerning the issuer or any class of its securities, if that research is in a publication distributed with reasonable regularity in the normal course of its business.[224] Rule 139 also provides a safe harbor in those situations for distributions by smaller seasoned issuers, if the broker or dealer complies with additional restrictions on the nature of the publication and the opinion or recommendation expressed in it.

(A) Issuer Specific Reports

Under the proposals, reports about a specific issuer could cover only issuers with at least a one year reporting history who are current and timely in their Exchange Act reports and are eligible to register a primary offering of securities on Forms S–3 or F–3,[225] based on the $75 million minimum public float or investment grade securities provisions of those forms.[226] Penny stock issuers, blank check companies, and shell companies would be excluded.

We are retaining the requirement that the broker or dealer publish or distribute the research report in the regular course of its business, but not the requirement of publication with reasonable regularity. We do not believe that the reasonable regularity requirement has added any particular degree of investor protection and has raised concerns as to when the condition is satisfied. We are, however, proposing that the broker or dealer must, at the time of use, have distributed or published research reports about the issuer or its securities.[227] This new proposed requirement, we believe, would retain the most important element of the "reasonable regularity" requirement, namely that the report initiating

[221] 17 CFR 230.138.

[222] In addition, Rule 138 requires that a foreign private issuer's securities be traded on a designated offshore securities market for at least twelve months. We are proposing to amend the Rule to specify that this requirement relates to the issuer's equity securities. Current Rule 138 covers issuers that are Form S–2 or Form F–2 eligible as well. We are proposing to eliminate these Forms, as discussed below.

[223] Current Rule 138 requires that the broker or dealer publish or distribute research in the regular course of business, but does not contain a condition that the broker or dealer have published or distributed research reports on the same types of securities.

[224] 17 CFR 230.139.

[225] As in the proposed changes to Rule 138, we are proposing that the foreign private issuer's equity securities be traded on a designated offshore securities market for at least twelve months. See proposed amendments to Rule 138.

[226] As is the case today, the eligibility determination would be made in the same manner as Form S–3 or Form F–3 eligibility at the time of reliance on the rule.

[227] See proposed amendments to Rule 139.

coverage of an issuer not benefit from an exemption under Rule 139.

We are not proposing a minimum time period for the broker or dealer to have distributed or published research reports. In addition, the proposal does not require that the previously published or distributed research report cover the same securities that are the subject of the registered offering. We believe that the recently adopted safeguards on publication of research, together with the limitation on such reports to issuers eligible to use Forms S–3 and F–3 for primary offerings, diminish any need to impose a minimum time period for prior publication or distribution or need for the previously published or distributed research to cover the same securities being sold in the registered offering.

(B) Industry-Related Reports

Industry reports under the proposals could cover issuers required to file reports pursuant to Exchange Act Section 13 or Section 15(d) or satisfying the conditions to use by foreign private issuers. The safe harbor for industry reports is not available if the issuer is now or any predecessor of the issuer was during the last two years a blank check company, shell company, or penny stock issuer. The proposals extend the safe harbor for industry reports to registered offerings of any reporting issuer, not only reporting issuers eligible to register their securities on Form S–3 or Form F–3. Registered offerings by non-reporting issuers would not benefit from the exemption.

Our proposals would remove the prohibition on a broker or dealer making a more favorable recommendation than the one it made in the last publication. We are not proposing that the report include any prior recommendations. The proposals provide, however, that the research reports must contain similar type of information about the issuer or its securities as contained in prior reports.

We believe that with the recently adopted safeguards regarding analyst recommendations, it is appropriate to remove the "no more favorable" recommendation conditions in current Rule 139. We believe the proposal would be consistent with our recent actions affecting research analysts and research reports and would result in enhanced opportunity to provide information to investors regarding issuers and their securities.

Request for Comment

- Should the type of eligible issuer be limited beyond blank check companies, shell companies, and penny stock issuers?
- The staff has previously declined to permit reliance on Rule 139 if the issuer is an open-end management investment company.[228] Should reliance on proposed Rule 139 be permitted if the issuer is an open-end management investment company or other investment company (*e.g.*, closed-end management investment company, unit investment trust, business development company)? If so, what additional conditions, if any, should be required for reliance on the rule? What advantages or disadvantages would Rule 139 offer as compared to Rule 482, which was recently amended to permit investment company advertisements to contain information the "substance of which" is not contained in the investment company's prospectus?[229]
- Are there reasons that we should maintain the current requirement in Rule 139 that the broker or dealer publish reports with reasonable regularity? If yes, should we provide more specificity as to what reasonable regularity means?
- Is the requirement in the proposed amendments to Rules 138 and 139 that the broker or dealer, at the time of use, be publishing reports about the issuer or its securities appropriate?
- Will our proposed approach lead to more research being published?
- Are there reasons to maintain the "no more favorable recommendation" requirement in current Rule 139?
- How many firms subject to the global research analyst settlement use their Web sites, rather than confirmations or account statements, to disclose security ratings of issuers provided by independent research providers along with the security ratings of the issuer provided by the firm?

v. Research Report Proposals in Connection With Regulation S and Rule 144A Offerings

The restrictions in Regulation S on directed selling efforts and offshore transactions[230] and in Rule 144A on offers to non-QIBs and general solicitation[231] have resulted in brokers and dealers withholding regularly published research that they have not prepared with a view towards promoting the offering to investors in those types of offerings.[232]

We are proposing to provide that research reports meeting the conditions of Rules 138 and Rule 139 will not be considered offers or general solicitation or general advertising in connection with offerings relying on Rule 144A.[233] The proposals also would provide that these research reports would not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S.[234] As we indicated in the 1998 proposals, we do not believe that the publication of research in reliance on Rules 138 and 139 would be used to circumvent Rule 144A and Regulation S. Limiting the ability to rely on these exemptions when research on the issuers may otherwise be available, in any case, could, we believe, negatively impair capital formation.

Request for Comment

- Should we put any limitations on offerings relying on Rule 144A or Regulation S if research is published or distributed in reliance on Rules 138 and 139? If yes, why?

vi. Research and Proxy Solicitations

We also are proposing to codify a Commission staff position[235] that the publication or distribution of research under the conditions set forth in Rules 138 and 139 is permitted in connection with a registered securities offering that is subject to the proxy rules under the

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[228] See Staff no-action letter to *Charles Schwab & Co., Inc.* (Dec. 30, 1987).

[229] See *Amendments to Investment Company Advertising Rules*, Release No. 33–8294 (Sept. 29, 2003) [68 FR 57760].

[230] Securities Act Regulation S [17 CFR 230.901 through 230.905] provides a safe harbor from the registration requirements of the Securities Act for offshore offers and sales of securities. When a broker or dealer is acting as an underwriter on behalf of an issuer in connection with a Regulation S offering, questions arise regarding whether those actions would conflict with the prohibition against directed selling efforts or the offshore transaction condition. The concern stems from the fact that the distribution of research could be viewed as conditioning the market, which would constitute directed selling efforts, or offering the securities in the United States, which is prohibited under the "offshore transaction" requirement.

[231] Securities Act Rule 144A [17 CFR 230.144A] provides a safe harbor from the registration requirements of the Securities Act for resales of restricted securities to "qualified institutional buyers" ("QIBs"). When a broker or dealer is selling securities in reliance on Rule 144A, it is subject to the condition that it may not make offers to persons other than those it reasonably believes are QIBs. Where it distributes research about the issuer around the time of a Rule 144A transaction, it may be viewed as making offers to persons that receive it, including those who are not QIBs.

[232] We began to address some of these concerns in 1998. In the 1998 proposals, we also expressed an interpretive view that brokers and dealers may publish and distribute research reports as described in current Rule 138 and 139 without such reports being deemed to constitute "directed selling efforts." The proposed amendments would codify that view.

[233] See proposed amendments to Rule 138 and Rule 139.

[234] See proposed amendments to Regulation S.

[235] See Staff no-action letter to *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (Oct. 24, 1997).

Exchange Act.[236] The new rule would provide that distribution of research in accordance with Rule 138 or 139 would be a solicitation to which Rules 14a–3 through 14a–15 (other than Rule 14a–9) of the proxy rules[237] would not apply.

Request for Comment

- Should we codify the staff position that research published in reliance on Rules 138 and 139 would not be solicitations under Rule 14a–1(l)(2)? If not, why not?

IV. Liability Issues

A. Information Conveyed by the Time of Sale for Purposes of Section 12(a)(2) and Section 17(a)(2) Liability

Under the Securities Act, purchasers of an issuer's securities in a registered offering have private rights of action for materially deficient disclosure in registration statements under Section 11 and in prospectuses and oral communications under Section 12(a)(2). Section 11 liability exists for untrue statements of material facts or omissions of material facts required to be included in a registration statement or necessary to make the statements in the registration statement not misleading at the time the registration statement became effective. Under Section 12(a)(2), sellers have liability to purchasers for offers or sales by means of a prospectus or oral communication that includes an untrue statement of material fact or omits to state a material fact that makes the statements made, based on the circumstances under which they were made, not misleading.[238] Securities Act Section 17(a) is a general anti-fraud provision which provides, among other things, that it shall be unlawful for any person in the offer and sale of a security to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.[239]

The term "sale" under the Securities Act includes any contract of sale.[240] We believe that we should address, at this time, the discrepancies in time between the time of the contract of sale for securities (when an investor makes the investment decision to purchase the securities) on the one hand, and the later time of availability of a prospectus (and perhaps other information) on the other hand. The Securities Act registration regime permits final prospectuses to become available after an investor has made the decision to purchase a security.[241] This availability, therefore, does not necessarily address the receipt by investors of information at the time of an investment decision.

We interpret Section 12(a)(2) and Section 17(a)(2) as reflecting a core concept of the Securities Act—that materially accurate and complete information regarding an issuer and the securities being sold should be available to investors at the time of the contract of sale, when they make their investment decisions.[242] Under our interpretation, the time at which an investor enters into a contract of sale, and therefore becomes committed to purchase the securities, is one appropriate time[243] to apply the liability standards of Section 12(a)(2) and Section 17(a)(2).[244]

We interpret Section 12(a)(2) and Section 17(a)(2) as meaning that, for purposes of assessing whether information that is conveyed to an investor at the time of sale (including a contract of sale) by or on behalf of a seller (including an issuer, underwriter, participating dealer, or other offering participant) includes or represents a material misstatement or omits to state a material fact necessary in order to make the statements in light of the circumstances under which they were made, not misleading, information conveyed to the investor only after the time of the contract of sale should not be taken into account.[245] For purposes of Section 12(a)(2) and 17(a)(2), whether or not information has been conveyed to an investor by a seller (including an issuer, underwriter, participating dealer or other offering participant) at or prior to the time of the contract of sale currently is a facts and circumstances determination, and our actions today do

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[236] See proposed Exchange Act Rule 14a–2(b)(5).

[237] 17 CFR 240.14a–3 through 14a–15.

[238] Whether any particular statement or omission is material will depend on the particular facts and circumstances. Information is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976); see also *Basic* v. *Levinson*, 485 U.S. 224, 231 (1988). To fulfill the materiality requirement, there must be a substantial likelihood that a fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*

Courts have analyzed materiality under Exchange Act Section 10(b) and Exchange Act Rule 10b–5, and Securities Act Sections 11 and 12(a)(2) in a similar fashion. See, *e.g.*, *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 n.10 (3d Cir. 1993) (noting that while there are substantial differences in the elements that a plaintiff must establish under these provisions, they all have a materiality requirement and this element is analyzed the same under all of the provisions).

[239] See Securities Act Section 17(a)(2) [15 U.S.C. 77q(a)(2)].

[240] See Securities Act Section 2(a)(3). Courts have held consistently that the date of a sale is the date when the investment decision is made, not the date that a confirmation is sent or received or payment is made. See, *e.g.*, *Radiation Dynamics, Inc.* v. *Goldmuntz*, 464 F.2d 876, 891 (2d Cir. 1972) (holding that a purchase occurs at "the time when the parties to the transaction are committed to one another"); *In re Alliance Pharmaceutical Corp. Secs. Lit.*, 279 F. Supp. 2d 171, 186–187 (following the holding in *Radiation Dynamics* with respect to the timing of a contract of sale); *Pahmer* v. *Greenberg*, 926 F. Supp. 287, (citing *Finkel* v. *Stratton Corp.*, 962 F.2d 169, 173 (2d Cir. 1992) ("[A] sale occurs for Section 12[(a)](2) purposes when the parties obligate themselves to perform what they have agreed to perform even if the formal performance of their agreement is to be after a lapse of time"); *Adams* v. *Cavanaugh Communities Corp.*, 847 F. Supp. 1390, 1402 (N.D. Ill. 1994) (noting that the Seventh Circuit has followed the *Radiation Dynamics* decision). Also, as indicated in note 244, below, the Uniform Commercial Code no longer requires that a securities contract be in writing.

[241] For example, in a shelf offering our rules permit an issuer to file a final prospectus supplement not later than the second business day after a takedown from a shelf registration statement.

[242] Under our interpretation, the time of contract of sale can be the time the purchaser either enters into the contract (including by virtue of acceptance by the seller of an offer to purchase) or completes the sale, whichever comes first. The time of the contract of sale under our interpretation follows the statutory definition of sale in Securities Act Section 2(a)(3). Under Section 2(a)(3), sale includes "every contract of sale."

The 1954 amendments to the Securities Act permitting the use of a preliminary prospectus recognized that the final prospectus would not always be available to investors at the time they made their investment decisions. See 1954 Amendments to the Securities Act of 1933, Pub. L. No. 83–577 68 Stat. 683 (1954). Following the 1954 amendments, the Commission adopted a number of rules that would ensure that preliminary prospectuses were sent to investors in initial public offerings at least 48 hours before the confirmation of the sale of the securities could be sent. Our proposals today do not affect this requirement. See Securities Act Rule 460 [17 CFR 230.460], and Exchange Act Rule 15c2–8 [17 CFR 240.15c2–8].

[243] Our interpretation is not intended to affect any rights currently existing at any other time. Section 12(a)(2) would apply to oral communications and prospectuses (including final prospectuses) at other times. Section 17(a)(2) would similarly apply to statements at other times. In addition, both Securities Act Section 12(a)(2) and Section 17(a) assess liability for "offers" as well as for sales. Nothing in our interpretation or proposed rule would limit any ability to proceed under those sections based on statements made in offers.

[244] Article 8 of the Uniform Commercial Code was amended in 1994 to eliminate the requirement that a contract for the purchase of a security be reflected in a writing. See UCC, 1994 official text with comments, Article 8–113 (West 1994). The official comment to the rule states that the requirement that a contract be in writing is unsuited to the realities of the securities business. Thus, under state law oral contracts for sales of securities are permitted.

[245] As we discuss above, the basis for liability under Section 12(a)(2) for statements in a prospectus (including a free-writing prospectus) or oral communication, and the basis for liability under Section 17(a)(2) for the statements to which the section applies, are that the statement cannot contain any misstatement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.

not affect that determination.[246] Such information could include information in the issuer's registration statement and prospectuses for the offering in question, the issuer's Exchange Act reports incorporated by reference therein or information otherwise disseminated by means reasonably designed to convey such information to investors. If our proposals today are adopted, such information also could include information contained in free writing prospectuses.

As noted above, liability under Section 12(a)(2) attaches to an oral communication or prospectus by means of which an offer or sale is made that contains a material misstatement or omits to state a material fact necessary to make the statements, in light of the circumstances in which they were made, not misleading. Liability under Section 17(a)(2) attaches to an untrue statement of a material fact or an omission to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading, by means of which money or property is obtained. Our actions today also do not affect these requirements.

Under our interpretation, the liability determination as to an oral communication, prospectus, or statement, as the case may be, would not take into account information conveyed only after the time of sale (including the contract of sale).[247] Thus, evaluation of information at or prior to the time of sale (including contract of sale) would not take into account any modifications, corrections, or additions that are made available subsequent to the time of sale (including the contract of sale), including information contained in any final prospectus, prospectus supplement, or Exchange Act filing that is only filed or delivered subsequent to the time of sale (including the contract of sale).

Our interpretation of Section 12(a)(2) and Section 17(a)(2) is independent of the information requirements for registration statements or final prospectuses or prospectus supplements and of the prospectus filing or delivery requirements,[248] and is not intended to affect the information that must be contained in the prospectus filed as part of the registration statement. As today, the final prospectus would have to contain information necessary to satisfy a line item requirement or Securities Act Rule 408 and to meet the requirements of Securities Act Section 10(a).[249] Section 12(a)(2) would also apply to material deficiencies in disclosure in final prospectuses.

In furtherance of our interpretation discussed above, we are also proposing an interpretive rule, Rule 159, under Section 12(a)(2) and Section 17(a). We intend that the effect of our proposed interpretive rule would be the same as our interpretation. Our proposed rule would provide the following:

- For purposes of Section 12(a)(2) and Section 17(a)(2) only, and without affecting any other rights under those sections, for purposes of determining at the time of sale (including the time of the contract of sale), whether a prospectus, oral statement, or a statement,[250] includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading,[251] any information conveyed to the purchaser only after that time of sale will not be taken into account.

The proposed interpretive rule would also provide that for purposes of Section 12(a)(2) only, a purchaser's "knowing of such untruth or omission" in respect of a sale (including a contract of sale) would mean knowing at the time of such sale.

We find that our interpretation and believe that our proposed interpretive rule are in furtherance of the objectives of Section 12(a)(2) and Section 17(a) and are necessary for the protection of the rights of investors intended to be provided by those sections.

Unlike our 1998 proposals, which were criticized for potentially harming the capital formation process by requiring actual delivery of a prospectus and term sheet in order to shift the liability determination date to the time of sale, we do not believe that our interpretation or proposed rule should result in "speed bumps" or otherwise slow down the offering process. In light of the proposed new rules regarding communications, issuers and underwriters should have sufficient flexibility to communicate information in a manner that does not slow the offering process. At the same time, in our view, the interpretation that the quality of information should be assessed at the time of the contract of sale is unassailable, and investors should have materially complete and accurate information at that time.

1. Rule 412

Under current Rule 412, information contained in a prospectus supplement or Exchange Act filing incorporated by reference into a registration statement may modify or supersede other previously disclosed information that was contained in a document incorporated or deemed to be incorporated by reference in that registration statement. We are proposing to revise Rule 412 to make it consistent with our other proposals. The revisions would provide that:

- Subsequently provided information deemed part of or incorporated by reference into a registration statement or prospectus would not modify or supersede any information conveyed to an investor at the time of sale (including the time of the contract of sale) for purposes of determining the information conveyed to an investor at or prior to that time; and
- Information contained in a document that is deemed part of or incorporated by reference into a registration statement or prospectus would modify or supersede the information contained in the registration statement or prospectus itself.[252]

Request for Comment

We request comment with respect to our proposed interpretive rule, including on the following specific questions:

- Would actual communication to an investor provide sufficient ability for offering participants to be able to advise investors of developments prior to the time of the contract of sale without creating speed bumps for an offering? Does the concept provide sufficient opportunity for investors to have information at the time of the contract of sale? Do actual communications to investors reflect market practices today? What other concepts, if any, regarding communications should we consider?
- Should we provide more detailed guidance as to what is considered

[246] Direct communications could take various forms, including orally or through the use of electronic or other free writing prospectuses under the proposed communications regime.

[247] This interpretation would not, of course, affect the ability of the seller and the purchaser to consider subsequently provided facts or disclosure and by agreement revise their sale contract and by agreement enter into a new contract of sale with respect to the offered securities. In such case, for purposes of our interpretation and proposed rule, the time of the contract of sale to that purchaser would be the time of the new contract of sale.

[248] When we use the term prospectus supplements, we refer to prospectuses or prospectus supplements filed pursuant to Rule 424.

[249] We remind issuers that, notwithstanding prior disclosure of information, issuers must still include required disclosures in their registration statements, either directly or through incorporation by reference (for those issuers eligible to use the registration forms that permit incorporation by reference).

[250] These would include a prospectus or oral statement in the case of Section 12(a)(2), or a statement to which Section 17(a)(2) is applicable.

[251] Or, in the case of Section 17(a)(2), any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

[252] See discussion in Section V.B.1 below under "Date of Inclusion of Prospectus Supplements in Registration Statements and New Effective Dates of Registration Statements."

information that is conveyed to an investor at or prior to the time of the contract of sale? If so, how should we define it and what information should be included? Should it include only information that is included in the issuer's registration statement including Exchange Act documents that are incorporated by reference? Should it include free writing prospectuses that have been filed? What other information should it include?

- Should there be a concept of public dissemination similar to that in Regulation FD? If yes, how would an investor know to look for the information to be able to assess statements made in a prospectus or oral communication? Should there be any requirement that the registration forms disclose that information may be filed in an Exchange Act report of an issuer or otherwise disseminated in a manner to advise the investor? Should there be a requirement that information be conveyed directly to an investor in all cases? Would a concept of public dissemination provide sufficient opportunity for investors to be advised of and be able to access the information at or prior to the time of the contract of sale? What types of public dissemination of issuer information reflect market practices today? What other concepts, if any, of public dissemination of information should we consider?
- Should we consider a rule that would require a passage of a specified time between an Exchange Act document filing or free writing prospectus filing on EDGAR and a time of contract of sale in order for the information to be considered part of the information against which statements would be evaluated? Should we address the method by which information should be made available to an investor to be considered conveyed to the investor for purposes of Section 12(a)(2) and Section 17(a)(2)?
- Do the proposed rules regarding communications and the interpretation regarding information that is conveyed to an investor lead to evidentiary issues that should be addressed?
- As to any of the above requests for comment, are there any special considerations that apply to investment companies in general, or to particular types of investment companies (*e.g.*, open-end management investment companies, closed-end management investment companies, unit investment trusts, business development companies) that we should address? If yes, please describe.
- Currently, Rule 412 only addresses information in subsequently filed Exchange Act reports incorporated by reference that modifies or supersedes information in previously filed Exchange Act reports. Because the proposed revisions to Rule 412 and proposed Rule 430B would permit issuers to use either Exchange Act reports incorporated by reference or prospectus supplements deemed part of registration statements to update information in the registration statement and prospectus, would it be clear to investors what information in the prospectus either directly (other than for Section 10(a)(3) updates to registration statements) or through filed Exchange Act reports or prospectus supplements was being updated?
- Do the proposed revisions to Rule 412 provide issuers with greater ability than they have today to update information in the filed registration statement and prospectus in a timely manner?

2. Relationship of Interpretation and Proposed Rule to Section 11 Liability

Under our interpretations, information contained in a prospectus or prospectus supplement that is filed after the time of the contract of sale will be considered to be part of and included in a registration statement for purposes of liability under Section 11 at the time of effectiveness, which may be at or before the time of the contract of sale.[253] The date and time that the information is deemed part of the registration statement preserves an investor's rights under Section 11, but does not affect any rights assessed at the time of sale that the investor may have under Section 12(a)(2) or that we might enforce under Section 17(a). Thus, information that is deemed part of the registration statement as of the time of the contract of sale for shelf takedowns or as of effectiveness under Securities Act Rule 430A,[254] would not, under our interpretation, be taken into account under Section 12(a)(2) or Section 17(a)(2), unless the information was conveyed to an investor at or prior to the time of the contract of sale.[255] Similarly, an investor's rights under Section 11 would not be affected by information conveyed to an investor at or prior to the time of the contract of sale that is not in or deemed part of the registration statement at the time of the effectiveness of the registration statement for the securities sold to the investor.

[253] Whether the time of sale occurs on the same date as the effective date of a registration statement would depend on the type of registered offering the issuer is undertaking. For example, for offerings not eligible to be registered on a delayed basis under Rule 415, the prospectus in the registration statement must contain all required information, other than that permitted to be omitted pursuant to Rule 430A. For these non-shelf offerings, the effective date of the registration statement would be on or before the sale date, but the registration statement at the effective date would be deemed, as today, to contain information that was not actually contained in the prospectus or registration statement at the date of effectiveness, but is included in the filed final prospectus under Rule 430A. For shelf offerings, based on our proposed amendment regarding the treatment of prospectus supplements, the effective date of the registration statement for liability purposes would be the earlier of the date of first use of certain prospectus supplements or the time of the contract of sale. See discussion regarding proposed Rule 430B in Section V.B.1. below under "Proposed Rule 430B."

[254] Individual offerings under a shelf registration statement are sometimes referred to as a "takedown off the shelf".

[255] An investor could also pursue an action under Section 12(a)(2) based on the final prospectus.

B. Issuer as Seller

We believe there currently is unwarranted uncertainty as to issuer liability under Section 12(a)(2) for issuer information in registered offerings using certain types of underwriting arrangements.[256] As a result, there is a possibility that issuers may not be held liable under Section 12(a)(2) for information contained in the issuer's prospectus included in its registration statement. Therefore, as part of our proposals regarding Section 12(a)(2), we are proposing a rule providing that an issuer in a primary offering of securities, regardless of the form of the underwriting arrangement, be considered to offer or sell the securities to the purchaser, and therefore be a seller for purposes of Section 12(a)(2) as to any communications made by or on behalf of the issuer.[257] Proposed Rule 159A provides that any of the following communications would be made by or on behalf of an issuer:

- An issuer's registration statement relating to the offering and any preliminary prospectus or prospectus supplement relating to the offering filed pursuant to Securities Act Rule 424 or Rule 497;
- Any free writing prospectus prepared by or on behalf of the issuer and, in the case of an issuer that is an open-end management investment company, any profile provided pursuant to Securities Act Rule 498;
- Information about the issuer or its securities provided by or on behalf of the issuer and included in any other free writing prospectus, or, in the case of an issuer that is a registered investment company or business development company, in any advertisements pursuant to Securities Act Rule 482; and
- Any other communication made by or on behalf of the issuer.

A communication by an underwriter or dealer participating in an offering would not be on behalf of the issuer solely by virtue of that participation. However, depending on the facts and circumstances, a communication by an underwriter or dealer could be a communication on behalf of an issuer to the extent it contained issuer information. This definition of the issuer as a seller is not intended to affect whether any other person offers or sells a security by means of the same prospectus or oral communication for purposes of Section 12(a)(2).

[256] See *e.g.*, *Capri* v. *Murphy*, 856 F.2d 473, 478 (2d Cir. 1988); *Lone Star Ladies Investment Club* v. *Schlotzsky's, Inc*, 238 F.3d 363, 370 (5th Cir. 2001); *Rosenzweig* v. *Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003).

[257] We are not proposing to address the status of the issuer as a seller in a registered offering of transactions by selling security holders only.

Request for Comment

- Should issuers always be considered sellers with regard to issuer information, regardless of who is communicating the information?
- Should we condition issuer liability for issuer information contained in a free writing prospectus or other communication on the issuer giving the information to the other party for use? On whether the issuer gave the user of the free writing prospectus permission to include the issuer information or issuer free writing prospectus?
- Should there be any particular level of issuer involvement in the communication in order for the issuer to be considered a seller of the securities for purposes of Section 12(a)(2)?
- Should the proposed rule extend to entirely secondary offerings?
- Should proposed Rule 159A apply to investment companies, and if so, to which types (*e.g.*, open-end management investment companies, closed-end management investment companies, unit investment trusts, business development companies)?
- Are the communications covered by proposed Rule 159A with respect to investment company issuers (*e.g.*, profiles provided pursuant to Rule 498, issuer information included in advertisements pursuant to Rule 482) appropriate?

V. Securities Act Registration Proposals

A. Overview of Proposals

As discussed above, enhanced requirements for reporting under the Exchange Act for public issuers and the shifting of the Division of Corporation Finance's resources toward reviewing Exchange Act reports are intended to improve the quality and currency of disclosure under the Exchange Act. Together with technological advances, these developments provide the basis for our proposals to modernize many procedural aspects of securities offerings registered under the Securities Act.

Our proposals cover the registration procedures for seasoned and unseasoned issuers, and seek to streamline the registration process for most types of reporting issuers. These proposals include:

- A more flexible automatic registration process for well-known seasoned issuers;
- Modifications that would clarify and expand how and when information could be included in registration statements;
- A clarification of the Securities Act liability treatment of information provided in prospectus supplements and Exchange Act reports incorporated by reference;
- Modification of the timing of effectiveness of shelf registration statements applicable to issuers to coordinate the timing of effectiveness with the timing of offerings and, therefore, more closely replicate the statutory liability framework intended under the Securities Act; and
- Proposals related to non-shelf offerings of securities.

B. Procedural Proposals

1. Procedural Changes Regarding Shelf Offerings

a. Overview

We are proposing changes to the operation of the shelf registration system under the Securities Act. These proposals involve:

- Clarification and codification of the information to be included in and omitted from base prospectuses in shelf registration statements;
- Codifying the manner of inclusion of information in the final prospectus;
- The treatment of prospectus supplements; and
- liberalization of requirements under Securities Act Rule 415, including:
  - Elimination of the two year limitation for registered securities for a delayed offering;
  - Elimination of the "at-the-market" offering restrictions;
  - Elimination of the prohibition against immediate takedowns off delayed shelf registration statements; and
  - Conforming changes to Rule 424 regarding the filing of prospectus supplements.

b. Information in a Prospectus

i. Mechanics

(A) Proposed Rule 430B

Rule 415 provides for continuous or delayed offerings and is, therefore, the foundation for shelf-registration.[258] Primary offerings on a delayed basis may be registered by seasoned issuers only. A number of other delayed or continuous offerings may be undertaken or registered by any issuer, including offerings on a continuous basis of securities issued on exercise of outstanding options or warrants or conversion of other securities, offerings on a continuous basis under dividend reinvestment plans, offerings on a continuous basis under employee benefit plans and offerings solely on behalf of selling security holders (often referred to as "secondary offerings"). Rule 415 also permits registration by any issuer of a continuous offering that will commence promptly and may continue for more than 30 days from the date of initial effectiveness.[259]

Many of the types of offerings contemplated by Rule 415 can be accomplished using a prospectus that is complete at the time of effectiveness of the related registration statement and therefore may not require a supplement, because there may be no additional information to include in the prospectus.[260] This is generally the case, for example, for offerings relating to most exercise or conversion transactions, for offerings involving employee benefit plans, offerings involving dividend reinvestment plans,

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[258] Securities Act Rule 415(a)(i) [17 CFR 230.415(a)(i)] currently reads as follows:

(a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, Provided, That:

(1) The registration statement pertains only to:

(i) Securities which are to be offered or sold solely by or on behalf of a person or persons other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary;

(ii) Securities which are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the registrant;

(iii) Securities which are to be issued upon the exercise of outstanding options, warrants or rights;

(iv) Securities which are to be issued upon conversion of other outstanding securities;

(v) Securities which are pledged as collateral;

(vi) Securities which are registered on Form F-6 (§ 239.36 of this chapter);

(vii) Mortgage related securities, including such securities as mortgage backed debt and mortgage participation or pass through certificates;

(viii) Securities which are to be issued in connection with business combination transactions;

(ix) Securities the offering of which will be commenced promptly, will be made on a continuous basis and may continue for a period in excess of 30 days from the date of initial effectiveness;

(x) Securities registered (or qualified to be registered) on Form S-3 or Form F-3 (§ 239.13 or § 239.33 of this chapter) which are to be offered and sold on a continuous or delayed basis by or on behalf of the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary; or

(xi) Shares of common stock which are to be offered and sold on a delayed or continuous basis by or on behalf of a registered closed-end management investment company or business development company that makes periodic repurchase offers pursuant to § 270.23c-3 of this chapter.

[259] See Securities Act Rule 415(a)(1)(ix) [17 CFR 230.415(a)(1)(ix)].

[260] The terms of the securities being offered and the plan of distribution are often complete at the time of effectiveness and not subject to change. Where the issuer is not registered on Form S-3 or Form F-3, updating information regarding the issuer cannot be included in future periodic reports filed under the Exchange Act and incorporated by reference, and therefore must be included in the prospectus by a post-effective amendment. In that case, the new form of prospectus included in the amended registration statement is then complete at the new effective date and therefore also does not require a supplement.

and many continuous offerings by selling security holders.

However, other offerings, principally delayed and continuous offerings where the terms of securities offered and sold in different takedowns vary, as for example in underwritten offerings, and some offerings by selling security holders, such as underwritten offerings where terms also vary in different offerings, require that the prospectus included in the related registration statement at the time of effectiveness, usually referred to as a "base prospectus," be supplemented to reflect the final terms of the security and offering for each particular offering of securities, as well as certain other updating information where necessary or appropriate. In addition, in all types of continuous or delayed offerings employing shelf registration under Rule 415, there may be circumstances where a prospectus will be supplemented with additional information other than at the time of a takedown.

Each of these types of forms of prospectuses and prospectus supplements including omitted, updated, or supplemented information is filed with us under Rule 424, which provides a framework for prospectus filing and filing deadlines. There currently is, however, no rule that specifies the relationship between forms of base prospectuses and prospectus supplements and the information that may be omitted from or included in one or the other. We are proposing two new rules, Rules 430B and 430C, which we intend to achieve that purpose by codifying existing practice in most respects and liberalizing the framework for the registration process in certain areas. We are also proposing conforming changes to Rule 424.

We propose to codify, in a single rule, the prospectus requirement for shelf registration statements for registered primary securities offerings, other than business combination transactions and exchange offers. Proposed Rule 430B would be a shelf offering corollary to existing Rule 430A, in that it would describe the type of information that primary shelf eligible and automatic shelf issuers may omit from a base prospectus in delayed offerings and include instead in a prospectus supplement, Exchange Act report incorporated by reference, or a post-effective amendment.[261] Rule 430B is intended to be largely consistent with current requirements and practice for shelf registration statements for delayed offerings on Forms S–3 and F–3.[262] Under proposed Rule 430B, a base prospectus in a shelf registration statement could continue to omit information that is unknown or not reasonably available to the registrant pursuant to Rule 409.[263]

Rule 430B would provide that a base prospectus that, as today, omitted information as provided in the Rule would be a permitted prospectus.[264] Thus, after a registration statement is filed, offering participants could use a base prospectus that omitted information in accordance with the Rule. In addition, issuers could communicate using Rule 134 notices, and issuers and other offering participants could use free writing prospectuses under proposed Rules 164 and 433.[265]

(B) Means for Providing Information

As today, a base prospectus that omits information would not be considered a Securities Act Section 10(a) final prospectus.[266] To satisfy the requirements of Securities Act Section 10(a), as is the case with shelf registration statements today, an issuer would have to include the information omitted from the base prospectus in a prospectus supplement, or, where permitted as described below, through its Exchange Act filings that were incorporated by reference into the registration statement and prospectus, and identified on the cover page of a prospectus supplement. Currently, information included in a base prospectus or in an Exchange Act periodic report that is incorporated into a base prospectus is included in the registration statement. Proposed Rule 430B would make clear that prospectus supplements and information in them also would be deemed to be part of and included in the registration statement.[267]

Our proposals would provide shelf issuers with primary and automatic shelf registration statements the ability to add to a prospectus more additional or omitted information than is currently the case by means other than a post-effective amendment to the registration statement.[268] We are proposing to amend Forms S–3 and F–3 to permit all information required in the prospectus about the issuer and its securities to be incorporated by reference from Exchange Act reports. Such information could also be contained in the prospectus or a prospectus supplement. For example, material changes in the plan of distribution, which currently are required to be included in post-effective amendments, could be amended under our proposal by incorporated Exchange Act reports or prospectus supplements. Under our proposals, prospectus supplements would be deemed to be part of and included in the registration statement.[269]

Request for Comment

- Would the provisions of proposed Rule 430B provide shelf issuers more certainty regarding the provision of information in delayed offerings off of shelf registration statements?
- Does proposed Rule 430B need to contain different or additional provisions in order to codify current practice in delayed shelf registered offerings? If so, what current practice is not addressed, what different or additional provisions should be considered, and what is the statutory or regulatory basis for the current practice that is not addressed in proposed Rule 430B?
- Should shelf issuers, other than well-known seasoned issuers, be

[261] Our proposals regarding permissible omissions from a base prospectus in proposed Rule 430B apply to delayed offerings under Rule 415(a)(1)(x) made by issuers eligible to use Form S–3 or Form F–3 to register a primary offering of securities in reliance on General Instructions I.B.1 or I.B.2 of Form S–3 or Form F–3. Rule 430B as proposed would also apply to offerings of mortgage-backed securities under Rule 415(a)(1)(vii). Issuers could not rely on proposed Rule 430B for offerings made in reliance on other provisions of Rule 415(a). For example, issuers not otherwise eligible to use Form S–3 or Form F–3 for primary offerings, but that are eligible to register securities for resale on behalf of selling security holders in reliance on General Instruction I.B.3 of Form S–3 or register the issuance of securities on exercise or conversion of outstanding securities pursuant to General Instruction I.B.4, do not need to rely on this rule and would not be eligible do so. The information permitted by proposed Rule 430B to be omitted would not be relevant to these types of conversion or exercise transactions.

[262] While we intend proposed Rule 430B to be largely consistent with current requirements and practice for shelf registration statements, it also would significantly liberalize requirements for automatic shelf registration statements, as discussed below. Those changes, which are discussed in Section V.B.2 below under "Automatic Shelf Registration for Well-Known Seasoned Issuers," would permit issuers to omit information regarding whether the offering is a primary offering or an offering on behalf of persons other than the issuer, the plan of distribution for the securities, and the identification of other registrants unless known.

[263] See proposed Rule 430B and Rule 409 [17 CFR 230.409].

[264] The proposal codifies that such a prospectus would satisfy the requirements of Section 10 for purposes of Section 5(b)(1).

[265] See proposed Rules 164 and 433(a)(1)(ii).

[266] See Securities Act Section 5(b)(2).

[267] In the 1998 proposals, we expressed the position that information contained in a prospectus supplement is subject to liability under Section 11. Today's proposals would codify that position.

[268] Issuers would still have the flexibility to file post-effective amendments to include the information.

[269] The proposed amendments would explicitly permit information required in the prospectus pursuant to Item 3 through Item 11 of Form S–3 and Form F–3 to be included in this manner.

allowed to amend their plans of distribution through incorporated Exchange Act reports or prospectus supplements, rather than only through post-effective amendments?

- Should Rule 430B apply to additional categories of offerings permitted under Rule 415(a)(1)?
- Should paragraph (vii) of Rule 415(a)(1) be eliminated, especially in the event that we adopt our proposed rules for asset-backed securities?
- Securities Act Rule 424 includes references to filing multiple copies. Should those references be revised to reflect electronic filing on EDGAR?

(C) Identification of Selling Security Holders Following Effectiveness

Transfers of restricted securities can occur after a private placement is completed so that the identities of the holders of those restricted securities at the time of filing the resale registration statement may not be known to the issuer. Filing post-effective amendments to add new or previously unidentified security holders can impose delays. To alleviate the timing concern arising from an issuer's inability to identify selling security holders prior to effectiveness, we are proposing to allow seasoned issuers eligible to use Form S–3 or Form F–3 for primary offerings in reliance on General Instruction I.B.1 to those Forms [270] to identify selling security holders after effectiveness.

The proposals would provide that the identities of the selling security holders, and all information about them, as required by Item 507 of Regulation S–K,[271] could be added to the registration statement covering the resale of their securities after effectiveness by either an amendment to that registration statement or a prospectus supplement which, under our proposals, would be part of the registration statement for which for liability purposes there would be a new effective date tied to the date of the transactions covered by the prospectus supplement. In either case, as a result of our proposals today, the information would be part of and included in the prospectus in the registration statement. This ability to identify security holders after effectiveness would be available under the proposals only if:

- The resale registration statement identified the specific private transaction or transactions pursuant to which the securities were sold; and
- The private transaction was completed and the securities that were the subject of the registration statement were issued in the private transaction and outstanding prior to initial filing of the resale registration statement.

We believe that it is important for issuers to be able to satisfy their contractual registration obligations to selling security holders in registering their resales, while also assuring that offerings are properly registered and the selling security holders and the securities to be sold by them are identified in the registration statement. The purpose of the proposed changes is to provide a more convenient method to identify selling security holders in registration statements, rather than to change the existing responsibilities and liabilities of issuers and these selling security holders under the federal securities laws.

The proposals would require the registration statement to specify the particular private transaction in which the securities covered by the registration statement, on behalf of the to-be-named selling security holders, were acquired. The securities covered by the registration statement would have to be issued and outstanding and the private offering in which the securities were sold completed under Securities Act Rule 152 [272] before the resale registration statement could be filed. Our proposed changes could not be used to offer or sell securities in the private offering or as a way to circumvent the provisions of Rule 152.

An issuer registering the resale of securities sold in a private offering, in which the securities were not yet issued in the private offering, although the investors were contractually bound to acquire the securities, would not be able to rely on this provision to identify selling security holders who would be acquiring the securities directly from the issuer. The issuer could still register the resale of these securities, but must identify the selling security holders in the registration statement prior to effectiveness. In this case, the issuer would know the identities of the selling security holders who would acquire the securities from the issuer and would therefore be required to identify them in the resale registration statement prior to filing.[273]

We would continue to limit the availability of resale registration statements for transactions that, although in technical compliance with the federal securities laws, are part of a plan or scheme to evade the registration requirements of the Securities Act.[274]

Request for Comment

- Will the conditions allowing the inclusion of the selling security holder information after the registration statement is effective enable issuers to satisfy their contractual obligations to the selling security holders?
- Are there other situations in which selling security holders should be identified by prospectus supplement rather than by post-effective amendment?
- Should the ability to identify selling security holders by prospectus supplement be limited to seasoned issuers? If so, why?
- Should the proposal cover securities that are issuable upon conversion of outstanding securities? If yes, should there be any restrictions on the types of convertible securities that may be outstanding or the conversion terms of the outstanding convertible securities? For example, should the names of security holders holding convertible securities with fixed conversion terms be permitted to be included by prospectus supplement? Should the names of security holders holding convertible securities with variable conversion terms be permitted to be included by prospectus supplement? If yes, explain why with specificity.

ii. Information Deemed Part of Registration Statement

We are proposing provisions in Rule 430B that will make clear that information contained in a prospectus supplement, whether filed in connection with a takedown or otherwise, will be deemed part of the registration statement containing the base prospectus to which the prospectus supplement relates. We also are proposing a new Rule 430C that would

[270] General Instruction I.B.1 to Form S–3 and Form F–3 permits reporting issuers that are current and timely in their periodic and current reporting obligations under the Exchange Act and that have $75 million in non-affiliate aggregate common equity market capitalization to register securities offerings for cash on Form S–3 and Form F–3 for the benefit of the issuer or selling security holders. In addition, blank check companies, shell companies, and penny stock issuers would not be eligible to rely on this proposed rule.

Currently, the staff in the Division of Corporation Finance requires all issuers registering securities for the benefit of selling security holders to include the names of selling security holders in the registration statement either prior to effectiveness or through a post-effective amendment to the registration statement, with limited exceptions for the identities of security holders owning a *de minimis* amount of the issuers securities (less than 1%) or receiving the securities as a result of a donative transfer.

[271] Item 507 of Regulation S–K [17 CFR 229.507].

[272] 17 CFR 230.152.

[273] See proposed Rule 430B. The proposals regarding automatic shelf registration statements would provide eligible well-known seasoned issuers with additional flexibility in this regard. See the discussion in Section V.B.2 below under "Information that May be Omitted From the Base Prospectus."

[274] See proposed Rule 430B.

have similar provisions regarding the treatment of prospectus supplements that would apply to offerings made in reliance on Rule 415(a)(1)(i) and (ix).[275] As a result of the proposed rules, prospectus supplements would, in all cases, be considered part of and included in registration statements for purposes of Securities Act Section 11.

iii. Date of Inclusion of Prospectus Supplements in Registration Statements and New Effective Dates of Registration Statements

Proposed Rule 430B and proposed Rule 430C would deem information contained in prospectus supplements to be included in the registration statement as follows:

- For a prospectus supplement filed other than in connection with a takedown (pursuant to Rule 424(b)(3) or Rule 497(c) or (e)) under proposed Rule 430B and Rule 430C, as applicable, all information contained in that prospectus supplement would be deemed part of the registration statement as of the date the prospectus supplement is first used;[276] and
- For a prospectus supplement filed in connection with a takedown (pursuant to Rule 424(b)(2), (b)(5), (b)(7) or proposed Rule 424(b)(8)) under proposed Rule 430B, all information in that prospectus supplement would be deemed part of the registration statement as of the earlier of the date it is first used or the date and time of the first contract of sale of securities in the offering to which the prospectus supplement relates.[277]

We have chosen the particular triggering dates for prospectus supplements to be deemed part of registration statements for a number of reasons. First, for a prospectus supplement filed other than in connection with a takedown, we have chosen the date of first use as the appropriate date for it to be deemed part of the registration statement because that is the date on which the prospectus supplement updates the information in the registration statement.[278] Second, a prospectus supplement filed in connection with a takedown would be part of the registration statement the earlier of when it is first used or, to provide that the date for assessing Section 11 liability for both issuers and underwriters and generally all other persons having liability under Section 11, would be the same as the relevant time of sale, as discussed below.[279]

Proposed Rule 430B also would establish a new effective date for a shelf registration statement for liability purposes for a takedown or takedowns.[280] That new effective date would be the date a prospectus supplement filed in connection with the takedown or takedowns was deemed part of the relevant registration statement. The new effective date would not, however, be considered the filing of a new registration statement for purposes of Form eligibility.[281] Such determination would remain, as today, to be made at the time of the Section 10(a)(3) update to the registration statement. As proposed, the new effective date would be for liability purposes only, would not, by itself, require the filing of additional consents of experts, and would not constitute an updating of the registration statement and prospectus for purposes of Securities Act Section 10(a)(3).[282] For example, a prospectus supplement filed in connection with one or more takedowns of securities that did not include other disclosure for which the consent of an expert would be required pursuant to Securities Act Section 7 and Securities Act Rule 436[283] would not require consents to be filed or be considered the filing of a new registration statement.

The triggering of a new effective date for a takedown would not, under our proposals, affect the information that was in the registration statement at the time of any prior sale. We are revising Securities Act Rule 412 to make clear that information contained in a prospectus supplement deemed part of, or in an Exchange Act report that is incorporated by reference into, a registration statement or prospectus as of a new effective date for a takedown of securities would not modify or supersede any information that was contained in that registration statement or the prospectus for purposes of an earlier effective date with respect to a prior takedown of securities off that registration statement. Thus, the rights of an investor in a prior sale (with a previous effective date) would be unaffected by subsequently filed prospectus supplements or Exchange Act reports.

Including information contained in prospectus supplements in registration statements and having prospectus supplements filed in connection with takedowns off shelf registration statements trigger new effective dates would provide and preserve important investor protections under the Securities Act. Under these provisions final prospectuses, including prospectus supplements, used in shelf offerings would in their entirety be part of the registration statement, as we believe was contemplated by and within the intent of the Securities Act. These provisions also would reconcile the effective date for shelf offerings with a comparable date for non-shelf offerings, as we believe was also within the intent of the Securities Act. We believe the proposals also would eliminate the unwarranted, disparate treatment of underwriters and issuers and others subject to liability under Section 11.[284] Today, new effective dates of shelf registration statements occur annually at the time of the Section 10(a)(3) updates, when takedowns occur periodically

[275] Proposed Rule 430C, as discussed below, addresses only prospectus supplements filed pursuant to Securities Act Rule 424(b)(3), and the filing of those prospectus supplements would not trigger new effective dates of the registration statement.

[276] We have already made clear that the date of first use for purposes of Securities Act Rule 424 is not the date that the prospectus supplement is given to a purchaser in connection with a sale. Rather, it refers to the date that the prospectus is available to the managing underwriter, syndicate member or any prospective purchaser. See, *Elimination of Certain Pricing Amendments and Revision of Prospectus Filing Procedures*, Release No. 33–6714 (May 27, 1987) [52 FR 21252].

[277] These new provisions would determine when a prospectus supplement is deemed part of the registration statement for Securities Act Section 11 purposes. They would not affect the determination of when information was conveyed to a purchaser for Section 12(a)(2) liability purposes.

[278] See proposed amendments to Securities Act Rule 412(a) [17 CFR 230.412(a)].

[279] Our proposals also address the circumstance in which facts and information may change between the date the prospectus supplement is deemed part of the registration statement and the time of the contract of sale (if later) of securities to a purchaser. In that case, an issuer may have liability to a purchaser if, as of the first contract of sale of the securities, there were material misstatements or materials omissions such that the registration statement was misleading.

[280] We are also proposing to amend Rule 158 to include conforming changes to the effective date for purposes of Securities Act Section 11(a).

[281] See Securities Act Rule 144 and Rule 401 [17 CFR 230.144 and 230.401].

[282] See the discussion in Section V.B.1. below under "Issuer Undertakings."

[283] Securities Act Section 7 [15 U.S.C. 77g] and Securities Act Rule 436 [17 CFR 230.436].

[284] Currently, there can be a mismatch among offering participants in the time that liability is assessed. For example, in an offering from a shelf registration statement, an issuer could have its liability assessed as of the date of the registration statement's original effectiveness or the most recent updating required under Securities Act Section 10(a)(3), while the liability of an underwriter would be assessed at the later time when it became an underwriter. Thus, for example, underwriters in takedowns occurring after initial effectiveness or the Section 10(a)(3) update would be subject to liability under Section 11 for an issuer's Exchange Act reports incorporated by reference into the prospectus included in the registration statement after the Section 10(a)(3) update while issuers would not. We believe that the Securities Act contemplates that as a general matter, the date of effectiveness of a registration statement for an offering and the date on which an underwriter becomes an underwriter would be close in time and this proposed change would effect that.

throughout the year. Our proposals generally would not change the date at which disclosure is evaluated under Section 11 for underwriters but generally would move the effective date for the issuer and others subject to liability under Section 11 to the same date, or approximately the same date, as for underwriters for takedowns off shelf registration statements.

Request for Comment

- Would prospectus supplements be filed any sooner than they are today as a result of proposals that would deem the prospectus supplement part of the registration statement and trigger new effective dates if the prospectus supplement relates to a takedown off a shelf registration statement? If so, how?
- Would the ability to include information in an Exchange Act report that is otherwise required to be contained in a prospectus enable issuers to file the information reflecting the takedown prior to the end of the second business day after the takedown?
- Would investors be able to locate the information that was included in the prospectus through incorporation by reference of an Exchange Act report through the proposed cover page disclosure?
- In shelf takedowns, would investors be able to identify the effective dates for the securities sold in their particular takedown?
- In light of the new effective date for liability purposes that would be imposed by proposed Rule 430B, will there be questions regarding the necessity of providing an auditor's consent or the letter regarding unaudited financial information (see Item 601(b)(15) of Regulation S–K) for interim period takedowns for prospectus supplements that did not contain disclosure for which a consent was required? If so, what would be the appropriate means to address this possible situation?
- Would a new effective date for each takedown for liability purposes have any effect on liability for incorporated Exchange Act reports that have not been modified or superseded?
- Should proposed Rule 430C apply to prospectus supplements filed by closed-end management investment companies under Rule 497?

iv. Proposed Amendments to Rule 415

(A) Elimination of Limitation on Amount of Securities Registered

For offerings other than business combination transactions and continuous offerings, the proposals would eliminate the current provision in Securities Act Rule 415 that limits the amount of securities registered to an amount that are intended to be offered or sold within two years from the registration statement effective date.[285] The two-year requirement was designed to ensure that the issuer had a *bona fide* intention to offer and sell securities in the proximate future.[286] We are proposing to eliminate this requirement for registration statements for capital raising transactions, as we do not believe that imposing it on shelf issuers is necessary to permit shelf registration or provides any significant investor protection in view of how shelf registered offerings are effected today. We are proposing, however, that shelf registration statements could only be used for three years after the initial effective date of the registration statement.[287] Under this proposal, new shelf registration statements would have to be filed every three years, with unsold securities and unused fees carried forward to the new registration statement.[288] Continuous offerings begun prior to the end of the three years could continue on the old registration statement until the effective date of the new registration statement, at which point the continuous offerings could continue on the new registration statement. We believe that, especially with our liberalization of procedures for shelf registration, particularly automatic shelf registration as described below, the precise contents of shelf registration statements may become difficult to identify over time, and that markets would benefit from a periodic updating and consolidation requirement.[289]

Request for Comment

- Should we keep the two-year intention requirement for shelf registration issuers? If not, should we require shelf registration issuers to file new registration statements every three years? Should the period be longer, such as five years?

(B) Immediate Takedowns From a Shelf Registration Statement Filed Under Rule 415(a)(1)(x)

We are proposing to amend Securities Act Rule 415 to allow primary offerings on Form S–3 or Form F–3 to occur promptly after effectiveness of a shelf registration statement.[290] With respect to immediate offerings from an effective registration statement, our rules currently permit omission of information from the prospectus at the time of effectiveness only in reliance on Securities Act Rule 430A.[291] Our proposed changes affecting the treatment of prospectus supplements would provide sufficient protection to investors to allow, in an immediate offering, omission of information under Rule 415 and proposed Rule 430B. To provide an alternative to issuers, Rule 430A would continue to be available for immediate takedowns.[292]

Request for Comment

- Should we permit immediate takedowns off shelf registration statements without requiring reliance on Rule 430A? If not, why not?

(C) Eliminating "At-the-Market" Offering Restrictions

We are proposing to eliminate the restrictions on primary "at-the-market" offerings of equity securities currently set forth in Rule 415(a)(4),[293] initially included to address concerns about the integrity of trading markets, [294] because they no longer provide protection to markets or investors. The market today has greater information about issuers than it did at the adoption of the "at the market" limitations, due to enhanced Exchange Act reporting. Further, trading markets for issuers' securities have grown significantly since that time. Requiring the involvement of underwriters and limiting the amount of securities that can be sold imposes artificial limitations on this avenue for issuers to access capital in the markets. Once eliminated, an issuer eligible to conduct an offering pursuant to Rule 415(a)(1)(x) could conduct an "at-the-market" offering of equity securities without requiring identification of an

[285] See proposed amendments to Securities Act Rule 415(a)(2).

[286] See Securities Act Section 6(a) [15 U.S.C. 77f(a)] and *Proposed Revision of Regulation S–K and Guides for the Preparation and Filing of Registration Statements and Reports*, Release No. 33–6276 at Part III.E (Dec. 23, 1980) [46 FR 78].

[287] Our proposal would not limit the amount that could be registered.

[288] For fee carry-forward provisions, see Securities Act Rule 457(p) [17 CFR 230.457(p)].

[289] See, for example, our proposals to revise Securities Act Rule 412 to permit information in registration statements and prospectuses to be modified or superseded by subsequently filed Exchange Act reports and prospectus supplements and our proposals to revise Forms S–3 and F–3 to permit most information to be included in the prospectus through incorporation by reference.

[290] See proposed amendments to Securities Act Rule 415(a)(1)(x).

[291] See *Prospectus Delivery; Securities Transactions Settlement*, Release No. 33–7168 (May 11, 1995) [60 FR 26604] at Section II.A.5.

[292] We also propose to amend Securities Act Rule 430A [17 CFR 230.430A] to enable the rule to be relied on by issuers using automatic shelf registration statements that go effective automatically.

[293] 17 CFR 230.415(a)(4).

[294] See *Adoption of Integrated Disclosure System*, Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380] at Section IV.B.2.d.

underwriter in its registration statement [295] and without a volume limitation.

Request for Comment

• Would the continuous offering provisions of Rule 415(a)(1)(ix), which require that an issuer must be ready and willing to sell those securities at all times, provide enough protection in the case of ongoing at-the-market offerings, or is there a concern that unseasoned and non-reporting issuers would use these provisions to conduct delayed offerings for which they were not eligible? If so, should the requirements contained in current Rule 415(a)(4) regarding the amount of securities to be offered apply to those offerings?

• Are there other constraints or conditions we should impose on the types of offerings that can be conducted at-the-market?

• Should we continue to impose Form S–3 or F–3 eligibility as a condition to conducting primary "at-the-market" offerings of equity securities? Should non-reporting and unseasoned issuers be permitted to do at-the-market offerings?

v. Rule 424 Amendments

In conjunction with our other procedural proposals, we are proposing certain companion modifications to Securities Act Rule 424. First, we are proposing to amend Instruction 2 to require that any prospectus supplement filed pursuant to Securities Act Rule 434[296] (which permits the use of term sheets) must be filed at the same time as other prospectus supplements for shelf registration statement takedowns. We do not believe that prospectus supplements used by issuers relying on Rule 434 should be treated differently than any other type of offering. The liability for the information would be the same in all cases. We are also proposing to amend Rule 434 to make similar changes to the timing of a prospectus supplement filing.

Second, we are proposing to add a requirement that in cases of offerings where information regarding the terms of the securities or the plan of distribution or other information related to the offering (including changes or additions to information previously provided) is included in Exchange Act reports incorporated by reference, the prospectus supplement filed pursuant to Rule 424 would be required to disclose on its cover page the Exchange Act report or reports containing such information. This cover page disclosure would assist investors and the markets in locating this offering-related information.

Request for Comment

• Should we eliminate Rule 434, which we believe has only been very rarely used, in light of our other proposed procedural changes?

• Would the requirement to include cover page references to where omitted information about the securities or plan of distribution may be located be helpful to investors and to issuers?

vi. Issuer Undertakings

We are proposing conforming revisions to the issuer undertakings that are required in connection with a shelf registration statement. These revisions would reflect the issuer's agreement regarding the inclusion of information contained in prospectus supplements in registration statements and new effective dates of the registration statement.

(A) Treatment of Information in Prospectus Supplements

Item 512(a) of Regulation S–K currently requires an issuer to undertake to file a post-effective amendment to a registration statement to:

• Include in the registration statement any prospectus required by Securities Act Section 10(a)(3);

• Reflect in a prospectus included in the registration statement any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereto) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement; and

• Include in a prospectus included in the registration statement any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change in such information in the registration statement.[297]

Currently, shelf issuers can satisfy the first two of these obligations by filing Exchange Act periodic reports that are incorporated by reference into the registration statement. We are proposing to revise the Item 512(a) undertaking to clarify that for shelf registration statements filed on Forms S–3 and F–3 for primary offerings of securities in reliance on Rule 415(a)(1)(x),[298] all the disclosures required by this undertaking can be contained in any filed prospectus supplement deemed part of and included in a registration statement or any Exchange Act report that an issuer files that is incorporated by reference into the registration statement, instead of only in periodic reports. This would permit an issuer to use an incorporated Form 8–K (or Form 6–K) to satisfy this undertaking. As discussed below, we also are proposing to revise the undertaking to allow automatic shelf issuers to include in this manner all other information that has been omitted from the base prospectus. In the event that satisfaction of any element of the undertaking requires the filing by any of the permitted methods of a consent of an expert, that consent may be filed by post-effective amendment to Part II of the registration statement only or by filing of an Exchange Act report, such as an annual report on Form 10–K or a report on Form 8–K or Form 6–K, incorporated by reference into the registration statement.[299]

Request for Comment

• Should issuers be able to incorporate by reference Form 8–K or 6–K reports to satisfy their obligations to file post-effective amendments for certain items, in addition to those permitted today? If so, are there other disclosure and other registration statement requirements that should similarly be permitted to be satisfied through the incorporation by reference of current reports on Form 8–K or 6–K?

• Are the proposed undertakings necessary?

• Is there a method other than through undertakings to achieve our objectives effectively? What is it?

• Foreign private issuers are required to undertake to update their financial statements under Item 512(a)(4) of Regulation S–K. Should we modify this requirement? If so, how should we modify it to continue to require financial statements to be included in a registration statement within the required time?

[295] Underwriters could, as in the case with other information, be included in the relevant prospectus supplement.

[296] 17 CFR 230.434.

[297] In addition, Item 512(a)(4) contains a provision under which foreign private issuers are required to undertake to update the financial and other information in a shelf prospectus in accordance with the age of financial statements provisions under Item 8.A of Form 20–F. We are not proposing to modify this requirement. Foreign private issuers would continue to be subject to this updating requirement, by a post-effective amendment or by incorporation by reference, as currently provided for under Item 512(a)(4).

[298] For automatic shelf registration statements, this provision would not apply. See discussion in Section V.B.1 below under "Mechanics for Including Information."

[299] See Securities Act Rule 436 [17 CFR 230.436].

(B) Prospectus Supplements Deemed Part of a Registration Statement and New Effective Dates

To reflect the issuer's understanding of and agreement to the proposed changes described above, we are proposing to include a new undertaking in which the issuer would agree that information in filed prospectus supplements are deemed part of and included in registration statements and that new effective dates would occur.[300] The new undertaking would provide that the issuer would acknowledge that a prospectus supplement, other than one filed in connection with a takedown,[301] would be deemed part of and included in the relevant registration statement as of the date of its first use and that a prospectus supplement filed in connection with a takedown would be deemed part of and included in the relevant registration statement as of the earlier of the date it is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. The issuer would acknowledge that such date, in the case of a prospectus supplement filed in connection with a takedown, would also be deemed for purposes of liability to be a new effective date of the registration statement relating to the securities to which the prospectus supplement relates, and the offering of such securities at that time would be deemed to be the initial bona fide offering of the securities. The proposed undertaking would assure that the issuer would agree and other offering participants would be aware that they have liability for information that is included in or deemed part of the registration statement, that the liability of the issuer and other offering participants would be assessed as of the indicated date, and that the statute of limitations for Section 11 liability for securities sold in that takedown would commence at that time.

Because closed-end management investment companies use Securities Act Rule 415 to make shelf offerings under certain circumstances, and provide an undertaking similar to that required by Item 512(a) of Regulation S–K in their registration statements on Form N–2, we are proposing a new undertaking in Form N–2 similar to that which we are proposing in Item 512(a) of Regulation S–K.[302] We are also proposing to amend Rule 415 to clarify that investment companies filing on Form N–2 that use the rule must provide the undertaking required by Form N–2, rather than the undertaking required in Item 512(a) of Regulation S–K.[303]

Request for Comment

- Are the proposed undertakings clear as to when issuers would be liable for prospectus supplements?
- Should we require an undertaking by closed-end management investment companies in Form N–2 acknowledging that a prospectus supplement would be deemed part of and included in the relevant registration statement as of the date of its first use, similar to the undertaking we are proposing to require in Regulation S–K? What modifications to the proposed undertaking would be appropriate for closed-end management investment companies?

c. Changes to Form S–3 and Form F–3

In addition to the proposed changes that would allow additional Form S–3 or Form F–3 disclosures to be included through prospectus supplements and Exchange Act reports, we are proposing to amend Form S–3 and Form F–3 to expand the categories of majority-owned subsidiaries that would be eligible to register their non-convertible securities or guarantees under proposed General Instruction I.C. of the respective forms. The permitted circumstances would be the same as those needed for majority-owned subsidiaries to be well-known seasoned issuers. The proposed revisions would expand the use of Form S–3 and Form F–3 to allow it to be used to register offerings of guarantees by majority-owned subsidiaries of non-convertible securities of other majority-owned subsidiaries or of the parent. We believe that this expansion is appropriate in that it recognizes the various types of subsidiary guarantees that may be employed in registered debt offerings of related entities. Whether information regarding the subsidiary would have to be included in the registration statement would depend, as today, on whether the subsidiary met the eligibility conditions of Rule 3–10 of Regulation S–X and Exchange Act Rule 12h–5.[304]

Request for Comment

- Should we expand Forms S–3 and F–3 eligibility only for wholly-owned subsidiary guarantors, instead of majority-owned subsidiaries?

2. Automatic Shelf Registration for Well-Known Seasoned Issuers

a. Overview

In addition to the updating of the shelf registration process described above, we are proposing to establish a significantly more flexible version of shelf registration for offerings by well-known seasoned issuers. This version of shelf registration, which we refer to in this release as "automatic shelf registration," would involve filings on Form S–3 or Form F–3. The automatic shelf registration proposals would be in addition to the proposed communications exemptions and would allow eligible well-known seasoned issuers substantially greater latitude in registering and marketing securities. The automatic shelf registration process would continue to enable the issuer, as with other shelf registrants, to takedown securities off the shelf registration statement from time to time.[305]

For well-known seasoned issuers, we believe that the proposed modifications would facilitate immediate market access and promote efficient capital formation, without at the same time diminishing investor protection. Most significantly, the proposals would provide the flexibility to take advantage of market windows, to structure securities on a real-time basis to accommodate issuer needs or investor demand, and to determine or change the plan of distribution of securities as issuers elect in response to changing market conditions. We hope that providing these automatic shelf issuers more flexibility for their registered offerings, coupled with the liberalized communications rules we have proposed, would encourage these issuers to raise their necessary capital through the registration process.[306]

[300] See proposed Rules 430B and 430C.

[301] These supplements would be those filed pursuant to Securities Act Rule 424(b)(3).

[302] Proposed Item 34.4.d and e of Form N–2. Form N–2 is the registration form used by closed-end management investment companies to register under the Investment Company Act of 1940 and to offer their securities under the Securities Act.

[303] See proposed Rule 415(a)(3).

[304] See Rule 3–10 of Regulation S–X [17 CFR 210.3–10] and Exchange Act Rule 12h–5 [17 CFR 240.12h–5].

[305] As with other delayed shelf registration statements, the issuer would only be considered to be in registration or offering its securities when it offers securities in a takedown off its registration statement. See *e.g.*, the 2000 Electronics Release at note 62.

[306] The flexibility permitted under the proposed automatic shelf registration process would benefit issuers and investors by facilitating different types of offers that issuers currently may elect not to conduct on a registered basis. In particular, this process would facilitate the registration under the Securities Act of rights offers conducted by eligible foreign private issuers. At present, foreign private issuers frequently do not extend rights offers to their U.S. security holders because the current registration process under the Securities Act does not accommodate the timing mechanics of rights offers, which are typically announced and launched in a very short period of time. The ability of eligible foreign private issuers to use the automatic shelf registration process and to have a Securities Act registration statement become automatically

Under our proposed automatic shelf registration process, eligible well-known seasoned issuers could register unspecified amounts of different specified types of securities on automatically effective Form S–3 or Form F–3 registration statements. Unlike other issuers registering primary offerings on Form S–3 or Form F–3, the automatic shelf registration process would allow eligible issuers to add additional classes of securities and eligible majority-owned subsidiaries as additional registrants after an automatic shelf registration statement is effective. They would also be able to freely accommodate both primary and secondary offerings using automatic shelf registration. Thus, these issuers would have significant latitude in determining the types and amounts of their securities or those of their eligible subsidiaries that could be offered without any potential time delay or other obstacles imposed by the registration process.

Issuers using an automatic shelf registration statement would be permitted to pay filing fees in advance or on a "pay-as-you-go" basis at the time of each takedown off the shelf registration statement in an amount calculated for that takedown. The proposals would permit more information to be excluded from the base prospectus in an automatic shelf registration statement than from a regular shelf registration statement. The omitted information would then be included at or before the time of filing a prospectus supplement. The automatic shelf registration process, together with the loosening of the restrictions on communications, would permit well-known seasoned issuers with maximum flexibility to use a free writing prospectus to structure transactions.

b. Automatic Shelf Registration Mechanics

i. Eligibility

The automatic shelf registration statement could be used for all primary and secondary offerings of securities of eligible well-known seasoned issuers, other than those in connection with business combination transactions or exchange offers.[307] We believe that, in introducing automatic shelf registration, we should limit availability to only well-known seasoned issuers.[308]

As proposed, an issuer could file an automatic shelf registration statement if it met the eligibility criteria on the initial filing date and would reassess its eligibility at the time of each updated prospectus required by Section 10(a)(3).[309] If an issuer were no longer eligible to use an automatic shelf registration statement at the time of its Section 10(a)(3) update, it would have to either post-effectively amend its registration statement onto the form it was then eligible to use or file a new registration statement on such a form. Any offerings that were ongoing at that time, such as registered conversions of outstanding convertible securities, could continue on the automatic shelf registration statement until a post-effective amendment or new registration that was filed in a timely manner was declared effective.[310] For example, a well-known seasoned issuer that was initially eligible for automatic shelf registration, that lost eligibility at the time of Section 10(a)(3) update, but that retained its eligibility to file a shelf registration statement under Rule 415 on Form S–3, could file a post-effective amendment or a new registration statement on Form S–3 that designated an amount of securities to be registered and otherwise complied with requirements for seasoned issuers that are not well-known seasoned issuers.

In general, securities of majority-owned subsidiaries of well-known seasoned issuers could be included on the automatic shelf registration statement if the subsidiary satisfied the conditions for being considered a well-known seasoned issuer described above.[311] Under automatic shelf registration, as proposed, a registration statement could be amended by post-effective amendment to add an eligible subsidiary as an issuer.[312]

Request for Comment

- Should eligibility for automatic shelf registration be limited to well-known seasoned issuers? If not, provide empirical and other information explaining why it should be available to a broader class of issuers, including the extent to which such issuers are followed by analysts and investors in the market.

ii. Information in a Registration Statement

(A) Information That May Be Omitted From the Base Prospectus

Our proposals would allow automatic shelf issuers to omit more information from the base prospectus in an automatic shelf registration statement than is the case currently or than would be the case in a regular shelf offering registration statement. A base prospectus included in an automatic shelf registration statement could, as today, omit information pursuant to Securities Act Rule 409[313] that was unknown and not reasonably available and, as proposed, could omit the following additional information:

- Whether the offering is a primary or secondary offering;
- The names of any selling security holders; and
- Any plan of distribution for the offering securities.[314]

Omitting this additional information from the base prospectus would not affect the information that an investor would be provided in connection with a particular sale.[315]

(B) Mechanics for Including Information

We believe that our proposals to broaden the means by which issuers may include information in an automatic shelf registration statement would benefit both issuers and investors. Our proposals would provide issuers with automatic shelf registration statements the ability to add omitted information to a prospectus generally by means other than a post-effective amendment to the registration statement.[316] As we discuss above, we

effective so that sales in a rights offer can take place immediately after filing should encourage eligible foreign private issuers to extend rights offers to U.S. holders.

[307] As today, business combination transactions and exchange offers could not be registered on Form S–3 or Form F–3.

[308] Certain subsidiaries of well-known seasoned issuers would also be permitted to be included on the parent's automatic shelf registration statement.

[309] For shelf registration statements, the Section 10(a)(3) update usually occurs upon the filing of the issuer's Form 10–K or Form 20–F (or a post-effective amendment with similar updating of information) for the prior fiscal year.

[310] To be considered timely for this purpose, the post-effective amendment or new registration statement would have to be filed within the period established by Securities Act Section 10(a)(3), which is 120 days after the issuer's most recent fiscal year end.

[311] See discussion in Section II above under "Well-Known Seasoned Issuers; Other Categories of Issuers".

[312] See discussion below at note 319.

[313] 17 CFR 230.409.

[314] See proposed Rule 430B.

[315] In shelf registration statements today, base prospectuses generally do not contain detailed information about particular securities offering takedowns. That information is communicated orally or through a preliminary prospectus and reflected in the final prospectus filed pursuant to Rule 424. The automatic shelf would expand the categories of information that may be omitted. In addition, the right to omit information from a base prospectus does not affect the fact that under our interpretation and proposed Rule 159 whether there are material misstatements or material omissions is assessed on the basis of information conveyed at the time of sale.

[316] Issuers would still have the flexibility to file post-effective amendments to include the information.

are proposing to amend Forms S–3 and F–3 to permit all information required in the prospectus about the issuer and its securities to be incorporated by reference from Exchange Act reports or be contained in the prospectus or a prospectus supplement that would be deemed to be part of and included in the registration statement.[317] Examples of the types of information that could be added in this manner for automatic shelf registration statements would include the public offering price, detailed description of securities including information not contained or incorporated by reference in the base prospectus, the identity of underwriters and selling security holders, and the plan of distribution of the securities.

The principal exceptions to this approach would be that an issuer desiring to add to the registration statement new types of securities[318] or new eligible issuers, including guarantors, and the securities they intend to issue must do so by post-effective amendment.[319] New issuers and their officers and directors would be required to be signatories to the post-effective amendment.[320]

(C) Registration of Securities to be Offered

An eligible issuer may register on an automatic shelf registration statement an unspecified amount of securities to be offered, without indicating whether the securities would be sold in primary offerings or secondary offerings on behalf of selling security holders. Well-known seasoned issuers that satisfy the definition based only on their aggregated registered debt issuances could register only non-convertible obligations under General Instruction I.B.2. of Form S–3 and Form F–3. The calculation of registration fee table in the initial registration statement also would not need to include a dollar amount or specific number of securities, but would specify each class of security registered. The issuer could specify the number or dollar amount of securities in a prospectus supplement for each offering.[321]

The base prospectus in the initial registration statement would identify and describe, to the extent the information was available at that time, the classes of securities registered. As under current practice with shelf registration, the descriptions would not need to contain detailed information as to particular security terms and conditions. In addition, we are proposing to expand the unallocated shelf procedure to allow automatic shelf issuers to register classes of securities without allocating the mix of securities registered between the issuer, its eligible subsidiaries or selling security holders.[322] Allowing registration without separately allocating the registered classes of securities would, we believe, provide greater flexibility to well-known seasoned issuers in conducting registered securities offerings.

We propose to remove the current restriction that would prevent well-known seasoned issuers from adding classes of securities to an automatic shelf registration statement after effectiveness.[323] Under the proposals, a well-known seasoned issuer could add new classes of securities or securities of an eligible subsidiary to an automatic shelf registration statement at any time before the sale of those securities. In order to add new classes of securities, an issuer would file a post-effective amendment to register an unspecified amount of securities of the new class of security.[324] This requirement would make the registration statement cover each new class of securities to be offered. An issuer could provide the disclosure about the new class of securities of the issuer in the post-effective amendment to, in a prospectus supplement deemed part of and included in, or in an Exchange Act report that was incorporated by reference into the registration statement.[325]

(D) Pay-as-You-Go Registration Fees

We are proposing to permit issuers using automatic shelf registration statements to pay filing fees at the time of a securities offering—commonly known as "pay-as-you-go"—or prior to

[317] The proposed amendments would permit any information required in the prospectus pursuant to Item 3 through Item 11 of Form S–3 and Form F–3 to be included in this manner.

In addition to the other proposed changes to Rule 424 that would apply to all issuers, we are proposing to revise Rule 424 to address specifically prospectus supplements filed by shelf issuers that contain only transaction specific information, such as term sheets that have been used as free writing prospectuses.

[318] See discussion in Section V.B.2 below under "Registration of Securities to be Offered."

[319] Adding the issuer by post-effective amendment, including necessary signatures and information and filings necessary for qualification under the Trust Indenture Act of 1939 where applicable, would ensure that the entity would be considered an issuer for purposes of Securities Act Section 11 for the securities covered by the registration statement. Information about the newly added subsidiary would be required in the amended registration statement, either in a prospectus that was part of the registration statement or through incorporation by reference, unless the subsidiary was exempt from reporting pursuant to Exchange Act Rule 12h–5. The post-effective amendment also would need to include necessary opinions and consents. All disclosure items with regard to that new issuer could be incorporated by reference from the new issuer's Exchange Act reports or registration statement, or be included in a prospectus supplement or a post-effective amendment. A new effective date for Section 11 liability purposes would also occur at the time of a takedown off the registration statement, which would include that information.

[320] See Securities Act Section 6 [15 U.S.C. 77f], and the discussion in Section V.B.2 below under "Registration of Securities to be Offered".

[321] See proposed amendments to Securities Act Rules 413, 456(b), and 457(r) [17 CFR 230.413; 230.456(b), and 230.457(r)]. See also, Form S–3—General Instruction I.D.1.(b)(5) and Instructions to the Calculation of Registration Fee Table.

[322] See proposed General Instruction II.E. of Form S–3 and proposed General Instruction II.F. of Form F–3. Currently, an issuer offering securities on Form S–3 or Form F–3 is not required to specify the amount of each class of securities that it will offer, but it is required to separately register and designate the amount and classes of securities that may be offered and sold by eligible subsidiaries and selling security holders. Under our current rules, offerings for selling security holders are not considered delayed offerings under Rule 415(a)(1)(x) and thus must be separately registered or designated prior to effectiveness of the registration statement. Issuers cannot currently offer and sell securities of selling security holders using an unallocated shelf registration statement.

[323] See proposed amendments to Securities Act Rule 413.

[324] If an issuer using automatic shelf registration determined after effectiveness to add a class of debt securities or guarantees of securities to its registration statement, in addition to filing a post-effective amendment to the registration statement to register the class of debt securities or guarantees, it also would need to qualify the indenture or guarantee under the Trust Indenture Act of 1939 [15 U.S.C. 77aaa–77bbbb]. The Division of Corporation Finance has long taken the position that the indenture covering the securities to be sold pursuant to a registration statement must be qualified when that registration statement becomes effective and not at the time of any post-effective amendment to that registration statement. See Division of Corporation Finance letter to Donald P. Spencer (available September 24, 1982). This position is consistent with the existing registration process and Securities Act Rule 413, which provides that an issuer must register an offering of additional securities through the use of a separate registration statement. In the automatic shelf registration process we propose today, however, an issuer would be permitted to add securities to a shelf registration statement by means of a post-effective amendment. As such, unlike in the existing registration statement process, the effectiveness of an automatic shelf registration post-effective amendment that adds securities to a shelf registration statement would be the time "when registration becomes effective as to such securit(ies)," as that term is used in Trust Indenture Act Section 309(a)(1). Accordingly, under the proposed automatic shelf procedure, the Trust Indenture Act qualification requirement would be satisfied in the following manner: (1) For debt securities or guarantees included in the registration statement at original effectiveness, the trust indenture would be required to be included in the registration statement at the time that registration statement became effective; and (2) for debt securities or guarantees added to the registration statement through a post-effective amendment, the trust indenture would be required to be included in the registration statement at the time that post-effective amendment became effective.

[325] This disclosure would become part of the registration statement regardless of the method chosen to provide it.

that time. Under this proposal, the issuer would pay a small initial filing fee at the time of filing the initial registration statement.[326] The triggering event for a required fee payment under our proposals would be a takedown off a shelf registration statement. For each takedown, the issuer could file a prospectus supplement for the takedown that would include a calculation of registration fee table or could file a post-effective amendment including the same information. The issuer would pay the appropriate fee calculated in accordance with Securities Act Rule 457 at the time of the filing of the prospectus supplement. The proposals would require that the issuer file the prospectus supplement in accordance with the due date for the prospectus supplement under Rule 424(b)(2), (b)(5), (b)(7) or (b)(8). In addition, at any time before one or more takedowns in the future (for example, in the case of a medium-term note program), the issuer could pay the appropriate fee and file such a prospectus supplement. Our proposals would amend Rule 424 to require an issuer using automatic shelf registration and the pay-as-you-go registration fee payment procedure to include on the cover page of the prospectus supplement a fee table calculating the registration fee for the current or future takedowns for which it is paying the required fee.

(E) Registration Under Securities Act Sections 5 and 6

Compliance with Securities Act Sections 5 and 6 would depend on the timing of the necessary filings and the content of the automatic shelf registration statement (including, as we have described, amendments, incorporated documents and prospectus supplements). Securities Act Section 5 requires registration of each securities offering unless an exemption is available. Securities Act Section 6 governs how securities may be registered, including the filing of registration statements and the payment of filing fees. For purposes of Securities Act Section 5, any securities offered and sold off an effective automatic shelf registration statement would be deemed to satisfy the requirements of Securities Act Section 5(c) if the registration statement, or any amendment thereto, included that class of securities prior to the offer and sale. If the class of securities was included on the registration statement, the amendment, incorporated Exchange Act document or prospectus supplement reflecting the transaction and the fee table was filed on a timely basis, and the appropriate fee was timely paid at or before the time of filing, the securities sold in the takedown would be deemed to be registered for purposes of Securities Act Section 6. Thus, Securities Act Section 5(a) would be deemed satisfied if the automatic shelf registration statement included the class of securities sold and the filing fee was timely paid. If, however, the filing and fee payment were not made on a timely basis, the sale of the securities would not be considered registered for purposes of the Securities Act.

(F) Automatic Effectiveness

As proposed, all automatic shelf registration statements and post-effective amendments thereto would become effective automatically upon filing, without staff review.[327] In addition, we are proposing to amend Securities Act Rule 401(g) to provide that an automatic shelf registration statement would be deemed to be filed on the proper form unless we notified the issuer after filing of our objection to the use of such form. Therefore, if an issuer had not been notified by us, it could conduct offerings with certainty that it had registered the securities on the proper form. After we notified an issuer of our objection, the issuer could not proceed with subsequent offerings (those offerings not in progress), unless it amended the registration statement to the proper form, or otherwise resolved the issue with us.[328] In that case, even if we were to notify an issuer that it was ineligible to use an automatic shelf registration statement, securities sold prior to our notification would not have been sold in violation of Section 5. In the 1998 proposals, we proposed to eliminate the presumption that an effective Securities Act registration statement is on the appropriate form. Many commenters opposed that proposal due to concerns about liability for a Section 5 violation. We believe our proposals address those concerns and appropriately protect the integrity of the registration process.[329]

Automatic effectiveness of automatic shelf registration statement would not, we believe, raise investor protection concerns. As with shelf registration statements today, most, if not all, information about the issuer is included in shelf registration statements through incorporation by reference of Exchange Act reports. Such shelf registration statements permit issuers to sell securities off the shelf registration statement without previous staff review of each offering.[330] With automatic effectiveness of the automatic shelf registration statements, we would expect issuers to evaluate whether there are unresolved disclosure or accounting issues that the Commission staff has raised on the issuer's Exchange Act filings before filing the automatic shelf registration statement or at the time of its Section 10(a)(3) update to such registration statement. Our 1998 proposals would have disqualified an issuer from short-form registration if the issuer's Exchange Act reports were subject to unresolved comments issued by Commission staff. Many commenters opposed that disqualification.[331] We are not proposing a similar disqualification. However, because we believe it is important that issuers address unresolved comments, as we discuss below, we are proposing to require disclosure by accelerated filers, which include well-known seasoned issuers, of written staff comments received 180 days before an issuer's fiscal year end that the issuer believes are material and that have remained unresolved at the time of filing of the Form 10-K or Form 20-F, for a lengthy period of time.[332]

Request for Comment

- Should we permit omission of additional information from the base

[326] The initial filing fee would be applied against the fees payable in connection with the first takedown off the registration statement.

Because an issuer also would have the ability to pay any filing fee in advance of a takedown, the proposals would provide flexibility in the timing of the fee payment if the issuer satisfied the conditions to the delayed payment. We are providing this flexibility for issuers, such as those with medium term note programs, to determine the fee payment approach most appropriate for them.

[327] See proposed Rule 462(e) and (f).

[328] For ongoing offerings, such as registered exercises of outstanding warrants or options, the issuer, if it is eligible for a primary offering on Form S–3 or Form F–3, once notified by us, would have to amend the registration statement to reflect that it is not an automatic shelf registration statement. Pending effectiveness of the post-effective amendment or a new registration statement, conversions could continue.

[329] See, *e.g.*, comment letters in File No. S7–30–98 from the ABA; ACIC; CSFB; Merck & Co, Inc.; SIA; and William J. Williams, Jr.

[330] The staff of the Division of Corporation Finance would continue to review prospectus supplements that involve novel and unique securities offerings that are submitted to them prior to the issuer undertaking the offering.

[331] See, *e.g.*, comment letter in File No. S7–30–98 from the Business Roundtable; Citigroup; Jack Coffee *et al.*; Fried Frank; Morgan Stanley; New York City Bar; PricewaterhouseCoopers LLP; SIA; Sullivan & Cromwell; and William J. Williams, Jr.

[332] See proposed amendments to Form 10–K and Form 20–F. We recently announced a new policy to publicly release staff comment letters and response letters relating to disclosure filings made after August 1, 2004 that are selected for review not less than 45 days after the staff has completed a filing review. See SEC Press Release 2004–89 (Jun. 24, 2004). See discussion in Section VII.B below under "Disclosure of Unresolved Staff Comments."

prospectus under automatic shelf registration? For example, should we permit omission of all information regarding the description of securities other than the identification of the classes of securities registered?

- Should we permit omission of less information in the base prospectus under automatic shelf registration? What additional information should we require?
- Should we make automatic effectiveness optional for automatic shelf registration statements? If so, why?
- If a well-known seasoned issuer did not want automatic effectiveness of its automatic shelf registration statement, should they still be able to use the automatic shelf registration statement process?
- Should we permit well-known seasoned issuers to elect to include a delaying amendment under Securities Act Section 8(a)? If so, in what circumstances?
- Should we condition automatic effectiveness on resolution of staff comments? Why or why not?
- In view of the recent changes affecting reporting issuers with respect to their Exchange Act reports, including among other things, accelerated filing deadlines for periodic reports for accelerated issuers, and issuer certifications of periodic reports and evaluation of disclosure controls and procedures and internal controls over financial reporting, as well as changes in the listing standards intended to improve corporate governance and enhance the role of the issuer's audit committee, should we consider whether to reevaluate the factors discussed in Securities Act Rule 176[333] regarding what constitutes a reasonable investigation and reasonable grounds under Securities Act Section 11(c)? If so, please explain specifically what changes should be made and how each of those changes would work in the context of each type of registered securities offering.

(G) Duration

An automatic shelf registration statement would become effective automatically and would cover an unspecified amount of securities. The open-ended nature of such registration statements could result in a large number of post-effective amendments. We are, therefore, proposing to require issuers to file new automatic shelf registration statements every three years that would, in effect, restate their then-current registration statement and amend it, as they deem appropriate. Under our proposals, issuers would be prohibited from issuing securities off an automatic shelf registration statement that is more than three years old. Our proposals provide, however, that, so long as eligibility for automatic shelf registration is maintained, the new registration statement would be effective immediately and would carry forward the securities registered and any fee paid on the old registration statement. As a result, an issuer's securities offerings under the registration statement would be uninterrupted.[334]

Request for Comment

- Should automatic shelf registration for well-known seasoned issuers be optional, as proposed, or mandatory? Would mandatory automatic shelf registration eliminate any market overhang effect? Would it create any uncertainty?
- Should we treat automatic shelf registration statements the same as non-automatic shelf registration statements and require that a new automatic shelf registration statement be filed every three years? If so, is three years appropriate or should we increase the requirement to five years or reduce it to two years?
- Is the pay-as-you-go filing fee procedure workable? Could it be made more workable? If so, how?
- What advantages or disadvantages would result from mandatory automatic registration in terms of the inability to undertake unregistered private offerings or other unregistered offerings?
- Should we provide by rule or interpretation guidance regarding the ability of issuers to undertake private offerings while they have automatic shelf registration statements on file?
- Should we adopt a less stringent presumption of proper form that would allow the Commission to object within some period of time after the initial filing (and automatic effectiveness) instead of on a prospective basis? What would be an appropriate period of time? 10 days? 15 days?

3. Unseasoned Issuers and Non-Reporting Issuers

a. Overview

We are proposing a number of procedural changes that would affect reporting issuers, that are not seasoned issuers. These include:

- Expanding the circumstances under which issuers may incorporate information from their Exchange Act reports into their Securities Act registration statements;[335] and
- Eliminating Form S–2 and Form F–2.

The provisions of proposed Rule 430C discussed above regarding prospectus supplements used in continuous offerings also would affect offerings by non-reporting issuers and reporting issuers that are not seasoned issuers.[336]

b. Proposed Amendments to Form S–1 and Form F–1—Expanded Use of Incorporation by Reference

i. Eligibility

As part of our initiatives to integrate further the Exchange Act and the Securities Act, we are proposing to amend Form S–1 and Form F–1 to permit a reporting issuer that has filed at least one annual report and that is current in its reporting obligation to incorporate by reference into its Form S–1 or Form F–1 information from its previously filed Exchange Act reports and documents.[337] Successor registrants could incorporate by reference if their predecessors were eligible.[338] The ability to incorporate by reference into a Form S–1 or Form F–1 would not be available to those issuers who are in the category of "ineligible issuers." As we discuss above, ineligible issuers include:

- Reporting issuers who are not current in their Exchange Act reports;
- Issuers who are (or were, or their predecessors were, in the past three years) blank check issuers;
- Issuers who are (or were, or their predecessors were, in the past three years) shell companies;
- Issuers who are (or were, or their predecessors were, in the past three years) penny stock issuers;
- Issuers who have received a "going concern" opinion from their auditors for the most recent fiscal year;
- Issuers who have filed for bankruptcy or insolvency during the past three years;

[333] 17 CFR 230.176.

[334] We are proposing a similar three-year requirement for non-automatic shelf issuers. See discussion in Section V.B.1. above under "Elimination of Limitation on Amount of Securities Registered."

[335] See proposed amendments to Form S–3 and Form F–3.

[336] See discussion in Section V.B.1 above under "Information Deemed Part of Registration Statement."

[337] As with Form S–3, under the proposal, to be current, at the time of filing the registration statement, the issuer must have filed all materials required to be filed pursuant to Exchange Act Sections 13, 14 or 15(d) [15 U.S.C. 78m, 78n, or 78o(d)] during the preceding 12 calendar months (or for such shorter period that the issuer was required to file such materials).

[338] This is the same as for Form S–2 today. The succession would either have to be primarily for the purpose of changing the state of incorporation of the issuer or because all of the predecessor issuers were eligible at the time of the succession and the issuer continues to be eligible.

• Issuers who have been or are the subject of refusal or stop orders under the Securities Act; or

• Issuers who have been found to have violated the federal securities laws, have entered into a settlement with any government agency involving allegations of violations of federal securities laws, or have been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the federal securities laws [339] during the past three years.[340]

In addition, the ability to incorporate by reference would be further conditioned on the issuer making its Exchange Act reports and other documents readily accessible on the issuer's web site. Today, all information must be included directly in the prospectus included in the registration statement. By conditioning the ability to incorporate by reference on the ready accessibility of an issuer's Exchange Act reports and documents on its web site, we are providing investors the ability to obtain the information from those reports and documents at the same time that they would have been able to obtain the information if it was set forth directly in the registration statement.

ii. Proposed Procedural Requirements

As proposed, the prospectus in the registration statement at effectiveness would identify all Exchange Act reports and documents, such as proxy and information statements, that are incorporated by reference. There would be no incorporation by reference of Exchange Act reports and documents not identified in and filed after the registration statement was effective—known as "forward incorporation." Under the proposals, an issuer eligible to incorporate by reference its Exchange Act reports and other documents into its Securities Act registration statement would list the incorporated reports and documents, state that it would provide copies of any incorporated reports or documents on request, and indicate that the reports and documents are available from us through our EDGAR system or our public reference room. The Form S–1 or Form F–1 would have to include material changes in or updates to the information that is incorporated by reference from an Exchange Act report or document.

[339] The covered decrees or orders would be prohibitions on future violations of the federal securities laws, orders requiring issuers to cease and desist from violating the federal securities laws, and determinations of violations of the federal securities laws.

[340] See proposed amendments to Form S–1 and Form F–1.

Request for Comment

• Should we require as a condition to incorporation by reference that all Exchange Act reports within a 12-month period (or such shorter period that the issuer was required to file such materials) have been timely filed?

• Should there be other eligibility conditions? If so, what should they be?

• Should we have the same ineligibility conditions as we have for the use of a free writing prospectus? Should there be other ineligibility provisions for financially troubled issuers?

• Should there be ineligibility provisions for issuers that have disclosed a material weakness in their internal controls over financial reporting?

• Should we consider allowing forward incorporation by reference in Form S–1 and Form F–1? If so, what conditions should we impose on such use?

• Should we require that issuer's maintain their own web sites as a condition to incorporation by reference or should the issuer be able to provide a uniform resource locator (URL) to the particular location on another web site, such as the Commission's, where the issuer's Exchange Act reports would be located? How long should the issuer be required to include the information on its web site or provide the URL to where the reports are located?

c. Elimination of Form S–2 and Form F–2

The purposes underlying the disclosure and delivery requirements of Form S–2 and Form F–2 are to minimize duplicative reporting, while still requiring that the incorporated information be delivered with the prospectus. It appears that the premises underlying Form S–2 and Form F–2 have become outdated in view of the introduction of EDGAR, other technological developments, and the rapid dissemination of information in the market. Also, these forms have not been widely used, particularly for the purposes they were intended.[341] Expanding the types of issuers that may incorporate by reference through our proposed amendments to Form S–1 and Form F–1, without requiring delivery of the incorporated documents, would make Form S–2 and Form F–2 superfluous. We are, therefore, proposing to rescind Form S–2 and Form F–2.[342]

[341] According to data obtained from our internal Filing Activity Tracking System ("FACTS"), over the last three years, a total of 10 Form F–2s have been filed by 9 different issuers and a total of 253 Form S–2s have been filed by 153 different issuers.

Request for Comment

• Should we eliminate Forms S–2 and F–2? If not, why not? What types of reporting issuers would continue to use Form S–2 and Form F–2 if the proposed amendments to Form S–1 and Form F–1 regarding incorporation by reference are adopted?

VI. Prospectus Delivery Reforms

A. Current Prospectus Delivery Requirements

The Securities Act requires delivery of a prospectus meeting the requirements of Securities Act Section 10(a), known as a "final prospectus," to each investor in a registered offering.[343] After the effective date of a registration statement, a written communication that offers a security for sale or confirms the sale of a security may be provided if a final prospectus is sent or given previously or at the same time.[344] Otherwise, such a communication is a prospectus and may not be provided unless it meets the requirements of Securities Act Section 10(a). A written confirmation is not designed to meet these requirements. Therefore, a final prospectus must accompany or precede a written confirmation. In addition, Securities Act Section 5(b)(2) makes it unlawful to deliver a security "unless accompanied or preceded" by a final prospectus.

Under these requirements, in the current system, if no preliminary prospectus or written selling materials are distributed, the final prospectus is the only prospectus received by investors.[345] However, an investor's investment decision and the sale of securities to the investor in the offering generally occur before the final prospectus is required to be delivered under the Securities Act. Moreover, for sales occurring in the aftermarket, as a result of our rules, investors in securities of reporting issuers are not

[342] We are proposing to amend Forms S–4 and F–4 to delete the references to Forms S–2 and F–2.

[343] Congress intended that the prospectus provide investors with "the means of understanding the intricacies of the transaction. * * *" H.R. Rep. No. 85, 73rd Cong., 1st Sess. 8 (1933).

[344] The term "prospectus," as defined in Securities Act Section 2(a)(10), includes any written communication that "offers a security for sale or confirms the sale of any security; except that * * * a communication provided after the effective date of the registration statement * * * shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 10" is sent or given.

[345] *See* Securities Act Rule 174(b) [17 CFR 230.174(b)].

delivered a final prospectus.[346] Accordingly, the greatest utility of a final prospectus may be as a document that informs and memorializes the information for the aftermarket. Actual delivery to purchasers is not necessary to satisfy this purpose.[347]

We have previously adopted a number of other rules to address prospectus delivery in primary offerings and secondary market transactions. Securities Act Rule 153 addresses delivery of final prospectuses in transactions between brokers taking place over a national securities exchange.[348] Securities Act Rule 434 was intended to ease the burden of prospectus delivery within the T+3 settlement cycle by permitting delivery of a final prospectus to be made in multiple documents at different intervals in the offering process.[349]

Many of our recent rulemakings to improve the content and timing of a reporting issuer's Exchange Act filings, together with the communications and procedural changes we are proposing today, are aimed at providing more information to investors when they need it to make informed investment decisions. The increase in the flow of current information about a reporting issuer and the proposed ability of offering participants to use free writing prospectuses in connection with offerings would give offering participants a greater ability to provide information to investors about the securities before they make their investment decisions. Further, rapid technological advances in the area of information delivery have resulted in greater access to information. For example, prospectuses and other filings now are available through EDGAR and other electronic sources, including the Internet, immediately upon filing.[350]

B. Prospectus Delivery Proposals

We are proposing changes to the prospectus delivery requirements. Our proposals are intended to facilitate effective access to information, while taking into account advancements in technology and the practicalities of the offering process. These changes are intended to alleviate timing difficulties that may arise under the current securities clearance and settlement system, and also to facilitate the successful delivery of, and payment for, securities in a registered offering.

We have attempted to address the goal of ensuring that investors have materially complete and accurate information at the time of their investment decision through other aspects of our proposals and believe it is also appropriate at this time to modify the prospectus delivery provisions. Given that the final prospectus delivery obligations generally affect investors only after they have made their investment decisions and that investors and the market have access to the final prospectus upon its filing, we believe that the obligation could be satisfied through a means other than physical delivery. Because the contract of sale has already occurred, we also believe that delivery of a confirmation and the delivery of the final prospectus need not be linked.[351]

Many commenters and market participants have encouraged us to adopt an "access equals delivery" model for prospectus delivery.[352] Under an "access equals delivery" model, investors are presumed to have access to the Internet, and issuers and intermediaries can satisfy their delivery requirements if the filings or documents are posted on a Web site. The access concept is premised on the information or filings being readily available.

At this time, we believe that Internet usage has increased sufficiently to allow us to propose a prospectus delivery model for issuers and their intermediaries that relies on timely access to filed information and documents.[353] Under this model, issuers, brokers, or dealers can satisfy their final prospectus delivery obligations if a final prospectus is on file with the Commission within the required time.

Our proposals would:

- Eliminate the existing link between delivery of the final prospectus and the delivery of a confirmation of sale;
- Provide that the obligation to have a final prospectus precede or accompany a security for sale could be satisfied by filing the final prospectus with us within the required time;
- Permit written notices of allocations; and
- Permit the prospectus delivery obligations in dealer transactions during any prospectus delivery period and registered resale transactions in securities that are trading to be satisfied if the final prospectus has been filed with us or will be filed with us within the required time.

1. Access Equals Delivery

a. Proposals

We are proposing new Rule 172[354] to implement our access equals delivery model.[355] Under the proposed rule, a final prospectus would be deemed to precede or accompany a security for sale for purposes of Securities Act Section 5(b)(2) as long as the final prospectus meeting the requirements of Securities Act Section 10(a) is filed with us as part of the registration statement by the

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[346] For non-reporting issuers who are listed, as of the offering date, on a national securities exchange or automated quotation system, we only require that prospectuses be delivered for 25 days after the offering date. *See* Securities Act Rule 174(d) [17 CFR 230.174(d)].

[347] Professor Louis Loss has noted that "[a] prospectus that comes with the security does not tell the investor whether or not he or she should buy; it tells the investor whether he has acquired a security or a lawsuit." L. Loss & J. Seligman, *Securities Regulation*, section 2–b–3 (3d ed. 2001). *See also* Cohen, *Truth in Securities Revisited*, 79 Harv. L. Rev., note 15 at 1386 (1966) (criticizing the requirement that a final prospectus be delivered after an investment decision is made and noting that information essential to a transaction should, to the extent practicable, be required be provided in time for use in an investment decision). The final prospectus also can be a basis for liability claims under Securities Act Section 12(a)(2).

Our proposed Rule 159 would also provide that liability under Section 12(a)(2) would be assessed based on the information conveyed at the time of the contract of sale, independent of the contents of the final prospectus filed after the time of sale.

[348] *See* Securities Act Rule 153 [17 CFR 230.153].

[349] Securities Act Rule 434 allows issuers and other offering participants to meet their prospectus delivery requirement by delivering a preliminary prospectus and a term sheet or abbreviated term sheet before or at the time of sale. The information contained in the preliminary prospectus, confirmation and term sheet or abbreviated term sheet must, in the aggregate, meet the informational requirements of Securities Act Section 10(a).

[350] Paper copies also remain available through our public reference room.

[351] Courts have consistently held that the date of a sale is the date when the investment decision is made, not the date that a confirmation is sent. See discussion at note 240 above.

[352] Commenters on prospectus delivery aspects of the 2000 Release indicated support for some sort of "access equals delivery" model. See comment letters in File No. S7–11–00 from ACCA; New York City Bar; SIA; and TBMA.

[353] Internet usage in the United States has grown considerably since 2000 when we published our most recent interpretive guidance on the use of electronic media in securities offerings, including with regard to prospectus delivery by electronic means. For example, recent data indicates that 75% of Americans have access to the Internet in their homes, and that those numbers are increasing steadily among all age groups. *See, Three out of Four Americans Have Access to the Internet*, Nielsen//NetRatings, March 18, 2004; Robyn Greenspan, *Senior Surfing Surges*, ClickZNetwork, Nov. 20, 2003 (citing statistics from Neilsen/NetRatings and Jupiter Research). In addition, there is evidence suggesting that the "digital divide" is diminishing. See, for example, Kristen Fountain, *Antennas Sprout, and a Bronx Neighborhood Goes Online*, The N.Y. Times, June 10, 2004 at G8; Steve Lohr, *Libraries Wired, and Reborn*, The N.Y. Times, Apr. 22, 2004 at G1.

[354] See proposed Rule 172.

[355] This proposed prospectus delivery model would be in addition to Rules 153 and 174, as we propose to amend those rules. See discussion in Section VI.B.3 under the heading "Transactions Taking Place on an Exchange or Through a Registered Trading Facility—Rule 153" and in Section VI.B.4 under the heading "Aftermarket Prospectus Delivery—Rule 174".

required Rule 424 prospectus filing date.[356]

Our proposed "access equals delivery" model would continue to satisfy the principal statutory purposes of prospectus delivery while recognizing the need to modernize the obligations in view of technological and market structure developments.[357]

b. Exceptions to the Proposals

We have excluded certain types of offerings from the proposed rule because either they do not raise the same issues as in corporate capital formation transactions or they are already subject to rules unique to their offerings. For example, in offerings made pursuant to Form S–8, the final prospectus is never filed with us and thus, these offerings do not raise the same types of issues as other capital formation transactions. Business combination transactions and exchange offers also differ from other types of offerings registered under the Securities Act because the proxy rules and tender offer rules in conjunction with state law impose informational and delivery requirements in those transactions. The information contained in the final prospectus therefore would be delivered regardless of the Securities Act's requirements. Moreover, it is important to retain consistency among the various rules and regulations applicable to these business combinations and exchange offers.[358]

Finally, registered investment companies and business development companies would not be able to rely on the proposed rule. These entities are subject to a separate framework governing communications with investors, and we believe that it would be more appropriate to consider any changes to our prospectus delivery requirements as they apply to registered investment companies and business development companies in the context of a broader reconsideration of this framework.

c. Notification

In addition to providing access to information, prospectus delivery can serve the function of informing investors that they purchased securities in a registered transaction. To preserve this function, we are proposing Rule 173, which provides that for each transaction involving a sale by an issuer or underwriter to a purchaser or a sale in which the final prospectus delivery requirements apply, each underwriter, broker or dealer participating in a registered offering (or, if the sale was effected by the issuer and not an underwriter, broker or dealer, then the issuer) may send to each purchaser from it, not later than two business days after the completion of the sale, in lieu of the final prospectus, a notice providing that the sale was made pursuant to a registration statement or a final prospectus pursuant to a registration statement.

The proposed Rule also would provide that an investor could request a final prospectus. Under the proposed rule, a requested final prospectus would not have to be provided before settlement.[359]

We propose to exempt compliance with proposed Rule 173 from being a condition to the exemption from final prospectus delivery under proposed Rule 172 and non-compliance with proposed Rule 173 would not result in a violation of Securities Act Section 5. The same offerings excluded pursuant to proposed Rule 172, as discussed above, would also be excluded from this notification provision.[360]

Request for Comment

- Would the adoption of the proposed condition that the final prospectus be on file within the required filing time period of Rule 424 affect either the timing of filing of final prospectuses or the use of the proposed rule?
- Should we consider any cure provisions in the event that the final prospectus is not filed within the required timeframe? Or notice inadvertently not included?
- Would the cost of receiving a final prospectus shift to an investor so that the investor would not access the final prospectus?
- Should investors be able to request a copy of a prospectus in all cases?
- Should we restrict the operation of the provisions only to capital formation transactions?
- Should we limit the operation of the new proposed rule regarding prospectuses only to offerings made in reliance on Rules 430 and 430A, and proposed Rule 430B?
- Should the proposed rules be available for continuous and best efforts offerings, where the final prospectus may be used by the issuer and underwriters or placement agents to offer and sell the securities?
- Should we consider extending an access equals delivery concept to the obligation in Exchange Act Rule 15c2–8 to deliver preliminary prospectuses?
- Commenters and others have recommended that we amend our rules to provide that confirmations incorporate by reference the final prospectus.[361] Given our broad exemptive authority to address the issue more directly, we have not proposed such an approach. Would it be more appropriate to provide that confirmations incorporate by reference the final prospectus? If so, why?
- Should we condition the availability of proposed Rule 172 on an issuer either posting the final prospectus on its web site or providing a hyperlink directly to the final prospectus on EDGAR? Alternatively, should we require issuers to disclose whether or not their final prospectuses will be available on an issuer's web site, if it has one, after the final prospectus is filed on EDGAR?
- Is the notice requirement of proposed Rule 173 appropriate? What should be the timeframe for the notice proposed to be required under proposed Rule 173? Should it be longer than the two business days?
- Should we amend the rules regarding record making and keeping by registered brokers and dealers to clarify any obligation arising under this proposal if we adopt this proposal?

[356] Rule 424, which we propose to amend, governs when final prospectuses must be filed with the Commission.

A final prospectus only filed as provided in proposed Rule 172 would not be considered to be sent or given prior to or with a written offer within the meaning of clause (a) of Securities Act Section 2(a)(10). Written offers prepared or paid for by non-reporting and unseasoned issuers after availability of the final prospectus could be used only if the final prospectus preceded or accompanied the written offer. For those issuers, filing under proposed Rule 172 would not satisfy this requirement to provide the final prospectus under proposed Rule 433.

[357] We are not proposing to amend Exchange Act Rule 15c2–8(d) [16 CFR 15c2–8(d)], which requires broker-dealers to take reasonable steps to comply promptly with written requests for copies of the final prospectus.

[358] Securities Act Rule 162 [17 CFR 230.162] provides, however, a final prospectus delivery exemption in certain registered exchange offers subject to Exchange Act Rules 13e–4(e) [17 CFR 240.13e–4(e)] or 14d–4(b) [17 CFR 240.14d–4(b)].

[359] The final prospectus also could, as today with regard to offerings relying on Securities Act Rule 434, be comprised of a set of documents which, taken together, satisfy the information requirements of Securities Act Section 10(a). See discussion in Section V.B.1 above under "Information Deemed Part of Registration Statement."

[360] In addition, as a result of the operation of proposed Rule 172 and Rule 173, if a current final prospectus has been filed with us, final prospectuses would no longer be required to be delivered in connection with market making transactions by dealers affiliated with issuers.

[361] Joseph McLaughlin, "Ten Easy Pieces for the SEC," 18 Rev. Secs. & Comms. Reg. 200 (1985); "Report of the Task Force on Disclosure Simplification," *www.sec.gov/news/studies/smpl.htm* (Mar. 5, 1996), "Report of the Advisory Committee on the Capital Formation and Regulatory Process," *www.sec.gov/news/studies/capform.htm* (July 24, 1996); comment letters in File No. S7–30–98 from the ABA and Gerald S. Backman, *et.al.*

2. Confirmations and Notices of Allocations

We are proposing an exemption from Securities Act Section 5(b)(1) to allow written confirmations and notices of allocation to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus.[362] The exemption would be conditioned on the registration statement being effective and the final prospectus meeting the requirements of Securities Act Section 10(a) being filed with us within the required timeframe. The exemption would permit:

- Confirmations containing information limited to that called for in Exchange Act Rule 10b–10 [363] and other information customarily included in confirmations; and
- Written communications from a broker-dealer to a customer or from an underwriter to participating dealers in the selling group notifying them of the basic terms of the transaction or their allocations of securities in a registered offering.

Under the proposed exemption, for example, broker-dealers could send e-mail notices after effectiveness to inform investors in a public offering of their allocations. Under the proposed rule, the notices of allocations could include the name of the securities, the amount allocated to the customer, the price of the securities, and the date or expected date of settlement and incidental information. Similar information would be required for notices to participating dealers. The exemption would not be available for the same offerings excluded from the access equals delivery proposal discussed above.

Request for Comment

- Should the notice of allocation include other information? If so, what type of information should be included in these communications?
- Should the notice of allocation to participating dealers be required to contain any particular information?
- Should any information be restricted or prohibited in the notices?
- Should we amend the record making and keeping rules by registered brokers and dealers if adopt this proposal?

3. Transactions Taking Place on an Exchange or Through a Registered Trading Facility—Rule 153

Securities Act Rule 153 [364] addresses delivery of final prospectuses in transactions taking place between brokers over a national securities exchange; it does not currently apply to transactions on an automated quotation system such as the Nasdaq Stock Market. Rule 153 provides that where members of the exchange are on both sides of the transaction and the transaction is effected on that exchange, the Section 5 delivery obligation of a final prospectus before or with a security will be satisfied if the issuer or underwriter delivers copies of the final prospectus to the exchange.[365] Rule 153 has limited utility today because it may be relied on only for transactions between brokers on an exchange. The difficulty in prospectus delivery that Rule 153 was designed to address—the difficulty or inability to identify the ultimate buyer—has expanded since 1936 with the rise in transactions effected on markets other than national securities exchanges such as the Nasdaq stock market and alternative trading systems, the growth of the book entry system and street name holdings.[366] In addition, the paper based system upon which Rule 153 is premised is outmoded and unnecessary due to electronic filings of final prospectuses on EDGAR and the technological resources of market members. There is currently effectively no significance to the paper copies of prospectuses delivered to national securities exchanges.

We believe it is important, therefore, to amend Rule 153.[367] Under our proposed amendments, brokers or dealers effecting transactions on an exchange or through any trading facility registered with us [368] would be deemed to satisfy their prospectus delivery obligations under Securities Act Section 5(b)(2) with regard to transactions in securities that are already trading on the market or through the trading facility if:

- The final prospectus is on file with us or will be on file with us by the applicable prospectus filing date;
- Securities of the same class are trading on an exchange or through any trading facility registered with us; and
- The registration statement relating to the offering is effective and not the subject of a stop order issued under Securities Act Section 8.

These changes would eliminate the difficulties for prospectus delivery in registered resales and other sales into existing trading markets where securities of the same class already are trading. We would not require as part of the rule that physical copies of the prospectus are sent to the exchange or a market maker and the exchange and the market maker no longer would need to keep track of any prospectuses.[369]

Our 1998 proposals recommended eliminating Rule 153. Commenters on that proposal were concerned that elimination of the Rule would cause difficulty because of the inability to identify buyers in exchange and other market transactions. Because the 1998 proposals would have taken another approach to prospectus delivery than we are proposing, we believe that our proposed modifications to Rule 153 would address commenters' concerns.

Request for Comment

- Are our beliefs accurate regarding the current use of Rule 153 and the additional impracticalities caused by transactions through other markets or on other trading facilities?
- Is there a reason why continued delivery to an exchange or to a market maker would be helpful?
- Should there be a requirement for the issuer, broker or dealer to notify the exchange or trading facility that the final prospectus is or will be on file with us?
- Should our new proposals apply to all transactions effected through a national securities exchange or through a facility of a national securities association or an alternative trading system?
- Is there a reason to repeal Rule 153 in its entirety in view of proposed Rule 172?
- How are prospectus delivery obligations of selling security holders satisfied today?

[362] *See* proposed Rule 172.

[363] 17 CFR 240.10b–10.

[364] 17 CFR 230.153.

[365] Securities Act Rule 153 is an interpretive rule defining the phrase "preceded by a prospectus" as used in Securities Act Section 5(b)(2).

[366] In connection with a proposed rulemaking in 1976, we solicited comment on extending the procedures available under Securities Act Rule 153 to transactions effected on the automated quotation system of a national securities association registered under Exchange Act Section 15A, at least initially for Form S–8 transactions. See *Effective Date of Amendments to Registration Statement and Possible Expansion of Definitional Rule,* Release No. 33–5768 (Nov. 22, 1976) [41 FR 52701]. Two years later, these plans were deferred for further consideration due to lack of public interest and input at the time. See *Effective Date of Amendments to Registration Statement and Expansion of Definition Rule,* Release No. 33–5978 (Sep. 18, 1978) [43 FR 43725]. Many trading markets allow market participants to preserve their anonymity, thus making it difficult or impossible to identify the ultimate buyer. The growth in the book entry system and the fact that most securities are held in street name exacerbates the problem.

[367] The proposed amendment would not supersede the exemption in Securities Act Rule 174 for transactions in securities of reporting issuers.

[368] This would include national securities exchanges, trading facilities of a national securities association and alternative trading systems.

[369] If we adopt the proposed changes to Rule 153, our interpretation in Question 11 in *Use of Electronic Media For Delivery Purposes,* Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458] would no longer be effective.

• Should the rule be available to primary offerings of securities by issuers? Such as issuer sales of securities into an existing trading market?

4. Aftermarket Prospectus Delivery—Rule 174

Unless our rules provide otherwise, all dealers are required to deliver a final prospectus for a specified period after a registration statement becomes effective to persons who buy the securities in the aftermarket.[370] Securities Act Rule 174 exempts from aftermarket prospectus delivery any transaction relating to securities of a reporting issuer. The rule applies only to dealers and does not apply to underwriters or dealers continuing to act as such with regard to any unsold allotment. If the transaction relates to securities of a non-reporting issuer that will be listed on a national securities exchange or quoted on an electronic inter-dealer quotation system, current Rule 174 sets an aftermarket delivery period of 25 days. For offerings of securities of non-reporting issuers that will not be so listed or quoted and offerings by blank check companies, Rule 174 sets an aftermarket prospectus delivery period of 90 days after effectiveness or after the funds are released from the escrow or trust account, as the case may be. Where a registration statement relates to offerings to be made from time to time, Rule 174 provides that there is no aftermarket delivery requirement once the initial period expires. The underlying purpose of aftermarket prospectus delivery was to assure wide dissemination of information about the issuer in the market. For reporting issuers, the Rule assumes that the information is already disseminated and so eliminates the prospectus delivery requirement for these issuers. We believe that, where information regarding all issuers is largely disseminated other than through physical delivery, including through EDGAR, physical delivery of a final prospectus in the aftermarket is of limited utility and necessity.

We are, therefore, proposing to revise Rule 174 to provide that during the aftermarket period, dealers can rely on proposed Rule 172 to satisfy any aftermarket delivery obligations (other than for blank check companies).

[370] Securities Act Section 4(3), which provides an exemption from Section 5 for transactions by dealers, is not available for the later of either 40 days or 90 days after the later date of the effectiveness of the registration statement or the first bona fide offer of the security. The 90-day period applies to securities of issuers who have not previously registered under the Securities Act. The 40-day period applies to securities of issuers who have previously registered under the Securities Act.

Request for Comment

• Should proposed Rule 172 be made available to aftermarket delivery obligations as proposed?

• Are there other changes that should be made to Rule 174 that would assist dealers in satisfying their aftermarket delivery obligations?

• As proposed, consistent with existing Rule 174(g), we propose to retain specific prospectus delivery obligations for blank check companies. Should blank check companies be excluded from proposed Rule 172 or proposed Rule 174 or, if not, should there be additional requirements in proposed Rule 172 or proposed Rule 174 for blank check companies? Should shell companies and penny stock issuers be eligible to use proposed Rule 172 and proposed Rule 174?

VII. Additional Exchange Act Disclosure Proposals

A. Risk Factor Disclosure

Many Securities Act registration statements require an analysis of the risks associated with an investment in an issuer's securities. Items 503(c) of Regulation S–K and Regulation S–B [371] describe that required disclosure as a "discussion of the most significant factors that make the offering speculative or risky." The risk factor section is intended to provide investors with a clear and concise summary of the material risks to an investment in the issuer's securities.

We propose to extend risk factor disclosure to annual reports on Forms 10–K and registration statements on Form 10.[372] We are not proposing to extend this requirement to Forms 10–KSB or Form 10–SB. As with risk factor disclosure that is required in Securities Act registration statements, risk disclosure in Exchange Act registration statements and annual reports would describe the most significant factors that may adversely affect the issuer's business, operations, industry or financial position, or its future financial performance. Risk factor disclosure under the Exchange Act would be the same type of Item 503 disclosure as in a Securities Act registration statement, other than information about a particular securities offering. We also are proposing that the risk factor disclosure in Exchange Act reports be written in accordance with the same "plain English" standards as apply to risk factor disclosure in Securities Act registration statements.[373] Our proposals would also require quarterly updates to the risk factors disclosure to reflect any material changes from risks previously disclosed in Exchange Act reports. They would not otherwise require a restatement or repetition of risk factors in quarterly reports.

The proposed requirement to include risk factor disclosure in Exchange Act filings would, we believe, further enhance the contents of Exchange Act reports and their value in informing investors and the markets. Further, requiring risk factor disclosure in Exhange Act registration statements and annual reports, would enhance the ability of reporting issuers to incorporate risk factor disclosure from Exchange Act reports into Securities Act registration statements to satisfy the risk factor disclosure requirements.[374]

We are proposing to require updated risk factor disclosure in quarterly reports because we believe that issuers who are required to file quarterly reports already need to undertake a review of changes in their operations, financial results and conditions and other circumstances in order to prepare the other portions of the quarterly report, including the financial statements and MD&A.[375] Therefore, we believe that issuers should be able to, on a quarterly basis, identify changes to risk factors affecting them.

We proposed including risk factor disclosure in the 1998 proposals, and

[371] See Item 503(c) of Regulation S–K [17 CFR 229.503(c)] and Item 503(c) of Regulation S–B [17 CFR 228.503(c)].

[372] See proposed amendments to Form 10–K and Form 10. Form 20–F (the form used for annual reports and Exchange Act registrations for foreign private issuers) already requires risk factor disclosure. See Item 3.D. of Form 20–F. The 1998 proposals also proposed risk factor disclosure in annual reports. The Advisory Committee Report contained similar recommendations. See the Advisory Committee Report note 20 at Section II.B.4.

[373] Securities Act Rule 421 requires issuers to write and design their risk factor disclosure in registration statements using plain English principles. See also Updated Staff Legal Bulletin No. 7 (June 7, 1999), question no. 3. The plain English rules applicable to Securities Act registration statements already apply to risk factor disclosure in Exchange Act reports incorporated by reference into Securities Act registration statements.

[374] We note that many issuers have included risk factor disclosure in their Exchange Act reports for a number of years. See comment letter in File No. S7–30–98 from the Business Roundtable.

Issuers may already include risk factor disclosure in their Exchange Act reports for varying reasons, including to take advantage of the safe harbor for forward looking statements in Securities Act Section 27A and the bespeaks caution defense developed through case law. *See, e.g., In re Donald Trump Sec. Litig.*, 7 F.3d at 371; *P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92, 97 (2d Cir., 2004); *In re Sprint Corp. Sec. Litig.*, 232 F. Supp. 2d 1193 (D. Kan. Sept. 30, 2002).

[375] Moreover, issuers will already have in place disclosure controls and procedures and internal controls over financial reporting that should alert them to new or changing material risks affecting the issuer.

many commenters supported this requirement.[376] Other commenters opposed any risk factor disclosure requirement for Exchange Act reports, for varying reasons, including that the information is already included elsewhere in the reports, an increased burden on issuers, and possible increased litigation arising from the risk disclosure.[377] Commenters also suggested that the risk factor disclosure standard should be similar to that contained in Securities Act Section 27A—"important factors that could cause actual results to differ materially from those in forward-looking statements"—rather than the standard reflected in Item 503 of Regulation S–K.[378] Because one of our goals is to further integrate the Securities Act and the Exchange Act, we believe it is important to establish consistent disclosure standards. We, therefore, are proposing to require compliance with Item 503, *i.e.* the most significant risks facing an issuer. We also note that the Section 27A provisions are aimed at providing protections where forward-looking statements are included, rather than providing protections for all discussions of the risks facing an issuer, but observe that issuers could appropriately use risk factor disclosure to identify a number of the factors referenced in Section 27A.

Request for Comment

- Should we require risk factor disclosure about specific matters that are in addition to those referred to in Item 503 of Regulation S–K? If so, what are they?
- Are there ways, in addition to those we have used in Item 503 and our plain English rules and our guidance on MD&A,[379] to ensure that issuers include meaningful, rather than boilerplate, risk factor disclosure?
- Should we extend risk factor disclosure requirements to Forms 10–KSB and 10–SB?

[376] *See, e.g.*, comment letters in File No. S7–30–98 from the ABA; ACCA; Ernst & Young LLP; New York City Bar; NASAA; the Philadelphia Bar Association; and Sullivan & Cromwell.

[377] *See, e.g.*, comment letters in File No. S7–30–98 from the CIT Group, Inc.; Joseph Grundfest; Intel Corporation; and Navistar International Corporation.

[378] *See, e.g.*, comment letters in File No. S7–30–98 from the American Society of Corporate Secretaries; and the Business Roundtable.

[379] See the 2003 MD&A Release note 33; *Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33–8056, (Jan. 22, 2002) [67 FR 3746]; *Interpretive Release: Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures*, Release No. 33–6835 (May 18, 1989) [54 FR 22427].

B. Disclosure of Unresolved Staff Comments

Because enhanced Exchange Act reporting provides a principal element of support for, and is at the core of, today's proposals, it is important that issuers timely resolve any staff comments on their Exchange Act reports. It is possible, however, that the procedural changes we are proposing would eliminate some of the incentives issuers have to respond to comments on their Exchange Act reports in a timely manner. In particular, with automatic effectiveness, well-known seasoned issuers would not be subject to the possibility that effectiveness of a Securities Act registration statement could be delayed while comments are resolved. In addition, all shelf eligible issuers would have to file new registration statements only every three years. Staff in the Division of Corporation Finance has begun to review more Exchange Act reports and will continue to do so in keeping with the mandate in the Sarbanes-Oxley Act as well as our view of the importance of the role of an issuer's Exchange Act reports. Under the circumstances and with the greater flexibility given in our proposals to communications outside the statutory prospectus and offering procedures, we think it is necessary to establish added incentives for accelerated filers to timely resolve outstanding staff comments on their Exchange Act reports.

We are proposing to require all accelerated filers to disclose, in their annual reports on Forms 10–K or 20–F, written comments our staff made in connection with review of Exchange Act reports that the issuer believes are material that were issued more than 180 days before the end of the fiscal year covered by the annual report and which remain unresolved as of the date of the filing of the Form 10–K or Form 20–F. The disclosure would be required to be sufficient to disclose the substance of the comments. Staff comments that have been resolved, including those that the staff and issuer have agreed would be addressed in future Exchange Act reports, would not need to be disclosed. Issuers would be able to include their position regarding any such unresolved comments.

Through the Form 10–K and Form 20–F disclosure, accelerated filers (including those issuers eligible for shelf registration and automatic shelf registration) would disclose long unresolved comments. This is designed to compensate for immediate effectiveness for well-known seasoned issuers, elimination of the two year limitation, and for increased emphasis by the staff of Exchange Act reports for all shelf registrants.[380]

Request for Comment

- Should we require disclosure of unresolved staff comments in quarterly reports as well?
- Is 180 days the right timeframe to resolve outstanding staff comments? Is it too short? Is it too long?
- Should the 180 days be calculated from the date of the initial written comment letter from the staff, regardless of comments received after that date that relate to or arise from the original comments or issuer responses to the original comments?
- Should we require the proposed disclosure of unresolved comments to also appear in Form 10–KSB reports filed by small business issuers?
- Should we require the proposed disclosure of unresolved comments to also appear in Form 40–F?
- Should we require issuers to list each outstanding comment in its disclosure by repeating the comment verbatim as issued by the staff? Should we permit issuers to paraphrase or summarize the outstanding staff comments?
- Are there more appropriate means to provide incentives to timely resolve staff comments?
- Should issuers have to disclose comments that have been resolved and will be addressed in future Exchange Act reports?
- Should we require disclosure of all unresolved comments without regard to a materiality assessment by the issuer?
- Should the staff have a role in determining which unresolved comments should be disclosed?
- Should the staff have to address issuer responses to outstanding written comment on Exchange Act reports within a particular timeframe after the response has been submitted by the issuer on EDGAR? If yes, what timeframe?

C. Disclosure of Status as Voluntary Filer Under the Exchange Act

Our filing system does not prohibit issuers that are otherwise not required to file Exchange Act reports with us from filing those reports voluntarily. In most cases, voluntary filers are issuers who have, at some point, completed a registered offering under the Securities Act and have continued to file Exchange Act reports even after their reporting

[380] Shelf registration statements allow an issuer to take down securities at any time during the year, even when staff comments on its Exchange Act reports may be pending.

obligation under Exchange Act Section 15(d) has been suspended.[381]

We are proposing to include a box on the cover page of Forms 10–K, 10–KSB, and 20–F for an issuer to check if it is filing reports voluntarily. The box would be for informational purposes only. An issuer's filing obligation would be unaffected by an incorrectly checked box.

We believe that it is important that investors and other market participants are aware that an issuer is a voluntary filer and thus, may cease to file its Exchange Act reports at any time and for any reason without notice. In addition, our communications and procedural proposals do not permit voluntary filers to become seasoned issuers. Identification of voluntary filers would enable us to monitor their use of our proposed communications rules as well as our other regulatory requirements.

Request for Comment

- Are there alternative means of addressing the issues posed by voluntary filers? Should we stop accepting voluntary filings and instead allow voluntary filers to register under Section 12(g) of the Exchange Act on a basis where they are exempted from certain provisions of the Exchange Act that do not apply to them? If so, should we limit any possible exclusions only to voluntary filers that have only issued debt in registered offerings? Should there be any other limitations?
- Should we require disclosure of voluntary filer status on Form 40–F? If not, why not?

VIII. Application of Proposals to Asset-Backed Securities

In April, we proposed new Regulation AB and other new and amended rules and forms to address comprehensively the registration, disclosure, and reporting requirements for asset-backed securities ("ABS") under the Securities Act and the Exchange Act (the "ABS Proposal").[382] This section describes how ABS offerings and the ABS Proposal would fit within the proposals we are making today.

ABS issuers offering securities registered on Form S–1 would be non-reporting issuers. ABS issuers offering securities registered on Form S–3 would be considered seasoned issuers. Today's proposal would provide that no ABS issuer would be a well-known seasoned issuer. As a result, automatic shelf registration would not be available to issuers of ABS. The general content of ABS registration statements under current practice and under the ABS proposals would not change under today's proposal.

We would anticipate that the communications proposals that we make today would, if adopted, apply to ABS offerings. Therefore, safe harbor exclusions from the definition of offer for purposes of the gun-jumping provisions would apply. Many of these proposals would have only limited application in respect of ABS. Certain of them, however, could be applicable. For example, the proposals regarding regularly released information for reporting issuers could apply, depending on the facts and circumstances, to information conveyed to investors in outstanding ABS, such as static pool information provided with respect to pools underlying outstanding ABS, either in Exchange Act reports or other communications, where the conditions of the proposed rule are satisfied.

In addition, under today's proposals regarding free writing prospectuses, the permitted use of free writing materials would change for ABS issuers from that contained in the ABS proposals. Following a series of staff no-action letters from the mid-1990s, certain ABS issuers have been permitted to use written offering related communications outside of the prospectus in connection with offerings registered on Form S–3.[383] Under the ABS Proposal, we have proposed codifying the use of these informational and computational materials for these issuers in accordance with the existing no-action letters. Under the ABS Proposal, these materials would all be filed on Form 8–K and incorporated by reference into the registration statement, regardless of who prepared the materials.

Under our proposal today, these materials would be considered free writing prospectuses, and their use would be conditioned on satisfying the conditions of proposed Rule 164 and proposed Rule 433. The conditions of proposed Rule 433 would permit use of free writing prospectuses by non-reporting issuers, including ABS issuers using Form S–1, if a registration statement containing a statutory prospectus complying with our requirements was filed and, in the case of free writing prospectuses prepared by or involving payments made or compensation given by issuers or other offering participants, the free writing prospectus was preceded or accompanied by the most recent statutory prospectus. Under our proposals, ABS issuers eligible to use Form S–3 would be seasoned issuers. Proposed Rule 433 would condition use of free writing prospectuses in offerings registered on Form S–3 on filing of a registration statement containing a statutory prospectus complying with our requirements, but not on actual delivery of that prospectus. Underwriters that use informational and computational materials would not be required to file the free writing prospectuses that they prepare. Including information prepared by the underwriters on the basis of, but not containing, issuer information, such as computational materials based on pool data provided by the issuer, would not trigger a filing requirement for an underwriter's free writing prospectus. However, an issuer would be required to file such materials prepared by it, as well as issuer information included in an underwriter's free writing prospectus unless it was already filed or part of a registration statement or previously filed free writing prospectus or issuer information. In addition, as is the case today, any final term sheet would need to be filed.[384] A free writing prospectus in an ABS offering, like any free writing prospectus, would not be automatically incorporated by reference into the registration statement under today's proposals.[385] Whether filed or not, all free writing prospectuses would be subject to Section 12(a)(2) liability under today's proposals.

Today's proposal would also address some of the concerns that were expressed in comments on the ABS Proposal regarding discrepancies between the time an investor makes an investment decision and the time of availability of a prospectus supplement.[386] Under today's proposals, information conveyed to investors by or on behalf of an issuer or other offering participant after the time of contract of sale would not be used to evaluate liability under Section 12(a)(2). For example, if a prospectus (including a free writing prospectus) provided

[381] Exchange Act Section 15(d) suspends automatically its application to any issuer that would be subject to the filing requirements of that section where, if other conditions are met, on the first day of the issuer's fiscal year, it has fewer than 300 holders of record of the class of securities that created the Section 15(d) obligation.

[382] *See* Asset-Backed Securities Proposing Release, note 58.

[383] See note 31 of the Asset-Backed Securities Proposing Release, note 58 above.

[384] See proposed Rule 433.

[385] Issuers could, of course, choose to include this information or incorporate it by reference (for example, by filing a report on Form 8–K that is incorporated by reference) into a registration statement and prospectus.

[386] See comment letters in File No. S7–21–04 from Investment Company Institute and Fidelity Management and Research Company.

prior to the time of the contract of sale failed to disclose material information about the asset pool and the omission caused the information conveyed to the investor to be misleading, then the omission could not be corrected by conveying the information subsequently, including in a subsequently available prospectus or prospectus supplement.

Today's proposal would also address some comments we received on the ABS Proposal requesting that we amend Rule 134 for ABS offerings. Our proposals broaden this rule and would permit a number of the items commenters requested. However, as is the case with offerings generally, we have not proposed to amend Rule 134 in a manner that would permit detailed term sheets for ABS offerings under the rule. Under today's proposals such information in ABS offerings, including informational and computational materials, could be provided in free-writing prospectuses or included in or incorporated by reference into registration statements and prospectuses.

As we noted in the ABS Proposal, we proposed codifying an existing staff no-action letter that provided a tailored research report safe harbor for Form S–3 ABS, which proceeded from the existing research report safe harbors in Rules 137, 138 and 139. As discussed above, we are proposing revisions today to the safe harbors in Rules 137, 138 and 139. To the extent these existing safe harbors are modified, we also will consider similar modifications to the proposed ABS safe harbor, if adopted.

Request for Comment

- How should ABS issues be treated under the current proposal? Is our proposal that S–1 ABS would be considered non-reporting issuers and S–3 ABS would be considered seasoned issuers appropriate?
- Should automatic shelf registration or other elements of today's proposals that would be available to well-known seasoned issuers also be made available to ABS issuers?
- Should computational materials prepared by an underwriter based on but not including asset data received from the issuer be considered issuer prepared free writing prospectus so that it must be filed?
- Should we be more restrictive regarding the use of free writing by ABS issuers and, as is the case today, only permit it for ABS issuers eligible to use Form S–3?
- Are further changes needed to revise Rule 134 for ABS issuers?
- Would it be helpful for us to explain how any other parts of today's proposal apply to ABS offerings?
- If the ABS Proposal is adopted, would it be appropriate to delete Securities Act Rule 415(a)(1)(viii)? If not, why not?

IX. General Request for Comment

We request comment on the proposals in this release, suggestions for additions to the proposals, and comment on other matters that might have an effect on the proposals contained in this release.

X. Paperwork Reduction Act

A. Background

The proposed rules and amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[387] We are submitting these to the Office of Management and Budget for review and approval in accordance with the PRA.[388] The titles for the collections of information are:[389]

(1) "Form 10" (OMB Control No. 3235–0064);
(2) "Form 20–F" (OMB Control No. 3235–0288);
(3) "Form 10–K" (OMB Control No. 3235–0063);
(4) "Form 10–Q" (OMB Control No. 3235–0070);
(5) "Regulation S–K" (OMB Control No. 3235–0071);
(6) "Regulation S–B" (OMB Control No. 3235–0417);
(7) "Regulation C" (OMB Control No. 3235–0074);
(8) "Form S–1" (OMB Control No. 3235–0065);
(9) "Form F–1" (OMB Control No. 3235–0258);
(10) "Form S–2" (OMB Control Number 3235–0072);
(11) "Form F–2" (OMB Control Number 3235–0257);
(12) "Form S–3" (OMB Control Number 3235–0073);
(13) "Form F–3" (OMB Control Number 3235–0256);
(14) "Form S–4" (OMB Control Number 3235–0324);
(15) "Form F–4" (OMB Control Number 3235–0325);
(16) "Form N–2" (OMB Control Number 3235–0026);
(17) "Rule 173" (OMB Control Number to be determined);
(18) "Rule 163" (OMB Control Number to be determined); and
(19) "Rule 433" (OMB Control Number to be determined).

We adopted all of the existing regulations and forms pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. They set forth the disclosure requirements for annual and quarterly reports, registration statements, and prospectuses that are prepared by issuers to ensure that investors have the information they need to make informed investment decisions in registered offerings and in secondary market transactions. We also are proposing for adoption new Securities Act Rules 163, 173, and 433 and eliminating Securities Act Forms S–2 and F–2.

The proposed amendments to existing forms and regulations and new requirements would modify and advance the Commission's regulatory system for offerings under the Securities Act, enhance communications between public issuers and investors, and promote investor protection. Our proposals involve three main areas:

- Communications related to registered securities offerings;
- Procedural restrictions in the offering and capital formation processes; and
- Delivery of information to investors.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collections of information. The estimates of reporting and cost burdens provided in this PRA analysis address the time, effort, and financial resources necessary to provide the proposed collections of information and are not intended to represent the full economic cost of complying with the proposals. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The information collection requirements related to registration statements and periodic reports would be mandatory. For registration statements and periodic reports, there would be no mandatory retention period for the information disclosed, and the information gathered would be made publicly available. The information collection requirements related to the communications and prospectus delivery proposals would apply only to issuers and other offering participants choosing to rely on them. There would be a mandatory record retention period

[387] 44 U.S.C. 3501 *et seq.*

[388] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[389] The paperwork burden from Regulations S–K, S–B, and C are imposed through the forms that are subject to the requirements in those Regulations and reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by Regulations S–K, S–B and C to be a total of one hour.

with respect to the communications and prospectus delivery provisions in the proposals. Moreover, communications covered by the proposals that are made by or on behalf of an issuer, and communications that are broadly disseminated by another offering participant, would have to be filed and would be publicly available on the EDGAR filing system, whereas communications by or on behalf of other parties would not have to be filed.

B. Summary of Information Collections

The proposals would add the following disclosure requirements to Exchange Act periodic reports and registration statements:

- Risk factor disclosure;
- Disclosure by accelerated filers, in their annual reports on Forms 10–K or 20–F, of any written staff comments regarding their Exchange Act periodic reports issued more than 180 days before the end of the fiscal year covered by the annual report that the issuer believes to be material and that remain unresolved as of the date of the filing of the annual report; and
- A "check box" that would appear on the cover page of the report or registration statement to indicate whether the registrant is filing Exchange Act reports on a voluntary basis.[390]

The proposals would impose the following new disclosure requirements and filing or publication conditions in connection with registered offerings under the Securities Act:

- A brief notice to purchasers in a registered offering providing that the sale was made pursuant to a registration statement; [391]
- A brief legend in "free writing prospectuses" [392] that refers investors to the statutory prospectus;
- "Check boxes" on registration statement cover pages indicating whether the registration statement is being used for "automatic shelf registration" or post-effective registration of additional securities; [393]
- Additional disclosure in the undertakings required to be included in a registration statement for securities to be offered pursuant to Rule 415; [394]
- A filing condition in connection with the use of certain free writing prospectuses; [395] and
- Making a version of an electronic road show readily available to the public.

The proposals would decrease existing disclosure requirements by:

- Reducing the need to repeat previously disclosed information by permitting any reporting issuer that has filed at least one annual report and that is current in its reporting obligation to incorporate information by reference into its registration statement on Forms S–1 or F–1; and
- Reducing the number of registration statements filed because the automatic shelf registration proposals likely would eliminate the need to file multiple registration statements.

C. Paperwork Reduction Act Burden Estimates

For purposes of the PRA, we estimate the annual incremental reduction in the paperwork burden for registrants to comply with our proposed collection of information requirements to be approximately 40,393 hours of in-house issuer personnel time and the reduction in cost to be approximately $70,797,000 for the services of outside professionals.[396] For broker-dealers, we estimate the annual incremental paperwork burden to comply with our proposed collection of information requirements to be approximately 3,874,133 hours of in-house issuer personnel time.[397] Those estimates include the time and the cost of preparing and reviewing disclosure, filing documents or otherwise publicizing information, and retaining records. Our methodologies for deriving the above estimates are discussed below.

Our estimates represent the average burden for all issuers, both large and small. We expect that the burdens and costs could be greater for larger issuers and lower for smaller issuers. For Exchange Act periodic reports, we estimate that 75% of the burden of preparation is carried by the issuer internally and that 25% of the burden is carried by outside professionals retained by the issuer at an average cost of $300 per hour.[398] For Securities Act registration statements, Exchange Act registration statements, all filings by foreign private issuers, and the free writing prospectus rules, we estimate that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden is carried by outside professionals retained by the issuer at an average cost of $300 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

1. Exchange Act Periodic Reports and Registration Statements

For purposes of the PRA, we estimate the annual incremental paperwork burden for all issuers to prepare the disclosure required in Exchange Act periodic reports and registration statements under our proposals to be approximately 43,245 hours of issuer personnel time and the cost to be approximately $4,477,000 for the services of outside professionals. Those estimates include the time and the cost of preparing and reviewing the proposed disclosure. Our estimates reflect our belief that, because our current disclosure requirements for Exchange Act reports (such as Management's Discussion and Analysis of Financial Condition and Results of Operations) [399] already require issuers to obtain information necessary to evaluate their material risks, and because disclosure by accelerated filers describing unresolved written staff comments on previous filings that the issuer believes to be material will be simply a summary of comments provided to the issuer by the staff of the Commission, the proposed disclosure that issuers would have to make in their Exchange Act periodic reports and registration statements should not impose significant new burdens.

We estimate that, over a three-year time period,[400] the annual incremental disclosure burden imposed by the proposed new disclosure requirements

[390] We believe that the burden associated with checking a box on the cover page of an Exchange Act report or registration statement is so minimal that we are unable to quantify the burden.

[391] Under proposed Securities Act Rule 173, this new requirement would be imposed where the proposed amendment to Securities Act Rule 172 would eliminate the more burdensome requirement of delivery of a final prospectus.

[392] "Free writing prospectuses" are written communications that constitute offers to sell or solicitations of offers to buy securities.

[393] In this regard, see note 390 regarding the burden associated with checking a box on the cover page.

[394] We also are proposing to require similar undertaking language in Form N–2, the registration statement form for closed-end management investment companies.

[395] See the discussion in Section III above under "Permissible Use of Free Writing Prospectuses" under "Filing Conditions."

[396] For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals havo been rounded to the nearest thousand.

[397] We assume that brokers and dealers would not use outside professionals to comply with the proposed collection of information requirements.

[398] In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $300 as the average cost of outside professionals that assist issuers in preparing disclosures and conducting registered offerings.

[399] Item 303 of Regulation S–K [17 CFR 229.303].

[400] We calculated an annual average over a three-year period because OMB approval of PRA submissions covers a three-year period.

would average 6.43 hours per Form 10–K (consisting of risk factor disclosure and disclosure by accelerated filers of outstanding comments), 0.23 hours per Form 10–Q (consisting of disclosure of material changes to risk factors), 0.05 hours per Form 20–F (consisting of disclosure by accelerated filers of outstanding comments), and 12 hours per Form 10 (consisting of risk factor disclosure).[401] These estimates were based on the following assumptions:

- 970 reporting issuers would have been required to prepare risk factor disclosure within the past year for a Securities Act registration statement;[402]
- Issuers who have not recently prepared risk factor disclosure will spend a greater amount of time preparing the disclosure in year 1 and will become more efficient in preparing the disclosure in years 2 and 3;[403]
- Issuers would include disclosure of new or material changes to risk factors in 15% of all 10–Qs filed; and
- 796 domestic and 52 foreign accelerated filers would have unresolved written staff comments that the issuer believes to be material each year, and, therefore, would need to disclose this fact.[404]

Tables 1 and 2 below illustrate the incremental annual compliance burden of the collection of information in hours and cost for periodic reports and registration statements under the Exchange Act.

TABLE 1.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR EXCHANGE ACT PERIODIC REPORTS

	Annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	75% issuer (D)=(C)*0.75	25% professional (E)=(C)*0.25	$300 prof. cost (F)=(E)*$300
10–K	8,220	6.43	52,854.6	39,640.95	13,213.65	$3,964,095
10–Q	20,264	0.23	4,660.72	3,495.54	1,165.18	349,554
Total				43,136.49		4,313,649

TABLE 2.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR EXCHANGE ACT REGISTRATION STATEMENTS AND FOREIGN PRIVATE ISSUER EXCHANGE ACT ANNUAL REPORTS

	Annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
10	56	12	672	168	504	$151,200
20–F	1,036	.05	51.8	12.95	38.85	11,655
Total				180.95		162,855

2. Communications and Prospectus Delivery

For purposes of the PRA, we estimate that the annual paperwork burden for issuers that choose to comply with our communications proposal would be approximately 1,532 hours of issuer personnel time and a cost of approximately $1,379,000 for the services of outside professionals. Those estimates reflect the burden hours and costs associated with the proposed disclosure, filing, and record retention conditions. We estimate that, over a three-year period, the annual burden for the information collection and record retention conditions set forth in proposed Securities Act Rules 163 and 433 would be an average of 2.11 hours per issuer (including the burden for offering participants that may need to file free writing prospectuses with respect to the issuer's offering),[405] and 3,874,133 hours total for all respondents to comply with proposed Rule 173.[406]

[401] We obtained data from our internal Filing Activity Tracking System database ("FACTS"). We calculated the average incremental increase in the burden for each Form 10–K by adding the average time per form that it will take to prepare the risk factor disclosures [[(970 Forms 10–K involving issuers who have recently prepared risk factors multiplied by 4 hours) plus (7,250 other Forms 10–K multiplied by 6.64)]/8,220 Forms 10–K = 6.33 hours per Form 10–K), and the average time per form that it will take to prepare disclosure of outstanding comments [796 Forms 10–K involving issuers with outstanding comments multiplied by 1 hour/8,220 Form 10–Ks = .1 hours], which equals 6.43 hours per Form 10–K. The calculation for Form 10–Q is as follows: [(20,264 Forms 10–Q multiplied by 15% frequency of disclosure multiplied by 1.5 hours)]/20,264 Forms 10–Q = .23 hours per Form 10–Q. The calculation for Form 20–F is: [(52 Forms 20–F involving disclosure of outstanding comments multiplied by 1 hour)/1,036 Forms 20–F = .05 hours per Form 20–F]. Because Form 10 filers generally are new entrants to the Exchange Act reporting system, they will be preparing risk factor disclosure for the first time. Based on our estimate that it will take first time filers 12 hours to prepare this disclosure, the average incremental increase in the burden will be 12 hours per Form 10. See also notes 402 and 403 and accompanying text.

[402] We assume that the paperwork burden associated with preparing risk factor disclosure is significantly reduced when an issuer already has prepared risk factor disclosure for a previous Securities Act registration statement. This number does not include registration statements on Form S–3 because many of those registration statements are for delayed offerings, and issuers often do not include risk factors in the base registration statement for these offerings. We used FACTS as our source.

[403] We estimate that it will take issuers who have not recently prepared this disclosure 12 hours in year one and 4 hours in years two and three, which comes to an average of 6.64 hours over the three-year period. Because Form 10 registration statements are filed by issuers who generally would not have previously prepared this disclosure, we estimate that these issuers will take 12 hours to prepare this disclosure.

[404] We obtained data from our FACTS database that indicates that 848 accelerated fliers had outstanding comments as of September 27, 2004. We estimate that it will take issuers an average of 1 hour to comply with this disclosure requirement.

[405] See also notes 407–409, and accompanying text, for an explanation of the underlying assumptions and calculations used. The calculation for the burden hours issuers would spend under Rule 433 is: (3,650 free writing prospectuses in connection with filings multiplied by 0.25 hours per filing) plus (4,002 free writing prospectuses in connection with electronic road shows multiplied by 0.25 hours per filing) plus (2,001 electronic road shows multiplied by 0.25 hours to make each road show available) plus (3,703 filings multiplied by 1 hour per filing for record retention) = 6,116.25 hours. The calculation for the burden hours issuers would spend under Rule 163 is: (53 free writing prospectuses in connection with filings multiplied by 0.25 hours per filing) = 13.25 hours. Accordingly, the calculation for the burden hours per issuer imposed by Rules 433 and 163 is: (6,116.25 hours for Rule 433 plus 13.25 hours for Rule 163)/2,906 issuers = 2.11 hours.

[406] See also notes 410 and 411 for an explanation of the underlying assumptions and calculations used. This is based on the estimate that broker dealers would deliver 232.448 million prospectuses, and spend 1 minute per prospectus

These estimates were based on the following assumptions:

- Filing a free writing prospectus or making a version of an electronic road show readily available each would require about 0.25 burden hours;[407]
- Issuers would make readily available to the public 2,001 electronic road shows per year;[408]
- 7,705 free writing prospectuses per year would be filed in connection with 3,703 offerings by 2,906 issuers;[409]

We also estimate that issues, on average, would file one free writing prospectus in connection with electronic road shows). We estimate that most well-known seasoned issuers would have an automatic shelf registration statement on file and would therefore not rely on the exemption provided in proposed Rule 163. Therefore, we estimate that 3,650 free writing prospectuses would be filed under Rule 433 and 53 free writing prospectuses would be filed under Rule 163 (in addition to any filings made in connection with electronic road shows).

Accordingly, the calculation for the number of free writing prospectuses filed per year is: (3,650 filed under Rule 433) plus (53 filed under Rule 163) plus (4,002 filed with road shows) = 7,705.

- The burden to retain free writing prospectuses would be no more than one hour per year for all free writing prospectuses associated with each offering;
- There would be approximately 232.45 million individual responses to proposed Rule 173 annually;[410] and
- The burden of the proposed Rule 173 notice requirement would be one minute per response.[411]

Table 3, below, illustrates the incremental annual compliance burden of the collection of information in hours and in cost for the communication and prospectus delivery proposals.

TABLE 3.—CALCULATION OF PRA BURDEN ESTIMATES FOR COMMUNICATIONS[412]

	Annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Rule 433 filing	7,652	0.25	1,913	478.25	1,434.75	$430,425
Make available electronic road show	2,001	0.25	500.25	125.06	375.19	112,556
Rule 433 record retention	3,703	1	3,703	925.75	2,777.25	833,175
Rule 163 filing	53	0.25	13.25	3.31	9.94	2,981
Total				1,532		1,379,137

[412] This table does not include the incremental burden estimate of 3,874,133 hours for proposed Rule 173, which is discussed above.

3. Securities Act Registration Statements

For purposes of the PRA, we estimate that the proposals affecting the collection of information requirements related to Securities Act registration statements would reduce incrementally the annual paperwork burden by approximately 85,170 hours of issuer personnel time and by a cost of approximately $76,653,000 for the services of outside professionals. That estimate reflects changes to the number of filings that could result from our proposals, as well as the decrease in disclosure preparation time resulting from our proposed expansion of incorporation by reference. These estimates were based on the following assumptions:

- 95 additional Forms S–1 and 5 additional Forms F–1 would be filed per year as a result of our proposed elimination of Forms S–2 and F–2;[413]
- Each year, 277 Forms S–1 and 8 Forms F–1 would incorporate information by reference;[414]
- Incorporating information by reference would reduce the paperwork burden in Forms S–1 by 374,227

preparing the Rule 173 notice (232.448 million multiplied by (1/60 hours) = 3,874,133 hours).

[407] Aside from a brief legend, we do not propose to specify the type of information that could be in a free writing prospectus. Accordingly, we are not estimating a paperwork burden for the specific information included in a free writing prospectus, other than the legend condition and the filing or dissemination condition, as applicable.

[408] For the period from August 1, 2003 to July 31, 2004, approximately 2,906 issuers filed 3,703 offerings, approximately 299 of which were initial public offerings by issuers that are not small business issuers. We estimate that close to 100% of the 299 initial public offerings filed involved an electronic road show, and approximately 50% of the 3,404 non-initial public offerings filed involved an electronic road show. Accordingly, the calculation for the number of road shows that will be made available per year is: [(299 IPOs) multiplied by (100%)] plus [(3,404 non-IPOs) multiplied by (50%)] = 2,001 electronic road shows available per year.

[409] We estimate that issuers, on average, would file two free writing prospectuses for each electronic road show under Rule 433. Based on the calculation in note , above, we estimate that, in connection with 2,001 electronic road shows, issuers would file 4,002 free writing prospectuses per year.

[410] In a recent release relating to confirmation requirements, we estimated that approximately 2.54 billion confirmations will be sent to customers annually in connection with transactions not involving mutual funds, unit investment trusts interests, and plan securities. *Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds*, Release No. 33–8358 (Jan. 29, 2004) [69 FR 6438] at Section VIII.C.4. These confirmations are sent for transactions in primary registered offerings as well as for transactions in the secondary market.

According to data obtained from the databases provided by the Center for Research in Securities Prices at the University of Chicago and the Securities Data Corporation, we estimated that, in 2002, the dollar amount of equity issued in the primary markets was 11.4% of the size of the total dollar amount of all the equity trades that year.

Accordingly, the calculation for confirmations sent annually in connection with transactions in primary registered offerings is: (2.54 billion confirmations) multiplied by (11.4% in the primary markets) = 289.56 million confirmations. This indicates that 289.56 million transactions are conducted annually in connection with primary registered offerings, for which prospectuses are required to be delivered.

In addition, Securities Act Rule 174 requires delivery of a prospectus for 25 calendar days following an IPO. We estimate that 1 million prospectuses are delivered annually pursuant to this requirement.

We further estimate that in 80% of instances where issuers and markets participants are required to deliver prospectuses, they would use the Rule 173 notice rather than delivering final prospectuses. Accordingly, the calculation for annual responses to proposed Rule 173 is: (289.56 million + 1 million) multiplied by 80% = 232.448 million.

[411] We have previously estimated that it takes one minute to generate and send a confirmation because the process of generating a confirmation is automated. *See Confirmation Requirements for Transactions of Security Futures Products Effected in Futures Accounts*, Release No. 34–46471 (Jun. 10, 2002) [67 FR 39647]. We believe that the incremental burden of Rule 173 would be a similar burden.

[413] Source: EDGAR—Forms S–2 and F–2 filed from October 1, 2003 to September 30, 2004.

[414] We estimate that repeat issuers that would be eligible to incorporate by reference under the proposals filed 277 Forms S–1 and 8 Forms F–1. Source: FACTS, from Aug. 1, 2003 to July 31, 2004.

hours[415] and Forms F–1 by 15,680 hours;[416]

• Each year, 38 Forms S–4 and 3 Forms F–4 would no longer incorporate information by reference about either the acquiring issuer or the issuer being acquired as a result of our proposed changes to Forms S–4 and F–4 and elimination of Forms S–2 and F–2;[417]

• Including additional information in Forms S–4 and F–4 as a result of not being eligible to incorporate by reference would increase the paperwork burden in Form S–4 by 51,338 hours[418] and Form F–4 by 5,880 hours;[419]

• 1,883 Forms S–3, 99 Forms F–3, and 65 initial registration statements or post-effective amendments on Form N–2 filed for an offering of securities pursuant to Rule 415 would each require one minute to include the additional Item 512 undertakings in the proposals;[420]

• The number of Forms S–3 and Forms F–3 filed per year would be reduced by 121 and 4 per year, respectively, as a result of automatic shelf registration proposals;[421] and

• Five additional Forms S–3 and one additional Form F–3 would be filed per year as a result of our amendments to form eligibility for majority-owned subsidiaries.[422]

Table 4 through Table 8, below, illustrate the incremental annual compliance burdens of the collection of information in hours and in cost for registration statements under the Securities Act.

TABLE 4.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR FORMS S–1, S–4, F–1 AND F–4 DUE TO ELIMINATION OF FORMS S–2 AND F–2

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–1	95	398	37,810	9,452.5	28,357.5	$8,507,250
Form F–1	5	167	835	208.75	626.25	187,875
Form S–4	38	1,351	51,338	12,834.5	38,503.5	11,551,050
Form F–4	3	1,960	5,880	1,470	4,410	1,323,000
Total				23,965.75		21,569,175

[415] We estimate that the burden to complete a Form S–1 that incorporates information by reference would be the same as the burden currently imposed by Form S–3 (398 hours). Therefore, the amount of time eliminated for each Form S–1 that incorporates information by reference would be 1,351 hours per form (1,749 hours for a Form S–1 that does not incorporate information by reference minus 398 hours for a Form S–1 that incorporates information by reference). Therefore, the total amount of time saved for the 277 issuers that would be able to incorporate by reference would be 374,227 (277 issuers multiplied by 1,351 hours per form).

[416] We estimate that the burden to complete a Form F–1 that incorporates information by reference would be the same as the burden currently imposed by Form F–3 (167 hours). Therefore, the amount of time eliminated for each Form F–1 that incorporates information by reference would be 1,960 hours per form (2,127 hours for a Form F–1 that does not incorporate information by reference minus 167 hours for a Form F–1 that incorporates information by reference). Therefore the total amount of time saved for the 8 issuers that would be able to incorporate by reference would be 15,680 (8 issuers multiplied by 1,960 hours per form).

[417] From filings on EDGAR from 10/1/2003 to 9/30/2004, we estimate that Forms S–2 represent 3.6% of registration statements filed on Form S–1, S–2, or S–3. Because many Forms S–4 include information about two different issuers, we estimate that 5% of Forms S–4 will include information about an issuer that is eligible to use Form S–2. Therefore, we estimate that 38 Forms S–4 (751 Forms S–4 filed from 10/1/2003 to 9/30/3004 multiplied by 5%) would have incorporated information by reference as a result of an issuer being eligible to use Form S–2. We also estimate that Forms F–2 represent 3.4% of registration statements filed on Form F–1, F–2, or F–3. Because many Forms F–4 include information about two different issuers, we estimate that 5% of Forms F–4 will include information about an issuer that is eligible to use Form F–2. Therefore, we estimate that 3 Forms F–4 (68 Forms F–4 filed from 10/1/2003 to 9/30/2004 multiplied by 5%) would have incorporated information by reference as a result of and issuer being eligible to use Form F–2.

[418] We estimate that the burden for each issuer involved to complete a Form S–4 without incorporating information by reference would be the same as the burden currently imposed by Form S–1 (1,749 hours). We also estimate that the burden for each issuer involved to complete a Form S–4 where the issuer is eligible to incorporate information by reference would be the same as the burden currently imposed by Form S–3 (398 hours). Therefore, the amount of time added to each Form S–4 that no longer includes information incorporated by reference would be 1,351 hours per form (1,749 hours to complete disclosure without incorporating by reference minus 398 hours to complete disclosure with incorporation by reference). The calculation for the burden including additional information in Forms S–4 as a result of not being eligible to incorporate by reference is (38 Forms S–4 that would have incorporated information by reference as a result of an issuer being able to use Form S–2) multiplied by 1,351 hours per form = 51,338 hours.

[419] We estimate that the burden for each issuer involved to complete a Form F–4 without incorporating information by reference would be the same as the burden currently imposed by Form F–1 (2,127 hours). We also estimate that the burden for each issuer involved to complete a Form F–4 where the issuer is eligible to incorporate information by reference would be the same as the burden currently imposed by Form F–3 (167 hours). Therefore, the amount of time added to each Form F–4 that no longer includes information incorporated by reference would be 1,960 hours per form (2,127 hours to complete disclosure without incorporating by reference minus 167 hours to complete disclosure with incorporation by reference). The calculation for the burden including additional information in Form F–4 as a result of not being eligible to incorporate by reference is: (3 Forms F–4 that would have incorporated information by reference as a result of being an issuer eligible to use Form S–2) multiplied by 1,960 hours per form = 5,880 hours.

[420] We estimate that 1,883 Forms S–3 (1,999 Forms S–3 filed on EDGAR from 10/1/2003 to 9/30/2004 minus 121 Forms S–3 due to automatic shelf registration proposals plus 5 new majority-owned subsidiaries) and 99 Forms F–3 (102 Forms F–3 filed on EDGAR from 10/1/2003 to 9/30/2004 minus 4 Forms F–3 due to automatic shelf registration proposals plus 1 new majority-owned subsidiary) would require the additional undertakings. We further estimate that 40 initial registration statements and 25 post-effective amendments by closed-end management investment companies on Form N–2 would require the additional undertakings.

[421] From data derived from our FACTS database, we estimate that 418 registrants each filed approximately 2 Forms S–3 or F–3 per year (covering both primary and secondary offerings). We estimate that 30% of these registrants would be "well-known seasoned issuers" that are eligible to use automatic shelf registration. Because automatic shelf registration would eliminate the need for multiple registration statements, we estimate that 125 registrants (418 registrants multiplied by 30% = 125.4) would file only one Form S–3 or F–3. Therefore, the number of Forms would be reduced by 125 (121 Forms S–3 and 4 Forms F–3).

[422] A search in EDGAR from 8/1/2003 to 7/31/2004 for registered guaranteed debt securities yielded about 25 Forms S–3 and no Form F–3 registration statements. We are assuming that the proposals to allow more majority-owned subsidiaries to be eligible to use short-form registration would increase the number of registered guarantee offerings by 20% (25 multiplied by 20% = 5). While our search yielded no majority-owned subsidiaries registered guarantees on Form F–3 during the time period in question, we are assuming that at least one additional registration statement would be filed under the proposals.

TABLE 5.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR FORMS S–1 AND F–1 TO REFLECT ISSUERS ELIGIBLE TO INCORPORATE BY REFERENCE

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–1	277	(1,351)	(374,227)	(93,556.75)	(280,670.25)	($84,201,075)
Form F–1	8	(1,960)	(15,680)	(3,920.00)	(11,760.00)	(3,528,000)
Total				(97,476.75)		(87,729,075)

TABLE 6.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR FORMS S–3, F–3 AND N–2 TO REFLECT NEW ITEM 512 UNDERTAKINGS

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–3	1,883	[423] 0.0167	31.38	7.85	23.54	$7,061.25
Form F–3	99	0.0167	1.65	0.41	1.24	371.25
Form N–2 [424]	65	0.0167	1.083	1.08	0.00	0.00
Total				9.34		7,432.50

[423] 1/60 of an hour, or 1 minute.
[424] In the case of Form N–2, we are assuming that all of the incremental burden will be borne in-house by company professionals.

TABLE 7.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR REDUCTION IN MULTIPLE FORMS S–3 AND F–3 TO DUE TO AUTOMATIC SHELF REGISTRATION

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)= (C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–3	(121)	398	(48,158)	(12,039.50)	(36,118.50)	($10,835,550)
Form F–3	(4)	167	(668)	(167.00)	(501.00)	(150,300)
Total				(12,206.50)		(10,985,850)

TABLE 8.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR EXPANDING THE MAJORITY-OWNED SUBSIDIARIES ELIGIBLE TO USE FORMS S–3 OR F–3

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–3	5	398	1,990	497.50	1,492.50	$447,750
Form F–3	1	167	167	41.75	125.25	37,575
Total				539.25		485,325

D. Request for Comment

We request comment in order to (a) evaluate whether the collections of information are necessary for the proper performance of our functions, including whether the information will have practical utility, (b) evaluate the accuracy of our estimate of the burden of the collections of information, (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected, and (d) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.[425]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, with reference to File No. S7–38–04. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7–38–04, and be submitted to the Securities and Exchange Commission, Office of Filings and Information Services, Branch of Records

[425] Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

Management, 450 Fifth Street, NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

XI. Cost Benefit Analysis

A. Background

We are proposing revisions to the registration, communications, and offering processes under the Securities Act. Our proposals involve three main areas:

- Communications related to registered securities offerings;
- Procedural restrictions in the offering and capital formation processes; and
- Delivery of information to investors.

The overall goal of the proposed reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets. We believe that the gun-jumping provisions of the Securities Act impose substantial and increasingly unworkable restrictions on useful communications that would be beneficial to investors and markets and consistent with investor protection. Today's proposals reflect our view that revisions to the Securities Act registration and offering processes are appropriate in light of significant developments in the offering and capital formation processes and can provide enhanced protection of investors under the statute. This view is based on our belief that today's proposals would:

- Facilitate greater availability of information to investors and the market with regard to all issuers;
- Eliminate barriers to open communications that have been made increasingly outmoded by technological advances;
- Reflect the increased importance of electronic dissemination of information, including the use of the Internet;
- Make the capital formation process more efficient; and
- Define more clearly both the information and the timeliness of the availability of information against which a seller's statements are evaluated for liability purposes.

B. Summary of Proposals

The amount of flexibility granted to issuers under our proposed revisions to the registration, communications, and offering processes is contingent on the characteristics of the issuer. We believe that the most far-reaching revisions of our communications rules and registration processes should be considered for issuers that have a reporting history under the Exchange Act and are presumptively the most widely followed in the marketplace. We believe that these issuers have an Exchange Act record, a broad following of their Exchange Act filings, and the contemplated attention directed to their Exchange Act reports by the staff of the Division of Corporation Finance that will produce the greatest likelihood of Exchange Act reports that not only are reliable but also are broadly scrutinized by investors and the markets.

For purposes of the proposals, we would categorize issuers into tiers, consisting of non-reporting issuers, unseasoned issuers, seasoned issuers, and well-known seasoned issuers. The first three tiers of issuers would be identified by pre-existing criteria under the existing federal securities laws. A non-reporting issuer would be an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act. An unseasoned issuer would be an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but does not satisfy the requirements of Form S–3 or Form F–3 for a primary offering of its securities.[426] A seasoned issuer would be an issuer that is eligible to use Form S–3 or Form F–3 to register offerings of securities to be sold by or on its behalf, on behalf of its subsidiary, or on behalf of a person of which it is the subsidiary. Our longstanding experience with these categories of issuers provides us with a basis for determining the amount of flexibility provided by the proposals.

The characteristics of the last tier of issuer, called well-known seasoned issuers in the proposals, would be easily measurable and readily available so that issuers and market participants can determine eligibility easily. For issuers with publicly traded equity, we believe that market capitalization provides a sufficient proxy for determining whether or not an issuer is well followed. For issuers of fixed income securities, we believe that the amount of fixed income securities sold in registered offerings in the past three years provides sufficient proxy.[427]

Under the proposals, a well-known seasoned issuer would have the greatest flexibility. The largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers, large, seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media. The communications of these well-known seasoned issuers are subject to scrutiny by investors, the financial press, analysts, and others who evaluate disclosure when it is made.

1. Communications

We are proposing communications rules that recognize the value of ongoing communications as well as the importance of avoiding unnecessary restrictions on offers during a registered offering. The proposed rules and amendments are designed to improve investors' access to information, to promote communications between offering participants and investors, and to maintain adequate investor protection. The proposals would operate in the following manner:

- There would be two separate safe harbors from the gun-jumping provisions for ongoing communications at any time—
  - A safe harbor for a reporting issuer's continued publication or dissemination at any time of regularly released factual business and forward-looking information; and
  - A safe harbor for a non-reporting issuer's continued publication or dissemination at any time of factual business information that is regularly released to persons other than investors or potential investors.
- There would be two separate exclusions from the gun-jumping provisions for communications not encompassed in the proposals above that occur prior to the filing of a registration statement:
  - An exclusion from the definition of offer for purposes of Securities Act Section 5(c) for all issuers for all communications made by or on behalf of issuers 30 days prior to filing a registration statement; and
  - An exemption from the prohibition on offers for purposes of Securities Act Section 5(c) before the filing of a registration statement for offers made by or on behalf of eligible well-known seasoned issuers.
- Certain written offering related communications, such as communications about the schedule for an offering or communications about account-opening procedures, would be permitted in connection with an

[426] Under the proposals, an issuer that is voluntarily filing Exchange Act reports, but is not required to do so, would be an unseasoned issuer for purposes of the communications and procedural proposals.

[427] For further discussion of the characteristics of well-known seasoned issuers, see Section II above.

offering and would be excluded from the definition of "prospectus."

- Issuers and other offering participants would be permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions (including, in specified cases, filing with the Commission).
- The safe harbors for research reports would be expanded.

2. Securities Act Registration Amendments

As part of our proposals to modernize the regulatory regime for registered securities offerings, we are proposing to streamline the registration process for most types of reporting issuers. The proposals recognize the role that technology and improved Exchange Act reporting procedures have on informing the marketplace. Our proposals address the registration procedures for seasoned and unseasoned issuers. These proposals include:

- Modifications that would clarify and expand how and when information could be included in registration statements;
- A clarification of the Securities Act liability treatment of information provided in a prospectus supplement and Exchange Act reports incorporated by reference;
- A more flexible automatic registration process for well-known seasoned issuers, including automatic effectiveness and pay-as-you-go registration fee payment; and
- Proposals related to non-shelf offerings of securities.

3. Prospectus Delivery

We are proposing an "access equals delivery" prospectus delivery model, where final prospectus delivery obligations for purposes of Securities Act Section 5(b)(2) would be satisfied if the issuer filed the final prospectus with the Commission within the required time frame. Our proposals would:

- Eliminate the existing link between delivery of the final prospectus and the delivery of confirmations of sale;
- Provide that the obligation to have a final prospectus precede or accompany a security for delivery after sale be satisfied by filing a final prospectus with us within the required time;
- Permit written notices of allocations; and
- Permit the prospectus delivery obligations in dealer transactions during any prospectus delivery period and registered resale transactions in securities that are trading to be satisfied if the final prospectus was filed within the required time.

4. Exchange Act Reports

A public issuer's Exchange Act record provides the most detailed source of information to the market and to potential purchasers regarding the issuer, its business, its financial condition, and its prospects. We are proposing several reforms to Exchange Act reporting requirements related to our proposed reforms to the Securities Act offering process. We propose to:

- Extend risk factor disclosure requirements to annual reports on Exchange Act Form 10–K and registration statements on Exchange Act Form 10;
- Require updates to risk factor disclosure in quarterly reports on Exchange Act Form 10–Q;
- Require accelerated filers to disclose in their annual reports on Exchange Act Form 10–K any written staff comments issued more than 180 days before the end of the fiscal year covered by the report that the issuer believes to be material and that remain unresolved as of the filing date of the report; and
- Include a box on the cover page of Exchange Act annual report forms for an issuer to check if it is filing reports voluntarily.

C. Benefits

As discussed, the overall goal of the proposed reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets. We believe that the proposed reforms will achieve this goal and consequently result in significant benefits in a number of areas, including by increasing the flow of information available to investors during a registered offering while maintaining investor protection against misleading or inaccurate disclosures. We also anticipate that our proposals will improve access to the public capital markets and possibly lower the cost of capital by, among other things, modifying, and in some cases clarifying, the federal securities laws related to communications, liability, shelf registration, and the use of electronic media during a registered offering. We also believe that our proposals will provide cost-saving options to issuers and underwriters.

1. Increased Information Flow

The primary benefit that our proposals seek to achieve is an increased flow of information to investors during a registered offering. The proposals regarding communications, registration, and liability would operate harmoniously to increase the amount of valuable information that could be provided to investors before they make investment decisions. We believe that more information would be provided on a more timely basis because the proposals would eliminate regulatory barriers to the dissemination of that information and the markets may provide incentives for issuers, underwriters, or broker dealers to produce additional information.

Increased information flow would promote efficient capital markets because the market may be able to value securities more accurately. Under the proposals, underwriters could communicate with potential investors during an offering to better gauge investor interest, thus facilitating greater discourse among investors and underwriters.

Another benefit of increasing the information flow is that investors may become better informed in making portfolio allocation decisions in accordance with their particular risk-return profiles. The ability of offering participants to use free writing prospectuses in connection with offerings would impart a greater ability to provide information to investors about securities before they make investment decisions. For example, issuers and underwriters would be able to provide proprietary analytical material that is specifically tailored to address the particular asset allocation considerations of different investors. In addition, we are proposing amendments to permit research to be distributed about more issuers that are making registered offerings. Having access to these reports may facilitate additional security analysis among investors.

By reducing the restrictions on the contents of written communications, we anticipate that investors will demand more information and issuers, underwriters, and other offering participants will be more willing to provide it. Significant technological advances have increased both the market's demand for more timely corporate disclosure and the ability of issuers to capture, process, and disseminate information. The proposals would enable issuers and market participants to take greater advantage of the Internet and other electronic media to communicate and deliver information to investors. As discussed in greater detail below, reducing regulatory and liability uncertainty with respect to the treatment of written communications may make issuers more comfortable in

supplying information without worrying about violating the gun-jumping provisions. Accordingly, investor demand for information could be satisfied through relatively inexpensive mass dissemination of the information through electronic means.

2. Investor Protection

Another benefit of the proposals is that they would maintain investor protection against misleading or inaccurate disclosures. Investor protection is of paramount importance in maintaining fair, orderly, and efficient capital markets. The proposals regarding liability and disclosure in Exchange Act periodic reports, as well as the filing and record retention conditions for free writing prospectuses, would maintain and enhance investor protection in connection with registered securities offerings.

A central premise underlying our liability proposals, which is reflective of the conceptual basis for the Securities Act, is that materially accurate and complete information regarding an issuer and the securities being sold should be available to investors at the time of sale (including the time of the contract of sale), when they make their investment decisions (not at the time of settlement or thereafter).[428] We believe that our proposals would provide issuers and underwriters with greater flexibility to communicate information in a manner that does not slow the offering process unduly. At the same time, investors should be in a better position to have materially complete and accurate information at the time of the sale of the securities to them (including the time of the contract of sale). These measures should encourage the disclosure of fair and accurate information about transactions.[429]

The free writing prospectus proposals would promote investor protection by requiring issuers to file issuer-prepared free writing prospectuses and issuer information in free writing prospectuses. We believe that conditioning the use of written issuer-provided information on filing would improve investor protection. On the one hand, the proposed filing requirement is designed to assure that written issuer information is publicly available. On the other hand, requiring underwriters to publicize their propriety analysis may cause them unjustifiable competitive harm and liability exposure. Moreover, our proposals to require a version of an issuer's electronic road show presentations to be either filed or publicly available provide appropriately for the availability of information to all investors.[430]

Our proposals to allow certain registration statements to become effective automatically will allow the Commission to shift its resources more toward the review of issuers' Exchange Act reports. Because we believe that an issuer's Exchange Act record provides the most detailed source of information to the market and to potential purchasers regarding the issuer, its business, its financial condition, and its prospects, we believe that investors will benefit from the staff's ability to review Exchange Act reports more frequently.

The proposals to include additional disclosures in Exchange Act periodic reports also would promote investor protection. We believe that the disclosure by accelerated filers of unresolved written staff comments that the issuer believes to be material will benefit investors because they will be able to ascertain the nature of the staff comments and decide if those comments raise particular concerns that would affect their decision to invest in the securities. We believe that the disclosure of risk factors will help investors in assessing the risks that an issuer currently faces or may face in the future. Many issuers currently provide this risk factor disclosure in their Exchange Act reports voluntarily. However, for other issuers, investors have access to this information only if the issuer has recently conducted a registered offering under the Securities Act, in which case the issuer would be subject to risk factor disclosure requirements in its Securities Act registration statement.

3. Facilitating Capital Formation

We anticipate that our proposals would facilitate capital formation, and possibly lower the cost of capital, by improving access to the public capital markets. The proposals are designed to eliminate unnecessary regulatory impediments to capital formation and provide more flexibility to issuers to conduct registered securities offerings. The amount of flexibility accorded by the proposals would depend on the characteristics of the issuer. We propose to grant the most flexibility under the automatic shelf registration system to eligible well-known seasoned issuers. Other issuers also would benefit, albeit to a lesser degree, from our other proposed amendments to the registration process.

The proposals may lower the cost of capital because they would provide significant flexibility to issuers and underwriters in marketing their securities. For example, automatic shelf registration would enable well-known seasoned issuers to take advantage of market windows more effectively for the following reasons. First, issuers would have more control over the timing of their public offerings and would be able to complete an offering more quickly. Second, underwriters would have more latitude to make changes to the plan of distribution of the issuer's securities in response to changing market conditions. Finally, freeing issuers from the constraint of having to initially register a particular class or amount of securities would permit issuers to structure securities on a real-time basis to accommodate investor demand.

The other amendments to the shelf registration procedures and expansion of incorporation by reference also will provide flexibility to issuers to enable them to access the capital markets at a lower cost. For example, removing the current restrictions on at-the-market offerings of equity securities would allow issuers to offer securities directly to the marketplace, without using the underwriting or syndication process. Under our proposals to expand Form S–3 eligibility to cover additional majority-owned subsidiaries, issuers would have greater flexibility to structure offerings of guaranteed securities without losing the benefits of shelf registration. In addition, our proposals to expand incorporation by reference will enable eligible issuers to use their Exchange Act filings to satisfy their disclosure requirements without having to incur costs to replicate information in the prospectus.

Providing flexibility for registered offerings may encourage issuers to raise capital through the registration process instead of through private placements. Typically, registered securities enjoy more liquid markets than unregistered securities. Therefore, registered securities would not be subject to a liquidity discount. In addition, registered securities offerings provide a larger investor base than that available to those who participate in private placements. Accordingly, issuers may

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[428] *See, e.g.*, Release No. 33–3519 (Oct. 11, 1954) [19 FR 6727]; Release No. 33–4968 (Apr. 24, 1969) [34 FR 7235]; *Adoption of Integrated Disclosure System*, Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380].

[429] Recent research has examined the effect of securities laws on stock market development in 49 countries and found strong evidence that laws facilitating private enforcement through disclosure and liability rules are positively correlated with more developed stock markets. *See*, La Porta, Lopez de Silanes, and Shleifer, "What Works in Securities Laws?" (July 16, 2003), Tuck School of Business Working Paper No. 03–22.

[430] The proposals would not affect the application of the Securities Act to oral road show presentations for their institutional investor clients.

incur lower transaction costs when raising capital because they would have access to a much deeper market for their securities and would not have to expend additional resources to locate investors.

The prospectus delivery proposals are designed to facilitate effective access to information, while taking into account advancements in technology and the practicalities of the offering process. These changes are intended to alleviate timing difficulties that may arise under the current securities clearance and settlement system, and also to facilitate the successful delivery of, and payment for, securities in a registered offering. Given that the final prospectus delivery obligations generally affect investors only after they have made their investment decisions and that investors and the market have access to the final prospectus upon its filing, we believe that the obligation could be satisfied through a means other than physical delivery. Because the contract of sale would have already occurred by the time the final prospectus was filed, we also believe that delivery of a confirmation and the delivery of the final prospectus need not be linked. Receiving confirmations earlier in the settlement process would enable investors to review the confirmation and verify trade data closer to the time of the investment decision.

4. Reduced Regulatory Uncertainty

The proposals modify the federal securities laws related to communications, liability, shelf registration, and the use of electronic media during a registered offering. The proposals, by enhancing issuers' certainty about the regulatory treatment of and liability provisions attached to the publication of information to the marketplace, could encourage issuers to increase the dissemination of readily available information useful to investors, such as management's plans and objectives for future operations. The proposed 30-day bright line exclusion and the proposed exemption from the prohibition on offers prior to filing for well-known seasoned issuers would provide issuers with comfort in communicating information without risk of violating the gun-jumping provisions. Moreover, as a result of the proposed safe harbors for regularly released factual business information and forward-looking information, issuers, brokers, and dealers would be able to avoid disruption in their ordinary communications with the investment community. At the same time, those communications could benefit all investors because there would be more current information and analysis available upon which to make investment decisions.

The proposals to amend the shelf registration procedures would codify in a single location rules for permissible omissions from shelf registration statements under the Securities Act and the permissible methods to include the omitted information. This would promote efficiency by providing certainty about the content of base prospectuses in shelf registration statements and the methods by which required information may be included, thereby reducing divergent practices and eliminating possible inadvertent mistakes. In addition, we believe the proposals would address the disparate treatment of underwriters from a liability standpoint by establishing a new effective date for liability purposes for issuers and other offering participants in connection with takedowns off shelf registration statements, as reflected in prospectus supplements filed for such takedowns.

5. Lower Costs

The prospectus delivery proposals and our proposals related to the registered securities offering process would provide cost-saving options to issuers, underwriters and participating broker-dealers. For purposes of our PRA analysis, we have estimated that our proposed amendments to the registered securities offering processes would reduce the current compliance costs by approximately $87,299,000.[431] In addition, we believe that issuers and underwriters will benefit from not having to print and deliver final prospectuses. We estimate that the cost savings per prospectus would be approximately $0.75 per prospectus. For purposes of the PRA, we have estimated 232.45 million instances in which broker dealers will be able to rely on our "access equals delivery" proposals. Investors may request the final prospectus, and we estimate that they will do so 25% of the time. Therefore, we estimate the annual cost savings will be approximately $130,753,000.[432]

D. Costs

While the overall goal of the proposed reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets, we do believe that there may be potential costs to our proposal. These include costs for compliance with the new rules, potential behavioral changes resulting from our liability proposals, and certain other costs.

1. Compliance Costs

One potential cost of the proposals is that issuers may incur increased filing costs associated with issuer free writing prospectuses or making a version of an electronic road show publicly available. For purposes of our PRA analysis, we have estimated that these costs will be approximately $621,800.[433] These costs should be mitigated somewhat by the fact that free writing prospectuses are not required to be filed as part of the registration statement and therefore will not have to be conformed to meet all the requirements for an amendment to the registration statement. In addition, because oral communications are not written and, therefore, not free writing prospectuses, our proposals should not result in significant incremental costs from existing regulations. We also are conditioning the use of free writing prospectuses on the inclusion of a legend that notifies investors that they can receive a copy of the prospectus by calling a toll-free number. Accordingly, there may be some costs for issuers and offering participants associated with establishing a toll-free number for investors.

Another potential compliance cost is the additional expenditures that issuers and offering participants may incur in storing and archiving information to satisfy the proposed record retention conditions. Especially when the communication has been transmitted electronically or is contained on Web sites, parties will need to implement appropriate mechanisms to ensure that they retain for three years adequate records of any free writing prospectuses used. For purposes of our PRA analysis, we have estimated that these costs will be approximately $948,900.[434]

[431] For purposes of monetizing the cost of issuer personnel time, we estimate the average hourly cost of issuer personnel time to be $125. The calculation for total cost is: (85,170 hours of issuer personnel time multiplied by $125 per hour) plus ($76,652,993 professional costs) = $87,299,000. *See* also notes 413 through 424 and accompanying text.

[432] ($0.75 per prospectus) multiplied by (232.45 million prospectuses multiplied by 75% frequency of relying on proposed Rule 172) = $130,753,125.

[433] We estimate the average hourly cost of issuer personnel time to be $125. The calculation for total filing cost is: (478.25 issuer hours to make filings under Rule 433 plus (3.31 issuer hours to make filings under Rule 163) plus (125.06 issuer hours to make available electronic road show) multiplied by ($125 per hour) plus ($430,425.00 professional costs to make filings under Rule 433) plus ($2,981.25 professional costs to make filings under Rule 163) plus ($112,556 professional costs to make available electronic road show) = $621,789.75. *See* also Table 3 in Section X above under "Paperwork Reduction Act."

[434] The calculation for total record retention cost is: (925.75 issuer hours) multiplied by ($125 per hour) plus $833,175.00 professional cost =

Continued

The proposed disclosures may increase the cost to issuers of preparing their Exchange Act reports. We do not expect the costs to accelerated filers of including disclosure of certain unresolved staff comments to be significant, because, even when an accelerated filer would have to include that disclosure, the information would be readily available to the issuer. For purposes of our PRA analysis, we have estimated that these additional disclosures will cost a total of $138,713 per year.[435]

Including risk factor disclosure will require extra effort for issuers who do not already include this disclosure in their Exchange Act reports for other reasons. For purposes of the PRA, we have estimated that these additional disclosures will result in additional costs of $9,743,417 to prepare, review, and file the proposed disclosure.[436] Because issuers already are required to prepare financial statements and other information about their business, financial condition, and prospects in their quarterly and annual reports, some of which will include these risk factors, we believe that issuers will have the information available to create their risk factor disclosure. In addition, issuers may already include risk factor disclosure in their Exchange Act reports for varying reasons, including to take advantage of the safe harbor for forward-looking statements in Securities Act Section 27A of the Securities Act[437] and the "bespeaks caution" defense developed through case law. We recognize, however, that issuers will incur costs in preparing, reviewing, filing, printing, and disseminating this information. In particular, in addition to involving in-house preparers, in-house legal and accounting staff, and senior management, issuers may consult with outside legal counsel in preparing this disclosure. We believe, however, that the potential compliance costs for the risk factor disclosure should be considered in light of the fact that requiring risk factor disclosure in Exchange Act registration statements and annual reports will enhance the ability of reporting issuers to incorporate risk factor disclosure from Exchange Act reports into Securities Act registration statements to satisfy the risk factor disclosure requirements.

Parties also may incur additional costs due to the requirement to notify investors that they have purchased in a registered offering. In addition, these same parties will incur costs to establish procedures for receiving and complying with requests for final prospectuses. We believe that providing the notice to investors would not impose a significant incremental costs because the notice could consist of a pre-printed message that is automatically delivered with the confirmation required by Exchange Act Rule 10b–10. Accordingly, we estimate that the cost for complying with proposed Rule 173 prospectus would be approximately $0.05 per notice. We estimate the annual cost of providing the notifications would be approximately $11,622,500.[438] The cost savings resulting from the elimination of the requirement to supply a final prospectus to each investor would offset these costs, however.

2. Potential for Increased Liability

Our proposals to deem prospectus supplements to be part of and included in effective registration statements, and to modify, for liability purposes, the effective date of shelf registration statements to link them to individual offerings or takedowns off the shelf registration statement may cause issuers to evaluate more carefully the information contained in the prospectus supplements and the information conveyed to investors.

With respect to the risk factor disclosure, a potential cost might be that issuers may be concerned about increased liability for a material misstatement or omission in their disclosure. In particular, some commenters on the 1998 proposals expressed concern that issuers might be liable for failure to disclose, or for failure to disclose prominently enough, a particular risk that in hindsight should have been emphasized. In addition, issuers were particularly concerned about liability for information that may be forward-looking in nature.

In view of existing liability for information in registration statements and Exchange Act reports, as well as existing safe-harbors for forward-looking information, in drafting the current proposal, however, we were sensitive to potential additional costs that the proposed disclosure requirement might impose. For example, for liability purposes, we are not proposing to treat risk factor disclosure any differently than other disclosures in Exchange Act reports that may be incorporated by reference into Securities Act registration statements. We also note that the safe harbor for forward-looking statements contained in Securities Act Section 27A and Exchange Act Section 21E would apply to this disclosure for eligible issuers. In addition, the risk factor disclosure is based on an evaluation of the material risks facing an issuer due to its business, operations, or other matters. Issuers currently disclose significant information about themselves in their Exchange Act reports, including in management's discussion and analysis of financial condition and results of operations[439] and, as a result, already analyze their business and operations. Moreover, we note that issuers already are subject to disclosure requirements regarding this information in Securities Act registration statements.

3. Research Reports

While the proposed rules expand, to some extent, the circumstances under which brokers and dealers can publish research reports on an issuer or its securities while the issuer is engaging in a registered offering, they also contain revised conditions to the availability of the safe harbors. For example, while we are expanding the categories of eligible issuers for purposes of Securities Act Rule 138, we also are revising the requirement that the broker or dealer have an established history of publishing or distributing research to provide that the research must be on the type of securities being offered. This could act as a barrier to brokers or dealers with no established history of publishing particular types of research from publishing research while they are participating in an offering. In addition, we are proposing to exclude from Securities Act Rules 137, 138, and 139 research reports relating to issuers who are, or their predecessors in the prior three years were, blank check companies, shell companies, or penny stock issuers. This could preclude certain issuers from being covered by brokers or dealers that are participating

$948,893.75. See also Table 3 in Section X above under "Paperwork Reduction Act."

[435] For purposes of the PRA, we estimated that issuers would spend a total of $61,650 on outside professionals to prepare this disclosure. We also estimated that issuers would spend a total of 616.5 hours of issuer personnel time preparing this disclosure. We estimate the average hourly cost of issuer personnel time to be $125, resulting in a total cost of $77,062.50 for issuer personnel time. This results in a total cost of $138,712.50 for all issuers.

[436] For purposes of the PRA, we estimated that issuers would spend a total of $4,414,854 on outside professionals to prepare this disclosure. We also estimated that issuers would spend a total of 42,628.5 hours of issuer personnel time per year on risk factor disclosures. We estimate the average hourly cost of issuer personnel time to be $125 per year, resulting in a total cost of $5,328,563 for issuer personnel time. This results in a total cost of $9,743,416.50 for all issuers.

[437] 17 U.S.C. 77z–2.

[438] ($0.05 per notice) multiplied by (232.45 million confirmations) = $11,622,500. *See* also note 410 and accompanying text.

[439] *See e.g.*, Item 503 of Regulation S–K [17 CFR 229.503].

in one of these issuers' registered offerings.

4. Other Potential Costs

We are proposing to allow registration statements by well-known seasoned issuers to become effective automatically, rather than being subject to review by the staff of the Division of Corporation Finance. As a result, registrants may not have the same incentive to remedy deficient disclosure in Exchange Act reports or in the registration statement itself than they would if their registration statements were subject to pre-effective staff review. We have sought to minimize this possibility by proposing to require accelerated filers to disclose, on an annual basis, written staff comments on their periodic report disclosures, that were issued more than 180 days prior to the fiscal year end covered by the report, that the issuer believes to be material, and that remain unresolved at the time of the filing of the annual report.

The proposed rules also could impose certain costs on underwriters. For example, removing the restrictions on at-the-market offerings could affect underwriters negatively because issuers may decide not to hire an underwriter to conduct an offering.

We also recognize that relaxing restrictions on communications may impose an analytical burden on investors. For example, today, for some offerings, such as those on Form S–1, much of the relevant information regarding an offering is required to be contained in one document comprising the registration statement. Under our proposals, some offerings would require an investor to assemble and assimilate information from various free writing prospectuses, Exchange Act reports, and the Securities Act registration statement in order to get the relevant information regarding an offering. Investors would have to compile the information integrated into the registration statement or delivered by means outside of the prospectus. We note, however, that Securities Act Forms S–3 and F–3 have long permitted incorporation by reference from the issuer's Exchange Act reports and investors have not complained they are unduly burdened when investing in offerings registered on these Forms.

E. Request for Comment

- Will our proposals result in investors receiving more timely and accurate information upon which to base an investment decision?
- Is our definition of "well-known seasoned issuer" appropriate for the purposes of the proposal?
- If we were to remove restrictions on at-the-market offerings, would issuers be inclined to conduct at-the-market offerings without the services of an underwriter?
- We request data to quantify the costs of filing issuer free writing prospectuses, even if they are not required to meet our statutory prospectus requirements. In addition, how many free writing prospectuses would an issuer expect to file on average in connection with each offering? How many other free writing prospectuses are offering participants likely to file in connection with each offering?
- We request comment on the costs of implementing and maintaining any storage systems and capabilities that issuers and offering participants will need to retain for three years adequate records of any free writing prospectuses used. Please provide any quantitative data on which you rely in formulating your comments.
- We request comment on whether investors would benefit overall from issuers communicating with investors outside of the statutory prospectus. Does the benefit of greater freedom in communications outweigh the cost to security holders of obtaining and analyzing the additional information?
- We request comment or data on any other costs that would be associated with the proposed relaxation of the communications restrictions and the amendments to the filing requirements.
- We request comment on the additional costs that issuers and underwriters may incur in complying with the proposed notification requirement for investors who purchased in a registered offering.
- We request comment as to whether the proposals regarding delivery of final prospectuses would negatively impact investors and, if so, how.
- We request comment on the assumptions and quantitative data underlying the costs to investors of acquiring final prospectuses. What percentage of investors would contact issuers for copies of prospectuses? What percentage of investors would obtain prospectuses through the Internet? How much would it cost investors in terms of paper, printer ink, Internet connection costs, and time to download information and print prospectuses?
- What are the costs to issuers and underwriters of printing and delivering prospectuses?
- Would issuers and underwriters incur additional incremental costs if they needed to print extra prospectuses due to demand for paper copies?
- We request comment on the number of prospectuses that issuers and underwriters would no longer need to print and deliver to investors and the size of the resulting cost savings.
- We request comment (especially quantitative data) as to whether having access to research reports will enhance investors' ability to evaluate securities and help ensure that the market will properly value securities.
- We request comment on the quantification of the benefits to investors of determining liability as to a statement or communication in a manner that does not take into account information conveyed only after the time of the contract of sale.
- We request comment on the costs and benefits of our proposal that an issuer in a primary offering of securities, regardless of the form of underwriting, be considered a seller for purposes of Securities Act Section 12(a)(2).
- We request comment on whether, and how, investors would benefit from the disclosure regarding unresolved comments in Exchange Act periodic reports, including any quantifiable benefits of having this additional disclosure.
- We request comment on whether, and how, investors would benefit from the disclosure regarding risk factors, including any quantifiable benefits of having this additional disclosure.
- We request comment on the potential liability costs of including the disclosure requirements in Exchange Act periodic reports, including a quantification of the costs of preparing the risk factor and unresolved staff comment disclosures and of the potential litigation costs.
- We request comment on whether it would be difficult or costly for investors to compile materials that are incorporated by reference into prospectuses.

XII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Exchange Act Section 23(a)(2) [440] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, Securities Act Section

[440] 15 U.S.C. 78w(a)(2).

2(b)[441] and Exchange Act Section 3(f)[442] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The proposed amendments are intended to modify and advance the Commission's regulatory system for offerings under the Securities Act of 1933, enhance communications between public issuers and investors, and promote investor protection. We anticipate these proposals will improve investors' ability to make informed investment decisions and, therefore, lead to increased efficiency and competitiveness of the U.S. capital markets. We anticipate that this increased market efficiency and investor confidence also may encourage more efficient capital formation. Specifically, we believe that the proposals will:

- Facilitate greater availability of information to investors and the market with regard to all issuers;
- Eliminate barriers to open communications that have been made increasingly outmoded by technological advances;
- Reflect the increased importance of electronic dissemination of information, including the use of the Internet;
- Make the capital formation process more efficient; and
- Define more clearly both the information and the timeliness of the availability of information against which a seller's statements are evaluated for liability purposes.

To the extent that some of these reforms will be available to well-known seasoned issuers, smaller issuers may not be able to use all of the reforms. In addition, it is possible that investors will favor issuers that are able to take advantage of the reforms. We believe, however, that these potential unequal effects are justified in order to ensure that investors have appropriate access to required information about all issuers.

We request comment on whether the proposals, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their views, if possible.

[441] 15 U.S.C. 77b(b).

[442] 15 U.S.C. 78c(f).

XIII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Securities Act and the Exchange Act that would (1) alter shelf registration procedures; (2) allow more communications between offering participants than currently permitted; and (3) enable offering participants to satisfy their prospectus delivery obligations through means other than actual physical delivery. These proposals are intended to modify and advance the Commission's regulatory system for offerings under the Securities Act of 1933, enhance communications between public issuers and investors, and promote investor protection.

A. Reasons for the Proposed Action

In 1998, the Commission proposed new rules under the Securities Act that were intended to modernize the securities offering process to recognize the evolution of the securities markets and securities products since the Securities Act's adoption and to enable market participants to capitalize on new technologies.[443] The underlying premise of those proposals—the need to modernize the securities offering and communications processes—was supported by commenters at the time. However, commenters indicated dissatisfaction with a number of the specifics in the 1998 proposals. We believe that the objectives of the 1998 proposals in reforming the offering process continue to be supported, and merit our attention still.

The 1998 proposals were a step in an evaluation of the offering process under the Securities Act that began as far back as 1966, when Milton Cohen noted the anomaly of the structure of the disclosure rules under the Securities Act and the Exchange Act and suggested the integration of the requirements under the two statutes.[444] Mr. Cohen's article was followed by a 1969 study led by Commissioner Francis Wheat[445] and the Commission's Advisory Committee on Corporate Disclosure in 1977.[446] These studies eventually led to the Commission's adoption of the integrated disclosure system, short-form registration under the Securities Act, and Securities Act Rule 415 permitting shelf registration of continuous offerings and delayed offerings.[447]

The Commission's attention to the offering and communications processes under the Securities Act has continued more recently. In particular, in March 1996, members of the Commission staff delivered the Report of the Task Force on Disclosure Simplification to the Commission.[448] It recommended a number of areas where simplification and modernization of the registration and offering process could be accomplished. In July 1996, the Advisory Committee on the Capital Formation and Regulatory Processes delivered its report to the Commission.[449] Its principal recommendation was that the Securities Act registration and disclosure processes be more directly tied to the philosophy and structure of the Exchange Act through the adoption of a system of "company registration." Under company registration, the focus of Securities Act and Exchange Act

[443] *See The Regulation of Securities Offerings*, Release No. 33–7606A (Nov. 13, 1998 [63 FR 67174] (the "1998 proposals").

The National Securities Markets Improvement Act of 1996 (NSMIA) provided the Commission with general authority to adopt exemptive rules under the Securities Act to the extent that such exemptive action is "necessary or appropriate in the public interest and consistent with the protection of investors." See Securities Act Section 28 [15 U.S.C. 77z–3]. This authority permitted a number of the proposals put forth in our 1998 proposals to go beyond previous modernization efforts.

[444] Milton H. Cohen, *Truth in Securities Revisited*, 79 Harv. L. Rev. 1340 (1966). ("It is my thesis that the combined disclosure requirements of these statutes would have been quite different if the 1933 and 1934 Acts * * * had been enacted in opposite order, or had been enacted as a single, integrated statute—that is, if the starting point had been a statutory scheme of continuous disclosures covering issuers of actively traded securities and the question of special disclosures in connection with public offerings had then been faced in this setting. Accordingly, it is my plea that there now be created a new coordinated disclosure system having as its basis the continuous disclosure system of the 1934 Act and treating the "1933 Act" disclosure needs on this foundation.")

[445] *See Disclosure to Investors—a Reappraisal of Federal Administrative Policies under the '33 and '34 Acts*, Policy Study (the "Wheat Report"), *www.sechistorical.org/museum/Museum_Papers/museum_Papers_Chron.php#1960* (Mar. 27, 1969).

[446] See Report of the Advisory Committee on Corporate Disclosure, Cmte. Print 95–29, House Cmte. On Interstate and Foreign Commerce, 95th Cong., 1st. Sess., Nov. 3, 1977 (Nov. 3, 1977). In addition, beginning in 1968, the American Law Institute ("ALI") began its work on a Federal Securities Code, which was approved in 1978 by the ALI membership. The ALI Federal Securities Code included company registration as a central component. See American L. Inst., Federal Securities Code (1980).

[447] *See Adoption of Integrated Disclosure System*, Release No. 33–6383 (Mar. 16, 1982) [47 FR 11380], *Delayed or Continuous Offering and Sale of Securities*, Release No. 33–6423 (Sept. 10, 1982) [47 FR 39799], and *Shelf Registration*, Release No. 33–6499 (Nov. 17, 1983) [48 FR 52889].

[448] *Report of the Task Force on Disclosure Simplification*, available at *www.sec.gov/news/studies/smpl.htm* (Mar. 5, 1996).

[449] *Report of the Advisory Committee on the Capital Formation and Regulatory Process*, available at *www.sec.gov/news/studies/capform.htm* (July 24, 1996) (the "Advisory Committee Report").

registration and disclosure would move from transactions to issuers and corollary steps would be taken to provide for disclosure and registration of individual offerings within the company registration framework.

Promptly after the Advisory Committee delivered its report, the Commission issued a concept release regarding regulation of the offering process.[450] The release sought input on a number of significant issues, including the concept of company registration, integration of the Securities Act and Exchange Act, enhanced Exchange Act reporting, whether information was properly and timely made available in the offering process, and whether the review of filings of issuers by the staff of the Division of Corporation Finance should be modified, at least for some category of large seasoned issuers.

While many of the issues cited above remain valid matters for consideration, much of the comment in response to our 1998 proposals suggested that the existing system of regulating capital formation in the registered offering market provides a number of advantages that should be carefully considered and retained if we are to make other changes. In putting forward proposed rules today, we have focused primarily on constructive, incremental changes in our regulatory structure and the offering process rather than the introduction of a far-reaching new system, as we believe that we can best achieve further integration of Securities Act and Exchange Act disclosure and processes by making adjustments in the current integrated disclosure and shelf registration systems. Further, consistent with our belief that investors and the securities markets will benefit from greater permissible communications by issuers while retaining appropriate liability for these communications, we have sought to address the need for timeliness of information for investors by building on current rules and processes without mandating delays in the offering process that we believe would be inconsistent with the needs of issuers for timely access to the securities markets and capital.

We are proposing revisions to the registration, communications, and offering processes under the Securities Act that we believe, while limited in scope, properly address the areas that are in need of modernization. Our proposals involve three main areas:

- Communications related to registered securities offerings;
- Procedural restrictions in the offering and capital formation processes; and
- Delivery of information to investors.

B. Objectives

The overall goal of the proposed reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets. The proposals reflect our view that revisions to the Securities Act registration and offering processes are not only appropriate in light of significant developments in the offering and capital formation processes, but also are necessary for the proper protection of investors under the statute. This view is based on our belief that today's proposals would:

- Facilitate greater availability of information to investors and the market with regard to all issuers;
- Eliminate barriers to open communications that have been made increasingly outmoded by technological advances;
- Reflect the increased importance of electronic dissemination of information, including the use of the Internet;
- Make the capital formation process more efficient; and
- Define more clearly both the information and the timeliness of the availability of information against which a seller's statements are evaluated for liability purposes.

C. Legal Basis

We are proposing amendments to the forms and rules under the authority set forth in Sections 7, 10, 19, 27A, and 28 of the Securities Act of 1933, as amended, Sections 3, 10, 12, 13, 15, 17, 21E, 23, and 36 of the Securities Exchange Act of 1934, as amended, and Sections 8, 24(a), 30, and 38 of the Investment Company Act of 1940.

D. Small Entities Subject to the Proposed Rules

The proposals would affect issuers that are small entities. Securities Act Rule 157[451] and Exchange Act Rule 0–10(a)[452] define a issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year.[453] We estimate that there were approximately 2,500 public issuers, other than investment companies, that may be considered small entities. We estimate that there are approximately 233 investment companies that may be considered small entities.

In addition to small issuers, small broker-dealers may be affected by the rules. Paragraph (c)(1) of Rule 0–10[454] states that the term "small business" or "small organization," when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2003, the Commission estimates that there were approximately 900 broker-dealers that qualified as small entities as defined above. To the extent a small broker-dealer participates in a securities offering or prepares research reports, it may be affected by our proposals. Generally, we believe larger broker-dealers engage in these activities, but we request comment on whether and how these proposals will affect small broker-dealers.

For purposes of the proposals, we would categorize issuers into tiers, consisting of non-reporting issuers, unseasoned issuers, seasoned issuers, and well-known seasoned issuers. The first three tiers of issuers would be identified by pre-existing criteria under the existing federal securities laws. A non-reporting issuer would be an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act. An unseasoned issuer would be an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but does not satisfy the requirements of Form S–3 or Form F–3 for a primary offering of its securities.[455] A seasoned issuer would be an issuer that is eligible to use Form S–3 or Form F–3 to register offerings of securities to be sold by or on its behalf, on behalf of its subsidiary, or on behalf of a person of which it is the subsidiary. Our longstanding experience with these categories of issuers provides us with a basis for determining the amount of flexibility provided by the proposals.

The characteristics of the last tier of issuer, called well-known seasoned issuers in the proposals, would be easily

[450] *Securities Act Concepts and Their Effects on Capital Formation*, Concept Release, Release No. 33–7314 (July 25, 1996) [61 FR 40044].

[451] 17 CFR 230.157.

[452] 17 CFR 240.0–10(a).

[453] An investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. 17 CFR 270.0–10.

[454] 17 CFR 240.0–10(c)(1).

[455] Under the proposals, an issuer that is voluntarily filing Exchange Act reports, but is not required to do so, would be an unseasoned issuer for purposes of the communications and procedural proposals.

measurable and readily available so that issuers and market participants can determine eligibility easily. For issuers with publicly traded equity, we believe that market capitalization provides a sufficient proxy for determining whether or not an issuer is well followed. For issuers of fixed income securities, we believe that the amount of fixed income securities sold in registered offerings in the past three years provides sufficient proxy.[456]

Under the proposals, a well-known seasoned issuer would have the greatest flexibility. The largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers, large, seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media. The communications of these well-known seasoned issuers are subject to scrutiny by investors, the financial press, analysts, and others who evaluate disclosure when it is made.

To the extent that some of these reforms are designed for well-known seasoned issuers, smaller issuers may not benefit from all of the reforms to the registration process. We believe, however, that these potential unequal effects are justified in order to ensure that investors have access to required information about all issuers. Therefore, allowing smaller entities to take advantage of all of the reforms to the registration process may not address issues of investor protection. We have proposed that the reforms not be available to offerings by a blank check company, offerings by a shell company, and offerings of penny stock by an issuer. These offerings are more likely to be made by issuers that are small issuers. We have proposed to exclude these offerings from the reforms because they pose the greatest risk of abuse of the reforms.

To the extent the proposals are not available to smaller issuers, the establishment of any differing compliance or reporting requirements or timetables or any exemptions for small business issuers may not be in keeping with the objectives of the proposed rules. We believe that the current proposals are a cost-effective initial approach to address specific concerns related to small entities.

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

E. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments are expected to impact all issuers raising capital and selling security holder transactions that are registered under the Securities Act, as well as all issuers that file annual reports on Exchange Act Form 10–K or Form 20–F.

For smaller issuers, we are not proposing any new restrictions on communications. In fact, small issuers will be able to take advantage of the new bright-line rule permitting communications more than 30 days before filing a registration statement and the clarification that they can continue to make factual business communications. Small issuers, like larger issuers, will have to file any free writing prospectus they use. We are not proposing to require issuers that file on Form 10–KSB, who tend to be smaller issuers, to disclose risk factors. Unlike larger companies that are "accelerated filers," smaller issuers will not be required to disclose outstanding staff comments in their annual reports.

The proposals also would affect broker-dealers participating in a registered offering, as they would no longer be required to delivery a final prospectus, but would be able to send a notice of allocation and notice of prospectus availability. They also would be permitted to prepare and use free writing prospectuses. The broker-dealer would have to retain copies of the free writing prospectus for three years. Finally, the broker-dealer would be permitted to issue research reports with respect to a broader class of issuers and securities than currently permitted.

We encourage written comments regarding this analysis. We solicit comments as to whether the proposed amendments could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or completely duplicate the proposed rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

1. Establishing different compliance or reporting requirements that take into account the resources of small entities;
2. The clarification, consolidation, or simplification of disclosure for small entities;
3. Use of performance standards rather than design standards; and
4. Including smaller entities in some of the reforms.

The Commission has considered a variety of reforms to achieve its regulatory objectives. We are not proposing to require small business issuers to include disclosure of risk factors or unresolved staff comments in their Exchange Act periodic reports. We are proposing to liberalize generally the restrictions regarding communications around the time of a Securities Act registered offering of securities. As discussed above, the proposed flexibility will be greatest for larger, more seasoned issuers; however, the proposals would provide greater flexibility for all issuers, including small entities. As we implement these changes, we will consider the available information to determine whether greater flexibility is warranted, consistent with investor protections.

H. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. In particular, we request comments regarding:

1. The number of small entities that may be affected by the proposals;
2. The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
3. How to quantify the impact of the proposed rules.

Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, or, in the alternative, a certification under Section 605(b) of the Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

XIV. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[457] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;

[456] For further discussion of the characteristics of well-known seasoned issuers, *see* Section II above.

[457] Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

• A major increase in costs or prices for consumers or individual industries; or

• Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on: (a) The potential effect on the U.S. economy on an annual basis; (b) any potential increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

XV. Statutory Basis—Text of the Proposed Amendments

We are proposing the new rules and amendments pursuant to Sections 7, 10, 19, 27A and 28 of the Securities Act, as amended, Sections 3, 10, 12, 13, 15, 17, 21E, 23 and 36 of the Securities Exchange Act, as amended, and Sections 8, 24(a), 30, and 38 of the Investment Company Act of 1940, as amended.

List of Subjects

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Parts 229, 230, 239, 240, and 243

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for part 228 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

2. Amend § 228.512 as follows:

a. Add paragraph (a)(4);

b. Add paragraph (a)(5); and

c. Add paragraph (g).

The additions read as follows:

§ 228.512 (Item 512) Undertakings.

* * * * *

(a) * * *

* * * * *

(4) For determining liability under the Securities Act of 1933 to any purchaser, each prospectus filed by the small business issuer pursuant to Rule 424(b)(3) (§ 230.424(b)(3) of this chapter) shall be deemed to be part of the registration statement as of the date it is first used after effectiveness.

(5) For determining liability of the small business issuer under the Securities Act of 1933 to any purchaser, the small business issuer undertakes that in a primary offering for the benefit of the small business issuer pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, the small business issuer will be considered to offer or sell the securities by means of any of the following communications:

(i) A small business issuer's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 424 (§ 230.424 of this chapter);

(ii) Any free writing prospectus prepared by or on behalf of the undersigned small business issuer;

(iii) Information about the small business issuer or its securities (A) provided by or on behalf of the undersigned small business issuer and (B) included in any other free writing prospectus; and

(iv) Any other communication made by or on behalf of undersigned small business issuer.

* * * * *

(g) If the small business issuer is relying on Rule 430C (§ 230.430C of this chapter), include the following:

Each prospectus filed pursuant to Rule 424(b)(3) (§ 230.424(b)(3) of this chapter) as part of a registration statement in reliance on Rule 430C (§ 230.430C of this chapter) relating to an offering made pursuant to Rule 415(a)(1)(i) or (ix) (§ 230.415(a)(1)(i) or (ix) of this chapter), other than registration statements relying on Rule 430A (§ 230.430A of this chapter), shall be deemed to be part of and included in the registration statement as of the date it is first used after effectiveness. *Provided, however,* that no statement in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in the registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of and included in the registration statement.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

3. The authority citation for part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 79e, 79j, 79n, 79t, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

4. Amend § 229.512 as follows:

a. Revise the proviso immediately following paragraph (a)(1)(iii);

b. Add paragraph (a)(5); and

c. Add paragraph (a)(6).

The revision and additions read as follows:

§ 229.512 (Item 512) Undertakings.

(a) * * *

(1) * * *

(iii) * * *

Provided, however, That: (A) paragraphs (a)(1)(i) and (a)(1)(ii) of this section do not apply if the registration statement is on Form S–8 (§ 239.16b of this chapter), and the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78o(d)) that are incorporated by reference in the registration statement; and (B) paragraphs (a)(1)(i), (a)(1)(ii) and (a)(1)(iii) of this section do not apply if the registration statement is on Form S–3 (§ 239.13 of this chapter) or Form F–3 (§ 239.33 of this chapter) and the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement, or is contained in a prospectus supplement filed pursuant to Rule 424(b) (§ 230.424(b) of this chapter).

* * * * *

(5) That, for the purpose of determining liability under the Securities Act of 1933 to any purchaser, except as provided in (a)(5)(ii) or (a)(5)(iii) of this section:

(i) Each prospectus filed by the registrant pursuant to Rule 424(b)(3)

(§ 230.424(b)(3) of this chapter) shall be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement; and

(ii) If the registrant is relying on Rule 430B (§ 230.430B of this chapter): Each prospectus filed pursuant to Rule 424(b)(2), (b)(5), (b)(7) or (b)(8) (§ 230.424(b)(2), (b)(5), (b)(7), or (b)(8) of this chapter) as part of a registration statement in reliance on Rule 430B (§ 230.430B of this chapter) or otherwise relating to an offering made pursuant to Rule 415(a)(1)(i) or (x) (§ 230.415(a)(1)(i) or (x) of this chapter), for the purpose of providing the information required by section 10(a) of the Securities Act of 1933 shall be deemed to be part of and included in the registration statement as of the earlier of the date it is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. Such date shall be deemed to be a new effective date of the registration statement for liability purposes as provided in Rule 430B (§ 230.430B of this chapter) relating to the securities in the registration statement to which that prospectus relates, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. *Provided, however*, that no statement in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in the registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of and included in the registration statement; or

(iii) If the registrant is relying on Rule 430C (§ 230.430C of this chapter): Each prospectus filed pursuant to Rule 424(b)(3) (§ 230.424(b)(3) of this chapter) as part of a registration statement in reliance on Rule 430C (§ 230.430C of this chapter) relating to an offering made pursuant to Rule 415(a)(1)(i) or (ix) (§ 230.415(a)(1)(i) or (ix) of this chapter), other than registration statements relying on Rule 430A (§ 230.430A of this chapter) shall be deemed to be part of and included in the registration statement as of the date it is first used after effectiveness. *Provided, however*, that no statement in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in the registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of and included in the registration statement.

(6) That, for the purpose of determining liability of the registrant under the Securities Act of 1933 to any purchaser:

The undersigned registrant undertakes that in a primary offering for the benefit of the undersigned registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, it will be considered to offer or sell the securities by means of any of the following communications:

(i) A registrant's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 424 (§ 230.424 of this chapter);

(ii) Any free writing prospectus prepared by or on behalf of the undersigned registrant;

(iii) Information about the registrant or its securities (A) provided by or on behalf of the undersigned registrant and (B) included in any other free writing prospectus; and

(iv) Any other communication made by or on behalf of undersigned registrant.

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

5. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

6. Revise § 230.134 to read as follows:

§ 230.134 Communications not deemed a prospectus.

Except as provided in paragraph (f) of this section, the terms "prospectus" as defined in section 2(a)(10) of the Act or "free writing prospectus" as defined in Rule 405 (§ 230.405) shall not include a communication limited to the statements required or permitted by this section, provided that the communication is published or transmitted to any person only after a registration statement (which includes a prospectus satisfying the requirements of section 10 of the Act, including a price range where required) has been filed.

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph:

(1) Factual information about the legal identity and business location of the issuer limited to the following: the name of the issuer of the security, the address, phone number and e-mail address of the issuer's principal offices and contact for investors, the issuer's country of organization, and the geographic areas in which it conducts business;

(2) The title of the security or securities and the amount or amounts being offered;

(3) A brief indication of the general type of business of the issuer, limited to the following:

(i) In the case of a manufacturing company, the general type of manufacturing, the principal products or classes of products manufactured, and the segments in which the company conducts business;

(ii) In the case of a public utility company, the general type of services rendered, a brief indication of the area served, and the segments in which the company conducts business;

(iii) In the case of an asset-backed issuer, the identity of key parties, such as sponsor, depositor, issuing entity, servicer, and trustee, the asset class of the transaction, and the identity of any credit enhancement or other support; and

(iv) In the case of any other type of company, a corresponding statement;

(4) The price of the security, or if the price is not known, the method of its determination or the bona fide estimate of the price range as specified by the issuer or the managing underwriter or underwriters;

(5) In the case of a fixed income security, the final maturity and interest rate provisions or, if the final maturity or interest rate provisions are not known, the probable final maturity or interest rate provisions, as specified by the issuer or the managing underwriter or underwriters;

(6) In the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter or underwriters and the yield of fixed income securities with comparable maturity and security rating as referred to in paragraph (a)(15) of this section;

(7) The name and address of the sender of the communication and the fact that it is participating, or expects to participate, in the distribution of the security;

(8) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(9) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them);

(10) A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy);

(11) Whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies, or similar investors under the laws of any State or Territory or the District of Columbia;

(12) Whether, in the opinion of counsel, the security is exempt from specified taxes, or the extent to which the issuer has agreed to pay any tax with respect to the security or measured by the income therefrom;

(13) Whether the security is being offered through rights issued to security holders, and, if so, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, the actual or proposed record date, the date upon which the rights were issued or are expected to be issued, the actual or anticipated date upon which they will expire, and the approximate subscription price, or any of the foregoing;

(14) Any statement or legend required by any state law or administrative authority;

(15) With respect to the securities being offered:

(i) Any security rating assigned, or reasonably expected to be assigned, by a *nationally recognized statistical rating organization* as defined in Rule 15c3–1(c)(2)(vi)(F) of the Securities Exchange Act of 1934 (§ 240.15c3–1(c)(2)(vi)(F) of this chapter) and the name or names of the nationally recognized statistical rating organization(s) that assigned or is or are reasonably expected to assign the rating(s); and

(ii) If registered on Form F–9 (§ 239.39 of this chapter), any security rating assigned, or reasonably expected to be assigned, by any other rating organization specified in the Instruction to paragraph A.(2) of General Instruction I of Form F–9;

(16) The names of selling security holders (if included in the prospectus filed at the time of the communication);

(17) The names of securities exchanges or other securities markets where any class of the issuer's securities are, or will be, listed;

(18) The ticker symbols, or proposed ticker symbols, of the issuer's securities; and

(19) Information disclosed in order to correct inaccuracies previously contained in a communication made pursuant to this section.

(b) Except as provided in paragraph (c) of this section, every communication used pursuant to this section shall contain the following:

(1) If the registration statement has not yet become effective, the following statement:

"A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective"; and

(2) The name and address of a person or persons from whom a written prospectus for the offering meeting the requirements of section 10 of the Act, including a price range where required, may be obtained.

(c) Any of the statements or information specified in paragraph (b) of this section may, but need not, be contained in a communication:

(1) Which does no more than state from whom a written prospectus meeting the requirements of section 10 of the Act, including a price range where required, may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or

(2) Which is accompanied or preceded by a prospectus or a summary prospectus, other than a free writing prospectus as defined in Rule 405 (§ 230.405), which meets the requirements of section 10 of the Act, including a price range where required, at the date of such preliminary communication.

(d) A communication sent or delivered to any person pursuant to this section which is accompanied or preceded by a prospectus (other than a free writing prospectus as defined in Rule 405 (§ 230.405)) which meets the requirements of section 10 of the Act, including a price range where required, at the date of such communication, may solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate whether he might be interested in the security, if the communication contains substantially the following statement:

"No offer to buy the securities can be accepted and no part of the purchase price can be received until the registration statement has become effective, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time prior to notice of its acceptance given after the effective date."

Provided, that such statement need not be included in such a communication to a dealer.

(e) This section does not apply to a notice, circular, advertisement, letter, or other communication relating to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)).

(f) A section 10 prospectus included in any communication pursuant to this section shall remain a prospectus for all purposes under the Act.

7. Revise § 230.137 to read as follows:

§ 230.137 Publications or distributions of research reports by brokers or dealers that are not participating in an issuer's registered distribution of securities.

Under the following conditions, the terms "offers," "participates", or "participation" in section 2(a)(11) of the Act shall not be deemed to apply to the publication or distribution of research reports with respect to the securities of an issuer which is the subject of an offering pursuant to a registration statement that the issuer proposes to file or has filed, or that is effective:

(a) The broker or dealer (and any affiliate) that has distributed the report and, if different, the person (and any affiliate) that has published the report have not participated, are not participating, and do not propose to participate in the distribution of the securities that are or will be the subject of the registered offering;

(b) In connection with the publication or distribution of any research report, the broker or dealer (and any affiliate) that has distributed the report and, if different, the person (and any affiliate) that has published the report are not receiving and have not received consideration directly or indirectly from, and are not acting under any direct or indirect arrangement or understanding with:

(1) The issuer of the securities;
(2) A selling security holder;
(3) Any participant in the distribution of the securities that are or will be the subject of the registration statement; or
(4) Any other person interested in the securities that are or will be the subject of the registration statement;
(c) The broker or dealer publishes or distributes the research report in the regular course of its business; and
(d) The issuer is not and any predecessor of the issuer during the past three years was not:
(1) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
(2) A shell company as defined in Rule 405 (§ 230.405); or
(3) An issuer for an offering of penny stock as defined in Rule 3a51–1 of the Securities Exchange Act of 1934 (§ 240.3a51–1 of this chapter).

Instructions to § 230.137.

1. *Definition of research report.* For purposes of this section, *research report* means a written communication as defined in Rule 405 (§ 230.405) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision.

2. Paragraph (b) of this section does not preclude payment of the regular price being paid by the broker or dealer for independent research, so long as the conditions of paragraph (b) of this section are satisfied.

3. Paragraph (b) of this section does not preclude payment of the regular subscription or purchase price for the research report.

8. Revise § 230.138 to read as follows:

§ 230.138 Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing.

(a) *Registered offerings.* Under the following conditions, a broker's or dealer's publication or distribution of research reports about securities of an issuer shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, even if the broker or dealer is participating or will participate in the registered offering of the issuer's securities:

(1)(i) The research report relates solely to the issuer's common stock, or debt securities or preferred stock convertible into its common stock, and the offering involves solely the issuer's non-convertible debt securities or non-convertible, nonparticipating preferred stock; or

(ii) The research report relates solely to the issuer's non-convertible debt securities or non-convertible, nonparticipating preferred stock, and the offering involves solely the issuer's common stock, or debt securities or preferred stock convertible into its common stock;

Instruction to paragraph (a)(1): If the issuer has filed a shelf registration statement under Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)) or pursuant to General Instruction I.D. of Form S–3 or General Instruction I.C. of Form F–3 (§ 239.13 or § 239.33 of this chapter) with respect to multiple classes of securities, the conditions of paragraph (a)(1) of this section must be satisfied for the offering in which the broker or dealer is participating or will participate.

(2) The issuer:

(i) Is required to file reports, and has filed all required periodic reports on Forms 10–K (§ 249.310 of this chapter), 10–KSB (§ 249.310b of this chapter), 10–Q (§ 249.308a of this chapter), 10–QSB (§ 249.308b of this chapter), and 20–F (§ 249.220f of this chapter) pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); or

(ii) Is a foreign private issuer that:

(A) Meets all of the registrant requirements of Form F–3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2.(a) of Form F–3;

(B) Either satisfies the public float threshold in General Instruction I.B.1. of Form F–3 or is issuing non-convertible investment grade securities as defined in General Instruction I.B.2. of Form F–3; and

(C) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§ 230.902(b)) and has had them so traded for at least 12 months;

(3) The broker or dealer publishes or distributes research reports on the types of securities in question in the regular course of its business; and

(4) The issuer is not and any predecessor of the issuer during the past three years was not:

(i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(ii) A shell company as defined in Rule 405 (§ 230.405); or

(iii) An issuer for an offering of penny stock as defined in Rule 3a51–1 of the Securities Exchange Act of 1934 (§ 240.3a51–1 of this chapter).

(b) *Rule 144A offerings.* If the conditions in paragraphs (a)(1), (a)(2), (a)(3) and (a)(4) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§ 230.144A).

(c) *Regulation S offerings.* If the conditions in paragraphs (a)(1), (a)(2), (a)(3), and (a)(4) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:

(1) Constitute directed selling efforts as defined in Rule 902(c) (§ 230.902(c)) for offerings under Regulation S (§§ 230.901 through 230.905); or

(2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§ 230.902(h)) for offerings under Regulation S.

Instruction to § 230.138.

Definition of research report. For purposes of this section, *research report* means a written communication as defined in Rule 405 (§ 230.405) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision.

9. Revise § 230.139 to read as follows:

§ 230.139 Publications or distributions of research reports by brokers or dealers distributing securities.

(a) *Registered offerings.* Under the conditions of paragraph (a)(1) or (a)(2) of this section, a broker's or dealer's publication or distribution of a research report about an issuer or any of its securities shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security that is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, even if the broker or dealer is participating or will participate in the registered offering of the issuer's securities:

(1) *Research reports of any type.*

(i) The issuer:

(A) Meets the registrant requirements of Form S–3 (§ 239.13 of this chapter) or Form F–3 (§ 239.33 of this chapter) and the minimum float or investment grade securities provisions of either paragraph (B)(1) or (2) of General Instruction I of the respective form; or

(B) Is a foreign private issuer that:

(*1*) Meets the registrant requirements of Form F–3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2.(a);

(*2*) Either satisfies the public float threshold in General Instruction I.B.1.of Form F–3 or is issuing non-convertible investment grade securities pursuant to General Instruction I.B.2. of Form F–3; and

(3) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§ 230.902(b)) and has had them so traded for at least 12 months;

(ii) The issuer is not and any predecessor of the issuer during the past two years was not:

(A) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(B) A shell company as defined in Rule 405 (§ 230.405); or

(C) An issuer for an offering of penny stock as defined in Rule 3a51–1 of the Securities Exchange Act of 1934 (§ 240.3a51–1 of this chapter); and

(iii) The broker or dealer publishes or distributes research reports in the regular course of its business and is, at the time of publication or distribution, publishing or distributing research reports about the issuer or its securities.

(2) *Industry reports.*

(i) The issuer is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d) or satisfies the conditions in paragraph (a)(1)(i)(B) of this section;

(ii) The condition in paragraph (a)(1)(ii) of this section is satisfied;

(iii) The research report includes similar information with respect to a substantial number of issuers in the issuer's industry or sub-industry, or contains a comprehensive list of securities currently recommended by the broker or dealer;

(iv) The analysis regarding the issuer or its securities is given no materially greater space or prominence in the publication than that given to other securities or issuers; and

(v) The broker or dealer publishes or distributes research reports in the regular course of its business and, at the time of the publication or distribution of the research report, is including similar information about the issuer or its securities in similar reports.

(b) *Rule 144A offerings.* If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§ 230.144A).

(c) *Regulation S offerings.* If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:

(1) Constitute directed selling efforts as defined in Rule 902(c) (§ 230.902(c)) for offerings under Regulation S (§§ 230.901 through 230.905); or

(2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§ 230.902(h)) for offerings under Regulation S.

Instructions to § 230.139.

1. *Definition of research report.* For purposes of this section, research report means a written communication as defined in Rule 405 (§ 230.405) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision.

2. *Projections.* A projection constitutes an analysis or information falling within the definition of research report. When a broker or dealer publishes or distributes projections of an issuer's sales or earnings in reliance on paragraph (a)(2) of this section, it must:

(i) Have previously published or distributed projections on a regular basis in order to satisfy the "regular course of its business" condition;

(ii) At the time of publishing or disseminating a research report, be publishing or distributing projections with respect to that issuer; and

(iii) For purposes of paragraph (a)(2)(iii) of this section, include projections covering the same or similar periods with respect to either a substantial number of issuers in the issuer's industry or sub-industry or all issuers represented in the comprehensive list of securities contained in the research report.

10. Revise § 230.153 to read as follows:

§ 230.153 Definition of "preceded by a prospectus" as used in section 5(b)(2) of the Act, in relation to certain transactions.

(a) *Definition of preceded by a prospectus.* The term preceded by a prospectus as used in section 5(b)(2) of the Act, regarding any requirement of a broker or dealer to deliver a prospectus to a broker or dealer as a result of a transaction effected on or through a national securities exchange or facility thereof, trading facility of a national securities association, or an alternative trading system registered pursuant to Rule 301 of Regulation ATS under the Securities Exchange Act of 1934 (§ 242.301 of this chapter), shall mean the filing of the final prospectus for the securities that are the subject of the transaction with the Commission by the applicable filing date under Rule 424 (§ 230.424) if the conditions in paragraph (b) of this section are satisfied.

(b) *Conditions.* A broker or dealer may rely on paragraph (a) of this section with regard to any requirement to deliver a prospectus for transactions covered by that paragraph if:

(1) Securities of the same class are trading on that national securities exchange or facility thereof, trading facility of a national securities association, or alternative trading system;

(2) The registration statement relating to the offering is effective and is not the subject of any pending proceeding or examination under section 8(d) or 8(e) of the Act;

(3) Neither the issuer, nor any underwriter or participating dealer is the subject of a pending proceeding under section 8A of the Act in connection with the offering; and

(4) The issuer has filed with the Commission a prospectus that satisfies the requirements of section 10(a) of the Act, other than omitting price-related information under Rule 430A (§ 230.430A), or for offerings relying on Rule 430B (§ 230.430B) or Rule 430C (§ 230.430C), the issuer has filed or will file such a prospectus within the time required under Rule 424 (§ 230.424).

(c) *Definitions.*

(1) The term *national securities exchange,* as used in this section, shall mean a securities exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).

(2) The term *trading facility* shall mean a trading facility sponsored and governed by the rules of a registered securities association or a national securities exchange.

(3) The term *alternative trading system* shall mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934 (§ 242.300(a) of this chapter).

11. Amend § 230.158 to revise paragraph (c) to read as follows:

§ 230.158 Definition of certain terms in the last paragraph of section 11(a).

* * * * *

(c) For purposes of the last paragraph of section 11(a) of the Act only, the *effective date of the registration statement* is deemed to be the date of the latest to occur of:

(1) The effective date of the registration statement;

(2) The effective date of the last post-effective amendment to the registration statement, next preceding a particular sale by the issuer of registered securities to the public filed for the purposes of:

(i) Including any prospectus required by section 10(a)(3) of the Act;

(ii) Reflecting in the prospectus any facts or events arising after the effective

date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement; or

(iii) Including any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

(3) The date of filing of the last report of the issuer incorporated by reference into the prospectus, and relied upon in lieu of filing a post-effective amendment for purposes of paragraphs (c)(2)(i), (ii) and (iii) of this section, next preceding a particular sale by the issuer of registered securities to the public; or

(4) The most recent effective date of the registration statement for liability purposes determined pursuant to Rule 430B (§ 230.430B) next preceding a particular sale by the issuer of registered securities to the public.

* * * * *

12. Add § 230.159 to read as follows:

§ 230.159 Information available to purchaser at time of contract of sale.

(a) For purposes of section 12(a)(2) of the Act only, and without affecting any other rights a purchaser may have, for purposes of determining whether a prospectus or oral statement included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

(b) For purposes of section 17(a)(2) of the Act only, and without affecting any other rights the Commission may have to enforce that section, for purposes of determining whether a statement includes or represents any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

(c) For purposes of section 12(a)(2) of the Act only, *knowing of such untruth or omission in respect of a sale* (including, without limitation, a contract of sale), means knowing at the time of such sale (including such contract of sale).

13. Add § 230.159A to read as follows:

§ 230.159A Definition of "seller" for purposes of section 12(a)(2) of the Act.

For purposes of section 12(a)(2) of the Act only, *seller* shall include the issuer of the securities with regard to, and the issuer shall be considered to offer or sell the securities by means of, any of the following communications made by or on behalf of the issuer in connection with primary offerings of securities of the issuer, regardless of the underwriting method used to sell the issuer's securities:

(a) An issuer's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 424 (§ 230.424) or Rule 497 (§ 230.497);

(b) Any free writing prospectus as defined in Rule 405(§ 230.405) prepared by or on behalf of the issuer and, in the case of an issuer that is an open-end management company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), any profile provided pursuant to Rule 498 (§ 230.498);

(c) Information about the issuer or its securities (1) provided by or on behalf of the issuer and (2) included in any other free writing prospectus or, in the case of an issuer that is an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), in any advertisement pursuant to Rule 482 (§ 230.482); and

(d) Any other communication made by or on behalf of the issuer.

Notes to § 230.159A: 1. For purposes of this section, information is provided or a communication is made *by or on behalf* of an issuer if the issuer or an agent or representative authorizes the information or communication and approves the information or communication before its provision or use.

2. This rule shall not affect in any respect the determination of whether any other person is a "seller" for purposes of section 12(a)(2) of the Act.

14. Add § 230.163 to read as follows:

§ 230.163 Exemption from section 5(c) of the Act for certain communications by or on behalf of well-known seasoned issuers.

Preliminary Note to § 230.163.

Because of the objectives of this section and the policies underlying the Act, the exemption is not available for any communication that, although in technical compliance with the section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

(a) In an offering by a well-known seasoned issuer as defined in Rule 405 (§ 230.405), that will be registered under the Act, an offer by or on behalf of such issuer is exempt from the prohibitions in section 5(c) of the Act on offers to sell, offers for sale or offers to buy its securities before a registration statement has been filed, provided that any written offer made in reliance on this exemption will be a prospectus under section 2(a)(10) of the Act and a free writing prospectus as defined in Rule 405 (§ 230.405) relating to a public offering of securities to be covered by the registration statement to be filed and the exemption from section 5(c) provided in this section for such written offer shall be conditioned on satisfying the conditions in paragraph (b) of this section.

(b) *Conditions.* (1) *Legend.* (i) Every written offer made in reliance on this exemption shall contain the following legend:

> [Issuer's name] may file a registration statement (including a prospectus) with the SEC for this offering. Before you invest, you should read the prospectus in it and other documents the issuer has filed with the SEC for more complete information about [issuer's name], including any risks affecting the issuer or its securities, and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at *www.sec.gov*. Alternatively, the company will arrange to send you the prospectus after filing if you request it by calling toll-free 1–8[xx–xxx–xxxx]. This document is a written communication that is an offer pursuant to a free writing prospectus."

(ii) The legend may indicate that the documents also are available by accessing the issuer's Web site, and provide the Internet address and the particular location of the documents on the Web site.

(iii) An unintentional failure to include the legend in a free writing prospectus required by this section will not result in a violation of section 5(c) of the Act or the loss of the ability to rely on this section so long as:

(A) A good faith and reasonable effort was made to comply with the legend condition;

(B) The free writing prospectus is amended to include the legend as soon as practicable after discovery of the omitted legend; and

(C) If the free writing prospectus has been transmitted without the legend, the free writing prospectus must be retransmitted with the legend to all prospective purchasers to whom, or by

the same means as, the free writing prospectus was originally transmitted.

(2) *Filing condition.*

(i) Every written communication made pursuant to this exemption shall be filed with the Commission promptly upon the filing of the registration statement or amendment covering the securities that are being offered in reliance on this exemption.

(ii) An immaterial or unintentional failure to file or delay in filing a free writing prospectus to the extent as provided in this section will not result in a violation of section 5(c) of the Act or the loss of the ability to rely on this section so long as:

(A) A good faith and reasonable effort was made to comply with the filing condition, and

(B) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.

(3) *Ineligible offerings.* The exemption in paragraph (a) of this section shall not be available to the following communications:

(i) Communications subject to Rule 166 (§ 230.166) for business combination transactions;

(ii) Communications made in connection with offerings registered on Form S–8 (§ 239.16b); or

(iii) Communications in offerings of securities of ineligible issuers as defined in Rule 405 (§ 230.405).

(c) For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative authorizes the communication and approves the communication before its use.

(d) For purposes of this section, a written communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by an issuer is deemed a written offer by the issuer and a free writing prospectus of the issuer.

(e) A communication exempt pursuant to this section will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934 (§ 243.100(b)(2)(iv) of this chapter).

15. Add § 230.163A to read as follows:

§ 230.163A Exemption from section 5(c) of the Act for certain communications made by or on behalf of issuers more than 30 days before a registration statement is filed.

Preliminary Note to § 230.163A.

Because of the objectives of this section and the policies underlying the Act, the exemption is not available for any communication that, although in technical compliance with the section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

(a) Except as excluded pursuant to paragraph (b) of this section, in all registered offerings by issuers, any communication made by or on behalf of an issuer more than 30 days before the date of the filing of the registration statement that does not reference a securities offering shall not constitute an offer to sell, offer for sale, or offer to buy the securities being offered under the registration statement for purposes of section 5(c) of the Act, provided that the issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement. Communications satisfying the requirements of Rule 168 (§ 230.168) or Rule 169 (§ 230.169) or other safe harbors or exemptions from the definition of offer or the requirements of section 5(c) of the Act are not subject to the restriction of this section on distribution or publication during the 30 days immediately preceding the date of filing the registration statement.

(b) The exemption in paragraph (a) of this section shall not be available to the following communications:

(1) Communications subject to Rule 166 (§ 230.166) for business combination transactions;

(2) Communications made in connection with offerings registered on Form S–8 (§ 239.16b of this chapter); or

(3) Communications in offerings of securities of ineligible issuers as defined in Rule 405 (§ 230.405).

(c) For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative authorizes the communication and approves the communication before its use.

(d) A communication exempt pursuant to this section will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934 (§ 243.100(b)(2)(iv) of this chapter).

16. Add § 230.164 to read as follows:

§ 230.164 Post-filing free writing prospectuses in connection with certain registered offerings.

Preliminary Note to § 230.164.

Because of the objectives of this section and the policies underlying the Act, this section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

(a) In connection with a registered offering, a free writing prospectus as defined in Rule 405 (§ 230.405) used by an issuer, underwriter or participating dealer after the filing of the registration statement will be a section 10(b) prospectus for purposes of section 5(b)(1) of the Act provided that the conditions set forth in Rule 433 (§ 230.433) are satisfied.

(b) An immaterial or unintentional failure to file or delay in filing a free writing prospectus as necessary to satisfy the filing condition contained in Rule 433 (§ 230.433) will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.

(c) An unintentional failure to include the legend in a free writing prospectus as necessary to satisfy the legend condition contained in Rule 433 (§ 230.433) will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as:

(1) A good faith and reasonable effort was made to comply with the legend condition;

(2) The free writing prospectus is amended to include the legend as soon as practicable after discovery of the omitted legend; and

(3) If the free writing prospectus has been transmitted without the legend, the free writing prospectus must be retransmitted with the legend to all prospective purchasers to whom, or by the same means as, the free writing prospectus was originally transmitted.

17. Add § 230.168 to read as follows:

§ 230.168 Factual business information and forward-looking information regularly released by a reporting issuer.

Preliminary Note to § 230.168.

This section is only available for factual business information and forward-looking information released or disseminated as provided in this section. This section is not available for any communication that may be in technical compliance with this section but is part of a plan or scheme to evade the requirements of section 5 of the Act.

(a) In the case of an issuer that is required to file reports pursuant to Section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), and that is not an investment company registered under

the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), for purposes of sections 2(a)(10) and 5(c) of the Act, the continued regular release or dissemination by or on behalf of the issuer of factual business information and forward-looking information shall be deemed not to constitute an offer to sell or offer for sale of a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied.

(b) Definitions. Except as provided in paragraph (c) of this section, *factual business information* is limited to some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section:

(i) Factual information about the issuer or some aspect of its business;

(ii) Advertisements of, or other information about, the issuer's products or services;

(iii) Factual information about business or financial developments with respect to the issuer;

(iv) Dividend notices; and

(v) Factual information set forth in any report that the issuer files pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(2) Except as provided in paragraph (c) of this section, *forward-looking information* is limited to some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section:

(i) Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

(ii) Statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;

(iii) Statements about the issuer's future economic performance, including statements of the type contemplated by the management's discussion and analysis of financial condition and results of operation described in Item 303 of Regulations S–B and S–K (§ 228.303 and § 229.303 of this chapter) or the operating and financial review and prospects described in Item 5 of Form 20–F (§ 249.220f of this chapter); and

(iv) Assumptions underlying or relating to any of the information described in paragraphs (b)(2)(i), (b)(2)(ii) and (b)(2)(iii) of this section.

(3) For purposes of this section, information is released or disseminated on behalf of the issuer if the issuer or an agent or representative authorizes the communication and approves the communication before its use.

(c) *Exclusions.* (1) For purposes of this section, *factual business information* does not include information about the registered offering or information released or disseminated as part of the offering activities in the registered offering; and

(2) For purposes of this section, *forward-looking information* does not include information about the registered offering or information released or disseminated as part of the offering activities in the registered offering.

(d) *Conditions to exemption.* The following conditions must be satisfied with respect to the information:

(1) The issuer has previously released or disseminated information of the type described in this section in the ordinary course of its business; and

(2) The information is released or disseminated in the ordinary course of the issuer's business and the timing, manner and form in which the information is released or disseminated is materially consistent with similar past disclosures.

18. Add § 230.169 to read as follows:

§ 230.169 Factual business information regularly released by a non-reporting issuer.

Preliminary Note to § 230.169.

This section is only available for factual business information released or disseminated as provided in this section. This section is not available for any communication that may be in technical compliance with this section but is part of a plan or scheme to evade the requirements of section 5 of the Act.

(a) In the case of an issuer that is not required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) and that is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), for purposes of sections 2(a)(10) and 5(c) of the Act, the continued regular release or dissemination by or on behalf of the issuer of factual business information shall be deemed not to constitute an offer to sell or offer for sale of a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied.

(b) *Definitions.*

(1) Except as provided in paragraph (c) of this section, *factual business information* is limited to some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section:

(i) Factual information about the issuer or some aspect of its business;

(ii) Advertisements of, or other information about, the issuer's products or services; and

(iii) Factual information about business or financial developments with respect to the issuer.

(2) For purposes of this section, information is released or disseminated on behalf of the issuer if the issuer or an agent or representative authorizes the communication and approves the communication before its use.

(c) *Exclusions.* For purposes of this section, *factual business information* does not include:

(1) Information about the registered offering or information released or disseminated as part of the offering activities in the registered offering; or

(2) Forward-looking information.

(d) *Conditions to exemption.* The following conditions must be satisfied with respect to the information:

(1) The issuer has previously released or disseminated information of this type in the ordinary course of its business;

(2) The information is released or disseminated in the ordinary course of the issuer's business and the timing, manner and form in which the information is released or disseminated is materially consistent with similar past disclosures; and

(3) The information is released or disseminated to persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the issuer's securities, by the issuer's employees or agents who regularly and historically have provided such information to such persons.

19. Add § 230.172 to read as follows:

§ 230.172 Delivery of prospectuses.

(a) *Sending confirmations and notices of allocations.* After the effective date of a registration statement, written confirmations of sales of securities in an offering pursuant to a registration statement that contain information limited to that called for in Rule 10b–10 under the Securities Exchange Act of 1934 (§ 240.10b–10 of this chapter) and other information customarily included in written confirmations of sales of securities and notices of allocation of

securities sold or to be sold in an offering pursuant to a registration statement that identify the securities and information which is otherwise limited to information regarding pricing, allocation and settlement, and information incidental thereto are exempt from the provisions of section 5(b)(1) of the Act if the conditions set forth in paragraph (c) of this section are satisfied.

(b) *Transfer of the security.* Any obligation under section 5(b)(2) of the Act to have a prospectus that satisfies the requirements of section 10(a) of the Act precede or accompany the carrying or delivery of a security in a registered offering is satisfied if the conditions in paragraph (c) of this section are met.

(c) *Conditions.* (1) The registration statement relating to the offering is effective and is not the subject of any pending proceeding or examination under section 8(d) or 8(e) of the Act;

(2) Neither the issuer, nor an underwriter or participating dealer is the subject of a pending proceeding under section 8A of the Act in connection with the offering; and

(3) The issuer has filed with the Commission a prospectus with respect to the offering that satisfies the requirements of section 10(a) of the Act, other than omitting price-related information under Rule 430A (§ 230.430A), or for offerings relying on Rule 430B (§ 230.430B) or Rule 430C (§ 230.430C), the issuer has filed or will file such a prospectus within the time required under Rule 424 (§ 230.424).

(d) *Exclusions.* This section shall not apply to any:

(1) Offering of any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*);

(2) Offering of any *business development company* as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48));

(3) A business combination transaction as defined in Rule 165(f)(1) (§ 230.165(f)(1); or

(4) Offering registered on Form S–8 (§ 239.16b of this chapter).

20. Add § 230.173 to read as follows:

§ 230.173 Notice of registration.

(a) Each underwriter or broker or dealer participating in an offering pursuant to a registration statement shall provide to each purchaser from it in a transaction that represents: (1) A sale by the issuer or an underwriter, or (2) a sale where a final prospectus meeting the requirements of section 10(a) of the Act is not exempt pursuant to section 4(3) of the Act and Rule 174 (§ 230.174), from a requirement to be delivered, not later than two business days following the completion of such sale, a copy of the final prospectus or, in lieu of such prospectus, a notice to the effect that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered in the absence of Rule 172 (§ 230.172).

(b) If the sale was by the issuer and was not effected by an underwriter, broker, or dealer, the responsibility to send a prospectus, or in lieu of such prospectus, such notice as set forth in paragraph (a) of this section, shall be the issuer's.

(c) Compliance with the requirements of this section is exempt from and not a requirement for compliance with Rule 172 (§ 230.172).

(d) A purchaser may request from the person responsible for sending a notice a copy of the final prospectus if one has not been sent.

(e) After the effective date of the registration statement with respect to an offering, including pursuant to Rule 430B (§ 230.430B), notices as set forth in paragraph (a) are exempt from the provisions of section 5(b)(1) of the Act.

(f) *Exclusions.* This section shall not apply to any:

(1) Offering of any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*);

(2) Offering of any *business development company* as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48));

(3) A business combination transaction as defined in Rule 165(f)(1) (§ 230.165(f)(1)); or

(4) Offering registered on Form S–8 (§ 239.16b of this chapter).

21. Amend § 230.174 by removing the authority citations following the section and adding paragraph (h) to read as follows:

§ 230.174 Delivery of prospectus by dealers; exemptions under section 4(3) of the Act.

* * * * *

(h) Any obligation pursuant to this section to deliver a prospectus, other than pursuant to paragraph (g) of this section, may be satisfied by compliance with the provisions of Rule 172 (§ 230.172).

22. Amend § 230.401 by removing the authority citations following the section and revising paragraph (g) to read as follows:

§ 230.401 Requirements as to proper form.

* * * * *

(g)(1) Subject to paragraph (g)(2) of this section, except for registration statements and post-effective amendments that become effective automatically pursuant to Rule 462 and Rule 464 (§ 230.462 and § 230.464), a registration statement or any amendment thereto is deemed filed on the proper registration form unless the Commission objects to the registration form before the effective date.

(2) An automatic shelf registration statement as defined in Rule 405 (§ 230.405) and any post-effective amendment thereto that becomes effective automatically pursuant to Rule 462 (§ 230.462) is deemed filed on the proper registration form unless and until the Commission notifies the issuer of its objection to the use of such form. Following any such notification, the issuer must amend its automatic shelf registration statement onto the registration form it is then eligible to use, *provided, however,* that any continuous offering of securities pursuant to Rule 415 (§ 230.415) the issuer has commenced pursuant to the registration statement before the Commission has notified the issuer of its ineligibility may continue until the effective date of a new registration statement or post-effective amendment to the registration statement that the issuer has filed on the proper registration form, if the issuer files promptly after notification the new registration statement or post-effective amendment relying on General Instructions I.B.1 or I.B.2 of Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) for primary offerings of its securities.

23. Amend § 230.405 as follows:

a. Add new definitions of "automatic shelf registration statement", "free writing prospectus", "ineligible issuer", "shell company", "well-known seasoned issuer", and "written communication", in alphabetical order; and

b. Revise the definition of "graphic communication".

The revision and additions read as follows:

§ 230.405. Definition of terms.

* * * * *

Automatic shelf registration statement. The term *automatic shelf registration statement* means a registration statement filed on Forms S–3 or F–3 (§ 239.13 or § 239.33 of this chapter) by a well-known seasoned issuer pursuant to General Instruction I.D. or I.C. of such forms, respectively.

* * * * *

Free writing prospectus. Except as otherwise specifically provided or the

context otherwise requires, a free writing prospectus is any written communication as defined in Rule 405 (§ 230.405) that constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed (or, in the case of a well-known seasoned issuer, whether or not such registration statement is filed) and is made by means other than

(1) A prospectus satisfying the requirements of section 10(a) of the Act, Rule 430 (§ 230.430), Rule 430A (§ 230.430A), Rule 430B (§ 230.430B), or Rule 431 (§ 230.431); or

(2) A written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of section 2(a)(10) of the Act.

Graphic communication. The term *graphic communication,* which appears in the definition of "write, written" in section 2(a)(9) of the Act and the definition written communication in Rule 405 (§ 230.405) shall include all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation.

Ineligible issuer. (1)An *ineligible issuer* is an issuer with respect to which any of the following is true:

(i) Any issuer that is required to file reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that has not filed all materials required by sections 13, 14 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78n, or 78o(d)), including any certifications required by any reports;

(ii) Within the past three years, the issuer or its predecessor was a blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(iii) Within the past three years, the issuer or its predecessor was a shell company as defined in Rule 405 (§ 230.405);

(iv) The issuer is registering an offering of penny stock as defined in Rule 3a51–1 of the Securities Exchange Act of 1934 (§ 240.3a51–1 of this chapter) or it or its predecessor has issued penny stock in the last three years;

(v) The issuer is a limited partnership that is offering and selling its securities other than through a firm commitment underwriting;

(vi) The independent registered public accountant that examined the issuer's financial statements for the most recent fiscal year expressed in its report substantial doubt about the issuer's ability to continue as a going concern;

(vii) Within the past three years, a petition under the federal bankruptcy laws or any state insolvency law was filed by or against the issuer, or a court appointed a receiver, fiscal agent or similar officer with respect to the business or property of the issuer; *provided, however,* that this would not make the issuer ineligible if it has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency or receivership process;

(viii) Within the past three years, the issuer or any of its subsidiaries was convicted of any felony or misdemeanor described in paragraphs (i) through (iv) of section 15(b)(4)(B) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(4)(B)(i) through (iv));

(ix) Within the past three years, the issuer or any of its subsidiaries entered into a settlement with any government agency involving allegations of violations of the federal securities laws or regulations;

(x) Within the past three years, the issuer or any of its subsidiaries was made the subject of any judicial or administrative decree or order arising out of a governmental action that:

(A) Prohibits certain conduct or activities regarding, including future violations of, the federal securities laws;

(B) Requires that the person cease and desist from violating any provision of the federal securities laws; or

(C) Determines that the person violated any provision of the federal securities laws;

(xi) The issuer has filed a registration statement that is the subject of any pending proceeding or examination under section 8 of the Act or has been the subject of any refusal order or stop order under section 8 of the Act within the past three years; or

(xii) The issuer is the subject of any pending proceeding under section 8A of the Act in connection with an offering.

(2) The following issuers shall also be deemed to be ineligible issuers:

(i) The issuer is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*);

(ii) The issuer is a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)); or

(iii) The issuer is registering an offering relating to a business combination transaction as defined in Rule 165(f)(1)(§ 230.165(f)(1)), but only for purposes of such offerings.

(3) An issuer, other than an issuer described in paragraph (2)(i) or (2)(ii) of this section shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

* * * * *

Shell company. The term *shell company* means a registrant with no or nominal operations and with:

(1) No or nominal assets; or

(2) Assets consisting solely of cash and cash equivalents.

* * * * *

Well-known seasoned issuer. A *well-known seasoned issuer* is any issuer that as of the last business day of its most recently completed second fiscal quarter prior to the date of filing its Form 10–K or Form 20–F (§ 249.310 or § 249.220f of this chapter) or amendment to its registration statement for purposes of complying with section 10(a)(3) of the Act:

(1)(i) Is eligible to file a registration statement on Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) for primary offerings of its securities relying on General Instruction I.B.1, I.B.2 (for issuers satisfying the requirements of paragraph (1)(i)(A) of this section), or I.D. of Form S–3 or General Instruction I.B.I, I.B.2 (for issuers satisfying the requirements of paragraph (1)(i)(B) of this section) or I.C. of Form F–3 and:

(ii) Has either:

(A) A market value of its outstanding common equity held by non-affiliates of $700 million or more; or

(B) Has issued in the last three years at least $1 billion aggregate amount of debt securities in offerings registered under the Act and will register only debt securities;

(2) Is a majority-owned subsidiary of a well-known seasoned issuer and, as to the subsidiaries' securities that are being or may be offered:

(i) The well-known seasoned issuer parent has fully and unconditionally guaranteed, as defined in Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter), the payment obligations on the subsidiary's securities and the securities are non-convertible obligations;

(ii) Are guarantees of:

(A) Non-convertible obligations of its parent; or

(B) Non-convertible obligations of another majority-owned subsidiary where such non-convertible obligations are fully and unconditionally guaranteed, as defined in Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter), by the parent; or

(iii) Are non-convertible obligations fully and unconditionally guaranteed, as defined in Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter), by another majority-owned subsidiary of the same well-known seasoned issuer parent that itself is a well-known seasoned issuer, other than pursuant to this paragraph (2) of this section.

(3) Is required to file reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) and has been required to file reports pursuant to those sections for at least the last 12 calendar months;

(4) Has filed all materials it was required to file during the last 12 calendar months under section 13, 14 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78n or 78o(d));

(5) Has filed in a timely manner all materials required to be filed during the 12 calendar months and any portion of a month immediately preceding the date of determination, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(a) of Form 8–K (§ 249.308 of this chapter), and if the issuer has used (during the 12 calendar months and any portion of a month immediately preceding the date of determination) Rule 12b–25(b) of the Securities Exchange Act of 1934 (§ 240.12b–25(b) of this chapter) with respect to a report or a portion of a report, it has actually filed that report or portion thereof within the time period prescribed by that section;

(6) Is not an ineligible issuer as defined in Rule 405 (§ 230.405); and

(7) Is not an asset-backed issuer as defined in Rule 405 (§ 230.405).

* * * * *

Written communication. Except as otherwise specifically provided or the context otherwise requires, a *written communication* is any communication that is written, printed, broadcast, or a graphic communication as defined in Rule 405 (§ 230.405).

24. Amend § 230.408 as follows:

a. Designate the current text as paragraph (a); and

b. Add paragraph (b).

The addition reads as follows:

§ 230.408 Additional information.

(a) * * *

(b) Notwithstanding paragraph (a) of this section, unless otherwise required to be included in the registration statement, the failure to include in a registration statement information included in a free writing prospectus will not, solely by virtue of inclusion of the information in a free writing prospectus (as defined in Rule 405 (§ 230.405)), be considered an omission of material information required to be included in the registration statement.

25. Amend § 230.412 as follows:

a. Remove the authority citation following the section;

b. Revise paragraph (a); and

c. Add paragraph (d).

The revision and addition read as follows:

§ 230.412 Modified or superseded documents.

(a) Any statement contained in a document incorporated or deemed to be incorporated by reference or deemed to be part of a registration statement or the prospectus shall be deemed to be modified or superseded for purposes of the registration statement or the prospectus to the extent that a statement contained in the prospectus or in any other subsequently filed document which also is or is deemed to be incorporated by reference or deemed to be part of the registration statement or prospectus modifies or replaces such statement. Any statement contained in a document that is deemed to be incorporated by reference or deemed to be part of a registration statement or the prospectus after the most recent effective date or after the date of the most recent prospectus may modify or replace existing statements contained in the registration statement or the prospectus.

* * * * *

(d) Notwithstanding paragraph (a) of this section, any statement contained in a document that is deemed to be incorporated by reference or deemed to be part of, or any statement contained in a registration statement or the prospectus after the most recent effective date of the registration statement for liability purposes deemed to have occurred pursuant to Rule 430B (§ 230.430B), will not modify or supersede any statement contained in the registration statement or the prospectus or contained in a document that is incorporated or deemed to be incorporated by reference or deemed to be part of a registration statement or the prospectus immediately before the most recent deemed effective date pursuant to Rule 430B (§ 230.430B).

26. Revise § 230.413 to read as follows:

§ 230.413 Registration of additional securities and additional classes of securities.

(a) Except as provided in sections 24(e)(1) and 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–24(e)(1) and 80a–24(f)) and in paragraph (b) of this section, where a registration statement is already in effect, the registration of additional securities shall only be effected through a separate registration statement relating to the additional securities.

(b) Notwithstanding paragraph (a) of this section, the following additional classes of securities may be added to an automatic shelf registration statement already in effect by filing a post-effective amendment to that automatic shelf registration statement. The provisions of Rule 401 (§ 230.401), other than Rule 401(g)(2) (§ 230.401(g)(2)), do not apply to any post-effective amendment filed in reliance on this section:

(1) Securities of a class different than those registered on the effective automatic shelf registration statement, provided that the information required by Item 202 of Regulation S–K (§ 229.202 of this chapter) is contained either in the post-effective amendment, a report on Form 10–K (§ 249.310 of this chapter), Form 20–F (§ 249.220f of this chapter), Form 10–Q (§ 249.308a of this chapter), Form 8–K (§ 249.308 of this chapter), or Form 6–K (§ 249.306 of this chapter) under the Securities Exchange Act of 1934 that is incorporated by reference into the registration statement, or a prospectus filed pursuant to Rule 424 (§ 230.424) deemed to be part of and included in the registration statement; or

(2) Securities of a subsidiary that are permitted to be included in an automatic shelf registration statement, provided that the subsidiary is identified as and satisfies the signature requirements of an issuer in the post-effective amendment and the provisions of paragraph (b)(1) of this section are satisfied.

27. Amend § 230.415 as follows:

a. Remove the authority citations following the section;

b. Revise paragraph (a)(1)(x);

a. Revise paragraph (a)(2);

b. Revise paragraph (a)(3);

e. Revise paragraph (a)(4) including the undesignated paragraph; and

f. Add paragraph (a)(5).

The revisions and addition read as follows:

§ 230.415 Delayed or continuous offering and sale of securities.

(a) * * *

(1) * * *

(x) Securities registered (or qualified to be registered) on Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) which are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the issuer, a subsidiary of the issuer or a person of which the issuer is a subsidiary.

* * * * *

(2) Securities in paragraphs (a)(1)(viii) and (ix) of this section not registered on Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S–K (§ 229.512(a) of this chapter), except that a registrant that is an investment company filing on Form N–2 (§§ 239.14 and 274.11a–1 of this chapter) must furnish the undertakings required by Item 34.4 of Form N–2.

(4) Securities in paragraph (a)(1)(i) or (x) of this section registered on a Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) may be offered and sold only if not more than three years have elapsed since the initial effective date of the registration statement. *Provided, however,* that continuous offerings of securities covered by the registration statement that commenced within the three years of the initial effective date may continue until the effective date of the new registration statement filed pursuant to paragraph (a)(5) of this section.

(5) Prior to the end of the three-year period described in paragraph (a)(4) of this section, an issuer may file a new registration statement and prospectus. The new registration statement and prospectus must include all the information that would be required at that time in a prospectus relating to all offering(s) that it covers. Upon the effective date of the new registration statement, any unsold securities covered by the earlier registration statement and any ongoing continuous offerings of securities pursuant to Rule 415 (§ 230.415) covered by the earlier registration statement would be deemed to be included in the new registration statement and any filing fee paid in connection with the earlier registration statement with regard to those securities may be used, pursuant to Rule 457(p) (§ 230.457(p)), to offset the filing fee due for the new registration statement. For purposes of Rule 457(p) (§ 230.457(p)), other than continuous offerings of securities that commenced prior to the expiration of the three year period described in paragraph (a)(4) of this section, the offering of securities on the earlier registration statement will be deemed terminated as of the date of effectiveness of the new registration statement. For automatic shelf registration statements, in addition to ongoing continuous offerings referenced in paragraph (a)(4) of this section, any offers of securities covered by the earlier registration statement also will be deemed included on the new registration statement as of the effective date of the new registration statement.

* * * * *

28. Amend § 230.418 as follows:

a. Revise the introductory text of paragraph (a)(3);

b. Remove the word "and" at the end of paragraph (a)(6);

c. Remove the period at the end of the paragraph (a)(7) and in its place add "; and";

d. Add paragraph (a)(8); and

e. Revise the introductory text of paragraph (b).

The addition and revisions read as follows:

§ 230.418 Supplemental information.

(a) * * *

(3) Except in the case of a issuer eligible to use Form S–3 (§ 239.13 of this chapter), any engineering, management or similar reports or memoranda relating to broad aspects of the business, operations or products of the issuer, which have been prepared within the past twelve months for or by the issuer and any affiliate of the registrant or any principal underwriter, as defined in Rule 405 (§ 230.405), of the securities being registered except for:

* * * * *

(8) Any free writing prospectuses prepared or used by the issuer, any underwriter or any participating dealer.

* * * * *

(b) Supplemental information described in paragraph (a) of this section shall not be required to be filed with or deemed part of and included in the registration statement, unless otherwise required. The information shall be returned to the issuer upon request, provided that:

* * * * *

29. Amend § 230.424 as follows:

a. Revise the introductory text of paragraph (b);

b. Revise paragraph (b)(2);

c. Revise Instruction 2 following paragraph (b)(7);

d. Add paragraph (b)(8); and

e. Add paragraph (g).

The additions and revisions read as follows:

§ 230.424 Filing of prospectuses, number of copies.

* * * * *

(b) Ten copies of each form of prospectus purporting to comply with section 10 of the Act, except for documents constituting a prospectus pursuant to Rule 428(a) (§ 230.428(a)) or free writing prospectuses filed pursuant to Rule 433(d) (§ 230.433(d)), shall be filed with the Commission in the form in which it is used after the effectiveness of the registration statement and identified as required by paragraph (e) of this section; *Provided, however,* that only a form of prospectus that contains substantive changes from or additions to a previously filed prospectus is required to be filed; *Provided, further,* that this paragraph (b) shall not apply in respect of a form of prospectus contained in a registration statement and relating solely to securities offered at competitive bidding, which prospectus is intended for use prior to the opening of bids. The ten copies shall be filed or transmitted for filing as follows:

* * * * *

(2) A form of prospectus used in connection with a primary offering of securities pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)) or securities registered for issuance on a delayed basis pursuant to Rule 415(a)(1)(i), (vii) or (viii) (§ 230.415(a)(1)(i), (vii) or (viii)), or that discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance on Rule 430B (§ 230.430B) shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

* * * * *

(7) * * *

Instruction 2: A form of prospectus sent or given in reliance on Rule 434(c) (§ 230.434(c)) with respect to securities registered on Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter), other than an abbreviated term sheet filed pursuant to paragraph (b)(7) of this section, shall be filed with the Commission in the time required by paragraph (b)(1) or (b)(2) of this section, as applicable.

(8) A form of prospectus that identifies selling security holders and the amounts to be sold by them that was previously omitted from the registration statement and the prospectus in reliance

upon Rule 430B (§ 230.430B) shall be filed with the Commission no later than the second business day following the earlier of the date of sale or the date of first use or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

* * * * *

(g) A form of prospectus filed pursuant to paragraph (b)(2) or (b)(5) of this section that (1) operates to reflect the payment of the filing fee for the offering pursuant to Rule 456 (§ 230.456) or (2) does not include disclosure of omitted information regarding the terms of the offering, the securities, or the plan of distribution because such omitted information has been included in periodic or current reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) incorporated or deemed incorporated by reference into the prospectus, must include on its cover page the calculation of registration fee table reflecting the payment of the filing fee for the securities that are the subject of the form of the prospectus filed pursuant to paragraph (b)(2) or (b)(5) of this section or the identification of the periodic or current reports that are incorporated or deemed incorporated by reference into the prospectus that contain the omitted information as specified in this paragraph.

30. Amend § 230.430A to add paragraph (f) following the note to read as follows:

§ 230.430A Prospectus in a registration statement at the time of effectiveness.

* * * * *

(f) This section shall apply to registration statements that are automatically effective pursuant to Rule 462(e) and (f) (§ 230.462(e) and (f)).

31. Add § 230.430B to read as follows:

§ 230.430B Prospectus in a registration statement after effective date.

(a) A form of prospectus filed as part of a registration statement for offerings pursuant to Rule 415(a)(1) (viii) or (x) (§ 230.415(a)(1) (viii) or (x)) may omit information that is unknown or not reasonably available to the issuer pursuant to Rule 409 (§ 230.409). A form of prospectus filed as part of an automatic shelf registration statement for offerings pursuant to Rule 415(a)(1)(§ 230.415(a)(1)), other than Rule 415(a)(1)(vii) (§ 230.415(a)(1)(vii)), may also omit information as to whether the offering is a primary offering or an offering on behalf of persons other than the issuer, the plan of distribution for the securities, and the identification of other issuers unless known. Each such form of prospectus shall be deemed to have been filed as part of the registration statement for the purpose of section 7 of the Act.

(b) A form of prospectus filed as part of a registration statement, for offerings pursuant to Rule 415(a)(1)(i) (§ 230.415(a)(1)(i)) by an issuer eligible to use Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) for primary offerings pursuant to General Instruction I.B.1 of such forms, may omit, in addition to the information omitted pursuant to paragraph (a) of this section, the identities of selling security holders and amounts of securities to be registered on their behalf if:

(1) The registration statement is an automatic shelf registration statement as defined in Rule 405 (§ 230.405); or

(2) All of the following conditions are satisfied:

(i) The offering in which the selling security holders acquired the securities being registered on their behalf was completed;

(ii) The securities were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities; and

(iii) The registration statement refers to any unnamed selling security holders in a generic manner by identifying the transaction in which the securities were acquired.

(c) A form of prospectus that is part of a registration statement that omits information in reliance upon paragraph (a) or (b) of this section meets the requirements of section 10 of the Act for the purpose of section 5(b)(1) thereof. This provision shall not limit the information required to be contained in a form of prospectus in order to meet the requirements of section 10(a) of the Act for the purposes of section 5(b)(2) thereof or exception (a) of section 2(a)(10) thereof.

(d) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section may be included in the prospectus by a post-effective amendment to the registration statement, a prospectus filed pursuant to Rule 424 (§ 230.424), or, if the applicable form permits, by including the information in the issuer's periodic or current reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated or deemed incorporated by reference into the prospectus in accordance with applicable requirements.

(e) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section, that is contained in a form of prospectus filed with the Commission pursuant to Rule 424(b)(3) (§ 230.424(b)(3)), shall be deemed part of and included in the registration statement as of the date it is first used after effectiveness.

(f) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section, that is contained in a form of prospectus filed with the Commission pursuant to Rule 424(b)(2), (b)(5), (b)(7) or (b)(8) (§ 230.424(b)(2), (b)(5), (b)(7) or (b)(8)), shall be deemed to be part of and included in the registration statement on the earlier of the date such form of prospectus is first used or the date and time of the first contract of sale of securities to which such subsequent form of prospectus relates. Such date shall be deemed, for liability purposes only, to be a new effective date of the registration statement relating to the securities to which such subsequent form of prospectus relates and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. *Provided, however,* that, except for any prospectus filed for purposes of including information required by section 10(a)(3) of the Act, the provisions of Rule 401 (§ 230.401) do not apply when prospectuses are deemed part of or included in registration statements.

(g) Notwithstanding paragraph (e) or (f) of this section, no statement in a document incorporated or deemed incorporated by reference or a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or a prospectus deemed part of and included in a registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the effective date occurring based on the filed prospectus.

(h) Issuers relying on this section shall furnish the undertakings required by Item 512(a) of Regulation S–K (§ 229.512(a) of this chapter).

32. Add § 230.430C to read as follows:

§ 230.430C Prospectus in a registration statement pertaining to an offering pursuant to Rule 415(a)(1)(i) or (ix) after effective date.

(a) In offerings pursuant to Rule 415(a)(1)(i) or (ix) (§ 230.415(a)(1)(i) or (ix)) by issuers not subject to the reporting requirements of section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) or not eligible to register a primary offering of its securities on Form S–3

(§ 239.13 of this chapter) pursuant to General Instructions I.B.1, I.B.2, I.C. or I.D. or Form F–3 (§ 239.33 of this chapter) pursuant to General Instructions I.A.5, I.B.1, I.B.2 or I.C., information contained in a form of prospectus filed with the Commission pursuant to (i) Rule 424(b)(3) (§ 230.424(b)(3)) for the purpose of providing the information required by section 10(a) of the Act, other than section 10(a)(3) of the Act, or for the purpose of providing information relating to the issuer or identified selling security holders that constitutes a substantive change from or addition to the information in the last form of prospectus filed; or (ii) Rule 497(c) or (e) (§ 230.497(c) or (e)), shall be deemed to be part of and included in the registration statement on the date it is first used after effectiveness.

(b) Notwithstanding paragraph (a) of this section, no statement in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a prospectus deemed part of and included in a registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of the registration statement.

(c) Nothing in this section shall affect the information required to be included in an issuer's registration statement and prospectus.

(d) In offerings subject to paragraph (a) of this section, the issuer shall furnish the undertakings required by Item 512(a) of Regulation S–K (§ 229.512(a) of this chapter), Item 512(a) and/or (g) of Regulation S–B (§ 229.512(a) and (g) of this chapter), or Item 34.4 of Form N–2 (§§ 239.14 and 274.11a–1 of this chapter), as applicable.

33. Add § 230.433 to read as follows:

§ 230.433 Conditions to permissible post-filing free writing prospectuses.

(a) *Scope of section.* This section applies to any free writing prospectus with respect to securities of any issuer (except as set forth in this section) that are the subject of a registration statement that has been filed under the Act. A free writing prospectus that satisfies the conditions of this section and which may include information the substance of which is not included in the registration statement, will be a prospectus permitted under section 10(b) of the Act for purposes of sections 2(a)(10), 5(b)(1), and 5(b)(2) of the Act and will be deemed to be public, without regard to its method of use or distribution, because it is related to the public offering of securities that are the subject of a filed registration statement.

(b) *Permitted use of free writing prospectus.* Subject to the conditions of this section and satisfaction of the conditions set forth in paragraphs (c) through (g) of this section, a free writing prospectus may be used under this section and Rule 164 (§ 230.164) in connection with a registered offering of securities:

(1) *Eligibility and prospectus conditions for non-reporting and unseasoned issuers.* If at the time of the filing of the registration statement, the issuer of the securities that are the subject of the registration statement is not required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) or does not satisfy the requirements to use Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) for a primary offering of securities pursuant to General Instructions I.B.1, I.B.2, I.C. or I.D. of Form S–3 or General Instructions I.A.5, I.B.1, I.B.2 or I.C. of Form F–3, then any person participating in the offer or sale of the securities may use a free writing prospectus after the registration statement is filed as follows:

(i) If the free writing prospectus was prepared by or on behalf of an issuer or any other person participating in the offer or sale of the securities, if consideration has been or will be given by the issuer or an offering participant for the publication or broadcast (in any format) of any free writing prospectus (including any published article, publication or advertisement), or if Securities Act section 17(b) requires disclosure that consideration has been or will be given by the issuer or any offering participant for any activity described therein, then the free writing prospectus shall be accompanied or preceded by the most recent prospectus that, other than by reason of this section or Rule 431 (§ 230.431), satisfies the requirements of section 10 of the Act, including a price range where required; *provided, however,* that use of the free writing prospectus is not conditioned on providing the most recent statutory prospectus if a prior statutory prospectus has been provided and there is no material change from the prior statutory prospectus reflected in the most recent statutory prospectus; *provided, further,* that after effectiveness and availability of a final prospectus meeting the requirements of section 10(a) of the Act, no earlier statutory prospectus may be provided, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier statutory prospectus had been previously provided:

(A) The condition in paragraph (b)(1)(i) of this section would be satisfied if an electronic free writing prospectus contained a hyperlink to the issuer's most recent preliminary prospectus; and

(B) For purposes of this section, a written communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by an issuer, underwriter, or participating dealer is deemed a written offer by such person and free writing prospectus of such person.

(ii) Where paragraph (b)(1)(i) of this section does not apply, the issuer shall have previously filed as part of its registration statement a statutory prospectus that, other than by reason of this section or Rule 431 (§ 230.431), satisfies the requirements of section 10 of the Act.

(2) *Eligibility and prospectus conditions for seasoned issuers and well-known seasoned issuers.* If at the time of the filing of the registration statement and at the time of an amendment to the registration statement for purposes of complying with section 10(a)(3) of the Act, the issuer of the securities that are the subject of the registration statement is a well-known seasoned issuer as defined in Rule 405 (§ 230.405), or if not a well-known seasoned issuer, is an issuer eligible to use Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) to register securities to be offered and sold by or on its behalf, on behalf of its subsidiary or on behalf of a person of which it is the subsidiary pursuant to General Instructions I.B.1, I.B.2, or I.C. of Form S–3 or General Instruction I.A.5, I.B.1. or I.B.2 of Form F–3, then the issuer or any other person participating in the offer or sale of the securities may use a free writing prospectus if the issuer shall have previously filed as part of its registration statement a statutory prospectus covering the securities that satisfies the requirements of section 10 of the Act (other than pursuant to Rule 431 (§ 230.431)), which could be a base prospectus satisfying the conditions of Rule 430B (§ 230.430B).

(3) *Successors.* A successor issuer will be considered to satisfy the applicable provisions of paragraph (b)(2) of this section if:

(i) Its predecessor and it, taken together, satisfy the conditions, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding

company and the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

(ii) All predecessors met the conditions at the time of succession and the issuer has continued to do so since the succession.

(4) *Ineligible issuers.* This section is not available if the issuer is an ineligible issuer as defined in Rule 405 (§ 230.405).

(c) *Information in a free writing prospectus.*

(1) A free writing prospectus used in reliance on this section shall not contain information inconsistent with information contained in any prospectus or prospectus supplement included in the registration statement or otherwise filed and not superseded or modified or information contained in the issuer's periodic and current reports filed or furnished to the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) and not superseded or modified.

(2) A free writing prospectus used in reliance on this section shall contain a prominent legend in the following form:

"[Issuer's name] has filed a registration statement (including a prospectus) with the SEC for this offering. Before you invest, you should read the prospectus in it and other documents the issuer has filed with the SEC for more complete information about [issuer's name], including any risks affecting the issuer or its securities, and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at *www.sec.gov* and clicking on_____. Alternatively, the company, any underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1–8[xx-xxx-xxxx]. This document is a written communication that is an offer pursuant to a free writing prospectus."

(3) The legend may indicate that the documents are also available by accessing the issuer's Web site and provide the Internet address and the particular location of the documents on the Web site.

(d) *Filing conditions.* (1) Except as provided in paragraphs (d)(3), (d)(4), (d)(5), (d)(6) and (f) of this section, the following shall be filed with the Commission under this section by a means reasonably calculated to result in filing no later than the date of first use. The filing shall constitute a free writing prospectus for purposes of this section and the Act but will not be filed as part of the registration statement:

(i) The issuer shall file:

(A) Any issuer free writing prospectus used by any person;

(B) Any free writing prospectus of any person used by the issuer;

(C) Any issuer information that is contained in a free writing prospectus prepared by any other person (but not information prepared by a person other than the issuer on the basis of that issuer information); and

(D) Any free writing prospectus prepared by any person that contains only a description of the final terms of the issuer's securities.

(ii) Any person other than the issuer participating in the offer and sale of the securities shall file any free writing prospectus that is distributed by such person in a manner reasonably designed to lead to its broad unrestricted dissemination, unless such free writing prospectus has previously been filed under this section.

(2) Each free writing prospectus or issuer information contained in a free writing prospectus filed under this section shall identify on the cover page the Commission file number for the related registration statement or, if that file number is unknown, a description sufficient to identify the related registration statement.

(3) The condition to file a free writing prospectus under paragraph (d)(1) of this section shall not apply if the free writing prospectus is substantially the same as, and does not contain substantive changes from or additions to, a free writing prospectus already filed.

(4) The condition to file issuer information contained in a free writing prospectus of a person other than the issuer shall not apply if such information is included (including through incorporation by reference) in a prospectus or free writing prospectus previously filed that relates to the offering that is the subject of the issuer's registration statement.

(5) Notwithstanding the provisions of paragraph (d)(1) of this section, a free writing prospectus that contains only a description of the final terms of the securities being offered for sale in a registered offering shall be filed by the issuer within two days of the later of the date such terms have become final and the date of first use.

(6) Notwithstanding any other provision of this paragraph (d), road shows transmitted or made available by means of graphic communication are free writing prospectuses provided that the condition to file a road show transmitted or made available by means of graphic communication, including any script for such road show, pursuant to this section shall not apply if:

(i) The issuer of the securities makes at least one version of a bona fide electronic road show available without restriction by means of graphic communication to any person, including any potential investor in the securities (and if there is more than one version of a road show transmitted or made available by means of graphic communication, the version available without restriction is made available no later than the other versions); and

(ii) The issuer complies with the filing conditions of paragraph (d)(1)(i)(C) of this section for issuer information provided at an electronic road show, except where paragraph (d)(4) of this section does not require such filing.

(e) *Treatment of information on, or hyperlinked from, an issuer's web site.*

(1) Except as provided otherwise in paragraph (e)(2) of this section, an offer of an issuer's securities that is contained on an issuer's Web site or hyperlinked by the issuer from the issuer's Web site to a third party's Web site is a written offer of such securities by the issuer and, unless otherwise exempt from the requirements of section 5(b)(1) of the Act, the filing conditions of paragraph (d) of this section apply to such offer.

(2) Historical issuer information that is identified as such and located in a separate section of the issuer's Web site containing historical issuer information will not be considered a current offer of the issuer's securities and therefore not a free writing prospectus unless such information has been incorporated by reference into or otherwise included in a prospectus of the issuer for the offering or is otherwise used or identified in connection with the offering.

(f) *Free writing prospectuses published or distributed by media.* Any written communication about an issuer or its securities for which an issuer or any person participating in the offer or sale of the securities or any person acting on their behalf provided information that is published or disseminated by a person unaffiliated with the issuer or any person participating in the offer or sale of the securities that is in the business of publishing, broadcasting or otherwise disseminating written communications would be considered to be a free writing prospectus prepared by or on behalf of the issuer or a person participating in the offer or sale of the securities for purposes of this section. Provided, however, the conditions of paragraphs (b)(1)(i), (c), and (d) of this section will not apply if:

(1) No payment is made or consideration given by or on behalf of the issuer or any person participating in the offer or sale of the securities for the written communication; and

(2) The issuer or any other person participating in the offer or sale of the securities files the written communication with the Commission with the legend required by paragraph (c) of this section within one business day after the publication or dissemination of the written communication.

(g) *Record retention.* Issuers and offering participants, including underwriters and participating dealers, shall retain all free writing prospectuses they have used for three years following the initial bona fide offering of the securities in question.

(h) *Definitions.*

(1) For purposes of this section, an *issuer free writing prospectus* means a free writing prospectus prepared by or on behalf of the issuer.

(2) For purposes of this section, *issuer information* means material information about the issuer or its securities that has been provided by or on behalf of the issuer.

(3) For purposes of this section, a *written communication* or information is prepared or provided by or on behalf of a person if the person or an agent or representative of the person authorizes the communication or information and approves the communication or information before its use.

(4) For purposes of this section, a *bona fide electronic road show* means a version of a road show that contains a presentation by some officers of an issuer or other person in an issuer's management and, if an issuer is using or conducting more than one road show transmitted or made available by means of graphic communication, includes discussion of the same general areas of information regarding the issuer, its management, and the securities being offered as such other issuer road show or shows for the same offering.

Instructions to § 230.433.

1. An issuer eligible to file information with the Commission on paper must file five copies of the information required by paragraph (d) of this section.

2. This section does not apply to communications that are not written communications at road shows that are not transmitted or made available by means of graphic communication.

3. This section does not affect in any way the operation of the provisions of clause (a) of section 2(a)(10) of the Act providing an exception from the definition of "prospectus."

34. Amend § 230.434 as follows:

a. Revise paragraph (d) before the Instruction; and

b. Revise paragraph (g).

The revisions read as follows:

§ 230.434 Prospectus delivery requirements in firm commitment underwritten offerings of securities for cash.

* * * * *

(d) Except in the case of offerings pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)), the information contained in any term sheet or abbreviated term sheet described under this section shall be deemed to be part of the registration statement as of the time such registration statement was declared effective. In the case of offerings pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)), the information contained in any term sheet or abbreviated term sheet described under this section shall be deemed to be part of the registration statement as of the earlier of the date it is first used after effectiveness or the date and time of the first contract of sale of the securities described in the term sheet or the abbreviated term sheet.

* * * * *

(g) For purposes of this section, *prospectus subject to completion* shall mean any prospectus that is either a preliminary prospectus used in reliance on Rule 430 (§ 230.430), a prospectus omitting information in reliance on Rule 430A (§ 230.430A), or a prospectus omitting information in reliance on Rule 430B (§ 230.430B) that is contained in a registration statement at the time of effectiveness or as subsequently revised.

35. Amend § 230.439 by revising paragraph (b) to read as follows:

§ 230.439 Consent to use of material incorporated by reference.

* * * * *

(b) Notwithstanding paragraph (a) of this section, any required consent may be incorporated by reference into a registration statement filed pursuant to Rule 462(b) (§ 230.462(b)) or a post-effective amendment filed pursuant to Rule 462(e) (§ 230.462(e)) from a previously filed registration statement relating to that offering, provided that the consent contained in the previously filed registration statement expressly provides for such incorporation.

36. Amend § 230.456 as follows:

a. Revise the section heading;

b. Designate the current text as paragraph (a); and

c. Add paragraphs (b) and (c).

The revisions and additions read as follows:

§ 230.456 Date of filing, timing of fee payment.

(a) * * *

(b)(1) Notwithstanding paragraph (a) of this section, a well-known seasoned issuer that registers securities offerings on an automatic shelf registration statement, or registers additional classes of securities pursuant to Rule 413(b) (§ 230.413(b)), may defer payment of the registration fee to the Commission required by section 6(b)(2) of the Act on the following conditions:

(i) The issuer pays an initial registration fee calculated in accordance with Rule 457(r) (§ 230.457(r)) at the time of the initial filing of the registration statement which will be credited against any fee subsequently due pursuant to this section;

(ii) The issuer pays the registration fees (*pay-as-you-go registration fees*) calculated in accordance with Rule 457(r) (§ 230.457(r)) in connection with an offering of securities from the registration statement at the time of or before the filing of the prospectus supplement pursuant to Rule 424(b)(2), (5) or (8) (§ 230.424(b)(2), (5) or (8)) within the time required by such section, in connection with a sale of securities in a particular offering; and

(iii) At the time the issuer pays a pay-as-you-go registration fee it reflects the payment of a pay-as-you-go registration fee by updating the "Calculation of Registration Fee" table to indicate the class and aggregate offering price of securities offered and the amount of registration fee paid in connection with the offering either in a post-effective amendment filed at the time of the fee payment or on the cover page of the prospectus reflecting the terms of the securities filed in a timely manner pursuant to Rule 424(b) (§ 230.424(b)).

(2) A registration statement filed relying on the pay-as-you-go registration fee payment provisions of paragraph (b)(1) of this section will be considered filed as to the classes of securities identified in the registration statement for purposes of this section and section 5 of the Act when it is received by the Commission, if it complies with all other requirements of the Act and the rules with respect to it.

(c) The securities sold pursuant to a registration statement will be considered registered, for purposes of section 6(a) of the Act, if the pay-as-you-go registration fee has been paid and the post-effective amendment or prospectus including the amended "Calculation of Registration Fee" table is timely filed as required in paragraph (b)(1) of this section.

37. Amend § 230.457 by adding paragraph (r) to read as follows:

§ 230.457 Computation of fee.

* * * * *

(r) Where securities are to be offered pursuant to an automatic shelf registration statement, the registration

fee is to be calculated in accordance with this section. When the issuer pays an initial registration fee of $100 at the time of initial filing of the registration statement, the "Calculation of Registration Fee" table in the registration statement does not need to include the number of shares or units of securities or the maximum aggregate offering price of any securities until the issuer updates the "Calculation of Registration Fee" table to reflect payment of the pay-as-you-go registration fee in accordance with Rule 456(b) (§ 230.456(b)).

38. Amend § 230.462 by adding paragraphs (e) and (f) to read as follows:

§ 230.462 Immediate effectiveness of certain registration statements and post-effective amendments

* * * * *

(e) An automatic shelf registration statement and any post-effective amendment thereto, including a post-effective amendment filed to register additional classes of securities pursuant to Rule 413(b) (§ 230.413(b)) shall become effective upon filing with the Commission.

(f) A post-effective amendment filed pursuant to paragraph (e) of this section for purposes of adding a new issuer and its securities as permitted by Rule 413(b) (§ 230.413(b)) that satisfies the requirements of Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter), as applicable, including the signatures required by Rule 402(e) (§ 230.402(e)), and contains a prospectus satisfying the requirements of Rule 430B (§ 230.430B), shall become effective upon filing with the Commission.

39. Amend § 230.473 by revising paragraph (d) to read as follows:

§ 230.473 Delaying amendments.

* * * * *

(d) No amendments pursuant to paragraph (a) of this section may be filed with a registration statement on Form F–7, F–8 or F–80 (§ 239.37, § 239.38 or § 239.41 of this chapter); on Form F–9 or F–10 (§ 239.39 or § 239.40 of this chapter) relating to an offering being made contemporaneously in the United States and the issuer's home jurisdiction; on Form S–8 (§ 239.16b of this chapter); on Form S–3 or F–3 (§ 239.13 or § 239.33 of this chapter) relating to a dividend or interest reinvestment plan; on Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) relating to an automatic shelf registration statement; or on Form S–4 (§ 239.25 of this chapter) complying with General Instruction G of that Form.

40. Amend § 230.902 as follows:

a. Remove the word "and" at the end of paragraph (c)(3)(v)(B);

b. Remove the period at the end of paragraph (c)(3)(vi) and add in its place a semi-colon;

c. Remove the period at the end of paragraph (c)(3)(vii) and add in its place "; and"; and

d. Add paragraphs (c)(3)(viii) and (h)(4).

The amendments and additions read as follows:

§ 230.902 Definitions.

* * * * *

(c) *Directed selling efforts.*

* * * * *

(3) * * *

(viii) Publication or distribution of information, an opinion or arecommendation by a broker or dealer in accordance with Rule 138(c) (§ 230.138(c)) or rule 139(b) (§ 230.139(b)).

* * * * *

(h) *Offshore transaction.*

* * * * *

(4) Notwithstanding paragraph (h)(1) of this section, publication or distribution of information, an opinion or a recommendation in accordance with Rule 138(c) (§ 230.138(c)) or Rule 139(b) (§ 230.139(b)) by a broker or dealer at or around the time of an offering in reliance on Regulation S (§§ 230.901 through 230.905) will not cause the transaction to fail to be an offshore transaction as defined in this section.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

41. The general authority citation for part 230 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 78mm, 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

42. Remove the authority citation following § 239.11.

43. Amend Form S–1 (referenced in § 239.11) as follows:

a. Add General Instruction VI;

b. Add Item 11A;

c. Redesignate Item 12 as Item 12A; and

d. Add new Item 12.

The additions read as follows:

Note: The text of Form S–1 does not and this amendment will not appear in the Code of Federal Regulations.

Form S–1—Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

* * * * *

VI. Eligibility To Use Incorporation by Reference

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Items 3 through 11 of this Form in accordance with Item 11A and Item 12 of this Form:

A. The registrant is subject to the requirement to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 ("Exchange Act");

B. The registrant has filed all reports and other materials required to be filed by Section 13(a), 14 or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials);

C. The registrant has filed an annual report required under Section 13(a) or 15(d) of the Exchange Act for its most recently completed fiscal year;

D. The registrant is not an ineligible issuer;

E. If a registrant is a successor registrant it shall be deemed to have met conditions A., B., C., and D. above if:

1. Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor, or

2. All predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession; and

F. The registrant makes its periodic and current reports filed pursuant to Section 13 or 15(d) of the Exchange Act readily available and accessible on a Web site maintained by or for the issuer and containing information about the issuer.

* * * * *

Item 11A. Material Changes

If the registrant elects to incorporate information by reference pursuant to General Instruction VI., describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10–K or Form 10–KSB and which have not been described in a Form 10–Q, Form 10–QSB or Form 8–K filed under the Exchange Act.

Item 12. Incorporation of Certain Information by Reference

If the registrant elects to incorporate information by reference pursuant to General Instruction VI.:

(a) It must specifically incorporate by reference into the prospectus the following documents by means of a statement to that effect in the prospectus listing all such documents:

(1) The registrant's latest annual report on Form 10–K or Form 10–KSB filed pursuant to Section 13(a) or 15(d) of the Exchange Act which contains financial statements for the registrant's latest fiscal year for which a Form 10–K or Form 10–KSB was required to have been filed; and

(2) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act or proxy or information statements filed pursuant to Section 14 of the Exchange Act since the end of the fiscal year covered by the annual report referred to in paragraph (a)(1) above.

Note to Item 12(a). Attention is directed to Rule 439 (§ 230.439) regarding consent to use of material incorporated by reference.

(b)(1) The registrant must state:

(i) That it will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the reports or documents that have been incorporated by reference in the prospectus but not delivered with the prospectus;

(ii) That it will provide these reports or documents upon written or oral request;

(iii) That it will provide these reports or documents at no cost to the requester;

(iv) The name, address, telephone number, and e-mail address, if any, to which the request for these reports or documents must be made; and

(v) The registrant's Web Site address, including the uniform resource locator (URL) where the reports and other documents may be accessed.

Note to Item 12(b)(1). If the registrant sends any of the information that is incorporated by reference in the prospectus to security holders, it also must send any exhibits that are specifically incorporated by reference in that information.

(2) The registrant must:

(i) Identify the reports and other information that it files with the SEC; and

(ii) State that the public may read and copy any materials it files with the SEC at the SEC's Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1–800–SEC–0330. If the registrant is an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (*http://www.sec.gov*).

* * * * *

44. Remove and reserve § 239.12 and remove Form S–2 referenced in that section.

45. Amend § 239.13 as follows:

a. Remove the word "or" at the end of paragraph (c)(2);

b. Revise paragraph (c)(3);

c. Add paragraphs (c)(4), (c)(5) and (c)(6);

d. Redesignate paragraph (d) as paragraph (e); and

e. Add new paragraph (d).

The revision and additions read as follows:

§ 239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(c) * * *

(3) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities;

(4) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the registrant-subsidiary fully and unconditionally guarantees the payment obligations on the parent's securities being registered;

(5) The registrant-subsidiary fully and unconditionally guarantees the payment obligations on non-convertible obligations being registered by another majority-owned subsidiary in accordance with the requirements of paragraph (c)(1), (c)(2), or (c)(3) of this section; or

(6) The securities of the registrant-subsidiary are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself meets the Registrant Requirements and the applicable Transaction Requirement by virtue of paragraphs (c)(1) or (c)(2) of this section.

Note to paragraph (c): With regard to paragraphs (c)(3), (c)(4), (c)(5), and (c)(6) of this section, the guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but may be registered on the same registration statement as are the guaranteed securities.

(d) Automatic shelf offerings by well-known seasoned issuers.

Any registrant that, immediately prior to the filing of a registration statement on this Form, is a well-known seasoned issuer may use this Form for registration under the Act of securities offerings pursuant to Rule 415 (§ 230.415 of this chapter), other than Rule 415(a)(1)(vii) or (viii) (§ 230.415(a)(1)(vii) or (viii) of this chapter), as follows:

(1) The securities to be offered are:

(i) Securities of the registrant to be offered pursuant to Rule 415, Rule 430A, and Rule 430B (§ 230.415, § 230.430A, and § 230.430B of this chapter) provided, however, that a registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 (§ 230.405 of this chapter) may register only non-convertible obligations satisfying the conditions of General Instruction I.B.2. of this Form.

(ii) Securities of majority-owned subsidiaries to be offered pursuant to Rule 415 and Rule 430B (§ 239.415 and § 230.430B of this chapter) if the parent registrant is a well-known seasoned issuer and the subsidiary meets the following requirements:

(A) Securities of a subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405 of this chapter);

(B) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by the parent registrant;

(C) Securities of a subsidiary that are a guarantee of

(1) Obligations of the parent registrant; or

(2) Non-convertible obligations of another majority-owned subsidiary where such obligations are fully and unconditionally guaranteed by the parent registrant;

(D) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405 of this chapter); or

(E) Securities of a subsidiary that meet the conditions of Transaction Requirement set forth in paragraph (b)(2) (Primary Offerings of Non-Convertible Investment Grade Securities); or

(iii) Securities to be offered for the account of any person other than the

issuer ("selling security holders") pursuant to paragraph (b)(1) or (b)(3) of this section, provided that the registration statement and the prospectus are not required to separately identify the securities to be sold by selling security holders until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement or current report under the Exchange Act identifying the selling security holders and the amount of securities to be sold by each of them;

(2) The registrant requirements of paragraph (a) of this section and transaction requirements of paragraph (b)(1), (b)(2), (b)(3) or (b)(4) of this section are satisfied;

(3) The registrant pays the registration fee either on a pay-as-you-go basis pursuant to Rule 456(b) (§ 230.456(b) of this chapter) and Rule 457(r) (§ 230.457(r) of this chapter) or in accordance with Rule 456(a) (§ 230.456(a) of this chapter);

(4) If the registrant is a majority-owned subsidiary, it is required to file reports pursuant to section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)) and satisfies the requirements of this Form with regard to incorporation by reference or information about the majority-owned subsidiary is included in the registration statement (or a post effective amendment to the registration statement);

(5) An automatic shelf registration statement and post-effective amendment will become effective automatically (Rule 462 (§ 230.462) of this chapter) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission; and

(6) The registrant may register additional classes of its or its subsidiary's securities on a post-effective amendment pursuant to Rule 413(b) (§ 230.413(b) of this chapter).

* * * * *

46. Amend Form S–3 (referenced in § 239.13) as follows:

a. Add two check boxes to the cover page immediately before "Calculation of Registration Fee" table;

b. Revise the Note to the "Calculation of Registration Fee" Table;

c. Remove the word "or" at the end of General Instruction I.C.2.;

d. Revise paragraph 3. and add paragraph 4, 5, and 6 to General Instruction I.C.;

e. Add paragraph D. to General Instruction I.;

f. Revise paragraph D. of General Instruction II.;

g. Add paragraphs E., F., and G. to General Instruction II.;

h. Revise the heading of General Instruction IV;

i. Designate the current text under General Instruction IV as paragraph A;

j. Add a heading to paragraph A.;

k. Add paragraph B. to General Instruction IV; and

l. Add paragraph (d) of Item 12 to Part I.

The revisions and additions read as follows:

Note: The text of Form S–3 does not and this amendment will not appear in the Code of Federal Regulations.

Form S–3—Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is a registration statement pursuant to General Instruction I.D. or a post-effective amendment thereto that shall become effective upon filing with the Commission pursuant to Rule 462(e) under the Securities Act, check the following box. ☐

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction I.D. filed to register additional securities or additional classes of securities pursuant to Rule 413(b) under the Securities Act, check the following box. ☐

* * * * *

Notes to the "Calculation of Registration Fee" Table ("Fee Table")

1. Specific details relating to the fee calculation shall be furnished in notes to the Fee Table, including references to provisions of Rule 457 (§ 230.457) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the Fee Table.

2. If the filing fee is calculated pursuant to Rule 457(o) under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities, and the amount of registration fee need to appear in the Fee Table. Where two or more classes of securities are being registered pursuant to General Instruction II.D., however, the Fee Table need only specify the maximum aggregate offering price for all classes; the Fee Table need not specify by each class the proposed maximum aggregate offering price (see General Instruction II.D.).

3. If the filing fee is calculated pursuant to Rule 457(r) under the Securities Act, the Fee Table must state that it registers an unspecified amount of securities of each identified class of securities and the initial filing fee. If the Fee Table is amended in a post-effective amendment to the registration statement or in a prospectus filed in accordance with Rule 456(b)(1)(iii) (§ 230.456(b)(1)(iii)) deemed part of and included in the registration statement, the Fee Table must specify the aggregate offering price for all classes of securities in the referenced offering and the applicable registration fee.

4. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 457 under the Securities Act.

General Instructions

I. Eligibility Requirements for Use of Form S–3

* * * * *

C. Majority-Owned Subsidiaries

If a registrant is a majority-owned subsidiary, security offerings may be registered on this Form if:

* * * * *

3. The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities;

4. The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the registrant-subsidiary fully and unconditionally guarantees the payment obligations on the parent's securities being registered;

5. The registrant-subsidiary fully and unconditionally guarantees the payment obligations on the non-convertible obligations being registered by another majority-owned subsidiary in accordance with the requirements of I.C.1, I.C.2, or I.C.3 above; or

6. The securities of the registrant-subsidiary are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself meets the Registrant Requirements and the applicable Transaction Requirement by virtue of I.C.1 or I.C.2 above.

Note to General Instruction I.C.: With regard to paragraphs I.C.3, I.C.4, I.C.5, and I.C.6 above, the guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but

may be registered on the same registration statement as are the guaranteed securities.

* * * * *

D. Automatic Shelf Offerings by Well-Known Seasoned Issuers

Any registrant that, immediately prior to the filing of a registration statement on this Form, is a well-known seasoned issuer may use this Form for registration under the Securities Act of securities offerings pursuant to Rule 415 (§ 230.415), other than Rule 415(a)(1)(vii) or (viii) (§ 230.415(a)(1)(vii) or (viii)), as follows:

1. The securities to be offered are:

(a) Securities of the registrant to be offered pursuant to Rule 415, Rule 430A, and Rule 430B (§ 230.415, § 230.430A, and § 230.430B);

(b) Securities of majority-owned subsidiaries to be offered pursuant to Rule 415 and Rule 430B if the parent registrant is a well-known seasoned issuer and the subsidiary meets the following requirements:

(i) Securities of a subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405);

(ii) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by the parent registrant;

(iii) Securities of a subsidiary that are a guarantee of:

(A) Obligations of the parent registrant; or

(B) Non-convertible obligations of another majority-owned subsidiary where such obligations are fully and unconditionally guaranteed by the parent registrant;

(iv) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405; or

(v) Securities of a subsidiary that meet the conditions of Transaction Requirement I.B.2. (Primary Offerings of Non-Convertible Investment Grade Securities).

(c) Securities to be offered for the account of any person other than the issuer ("selling security holders") pursuant to General Instruction I.B.1. or I.B.3. of this Form, provided that the registration statement and the prospectus are not required to separately identify the securities to be sold by selling security holders until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement, or periodic or current report under the Exchange Act identifying the selling security holders and the amount of securities to be sold by each of them;

2. The registrant requirements of General Instruction I.A.and transaction requirements of General Instruction I.B.1, I.B.2, I.B.3, or I.B.4 of this Form are satisfied;

3. The registrant pays the registration fee either on a pay-as-you-go basis pursuant to Rules 456(b) (§ 230.456(b)) and 457(r) (§ 230.457(r)) or in accordance with Rule 456(a) (§ 230.456(a));

4. If the registrant is a majority-owned subsidiary, it is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act and satisfies the requirements of the Form with regard to incorporation by reference or information about the majority-owned subsidiary is included in the registration statement (or a post effective amendment to the registration statement);

5. An automatic shelf registration statement and post-effective amendment will become effective automatically (Rule 462, § 230.462) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission; and

6. The registrant may register additional classes of its or its subsidiaries securities on a post-effective amendment pursuant to Rule 413(b) (§ 203.413(b)).

II. Application of General Rules and Regulations

* * * * *

D. Non-Automatic Shelf Registration Statements

Where two or more classes of securities being registered on this Form pursuant to General Instruction I.B.1. or I.B.2. are to be offered pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)), and where this Form is not an automatic shelf registration statement, Rule 457(o) (§ 230.457(o)) permits the registration fee to be calculated on the basis of the maximum offering price of all the securities listed in the Fee Table. In this event, while the Fee Table would list each of the classes of securities being registered and the aggregate proceeds to be raised, the Fee Table need not specify by each class information as to the amount to be registered, proposed maximum offering price per unit, and proposed maximum aggregate offering price.

E. Automatic Shelf Registration Statements

Where securities are being registered on this Form pursuant to General Instruction I.D., Rule 456(b) (§ 230.456(b)) permits the registrant to pay the registration fee on a pay-as-you-go basis and Rule 457(r) (§ 230.457(r)) permits the registration fee to be calculated on the basis of the aggregate offering price of the securities to be offered in a particular offering off the registration statement. In this event, the Fee Table in the initial filing must identify the classes of securities being registered and the initial filing fee, but the Fee Table does not need to specify any other information. When the registrant amends the Fee Table in accordance with Rule 456(b)(1)(iii) (§ 230.456(b)(1)(iii)), the amended Fee Table must include the aggregate offering price for all classes of securities referenced in the offering and the applicable registration fee.

F. Information in Automatic and Non-Automatic Shelf Registration Statements

Where securities are being registered on this Form pursuant to General Instruction I.B.1, I.B.2, I.C., or I.D., information in is only required to be furnished as of the date of initial effectiveness of the registration statement to the extent required by Rule 430A (§ 230.430A) or Rule 430B (§ 230.430B). Required information about a specific transaction must be included in the prospectus in the registration statement by means of a prospectus that is deemed to be part of and included in the registration statement pursuant to Rule 430B, a post-effective amendment to the registration statement, or a periodic or current report under the Exchange Act incorporated by reference into the registration statement and the prospectus and identified in a prospectus filed pursuant to Rule 424(b) (§ 230.424(b).

G. Selling Security Holder Offerings

Where a registrant eligible to register primary offerings on this Form pursuant to General Instruction I.B.1 registers securities offerings on this Form pursuant to General Instruction I.B.1 or I.B.3 for the account of persons other than the registrant, if the offering of securities being registered for resale on behalf of such persons was completed and the securities issued prior to filing the resale registration statement, the registrant may, in lieu of identifying all selling security holders prior to

effectiveness of the resale registration statement, identify any known selling security holders and the amounts of securities to be sold by them and refer to any unnamed selling security holders in a generic manner by identifying the transaction in which the securities were acquired. Following effectiveness, the registrant must file a prospectus, a prospectus supplement or a post-effective amendment to the registration statement to add the names of the previously unidentified selling security holders and amounts of securities that they intend to sell. If this Form is being filed pursuant to General Instruction I.D., for offerings pursuant to General Instruction I.B.1 or I.B.3 for the account of persons other than the issuer, the registration statement and the prospectus included in the registration statement does not need to designate the securities that will be offered for the account of such persons, identify them, or identify the transactions in which they acquired their securities until the registrant files a post-effective amendment to the registration statement or a prospectus pursuant to Rule 424(b) (§ 230.424(b)) containing information for the offering on behalf of such persons.

* * * * *

IV. Registration of Additional Securities and Additional Classes of Securities

A. Registration of Additional Securities Pursuant to Rule 462(b)

* * * * *

B. Registration of Additional Classes of Securities After Effectiveness

A registrant relying on General Instruction I.D. of this Form may register additional classes of securities, pursuant to Rule 413(b) (§ 230.413(b)) by filing a post-effective amendment to the effective registration statement. The registrant may add majority-owned subsidiaries as additional registrants whose securities are eligible to be sold as part of the automatic shelf registration statement by filing a post-effective amendment identifying the additional registrants and the registrant and the additional registrants and other persons required to sign the registration statement must sign the post-effective amendment. The post-effective amendment, if filed, must consist of the facing page; any disclosure required by this Form that is necessary to update the registration statement to reflect the additional securities, additional classes of securities or additional registrants; any required opinions and consents; and the signature page. Such information, consents or opinions may be included in the prospectus and the registration statement through a post-effective amendment or may be provided through a document incorporated or deemed incorporated by reference into the registration statement and the prospectus, or, as to the information only, contained in a prospectus filed pursuant to Rule 424(b) (§ 230.424(b)) that is deemed part of and included in the registration statement and prospectus.

* * * * *

Part I.—Information Required in Prospectus

* * * * *

Item 12. Incorporation of Certain Information by Reference

* * * * *

(d) Any information required in the prospectus in response to Item 3 through Item 11 of this Form may be included in the prospectus through documents filed pursuant to Section 13(a), 14 or 15(d) of the Exchange Act that are incorporated or deemed incorporated by reference into the prospectus.

* * * * *

47. Amend Form S–4 (referenced in § 239.25) as follows:

a. Revise paragraphs B.1.b., B.1.c., C.1.b. and C.1.c. to the General Instructions;

b. Revise the heading and introductory text of Item 12;

c. Revise the introductory text of Item 13;

d. Revise the heading and introductory text of Item 14;

e. Revise the heading and paragraph (a) of Item 16;

f. Revise the heading and introductory text of Item 17;

g. Revise paragraph (b) of Item 18; and

h. Revise paragraph (c) of Item 19.

The revisions read as follows:

Note: The text of Form S–4 does not and the amendments will not appear in the Code of Federal Regulations.

Form S–4—Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

* * * * *

B. Information With Respect to the Registrant

* * * * *

1. * * *

b. Items 12 and 13 of this Form, if the registrant meets the requirements for use of Form S–3 and elects this alternative; or

c. Item 14 of this Form, if the registrant does not meet the requirements for use of Form S–3, or if it otherwise elects to use this alternative.

* * * * *

C. Information With Respect to the Company Being Acquired

* * * * *

1. * * *

b. Item 16 of this Form, if the company being acquired meets the requirements for use of Form S–3 and this alternative is elected; or

c. Item 17 of this Form, if the company being acquired does not meet the requirements for use of Form S–3, or if this alternative is otherwise elected.

* * * * *

Part I.—Information Required in Prospectus

* * * * *

B. Information About the Registrant

* * * * *

Item 12. Information With Respect to S–3 Registrants

If the registrant meets the requirements for use of Form S–3 and elects to comply with this Item, furnish the information required by either paragraph (a) or paragraph (b) of this Item. The information required by paragraph (b) shall be furnished if the registrant satisfies the conditions of paragraph (c) of this Item.

* * * * *

Item 13. Incorporation of Certain Information by Reference

If the registrant meets the requirements for use of Form S–3 and elects to furnish information in accordance with the provisions of Item 12 of this Form:

* * * * *

Item 14. Information With Respect to Registrants Other Than S–3 Registrants

If the registrant does not meet the requirements for use of Form S–3, or otherwise elects to comply with this Item in lieu of Item 10 or 12, furnish the information required by:

* * * * *

C. Information About the Company Being Acquired

* * * * *

Item 16. Information With Respect to S–3 Companies

(a) If the company being acquired meets the requirements for use of Form S–3 and elects to comply with this Item,

furnish the information that would be required by Items 12 or 13 of this Form if securities of such company were being registered.

* * * * *

Item 17. Information With Respect to Companies Other Than S–3 Companies

If the company being acquired does not meet the requirements for use of Form S–3, or compliance with this Item is otherwise elected in lieu of Item 15 or 16, furnish the information required by paragraph (a) or (b) of this Item, whichever is applicable.

* * * * *

D. Voting and Management Information

Item 18. Information if Proxies, Consents or Authorizations Are To Be Solicited

* * * * *

(b) If the registrant or the company being acquired meets the requirements for use of Form S–3, any information required by paragraphs (a)(5)(ii) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 10–K.

* * * * *

Item 19. Information if Proxies, Consents or Authorizations Are Not To Be Solicited or in an Exchange Offer

* * * * *

(c) If the registrant or the company being acquired meets the requirements for use of Form S–3, any information required by paragraphs (a)(5) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 10–K.

* * * * *

48. Amend Form F–1 (referenced in § 239.31) as follows:

a. Add General Instruction VI;

b. Add Item 4A;

c. Redesignate Item 5 as Item 5A; and

d. Add new Item 5.

The additions read as follows:

Note: The text of Form F–1 does not and this amendment will not appear in the Code of Federal Regulations.

Form F–1—Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

* * * * *

VI. Eligibility To Use Incorporation by Reference

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Item 4 of this Form in accordance with Item 4 and Item 5 of this Form:

A. The registrant is subject to the requirement to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 ("Exchange Act");

B. The registrant has filed all reports and other materials required to be filed by Section 13(a) or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials);

C. The registrant has filed an annual report required under Section 13(a) or 15(d) of the Exchange Act for its most recently completed fiscal year;

D. The registrant is not an ineligible issuer;

E. If a registrant is a successor registrant it shall be deemed to have met conditions A., B., C., and D. above if:

1. Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the jurisdiction of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

2. All predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession;

F. The registrant makes its periodic and current reports filed pursuant to Sections 13 or 15(d) of the Exchange Act readily available and accessible on a Web site maintained by or for the issuer and containing information about the issuer.

* * * * *

Item 4A. Material Changes

a. If the registrant elects to incorporate information by reference pursuant to General Instruction VI., describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in accordance with Item 5 of this Form and which have not been described in a report on Form 6–K, Form 10–Q or Form 8–K filed under the Exchange Act and incorporated by reference pursuant to Item 5 of this Form.

b.1. Include in the prospectus, if not included in the reports filed under the Exchange Act which are incorporated by reference into the prospectus pursuant to Item 5:

i. Information required by Rule 3–05 and Article 11 of Regulation S–X;

ii. Restated financial statements if there has been a change in accounting principles or a correction of an error where such change or correction requires material retroactive restatement of financial statements;

iii. Restated financial statements where one or more business combinations accounted for by the pooling of interest method of accounting have been consummated subsequent to the most recent fiscal year and the acquired businesses, considered in the aggregate, are significant under Rule 11–01(b); or

iv. Any financial information required because of a material disposition of assets outside the normal course of business.

2. If the financial statements included in this registration statement in accordance with Item 6 are not sufficiently current to comply with the requirements of Item 8.A of Form 20–F, financial statements necessary to comply with that Item shall be presented:

i. Directly in the prospectus;

ii. Through incorporation by reference and delivery of a Form 6–K identified in the prospectus as containing such financial statements; or

iii. Through incorporation by reference of an amended Form 20–F, Form 40–F, or Form 10–K, in which case the prospectus shall disclose that the Form 20–F, Form 40–F, or Form 10–K has been so amended.

Instruction. Financial statements or information required to be furnished by this Item shall be reconciled pursuant to either Item 17 or 18 of Form 20–F, whichever is applicable to the primary financial statements.

Item 5. Incorporation of Certain Information by Reference

If the registrant elects to incorporate information by reference pursuant to General Instruction VI.:

a. It must specifically incorporate by reference into the prospectus the following documents by means of a statement to that effect in the prospectus listing all such documents:

1. The registrant's latest annual report on Form 20–F, Form 40–F or Form 10–K filed under the Exchange Act shall be incorporated by reference.

2. Any report on Form 10–Q or Form 8–K filed since the date of filing of the annual report shall also be incorporated by reference. The registrant may also incorporate by reference any Form 6–K meeting the requirements of this Form.

Note to Item 5.a. Attention is directed to Rule 439 (§ 230.439) regarding consent to use of material incorporated by reference.

b.1. The registrant must state:

i. That it will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the reports or documents that have been incorporated by reference in the prospectus but not delivered with the prospectus;

ii. That it will provide these reports or documents upon written or oral request;

iii. That it will provide these reports or documents at no cost to the requester;

iv. The name, address, telephone number, and e-mail address to which the request for these reports or documents must be made; and

v. The registrant's Web site address, including the uniform resource locator (URL) where the reports and other documents may be accessed.

Note to Item 5.b.1. If the registrant sends any of the information that is incorporated by reference in the prospectus to security holders, it also must send any exhibits that are specifically incorporated by reference in that information.

2. The registrant must:

i. Identify the reports and other information that it files with the SEC; and

ii. State that the public may read and copy any materials it files with the SEC at the SEC's Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1–800–SEC–0330. If the registrant is an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (*http://www.sec.gov*).

* * * * *

49. Remove and reserve § 239.32 and remove Form F–2 referenced in that section.

50. Amend § 239.33 as follows:

a. Remove the word "or" at the end of paragraph (a)(5)(ii);

b. Revise paragraph (a)(5)(iii);

c. Add paragraphs (a)(5)(iv), (a)(5)(v), and (a)(5)(vi); and

d. Add paragraph (c).

The revisions and additions read as follows:

§ 239.33 Form F–3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * * *

(a) * * *

(5) * * *

(iii) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities;

(iv) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the registrant-subsidiary fully and unconditionally guarantees the payment obligations on the parent's securities being registered;

(v) The registrant-subsidiary fully and unconditionally guarantees the payment obligations on the non-convertible obligations being registered by another majority-owned subsidiary in accordance with the requirements of paragraph (a)(5)(i), (a)(5)(ii), or (a)(5)(iii) of this section; or

(vi) The securities of the registrant-subsidiary are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself meets the Registrant Requirements and the applicable Transaction Requirement by virtue of paragraph (a)(5)(i) or (a)(5)(ii) of this section.

Note to paragraphs (a)(5)(iii), (a)(5)(iv), (a)(5)(v), and (a)(5)(vi): In the situation described in paragraphs (a)(5)(iii), (a)(5)(iv), (a)(5)(v), and (a)(5)(vi) of this section, the parent or subsidiary guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but may be registered on the same registration statement as are the guaranteed securities. Both the parent or subsidiary guarantor and the majority-owned subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the subsidiary will not be eligible to file annual reports on Form 20–F or Form 40–F (§§ 249.220f or 249.240f of this chapter) after the effective date of the registration statement, then it shall disclose the information specified in Form S–3 (§ 239.13). Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter) specifies the financial statements required.

* * * * *

(c) *Automatic shelf offerings by well-known seasoned issuers.*

Any registrant that, immediately prior to the filing of a registration statement on this Form, is a well-known seasoned issuer may use this Form for registration under the Securities Act of securities offerings pursuant to Rule 415 (§ 230.415 of this chapter), other than Rule 415(a)(1)(vii) (§ 230.415(a)(1)(vii) of this chapter), as follows:

(1) The securities to be offered are:

(i) Securities of the registrant to be offered pursuant to Rule 415, Rule 430A and Rule 430B (§ 230.415, § 230.430A, and § 230.430B of this chapter);

(ii) Securities of majority-owned subsidiaries to be offered pursuant to Rule 415 and Rule 430B (§ 230.415 and § 230.430B of this chapter) if the parent registrant is a well-known seasoned issuer and the subsidiary meets the following requirements:

(A) Securities of a subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405 of this chapter);

(B) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by the parent registrant;

(C) Securities of a subsidiary that are a guarantee of:

(*1*) Obligations of the parent registrant; or

(*2*) Non-convertible obligations of another majority-owned subsidiary where such obligations are fully and unconditionally guaranteed by the parent registrant;

(D) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405 of this chapter); or

(E) Securities of a subsidiary that meet the conditions of the Transaction Requirement set forth in paragraph (b)(2) (Primary Offerings of Non-Convertible Investment Grade Securities); or

(iii) Securities to be offered for the account of any person other than the issuer ("selling security holders") pursuant to paragraph (b)(1) or (b)(3) of this Form, provided that the registration statement and the prospectus are not required to separately identify the securities to be sold by selling security holders until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement or Form 8–K or Form 6–K incorporated by reference (§§ 249.308 or 249.306 of this chapter) identifying the selling security holders and the amount of securities to be sold by each of them.

(2) The registrant requirements of paragraph (a) of this section and transaction requirements of paragraph (b)(1), (b)(2), (b)(3) or (b)(4) of this section are satisfied;

(3) The registrant pays the registration fee either on a pay-as-you-go basis pursuant to Rules 456(b) (§ 230.456(b) of

this chapter) and 457(r) (§ 230.457(r) of this chapter) or in accordance with Rule 456(a) (§ 230.456(a) of this chapter);

(4) If the registrant is a majority-owned subsidiary, it is required to file reports pursuant to section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)) and satisfies the requirements of this Form with regard to incorporation by reference or information about the subsidiary is included in the registration statement (or a post effective amendment to the registration statement);

(5) An automatic shelf registration statement and post-effective amendment will become effective automatically pursuant to Rule 462 (§ 230.462) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission; and

(6) The registrant may register additional classes of its or its subsidiaries securities on a post-effective amendment pursuant to Rule 413(b) (§ 230.413(b)).

51. Amend Form F–3 (referenced in § 239.33) as follows:

a. Add two check boxes to the cover page immediately before "Calculation of Registration Fee" table;

b. Revise the Note to the "Calculation of Registration Fee" Table;

c. Remove the word "or" at the end of paragraph (ii), revise paragraph (iii) and add paragraph (iv), (v), and (vi) to General Instruction I.A.5.;

d. Add paragraph C. to General Instruction I.;

e. Revise paragraph C. of General Instruction II.;

f. Add paragraphs F., G., and H. to General Instruction II.;

g. Revise the heading of General Instruction IV and designate the current text under General Instruction IV as paragraph A;

h. Add a heading to paragraph A.;

i. Add paragraph B. to General Instruction IV; and

j. Add paragraph (f) of Item 6 to Part I.

The revisions and additions read as follows:

Note: The text of Form F–3 does not and this amendment will not appear in the Code of Federal Regulations.

Form F–3—Registration Statement Under the Securities Act of 1933

* * * * *

If this Form is a registration statement pursuant to General Instruction I.C. or a post-effective amendment thereto that shall become effective upon filing with the Commission pursuant to Rule 462(e) under the Securities Act, check the following box. ☐

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction I.C. filed to register additional securities or additional classes of securities pursuant to Rule 413(b) under the Securities Act, check the following box. ☐

* * * * *

Notes to the "Calculation of Registration Fee" Table ("Fee Table")

1. Specific details relating to the fee calculation shall be furnished in notes to the Fee Table, including references to provisions of Rule 457 (§ 230.457) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the Fee Table.

2. If the filing fee is calculated pursuant to Rule 457(o) under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities, and the amount of registration fee need to appear in the Fee Table. Where two or more classes of securities are being registered pursuant to General Instruction II.C., however, the Fee Table need only specify the maximum aggregate offering price for all classes; the Fee Table need not specify by each class the proposed maximum aggregate offering price (see General Instruction II.C.).

3. If the filing fee is calculated pursuant to Rule 457(r) under the Securities Act, the Fee Table must state that it registers an unspecified amount of securities of each identified class of securities and the initial filing fee. If the Fee Table is amended in a post-effective amendment to the registration statement or in a prospectus filed in accordance with Rule 456(b)(1)(iii) (§ 230.456(b)(1)(iii)) deemed part of and included in the registration statement, the Fee Table must specify the aggregate offering price for all classes of securities in the referenced offering and the applicable registration fee.

4. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 457 under the Securities Act.

General Instructions

I. Eligibility Requirements for Use of Form F–3

* * * * *

A. Registrant Requirements

* * * * *

5. Majority-Owned Subsidiaries

If a registrant is a majority-owned subsidiary, security offerings may be registered on this Form if:

* * * * *

(iii) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities;

(iv) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the registrant-subsidiary fully and unconditionally guarantees the payment obligations on the parent's securities being registered;

(v) The registrant-subsidiary fully and unconditionally guarantees the payment obligations on the non-convertible obligations being registered by another majority-owned subsidiary in accordance with the requirements of paragraph I.A.5(i), (ii), or (iii) above; or

(vi) The securities of the registrant-subsidiary are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself meets the Registrant Requirements and the applicable Transaction Requirement by virtue of paragraph I.A.5(i), or I.A.5(ii) above.

Note: In the situation described in paragraphs I.A.5(iii), I.A.5(iv), I.A.5(v), and I.A.5(vi) above, the parent or subsidiary guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but may be registered on the same registration statement as are the guaranteed securities. Both the parent or subsidiary guarantor and the majority-owned subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the subsidiary will not be eligible to file annual reports on Form 10–F or Form 40–F after the effective date of the registration statement, then it shall disclose the information specified in Form S–3. Rule 3–10 of Regulation X (§ 210.3–10) specifies the financial statements required.

* * * * *

C. Automatic Shelf Offerings by Well-Known Seasoned Issuers

Any registrant that, immediately prior to the filing of a registration statement on this Form, is a well-known seasoned issuer may use this Form for registration under the Securities Act of securities offerings pursuant to Rule 415

(§ 230.415), other than Rule 415(a)(1)(vii) or (viii) (§ 230.415(a)(1)(vii) or (viii)) as follows:

1. The securities to be offered are:

(a) Securities of the registrant to be offered pursuant to Rule 415, Rule 430A and Rule 430B (§ 230.415, § 230.430A and § 230.430B);

(b) Securities of majority-owned subsidiaries to be offered pursuant to Rule 415 and Rule 430B if the parent registrant is a well-known seasoned issuer and the subsidiary meets the following requirements:

(i) Securities of a subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405);

(ii) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by the parent registrant;

(iii) Securities of a subsidiary that are a guarantee of (A) obligations of the parent registrant or (B) non-convertible obligations of another majority-owned subsidiary where such obligations are fully and unconditionally guaranteed by the parent registrant;

(iv) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405); or

(v) Securities of a subsidiary that meet the conditions of Transaction Requirement I.B.2. (Primary Offerings of Non-Convertible Investment Grade Securities).

(c) Securities to be offered for the account of any person other than the issuer ("selling security holders") pursuant to General Instruction I.B.1. or I.B.3. of this Form, provided that the registration statement and the prospectus are not required to separately identify the securities to be sold by selling security holders until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement or report under the Exchange Act identifying the selling security holders and the amount of securities to be sold by each of them.

2. The registrant requirements of General Instruction I.A. and transaction requirements of General Instruction I.B.1, I.B.2, I.B.3, or I.B.4 of this Form are satisfied.

3. The registrant pays the registration fee either on a pay-as-you-go basis pursuant to Rules 456(b) (§ 230.456(b)) and 457(r) (§ 230.457(r)) or in accordance with Rule 456(a) (§ 230.456(a)).

4. If the registrant is a majority-owned subsidiary, it is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act and satisfies the requirements of the Form with regard to incorporation by reference or information about the subsidiary is included in the registration statement (or a post effective amendment to the registration statement).

5. An automatic shelf registration statement and post-effective amendment will become effective automatically (Rule 462, § 230.462) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission.

6. The registrant may register additional classes of its or its subsidiaries securities on a post-effective amendment pursuant to Rule 413(b) (§ 203.413(b)).

II. Application of General Rules and Regulations

* * * * *

C. Non-Automatic Shelf Registration Statements

Where two or more classes of securities being registered on this Form pursuant to General Instruction I.B.1.or I.B.2. are to be offered pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)), and where this Form is not an automatic shelf registration statement, Rule 457(o) (§ 230.457(o)) permits the registration fee to be calculated on the basis of the maximum offering price of all the securities listed in the Fee Table. In this event, while the Fee Table would list each of the classes of securities being registered and the aggregate proceeds to be raised, the Fee Table need not specify by each class information as to the amount to be registered, proposed maximum offering price per unit, and proposed maximum aggregate offering price.

* * * * *

F. Automatic Shelf Registration Statements

Where securities are being registered on this Form pursuant to General Instruction I.C., Rule 456(b) (§ 230.456(b)) permits the registrant to pay the registration fee on a pay-as-you-go basis and Rule 457(r) (§ 230.457(r)) permits the registration fee to be calculated on the basis of the aggregate offering price of the securities to be offered in a particular offering off the registration statement. In this event, the Fee Table in the initial filing must identify the classes of securities being registered and the initial filing fee, but the Fee Table does not need to specify any other information. When the registrant amends the Fee Table in accordance with Rule 456(b)(1)(iii) (§ 230.456(b)(1)(iii)), the amended Fee Table must include the aggregate offering price for all classes of securities referenced in the offering and the applicable registration fee.

G. Information in Automatic and Non-Automatic Shelf Registration Statements

Where securities are being registered on this Form pursuant to General Instruction I.A.5, I.B.1, I.B.2, or I.C., information is only required to be furnished as of the date of initial effectiveness of the registration statement to the extent required by Rule 430B (§ 230.430B). Required information about a specific transaction must be included in the prospectus in the registration statement by means of a prospectus that is deemed to be part of and included in the registration statement pursuant to Rule 430A or 430B (§ 230.430A or § 230.430B), a post-effective amendment to the registration statement, or a periodic or current report under the Exchange Act incorporated by reference into the registration statement and the prospectus and identified in a prospectus filed pursuant to Rule 424(b) (§ 230.424(b)).

H. Selling Security Holder Offerings

Where a registrant eligible to register primary offerings on this Form pursuant to General Instruction I.B.1 registers securities offerings on this Form pursuant to General Instruction I.B.1 or I.B.3 for the account of persons other than the registrant, if the offering of securities being registered for resale on behalf of such persons was completed and the securities issued prior to filing the resale registration statement, the registrant may, in lieu of identifying all selling security holders prior to effectiveness of the resale registration statement, identify any known selling security holders and the amounts of securities to be sold by them and refer to any unnamed selling security holders in a generic manner by identifying the transaction in which the securities were acquired. Following effectiveness, the registrant must file a prospectus, a prospectus supplement or a post-effective amendment to the registration statement to add the names of the previously unidentified selling security holders and amounts of securities that they intend to sell. If this Form is being filed pursuant to General Instruction I.C., for offerings pursuant to General

Instruction I.B.1 or I.B.3 for the account of persons other than the issuer, the registration statement and the prospectus included in the registration statement does not need to designate the securities that will be offered for the account of such persons, identify them, or identify the transactions in which they acquired their securities until the registrant files a post-effective amendment to the registration statement or a prospectus pursuant to Rule 424(b) (§ 230.424(b)) containing information for the offering on behalf of such persons.

* * * * *

IV. Registration of Additional Securities and Additional Classes of Securities

A. Registration of Additional Securities Pursuant to Rule 462(b)

* * * * *

B. Registration of Additional Classes of Securities After Effectiveness

A registrant relying on General Instruction I.C. of this Form may register additional classes of securities, pursuant to Rule 413(b) (§ 230.413(b)) by filing a post-effective amendment to the effective registration statement. The registrant may add majority-owned subsidiaries as additional registrants whose securities are eligible to be sold as part of the automatic shelf registration statement by filing a post-effective amendment identifying the additional registrants and the registrant and the additional registrants and other persons required to sign the registration statement must sign the post-effective amendment. The post-effective amendment, if filed, must consist of the facing page; any disclosure required by this Form that is necessary to update the registration statement to reflect the additional securities, additional classes of securities or additional registrants; any required opinions and consents; and the signature page. Such information, consents or opinions may be included in the prospectus and the registration statement through a post-effective amendment or may be provided through a document incorporated or deemed incorporated by reference into the registration statement and the prospectus, or, as to the information only, contained in a prospectus filed pursuant to Rule 424(b) (§ 230.424(b)) that is deemed part of and included in the registration statement and prospectus.

* * * * *

Part I.—Information Required in Prospectus

* * * * *

Item 6. Incorporation of Certain Information by Reference

* * * * *

(f) Any information required in the prospectus in response to Item 3 through Item 5 of this Form may be included in the prospectus through documents filed pursuant to Sections 13(a), 14, or 15(d) of the Exchange Act that are incorporated or deemed incorporated by reference into the prospectus.

* * * * *

52. Amend Form F–4 (referenced in § 239.34) as follows:

a. Revise paragraph B.1.(b), B.1.(c), C.1.(b) and C.1.(c) to the General Instructions;

b. Revise the heading, introductory text, and the introductory text of paragraphs (b)(2) and (b)(3)(vii) to Item 12 in Part I.;

c. Revise Instructions 1. and 3. to Item 13;

d. Revise the heading and introductory text of Item 14;

e. Revise the heading and text of Item 16;

f. Revise the heading and introductory text of Item 17;

g. Revise paragraph (b) of Item 18; and

h. Revise the heading and paragraph (c) of Item 19.

The revisions read as follows:

Note: The text of Form F–4 does not and this amendment will not appear in the Code of Federal Regulations.

Form F–4—Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

* * * * *

B. Information With Respect to the Registrant

* * * * *

1. * * *

(b) Items 12 and 13 of this Form, if the registrant meets the requirements for use of Form F–3 and elects this alternative; or

(c) Item 14 of this Form, if the registrant does not meet the requirements for use of Form F–3, or if it otherwise elects this alternative.

* * * * *

C. Information With Respect to the Company Being Acquired

1. * * *

(b) Item 16 of this Form, if the company being acquired meets the requirements for use of Form F–3 and this alternative is elected; or

(c) Item 17 of this Form, if the company being acquired does not meet the requirements for use of Form F–3, or if this alternative is otherwise elected.

* * * * *

Part I.—Information Required in Prospectus

* * * * *

B. Information About the Registrant

* * * * *

Item 12. Information With Respect to F–3 Registrants

If the registrant meets the requirements use of Form F–3 or Form S–3 and elects to comply with this Item, furnish the information required by either paragraph (a) or (b) of this Item. However, the registrant shall not provide prospectus information in the manner allowed by paragraph (a) of this Item if the financial statements incorporated by reference pursuant to Item 13 reflect:

* * * * *

(b) * * *

(2) Include financial statements and information as required by Item 18 of Form 20–F, except that financial statements of the registrant may comply with Item 17 of Form 20–F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F–3. In addition, provide:

* * * * *

(3) * * *

(vii) Financial statements required by Item 18 of Form 20–F, except that financial statements of the registrant may comply with Item 17 of Form 20–F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F–3, and financial information required by Rule 3–05 and Article 11 of Regulation S–X with respect to transactions other than that pursuant to which the securities being registered are to be issued (Schedules required under Regulation S–X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form, but need not be provided with respect to the company being acquired if information is being furnished pursuant to Item 17(a) of this Form); and

* * * * *

Item 13. Incorporation of Certain Information by Reference

* * * * *

Instructions.

1. All annual reports incorporated by reference pursuant to Item 13 of this Form shall contain financial statements that comply with Item 18 of Form 20–F, except that financial statements of the

registrant may comply with Item 17 of Form 20–F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F–3.

* * * * *

3. The registrant may incorporate by reference and deliver with the prospectus any Form 6–K, Form 10–Q or Form 8–K containing information eligible to be incorporated by reference into Form F–1. See Rules 4–01(a)(2) and 10–01 of Regulation S–X and Item 18 of Form 20–F.

* * * * *

Item 14. Information With Respect to Registrants Other Than F–3 Registrants

If the registrant does not meet the requirements for use of Form F–3, or otherwise elects to comply with this Item in lieu of Items 10 and 11 or Items 12 and 13, furnish the following information:

* * * * *

C. Information About the Company Being Acquired

* * * * *

Item 16. Information With Respect to F–3 Companies

a. If the company being acquired meets the requirements for use of Form F–3 and compliance with this Item is elected, furnish the information that would be required by Items 12 and 13 of this Form if securities of such company were being registered.

* * * * *

Item 17. Information With Respect to Foreign Companies Other Than F–3 Companies

If the company being acquired does not meet the requirements for use of Form F–3 or compliance with this Item is otherwise elected in lieu of Item 15 or 16, furnish the information required by paragraph (a) or (b) of this Item, whichever is applicable.

* * * * *

D. Voting and Management Information

Item 18. Information if Proxies, Consents or Authorizations Are To Be Solicited

* * * * *

(b) If the registrant or the company being acquired meets the requirements for use of Form F–3, any information required by paragraphs (a)(5)(ii) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 20–F.

Item 19. Information if Proxies, Consents or Authorizations Are Not To Be Solicited or in an Exchange Offer

* * * * *

(c) If the registrant or the company being acquired meets the requirements for use of Form F–3, any information required by paragraphs (a)(5) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 20–F.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

53. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

54. Amend § 240.14a–2 as follows:

a. Remove the authority citation following the section; and

b. Add paragraph (b)(5).

The addition reads as follows:

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

* * * * *

(b) * * *

(5) Publication or distribution by a broker or a dealer of a research report in accordance with Rule 138 (§ 230.138 of this chapter) or Rule 139 (§ 230.139 of this chapter) during a transaction registered under the Securities Act of 1933 in which the broker or dealer or its affiliate participates or acts in an advisory role.

PART 243—REGULATION FD

55. The authority citation for part 243 continues to read as follows:

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a–29, unless otherwise noted.

56. Amend § 243.100 by revising paragraph (b)(2)(iv) to read as follows:

§ 243.100 General rule regarding selective disclosure.

* * * * *

(b) * * *

(2) * * *

(iv) By any of the following means in connection with a securities offering registered under the Securities Act, other than an offering of the type described in any of Rule 415(a)(1)(i) through (vi) under the Securities Act (§ 230.415(a)(1)(i) through (vi) of this chapter) that does not also involve a registered offering for capital formation purposes for the account of the issuer, including an underwritten offering that is both for the account of the issuer and selling security holders (unless the issuer's offering is being registered for the purpose of evading the requirements of this section):

(A) A registration statement filed under the Securities Act, including a prospectus contained therein;

(B) A free writing prospectus used after filing of the registration statement for the offering and satisfying the requirements of Rule 433 under the Securities Act (§ 230.433 of this chapter), or a communication falling within the exception to the definition of prospectus contained in clause (a) of section 2(a)(10) of the Securities Act;

(C) Any other Section 10(b) prospectus;

(D) A notice permitted by Rule 135 under the Securities Act (§ 230.135 of this chapter);

(E) A communication permitted by Rule 134 under the Securities Act (§ 230.134 of this chapter); and

(F) An oral communication made in connection with the registered securities offering after filing of the registration statement for the offering under the Securities Act.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

57. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350 *et seq.*, unless otherwise noted.

* * * * *

58. Amend Form 10 (referenced in § 249.210) by adding Item 1A. to read as follows:

Note: The text of Form 10 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10

* * * * *

Item 1A. Risk Factors

Set forth, under the caption "Risk Factors", the risk factors described in Item 503(c) of Regulation S–K (§ 229.503(c)) applicable to the registrant, including the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. Provide the discussion of risk factors in plain English in accordance with Rule 421(d)

of the Securities Act of 1933 (§ 230.421(d) of this chapter).

* * * * *

59. Amend Form 20–F (referenced in § 249.220f) as follows:

a. Add the a check box to the cover page before the paragraph that starts "Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months * * *";

b. Revise paragraph (c) to General Instruction E; and

c. Add Item 4A.

The revision and additions read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Check the following box if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934.

Note: Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 from their obligations under those Sections.

* * * * *

General Instructions

* * * * *

E. Which Items To Respond to in Registration Statements and Annual Reports

* * * * *

(c) *Financial Statements.* An Exchange Act registration statement or annual report filed on this Form must contain the financial statements and related information specified in Item 17 of this Form. We encourage you to provide the financial statements and related information specified in Item 18 of this Form in lieu of Item 17, but the Item 18 statements and information are not required. In certain circumstances, Forms F–1, F–3 or F–4 for the registration of securities under the Securities Act require that you provide the financial statements and related information specified in Item 18 in your annual report on Form 20–F. Consult those Securities Act forms for the specific requirements and consider the potential advantages of complying with Item 18 instead of Item 17 of this Form. Note that Items 17 and 18 may require you to file financial statements of other entities in certain circumstances. These circumstances are described in Regulation S–X.

The financial statements must be audited in accordance with U.S. generally accepted auditing standards, and the auditor must comply with the U.S. standards for auditor independence. If you have any questions about these requirements, contact the Office of Chief Accountant in the Division of Corporation Finance at (202) 942–2960.

* * * * *

Item 4. * * *

Item 4A. Unresolved Staff Comments

If the registrant is an accelerated filer and has received written comments from the Commission staff regarding its periodic filings under the Exchange Act not less than 180 days before the end of its fiscal year to which the annual report relates, and such comments remain unresolved, disclose the substance of any such unresolved comments that the registrant believes are material. Such disclosure may include the position of the registrant with respect to any such comment.

* * * * *

60. Amend Form 10–K (referenced in § 249.310) as follows:

a. Add a check box to the cover page before the paragraph that starts "Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months * * *";

b. Add Item 1A. to Part I; and

c. Add Item 1B. to Part I.

The additions read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–K

* * * * *

Check the following box if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. ☐

Note: Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Act from their obligations under those Sections.

* * * * *

Part I

* * * * *

Item 1. * * *

Item 1A. Risk Factors

Set forth, under the caption "Risk Factors," the risk factors described in Item 503(c) of Regulation S–K (§ 229.503(c)) applicable to the registrant, including the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. Provide the discussion of risk factors in plain English in accordance with Rule 421(d) of the Securities Act of 1933 (§ 230.421(d) of this chapter).

Item 1B. Unresolved Staff Comments

If the registrant is an accelerated filer and has received written comments from the Commission staff regarding its periodic filings under the Act not less than 180 days before the end of its fiscal year to which the annual report relates, and such comments remain unresolved, disclose the substance of any such unresolved comments that the registrant believes are material. Such disclosure may include the position of the registrant with respect to any such comment.

* * * * *

61. Amend Form 10–KSB (referenced in § 249.310b) by adding a check box to the cover page before the paragraph that starts "Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months * * *" to read as follows:

Note: The text of Form 10–KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–KSB

* * * * *

Check the following box if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Exchange Act. ☐

Note: Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Exchange Act from their obligations under those Sections.

* * * * *

62. Amend Form 10–Q (referenced in § 249.308a) by adding Item 1A to Part II to read as follows:

Note: The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–Q

* * * * *

Part II. Other Information

* * * * *

Item 1. * * *

Item 1A. Risk Factors

Set forth any material changes from previously disclosed risk factors contained in the registrant's Form 10–K in response to Item 1A to part I of Form 10–K.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

63. The authority citation for Part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

64. Amend Form N–2 (referenced in § 239.14 and § 274.11a–1) by adding paragraphs 4.d and 4.e to Item 34, to read as follows:

Note: The text of Form N–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–2

* * * * *

Item 34. Undertakings

* * * * *

4. * * *

d. that, for the purpose of determining liability under the 1933 Act to any purchaser, except as provided in paragraph 4.d.2 of these undertakings:

(1) Each prospectus filed by the registrant pursuant to Rule 497(c) or (e) under the 1933 Act [17 CFR 230.497(c) or (e)] shall be deemed to be part of the registration statement as of the date it is first used after effectiveness; and

(2) Each prospectus filed pursuant to Rule 497(c) or (e) under the 1933 Act [17 CFR 230.497(c) or (e)] as part of a registration statement in reliance on Rule 430C [17 CFR 230.430C] relating to an offering made pursuant to Rule 415(a)(1)(i) or (ix) [17 CFR 230.415(a)(1)(i) or (ix)], other than registration statements relying on Rule 430A under the 1933 Act [17 CFR 230.430A], shall be deemed to be part of and included in the registration statement as of the date it is first used after effectiveness. *Provided, however,* that no statement in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in the registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of and included in the registration statement.

e. That for the purpose of determining liability of the Registrant under the 1933 Act to any purchaser:

The undersigned Registrant undertakes that in a primary offering for the benefit of the undersigned Registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, it will be considered to offer or sell the securities by means of any of the following communications:

(1) A Registrant's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 497 [17 CFR 230.497];

(2) Any information about the Registrant or its securities:

(A) Provided by or on behalf of the undersigned Registrant; and

(B) Included in any advertisement pursuant to Rule 482 under the 1933 Act [17 CFR 230.482]; and

(3) Any other communication made by or on behalf of the undersigned Registrant.

* * * * *

Dated: November 3, 2004.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–24910 Filed 11–16–04; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Wednesday,
November 17, 2004

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Parts 25 and 121
Miscellaneous Cabin Safety Changes; Correction; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 25 and 121

[Docket No. FAA–2004–19412; Amendment Nos 25–116 and 121–306]

RIN 2120–AF77

Miscellaneous Cabin Safety Changes; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to the final rule published in the **Federal Register** on October 27, 2004 (69 FR 62778). That rule amended airworthiness standards for miscellaneous cabin safety features. This correction is necessary to eliminate any confusion caused by an unnecessary section heading.

DATES: Effective Date: Effective on November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Jeff Gardlin, telephone (425) 227–2136.

Correction

■ In final rule FR Doc. 04–23862, published on October 27, 2004, (69 FR 62778), make the following correction:

■ 1. On page 62788, in column 3, after paragraph (f), delete the section heading line "§ 25.819 (Amended)."

Issued in Washington, DC on November 9, 2004.

Tony F. Fazio,

Director of the Office of Rulemaking.

[FR Doc. 04–25495 Filed 11–16–04; 8:45 am]

BILLING CODE 4910–13–P

Federal Register

Wednesday,
November 17, 2004

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Parts 25 and 121
Revision of Emergency Evacuation Demonstration Procedures To Improve Participant Safety; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 25 and 121

[Docket No. FAA–2004–19629, Amendment Nos. 25–117 and 121–307]

RIN 2120–AF21

Revision of Emergency Evacuation Demonstration Procedures To Improve Participant Safety

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: These amendments revise the airworthiness standards for transport category airplanes and the operating requirements for domestic, flag, and supplemental operations, by allowing certain alternative procedures in conducting full-scale emergency evacuation demonstrations for transport category airplanes. The changes will make full-scale emergency evacuation demonstrations safer for participants and will codify existing practices.

DATES: December 17, 2004.

FOR FURTHER INFORMATION CONTACT: Jeff Gardlin, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2136.

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

(Note: The FAA transitioned to the new Department of Transportation's Management System (DMS) during the course of this rulemaking. At earlier stages of the rulemaking, the docket number was "28272." Under the new DMS, the docket number is FAA–2004–19629.)

You can get an electronic copy using the Internet by:

(1) Searching the DOTs electronic DMS Web page (*http://dms.dot.gov/search*);

(2) Visiting the Office of Rulemaking's Web page at *http://faa.gov/avr/arm/index.cmf;* or

(3) Assessing the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the amendment, if submitted on behalf of an association, business, labor union, etc. You may review DOT's complete Privacy statement in the **Federal Register** publication on April 11, 2000 (volume 65, number 70, pages 19477–78) or you may visit *http://dms.dot.gov.*

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT.** You can find out more about SBREFA on the Internet at our site, *http://www.faa.gov/avr/arm/sbrefa.htm.* For more information on SBREFA, e-mail us at *9-AWA-SBREFA@faa.gov.*

Background

Notice of Proposed Rulemaking

These amendments are based on Notice of Proposed Rulemaking (NPRM), Notice No. 95–9, which was published in the **Federal Register** on July 18, 1995 (60 FR 36932). In that proposed rule, the FAA proposed to amend 14 Code of Federal Regulations (CFR) parts 25 and 121. Appendix J to part 25 would be changed to allow certain alternative procedures to be used during the conduct of full-scale emergency evacuation demonstrations. Section 121.291(b)(1) would be changed to require that even operators whose crews participate in a manufacturer's full-scale demonstration perform a partial evacuation demonstration upon entry of a new model into service.

Part 25 contains the airworthiness standards for transport category airplanes. Manufacturers of transport category airplanes must show that each airplane they produce complies with the relevant standards of part 25. These standards apply to airplanes manufactured within the U.S. and in other countries that import the airplanes under a bilateral airworthiness agreement. One of the standards that manufacturers must meet is that of demonstrating that passengers and crewmembers can be evacuated in a timely manner in an emergency. This standard is addressed by the requirements in § 25.803 and Appendix J to part 25. This standard is intended to demonstrate emergency evacuation capability under a consistent set of prescribed conditions but is not intended to demonstrate that all passengers can be evacuated under all conceivable emergency conditions.

Part 121 contains the requirements governing the operations of domestic, flag, and supplemental air carriers, and commercial operators of large airplanes. One of the requirements is that the certificate holder must demonstrate the effectiveness of the crewmember training and operating procedures for opening floor level and non-floor level exists and for deploying the evaluation slides, if installed, in a timely manner.

History of the Emergency Evacuation Regulations

Amendment 121–2, effective March 3, 1965, first introduced the requirements for an emergency evacuation demonstration in part 121. Operators operating under part 121 were required to conduct full-scale emergency evacuation demonstrations using 50 percent of the airplane's exits within 120 seconds. Half of the exits were rendered inoperative to simulate the type of emergency where fire, structural, or other adverse conditions would prevent those exits from being used. Operators were required to conduct a demonstration during the initial introduction of a type and model of airplane into passenger-carrying operations and when an airplane passenger seating capacity increased five percent or greater or when a major change was made to the interior arrangement that would affect emergency evacuation. The purposes of the demonstration were to demonstrate the ability of crewmembers to execute established emergency evacuation procedures, and to ensure realistic assignments of crewmember functions.

Amendment 25–15, effective October 24, 1967, introduced the emergency evacuation requirements into part 25. Newly created § 25.803 required airplane manufacturers to conduct an emergency evacuation demonstration for passenger-carrying airplanes with passenger seating capacity of 44 or more, within 90 seconds. The purpose of this demonstration was to establish the evacuation capability of the airplane. Section 25.803(d) listed conditions under which analysis could be used in lieu of a full-scale demonstration to demonstrate compliance with the regulation. The section stated that the full-scale demonstration did not have to be repeated for a change in the interior arrangement, or for an increase in passenger capacity of less than five

percent, if it could be substantiated by analysis that all occupants could be evacuated in less than 90 seconds.

Amendment 121–30, effective October 24, 1967, reduced the demonstration time. This reduction was primarily attributable to significant gains made in the efficacy of devices, such as inflatable slides, to assist in the evacuation. The purpose of the part 121 demonstration is crew training and crew procedures so that demonstration conditions remained somewhat different between the two parts.

Amendment 25–46, effective December 1, 1978, revised § 25.803 to allow means other than actual demonstration to show the evacuation capability of the airplane. It also replaced the existing part 25 demonstration conditions with conditions that would satisfy both parts 25 and 121. One demonstration could be used to satisfy both requirements. In addition, § 25.803 was revised to allow analysis in combination with tests to be used to substantiate compliance for an increase in seating capacity of more than five percent. Amendment 121–149, effective December 1, 1978, revised part 121 to accept the results of demonstrations conducted in compliance with § 25.803 as of Amendment 25–46.

Amendment 25–72, effective August 20, 1990, placed the demonstration conditions previously listed in § 25.803(c) into a new Appendix J to part 25 and amended them for clarification and editorial consistency with part 121.

Amendment 25–79, effective September 27, 1993, revised the age/gender mix in Appendix J to part 25 to be used when running an emergency evacuation demonstration. The revision allowed the use of stands or ramps for descending from overwing exits only when the airplane is not equipped with an off-wing descent means, and prohibited the flightcrew from taking an active role in assisting in the passenger cabin.

Amendment 121–233, effective September 27, 1993, revised § 121.291 to allow demonstrations in compliance with § 25.803 in effect on or after December 1, 1978—not just in effect on December 1, 1978—to satisfy the requirements of § 121.291.

Injuries During Full Scale Emergency Evacuation Demonstrations

Hundreds of people jumping from an airplane in simulated dark of night conditions onto inflated slides, sliding as many as 25 feet to the ground, can result in some injuries. In a sampling of seven full-scale evacuation demonstrations conducted between 1972 and 1980, involving 2,571 passengers and crewmembers, 166 participants suffered injuries ("An FAA Analysis of Aircraft Emergency Evacuation Demonstrations," 1982, Society of Automotive Engineers Technical Paper Series #82148).

Additionally, a review of 19 full-scale evacuation demonstrations between 1972 and 1991, involving 5,797 participants, identified 269 injuries, or 4.5 percent of the passenger and crewmembers. In the seven demonstrations for which there was information on the types of injuries, of 216 people, 13 suffered fractures, 63 sprains or strains, 32 contusions, and 108 suffered lacerations or abrasions. In one of the demonstrations involving a McDonnell Douglas DC–11 for 410 passengers, a participant was seriously injured, resulting in paralysis. For its second attempt to certificate the MD–11 on December 11 and 12, 1992, McDonnell Douglas replaced the slides with level platforms or gently sloped ramps, and the exterior or the aircraft was lighted.

In addition, the U.S. Congressional Office of Technology Assessment reported that on average, 6 percent of full-scale emergency evacuation demonstration participants are injured during full-scale tests ("Aircraft Evacuation Testing. Research and Technology Issues" September 1993, OTA–BP–SET–121, NTIS Order #107620).

The Aviation Rulemaking Advisory Committee

The FAA formally established the Aviation Rulemaking Advisory Committee (ARAC) on January 22, 1991, to provide advice and recommendations to the FAA concerning the full range of the FAA's safety-related rulemaking activity (56 FR 2190).

Members of ARAC interested in issues involving emergency evacuation met on May 24, 1991, and instituted the charter and membership for the Performance Standards Working Group (PSWG), for a working group that would report to ARAC. Members of the PSWG included United States and European representatives from airplane and parts manufacturers, pilot, flight attendant and machinist unions, airlines, airworthiness authorities, passenger associations, and other public interest groups. The PSWG charter instructed the working group to recommend to the ARAC whether new or revised emergency evacuation standards could and should be stated in terms of performance standards rather than design standards.

On October 26, 1991, two unsuccessful emergency evacuation demonstrations were conducted on an airplane for which increased seating capacity was sought. During one of them, a participant was seriously injured. Following the demonstrations, the FAA tasked the ARAC to draft recommendations for revising the emergency evacuation demonstration requirements and compliance methods to eliminate or minimize the potential for injury to demonstration participants. The ARAC accepted the task and decided to add this task to the charter of the PSWG.

In response to this additional task, the PSWG drafted a report for discussion. The draft report consisted primarily of two sets of recommendations—(1) Changes that could be made to the current demonstration that would improve participant safety, but would not alter the basic character of the demonstration; and (2) analysis that could be used in lieu of the full scale demonstration, plus an outlined step-by-step methodology for preparing such an analysis. The former recommendation would require a revision to Appendix J to part 25, while the latter recommendations would expand FAA guidance currently in Advisory Circular 25.803–1, Emergency Evacuation Demonstrations. The report was revised numerous times, over several PSWG meetings, based on comments from PSWG members. Nonetheless, after numerous attempts to develop a report that was acceptable, members of the working group were unable to reach consensus.

Representatives of three organizations on the PSWG wrote letters stating their objections to the report as finalized. These letters are included as Appendix 2 of the report. Comments were primarily aimed at the proposed revisions to the existing advisory circular and not to the revisions to Appendix J of part 25 contained in the NPRM. The objectors expressed concern that the committee did not systematically review the causes of injuries in emergency evacuation demonstrations, and thus could not make meaningful recommendations to reduce or eliminate those injuries. Instead, the objectors felt that the committee had concentrated on an approach which would effectively eliminate the full-scale demonstration.

The report was forwarded to the ARAC on January 28, 1993, and then forwarded on to the FAA. The ARAC then tasked the PSWG to draft the appropriate rulemaking document and revise the advisory material as recommended in the report. The PSWG

completed the task and the recommendations were accepted by the FAA. These amendments cover the recommended revisions to part 25 covered in the report, "Emergency Evacuation Requirements and Compliance Methods That Would Eliminate or Minimize the Potential for Injury to Full Scale Evacuation Demonstration Participants." A copy of the report has been placed in the docket. The FAA is developing a revised advisory circular based on the report submitted by ARAC.

Discussion of the Final Rule

This amendment changes Appendix J to part 25 to reduce the possibility of injury to participants in a full-scale emergency evacuation demonstration and to codify existing practice regarding airplanes equipped with overwing slides as recommended by the ARAC.

Exterior Lighting

Paragraph (a) of Appendix J is amended to allow exterior light levels of 0.3 foot-candles or less prior to the activation of the airplane emergency lighting system, in lieu of "dark of night" conditions. This light level is approximately the level that would be found in the passenger cabin when the emergency lighting system is the only source of illumination. Allowing this low level of lighting outside the airplane enhances the ability of the demonstration director to see and react more quickly to problems that may develop during the demonstration. While this does not prevent injuries incurred at the onset of the problems, it could result in reducing the number of injuries by halting the demonstration sooner than in the past. Specific tests were not run to ascertain whether or not such exterior ambient lighting would enhance or detract from evacuation performance, since it was considered that crew performance, escape system efficiency, and illumination provided by the airplane emergency lighting system have the predominant impact on evacuation performance. As discussed below, airplane exterior emergency lighting is being addressed separately.

Pre-Deployment of Escape Slides

Paragraph (p) of Appendix J is revised to allow exits with inflatable slides to have the slides deployed and available for use prior to the start of the demonstration. If this method were used, the exit preparation time, which would be established in separate component tests, would need to be accounted for in some manner. This change prevents a participant exiting the airplane before the slide is fully available for use, which has occurred in at least two instances. In both cases, the participant was not seriously injured; however, the potential for serious injury is great, particularly considering the sill heights of wide-body airplanes.

An additional benefit is that pre-deployed and inflated slides are not subject to damage from equipment that is placed near the airplane to facilitate conduct or documentation of the demonstration (for example, infrared lighting). The pre-deployment and inflation of slides also allows the proper placement and opportunity for inspection of safety mats around the slide prior to the start of the demonstration. Additionally, paragraph (p) is revised to require that the exits that are not to be used in the demonstration must be clearly indicated once the demonstration has started. The more general wording of this change accommodates the additional flexibility in exit configuration (slide stowed or pre-deployed and inflated).

Finally, the opening sentence in paragraph (p) is revised to more succinctly describe the exits that are to be used in the demonstration. The "exit pairs" in this regulation are as discussed in the passenger seating tables in § 25.807(g). This change responds to numerous prior requests to the FAA for clarification of the existing text. As in the past, exits which are not installed in pairs, typically tail cone or ventral exits, are not used in the demonstration.

Paragraph (f) of Appendix J is revised to remove the requirement that each external door and exit be in the takeoff configuration. This change is necessary to be consistent with the change to paragraph (p), noted above, which allows slides to be deployed and inflated prior to the start of the demonstration. If the option to pre-deploy the slide is selected by the applicant, the FAA must approve the specific procedures to prevent demonstration participants from determining which exits will be used, as well as the method of making the exits available, prior to the demonstration. The method of assessing the impact on the resulting evacuation times for each of the exits used must also be agreed in advance.

Paragraph (o) of Appendix J is revised to state more generally its intent rather than requiring specific actions. The intent is that participants inside the airplane should not be able to identify, prior to the start of the demonstration, which exits will be used during the demonstration. Although this may be made more difficult if an applicant elects to utilize pre-deployed escape slides in accordance with the change to paragraph (p), this change is in keeping with general regulatory practice. This change is not specifically related to reducing injuries.

Safety Briefing

Paragraph (n) of Appendix J is revised to allow passengers to be briefed on safety procedures that are in place for the particular demonstration, *e.g.*, procedures to abort the demonstration, or procedures that have to do with the demonstration site, *e.g.*, how to evacuate the building in which the demonstration is being conducted. The revision also notes when that briefing could take place. This briefing could help some participants from adding to an already potentially injurious situation in the event of problems, such as a collapsed evacuation slide. It could also provide information that would be helpful in case of a problem at the demonstration site, *e.g.*, a fire in the building. The briefing would have to be carefully constructed so as not to impart any information that would enable the participants to evacuate the airplane faster. Additionally, the appropriate time for the passenger briefing required by § 121.571 has been added.

Other Changes

The ARAC recommended that paragraph (c) of Appendix J be amended to allow the use of stands or ramps for overwing exits only if assist means are not required as part of the airplane type design. It was not proposed in Notice No. 95–9, however because that change has already been implemented by Amendment 25–79.

Another of the recommendations involved revising the age/gender mix to require using only the age/gender groups least susceptible to injury. It was not proposed in Notice No. 95–9, pending research to identify the groups and develop an appropriate mix. A group of participants based on the new mix would have to have the same evacuation capability as a group based on the existing mix. This possible future proposal would be in addition to the change to the mix adopted by Amendment 25–79.

This amendment also makes minor revisions to part 121, to be consistent with the changes being made to part 25. Section 121.291(a) requires that certificate holders must conduct an emergency evacuation demonstration in accordance with paragraph (a) of Appendix D to part 121, or in accordance with § 25.803 of part 25. Section 25.803 incorporates by reference Appendix J of part 25 which is amended by this final rule. Section 121.291(b)(1) is amended to require that even

operators whose crews participate in a manufacturer's full-scale demonstration perform a partial evacuation demonstration upon entry of a new model into service. This change will account for aspects of the operator's evacuation procedure that might be lost if the manufacturer elects to conduct the full-scale demonstration with pre-deployed slides.

Discussion of Comments

Comments were received from 10 parties, representing foreign and domestic airplane manufacturers, labor associations, foreign and domestic operators, as well as foreign regulatory authorities and one individual. Each proposed change received comments. Two commenters support the proposals with minor editorial suggestions. Four commenters agree with specific aspects of the proposals, and did not comment on others. Four commenters disagree with at least parts of the proposals.

Exterior Lighting

Three commenters support and four commenters oppose the proposal to allow a specified ambient light level, exterior to the airplane, for the purposes of conducting the full-scale evacuation demonstration.

Commenters opposing the change cite the lack of specific research to support the proposed light level, and contend that such light levels would, in any case, speed the evacuation. One commenter suggests that night vision goggles could be provided to the test directors to enable them to survey the situation and thereby achieve the same objective as the proposal. One commenter cites a non-aviation research study where an increase in ambient light level increased the speed of evacuation for different age groups. This commenter also suggests that the proposed light level would be acceptable, if it were produced by the airplane's emergency lighting system.

While the FAA acknowledges that the proposed exterior light level is not based on dedicated research, this level is considered reasonable, based on several factors. First, the proposed light level is still quite dim, particularly in comparison with the typical emergency cabin lighting environment. Second, as is discussed below, the area surrounding the airplane is not a primary factor in the speed of evacuations as compared to the escape slide itself, and its conspicuity. Third, as discussed later, the FAA tasked the ARAC working group to develop qualification methods for escape slides that would determine their usability under strict dark of night conditions. The qualification of the escape slides in the absence of ambient illumination means that the ambient illumination level for the demonstration would not be critical.

The FAA agrees that the use of night vision goggles could improve some aspects of the test directors' ability to assess the situation during the full-scale evacuation. However, the results would not be equivalent since the goggles will not provide peripheral visual information, and will be distorted by the light that is produced by the airplane's emergency lighting system. Thus, while this amendment would not prohibit the use of night vision goggles, that approach is not considered a direct substitute for the proposal.

Numerous airplane evacuation studies have been conducted in daylight conditions, as well as "dark of night" conditions. Statistically, the evacuation rates seen in these diametrically opposed illumination conditions have been equivalent. The FAA also reviewed certification test data for tests conducted in daylight and dark of night conditions, where the other parameters are the same, and has seen no statistical difference in evacuation rates. However, to maintain the "feel" of a nighttime evacuation and address the safety of participants, the FAA has chosen a low light level that will still provide enhanced situational awareness to the demonstration director.

An important adjunct to the change in ambient illumination level is the change to the requirements for escape slide qualification relative to dark of night conditions. The FAA and the ARAC have developed new methods of escape slide qualification testing that would ensure that the escape system itself has adequate lighting capability to enable rapid evacuation in the absence of any other source(s) of light. The FAA has incorporated these methods into the Technical Standard Order (TSO) C69 for escape slides. The rule change adopted here pertains to the full-scale evacuation demonstration only. Qualification of the escape systems is an independent requirement and should be largely completed prior to the full-scale evacuation demonstration. In the past, qualification of the escape systems has not always been completed prior to the full-scale evacuation demonstrations. The FAA, however, considers that qualification of the system is an essential element of this amendment. Since the change adopted here applies to new type certificates, the FAA expects that the TSO revision will be adopted prior to a full-scale evacuation demonstration for type certification in accordance with this amendment. Should that prove not to be the case, the FAA will still require that the escape systems lighting performance be substantiated in an approved manner prior to the demonstration.

The FAA reviewed the research study cited by the commenter and concluded that the findings in the study do not directly relate to the full-scale evacuation requirement. The study is primarily an assessment of a test subject's ability to negotiate an unknown evacuation path in conditions of varied illumination. This proposal addresses lighting conditions, which only become evident upon leaving the airplane, after the evacuees have negotiated the evacuation path.

In addition, the reflectivity of the test environment in the study is much higher than would be allowed by this amendment, increasing the effective ambient illumination. Further, differences in egress performance are greatly reduced when luminous versus non-luminous signs were used for a given illumination level. This indicates that the test subjects performed poorly at effective ambient illumination levels above those allowed by this amendment, and that ambient illumination may not be the primary factor controlling performance in the conditions tested. In summary, the FAA has concluded that the study does not directly relate to this amendment and, as discussed above, issues related to escape slide performance have been addressed in TSO C69.

The FAA does not agree that increased ambient light level should be required to be generated by the airplane's emergency lighting system. The current standards for airplane emergency lighting systems have been shown to be adequate for evacuation. The purpose of allowing increased ambient lighting in this amendment is not to assist in the evacuation, but to assist in monitoring the evacuation to insure participant safety. As noted earlier, the qualification of the actual lighting will be a requirement for certification. The commenter's suggestion would essentially change the regulations for exterior emergency lighting, which is beyond the scope of the notice.

Pre-Deployment of Escape Slides

Two commenters support, while four commenters oppose the proposal to allow the demonstration to be conducted with escape slides pre-deployed.

Commenters supporting the proposal note the potential to prevent injuries resulting from persons leaving the

airplane prior to the escape slide being ready for use, for whatever reason.

Commenters opposing the proposal cite various reasons for their opposition. Some commenters state that separating exit operation and evacuation would not demonstrate the efficacy of flight attendant training. Some commenters assert that not having a specific methodology for accounting for the pre-deployed slides will invalidate the demonstration. A commenter suggests that this option is purely a cost saving measure to avoid repeating tests that fail on account of equipment failure. One commenter suggests that the noise of deploying slides and opening doors is not accounted for as part of the demonstration, and will reduce the "chaos and distraction" aspects of the demonstration. Another commenter notes that the risk of persons leaving the airplane early can be accommodated by different designs that prevent the doors from opening prior to the escape slide being deployed.

The FAA has considered all the comments and believes that, while many of the issues raised require consideration, the proposal is sound and does not require changes.

In the case of the flight attendant training program and the crews' interaction with the escape systems, the change to § 121.291(b)(1) would necessitate that the operators conduct a partial evacuation demonstration before entering service, whether or not that operator's crew participated in the full-scale evacuation demonstration. Since typically only one operator's crew participates in the full-scale part 25 evacuation demonstration, the training benefits that might result from the demonstration are limited to that operator. This proposal would actually increase the number of operators required to conduct a partial evacuation demonstration in accordance with § 121.291(b)(1), over what was previously required.

In addition, regarding the comment that the proposal is intended to avoid repeat demonstrations due to equipment failure, qualification of equipment is not the purpose of the demonstration. Under § 25.810, the certificate holder would have to demonstrate the proper operation of the escape systems from a mechanical standpoint and it is not appropriate to rely on the full-scale evacuation demonstration to identify problems with equipment. The full-scale demonstration is intended to address the gross evacuation capability of the airplane and its crew, and not to address specific equipment qualification.

The FAA has not proposed a specific methodology to pre-deploy the escape slides since deployment will vary among the different exit designs. In addition, recommendations on methodology are more appropriately the function of advisory material. While there is no obvious need for advisory material at this time, if a need develops appropriate guidance will be prepared.

The FAA has determined that there are means of accounting for pre-deployed escape slides that will not compromise the evacuation demonstration. Issues that must be addressed include the time it takes for a flight attendant to operate and assess the availability of the exit; the inflation time of the slide; the queue of passengers that might form while the slide is inflating and the effect that the queue has on the initial evacuation rate. Many of these issues could be addressed by correctly timing the availability of the exits to be used in the demonstration.

As is currently the case, exits that will be used must not be distinguishable from exits that will not be used, prior to the demonstration. This approach may necessitate the use of special covers over all exits, for example. In those cases where it is not possible to develop a satisfactory methodology, the applicant will not be able to use the option of pre-deployed slides.

Predeployment of slides will reduce the potential for slide failure or damage to slides that can occur during a demonstration. This could avoid repeating a demonstration and the applicant costs associated with repeating. But the purpose of the evacuation demonstration is to determine if the aircraft, as designed, can be evacuated in a timely manner. The test limitation allowing use of only 50 percent of available slides accounts for the potential for unusable slides. The reliability of the slide system is required to be demonstrated separately under § 25.810. Although the potential for repeat demonstrations may be reduced, the reason for considering this change is to prevent injuries.

The noise that is produced by deploying escape slides is not generally accounted for, if the slides are pre-deployed. The FAA is unaware of what role, if any, the sound of deploying escape slides plays in an evacuation demonstration. Research tests conducted with pre-deployed escape slides result in evacuation rates consistent with those produced in full-scale demonstrations that do not pre-deploy slides. In addition, and as the basis for the proposal, in past full-scale evacuation demonstrations, passengers frequently reached the exit before the slide was fully deployed and, in some cases, have left the airplane before the slide is ready. It is doubtful that the absence of the sounds of deployment will cause them to reach the exit any sooner. Nonetheless, if there are data that indicate that the sounds are necessary, it would be a simple matter to include recorded sounds, as a part of the other procedures that will be needed to follow this option. At this time, however, the data do not suggest that this is necessary.

It is true that the escape system design could be such that the exits were prevented from opening until the escape slide was fully deployed. However, such a requirement could have the unintended effect of delaying an evacuation in an accident. Under actual emergency conditions it is less likely that persons would depart the airplane prior to the escape slide's deployment, since there is no defined "start" signal such as there is in a demonstration. Under actual conditions, the sooner the escape slide is available, the more likely the success of the evacuation. Since the escape slide is not available to passengers until the exit is open, requiring the exits to delay opening would not be in the interest of safety. It should be noted that there are specific designs that incorporate features to permit the exit opening to coincide with the slide deployment, that do not delay the overall exit system availability. Such designs would, of course, continue to be acceptable.

Safety Briefing

Three commenters support and three commenters oppose the proposal to allow a safety briefing for test participants. One commenter expresses concern regarding the use of test participants' to assist at the bottom of the escape slides, commenting that this is better left to test personnel.

Most commenters opposing the proposal were not specific as to their opposition, other than concern that the briefing could somehow enable the participants to evacuate faster. As stated in Notice No. 95–9, the purpose of this provision is to convey safety information about the logistics of the demonstration site and test sequence. The notice also states that such briefings would have to be carefully constructed in order not to disclose information about the demonstration itself. In actual practice, the manufacturers have conducted such briefings in the past, but with no real standardization. This amendment provides codification of that practice and gives information as to

content and when such a briefing can take place.

With respect to persons who are assigned to assist at the bottom of the slide, the FAA agrees with the commenter who believes that test personnel would probably be the best choice. However, if an operator's procedures included assigning passengers to perform this duty, they should not be precluded from employing the same procedures in the demonstration. This provision would not override the safety procedures to be followed for demonstration purposes and, should problems develop, it might be necessary for test personnel to provide additional assistance. Were that to occur, the contribution of the test personnel would have to be assessed to determine whether the validity of the demonstration had been affected. The proposal is therefore adopted.

Other Comments

Other comments concerned editorial suggestions that have been adopted where appropriate, and some comments that were beyond the scope of the notice. One commenter suggests that the combination of exits likely to result in the slowest evacuation times should be required in paragraph (p) of Appendix J of part 25, and not one from each pair of exits, as proposed. The current standard contained in the first sentence of paragraph (p) only requires that not more than 50 percent of the exits are used in the demonstration. Currently, applicants are free to select any combination of exits. The proposed change to the first sentence of paragraph (p) was intended to reflect current practice of using one exit from each pair, not to establish a new standard. The commenter's suggestion would create a more stringent standard. Although the comments may be applicable to future rulemaking in this area, they were not considered applicable to this proposal.

One commenter recommends against combining the demonstration requirements for parts 25 and 121. The provision to demonstrate compliance with both parts 25 and part 121 actually occurred in Amendments 25–46 and 121–149, in 1978, and was not a part of NPRM 95–9.

Finally, commenters contend that the proposal is an indirect effort to do away with the full-scale demonstration entirely. Since the entire proposal focuses on procedures for conducting the demonstration, this contention is not accurate. The FAA will continue to require full-scale demonstrations when appropriate.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), there are no current or new requirements for information collection associated with this amendment.

International Compatibility With ICAO Standards

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practical. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and the Joint Aviation Authorities regulations, where they exist, and has identified no differences in these amendments and the foreign regulations.

Economic Evaluation, Regulatory Flexibility Determination, International Trade Impart Assessment, and Unfunded Mandates Assessment

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. And fourth, the Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million or more, in any one year (adjusted for inflation.)

For regulations with an expected minimal impact a complete regulatory evaluation is not required. The Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If it is determined that the expected impact is so minimal that the proposal does not warrant a full Evaluation, a statement to that effect and the basis for it is included in the final regulation. Since this final rule revises existing rules and codifies existing practices, the expected outcome is to have a minimal impact with positive net benefits. The justification for the minimal impact determination follows.

Regulatory Evaluation Summary

Exterior Lighting

In the original NPRM, the FAA estimated that it will take two engineers and two technicians ½ hour at burdened rates of $60 and $45 per hour, respectively, to prepare and adjust the exterior lighting level to 0.3 foot-candles or less, at a cost of $105.

Predeployment of Escape Slides

The final rule removes the requirement in paragraph (f) that the external doors and exits be in the takeoff configuration. No costs are associated with this change.

Safety Briefings

Paragraph (n) is amended to allow demonstration participants to be briefed only with respect to safety procedures in place for the demonstration or the demonstration site, such as demonstration abort procedures or procedures pertaining to the demonstration site. Flight attendants will be allowed to assign demonstration subjects to assist other participants from the bottom of the slide. The final rule will continue to prohibit passengers from being instructed on procedures to be followed in the demonstration. No costs are attributed to these changes.

Paragraph (o) requires that the airplane be configured so that available emergency exits are not disclosed to participants. This revision states more generally the intent of the requirement rather than specific actions. Associated costs are described in comments pertaining to paragraph (p) below.

Paragraph (p) allows exits with inflatable slides to be opened with the slides deployed prior to the start of the demonstration timing. The final rule retains the current requirement that all exits will have to be configured so that the usable exits are not disclosed to participants prior to the demonstration. Manufacturers currently cover all windows to prevent participants from determining which exits will be usable in the demonstration. The FAA estimates that, under the final rule, manufacturers will also cover exits with curtains, screens, or other means to prevent premature disclosure of active exits. These screening devices will cost approximately $1,000 for labor and

materials. (Depending on future airplane designs, slides may be able to be deployed without opening the exits they serve. In those cases, there will be no costs for screening devices because it will not be necessary to cover the exit doors to prevent participants from determining which exits will be used.)

Costs

The final rule does not necessarily result in additional compliance costs, because it allows *alternative* procedures in conducting demonstrations, rather than mandating them. If manufacturers elect to use the final procedures, however, the FAA estimates that there will be incremental costs of approximately $1,105 per demonstration. These costs will be insignificant in comparison to the total cost of an evacuation demonstration, estimated to range between $1,000,000 and $2,000,000.

Benefits

The risk of injury to passengers during repetitive full-scale emergency demonstrations is appreciable.

The FAA reviewed seven full-scale evacuation demonstrations conducted between 1972 and 1980 ("An FAA Analysis of Aircraft Emergency Evacuation Demonstrations"). Of the 2,571 participants in the demonstrations, 166, or 6.5 percent were injured.

In addition, the Office of Technology Assessment states that on average, 6 percent of full-scale emergency evacuation demonstration participants are injured during full-scale tests ("Aircraft Evacuation Testing: Research and Technology Issues", September 1993, OTA–BP–SET–121, NTIS order #PB94–107620).

The FAA reviewed 19 demonstrations conducted between 1972 and 1991. Of the 5,797 participants in the demonstrations, 269 were injured. In the seven demonstrations for which there was information on the types of injuries, 13 suffered fractures, 63 sprains or strains, 32 contusions, and 108 suffered lacerations or abrasions, a total of 216 people injured. This review revealed 4.5 percent of the passengers or crewmembers received injuries. In one of the emergency evacuation demonstrations reviewed by the FAA, a participant was seriously injured, which resulted in paralysis. The FAA believes a 4.5% injury rate during an emergency evacuation demonstration is not an acceptable safety practice.

Personnel participating in the demonstration should be protected from potential injury without compromising the test results ("Emergency Evacuation Demonstrations", AC 20–118). The primary benefit of the rule will be reduced risks of injuries to demonstration participants.

The National Transportation Safety Board (NTSB) classifies fractures, strains, contusions, lacerations, and abrasions as "minor", "moderate", or "Critical" according to the abbreviated injury scale (AIS) used. The FAA estimates that the average cost of a "minor injury" is $5,400, the average cost of a "moderate" injury is $41,900, and the average cost of a "Critical" injury, resulting in paralysis, is $2,058,800 ("Economic Values for Evaluation of Federal Aviation Administration Investment and Regulatory Programs," (FAA–APO–98–8), Treatment of the Values of Life and Injury in Economic Analyses). Avoiding only one minor injury during an evacuation demonstration will result in cost savings exceeding the estimated $1,105 incremental costs of the alternative procedures.

The emergency evacuation demonstration must be conducted during the dark of night or with the dark of night simulated, so that the airplane's emergency lighting system provides the only illumination of exit paths and slides ("Aircraft Evacuation Testing: Research and Technology Issues," September 1993, OTA–BP–SET–121, NTIS order #PB94–107620). But allowing low-level light, outside the airplane, will enhance the ability of the demonstration director to react more quickly to problems, which could develop during the demonstration. The ability of the demonstrator to react more quickly to problems could reduce the risk of injuries to demonstration participants.

The FAA has determined since costs will be minor, and the benefits could be significantly higher than the costs, the rule will be cost-beneficial.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The Act covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 act provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule will make full-scale emergency evacuation demonstrations safer for participants and will codify existing practices. Because there are no manufacturers of part 25 airplanes with 1,500 or fewer employees,[1] the FAA certifies that the final amendments will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Analysis

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

In accordance with the above statute and policy, the FAA has assessed the potential effect of this final rule to be minimal and therefore has determined that this final rule will not result in an impact on international trade by companies doing business in or with the United States.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Section 202(a) (2 U.S.C. 1532) of Title II of the Act requires that each Federal agency, to the extent permitted by law, prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may

[1] 13 CFR 121.201, Size Standards Used To Define Small Business Concerns, Sector 48–49 Transportation, Subsector 481 Air Transportation.

result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of $120.7 million in lieu of $100 million. Section 203(a) of the Act (2 U.S.C. 1533) provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, an agency shall have developed a plan under which the agency shall: (1) Provide notice of the requirements to potentially affected small governments, if any; (2) enable officials of affected small governments to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates; and, (3) inform, educate, and advise small governments on compliance with the requirements. With respect to (2), Section 204(a) of the Act (2 U.S.C. 1534) requires the Federal agency to develop an effective process to permit elected officers of State, local, and tribal governments (or their designees) to provide the input described.

This final rule does not contain a significant Federal intergovernmental/private sector mandate. Therefore, the requirements of Title II do not apply.

Executive Order 3132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the State, or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this final rule does not have federalism implications.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order because it is not a "significant regulatory action" under Executive Order 12855, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

14 CFR Part 25

Air transportation, Aircraft, Aviation safety, Safety.

14 CFR Part 121

Aviation safety, Safety, Air carrier, Air traffic control, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Airports, Airspace, Cargo Chemicals, Children, Narcotics, Flammable materials, Handicapped, Hazardous materials, Common carriers.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends parts 25 and 121 of Title 14 Code of Federal Regulations as follows:

PART 25—AIRWORTHINESS STANDARDS—TRANSPORT CATEGORY AIRPLANES

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702 and 44704.

■ 2. Appendix J to part 25 is amended by revising paragraphs (a), (f), (n), (o), and (p) as follows:

Appendix J to Part 25—Emergency Evacuation

* * * * *

(a) The emergency evacuation must be conducted with exterior ambient light levels of no greater than 0.3 foot-candles prior to the activation of the airplane emergency lighting system. The source(s) of the initial exterior ambient light level may remain active or illuminated during the actual demonstration. There must, however, be no increase in the exterior ambient light level except for that due to activation of the airplane emergency lighting system.

* * * * *

(f) Each internal door or curtain must be in the takeoff configuration.

* * * * *

(n) Prior to entering the demonstration aircraft, the passengers may also be advised to follow directions of crewmembers but may not be instructed on the procedures to be followed in the demonstration, except with respect to safety procedures in place for the demonstration or which have to do with the demonstration site. Prior to the start of the demonstration, the pre-takeoff passenger briefing required by § 121.571 may be given. Flight attendants may assign demonstration subjects to assist persons from the bottom of a slide, consistent with their approved training program.

(o) The airplane must be configured to prevent disclosure of the active emergency exits to demonstration participants in the airplane until the start of the demonstration.

(p) Exits used in the demonstration must consist of one exit from each exit pair. The demonstration may be conducted with the escape slides, if provided, inflated and the exits open at the beginning of the demonstration. In this case, all exits must be configured such that the active exits are not disclosed to the occupants. If this method is used, the exit preparation time for each exit utilized must be accounted for, and exits that are not to be used in the demonstration must not be indicated before the demonstration has started. The exits to be used must be representative of all of the emergency exits on the airplane and must be designated by the applicant, subject to approval by the Administrator. At least one floor level exit must be used.

* * * * *

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 3. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 46105.

■ 4. Section 121.291 is amended by revising paragraph (b)(1) as follows:

§ 121.291 Demonstration of emergency evacuation procedures.

* * * * *

(b) * * *

(1) Initial introduction of a type and model of airplane into passenger-carrying operation;

* * * * *

Issued in Washington, DC, on November 8, 2004.

Marion C. Blakey,

Administrator.

[FR Doc. 04–25493 Filed 11–16–04; 8:45 am]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html.*

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html.* Some laws may not yet be available.

H.R. 4381/P.L. 108–392
To designate the facility of the United States Postal Service located at 2811 Springdale Avenue in Springdale, Arkansas, as the "Harvey and Bernice Jones Post Office Building". (Oct. 30, 2004; 118 Stat. 2245)

H.R. 4471/P.L. 108–393
Homeownership Opportunities for Native Americans Act of 2004 (Oct. 30, 2004; 118 Stat. 2246)

H.R. 4481/P.L. 108–394
Wilson's Creek National Battlefield Boundary Adjustment Act of 2004 (Oct. 30, 2004; 118 Stat. 2247)

H.R. 4556/P.L. 108–395
To designate the facility of the United States Postal Service located at 1115 South Clinton Avenue in Dunn, North Carolina, as the "General William Carey Lee Post Office Building". (Oct. 30, 2004; 118 Stat. 2249)

H.R. 4579/P.L. 108–396
Truman Farm Home Expansion Act (Oct. 30, 2004; 118 Stat. 2250)

H.R. 4618/P.L. 108–397
To designate the facility of the United States Postal Service located at 10 West Prospect Street in Nanuet, New York, as the "Anthony I. Lombardi Memorial Post Office Building". (Oct. 30, 2004; 118 Stat. 2251)

H.R. 4632/P.L. 108–398
To designate the facility of the United States Postal Service located at 19504 Linden Boulevard in St. Albans, New York, as the "Archie Spigner Post Office Building". (Oct. 30, 2004; 118 Stat. 2252)

H.R. 4731/P.L. 108–399
To amend the Federal Water Pollution Control Act to reauthorize the National Estuary Program. (Oct. 30, 2004; 118 Stat. 2253)

H.R. 4827/P.L. 108–400
To amend the Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act of 2000 to rename the Colorado Canyons National Conservation Area as the McInnis Canyons National Conservation Area. (Oct. 30, 2004; 118 Stat. 2254)

H.R. 4917/P.L. 108–401
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H.R. 5027/P.L. 108–402
To designate the facility of the United States Postal Service located at 411 Midway Avenue in Mascotte, Florida, as the "Specialist Eric Ramirez Post Office". (Oct. 30, 2004; 118 Stat. 2257)

H.R. 5039/P.L. 108–403
To designate the facility of the United States Postal Service located at United States Route 1 in Ridgeway, North Carolina, as the "Eva Holtzman Post Office". (Oct. 30, 2004; 118 Stat. 2258)

H.R. 5051/P.L. 108–404
To designate the facility of the United States Postal Service located at 1001 Williams Street in Ignacio, Colorado, as the "Leonard C. Burch Post Office Building". (Oct. 30, 2004; 118 Stat. 2259)

H.R. 5107/P.L. 108–405
Justice for All Act of 2004 (Oct. 30, 2004; 118 Stat. 2260)

H.R. 5131/P.L. 108–406
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H.R. 5133/P.L. 108–407
To designate the facility of the United States Postal Service located at 11110 Sunset Hills Road in Reston, Virginia, as the "Martha Pennino Post Office Building". (Oct. 30, 2004; 118 Stat. 2297)

H.R. 5147/P.L. 108–408
To designate the facility of the United States Postal Service located at 23055 Sherman Way in West Hills, California, as the "Evan Asa Ashcraft Post Office Building". (Oct. 30, 2004; 118 Stat. 2298)

H.R. 5186/P.L. 108–409
Taxpayer-Teacher Protection Act of 2004 (Oct. 30, 2004; 118 Stat. 2299)

H.R. 5294/P.L. 108–410
John F. Kennedy Center Reauthorization Act of 2004 (Oct. 30, 2004; 118 Stat. 2303)

S. 129/P.L. 108–411
Federal Workforce Flexibility Act of 2004 (Oct. 30, 2004; 118 Stat. 2305)

S. 144/P.L. 108–412
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S. 643/P.L. 108–413
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S. 1194/P.L. 108–414
Mentally Ill Offender Treatment and Crime Reduction Act of 2004 (Oct. 30, 2004; 118 Stat. 2327)

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108th Congress

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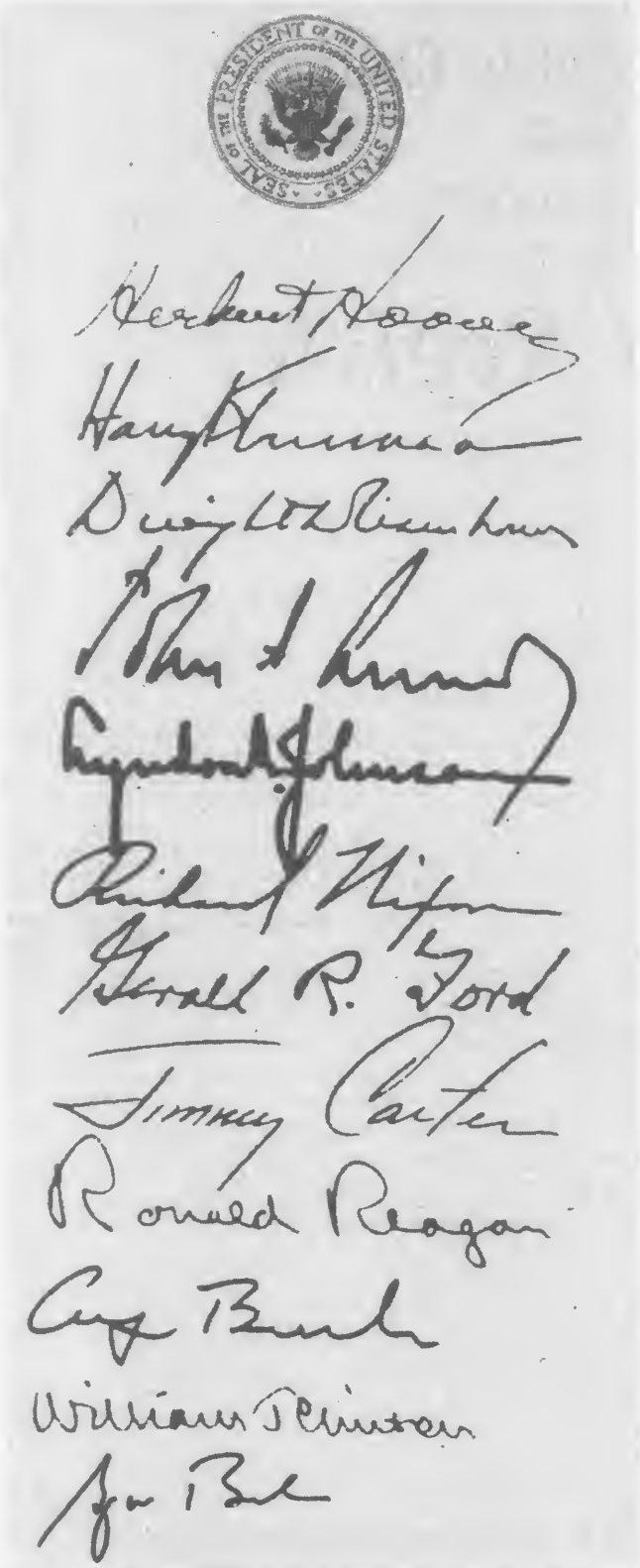

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