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FARM CREDIT ADMINISTRATION

12 CFR Parts 609, 611, 612, 614, 615, and 617

RIN 3052–AB69

Electronic Commerce; Organization; Standards of Conduct and Referral of Known or Suspected Criminal Violations; Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Borrower Rights

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA) issues this final rule to clarify the rights provided in the Farm Credit Act of 1971, as amended (Act), for loan applicants and borrowers of the Farm Credit System (FCS or System). The final rule further explains the responsibilities of the System in providing these rights, responds to comments, and places all borrower rights provisions in one part of our regulations.

EFFECTIVE DATE: This regulation will be effective 30 days after publication in the **Federal Register** during which time either or both Houses of Congress are in session. We will publish a notice of the effective date in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:
Mark L. Johansen, Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4479, TTY (703) 883–4434;
or
Joy Strickland, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–2020.

SUPPLEMENTARY INFORMATION:

I. Objectives

The objectives of the final rule are to:

- Provide the protections required by the Act to applicants and borrowers with distressed loans;
- Avoid placing unnecessary burdens on System institutions; and
- Use plain language in a question-and-answer format.

II. Background

In the Farm Credit Amendments Act of 1985 [1] and the Agricultural Credit Act of 1987,[2] Congress gave particular rights to borrowers with distressed loans who borrow from System institutions operating under titles I and II of the Act. These rights include notice when a loan becomes distressed; the opportunity to request a restructuring of a distressed loan; review of certain loan decisions; and the right of first refusal on purchasing or leasing agricultural real estate acquired by a System institution through foreclosure or voluntary conveyance. Collectively, these rights are referred to as borrower rights. We published a proposed rule (69 FR 5595) on February 4, 2003, to clarify our expectations for compliance with borrower rights. This final rule addresses the comments received on the proposed rule.

III. Redesignate Portions of Part 614 to Part 617

We are redesignating § 614.4336 and all of subparts L and N of part 614 to a new part 617 to make the borrower rights rules more readily identifiable. We are also redesignating § 612.2130 through § 612.2270 to a new subpart A in part 612 and § 617.1 through § 617.4 to § 612.2300 through § 612.2303. In addition, we are making conforming changes to §§ 609.910(c), 611.1223(d)(6), 611.1290, 614.4560(d), 615.5280(h), and 615.5290(a) and (b) to reflect the redesignation. As a result of finalizing this rule before we finalize the proposed Effective Interest Rate Disclosure rule (68 FR 5587), we are also including amendatory and conforming changes to §§ 611.1223(d)(6), 611.1290, and 614.4560(d) here.

IV. Comments and Our Response

We received 12 comments on our proposed rule from 10 System associations, one System bank, and the Farm Credit Council (FCC) on behalf of the Farm Credit institutions they represent. The commenters generally supported the proposed rule; however, they asked us to change or clarify certain aspects of our proposal. We discuss those aspects, the individual comments associated with them, and our responses below. Those areas of the proposed rule that did not receive comments are finalized as proposed.

[1] Pub. L. 99–205, 99 Stat. 1678.

[2] Pub. L. 100–233, 101 Stat. 1568.

V. General Issues

A. Waiver of Borrower Rights

Four System associations commented that FCA should interpret the Act to allow the waiver of borrower rights by certain borrowers, such as large and sophisticated borrowers. They argued that these borrowers are represented by experienced counsel and are at equal-bargaining strength with qualified lenders. They also commented that borrower rights prevent qualified lenders from acting as lead or agent lenders in commercial transactions.

We continue to believe that waivers of borrower rights should be authorized only on a limited basis. Wholesale waiver provisions, such as ones for all large and sophisticated borrowers, would not be consistent with the intent of Congress.

A System association also commented that prohibiting waivers of borrower rights deprives borrowers of a potential "tool" for use in negotiating concessions or some other economic value in a workout situation. The association stated that without this "tool" the institution has no incentive to listen to such loan-servicing proposals. The institution's position is not in keeping with the legislative intent of borrower rights. Borrower rights are not bargaining tools. They are statutory rights designed to protect borrowers with distressed loans who generally are in unequal-bargaining positions with qualified lenders. The Act and our regulations do not consider these rights to be "tools" for obtaining concessions in restructuring discussions, and neither should the System.

B. Borrower Rights and Bankruptcy

Six System associations and the FCC commented that the Bankruptcy Code supersedes all borrower rights and, therefore, no borrower rights should be offered once bankruptcy has been filed. The commenters offered several reasons

to support this supposition, including (1) A qualified lender may not always be able to satisfy both the Bankruptcy Code and our regulations in a way that is meaningful to the borrower; (2) a borrower who voluntarily files bankruptcy has made an "election of remedies" that effectively waives his rights under the Act; (3) the process of debt restructuring under borrower rights should not be concurrent with the process of bankruptcy because it creates a conflict in jurisdiction and right of review; and (4) the Bankruptcy Code and the Act provide separate and distinct remedies to the borrowers.

We do not agree that borrower rights and bankruptcy are mutually exclusive, but that the requirements of the Act and the Bankruptcy Code can co-exist. Further, the courts have ruled that our borrower rights provisions apply to debtors in bankruptcy.[3] Borrower rights under the Act are generally compatible with filing for reorganization in bankruptcy, as both laws are designed to resolve a borrower's financial difficulties. Additionally, bankruptcy reorganization offers various remedies to borrowers, many that are similar to those provided under the Act. We believe that borrowers filing for bankruptcy do not waive their rights under the Act, nor make an election of remedies resulting in a loss of those rights.

One of the associations commented that borrower rights impede the bankruptcy plan negotiation process. We do not believe that notifying a borrower of restructuring opportunities impedes a bankruptcy workout negotiation. Further, we do not believe that informing a borrower in bankruptcy, and his counsel, of his restructuring opportunities conflicts with any bankruptcy provisions. We recognize that combining borrower rights with bankruptcy reorganization may require additional effort by qualified lenders, but believe no real conflict exists between the Act and the Bankruptcy Code.

C. Borrower Rights and Arbitration

The FCC commented that it disagreed with our position that borrower rights may not be set aside as a result of the arbitration process. The FCC stated that our position defeats the purpose of arbitration and creates a disincentive for qualified lenders to use arbitration. We do not agree with the comment. Arbitrators must work within the framework of borrower rights and other prevailing laws when reaching decisions.

VI. Section-by-Section Analysis

A. Definitions

1. Adverse Credit Decision [§ 614.4440(a) to New § 617.7000]

A System association and the FCC commented that the definition of an adverse credit decision excludes those situations where a loan request is approved for less than the amount requested by the applicant. The System association commented that applicants have been confused by receiving notices of the adverse credit decision after agreeing to a loan in a lesser amount. The System association further pointed out that the Federal Reserve Board's (FRB) Regulation B provides that a loan in a reduced amount, if accepted by an applicant and closed, is not an adverse credit action. The System association further commented that if an applicant does not accept a counter offer within a set period of time the nonacceptance would be an adverse credit decision.

The commenter correctly referenced Regulation B and adverse credit decisions; however, the plain language of section 4.14 of the Act does not support the commenter's approach. The plain language of the Act clearly states that making a loan in an amount less than requested is an adverse credit decision. While it may appear confusing for applicants to receive a notice of the adverse credit decision after agreeing to a loan in a lesser amount, we believe this confusion is minimized by qualified lenders appropriately counseling applicants or by providing an explanation of the requirements in the notice of the adverse credit decision.

The FCC commented that our treatment of reduced loan offers is inconsistent with our discussion in the proposed rule on applications for restructuring. We stated that Congress expected borrowers and lenders to negotiate applications for restructuring. If negotiations result in a denial of the application for restructuring, the borrower may appear before the credit review committee (CRC). The FCC argues that we proposed an inconsistent definition of adverse credit decision because we did not specifically identify approved restructuring plans that are less than what the borrower applied for as subject to CRC review. The FCC compared reduced loan requests with reduced restructuring requests when making this argument. The Act and our proposed rule treat these two types of actions differently. Sections 4.13B(a)(2) and 4.14(b)(1) of the Act specifically state that applicants may request CRC reviews of decisions to deny or reduce the amount of the loan applied for. Conversely, section 4.14(b)(2) provides CRC review rights for denied loan restructurings, not reductions in restructuring requests.

2. Application for Restructuring [§§ 614.4440(c) and 614.4512(a) to New § 617.7000]

A System association and the FCC commented that they disagreed with including a borrower's bankruptcy plan of reorganization in our proposed definition of an application for restructuring. They expressed concern that including a bankruptcy plan in the definition may make it difficult or impossible for the qualified lender to comply with all borrower rights provisions. We agree that the proposed definition inadvertently created confusion and are removing bankruptcy plans of reorganization from the definition of "application for restructuring." However, as a paperwork reduction measure, a proposed bankruptcy plan may be considered as the application for restructuring if the bankruptcy filing contains all of the information necessary for a restructuring application, as required by section 4.14A(a)(1) of the Act.

A System association commented that it appeared that we had deleted the requirement contained in existing § 614.4440(c) that an application for restructuring include a preliminary plan of restructuring from the borrower. In our plain language rewrite of the rule, we deleted the specific phrase "preliminary restructuring plan proposed by the borrower" from existing § 614.4440(c)(1). That requirement is contained in the Act at section 4.14A(a)(1)(A); therefore a regulatory provision with the same requirement is unnecessary. Although we deleted the specific phrase, we did not delete the requirement that a borrower submit an application for restructuring that includes a preliminary plan.

3. Independent Evaluator [§ 614.4440(f) to New § 617.7000]

Our proposed rule clarified the definition of "independent evaluator" by specifically including the term "agent" in the definition instead of referencing it through part 612. A

[3] *In re Kvamme*, 91 B.R. 77 (Bankr. D. N.D. 1988) (holding the Act merely provides for a restructuring opportunity and within bankruptcy that opportunity is no more nor less than what would be available to a borrower outside of bankruptcy (emphasis in original)).

Courts have also held that they are "not at liberty to pick and choose among congressional enactments and when statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *See Morton v. Mancari*, 417 U.S. 535, 551 (1974).

System association commented that adding "agent" to the definition of an independent evaluator makes the term too restrictive. The association recommended adding a time element to the definition so that an independent evaluator would not be considered an agent if he or she did not have a contractual relationship with a qualified lender within 1 year of being selected as an independent evaluator. We declined to make this change, as adding the term "agent" to new § 617.7000 does not modify the existing definition.

4. Restructure and Restructuring of a Loan [§§ 614.4440(i) and 614.4512(h) to New § 617.7000]

A System association commented that using "best opportunity" in the definition of "restructure" was troublesome. A borrower could argue that the restructuring was not the best opportunity or suggest that the lender had somehow influenced the success of the plan. The association suggested changing "best" to "reasonable." The purpose of restructuring is not necessarily to return the operation to viability. As such, we removed the phrase referring to viability in the proposed definition to focus the definition on the loan terms.

B. What Happens to Borrower Rights When a Loan is Sold? [New § 617.7015]

A System association commented that the 180-day period for loans designated for sale into a secondary market should be changed to 365 days. We cannot agree to this change since the 180-day period is required by section 4.14A(a)(5)(B)(ii) of the Act.

C. When Acting on a Loan Application, What Are the Notice Requirements and Review Rights? [New § 617.7300 et seq.]

1. What Documents May the CRC Consider? [New § 617.7310(c)]

A System association commented that we limit a borrower's or applicant's entitlement to a copy of a qualified lender's collateral evaluation to just the collateral in connection with the adverse credit decision under review. We do not agree with this comment. Section 4.13A of the Act provides borrowers the right to receive copies of all appraisals of borrower assets made or used by the qualified lender, not just the independent collateral evaluation made in connection with a CRC review.

2. May an Applicant Obtain a New Collateral Evaluation Even if Collateral Was Not a Reason for the Adverse Credit Decision? [New § 617.7310(d)]

Five System associations, a System bank, and the FCC commented that applicants and borrowers receiving notices of the adverse credit decision should not have the right to obtain an independent collateral evaluation unless inadequate collateral was a basis for the adverse credit decisions. We do not agree with the comment. The Act clearly states that applicants and borrowers have the right to request collateral evaluations without regard to whether the evaluations are part of the reasons for the adverse credit decision. We believe restricting this right might cause harm to an applicant or borrower. For example, a notice of the adverse credit decision may not state that collateral was a reason for an adverse credit decision, but the loan might have been approved if the collateral evaluation had resulted in a higher value. We also want to preclude institutions listing reasons other than collateral for the adverse credit decision to avoid providing the right to an independent collateral evaluation.

A System bank also commented that section 4.14(d)(1) of the Act states that a request for a CRC review of an adverse credit decision "may include" independent appraisals. The bank argued that "may include" is permissive and may be interpreted to mean that the Act does not entitle every applicant or borrower to an independent collateral evaluation when requesting a CRC review. We interpret the Act as expressly providing an applicant or borrower the option of obtaining an independent collateral evaluation when seeking a CRC review. Applicants and borrowers, though not required to, may choose to obtain independent collateral evaluations and submit them as part of CRC review requests. We believe complete disclosure of the reasons for an adverse credit decision will help applicants and borrowers decide whether the expenditure of time and money for an independent collateral evaluation will benefit their CRC reviews. We note, however, that Congress limited such requests to only collateral being offered to secure loans related to the adverse credit decision.

The FCC separately commented that permitting an applicant or borrower to obtain an independent collateral evaluation when inadequate collateral was not among the reasons for the adverse credit decision is at odds with section 4.14(d)(2) of the Act. Section 4.14(d)(2) requires the CRC to provide an applicant or borrower with an approved list of appraisers within 30 days after request, instructs the applicant or borrower to bear the cost of the evaluation, and requires the CRC to include the evaluation in its reconsideration of an adverse credit decision. We do not see a conflict between the applicant's or borrower's right to include independent collateral evaluations in CRC reviews and the procedures for responding to the exercise of this right.

3. When Must an Applicant or Borrower Obtain the Independent Collateral Evaluation? [New § 617.7310(d)(2)]

Three System associations and the FCC disagreed with the proposed 30-day time period for an applicant or borrower to enter into a contractual arrangement with an independent evaluator. The commenters instead requested that we establish a time limit for completing the independent evaluation, such as 30 or 60 days. We do not believe a regulatory time limit to obtain an independent evaluation is appropriate. There may be instances where an applicant or borrower needs a longer time than the 30 or 60 days suggested. Further, we do not believe that restricting a process that is not in the complete control of the qualified lender, applicant, or borrower is in keeping with the spirit of the borrower rights provisions.

Five System associations commented that the 30-day time period to contract with an independent evaluator is too long. Two of the associations provided alternative time periods ranging from 7 days to 2 weeks. One of the associations also suggested that an applicant or borrower execute a written contract for services that complies with the qualified lender's standards. We are maintaining the 30-day period. However, we agree that a written contract for appraisal services should be executed and should comply with a qualified lender's appraisal standards. We have amended our proposal to reflect this change.

D. When and How Does a Qualified Lender Notify a Borrower of the Right to Seek Loan Restructuring? [New § 617.7410]

1. What Notice Should the Qualified Lender Send to a Borrower Who Is a Debtor in a Bankruptcy Proceeding? [New § 617.7410(c)]

A System association, a System bank, and the FCC commented that sending a notice of restructuring to a borrower who has filed bankruptcy violates the automatic stay of a bankruptcy proceeding. The System bank also asked that the notice be made optional to address jurisdictional variations. The FCC argued that some bankruptcy judges have viewed any such letters as a violation of the automatic stay. We do not agree that sending notice of a restructuring opportunity is a violation of the automatic stay. Debtors do not

forfeit borrower rights, including notice of the opportunity to restructure under the Act, when filing for bankruptcy. The automatic stay prohibits creditors from making collection efforts. The notice required by the Act is not a collection effort. It is a means of informing a borrower of his rights under the Act. We believe a properly worded notice is not an effort to collect. However, if a qualified lender is concerned about potential misunderstandings, the qualified lender should include language in the notice that the notice is not a collection attempt. Qualified lenders should check with their own counsel for appropriate wording.

2. Whom Should the Qualified Lender Notify? [New § 617.7410(d)]

Two System associations commented on our proposal to send distressed loan notices to a borrower's attorney in bankruptcy. Both associations stated that not all debtors in bankruptcy have legal representation, and one suggested that the notices be sent directly to the borrower. We agree that not all borrowers retain counsel for a bankruptcy proceeding and we have amended our rule accordingly. The final rule allows for sending notice to the borrower and the borrower's counsel, if known.

A System association asked what notice is required when a borrower has been discharged of debt in a Chapter 7 bankruptcy. When a Bankruptcy Court has discharged a debt, the debt is eliminated. Thus, no borrower rights obligations remain, absent the right of first refusal that may apply.

3. When Is a Qualified Lender Required To Send Another Restructure Notice to a Borrower Whose Loan Was Previously Restructed? [New § 617.7410(e)]

Two System associations commented that we should expand our definition of performance under a restructure agreement beyond payment terms. One association suggested the definition include nonperformance of contractual requirements, such as liquidating a piece of equipment. The other association suggested that a qualified lender and borrower be given the latitude to define compliance. We recognize that loan restructuring often includes performance criteria in addition to repayment. However, nonpayment criteria cannot be used to determine default under the Act. Section 4.14D(c) of the Act prohibits a qualified lender from initiating foreclosure on a loan that is not past due. Thus, a qualified lender cannot accelerate a borrower's loan if the borrower has made all scheduled payments.

E. How Does a Qualified Lender Decide To Restructure a Loan? [New § 617.7415]

1. How Does a Qualified Lender Decide Whether To Restructure or Foreclose? [New § 617.7415 (a), (b) and (d)]

Two System associations commented that viability should be the deciding factor in determining whether to restructure or foreclose, rather than least cost. We disagree with the comment. Section 4.14A(f) requires that the least cost, that is, the lesser of the cost of restructuring versus the cost of foreclosure, be used when determining whether to restructure or foreclose. Therefore, a restructured loan does not have to restore the farming operation to viability; it only has to be the least-cost alternative. We note however, that viability is an important consideration when calculating the cost of restructure.

One association went on to comment that our position on least cost is contrary to portions of the proposed rule, where we stated that deficient management should weigh heavily in determining the future viability of the operation. We do not agree that our position regarding viability and least cost is in conflict with our statement that deficient management should weigh heavily in determining the future viability of a borrower's operation. Both are relevant factors. The capability of farm management weighs heavily in the potential viability of the operation, and determining viability is part of the overall least-cost analysis.

2. What Should the Qualified Lender Do if the Borrower and the Qualified Lender Cannot Agree on the Financial Inputs Used in the Application for Restructuring? [New § 617.7415(c)]

A System association commented that we define the term "financial inputs" and allow benchmarks to include any source or mechanism regularly used by a qualified lender. We agree that benchmarks include any objective source or mechanism regularly used by a qualified lender, which is why we use the phrase "or other such support" in the rule. Further, to alleviate any confusion, we have replaced the term "input" with "projections."

F. How Will a Decision on an Application for Restructuring Be Issued? [New §§ 617.7420 to 617.7425]

1. What Notice Is Required if the Restructuring Request Is Denied? [New § 617.7420(c)]

A System association commented that the notice of the adverse credit decision does not need to include every reason for the denial of an application for restructuring. The association stated that we have exceeded what is necessary and have created an administrative burden. The commenter also stated that our proposal was contradictory to the FRB's staff commentary to Regulation B that a combination of more than four principal reasons for an adverse action is not likely to be helpful to applicants. We disagree with the comment. Borrowers have the right to know all the reasons leading to a denial. Failure to provide all reasons for a denial deprives borrowers of complete information needed to decide whether to request a CRC review of an adverse credit decision. Although the FRB has noted in staff commentary to Regulation B that more than four reasons may not be helpful, it does not limit disclosure to only four or less reasons. We believe including all the reasons for a denial is not unreasonable.

As a general rule, we encourage open and complete communication with borrowers and applicants at every stage of the loan-making process, especially in ensuring that applicants and borrowers receive the rights intended by Congress. At the outset, System institutions should be open to accepting loan applications from all eligible parties. We further encourage System institutions to process those applications, using open, helpful communication. If the loan is denied, qualified lenders should provide complete communication of the specific reasons for denial so that applicants are able to determine whether to seek review of a denial. In the situation where a borrower has a distressed loan, qualified lenders should provide full information on restructuring rights and then engage in meaningful, open negotiations with borrowers to identify and evaluate restructuring opportunities. Again, complete communication of the specific reasons for restructuring denials enable borrowers to make informed decisions on whether to seek CRC reviews.

G. What Type of Notice Should Be Given to a Borrower Before Foreclosure? [New § 617.7425]

Two System associations and the FCC provided comment on the treatment of chronically delinquent borrowers.[4] The two associations commented that we should change our regulations to require only one distressed loan notice per 12-month period. The FCC supported the 12-month comment and suggested linking this requirement to the performance provision on restructuring in new § 617.7410(e). We do not agree that chronically delinquent borrowers should receive limited restructuring opportunities, but we recognize that these borrowers can create a burden for some institutions.

A distressed loan is one where the borrower does not have the financial capacity to pay. In some instances, a chronically delinquent borrower has the financial capacity to pay, so by definition the loan is not distressed. If qualified lenders send distressed loan notices in these cases, they may be using the notices as servicing letters. By doing so, they invoke the requirements of borrower rights, which are only intended for distressed loans. We encourage qualified lenders to use caution when determining whether chronically delinquent loans are distressed, as defined by the Act. However, if a loan is distressed, the qualified lender must send a restructuring notice at least 45 days prior to beginning foreclosure.

H. Distressed Loan Restructuring Directive [New § 617.7500 *et seq.*]

Two System associations and the FCC questioned the need for regulations on issuing borrower rights directives and stated that existing FCA enforcement authorities are adequate. One association commented that these regulations would provide borrowers additional opportunities to delay the restructuring process. Another remarked that our examination process provides an adequate check and balance on borrower rights. The FCC commented that a distinct enforcement process for borrower rights does not provide any additional benefit.

We do not agree with the comments. As discussed in the proposed rule, Congress expressly provided FCA with directive authorities for distressed loan restructurings. However, the Act does not describe the procedures used when issuing directives. Therefore, we are adopting the directive authority, as proposed, to implement our statutory authority.

I. Right of First Refusal [New § 617.7600 et seq.]

1. What Are the Definitions Used in This Subpart? [New § 617.7600]

a. *What Property Is Included in the Term "Acquired Agricultural Real Estate or Property"?* A System bank, an association, and the FCC commented that the definition of "acquired agricultural real estate or property" does not include property acquired through bankruptcy proceedings. All three commenters claim that the right of first refusal should not apply when a System institution obtains title to agricultural real estate in a Chapter 7 trustee sale because this type of sale is not a foreclosure or a voluntary conveyance. The System bank also commented that a bankruptcy sale is outside the language of the Act, and offering the right of first refusal is inconsistent with the Bankruptcy Court's determination that a debtor's sale of property is conducive to reorganization or liquidation.

We do not agree with these comments. Section 4.36 of the Act states that agricultural real estate acquired by a System institution from loan foreclosure or a voluntary conveyance by a borrower is subject to the right of first refusal. Because of the similarities between a Bankruptcy Trustee sale and a loan foreclosure, property acquired by a System institution under these circumstances would be subject to the right of first refusal.

b. *Who is the Previous Owner?* [New § 617.7600] The FCC commented that it does not agree that a previous owner includes a prior record owner of the property in question. They argue that the Act restricts the term previous owner to the borrower on the loan for which the property served as collateral. Further, the FCC contends our definition complicates the process of determining the previous owner's ability to avoid foreclosure since a previous owner who is not a borrower has little or no opportunity to prevent foreclosure. We do not agree that the Act intended to restrict the term "previous owner" to a borrower only. We believe the legislative history clearly explains that the intention of the right of first refusal is to preserve the family farm. Restricting the definition of previous owner to individuals signing a debt instrument may not achieve this goal. We believe the System is able to determine the ability of a borrower to avoid foreclosure and then, when appropriate, to offer first refusal rights to the previous owner. If the borrower could have avoided foreclosure, then the previous owner would have no first refusal rights.

2. May a Previous Owner Waive the Right of First Refusal?

The FCC requested clarification on whether a waiver of the right of first refusal may be obtained. The FCC stated that a borrower should be able to freely waive the right of first refusal as part of a debt settlement. The FCC specified that such a waiver would be appropriate when there has been bona fide consideration, the borrower has been specifically advised of his rights, and the borrower has had the opportunity to obtain counsel. In addition, the FCC commented that a borrower should be able to waive this right subsequent to the System institution acquiring the property. We proposed no waiver of the right of first refusal, and the Act does not provide for a waiver. Further, we do not believe a waiver in this situation is appropriate, nor should borrower rights be used as a basis for negotiation in the servicing of a loan. A borrower in a distressed loan situation, including debt settlement, cannot be considered free of duress when the lender is initiating "waiver" discussions.

3. How Should System Institutions Document Whether the Borrower Had the Financial Resources To Avoid Foreclosure? [New § 617.7605].

A System association and the FCC asked if a System institution would violate our regulations by offering the right of first refusal to a borrower who may have had the ability to avoid foreclosure or voluntary conveyance. The Act requires System institutions to provide the right of first refusal to borrowers who do not have the financial resources to avoid foreclosure or voluntary conveyance. It does not prohibit offering this opportunity to other borrowers. However, a System institution should establish an objective standard for making such an opportunity available. The lack of established standards poses a risk of perceived discrimination or favoritism. Also, once the right of first refusal is offered optionally by the institution, the provisions of the Act and regulations governing the means of processing the exercise of that right become applicable.

4. What Should the System Institution Do When It Decides To Sell Acquired Agricultural Real Estate? [New § 617.7610]

A System association requested guidance regarding a System institution's ability to reject an offer to

[4] We refer to borrowers who repeatedly default as chronically delinquent.

purchase agricultural real estate if the offer contains unusual or unacceptable contingencies, such as an unreasonable timeframe to settle. The association also requested that we add a regulatory provision requiring offers from previous owners to be made in writing, dated, and signed. We believe this comment has merit, and we are considering resoliciting comments on this issue.

VII. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not "small entities" as defined in the Regulatory Flexibility Act.

List of Subjects

12 CFR Part 609

Agriculture, Banks, banking, Electronic commerce, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 611

Agriculture, Banks, banking, Rural areas.

12 CFR Part 612

Agriculture, Banks, banking, Conflict of interests, Rural areas.

12 CFR Part 614

Agriculture, Banks, banking, Flood insurance, Foreign trade, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 615

Accounting, Agriculture, Banks, banking, Government securities, Investments, Rural areas.

12 CFR Part 617

Banks, banking, Criminal referrals, Criminal transactions, Embezzlement, Insider abuse, Investigations, Money laundering, Theft.

■ For the reasons stated in the preamble, parts 609, 611, 612, 614, 615, and 617, chapter VI, title 12 of the Code of Federal Regulations are amended as follows:

PART 609—ELECTRONIC COMMERCE

■ 1. The authority citation for part 609 continues to read as follows:

Authority: Sec. 5.9 of the Farm Credit Act (12 U.S.C. 2243); 5 U.S.C. 301; Pub. L. 106–229 (114 Stat. 464).

Subpart A—General Rules

■ 2. Amend § 609.910(c) by revising the fourth sentence to read as follows:

§ 609.910 Compliance with the Electronic Signatures in Global and National Commerce Act (Public Law 106–229)(E-SIGN).

* * * * *

(c) * * * Thus, System institutions cannot use electronic notification to deliver some notices that must be provided under part 617, subparts A, D, E, and G of this chapter. * * *

* * * * *

PART 611—ORGANIZATION

■ 3. The authority citation for part 611 continues to read as follows:

Authority: Secs. 1.3, 1.13, 2.0, 2.10, 3.0, 3.21, 4.12, 4.15, 4.20, 4.21, 5.9, 5.10, 5.17, 6.9, 6.26, 7.0–7.13, 8.5(e) of the Farm Credit Act (12 U.S.C. 2011, 2021, 2071, 2091, 2121, 2142, 2183, 2203, 2208, 2209, 2243, 2244, 2252, 2278a–9, 2278b–6, 2279a–2279f–1, 2279aa–5(e)); secs. 411 and 412 of Pub. L. 100–233, 101 Stat. 1568, 1638; secs. 409 and 414 of Pub. L. 100–399, 102 Stat. 989, 1003, and 1004.

Subpart P—Termination of System Institution Status

■ 4. Amend § 611.1223(d)(6) by revising the second sentence to read as follows:

§ 611.1223 Information statement—contents.

* * * * *

(d) * * *

(6) * * * You must explain the effect termination will have on borrower rights granted in the Act and part 617 of this chapter.

* * * * *

■ 5. Amend § 611.1290 by revising the second sentence to read as follows:

§ 611.1290 Continuation of borrower rights.

* * * Institutions that become other financing institutions on termination must comply with the applicable borrower rights provisions in the Act and part 617 of this chapter.

PART 612—STANDARDS OF CONDUCT AND REFERRAL OF KNOWN OR SUSPECTED CRIMINAL VIOLATIONS

■ 6. The authority citation for part 612 continues to read as follows:

Authority: Secs. 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2243, 2252, 2254).

■ 7. Revise the heading of part 612 to read as set forth above.

■ 8. Redesignate §§ 612.2130 through 612.2270 as subpart A and add a heading for new subpart A to read as follows:

Subpart A—Standards of Conduct

PART 614—LOAN POLICIES AND OPERATIONS

■ 9. The authority citation for part 614 is revised to read as follows:

Authority: 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128; secs. 1.3, 1.5, 1.6, 1.7, 1.9, 1.10, 1.11, 2.0, 2.2, 2.3, 2.4, 2.10, 2.12, 2.13, 2.15, 3.0, 3.1, 3.3, 3.7, 3.8, 3.10, 3.20, 3.28, 4.12, 4.12A, 4.13B, 4.14, 4.14A, 4.14C, 4.14D, 4.14E, 4.18, 4.18A, 4.19, 4.25, 4.26, 4.27, 4.28, 4.36, 4.37, 5.9, 5.10, 5.17, 7.0, 7.2, 7.6, 7.8, 7.12, 7.13, 8.0, 8.5 of the Farm Credit Act (12 U.S.C. 2011, 2013, 2014, 2015, 2017, 2018, 2019, 2071, 2073, 2074, 2075, 2091, 2093, 2094, 2097, 2121, 2122, 2124, 2128, 2129, 2131, 2141, 2149, 2183, 2184, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2206, 2206a, 2207, 2211, 2212, 2213, 2214, 2219a, 2219b, 2243, 2244, 2252, 2279a, 2279a–2, 2279b, 2279c–1, 2279f, 2279f–1, 2279aa, 2279aa–5); sec. 413 of Pub. L. 100–233, 101 Stat. 1568, 1639.

Subpart H—Loan Purchases and Sales

§ 614.4336 [Removed]

■ 10. Remove § 614.4336.

Subpart L—[Removed]

■ 11. Remove subpart L, consisting of §§ 614.4440 through 614.4444.

Subpart N—Loan Servicing Requirements; State Agricultural Loan Mediation Programs; Right of First Refusal

§§ 614.4514–614.4522 [Removed]

■ 12. Remove §§ 614.4514 through 614.4522 in subpart N.

Subpart P—Farm Credit Bank and Agricultural Credit Bank Financing of Other Financing Institutions

■ 13. Revise § 614.4560(d) to read as follows:

§ 614.4560 Requirements for OFI funding relationships.

* * * * *

(d) The borrower rights requirements in part C of title IV of the Act, and section 4.36 of the Act, and the regulations in part 617 of this chapter shall apply to all loans that an OFI funds or discounts through a Farm Credit Bank or agricultural credit bank, unless such loans are subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*

* * * * *

PART 615—FUNDING AND FISCAL AFFAIRS, LOAN POLICIES AND OPERATIONS, AND FUNDING OPERATIONS

■ 14. The authority citation for part 615 continues to read as follows:

Authority: Secs. 1.5, 1.7, 1.10, 1.11, 1.12, 2.2, 2.3, 2.4, 2.5, 2.12, 3.1, 3.7, 3.11, 3.25, 4.3, 4.3A, 4.9, 4.14B, 4.25, 5.9, 5.17, 6.20, 6.26, 8.0, 8.3, 8.4, 8.6, 8.7, 8.8, 8.10, 8.12 of the Farm Credit Act (12 U.S.C. 2013, 2015, 2018, 2019, 2020, 2073, 2074, 2075, 2076, 2093, 2122, 2128, 2132, 2146, 2154, 2154a, 2160, 2202b, 2211, 2243, 2252, 2278b, 2278b–6, 2279aa, 2279aa–3, 2279aa–4, 2279aa–6, 2279aa–7, 2279aa–8, 2279aa–10, 2279aa–12); sec. 301(a) of Pub. L. 100–233, 101 Stat. 1568, 1608.

Subpart J—Retirement of Equities

■ 15. Section 615.5280(h) is revised to read as follows:

§ 615.5280 Retirement in event of default.

* * * * *

(h) The requirements of this section may be satisfied by notices given pursuant to §§ 617.7405, 617.7410, 617.7420, and 617.7425 of this chapter that contain the information required by this section.

■ 16. Amend § 615.5290 by revising paragraphs (a) and (b) to read as follows:

§ 615.5290 Retirement of capital stock and participation certificates in event of restructuring.

(a) If a Farm Credit Bank or agricultural credit bank forgives and writes off, under § 617.7415, any of the principal outstanding on a loan made to any borrower, where appropriate the Federal land bank association of which the borrower is a member and stockholder shall cancel the same dollar amount of borrower stock held by the borrower in respect of the loan, up to the total amount of such stock, and to the extent provided for in the bylaws of the Bank relating to its capitalization, the Farm Credit Bank or agricultural credit bank shall retire an equal amount of stock owned by the Federal land bank association.

(b) If a production credit association or merged association forgives and writes off, under § 617.7415, any of the principal outstanding on a loan made to any borrower, the association shall cancel the same dollar amount of borrower stock held by the borrower in respect of the loan, up to the total amount of such loan.

* * * * *

PART 617—REFERRAL OF KNOWN OR SUSPECTED CRIMINAL VIOLATIONS

■ 17. The authority citation for part 617 is revised to read as follows:

Authority: Secs. 4.13, 4.13A, 4.13B, 4.14, 4.14A, 4.14C, 4.14D, 4.14E, 4.36, 5.9, 5.17 of the Farm Credit Act (12 U.S.C. 2199, 2200, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2219a, 2243, 2252).

PART 617—[REMOVED]

§§ 617.1–617.4 [Redesignated as §§ 612.2300–612.2303]

■ 18. Redesignate §§ 617.1 through 617.4 as new §§ 612.2300 through 612.2303.

■ 19. Remove part 617.

■ 20. Redesignate newly designated §§ 612.2300–612.2303 as subpart B and add a heading for Subpart B to read as follows:

Subpart B—Referral of Known or Suspected Criminal Violations

§ 612.2300 [Amended]

■ 21. Amend newly designated § 612.2300 by removing the reference "§ 617.2" each place it appears and add in its place, the reference "§ 612.2301" in paragraphs (a), (c), and (e).

■ 22. Add a new part 617, subpart A, to read as follows:

PART 617—BORROWER RIGHTS

Subpart A—General

Sec.

617.7000 Definitions
617.7005 When may electronic communications be used in the borrower rights process?
617.7010 May borrower rights be waived?

Subpart A—General

§ 617.7000 Definitions.

For the purposes of this part, the following terms apply:

Adverse credit decision means a credit decision where a qualified lender:

(1) Decides not to make a loan to an applicant;

(2) Approves a loan in an amount less than the applicant requested; or

(3) Denies an application for restructuring.

Applicant means any person who completes and executes a loan application from a qualified lender.

Application for restructuring means a written request from a borrower to restructure a distressed loan. The request must be submitted on the appropriate forms prescribed by the qualified lender and accompanied by sufficient financial information and repayment projections, where appropriate, as required by the qualified lender to support a sound credit decision.

Distressed loan means a loan that the borrower does not have the financial capacity to pay according to its terms, as determined by the qualified lender, and exhibits one or more of the following characteristics:

(1) The borrower is demonstrating adverse financial and repayment trends.

(2) The loan is delinquent or past due under the terms of the loan contract.

(3) One or both of the factors listed in paragraphs (1) and (2) of this section, together with inadequate collateralization, present a high probability of loss to the qualified lender.

Foreclosure proceeding means:

(1) A foreclosure or similar legal proceeding to enforce a lien on property, whether real or personal, that secures a non-interest-earning asset or distressed loan; or

(2) The seizing of and realizing on non-real property collateral, other than collateral subject to a statutory lien arising under titles I and II of the Act, to effect collection of a nonaccrual or distressed loan.

Independent evaluator means an individual who is a qualified evaluator and who satisfies the standards of § 614.4260, subpart F of this chapter, and the standards set by the qualified lender for the type of property to be evaluated. The independent evaluator may not be an employee or agent of a qualified lender or have a relationship with the lender or any of its officers or directors in contravention of part 612 of this chapter.

Loan means an extension of credit made to a farmer, rancher, or producer or harvester of aquatic products, for any agricultural or aquatic purpose and other credit needs of the borrower, including financing for basic processing and marketing that directly relates to the borrower's operations and those of other eligible farmers, ranchers, and producers or harvesters of aquatic products.

Loan application means a complete oral or written request for an extension of credit made in accordance with a qualified lender's procedures for the type of credit requested. An application is complete when the qualified lender receives all the information normally obtained and used in evaluating applications for credit. This information may include credit reports, supporting information for the credit requested, and reports by governmental agencies or other persons necessary to guarantee, insure, or provide security for the credit or collateral.

Qualified lender means:

(1) A System institution, except a bank for cooperatives, that makes loans as defined in this section; and

(2) Each bank, institution, corporation, company, credit union, and association described in section 1.7(b)(1)(B) of the Act (commonly referred to as an other financing institution), but only with respect to loans discounted or pledged under section 1.7(b)(1).

Restructure and restructuring of a loan means a reamortization, renewal, deferral of principal or interest, monetary concessions, or the taking of any other action to modify the terms of, or forbear on, a loan.

§ 617.7005 When may electronic communications be used in the borrower rights process?

Qualified lenders may use, with the parties' agreement, electronic commerce (E-commerce), including electronic communications for borrower rights disclosures. Part 609 of this chapter addresses when a qualified lender may use E-commerce. Consistent with these rules, a qualified lender should interpret part 617 broadly to allow electronic transmissions, communications, records, and submissions. However, electronic communications may not be used for a notice of default, acceleration, repossession, foreclosure, eviction, or the right to cure when a borrower's primary residence secures the loan. In these instances, a qualified lender must use paper disclosures.

§ 617.7010 May borrower rights be waived?

(a) A qualified lender may not obtain a waiver of borrower rights, except as indicated in paragraph (b) of this section.

(b) A borrower may waive rights relating to distressed loan restructuring, credit reviews, and the right of first refusal as follows:

(1) When a loan is guaranteed by the Small Business Administration.

(2) In connection with a loan sale as provided in § 617.7015.

(c) All waivers must be voluntary and in writing. The document evidencing the waiver must clearly explain the rights the borrower is being asked to waive and provide an explanation of such rights.

§ 617.7015 What happens to borrower rights when a loan is sold?

(a) *What happens when a qualified lender sells a loan to another qualified lender?* A loan made by a qualified lender and subsequently sold, in whole or in part, to another qualified lender is subject to the borrower rights provisions of title IV of the Act.

(b) *What happens when a qualified lender sells a loan into the secondary market?*

(1) Except as provided in paragraph (b)(2) of this section, the borrower rights provisions of sections 4.14, 4.14A, 4.14B, 4.14C, 4.14D, and 4.36 of the Act do not apply to a loan made on or after February 10, 1996, and designated for sale into a secondary market at the time the loan was made.

(2) Borrower rights apply to a loan designated for sale under paragraph (b)(1) of this section but not sold into a secondary market during the 180-day period that begins on the date of designation. The provisions of paragraph (b)(1) of this section will subsequently apply on the date of sale if the loan is later sold into a secondary market.

(c) *What happens when a qualified lender sells a loan to a nonqualified lender?*

(1) Except for loans sold to another qualified lender or designated for sale into a secondary market, a qualified lender must comply with one of the following requirements before selling a loan or interest in a loan subject to borrower rights:

(i) The qualified lender and borrower must agree to include provisions in the loan contract with the borrower, or a written modification thereto, that ensure that the buyer of the loan will be obligated to provide the borrower the same rights a qualified lender must provide; or

(ii) The qualified lender must obtain from the borrower a signed written consent to the sale, which clearly states the borrower waives statutory borrower rights.

(2) Before the qualified lender obtains the borrower's consent to the sale of the loan and the waiver of borrower rights under paragraph (c)(1)(ii) of this section, the qualified lender must disclose in writing to the borrower:

(i) A complete description of the statutory rights the borrower will waive;

(ii) Any changes in the loan terms or conditions that will occur if the qualified lender does not sell the loan;

(iii) That waiving borrower rights will not become effective unless the qualified lender sells the loan; and

(iv) That borrower rights will become effective again if any qualified lender repurchases the loan or any interest in the loan.

(3) The consent to the loan sale and waiver of borrower rights shall have no effect until the qualified lender sells the loan. Borrower rights become effective again if any qualified lender repurchases the loan or any interest in the loan.

(4) A qualified lender may not make a loan conditioned on the borrower consenting to the loan's sale and a waiver of borrower rights.

■ 23. Amend part 617 by adding new subparts D, E, F, and G to read as follows:

Subpart D—Actions on Applications; Review of Credit Decisions

Sec.

617.7300 When acting on a loan application, what are the notice requirements and review rights?
617.7305 What is a CRC and who are the members?
617.7310 What is the review process of the CRC?
617.7315 What records must the qualified lender maintain on behalf of the CRC?

Subpart D—Actions on Applications; Review of Credit Decisions

§ 617.7300 When acting on a loan application, what are the notice requirements and review rights?

Each qualified lender must make its decision on a loan application as quickly as possible. The qualified lender must provide prompt written notice of its decision to the applicant. The qualified lender is required to notify all primary applicants. If a loan application has more than one primary applicant, the qualified lender may send the original notice to the applicant designated to receive notices and may send copies to all other applicants. If the qualified lender makes an adverse credit decision on a loan application, the notice must include:

(a) The specific reasons for the qualified lender's decision;

(b) A statement that the applicant may request a review of the decision;

(c) A statement that a written request for review must be made within 30 days after the applicant receives the qualified lender's notice; and

(d) A brief explanation of the process for seeking review of the decision, including the independent collateral evaluation review process, whom to contact for access to information, and the applicant's right to appear in person before the credit review committee (CRC).

§ 617.7305 What is a CRC and who are the members?

The board of directors of each qualified lender must establish one or more CRCs to review adverse credit decisions made by a qualified lender. The CRC may only review adverse credit decisions at the request of the applicant or borrower. The CRC has the ultimate decision-making authority on the loan or application under review.

CRC members are selected by the board of directors of each qualified lender and must include at least one of the qualified lender's farmer-elected board members. The loan officer involved in the adverse credit decision being reviewed may not serve on the CRC when it reviews that loan.

§ 617.7310 What is the review process of the CRC?

(a) *How will an applicant or borrower know when the CRC will consider the review request?* The qualified lender must inform the applicant or borrower 15 days in advance of the CRC meeting where the applicant or borrower's request will be reviewed.

(b) *Who may make a personal appearance before the CRC?* Each applicant or borrower who has requested a review may appear in person before the CRC. The applicant or borrower may be accompanied by counsel or other representative when seeking a reversal of a decision on a loan or an application for restructuring.

(c) *What documents may the CRC consider?* An applicant or borrower may submit any documents or other evidence to support the information contained in the loan or application for restructuring. The documents should demonstrate that the application for a loan or restructuring satisfies the credit standards of the qualified lender and is an eligible loan or application for restructuring. Additionally, the applicant or borrower is entitled to a copy of each independent collateral evaluation used by the qualified lender.

(d) *May an applicant obtain a new collateral evaluation even if collateral was not a reason for the adverse credit decision?* As part of a CRC review, an applicant may request an independent collateral evaluation of the agricultural real estate securing the loan or being offered as security, regardless of whether collateral was an identified reason for the adverse credit decision. The independent collateral evaluation may be for any interest(s) in the property securing the loan, except stock or participation certificates issued by the qualified lender and held by the applicant or borrower.

(1) *Who may conduct an independent collateral evaluation?* The independent collateral evaluation must be conducted by an independent evaluator. The CRC must provide the applicant or borrower with a list of three independent evaluators approved by the qualified lender within 30 days of the request for an independent collateral evaluation. The applicant or borrower must select and engage the services of an evaluator from the list. The evaluation must comply with the collateral evaluation requirements of part 614, subpart F, of this chapter. The qualified lender must provide the applicant or borrower a copy of part 614, subpart F, for presentation to the selected independent evaluator. A copy of part 614, subpart F, signed by the evaluator is a required exhibit in the subsequent evaluation report.

(2) *When must an applicant or borrower obtain the independent collateral evaluation and who pays for the evaluation?* The applicant or borrower must enter into a contractual arrangement for evaluation services within 30 days of receiving the names of three approved independent evaluators. The contractual arrangement must be a written contract for services that complies with the lender's appraisal standards. The evaluation must be completed within a reasonable period of time, taking into consideration any extenuating circumstance. The applicant or borrower is responsible for the costs of the independent evaluation.

(3) *How does the CRC use an independent collateral evaluation when making a decision?* The CRC will consider the results of any independent collateral evaluation before making a final determination with respect to the loan or restructuring, except the CRC is not required to consider a collateral evaluation that does not conform to the collateral evaluation standards described in part 614, subpart F, of this chapter.

(e) *When must the CRC issue a decision?* The CRC must reach a decision, and it must be the final decision of the qualified lender, not later than 30 days after the meeting on the request under review. The CRC must make every reasonable effort to conduct reviews and render decisions in as expeditious a manner as possible. After making its decision, the committee must promptly notify the applicant or borrower in writing of the decision and the reasons for the decision.

§ 617.7315 What records must the qualified lender maintain on behalf of the CRC?

A qualified lender must maintain a complete file of all requests for CRC reviews, including participation in state mediation programs, the minutes of each CRC meeting, and the disposition of each review by the CRC.

Subpart E—Distressed Loan Restructuring; State Agricultural Loan Mediation Programs

Sec.

617.7400 What protections exist for borrowers who meet all loan obligations?
617.7405 On what policies are loan restructurings based?
617.7410 When and how does a qualified lender notify a borrower of the right to seek loan restructuring?
617.7415 How does a qualified lender decide to restructure a loan?
617.7420 How will a decision on an application for restructuring be issued?
617.7425 What type of notice should be given to a borrower before foreclosure?
617.7430 Are institutions required to participate in state agricultural loan mediation programs?

Subpart E—Distressed Loan Restructuring; State Agricultural Loan Mediation Programs

§ 617.7400 What protections exist for borrowers who meet all loan obligations?

(a) A qualified lender may not foreclose on a loan because the borrower failed to post additional collateral when the borrower has made all accrued payments of principal, interest, and penalties on the loan.

(b) A qualified lender may not require a borrower to reduce the outstanding principal balance of a loan by any amount that exceeds the regularly scheduled principal installment when due and payable, unless:

(1) The borrower sells or otherwise disposes of part, or all, of the collateral without the prior approval of the qualified lender and the proceeds from the sale or disposition are not applied to the loan; or

(2) The parties agree otherwise in writing.

(c) After a borrower has made all accrued payments of principal, interest, and penalties on a loan, the qualified lender may not enforce acceleration of the borrower's repayment schedule due to the borrower's untimely payment of those principal, interest, or penalty payments.

(d) If a qualified lender places a loan in non-interest-earning status and this results in an adverse action being taken against the borrower, such as revoking any undisbursed loan commitment, the lender must document the change of status and promptly notify the borrower in writing of the action and the reasons for taking it. If the borrower was not delinquent on any principal, interest, or penalty payment at the time of such action and the borrower's request to have the loan placed back into accrual status is denied, the borrower may obtain a review of the denial before the CRC pursuant to § 617.7310 of this part. The borrower must request this review within 30 days after receiving the lender's notice.

§ 617.7405 On what policies are loan restructurings based?

Loan restructurings must be made in accordance with the policy adopted by

the supervising bank board of directors under section 4.14A(g) of the Act.

§ 617.7410 When and how does a qualified lender notify a borrower of the right to seek loan restructuring?

(a) *What are the notice requirements?* When a qualified lender determines that a loan is, or has become, distressed, the lender must provide one of the following written notices to the borrower stating that the loan may be suitable for restructuring.

(1) A notice stating that the loan has been identified as distressed and that the borrower has the right to request a restructuring of the loan (nonforeclosure notice).

(2) A notice that the loan has been identified as distressed, that the borrower has the right to request a restructuring of the loan, and that the alternative to restructuring may be foreclosure (45-day notice). The qualified lender must provide this notice to the borrower no later than 45 days before the qualified lender begins foreclosure proceedings with respect to any loan outstanding to the borrower. This notice must specifically state that if the loan is restructured and the borrower does not perform under the restructure agreement (as described in § 617.7410(e)), the qualified lender may initiate foreclosure proceedings without further notice.

(b) *What should each notice include?*

(1) A copy of the policy the qualified lender established governing the treatment of distressed loans; and

(2) All materials necessary for the borrower to submit an application for restructuring.

(c) *What notice should a qualified lender send to a borrower who is a debtor in a bankruptcy proceeding?* The qualified lender should send a notice that identifies the loan as distressed and the statutory right to file an application for a restructuring. The notice may also restate the language from the automatic stay provision to emphasize that the notice is not intended as an attempt to collect, assess, or recover a claim.

(d) *Whom should the qualified lender notify?* The qualified lender is required to notify all primary obligors. If the obligors identify one party to receive notices, the qualified lender should send the original notice to that person and send copies to the other obligors. For borrowers in a bankruptcy proceeding, the qualified lender should send the notice to the borrower and, if retained, the borrower's counsel.

(e) *When is a qualified lender required to send another restructure notice to a borrower whose loan was previously restructured?* A qualified lender must notify a borrower of the right to file another application to restructure the loan if the qualified lender sent the nonforeclosure notice to the borrower and the borrower has performed on the previous restructure agreement. Performance means that a borrower has made six consecutive monthly payments, four consecutive quarterly payments, three consecutive semiannual payments, or two consecutive annual payments. However, a qualified lender is not required to send another notice if they previously sent a 45-day notice, as described in § 617.7410(a)(2), and a borrower did not perform under a restructure agreement, as described above.

(f) *Does the borrower have the opportunity to meet with the qualified lender after receiving the restructure notice?* The qualified lender must provide any borrower to whom a notice has been sent with a reasonable opportunity to meet personally with a representative of the lender. The borrower and lender may meet to review the status of the loan, the financial condition of the borrower, and the suitability of the loan for restructuring. A meeting to discuss a loan that is in a non-interest-earning status may also involve developing a plan for restructuring, if the qualified lender determines the loan is suitable for restructuring.

(g) *May the qualified lender voluntarily consider restructuring for a borrower who did not submit a restructuring application?* A qualified lender may, in the absence of an application for restructuring from a borrower, propose restructuring to an individual borrower.

§ 617.7415 How does a qualified lender decide to restructure a loan?

(a) *What criteria does a qualified lender use to evaluate an application for restructuring?* The qualified lender should consider the following:

(1) Whether the cost to the lender of restructuring the loan is equal to or less than the cost of foreclosure, considering all relevant criteria. These criteria include:

(i) The present value of interest and principal foregone by the lender in carrying out the application for restructuring;

(ii) Reasonable and necessary administrative expenses involved in working with the borrower to finalize and implement the application for restructuring;

(iii) Whether the borrower's application for restructuring included a preliminary restructuring plan and cash flow analysis, taking into account income from all sources to be applied to the debt and all assets to be pledged, that show a reasonable probability that orderly debt retirement will occur as a result of the proposed restructuring; and

(iv) Whether the borrower has furnished, or is willing to furnish, complete and current financial statements in a form acceptable to the qualified lender.

(2) Whether the borrower is applying all income over and above necessary and reasonable living and operating expenses to the payment of primary obligations;

(3) Whether the borrower has the financial capacity and the management skills to protect the collateral from diversion, dissipation, or deterioration;

(4) Whether the borrower is capable of working out existing financial difficulties, taking into consideration any prior restructuring of the loan, reestablishing a viable operation, and repaying the loan on a rescheduled basis; and

(5) In the case of a distressed loan that is not delinquent, whether restructuring consistent with sound lending practices may be taken to reasonably ensure that the loan will not have to be placed into non-interest-earning status in the future.

(b) *What should be included in determining the cost of foreclosure?*

(1) The difference between the outstanding balance due, as provided by the loan documents, and the liquidation value of the loan, taking into consideration the borrower's repayment capacity and the liquidation value of the collateral used to secure the loan;

(2) The estimated cost of maintaining a loan classified as a high-risk asset;

(3) The estimated cost of administrative and legal actions necessary to foreclose a loan and dispose of property acquired as the result of the foreclosure, including attorneys' fees and court costs;

(4) The estimated cost of value changes in collateral used to secure a loan during the period beginning on the date of the initiation of an action to foreclose or liquidate the loan and ending on the date of the disposition of the collateral; and

(5) All other costs incurred as the result of the foreclosure or liquidation of a loan.

(c) *What should the qualified lender do if the borrower and the qualified lender cannot agree on the financial projections used in the application for restructuring?* If the borrower and lender are not able to agree on supportable or realistic financial projections, the lender may use benchmarks to determine the operational input costs and chattel

security values. These benchmarks may include, but are not limited to, the borrower's 5-year production average; averages in the county where the farming operation is located, based on data from United States Department of Agriculture, local colleges or universities, or other recognized authority; and other such reasonable sources.

(d) *How does the qualified lender decide whether to restructure or foreclose?* If a qualified lender determines the potential cost to the lender of restructuring the loan as proposed in the application for restructuring is less than or equal to the potential cost of foreclosure, the qualified lender must restructure the loan. If two or more restructuring alternatives are available, the qualified lender must restructure the loan using the alternative that results in the least cost to the lender.

(e) *What documentation should the qualified lender retain?* In the event that an application for restructuring is denied, a qualified lender must maintain sufficient documentation to demonstrate compliance with paragraphs (a), (b), and (c) of this section, as applicable.

§ 617.7420 How will a decision on an application for restructuring be issued?

(a) *When must a qualified lender make a decision on an application for restructuring?* Each qualified lender must provide a written decision on an application for restructuring and provide this decision to the borrower within 15 days from the conclusion of the negotiations used to develop the application for restructuring.

(b) *How does a qualified lender notify the borrower of the decision?* On reaching a decision on an application for restructuring, the qualified lender must provide written notice in any manner that requires a primary obligor to acknowledge receipt of the lender's decision. In the case of a loan involving one or more primary obligors, the original notice may be provided to the primary obligor identified to receive such notice, with copies provided by regular mail to the other obligors.

(c) *What notice is required if the restructuring request is denied?* When an application for restructuring is denied, the notice must include:

(1) The specific reason(s) for the denial and any critical assumptions and relevant information on which the specific reasons are based, except that any confidential information shall not be disclosed;

(2) A statement that the borrower may request a review of the denial;

(3) A statement that any request for review must be made in writing within 7 days after receiving such notice.

(4) A brief explanation of the process for seeking review of the denial, including the appraisal review process and the right to appear before the CRC, pursuant to § 617.7310 of this part, accompanied by counsel or any other representative, if the borrower chooses.

§ 617.7425 What type of notice should be given to a borrower before foreclosure?

The qualified lender must send the 45-day notice, as described in § 617.7410(a)(2), no later than 45 days before any qualified lender begins foreclosure proceedings. The notice informs the borrower in writing that the loan may be suitable for restructuring and that the qualified lender will review any suitable loan for possible restructuring. The 45-day notice must include a copy of the policy and the materials described in § 617.7410(b). The notice must also state that if the loan is restructured, the borrower must perform under this restructure agreement. If the borrower does not perform, the qualified lender may initiate foreclosure.

(a) *Does the notice have to inform the borrower that foreclosure is possible?* The notice must inform the borrower that the alternative to restructuring may be foreclosure. If the notice does not inform the borrower of potential foreclosure, then the qualified lender must send a second notice at least 45 days before foreclosure is initiated.

(b) *How are borrowers who are debtors in a bankruptcy proceeding notified?* A qualified lender must restate the language from the automatic stay provision to emphasize that the notice is not intended to be an attempt to collect, assess, or recover a claim. The qualified lender should send the notice to the borrower and, if retained, the borrower's counsel.

(c) *May a qualified lender foreclose on a loan when there is a restructuring application on file?* No qualified lender may foreclose or continue any foreclosure proceeding with respect to a distressed loan before the lender has completed consideration of any pending application for restructuring and CRC consideration, if applicable. This section does not prevent a lender from taking any action necessary to avoid the dissipation of assets or the diversion, dissipation, or deterioration of collateral if the lender has reasonable grounds to believe that such diversion, dissipation, or deterioration may occur.

§ 617.7430 Are institutions required to participate in state agricultural loan mediation programs?

(a) If initiated by a borrower, System institutions must participate in state mediation programs certified under section 501 of the Agricultural Credit Act of 1987 and present and explore debt restructuring proposals advanced in the course of such mediation. If provided in the certified program, System institutions may initiate mediation at any time.

(b) System institutions must cooperate in good faith with requests for information or analysis of information made in the course of mediation under any loan mediation program.

(c) No System institution may make a loan secured by a mortgage or lien on agricultural property to a borrower on the condition that the borrower waive any right under the agricultural loan mediation program of any state.

(d) A state mediation may proceed at the same time as the loan restructuring process of § 617.7415 or at any other appropriate time.

Subpart F—Distressed Loan Restructuring Directive

Sec.

617.7500 What is a directive used for and what may it require?
617.7505 How will the qualified lender know when FCA is considering issuing a distressed loan restructuring directive?
617.7510 What should the qualified lender do when it receives notice of a distressed loan restructuring directive?
617.7515 How does the FCA decide whether to issue a directive?
617.7520 How does the FCA issue a directive and when will it be effective?
617.7525 May FCA use other enforcement actions?

Subpart F—Distressed Loan Restructuring Directive

§ 617.7500 What is a directive used for and what may it require?

(a) A distressed loan restructuring directive is an order issued to a qualified lender when FCA has determined that the lender has violated section 4.14A of the Act.

(b) A distressed loan restructuring directive requires the qualified lender to comply with the specific distressed loan restructuring requirements in the Act.

(c) A distressed loan restructuring directive is enforceable in the same manner and to the same extent as an effective and outstanding cease and desist order that has become final. Any violation of a distressed loan restructuring directive may result in FCA assessing civil money penalties or seeking a court order pursuant to section 5.31 or 5.32 of the Act.

§ 617.7505 How will the qualified lender know when FCA is considering issuing a distressed loan restructuring directive?

When FCA intends to issue a distressed loan restructuring directive, it will notify the qualified lender in writing. The notice will state:

(a) The reasons FCA intends to issue a distressed loan restructuring directive;

(b) The proposed contents of the distressed loan restructuring directive; and

(c) Any other relevant information.

§ 617.7510 What should the qualified lender do when it receives notice of a distressed loan restructuring directive?

(a) A qualified lender should respond to the notice by stating why FCA should not issue a distressed loan restructuring directive, by proposing changes to the directive, or by seeking other suitable relief. The response must include any information, documentation, or other relevant evidence that supports the qualified lender's position. The response may include a plan for achieving compliance with the distressed loan restructuring requirements of the Act. The response must be in writing and delivered to FCA within 30 days after the date on which the qualified lender received the notice. In its discretion, FCA may extend the time period for good cause. FCA may shorten the 30-day period with the consent of the qualified lender or when FCA determines that providing the full 30 days would result in a borrower not receiving distressed loan restructuring rights.

(b) If the qualified lender fails to respond within 30 days or such other time period specified by FCA, this failure will constitute a waiver of any objections to the proposed distressed loan restructuring directive.

§ 617.7515 How does the FCA decide whether to issue a directive?

After the closing date of the qualified lender's response period, or following receipt of the qualified lender's response, FCA must decide if there is sufficient information to support the issuance of a directive or if additional information is necessary. Once FCA has received sufficient information, it must decide whether to issue a directive as originally proposed or as modified.

§ 617.7520 How does the FCA issue a directive and when will it be effective?

A distressed loan restructuring directive is effective immediately on receipt by the qualified lender, or on such later date as may be specified by FCA, and will remain effective and enforceable until it is stayed, modified, or terminated by FCA.

§ 617.7525 May FCA use other enforcement actions?

FCA may issue a distressed loan restructuring directive in addition to, or instead of, any other action allowed by law, including cease and desist proceedings, civil money penalties, or the granting or conditioning of any application or other requests by the System institution.

Subpart G—Right of First Refusal

Sec.

617.7600 What are the definitions used in this subpart?
617.7605 How should System institutions document whether the borrower had the financial resources to avoid foreclosure?
617.7610 What should the System institution do when it decides to sell acquired agricultural real estate?
617.7615 What should the System institution do when it decides to lease acquired agricultural real estate?
617.7620 What should the System institution do when it decides to sell acquired agricultural real estate at a public auction?
617.7625 Whom should the System institution notify?
617.7630 Does this Federal requirement affect any state property laws?

Subpart G—Right of First Refusal

§ 617.7600 What are the definitions used in this subpart?

In addition to the definitions in § 617.7000, the following definitions apply to this subpart.

Acquired agricultural real estate or property means agricultural real estate acquired by a System institution as a result of a loan foreclosure or a voluntary conveyance by a borrower who, as determined by the institution, does not have the financial resources to avoid foreclosure.

Previous owner means:

(1) The prior record owner who was a borrower from a System institution and did not have the financial resources, as determined by the institution, to avoid foreclosure on acquired agricultural real estate; or

(2) The prior record owner who is not a borrower and whose acquired agricultural real estate was used as collateral for a loan to a System borrower.

System institution means a Farm Credit System institution, except a bank for cooperatives, which makes loans as defined in § 617.7000.

§ 617.7605 How should System institutions document whether the borrower had the financial resources to avoid foreclosure?

The right of first refusal applies only to borrowers who did not have the financial resources to avoid foreclosure or voluntary conveyance. A System institution must clearly document in its files whether the borrower had the resources to avoid foreclosure or voluntary conveyance.

§ 617.7610 What should the System institution do when it decides to sell acquired agricultural real estate?

(a) Notify the previous owner,

(1) Within 15 days of the System institution's decision to sell acquired agricultural real estate, it must notify the previous owner, by certified mail, of the property's appraised fair market value as established by an accredited appraiser and of the previous owner's right to:

(i) Buy the property at the appraised fair market value, or

(ii) Offer to buy the property at a price less than the appraised value.

(2) That any offer must be received within 30 days of receipt of the notice.

(b) Act on an offer to buy the acquired agricultural real estate at the appraised value. Within 15 days after the receipt of the previous owner's offer to buy the acquired agricultural real estate at the appraised value, the System institution must accept the offer and sell the property to the previous owner if the offer was received within 30 days of the notice required in paragraph (a)(2) of this section.

(c) Act on an offer to buy the acquired agricultural real estate at less than the appraised value.

(1) The System institution must consider the offer if it was received within 30 days of the notice required in paragraph (a)(2) of this section.

(2) If the System institution accepts this offer, it must notify the previous owner of the decision and sell the acquired agricultural real estate to the previous owner within 15 days of receiving the offer to buy the acquired agricultural real estate at a value less than the appraised value.

(3) If the System institution rejects this offer, it must notify the previous owner of the decision within 15 days of receiving the offer to buy the acquired agricultural real estate at a value less than the appraised value. The previous owner has 15 days from receipt of the notice to submit an offer to buy at such price or under such terms and conditions. The System institution may not sell the acquired agricultural real estate to any other person:

(i) At a price equal to, or less than, that offered by the previous owner; or

(ii) On different terms or conditions than those extended to the previous owner without first notifying the previous owner by certified mail and providing an opportunity to buy the

property at such price or under such terms and conditions.

(d) For purposes of this section, financing by the System institution is not a term or condition of the sale of acquired agricultural real estate. A System institution is not required to provide financing to the previous owner for purchase of acquired agricultural real estate.

§ 617.7615 What should the System institution do when it decides to lease acquired agricultural real estate?

(a) Notify the previous owner,

(1) Within 15 days of the System institution's decision to lease acquired agricultural real estate, it must notify the previous owner, by certified mail, of the property's appraised rental value, as established by an accredited appraiser, and of the previous owner's right to:

(i) Lease the property at a rate equivalent to the appraised rental value of the property, or

(ii) Offer to lease the property at rate that is less than the appraised rental value of the property.

(2) That any offer must be received within 15 days of receipt of the notice.

(b) Act on an offer to lease the acquired agricultural real estate at a rate equivalent to the appraised rental value of the property.

(1) Within 15 days after receipt of such offer, the System institution may accept the offer to lease the property at the appraised rental value and lease the property to the previous owner, or

(2) Within 15 days after receipt of such offer, the System institution may reject the offer to lease the property at the appraised rental value when the institution determines that the previous owner:

(i) Does not have the resources available to conduct a successful farming or ranching operation; or

(ii) Cannot meet all the payments, terms, and conditions of such lease.

(c) Act on an offer to lease the acquired agricultural real estate at a rate that is less than the appraised rental value of the property.

(1) The System institution must consider the offer to lease the property at a rate that is less than the appraised rental value of the property. Notice of the decision to accept or reject such offer must be provided to the previous owner within 15 days of receipt of the offer.

(2) If the System institution accepts the offer to lease the property at less than the appraised rental value, it must notify the previous owner and lease the property to the previous owner.

(3) If the institution rejects the offer, the System institution must notify the previous owner of this decision. The previous owner has 15 days after receipt of the notice in which to agree to lease the property at such rate or under such terms and conditions. The System institution may not lease the property to any other person:

(i) At a rate equal to or less than that offered by the previous owner; or

(ii) On different terms and conditions than those that were extended to the previous owner without first informing the previous owner by certified mail and providing an opportunity to lease the property at such rate or under such terms and conditions.

§ 617.7620 What should the System institution do when it decides to sell acquired agricultural real estate at a public auction?

System institutions electing to sell or lease acquired agricultural real estate or a portion of it through a public auction, competitive bidding process, or other similar public offering must:

(a) Notify the previous owner, by certified mail, of the availability of such property. The notice must contain the minimum amount, if any, required to qualify a bid as acceptable to the institution and any terms or conditions to which such sale or lease will be subject;

(b) Accept the offer by the previous owner if the System institution receives two or more qualified bids in the same amount, the bids are the highest received, and one of the qualified bids is from the previous owner; and

(c) Not discriminate against a previous owner in these proceedings.

§ 617.7625 Whom should the System institution notify?

Each certified mail notice requirement in this section is fully satisfied by mailing one certified mail notice to the last known address of the previous owner or owners.

§ 617.7630 Does this Federal requirement affect any state property laws?

The rights provided under section 4.36 of the Act and this section do not affect any right of first refusal under the law of the state in which the property is located.

Dated: March 3, 2004.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NE–31–AD; Amendment 39–13445; AD 2004–03–01]

RIN 2120–AA64

Airworthiness Directives; Air Cruisers Company Emergency Evacuation Slide/Raft System; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to Airworthiness Directive (AD) 2004–03–01 applicable to certain Air Cruisers Company Emergency Evacuation Slide/Raft System that was published in the **Federal Register** on February 5, 2004 (69 FR 5459). The AD number, referenced in paragraph (i), in the Credit for Previous Repacking section, is incorrect. This document corrects that AD number. In all other respects, the original document remains the same.

EFFECTIVE DATE: Effective February 5, 2004.

FOR FURTHER INFORMATION CONTACT: Leung Lee, Aerospace Engineer, New York Aircraft Certification Office, FAA, Engine and Propeller Directorate, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228–7309; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION: A final rule AD, FR Doc 04–2051, applicable to certain Air Cruisers Company Emergency Evacuation Slide/Raft System, was published in the **Federal Register** on February 5, 2004 (69 FR 5459). The following correction is needed:

PART 39—[AMENDED]

§ 39.13 [Corrected]

■ On page 5461, in the second column, in the Credit for Previous Repacking section, in paragraph (i), in the fourth line, "2003–11–03 "is corrected to read "2003–03–11".

Issued in Burlington, MA, on March 2, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–5129 Filed 3–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–390–AD; Amendment 39–13510; AD 2004–05–15]

RIN 2120–AA64

Airworthiness Directives; Dassault Model Mystere-Falcon 900 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Dassault Model Mystere-Falcon 900 series airplanes, that requires revising the Abnormal Procedures section of the airplane flight manual to advise the flightcrew to avoid use of certain display modes during approaches. This AD also requires replacing certain symbol generators of the Electronic Flight Information System (EFIS) with modified symbol generators. This action is necessary to prevent distraction of the flightcrew during a critical phase of flight due to certain EFIS displays flashing or going blank, which could result in loss of control of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective April 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Dassault Falcon Jet, P.O. Box 2000, South Hackensack, New Jersey 07606. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Dassault Model Mystere-Falcon 900 series airplanes was published in the **Federal Register** on December 8, 2003 (68 FR 68299). That action proposed to require revising the Abnormal Procedures section of the airplane flight manual (AFM) to advise the flightcrew to avoid use of certain display modes during approaches. That action also proposed to require replacing certain symbol generators of the Electronic Flight Information System with modified symbol generators.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Explanation of Editorial Change

We have revised paragraph (a) of this final rule to specify that Temporary Change 86 to the Mystere-Falcon 900 AFM is dated July 3, 2001. The date was inadvertently omitted from the proposed AD.

Conclusion

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

Cost Impact

We estimate that 93 airplanes of U.S. registry are affected by this AD.

It will take approximately 1 work hour per airplane to accomplish the required AFM revision, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of this action on U.S. operators is estimated to be $6,045, or $65 per airplane.

It will take approximately 1 work hour per airplane to accomplish the required replacement, at an average labor rate of $65 per work hour. Required parts will be provided by the parts manufacturer at no charge. Based on these figures, the cost impact of this action on U.S. operators is estimated to be $6,045, or $65 per airplane.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–05–15 Dassault Aviation: Amendment 39–13510. Docket 2001–NM–390–AD.

Applicability: Model Mystere-Falcon 900 series airplanes, certificated in any category; serial numbers (S/Ns) 1 through 168 inclusive, and 170 through 178 inclusive; equipped with an SPZ 8000 avionics system.

Compliance: Required as indicated, unless accomplished previously.

To prevent distraction of the flightcrew during a critical phase of flight due to certain Electronic Flight Information System (EFIS) displays flashing or going blank, which could result in loss of control of the airplane, accomplish the following:

Airplane Flight Manual Revision

(a) Within 30 days after the effective date of this AD, revise the Abnormal Procedures section of the Mystere-Falcon 900 Airplane Flight Manual (AFM) to include the information in Temporary Change (TC) No. 86, dated July 3, 2001. That TC advises the flightcrew that certain EFIS displays may blink or blank due to overload of certain symbol generators, and advises the flightcrew to avoid using certain display modes during approaches to decrease the load on the display processor. Operate the airplane per the limitations and procedures in the TC.

Note 1: The requirements of paragraph (a) may be done by inserting a copy of TC No. 86 in the AFM. When this TC has been included in general revisions of the AFM, the general revisions may be inserted in the AFM, and TC No. 86 may be removed from the AFM, provided the relevant information in the general revision is identical to that in TC No. 86.

Replacement of Symbol Generators

(b) Within 18 months after the effective date of this AD, do paragraphs (b)(1) and (b)(2) of this AD, per Dassault Service Bulletin F900–281, Revision 1, dated October 3, 2001, except that it is not necessary to complete the compliance card.

(1) Replace all SG–820 symbol generators having part numbers (P/Ns) 7007356–901 or –902, or P/Ns 7007356–903 or –904 without Honeywell Modification S; with symbol generators having a P/N and a Honeywell modification level listed in the "NEW P/N" column of the table under paragraph 3.A. of the service bulletin.

(2) Replace all MG–820 symbol generators having P/Ns 7009289–801 or –802, or P/Ns 7009289–803 or –804 without Honeywell Modification V, with symbol generators having a P/N and a Honeywell modification level listed in the "NEW P/N" column of the table under paragraph 3.B. of the service bulletin.

Parts Installation

(c) As of the effective date of this AD, no person may install a symbol generator having a P/N and a modification level listed in the "OLD P/N" column of the tables under paragraphs 3.A. and 3.B. of Dassault Service Bulletin F900–281, Revision 1, dated October 3, 2001.

Alternative Methods of Compliance

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

Incorporation by Reference

(e) The actions shall be done in accordance with Temporary Change (TC) No. 86, dated July 3, 2001, to the Mystere-Falcon 900 Airplane Flight Manual; and Dassault Service Bulletin F900–281, Revision 1, dated October 3, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Dassault Falcon Jet, P.O. Box 2000, South Hackensack, New Jersey 07606. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in French airworthiness directive 2001–466–033(B), dated October 3, 2001.

Effective Date

(f) This amendment becomes effective on April 13, 2004.

Issued in Renton, Washington, on February 25, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–4938 Filed 3–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–275–AD; Amendment 39–13513; AD 2004–05–18]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–90–30 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD–90–30 airplanes, that currently requires repetitive fluorescent penetrant and magnetic particle inspections to detect fatigue cracking of the main landing gear (MLG) piston, and repair if necessary. This amendment expands the applicability of the existing AD to require the currently required inspections, and corrective actions if necessary, on additional airplanes and MLG piston part numbers, and requires repetitive inspections for evidence of cracking in the paint topcoat of the MLG pistons. This amendment also requires replacement of certain MLG shock strut piston assemblies with new or serviceable improved assemblies, which terminates the requirements of this AD. The actions specified by this AD are intended to prevent fatigue cracking of MLG pistons, which could result in failure of the pistons, and consequent damage to the airplane structure and injury to flightcrew, passengers, or ground personnel. This action is intended to address the identified unsafe condition.

DATES: Effective April 13, 2004.

The incorporation by reference of Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001, as listed in the regulations, is approved by the Director of the Federal Register as of April 13, 2004.

The incorporation by reference of Boeing Service Bulletin MD90–32–031, Revision 01, dated April 25, 2001, as listed in the regulations, was approved previously by the Director of the Federal Register as of June 20, 2002 (67 FR 34823, May 16, 2002).

The incorporation by reference of certain other publications, as listed in the regulations, was approved previously by the Director of the Federal Register as of March 22, 2000 (65 FR 7719, February 16, 2000).

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carl Fountain, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5222; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2000–03–08, amendment 39–11567 (65 FR 7719, February 16, 2000), which is applicable to certain McDonnell Douglas Model MD–90–30 airplanes, was published in the **Federal Register** on October 14, 2003 (68 FR 59139). The action proposed to continue to require repetitive fluorescent penetrant and magnetic particle inspections to detect fatigue cracking of the main landing gear (MLG) piston, and repair if necessary. The action proposed to expand the applicability of the existing AD to require the currently required inspections, and corrective actions if

necessary, on additional airplanes and MLG piston part numbers, and to require repetitive inspections for evidence of cracking in the paint topcoat of the MLG pistons. The action also proposed to require replacement of certain MLG shock strut piston assemblies with new or serviceable improved assemblies, which would terminate the requirements of this AD.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 114 Model MD–90–30 airplanes of the affected design in the worldwide fleet.

In AD 2000–03–08, the FAA estimated that the actions in that AD applied to 15 airplanes of U.S. registry. The actions that are currently required by AD 2000–03–08 take approximately 2 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $1,950, or $130 per airplane, per inspection cycle.

We estimate that 21 airplanes of U.S. registry will be affected by this new AD.

The new inspections required in this AD action will take approximately 2 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the new requirements of this AD on U.S. operators is estimated to be $2,730, or $130 per airplane.

The replacement of MLG pistons included in this AD is already required by AD 2002–10–03. Therefore, this AD adds no new costs associated with that action. We restate the cost impact estimate in its entirety in this AD for the convenience of affected operators:

The replacement included in this AD action and currently required by AD 2002–10–03 takes approximately 28 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts cost approximately $263,438 per airplane. Based on these figures, the cost impact of this requirement on U.S. operators of airplanes subject to this AD is estimated to be $5,570,418, or $265,258 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions. The manufacturer may cover the cost of replacement parts associated with this AD, subject to warranty conditions. As a result, the costs attributable to the AD may be less than stated above.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by removing amendment 39–11567 (65 FR 7719, February 16, 2000), and by adding a new airworthiness directive (AD), amendment 39–13513, to read as follows:

2004–05–18 McDonnell Douglas: Amendment 39–13513. Docket 2001–NM–275–AD. Supersedes AD 2000–03–08, Amendment 39–11567.

Applicability: Model MD–90–30 airplanes listed in Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking of main landing gear (MLG) pistons, which could result in failure of the pistons, and consequent damage to the airplane structure and injury to flightcrew, passengers, or ground personnel; accomplish the following:

Restatement of Requirements of AD 2000–03–08

Inspection of MLG Piston Part Number 5935347–509

(a) For airplanes listed in McDonnell Douglas Service Bulletin MD90–32–012, Revision 01, dated June 2, 1998: For MLG pistons, part number (P/N) 5935347–509, perform fluorescent penetrant and magnetic particle inspections to detect fatigue cracking of the MLG pistons, in accordance with McDonnell Douglas Service Bulletin MD90–32–012, dated May 19, 1997, or Revision 01, dated June 2, 1998; or Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001; at the later of the times specified in paragraphs (a)(1) and (a)(2) of this AD. Repeat the inspections thereafter at intervals not to exceed 2,500 landings.

(1) Prior to the accumulation of 4,000 total landings; or

(2) Within 2,500 landings or 12 months after March 22, 2000 (the effective date of AD 2000–03–08, amendment 39–11567), whichever is first.

Inspection of MLG Piston Part Numbers 5935347–511 and –513

(b) For airplanes listed in McDonnell Douglas Service Bulletin MD90–32–012, Revision 01, dated June 2, 1998: For MLG pistons, P/Ns 5935347–511 and –513, within 5,000 landings after March 22, 2000, perform fluorescent penetrant and magnetic particle inspections to detect fatigue cracking of the MLG pistons, in accordance with McDonnell Douglas Service Bulletin MD90–32–012, dated May 19, 1997, or Revision 01, dated June 2, 1998; or Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001. Repeat the inspections thereafter at intervals not to exceed 5,000 landings.

Repair

(c) If any crack is found during any inspection required by paragraphs (a), (b), or (f) of this AD: Repair in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA. For a repair method to be approved by

the Manager, Los Angeles ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

New Requirements of This AD

No Requirement to Submit Information

(d) Although Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001, specifies to submit information to the manufacturer, this AD does not include such a requirement.

Clarification of Inspection Sequence

(e) For inspections accomplished after the effective date of this AD: Where this AD requires fluorescent penetrant and magnetic particle inspections, accomplishment of the fluorescent penetrant inspection must precede accomplishment of the magnetic particle inspection.

Inspection of MLG Piston P/Ns 5935347–1 through –509, –511, and –513; and SR09320081–3 through –13

(f) For any MLG piston having P/N 5935347–1 through –509, –511, or –513; or P/Ns SR09320081–3 through –13: Perform fluorescent penetrant and magnetic particle inspections to detect fatigue cracking of the MLG pistons, in accordance with Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001. Do the initial inspections at the later of the times specified in paragraphs (f)(1) and (f)(2) of this AD, except as provided by paragraph (g) of this AD. Repeat the inspections thereafter at intervals not to exceed 5,000 landings.

(1) Prior to the accumulation of 4,000 total landings; or

(2) Within 2,500 landings or 12 months after the effective date of this AD, whichever is first.

MLG Pistons Inspected Per Paragraph (a) or (b) of This AD

(g) MLG pistons having P/N 5935347–509, –511, or –513 that have been inspected as required by paragraph (a) or (b) of this AD, as applicable, are not required to be reinspected per paragraph (f) of this AD.

Repetitive Inspections for Evidence of Cracking and Follow-on Actions

(h) During the first brake change after the effective date of this AD, perform a general visual inspection to find evidence of cracking in the paint topcoat of the MLG piston, per the Accomplishment Instructions of Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001. Repeat this inspection during every brake change.

(1) If any evidence of cracking in the paint topcoat, as described in the service bulletin, is found: Within 7 days or 50 landings after the evidence is found, whichever is first, perform a non-destructive test (NDT) inspection of the MLG piston to determine if there is any cracking.

(2) If any crack is found during the NDT inspection required by paragraph (h)(1) of this AD, before further flight, repair per a method approved by the Manager, Los Angeles ACO. For a repair method to be approved by the Manager, Los Angeles ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

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

Inspections Accomplished Per Previous Issue of Service Bulletin

(i) Inspections accomplished before the effective date of this AD per McDonnell Douglas Service Bulletin MD90–32–012, Revision 02, dated June 29, 1999, are considered acceptable for compliance with the corresponding actions specified in this AD.

Replacement of MLG Shock Strut Piston Assemblies

(j) Before the accumulation of 30,000 total landings on the MLG shock strut piston assemblies, or within 5,000 landings after June 20, 2002 (the effective date of AD 2002–10–03, amendment 39–12749), whichever occurs later: Replace the MLG shock strut piston assemblies, left- and right-hand sides, with new or serviceable improved assemblies, per the Accomplishment Instructions of Boeing Service Bulletin MD90–32–031, Revision 01, dated April 25, 2001. If the MLG shock strut piston is not serialized or the number of landings on the piston cannot be conclusively determined, consider the total number of landings on the piston assembly to be equal to the total number of landings accumulated by the airplane with the highest total number of landings in the operator's fleet.

Note 2: Paragraph (a) of AD 2002–10–03, amendment 39–12749, requires the same actions as paragraph (j) of this AD.

Compliance With Requirements of Other ADs

(k) Accomplishment of the replacement required by paragraph (j) of this AD constitutes terminating action for the requirements of this AD and AD 2002–10–03, amendment 39–12749, for the Model MD–90–30 airplanes listed in Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001.

Alternative Methods of Compliance

(l)(1) In accordance with 14 CFR 39.19, the Manager, Los Angeles ACO, is authorized to approve alternative methods of compliance for this AD.

(2) Alternative methods of compliance, approved previously per AD 2000–03–08, amendment 39–11567, are approved as alternative methods of compliance with paragraphs (a), (b), and (c) of this AD.

Incorporation by Reference

(m) Unless otherwise specified in this AD, the actions must be done in accordance with McDonnell Douglas Service Bulletin MD90–32–012, dated May 19, 1997, or McDonnell Douglas Service Bulletin MD90–32–012, Revision 01, dated June 2, 1998; Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001; and Boeing Service Bulletin MD90–32–031, Revision 01, dated April 25, 2001; as applicable.

(1) The incorporation by reference of Boeing Service Bulletin MD90–32–012, Revision 03, dated June 29, 2001, is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Boeing Service Bulletin MD90–32–031, Revision 01, dated April 25, 2001, was approved previously by the Director of the Federal Register as of June 20, 2002 (67 FR 34823, May 16, 2002).

(3) The incorporation by reference of McDonnell Douglas Service Bulletin MD90–32–012, dated May 19, 1997; and McDonnell Douglas Service Bulletin MD90–32–012, Revision 01, dated June 2, 1998; was approved previously by the Director of the Federal Register as of March 22, 2000 (65 FR 7719, February 16, 2000).

(4) Copies may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(n) This amendment becomes effective on April 13, 2004.

Issued in Renton, Washington, on February 25, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–4923 Filed 3–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–49–AD; Amendment 39–13511; AD 2004–05–16]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767–200 and –300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD),

applicable to certain Boeing Model 767–200 and –300 series airplanes, that requires repetitive inspections of the aft pressure bulkhead web, and corrective action, if necessary. This action is necessary to detect and correct fatigue cracks in the aft pressure bulkhead web, which could result in uncontrolled rapid decompression. This action is intended to address the identified unsafe condition.

DATES: Effective April 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 13, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Suzanne Masterson, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6441; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Boeing Model 767–200, –300, and –300F series airplanes was published in the **Federal Register** on October 6, 2003 (68 FR 57639). That action proposed to require repetitive inspections of the aft pressure bulkhead web, and corrective action, if necessary.

Comments

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

Concur With Proposed AD

One commenter has reviewed the proposed AD and concurs with the proposed inspections and corrective action.

Add Provision for Flight Cycles With Cabin Differential Pressure Less Than 2.0 psi

One commenter requests that a provision be added allowing flight cycles to not be counted if cabin differential pressure was below 2.0 pounds per square inch (psi), provided that cabin pressure records be maintained for each airplane, and that no fleet averaging of cabin pressure is allowed. The commenter notes that there is a provision in Boeing Alert Service Bulletin 767–53A0087, dated October 21, 1999, which is the source of service information for this AD. In the "General Notes" of the Accomplishment Instructions of the service bulletin, paragraph 6. specifies that "flight-cycles, as defined herein, need not be counted if cabin differential pressure was below 2.0 psi."

We do not agree with the commenter's request to add a provision for flight cycles with cabin differential pressure less than 2.0 psi. Cabin differential pressure of 2.0 psi or less is not typical of normal operation of the affected airplanes. We do not consider it appropriate to include various provisions in an AD applicable to unique uses of an affected airplane. We have determined that mitigating factors, such as total number of low pressure cycles, could best be evaluated through requests for alternative methods of compliance, as provided by paragraph (e) of this AD. In addition, we have clarified paragraphs (a) and (b) of this AD by referring to the "Work Instructions" of the service bulletin instead of the "Accomplishment Instructions."

Change Effectivity and Revise Affected Models

One commenter requests the applicability be changed to line numbers 1 through 423 inclusive and that Model –300F series airplanes be removed from the list of affected models. The commenter states that AD 2003–18–10, amendment 39–13301 (68 FR 53503, September 11, 2003), mandates the current revision of Section 9 of the Maintenance Planning Data document, which contains inspection item number 53–80–I01A. Inspection item number 53–80–I01A is the same as the proposed actions for line numbers 424 and on. This would cause duplicate requirements for the same actions, causing confusion for operators as to what inspections to accomplish and how to comply with both ADs.

The FAA agrees with the commenter's request. For line numbers 424 and on, the Airworthiness Limitations for Boeing Model 767 series airplanes are currently in effect and AD 2003–18–10 adequately mandates the proposed inspections and corrective action. We have changed the applicability to line numbers 1 through 423 inclusive and removed Model –300F series airplanes from the list of affected models. Because of the new applicability, we also removed Group 3 and Group 4 from Table 1 of this AD, revised paragraph (b) of this AD, and changed the number of affected airplanes in the "Cost Impact" paragraph of the AD.

Conclusion

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

Cost Impact

There are approximately 406 airplanes of the affected design in the worldwide fleet. The FAA estimates that 182 airplanes of U.S. registry will be affected by this AD, that it will take approximately 14 work hours per airplane to accomplish the required inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $165,620, or $910 per airplane.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic

impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–05–16 Boeing: Amendment 39–13511. Docket 2003–NM–49–AD.

Applicability: Model 767–200 and –300 series airplanes, line numbers 1 through 423 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracks in the aft pressure bulkhead web, which could result in uncontrolled rapid decompression, accomplish the following:

Initial and Repetitive Inspections

(a) Do high frequency eddy current inspections of the aft pressure bulkhead web, per the Work Instructions of Boeing Alert Service Bulletin 767–53A0087, dated October 21, 1999; at the later of the applicable "Threshold" and "Grace Period" times specified in Table 1 of this AD. Table 1 is as follows:

TABLE 1.—COMPLIANCE TIMES FOR INSPECTION

For—	Compliance times—	
	Threshold—	Grace period—
(1) Group 1 airplanes as identified in the service bulletin.	Prior to the accumulation of 37,500 total flight cycles.	Within 18 months or within 3,000 flights after the effective date of this AD, whichever comes first
(2) Group 2 airplanes as identified in the service bulletin.	Prior to the accumulation of 50,000 total flight cycles.	Within 18 months or within 3,000 flights after the effective date of this AD, whichever comes first

(b) If no crack is found during any inspection required by paragraph (a) of this AD, repeat the high frequency eddy current inspections thereafter at intervals not to exceed 6,000 flight cycles, per the Work Instructions of Boeing Alert Service Bulletin 767–53A0087, dated October 21, 1999.

Corrective Actions

(c) If any crack is found during any inspection required by paragraph (a) or (b) of this AD and Boeing Alert Service Bulletin 767–53A0087, dated October 21, 1999, specifies to contact Boeing for repair: Before further flight, repair per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved, the approval must specifically reference this AD.

Previously Installed Repairs

(d) If previously installed repairs are installed in the inspection area, and Boeing Alert Service Bulletin 767–53A0087, dated October 21, 1999, specifies to contact Boeing for inspection details, an alternative method of compliance must be approved as required by sections 39.15, 39.17, and 39.19 of the Code of Federal Regulations (14 CFR 39.15, 39.17, 39.19).

Alternative Methods of Compliance

(e) In accordance with 14 CFR 39.19, the Manager, Seattle ACO, FAA, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(f) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 767–53A0087, dated October 21, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(g) This amendment becomes effective on April 13, 2004.

Issued in Renton, Washington, on February 25, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–4922 Filed 3–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–04–AD; Amendment 39–13491; AD 2004–04–10]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B2 and A300 B4 Series Airplanes; A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (Collectively Called A300–600); and A310 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Airbus Model A300 B2 and A300 B4 series airplanes; A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600); and A310 series airplanes. This AD requires, for certain airplanes, identifying the part number of the landing gear selector valves. For all airplanes, this AD requires repetitive maintenance tasks or operational tests of the landing gear selector valves, and replacing discrepant valves with certain new valves. This action is necessary to prevent failure of the landing gear selector valves, which could result in residual pressure on the retraction chamber side of the electro-hydraulic

selector, and consequent uncommanded retraction of the landing gear when the airplane is on the ground. This action is intended to address the identified unsafe condition.

DATES: Effective April 13, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 13, 2004.

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

FOR FURTHER INFORMATION CONTACT: Tom Groves, Aerospace Engineer; International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1503; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Airbus Model A300 B2 and A300 B4 series airplanes; A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600); and A310 series airplanes; was published in the **Federal Register** on December 22, 2003 (68 FR 71045). That action proposed to require, for certain airplanes, identifying the part number of the landing gear selector valves. For all airplanes, that action proposed to require repetitive maintenance tasks or operational tests of the landing gear selector valves, and replacing discrepant valves with certain new valves.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been submitted on the proposed AD or on the determination of the cost to the public.

Change to Proposed AD

We have slightly revised the description of Model A300–600 series airplanes in this final rule. The revised description more accurately reflects the listing on the type certificate data sheet and identifies the model/series as "A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600)" series airplanes.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD with the change described above.

Cost Impact

The following table provides the estimated costs to do the actions specified in this AD.

Model	Action	Work hours	Average hourly labor rate	Cost per airplane	Number of U.S. airplanes	Fleet cost
A300 B2 A300 B4	Part number identification	1	$65	$65	32	$2,080
	MPD task	1	65	65, per task cycle	32	2,080, per task cycle
	Operational test	1	65	65, per test cycle	32	2,080, per test cycle
A300–600	Operational test	1	65	65, per test cycle	89	5,785, per test cycle
A310	Operational test	1	65	65, per test cycle	47	3,055, per test cycle

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–04–10 Airbus: Amendment 39–13491. Docket 2002–NM–04–AD.

Applicability: All Airbus Model A300 B2 and A300 B4 series airplanes; A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600); and A310 series airplanes; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the landing gear selector valves, which could result in residual pressure on the retraction chamber side of the electro-hydraulic selector, and consequent uncommanded retraction of the landing gear when the airplane is on the ground, accomplish the following:

Part Number Identification

(a) For Model A300 B2 and A300 B4 series airplanes: Before the accumulation of 32,000 total flight cycles on the landing gear selector

valves, or within 600 flight hours after the effective date of this AD, whichever occurs later, do the actions required by paragraphs (a)(1) and (a)(2) of this AD.

(1) Inspect to determine whether any selector valve having part number (P/N) A25199–0–2 is installed.

(2) Replace any selector valve having P/N A25199–0–2 with a new selector valve having P/N A25199–0–3, in accordance with Airbus Service Bulletin A300–32–0438, Revision 01, dated November 20, 2001.

Operational Test

(b) For airplanes installed with selector valves having P/N A25199–0–3 only: Before the accumulation of 32,000 total flight cycles on the landing gear selector valves, or within 600 flight hours after the effective date of this AD, whichever occurs later, perform an operational test of the selector valves. Do the test in accordance with the Accomplishment Instructions of Airbus Service Bulletins A300–32–0438 (for Model A300 B2 and A300 B4 series airplanes), A300–32–6082 (for Model A300–600 series airplanes and Model A300 C4–605R Variant F airplanes), and A310–32–2118 (for Model A310 series airplanes); all Revision 01, dated November 20, 2001; as applicable. Before further flight, replace any valve that fails the operational test with a new valve having P/N A25199–0–3, in accordance with the applicable service bulletin.

Follow-on and Corrective Actions

(c) For Model A300 B2 and A300 B4 series airplanes that have not been modified in accordance with Airbus Modification 3083 (Airbus Service Bulletin A300–32–0269): Within 3,000 flight hours after the accumulation of 32,000 total flight cycles on the valve, or within 3,000 flight hours after performing the operational test required by paragraph (b) of this AD, whichever occurs later, do task 323112–0503–2 of the Airbus A300 Maintenance Planning Document (MPD). Repeat the MPD task thereafter at intervals not to exceed 3,000 flight hours.

(d) For Model A300 B2 and A300 B4 series airplanes that have been modified in accordance with Airbus Modification 3083 (Airbus Service Bulletin A300–32–0269), and for Model A300–600 and A310 series airplanes and Model A300 C4–605R Variant F airplanes: Repeat the operational test specified in paragraph (b) of this AD at the later of the times specified by paragraphs (d)(1) and (d)(2) of this AD. Thereafter, repeat the test at intervals not to exceed 18 months or 2,800 flight cycles, whichever occurs first.

(1) Within 18 months or 2,800 flight cycles, whichever occurs first, after the accumulation of 32,000 total flight cycles on the valve.

(2) Within 18 months or 2,800 flight cycles, whichever occurs first, after performing the initial operational test required by paragraph (b) of this AD.

Alternative Methods of Compliance

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

Incorporation by Reference

(f) Unless otherwise specified in this AD, the actions must be done in accordance with Airbus Service Bulletin A300–32–0438, Revision 01, including Appendix 01, dated November 20, 2001; Airbus Service Bulletin A300–32–6082, Revision 01, including Appendix 01, dated November 20, 2001; and Airbus Service Bulletin A310–32–2118, Revision 01, including Appendix 01, dated November 20, 2001; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 1: The subject of this AD is addressed in French airworthiness directive 2001–603(B), dated December 12, 2001.

Effective Date

(g) This amendment becomes effective on April 13, 2004.

Issued in Renton, Washington, on February 27, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–4921 Filed 3–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–03–AD; Amendment 39–13514; AD 2004–05–19]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, –700C, –800, and –900 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to all Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. This action requires an inspection of the rear spar attach pins and front spar attach bolts that attach the horizontal stabilizers to the horizontal stabilizer center section for damage; and follow-on or corrective actions, as applicable. This action is necessary to detect and correct damaged rear spar attach pins or front spar attach bolts, which may lead to failure of the bolts or pins, and consequent loss of the stabilizer and loss of controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective March 24, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of March 24, 2004.

Comments for inclusion in the Rules Docket must be received on or before May 10, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2004–NM–03–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2004–NM–03–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6440; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: The FAA has received numerous reports indicating that, during incorporation of Boeing Service Bulletin 737–55–1074, damaged rear spar attach pins and front spar attach bolts that attach the horizontal stabilizers to the horizontal stabilizer center section were found on Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. The damaged bolts and pins have premature wear, corrosion, pitting, and galling. Such damaged rear spar attach pins or front spar attach bolts, if not corrected, may lead to failure of the bolts or pins, which could result in loss of the

stabilizer and consequent loss of controllability of the airplane.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Service Bulletin 737–55–1086, dated December 11, 2003. The service bulletin describes procedures for an initial detailed inspection of the rear spar attach pins and front spar attach bolts that attach the horizontal stabilizers to the horizontal stabilizer center section for damage (*e.g.*, pitting, corrosion, no plating (pins only), galling (bolts only), or wear); and follow-on or corrective actions, as applicable. The follow-on actions include repetitive detailed inspections. The corrective actions include repair of any damaged part; replacement of any damaged pin and/or bolt with a new one; and a detailed inspection of a stripped pin for pitting, corrosion, or galling.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD requires accomplishment of the actions specified in the service bulletin described previously.

Interim Action

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

Determination of Rule's Effective Date

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

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

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2004–NM–03–AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–05–19 Boeing: Amendment 39–13514. Docket 2004–NM–03–AD.

Applicability: All Model 737–600, –700, –700C, –800, and –900 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct damaged rear spar attach pins or front spar attach bolts, which may lead to failure of the bolts or pins, and consequent loss of the stabilizer and loss of controllability of the airplane, accomplish the following:

Initial Inspection

(a) Do a detailed inspection of the rear spar attach pins and front spar attach bolts that attach the horizontal stabilizers to the horizontal stabilizer center section for damage (*e.g.*, pitting, corrosion, no plating (pins only), galling (bolts only), or wear), per the Accomplishment Instructions of Boeing Service Bulletin 737–55–1086, dated December 11, 2003. The inspection must be done at the later of the times specified in the threshold and applicable grace period columns in Table 1 of this AD.

TABLE 1.—INITIAL COMPLIANCE TIME

Threshold	Grace period
Prior to the accumulation of 15,000 total flight cycles or 60 months since the date of issuance of the original Airworthiness Certificate or the date of issuance of the Export Certificate of Airworthiness, whichever occurs first.	For airplanes on which Boeing Service Bulletin 737–55–1074, dated August 15, 2002, has not been done as of the effective date of this AD: Within 90 days after the effective date of this AD.

TABLE 1.—INITIAL COMPLIANCE TIME—Continued

Threshold	Grace period
	For airplanes on which Boeing Service Bulletin 737–55–1074, dated August 15, 2002, has been done as of the effective date of this AD: Within 24 months or 6,000 flight cycles since accomplishment of the service bulletin.

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

Not Damaged and Not A Replaced or Repaired Pin or Bolt: Repetitive Inspections

(b) If no damaged rear spar attach pin or front spar attach bolt is found during any detailed inspection required by paragraph (a) of this AD, and if that pin or bolt has not been replaced per paragraph (c) of this AD or repaired per Boeing Service Bulletin 737–55–1086, dated December 11, 2003, repeat the detailed inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 9,000 flight cycles or 36 months, whichever occurs first, for that pin or bolt only.

Damaged Pin or Bolt: Corrective Actions

(c) If any damaged rear spar attach pin or front spar attach bolt is found during any inspection required by this AD, before further flight, accomplish applicable corrective actions (*e.g.*, repair; replacement of pin and/or bolt with a new one; and detailed inspection of a stripped pin for pitting, corrosion, or galling) per the Accomplishment Instructions of Boeing Service Bulletin 737–55–1086, dated December 11, 2003.

Replaced or Repaired Pin or Bolt: Repetitive Inspections

(d) If any rear spar attach pin or front spar attach bolt has been replaced with a new part per paragraph (c) of this AD, repeat the detailed inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 15,000 flight cycles or 60 months, whichever occurs first, for the replaced pin or bolt only.

(e) If any rear spar attach pin or front spar attach bolt has been repaired per paragraph (c) of this AD, repeat the detailed inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 9,000 flight cycles or 36 months, whichever occurs first, for the replaced pin or bolt only.

Alternative Methods of Compliance

(f)(1) In accordance with 14 CFR 39.19, the Manager, Seattle ACO, FAA, is authorized to approve alternative methods of compliance (AMOCs) for this AD.

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

Incorporation by Reference

(g) The actions shall be done in accordance with Boeing Service Bulletin 737–55–1086, dated December 11, 2003. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(h) This amendment becomes effective on March 24, 2004.

Issued in Renton, Washington, on February 25, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–4898 Filed 3–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket No. FEMA–D–7553]

Changes in Flood Elevation Determinations

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

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect prior to this determination for each listed community.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Director reconsider the changes. The modified elevations may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based upon knowledge of changed conditions, or upon new scientific or technical data.

The modifications are made pursuant to Section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State or regional entities.

The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act

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

Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification

This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as shown below:

State and county	Location	Dates and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	community number
Alabama: Houston	City of Dothan	Jan. 28, 2004, Feb. 4, 2004, The Dothan Eagle.	The Honorable Chester L. Sowell, III, Mayor of the City of Dothan, P.O. Box 2128, Dothan, Alabama 36302.	May 5, 2004	010404 E
Florida:					
Orange	Unincorporated Areas.	Jan. 28, 2004, Feb. 4, 2004, The Orlando Sentinel.	Dr. M. Krishnamurthy, P.E., Manager of the Orange County Stormwater Management Division, 4200 South John Young Parkway, Orlando, Florida 32839.	May 5, 2004	120179 E
Walton	Unincorporated Areas.	Jan. 1, 2004, Jan. 8, 2004, Defuniak Springs Herald-Breeze.	Mr. Larry Jones, Chairman of the Walton County Board of Commissioners, P.O. Drawer 1355, Defuniak Springs, Florida 32435.	April 8, 2004	120317 F
Maryland: Howard	Unincorporated Areas.	Jan. 15, 2004, Jan. 22, 2004, The Howard County Times.	Mr. James N. Robey, Howard County Executive, 3430 Courthouse Drive, Ellicott City, Maryland 21043.	April 22, 2004	240044 B
Mississippi: DeSoto.	City of Southaven	Jan. 1, 2004, Jan. 8, 2004, The DeSoto County Tribune.	The Honorable Charles G. Davis, Mayor of the City of Southaven, 8710 Northwest Drive, Southaven, Mississippi 38671.	April 8, 2004	280331 F
Pennsylvania: Lehigh.	Township of South Whitehall.	Feb. 9, 2004, Feb. 16, 2004, The Morning Call.	Mr. Gerald Gasda, Township of South Whitehall Manager, 4444 Walbert Avenue, Allentown, Pennsylvania 18104.	Jan. 28, 2004	420593 D
Puerto Rico	Commonwealth ..	Jan. 20, 2004, Jan. 27, 2004, The San Juan Star.	The Honorable Sila M. Calderon, Government of the Commonwealth of Puerto Rico, Office of the Governor, P.O. Box 9020082, San Juan, Puerto Rico 00902–0082.	April 27, 2004	720000 C

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Dated: March 3, 2004.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 04–5244 Filed 3–8–04; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

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

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being

already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

EFFECTIVE DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: FEMA makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate, has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67.

The Agency has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act

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

Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification

This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for Part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) ♦ Elevation in feet (BCD)
MARYLAND	
Baltimore County (Unincorporated Areas) (FEMA Docket No. D–7578)	
Herbert Run:	
Approximately 350 feet upstream of confluence with Patapsco River	♦ 25
At confluence of East and West Branch Herbert Run	♦ 39
Baltimore County (Unincorporated Areas)	
East Branch Herbert Run:	
At confluence with Herbert Run	♦ 39
Approximately 850 feet upstream of Wilkens Avenue	♦ 159
Baltimore County (Unincorporated Areas)	
West Branch Herbert Run:	
At confluence with Herbert Run	♦ 39
Approximately 0.64 mile upstream of Sulphur Spring Road	♦ 119
Baltimore County (Unincorporated Areas)	
Arbutus Run:	
At confluence with East Branch Herbert Run	♦ 79
Just downstream of Interstate 695	♦ 131
Baltimore County (Unincorporated Areas)	
Baltimore County (Unincorporated Areas)	
Maps available for inspection at the Baltimore County Office Building, Room 307, 111 West Chesapeake Avenue, Towson, Maryland.	
PENNSYLVANIA	
Lycoming County (FEMA Docket Nos. D–7562 and D–7574)	
Dougherty Run:	
At the confluence with Lycoming Creek	*644
Approximately 185 feet upstream of confluence with Lycoming Creek	*644
Township of Lewis	
Grays Run:	
At the confluence with Lycoming Creek	*719
Approximately 5 feet upstream of the abandoned railroad bridge	*719
Township of Lewis	
Gregs Run:	
Approximately 523 feet upstream of the confluence with Sugar Run	*560
Approximately 75 feet downstream of Gregs Run Road (Township Route 270)	*574
Township of Wolf	
Mill Creek No. 2:	
Approximately 150 feet upstream of State Route 87	*543
Approximately 1,750 feet upstream of State Route 87	*549
Township of Fairfield	
Hoagland Run:	
At the confluence with Lycoming Creek	*603
Approximately 1,250 feet upstream of confluence with Lycoming Creek	*603
Township of Lycoming	
Little Muncy Creek:	
At the confluence with Muncy Creek	*512
Approximately 1.1 miles upstream of Tome Road	*712

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) ♦ Elevation in feet (BCD)
Townships of Franklin and Muncy Creek	
Loyalsock Creek:	
Approximately 30 feet upstream of CONRAIL	*524
Approximately 0.56 mile upstream of Dunwoody Road	*747
Townships of Gamble, Eldred, Fairfield, Montoursville, Loyalsock and Upper Fairfield, Borough of Montoursville	
Lycoming Creek:	
At upstream side of Memorial Avenue	*534
Approximately 100 feet downstream of County boundary	*644
Townships of Hepburn, Lewis, Loyalsock, Lycoming, McIntyre, McNette and Old Lycoming, City of Williamsport	
Mill Creek No. 1:	
At the confluence with Lycoming Creek	*576
Approximately 1,100 feet upstream of confluence with Lycoming Creek	*576
Township of Hepburn	
Mosquito Creek:	
Approximately 25 feet downstream of Edgewood Avenue	*568
Approximately 300 feet upstream of Edgewood Avenue	*574
Borough of Duboistown	
Muncy Creek:	
At the confluence with West Branch Susquehanna River	*505
Approximately 1.6 miles upstream of Boston Road	*680
Townships of Muncy Creek, Penn, Shrewsbury, and Wolf, Boroughs of Hughesville and Picture Rocks	
Rock Run:	
At the confluence with Lycoming Creek	*849
Approximately 600 feet upstream of the confluence with Lycoming Creek	*849
Township of McIntyre	
Shoemaker Run:	
At the confluence with Lycoming Creek	*740
At Bodines Road	*740
Township of Lewis	
Stroehmann Overland Flow:	
At the confluence with Lycoming Creek	*568
Approximately 325 feet upstream of Pleasant Hill Road	*584
Townships of Lycoming and Old Lycoming	
Sugar Run:	
At the confluence with Muncy Creek	*542
Approximately 125 feet downstream of confluence of Gregs Run	*559
Township of Wolf	
Trout Run:	
At the confluence with Lycoming Creek	*674
Approximately 425 feet downstream of State Route 14	*674
Township of Lewis	
Wallis Run:	
At the confluence with Loyalsock Creek	*635
Approximately 3.6 miles upstream of Wallis Run Road	*639
Townships of Gamble and Cascade	
Wolf Run No. 1:	
Approximately 1,710 feet upstream of John Brady Drive	*505
Approximately 1,760 feet upstream of John Brady Drive	*505
Township of Muncy	
Wolf Run No. 2:	
At the confluence with Lycoming Creek	*657
Approximately 15 feet downstream of abandoned railroad bridge	*663
Township of Lewis	
Pine Creek:	
Approximately 1.66 miles upstream of confluence with West Branch Susquehanna River	*554
Approximately 1,950 feet upstream of State Route 44	*628
Townships of Cummings, Porter, and Watson	
Nichols Run:	
At the confluence with Pine Creek	*555
Approximately 1,510 feet upstream of Algonquin Trail	*557
Township of Porter, Borough of Jersey Shore	
Little Pine Creek:	
At the confluence with Pine Creek	*622
Approximately 2,450 feet upstream of confluence with Pine Creek	*622
Township of Cummings	
Township of Cascade	
Maps available for inspection at the Cascade Township Office, 33 Kelly Road, Trout Run, Pennsylvania.	
Township of Cummings	
Maps available for inspection at the Cummings Township Office, 10978 North Route 44 Highway, Waterville, Pennsylvania.	
Borough of Duboistown	
Maps available for inspection at the Duboistown Borough Office, 2651 Euclid Avenue, Duboistown, Pennsylvania.	
Township of Eldred	
Maps available for inspection at the Eldred Township Fire Department, 5556 Warrensville Road, Montoursville, Pennsylvania.	
Township of Fairfield	
Maps available for inspection at the Fairfield Township Office, 238 Fairfield Church Road, Montoursville, Pennsylvania.	
Township of Franklin	
Maps available for inspection at the Franklin Township Office, 61 School Lane, Lairdsville, Pennsylvania.	
Township of Gamble	
Maps available for inspection at the Gamble Township Office, 7670 Wallis Run Road, Trout Run, Pennsylvania.	
Township of Hepburn	
Maps available for inspection at the Hepburn Township Office, 615 Route 973 East, Cogan Station, Pennsylvania.	
Borough of Hughesville	
Maps available for inspection at the Hughesville Borough Office, 147 South Fifth Street, Hughesville, Pennsylvania.	
Borough of Jersey Shore	
Maps available for inspection at the Jersey Shore Borough Office, 232 Smith Street, Jersey Shore, Pennsylvania.	
Township of Lewis	
Maps available for inspection at the Lewis Township Office, 69 Main Street, Trout Run, Pennsylvania.	
Township of Loyalsock	
Maps available for inspection at the Loyalsock Township Building, 2501 East Third Street, Williamsport, Pennsylvania.	
Township of Lycoming	
Maps available for inspection at the Lycoming Township Office, 328 Dauber Road, Cogan Station, Pennsylvania.	
Township of McIntyre	
Maps available for inspection at the McIntyre Township Office, 47 Thompson Street, Roaring Branch, Pennsylvania.	
Township of McNett	
Maps available for inspection at the McNett Township Office, 385 Yorktown Road, Roaring Branch, Pennsylvania.	

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD) • Elevation in feet (NAVD) ♦ Elevation in feet (BCD)
Borough of Montoursville	
Maps available for inspection at the Montoursville Borough Office, 617 North Loyalsock Avenue, Montoursville, Pennsylvania.	
Township of Muncy	
Maps available for inspection at the Muncy Township Office, 1922 Pond Road, Pennsdale, Pennsylvania.	
Township of Muncy Creek	
Maps available for inspection at the Muncy Creek Township Office, 575 Route 442 Highway, Muncy, Pennsylvania.	
Township of Old Lycoming	
Maps available for inspection at the Old Lycoming Township Office, 1951 Green Avenue, Williamsport, Pennsylvania.	
Township of Penn	
Maps available for inspection at the Penn Township Office, 4600 Beaver Lake Road, Hughesville, Pennsylvania.	
Borough of Picture Rocks	
Maps available for inspection at the Picture Rocks Borough Office, 113 Main Street, Picture Rocks, Pennsylvania.	
Township of Plunketts Creek	
Maps available for inspection at the Plunketts Creek Township Office, 179 Dunwoody Road, Williamsport, Pennsylvania.	
Township of Porter	
Maps available for inspection at the Porter Township Office, 5 Shaffer Lane, Jersey Shore, Pennsylvania.	
Township of Shrewsbury	
Maps available for inspection at the Shrewsbury Township Office, 143 Point Bethel Road, Hughesville, Pennsylvania.	
Township of Upper Fairfield	
Maps available for inspection at the Upper Fairfield Township Building, 4090 Route 87 Highway, Montoursville, Pennsylvania.	
Township of Watson	
Maps available for inspection at the Watson Township Office, 1710 Ridge Road, Jersey Shore, Pennsylvania.	
City of Williamsport	
Maps available for inspection at the Williamsport City Office, 245 West Fourth Street, Williamsport, Pennsylvania.	
Township of Wolf	
Maps available for inspection at the Wolf Township Office, 695 Route 405 Highway, Hughesville, Pennsylvania.	

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: March 3, 2004.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 04–5246 Filed 3–8–04; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

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

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

EFFECTIVE DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: FEMA makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate, has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67.

The Agency has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act

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

Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification

This final rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for Part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)
VIRGINIA	
Falls Church (Independent City) (FEMA Docket No. D–7580)	
Poplar Drive Bypass:	
At confluence with Tripps Run	*337
At upstream corporate limits	*343
Tripps Run:	
Approximately 100 feet downstream of U.S. Route 29	*280
Approximately 50 feet upstream of the upstream corporate limits	*339
Maps available for inspection at the City of Falls Church Department of Environmental Services, 300 Park Avenue, Falls Church, Virginia	

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Dated: March 3, 2004.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 04–5247 Filed 3–8–04; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2003–17140]

RIN 2127–AI88

Federal Motor Vehicle Safety Standards; Child Restraint Systems

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: In response to a petition from a child restraint manufacturer, the agency issued an interim final rule published on October 22, 2002, and amended on November 28, 2003, adopting a temporary provision permitting the manufacture of harnesses for use on a school bus that attach to a school bus seat back. Harnesses and other types of child restraints are otherwise generally prohibited by the standard from having any means designed for attaching the system to a vehicle seat back. The provision is set to terminate on September 1, 2004.

This final rule eliminates the termination date for that provision, thus extending indefinitely the permission for manufacture of the harnesses. The harnesses must bear a warning label informing users that the harness must be used only on school bus seats, and that the entire seat directly behind the child wearing the seat-mounted harness must be either unoccupied or occupied by restrained passengers.

DATES: *Effective Date:* The amendments made in this rule are effective on September 1, 2004. *Petitions:* Petitions for reconsideration must be received by April 23, 2004.

ADDRESSES: Petitions for reconsideration, identified by DOT DMS docket number of this notice, should be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: The following persons at the National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, DC, 20590:

For technical issues: Mr. Tewabe Asebe, Office of Rulemaking, NVS–113, telephone (202) 366–2365, facsimile (202) 493–2739.

For legal issues: Mr. Christopher Calamita, Office of Chief Counsel, NCC–112, telephone (202) 366–2992, facsimile (202) 366–3820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Background
III. Public Comments
IV. Response to Comments
V. Final Rule
VI. Rulemaking Analysis and Notices

I. Introduction

This document permanently adopts the interim amendments to Federal Motor Vehicle Safety Standard (FMVSS) No. 213, *Child restraint systems* (49 CFR 571.213), which excluded properly labeled harnesses manufactured for use on school bus seats from the prohibition in that standard against child restraints that are designed to attach to a vehicle seat back. A harness restraint system consists primarily of flexible material, such as straps, webbing or similar material, and that does not include a rigid seating structure for the child.

(FMVSS No. 213 uses the term "harness" in specifying requirements for this type of child restraint system. We consider the terms "vest" and "harness" to be interchangeable. However, in this preamble we use the term "harness" to maintain consistency with the regulatory language. However, we re-emphasize our belief that the terms are synonymous.)

II. Background

On October 22, 2002, NHTSA published an interim final rule to permit the temporary manufacture of harnesses designed to attach to school bus seats. (67 FR 64818; Interim Rule). The Interim Rule was adopted to facilitate the transportation of preschool and special needs children and to relieve the restriction imposed by FMVSS No. 213 for the new school year.

The Interim Rule responded to a petition for rulemaking from Constance S. Murray (Petitioner), president of E-Z-On Products, Inc. (E-Z-On), requesting that NHTSA amend the prohibition against seat-mounted harnesses in S5.3.1 of FMVSS No. 213 in order to allow their manufacture and sale for use in school buses. S5.3.1 provides:

> (e)xcept for components designed to attach to a child restraint anchorage system, each add-on child restraint system shall not have any means designed for attaching the system to a vehicle seat cushion or vehicle seat back and any component (except belts) that is designed to be inserted between the vehicle seat cushion and vehicle seat back.

The petition was submitted in response to an agency interpretation letter in which we determined that a product with straps that "wrap the seat back and are independent of the seat belt" was subject to FMVSS No. 213 and

that such a product did not meet the standard's prohibition against child restraints that attach to the vehicle seat back.[1] Petitioner submitted documentation of the current usage of seat-mounted harnesses in school buses along with accounts of crashes in which a seat-mounted harness was used and that there were no injuries reported or described. Subsequent to NHTSA's receipt of the petition, a number of pupil transporters wrote identical "petitions" to NHTSA in support of the E–Z-On petition.

The Interim Rule amended FMVSS No. 213 to exclude harnesses manufactured and sold for use on school bus seats from the prohibition in S5.3.1, thereby permitting the manufacture and sale of seat-mounted harnesses for pupil and Head Start transportation. NHTSA stated that it believed that permitting the manufacture and sale of seat-mounted harnesses for use on school buses would enhance the safe transportation of preschool and special needs children, provided that certain conditions were met to ensure that the seat back would not be overloaded in a collision and subject to failure. To prevent such failure, the entire seat directly rearward of a child restrained in a seat-mounted harness must remain vacant or occupied by restrained passengers. Under the Interim Rule, the agency required that harnesses manufactured on or after February 1, 2003, must bear a permanent warning label, set forth in Figure 12 of the standard, in order to be excluded. The label must be placed on the part of the restraint that attaches the harness to the vehicle seat back, and must be visible when the harness is installed. It must contain a pictogram and the following statement: "**WARNING**! This restraint must only be used on school bus seats. Entire seat directly behind must be unoccupied or have restrained occupants."

The label must state that the restraint is manufactured for use only on "school bus seats" rather than on "school buses." The reference in the Interim Rule to "school bus seats" accommodates the possible use of seat-mounted harnesses on alternate vehicles, as defined by the Department of Health and Human Services final rule published on January 18, 2001, which are not school buses, but which have school bus seats (66 FR 5296). A school bus seat is a seat in a vehicle that meets FMVSS No. 222, *School bus seating and crash protection* (49 CFR § 571.222).

The Interim Rule also added a definition of "harness" to the standard. The definition of a harness is "a combination pelvic and upper torso child restraint system that consists primarily of flexible material, such as straps, webbing or similar material, and that does not include a rigid seating structure for the child." As noted previously, we consider the term "harness," to be interchangeable with the term "vest," which is commonly used to describe seat-mounted restraints.

The Interim Rule made several other amendments to FMVSS No. 213 relating to the exclusion. It amended S5.3.2 and an accompanying table specifying the means of attachment by which a harness must be capable of meeting the requirements of FMVSS No. 213. The table in S5.3.2 was modified to provide that harnesses designed for use on school bus seats must be capable of meeting the requirements when attached to the seat back by a seat mount. The Interim Rule also amended the table to S5.1.3.1(a) of the standard, which specifies the head and knee excursion requirements that add-on forward-facing child restraints must meet.

In addition, the dynamic test procedures of the standard were amended to specify procedures for testing seat-mounted harnesses. Up to that time, the procedures had reflected attachment of add-on child restraints by a lap belt, lap belt and tether, lap and shoulder belt, and child restraint anchorage system. Seat-mounted harnesses are not attached by those means. Accordingly, S6.1.2(a)(1)(i)(A) and S6.1.2(d)(1)(ii) were revised to include specifications appropriate for the manner in which seat-mounted harnesses are attached.

NHTSA determined that it was in the public interest to make the changes effective immediately on an interim basis until December 1, 2003. We also requested comments on the Interim Rule and on whether to amend the standard permanently. The termination date was subsequently extended until September 1, 2004. (68 FR 66741; November 28, 2003.)

III. Public Comments

The agency received 100 comments on the Interim Rule, including comments from state departments of education, school transportation associations, public and independent school districts, school bus transportation facilities, school bus operators, Head Start programs, individuals employed in the pupil transportation industry, physical therapists, child restraint manufacturers, the University of Michigan Transportation Research Institute (UMTRI), the American Academy of Pediatrics, and a certified child passenger safety technician. A large majority of the 100 commenters supported adopting a permanent exclusion for harnesses manufactured and sold for use on school bus seats from the prohibition against such a design.

While there was general support for the interim rule becoming permanent, some commenters raised concerns regarding the warning label text and placement. They were particularly concerned with the requirement for the label to contain the following statement: "Entire seat directly behind must be unoccupied or have restrained occupants." Comments were also received on the use of the harnesses on non-lap-belt ready school bus seats and on the specific test conditions of the standard.

Ten comments were received in opposition to extending the exception adopted in the Interim Rule. Several of these comments raised issues not related to the design or use of the harness, such as excessive vehicle speed and school bus driver fatigue, and as such were beyond the scope of the rulemaking. The relevant opposing comments cited concerns about the effects of harness use on evacuation, use difficulties (*e.g.*, children pulling on excess webbing and unwillingness of students to remain restrained), and the potential for false charges of sexual abuse arising from school bus operators securing the harness crotch straps.

A. Warning Label—Seating Configuration

Several commenters objected to or had concerns about the labeling requirement as adopted in the Interim Rule. James Fey, North Florida Child Development, Inc., Montgomery County Schools Department of Transportation, Earl Henry, and Robin Melton stated that because the warning directs that the seat behind the harness-restrained child remain vacant or contain a restrained individual, more buses would be required to transport the same number of children. Montgomery County Schools Department of Transportation also commented that, in the past, there had not been any issue with

[1] See agency interpretation letter to Kathy Durkin (Hold Me Tight Products), August 31, 2001. In that letter NHTSA discussed S5.3.1. The letter explained that child restraints are prohibited from attaching to the vehicle seat back because they will load the seat back in a crash. The seat back might not be able to withstand the additional load applied to it by an attached, occupied child restraint. NHTSA concluded the letter by stating that child restraints that are designed to attach to a vehicle seat back do not meet S5.3.1.

unrestrained children sitting directly behind harness-restrained students.

Robin Melton asked that the agency consider a "size of child" stipulation for this warning, possibly amending the warning language to state that unrestrained students between the grades of kindergarten through second grade could be seated directly behind a safety harness-restrained child. Several commenters asked for clarification of the term "restrained passenger."

UMTRI commented that the warning requirement is based on the results of severe frontal impact test conditions that are unlikely to occur in the foreseeable future for school bus transportation. UMTRI argued that the warning not to place any unrestrained children behind safety harness-restrained children is inappropriate and unreasonable.

B. Warning Label—Required Language

UMTRI commented that the warning label should be changed from, "Warning! This restraint must only be used on school bus seats. * * *" to, "Warning! This restraint must only be used on school buses when installed by attaching to the seatback. * * *" UMTRI stated that the current language assumes that harnesses cannot be installed in a more conventional manner (one not requiring a seat-mount for attachment) that complies with the current FMVSS No. 213.

C. Other Warning Label Issues

Some commenters stated that the warning label should be placed on the "cam wrap" and not the harness. Peter J. Grandolfo, Chicago Public Schools, suggested that a warning label should also be placed in a conspicuous spot on the bus interior to advise personnel on the safe use of harnesses.

E–Z–On suggested that CRS manufacturers provide a similar warning concerning unrestrained occupants on rear-facing child systems that would be installed on school bus seats. E-Z-On stated that rear-facing seats required similar warning labels because "in a dynamic situation, infant seats are designed to move towards the seat back, while the back of a school bus seat is designed to flex forward." E-Z-On also suggested that currently used seat-mounts should have a warning label.

D. Lap-Belt-Ready School Buses

One commenter requested that the final rule distinguish between school bus seats and lap-belt-ready school bus seats. The commenter stated that because of additional forces placed on the school bus seat by a harness that attaches to a seat back, such a harness could only be used safely on a lap-belt-ready school bus seat.

E. Test Conditions

Q'Straint commented that the resultant acceleration limits at the location of the upper thorax be reviewed due to the difficulties in all harnesses meeting the requirement of S5.1(b) of FMVSS No. 213. Q'Straint also suggested utilizing a regular FMVSS No. 222 approved school bus seat for testing harnesses instead of the FMVSS No. 213 bench seat, stating that this would be more representative of real world usage.

E–Z–On commented that tightening the tension of the seat-mount strap to not less than 53.5 N and not more than 67 N, as required by the Interim Rule, could affect the dynamic performance resulting in failure. E-Z-On suggested that the range be expanded from 67 N to 132 N. Because installation instructions for the seat-mounted harness require the seat-mount strap be tightened as much as possible, E-Z-On argued that the 67 N minimum would be more representative of actual installation.

F. Emergency Evacuation and Use Difficulties

Three commenters raised concern with the potential impact of harness use on school bus evacuation time. Commenters raised the possibility that more time may be required to remove a child from a safety harness than from other types of child restraints. One commenter stated, "[W]e have timed a [sic] evacuation drill and it approximately takes the driver and aide 12 minutes to get all children unfasten [sic] and off [sic] bus to safety. We believe that is too long."

One of these commenters expressed concern about the potential for excess webbing to hang off the portion of the restraint that attaches to the seat back. She stated that other children could possibly pull on the excess webbing and injure the child secured in the harness. A different commenter expressed concern that children would choose not to stay in the restraints.

F. Use of Crotch Straps

One individual commented that the use of crotch straps on the harnesses might result in mistaken claims of sexual abuse against those individuals fastening children in the harnesses. This commenter was particularly concerned with children unable to fasten themselves and who required adult assistance. However, a separate individual stated that in practical use, this problem had not been encountered.

IV. Response to Comments

A majority of the commenters supported making no changes to the provisions adopted in the Interim Rule. Even among commenters who raised issues with specific portions of the rule, there was a general consensus that child restraint systems that attach to the seat back and are manufactured and sold for the exclusive use on school bus seats should be permitted.

A. Warning Label—Seating Configuration

The portion of the warning label stating that the seat directly behind the harness-restrained child should either remain unoccupied or be occupied only by restrained passengers attracted the most comments. Representatives from child transportation organizations, schools, and individuals were concerned that this warning would necessitate an increase in the number of school buses because of the loss of seating positions. UMTRI commented that this language was based on severe frontal impacts that are not representative of real world crashes.

The agency is adopting the warning language as it exists in the Interim Rule. This labeling requirement was based on data that showed an increase in the head injury criteria (HIC) values of a harness restrained HII–3-year-old test dummy (HII–3YO) seated in front of an unrestrained 50th percentile male test dummy. In testing, when unrestrained 50th percentile male test dummies were seated directly behind restrained HII–3YOs, the HIC values for three of the four HII–3YOs were above the limit set forth in S5.1.2 of FMVSS No. 213. The high HIC values were a result of overloading of the seat back during a frontal crash by unrestrained passengers seated behind it. This danger is magnified when a mix of special needs and pre-K to 12th grade students with varied weight distributions are transported on a single bus. As reflected in comments by Earl Henry and Mark E. Wagstaff, some Headstart programs coordinate transportation with the local school districts. This creates a potential for children of disparate sizes (pre-K and high school students) to be seated on the same bus. Also, as pointed out in comments from Terri Wontrobski, adult bus monitors might sit behind harness-restrained children. Seating a large, full grown unrestrained 12th grader directly behind a seat-mounted-harness-restrained pre-K student could result in forces on the seat back in a crash that would generate a HIC value above the allowable limit for the pre-K

student, potentially resulting in injuries to that pre-K student.

From some of the comments received, it appears that there is a misunderstanding as to the meaning of the warning. The warning does not direct that the seat directly behind the harness-restrained child remain empty. The warning states that this seat should remain unoccupied *or* occupied only by restrained passengers. As we have previously explained in the preamble to the Interim Rule and in a subsequent interpretation letter,[2] the term "restrained" refers to the use of any type of user appropriate vehicle restraint or child restraint system. This includes lap belts, lap and shoulder belts, booster seats, child seats, and harnesses.

Robin P. Melton asked the agency to establish a "child size" threshold for the warning. In general, we agree that an unrestrained 6-year-old seated directly behind a harness-restrained 3-year old child may not cause the severe injury measurements that might occur if an adult equal in size to the 50th percentile male sat behind the 3-year-old. However, the agency does not have the data or resources to determine a threshold weight limit below which it would be safe to place an unrestrained student directly and immediately behind a harness-restrained student. Even if the agency were able to determine such a threshold, it could confuse the warning and make it less effective. Further, a weight threshold could prove impractical to follow because such a warning would necessitate vehicle operators and caregivers determining the weight of each child being seated in the school bus seats.

UMTRI commented that the test procedures used to justify the warning language were not representative of crashes experienced by school buses. As stated in the preamble to the Interim Rule, the test conditions represented a 30 mile-per-hour (mph) small school bus crash with a vehicle of comparable mass traveling at the same speed. These crash conditions take into account the fact that harness-restrained children will be transported on small school buses and multifunction school activity buses.[3] So long as school children are transported in smaller vehicles with school bus seats, there is a likelihood for crash conditions similar to those used in our testing. The warning language reflects the agency's commitment to protect all students transported in all school buses, including those transported in small school buses.

NHTSA anticipates that any loss of seating space resulting from following the warning language will be negligible. We agree with comments submitted by Robert W. Markwardt, in which he states that seat loss can be minimized by optimizing seating patterns. By optimizing seating patterns, harnesses can be used while nearly maintaining the current occupant levels on school buses.

B. Warning Label—Required Language

The warning label limits the use of harnesses to school bus seats. UMTRI recommended that the warning language be amended to state, in part, "Warning! This restraint must only be used on school buses when installed by attaching to the seatback. * * * This change, UMTRI argues, would reflect that some safety harnesses might be able to be installed in a more conventional manner, and thus be used on vehicle seats other than school bus seats.

The current label language is intended to discourage the use of seat-mounted harnesses on non-school bus seats. FMVSS No. 222, School bus passenger seating and crash protection, imposes seat back strength requirements on school bus seats that seats for other types of vehicles are not required to meet. In a crash, a non-school bus seat back might not be able to withstand the additional load applied to it by an attached, occupied child restraint.

If a manufacturer designs a harness that either attaches to the seat back or to the seat belt assembly, the warning label would only be required on the portion of the harness that attaches to the seat back. For a restraint that could be installed in a more conventional manner as well as with the seat wrap, the label's prominence would be reduced when the restraint was installed by the more conventional means. Further, the current warning language helps ensure that use of harnesses is limited to their intended use on school bus seats.

C. Other Warning Label Issues

The warning labels are required to be placed on the part of the restraint that attaches the harness to the vehicle seat back and must be visible when installed. Comments were received requesting that the text of the warning require the label to be placed on the "seat-mount." The "seat-mount" is the part of the restraint that attaches the restraint to the seat back. However, not all manufacturers may use the term "seat-mount" (*e.g.*, the E-Z-On cam wrap). The rule language is written in general terms so as to be understood by all manufacturers.

Peter J. Grandolfo requested that the final rule require a warning label to be placed in the interior of school buses in order to educate transportation personnel. We agree with Mr. Grandolfo that it is important for all school bus operators to know about the safe uses of these harnesses. However, a label on every bus would serve no purpose in most situations, since the harnesses are not usually used in school buses. Accordingly, the agency is not mandating the label. If a State or individual district wanted to require such a label in its school buses, it may do so.

E-Z-On suggested that rear facing child seats used in school buses and all harness restraints currently in use be provided with similar warning labels. First, unlike a rear facing child seat, a harness restraint that attaches to the seat back of a school bus transfers the entire load of the occupant to the seat back. A rear facing child restraint attaches to the bus by means of a lap belt or LATCH and does not transfer a load to the seat back. The harness restraint thus presents a unique situation that NHTSA believes needs to be addressed by this label. Second, NHTSA does not have legal authority to mandate labels for seat mounts already in service. However, the agency believes that the label information is important for all seat mounted restraints and strongly encourages manufacturers to send labels voluntarily to owners of seat mounts that were manufactured prior to the label requirement.

D. Lap-Belt-Ready School Buses

This final rule makes no distinction between harness restraint use on lap-belt-ready school bus seats and school bus seats that are not lap-belt-ready. Bill Hanson from the Billings Montana Head Start program raised concern that school bus seats that are not lap-belt-ready may not be able to withstand the additional loading from the seat mount.

The agency is not aware of any problem with the real world usage of harnesses on non-seat-belt-ready seats. However, the agency is aware of seat failures during laboratory testing of harnesses with non-seat-belt-ready seats. Therefore, we continue to recommend the use of seat-belt-ready seats when transporting a child in any child restraint on a school bus. (*See* Guideline for the Safe Transportation of Pre-school Age Children in School Buses.) We note that some States already require that all child restraint

[2] See agency interpretation letter to Ms. Lori Crouzillat (E–Z–ON Products, Inc.), March 13, 2003.

[3] A multifunction school activity bus is defined as a school bus whose purposes do not include transporting students to and from home or school bus stops. 49 CFR 571.3(b). (68 FR 44892; July 31, 2003)

systems used in school buses must be used on seats that meet the requirements of FMVSS No. 210.

E. Test Conditions

S5.1.2(b) of FMVSS No. 213 requires that seat mounted harnesses:

> Limit the resultant acceleration at the location of the accelerometer mounted in the test dummy upper thorax as specified in part 572 to not more than 60 g's, except for intervals whose cumulative duration is not more than 3 milliseconds.

While Q'Straint stated that there might be a problem in meeting this requirement, it did not provide any data to support its claim. Our testing of school bus harnesses has not shown a problem meeting this requirement and we have no knowledge of such a problem from other sources. As such, this document does not amend this provision of the standard.

Q'Straint further suggested that that the testing procedure utilize an FMVSS No. 222 approved school bus seat. While use of a school bus seat may be more representative of real world usage, we are maintaining the use of an FMVSS No. 213 bench seat. Incorporating an FMVSS No. 222 school bus seat into the test procedure would require further testing to be performed and would need to be addressed through a separate rulemaking. At this time, we have no indication that the performance of the school bus harness would be different on an FMVSS No. 213 bench seat versus an FMVSS No. 222 school bus seat.

E–Z–On recommended changing the tightening tension requirements for testing the seat-mounted harnesses in order to replicate the tighter tensions recommended in the installation instructions. We are currently not aware of any data showing that the current tightening tension range negatively affects the performance of the restraint. Further, E–Z–On did not provide any data to support their request for a higher upper bound tightening range (67 N to 132 N). Therefore, we are not making revisions to the procedures as set forth in the Interim Rule.

Q'Straint requested a change to the table to S5.1.3.1(a) indicating the installation method by which a restraint must meet the applicable requirements. The commenter suggested that for a harness labeled per S5.3.1(b)(1) through S5.3.1(b)(3) and Figure 12, the figure should indicate seat back mount and child restraint anchorage system. FMVSS No. 213 does not require harnesses to be capable of attaching to a child restraint anchorage system (*see* S5.9(a)). Since the table specifies only the mandated methods of attachment, the change has not been made.

F. Emergency Evacuation and Use Difficulties.

The agency is aware that use of seat-mounted harnesses may increase evacuation time for school buses. Rhonda E. Smith commented that in an evacuation drill in which students were restrained in harnesses, the evacuation time was 12 minutes. However, Ms. Smith did not provide details of the drill, such as the number of children in the bus, number of adult monitors or aides, bus size, number of children restrained by harnesses, etc. We are unable to determine if this drill was representative of real world scenarios. Further, there has been no indication that evacuation time has been a problem for those buses using the seat-mounted harnesses. If emergency evacuation were to become a problem, it would be better addressed on a case-by-case basis by the school districts and school bus transportation industry. Plus, if evacuation time were to be determined a problem, harness usage could be supplemented with alternative devices for transporting special needs students and pre-K students that are recommended by the agency's "Guideline for the Safe Transportation of Pre-school Age Children in School Buses."

Ms. Smith and Amy Nelson also raised concerns about the potential for difficulties arising from the use of the harnesses. Ms. Smith argued that other children might pull on the excess webbing on the seat wrap and Ms. Nelson stated that children might choose not to remain restrained in the harnesses. The agency notes that commenters who have had experience in using the harness, including Wayne Clutter of the West Virginia Department of Education and Dee Jay Jennings of the Killeen Independent School District, did not cite such difficulties. Further, if such difficulties were to arise, other transportation options are available, such as forward facing child seats.

F. Use of Crotch Straps

Crotch straps prevent children from sliding forward in their seats, helping to prevent injuries in crash situations. Ms. Smith voiced concern that the process of caregivers restraining children with crotch straps may result in erroneous sexual abuse claims because of incidental contact with the child. In response to Ms. Smith's comment, Michelle Lupo commented that her staff has taught the children to get the crotch strap through their legs by themselves minimizing the need for staff to fasten the crotch straps and alleviating these types of concerns.

The December 2002 issue of *Transporting Students with Disabilities* (Volume 13) stated that crotch straps do not appear to be an issue with parents and school bus transportation service providers and recognized the benefits from using the crotch straps. The issue cited a court case in which a Federal district judge for the Eastern District of Pennsylvania ruled that a lawsuit could proceed against a school district and special care facility, in which a special needs student was strangled after apparently being improperly restrained in a four point harness (without a crotch strap). *See, Susavage* v. *Bucks County Schools Intermediate Unit No. 22*, 2002 U.S. Dist. Lexis 1274 (E.D. Pa. January 22, 2002).[4]

Based on the benefits of the crotch strap and its reported acceptance by parents, we are maintaining the crotch strap requirement in S5.4.3.4(b).

V. Final Rule

This final rule excludes harnesses manufactured and sold for use on school bus seats from the prohibition in FMVSS No. 213 against child restraints that mount to a vehicle seat back. The regulation as set forth in the October 2002 Interim Rule, which temporarily sanctioned the manufacture and sale of seat-mounted harnesses for pupil and Head Start transportation, is adopted indefinitely. The devices must bear a permanent warning label to be excluded. *See* Figure 12, *infra*. The label must be placed on the part of the restraint that attaches the harness to the vehicle seat back, and must be visible when the harness is installed. It must contain a pictogram and the following statements: "**WARNING!** This restraint must only be used on school bus seats. Entire seat directly behind must be unoccupied or have restrained occupants." The reference in today's rule to "school bus seats" accommodates the possible use of seat-mounted harnesses on multifunction school activity buses as defined in § 571.3(b) and alternate vehicles as defined by the Department of Health and Human Services. A school bus seat is a seat in a vehicle that meets FMVSS No. 222, "School Bus Seating and Crash Protection" (49 CFR 571.222).

To implement the exclusion, a definition of "harness" is added to the standard. The definition of a harness is

[4] It has been reported that the lawsuit was settled in favor of the student's parents for $3.6 million dollars. *See* Elliot Grossman, *Parties settle school bus strangulation case; disabled Quaker girl's death led districts to change policies*, Allentown Morning Call, August 19, 2003.

"a combination pelvic and upper torso child restraint system that consists primarily of flexible material, such as straps, webbing or similar material, and that does not include a rigid seating structure for the child." In developing the definition, we considered the definition of a Type 3 seat belt assembly that FMVSS No. 209 once had.[5] The definition was as follows: "a combination pelvic and upper torso restraint for persons weighing not more than 50 pounds or 23 kilograms and capable of sitting upright by themselves, that is children in the approximate range of 8 months to 6 years." As noted previously, we consider the term "harness," to be interchangeable with the term "vest," which is commonly used to describe seat-mounted restraints.

This rule also makes several other amendments to FMVSS No. 213 relating to the exclusion. The table to S5.1.3.1(a), which specifies the head and knee excursion requirements, is amended to include requirements for harnesses for use on school bus seats. The table to S5.3.2 is amended to indicate that harnesses labeled per S5.3.1(b)(1) through S5.3.1(b)(3) and Figure 12 must meet the relevant requirements of the standard when attached with a seat mount back.

In addition, the dynamic test procedures of the standard are amended to specify procedures for testing seat-mounted harnesses. The procedures had reflected attachment of add-on child restraints by a lap belt, lap belt and tether, lap and shoulder belt, and child restraint anchorage system. Seat-mounted harnesses are not attached by those means. Accordingly, S6.1.2(a)(1)(i)(A) and S6.1.2(d)(1)(ii) are revised to include specifications appropriate for the manner in which seat-mounted harnesses are attached.

This rule also amends FMVSS No. 213 by adding a requirement (S5.6.1.11) that the printed instructions accompanying these harnesses must include the warning statement: "WARNING! This restraint must only be used on school bus seats. Entire seat directly behind must be unoccupied or have restrained occupants." The purpose of this requirement is to increase the likelihood that the seat back will not be overloaded during a frontal crash by the forward movement of unrestrained passengers who were sitting in the seat immediately behind the child restrained in a harness. As explained above, the term "restrained" refers to the use of any type of user appropriate vehicle restraint or child restraint system. This includes lap belts, lap and shoulder belts, booster seats, child seats, and harnesses.

[5] The definition was removed in 1981, when the requirements for child harnesses were moved to Standard No. 213.

VI. Rulemaking Analysis and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rule under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under E.O. 12866, "Regulatory Planning and Review." This action has been determined to be "nonsignificant" under the Department of Transportation's regulatory policies and procedures. The agency concludes that the impacts of the amendments are so minimal that preparation of a full regulatory evaluation is not required. The rule will not impose any new requirements or costs on manufacturers, but instead will permit manufacturers to produce a type of harness if the harness bears a label regarding how the restraint should be used.

B. Regulatory Flexibility Act

NHTSA has considered the impacts of this rulemaking action under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). I certify that the amendment will not have a significant economic impact on a substantial number of small entities. The rule will not impose any new requirements or costs on manufacturers, but instead will permit manufacturers to produce a type of harness, a seated-mounted harness, if the harness bears a label regarding how the restraint should be used. We anticipate that the seat-mounted harnesses will be sold to school districts and to other pupil transportation providers. NHTSA has learned of the existence of two manufacturers, both of which are small businesses. The agency believes that this rule will not have a significant impact on these businesses. Adding a warning label to a harness strap will cost approximately eight cents per harness. Since the cost of the label is minimal, purchasers will not be substantially affected by the rule.

C. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. This document does not establish any new information collection requirements.

D. National Environmental Policy Act

NHTSA has analyzed this amendment for the purposes of the National Environmental Policy Act and determined that it will not have any significant impact on the quality of the human environment.

E. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation. NHTSA may also not issue a regulation with Federalism implications and that preempts State law unless the agency consults with State and local officials early in the process of developing the proposed regulation.

The agency has analyzed this rulemaking action in accordance with the principles and criteria contained in Executive Order 13132 and has determined that it does not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The rule will have no substantial effects on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials.

F. Executive Order 12778 (Civil Justice Reform)

This rule does not have any retroactive effect. Under section 49 U.S.C. 30103, whenever a Federal motor vehicle safety standard is in effect, a state may not adopt or maintain a safety standard applicable to the same aspect of performance which is not identical to the Federal standard, except to the extent that the state requirement

imposes a higher level of performance and applies only to vehicles procured for the State's use. Section 49 U.S.C. 30161 sets forth a procedure for judicial review of final rules establishing, amending or revoking Federal motor vehicle safety standards. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272) directs us to use voluntary consensus standards in regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the Society of Automotive Engineers (SAE). The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

The agency searched for, but did not find any voluntary consensus standards relevant to this final rule.

H. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal 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 more than $ 100 million in any one year (adjusted for inflation with base year of 1995). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires NHTSA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows NHTSA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted.

This final rule will not impose any unfunded mandates under the Unfunded Mandates Reform Act of 1995. This rule will not result in costs of $100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

I. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

J. 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.*

List of Subjects in 49 CFR Part 571

Motor vehicle safety, Reporting and recordkeeping requirement, Tires.

PART 571—[AMENDED]

■ In consideration of the foregoing, NHTSA amends 40 CFR part 571 as set forth below.

■ 1. The authority citation for Part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

■ 2. Section 571.213 is amended by:

■ (a) Amending S4 by adding, in alphabetical order, a definition of "harness";

■ (b) Revising the "Table to S5.1.3.1(a)—Add-On Forward-Facing Child Restraints", and revising S5.3.1 and S5.3.2 (including the table in S5.3.2);

■ (c) Adding S5.6.1.11;

■ (d) Revising S6.1.2(a)(1)(i)(A) and S6.1.2(d)(1)(ii); and

■ (e) Adding Figure 12 at the end of § 571.213.

The revised and added sections read as follows:

§ 571.213 Standard No. 213; Child restraint systems.

* * * * *

S4. Definitions.

* * * * *

Harness means a combination pelvic and upper torso child restraint system that consists primarily of flexible material, such as straps, webbing or similar material, and that does not include a rigid seating structure for the child.

* * * * *

S5.1.3.1 * * *

TABLE TO S5.1.3.1(a)—ADD-ON FORWARD-FACING CHILD RESTRAINTS

When this type of child restraint	is tested in accordance with—	these excursion limits apply	**Explanatory note:** In the test specified in 2nd column, the child restraint is attached to the test seat assembly in the manner described below, subject to certain conditions
Harnesses, backless booster seats and restraints designed for use by physically handicapped children.	S6.1.2(a)(1)(i)(A)	Head 813 mm; ..... Knee 915 mm	Attached with lap belt; in addition, if a tether is provided, it is attached.
Harnesses labeled per S5.3.1(b)(i) through S5.3.1(b)(iii) and Figure 12.	S6.1.2(a)(1)(i)(A)	Head 813 mm; ..... Knee 915 mm	Attached with seat back mount.
Belt-positioning seats	S6.1.2(a)(1)(ii)	Head 813 mm; ..... Knee 915 mm	Attached with lap and shoulder belt; no tether is attached.
All other child restraints, manufactured before September 1, 1999.	S6.1.2(a)(1)(i)(B)	Head 813 mm; ..... Knee 915 mm	Attached with lap belt; no tether is attached.
All other child restraints, manufactured on or after September 1, 1999.	S6.1.2(a)(1)(i)(B)	Head 813 mm; ..... Knee 915 mm	Attached with lap belt; no tether is attached.

TABLE TO S5.1.3.1(a)—ADD-ON FORWARD-FACING CHILD RESTRAINTS—Continued

When this type of child restraint	is tested in accordance with—	these excursion limits apply	**Explanatory note:** In the test specified in 2nd column, the child restraint is attached to the test seat assembly in the manner described below, subject to certain conditions
	S6.1.2(a)(1)(i)(D) (beginning September 1, 2002).		Attached to lower anchorages of child restraint anchorage system; no tether is attached.
	S6.1.2(a)(1)(i)(A)	Head 720 mm; Knee 915 mm	Attached with lap belt; in addition, if a tether is provided, it is attached.
	S6.1.2(a)(1)(i)(C) (beginning September 1, 2002).		Attached to lower anchorages of child restraint anchorage system; in addition, if a tether is provided, it is attached.

* * * * *

S5.3.1 Add-on child restraints shall meet either (a) or (b), as appropriate.

(a) Except for components designed to attach to a child restraint anchorage system, each add-on child restraint system must not have any means designed for attaching the system to a vehicle seat cushion or vehicle seat back and any component (except belts) that is designed to be inserted between the vehicle seat cushion and vehicle seat back.

(b) Harnesses manufactured for use on school bus seats must meet S5.3.1(a) of this standard, unless a label that conforms in content to Figure 12 and to the requirements of S5.3.1(b)(1) through S5.3.1(b)(3) of this standard is permanently affixed to the part of the harness that attaches the system to a vehicle seat back. Harnesses that are not labeled as required by this paragraph must meet S5.3.1(a).

(1) The label must be plainly visible when installed and easily readable.

(2) The message area must be white with black text. The message area must be no less than 20 square centimeters.

(3) The pictogram shall be gray and black with a red circle and slash on a white background. The pictogram shall be no less than 20 mm in diameter.

S5.3.2 Each add-on child restraint system shall be capable of meeting the requirements of this standard when installed solely by each of the means indicated in the following table for the particular type of child restraint system:

TABLE FOR S5.3.2

Type of add-on child restraint system	Means of installation				
	Type 1 seat belt assembly	Type 1 seat belt assembly plus a tether anchorage, if needed	Child restraint anchorage system (effective September 1, 2002)	Type II seat belt assembly	Seat back mount
Harnesses labeled per S5.3.1(b)(1) through S5.3.1(b)(3) and Figure 12					X
Other harnesses		X			
Car beds	X				
Rear-facing restraints	X		X		
Belt-positioning seats					X
All other child restraints	X	X	X		

* * * * *

S5.6.1.11 For harnesses that are manufactured for use on school bus seats, the instructions must include the following statements:

"WARNING! This restraint must only be used on school bus seats. Entire seat directly behind must be unoccupied or have restrained occupants." The labeling requirement refers to a restrained occupant as: an occupant restrained by any user appropriate vehicle restraint or child restraint system (*e.g.* lap belt, lap and shoulder belt, booster, child seat, harness . . .).

* * * * *

S6.1.2 Dynamic test procedure.

(a) * * *

(1) * * *

(i) * * *

(A) Install the child restraint system at the center seating position of the standard seat assembly, in accordance with the manufacturer's instructions provided with the system pursuant to S5.6.1, except that the standard lap belt is used and, if provided, a tether strap may be used. For harnesses that bear the label shown in Figure 12 and that meet S5.3.1(b)(1) through S5.3.1(b)(3), attach the harness in accordance with the manufacturer's instructions provided with the system pursuant to S5.6.1, *i.e.*, the seat back mount is used.

* * * * *

(d) * * *

(1) * * *

(ii) All Type I belt systems used to attach an add-on child restraint system to the standard seat assembly, and any provided additional anchorage belt (tether), are tightened to a tension of not less than 53.5 N and not more than 67 N, as measured by a load cell used on the webbing portion of the belt. All belt systems used to attach a harness that bears the label shown in Figure 12 and that meets S5.3.1(b)(i) through S5.3.1(b)(iii) are also tightened to a tension of not less than 53.5 N and not more than 67 N, by measurement means specified in this paragraph.

* * * * *

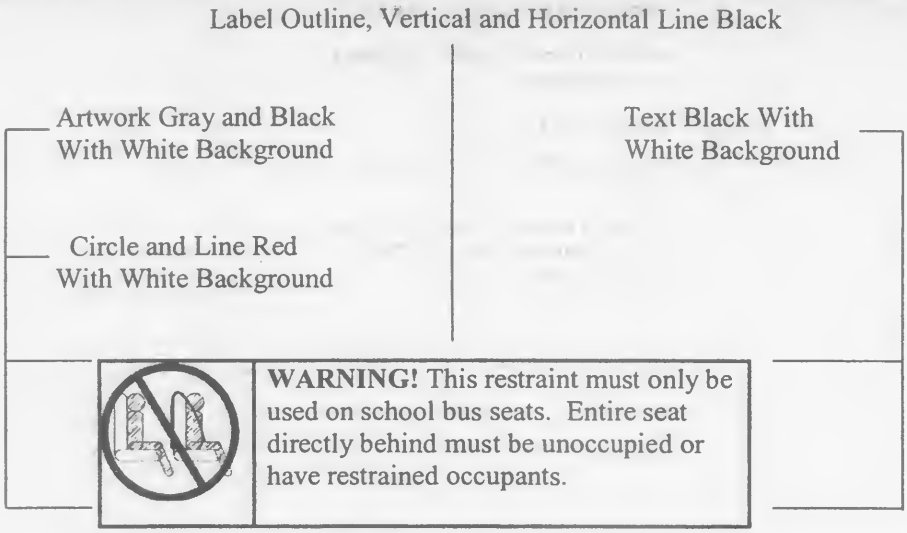


Figure 12. Label on Harness Component That Attaches to School Bus Seat Back.

Issued on: March 3, 2004.

Jeffrey W. Runge,

Administrator.

[FR Doc. 04–5168 Filed 3–8–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D. 030304A]

Atlantic Highly Migratory Species; Small Coastal Shark Fishery

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

ACTION: Regional fishery closure.

SUMMARY: NMFS is closing the commercial fishery for small coastal sharks conducted by persons aboard vessels issued a Federal Atlantic shark permit in the Gulf of Mexico region. This action is necessary because the quota for the first 2004 semiannual season in the Gulf of Mexico season has been exceeded. The commercial small coastal shark fisheries in the South Atlantic and North Atlantic regions are allocated separate quotas and will remain open until further notice.

DATES: The commercial small coastal shark fishery in the Gulf of Mexico region is closed effective from 11:30 p.m. local time March 18, 2004, through June 30, 2004.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz, 301–713–2347; fax 301–713–1917.

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks and its implementing regulations found at 50 CFR part 635 issued under authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

On December 24, 2003 (68 FR 74746), NMFS announced that the small coastal shark quota for the first semiannual fishing season of the 2004 fishing year in the Gulf of Mexico region would be 11.2 metric tons (mt) dressed weight (dw) (24,691.5 lbs dw). As of February 27, 2004, preliminary reports from dealers indicate that approximately 20.7 mt dw (45,553 lbs dw) have been reported landed in the Gulf of Mexico region during the 2004 fishing year.

Under 50 CFR 635.28(b)(2), when the fishing season quota for small coastal sharks is reached for a particular region, NMFS will file for publication a notice of closure at least 14 days before the effective date. Accordingly, NMFS is closing the commercial small coastal shark fishery in the Gulf of Mexico region as of 11:30 p.m. local time March 18, 2004, through June 30, 2004. During the closure, retention of small coastal sharks is prohibited for persons fishing aboard vessels issued a commercial shark limited access permit under 50 CFR 635.4, unless the vessel is permitted to operate as a charter vessel or headboat for HMS and is engaged in a for-hire trip, in which case the recreational retention limits for sharks may apply (50 CFR 635.22(c)). The sale, purchase, trade, or barter or attempted sale, purchase, trade, or barter of carcasses and/or fins of small coastal sharks harvested by a person aboard a vessel in the Gulf of Mexico region that has been issued a commercial shark limited access permit under 50 CFR 635.4, is prohibited, except for those that were harvested, offloaded, and sold, traded, or bartered prior to the closure, and were held in storage by a dealer or processor. Small coastal sharks can be harvested, offloaded, and sold, traded, or bartered in a region other than the Gulf of Mexico until further notice.

This closure does not affect the commercial small coastal shark fisheries in the South Atlantic or North Atlantic regions which remain open until further notice. In addition, the commercial pelagic shark fishery remains open until further notice. The large coastal shark fishery in the North Atlantic is currently open, and as was announced on December 24, 2004 (68 FR 74746), will close on April 15, 2004. The recreational shark fishery is not affected by this closure.

Classification

Pursuant to 5 U.S.C. 553 (b)(B), the Assistant Administrator for Fisheries, NOAA (AA), finds that providing for prior notice and public comment for this action is impracticable and contrary to the public interest. Based on recent

landings reports, this closure is necessary to prevent the further overharvest of the small coastal shark quota established for the Gulf of Mexico region. The fishery is currently underway, and any further delay in this action would cause further overharvest of the quota and be inconsistent with management requirements and objectives. NMFS provides rapid notification of the closure by publishing the closure notice in the **Federal Register**, faxing notification to individuals on the HMS FAX Network and to known fishery representatives. For these same reasons, the AA also finds good cause to waive the 30–day delay in effective date pursuant to 5 U.S.C. 553 (d)(3). This action is required under 50 CFR 635.28(b)(2) and is exempt from review under Executive Order 12866.

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

Dated: March 4, 2004.

Bruce C. Morehead,

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

[FR Doc. 04–5283 Filed 3–4–04; 3:50 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 021122284–2323–02; I.D. 030304B]

Fisheries of the Northeastern United States; Summer Flounder; 2004 Specifications

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

ACTION: Commercial quota restoration.

SUMMARY: NMFS publishes revised 2004 commercial quotas for summer flounder. This action is necessary to comply with the regulatory provision that requires the Administrator, Northeast Region, NMFS (Regional Administrator) to correct erroneous landings data that factored into an overage deduction. The intent of this action is to provide fishermen the opportunity to harvest the available quotas for the summer flounder fishery.

DATES: This document is effective from January 14, 2004, through December 31, 2004.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, Fishery Policy Analyst, (978) 281–9279, fax (978) 281–9135, e-mail *sarah.mclaughlin@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

NMFS published final specifications and preliminary quota adjustments for the 2004 summer flounder, scup, and black sea bass fisheries on January 14, 2004 (69 FR 2074). The final rule included preliminary 2003 landings and 2004 quota adjustments. Section 648.100(d)(1)(ii) provides that, if the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, the Regional Administrator will restore the overage that was deducted in error to the appropriate summer flounder quota allocation and publish notification in the **Federal Register** announcing the restoration.

During a retrospective review of the landings data used to determine overharvest or underharvest of summer flounder in 2003, NMFS determined that, for some states, a portion of the 2002 landings were misattributed and counted as 2003 landings. The result of these findings made during the data review process is that the landings recorded for certain states (Massachusetts, Connecticut, Maryland, and North Carolina) exceeded the actual landings. Therefore, NMFS hereby restores quota for the 2004 fishing year to the appropriate state quotas as follows: Massachusetts--280 lb (127 kg); Connecticut--41,107 lb (18,646 kg); Maryland--44,077 lb (19,993 kg); and North Carolina--451,595 lb (204,842 kg). The 2004 commercial summer flounder adjusted quotas (less the amount set aside for research and as published in the January 14, 2004, final rule), the amounts being restored to the 2004 adjusted quotas, and the revised 2004 quotas (less the amount set aside for research), by state, are presented in the table below.

BILLING CODE 3510–22–S

REVISED 2004 STATE-BY-STATE COMMERCIAL SUMMER FLOUNDER QUOTA ALLOCATIONS

	2004 Adjusted Quota, less the 2004 Research Set-Aside (as published January 14, 2004)		Amount Restored to the 2004 Adjusted Quota[1]		Revised 2004 Quota, less the 2004 Research Set-Aside	
State	lb[2]	kg[2,3]	lb	kg[3]	lb[2]	kg[2,3]
ME	1,107	502	0	0	1,107	502
NH	77	35	0	0	77	35
MA	1,127,996	511,655	280	127	1,128,276	511,782
RI	2,637,117	1,196,188	0	0	2,637,117	1,196,188
CT	338,424	153,508	41,107	18,646	379,531	172,154
NY	1,285,853	583,259	0	0	1,285,853	583,259
NJ	2,812,332	1,275,655	0	0	2,812,332	1,275,655
DE	(47,097)	(21,363)	0	0	(47,097)	(21,363)
MD	269,581	122,281	44,077	19,993	313,658	142,274
VA	3,584,445	1,625,894	0	0	3,584,445	1,625,894
NC	4,163,464	1,888,535	451,595	204,842	4,615,059	2,093,377
Total[4]	16,220,396	7,674,862	537,059	243,608	16,757,455	7,601,132

1 Amount restored was calculated to correct for the misattributed portion of 2002 landings.
2 Parentheses indicate a negative number. Delaware has an allocation of zero and continues repayment of overharvest from 2002.
3 Kilograms are as converted from pounds and may not necessarily add due to rounding.
4 Total quota is the sum of all states having allocation, i.e., states other than Delaware.

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: March 4, 2004.

Bruce C. Morehead,

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

[FR Doc. 04–5284 Filed 3–4–04; 3:50 pm]

BILLING CODE 3510–22–C

Proposed Rules

Federal Register
Vol. 69, No. 46
Tuesday, March 9, 2004

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–CE–57–AD]

RIN 2120–AA64

Airworthiness Directives; LET a.s. Model Blanik L–13 AC Sailplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all LET a.s. (formerly LET n.p.) (LET) Model Blanik L–13 AC sailplanes. This proposed AD would require you to repetitively inspect the bedding of the front and rear control levers for cracks, and, if any cracks are found, replace with parts found free of cracks. This proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the Czech Republic. We are issuing this proposed AD to detect and correct cracks in the bedding of the front and rear control levers, which could result in failure of the bridge of controls for the sailplane. This failure could lead to loss of sailplane control.

DATES: We must receive any comments on this proposed AD by April 16, 2004.

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

- *By mail:* FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–57–AD, 901 Locust, Room 506, Kansas City, Missouri 64106.
- *By fax:* (816) 329–3771.
- *By e-mail: 9-ACE-7-Docket@faa.gov.* Comments sent electronically must contain "Docket No. 2003–CE–57–AD" in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII.

You may get the service information identified in this proposed AD from LET n.p., Kunovice 686 04, Czech Republic; telephone: +420 632 55 44 96; facsimile: +420 632 56 41 13.

You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–57–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

How do I comment on this proposed AD? We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include "AD Docket No. 2003–CE–57–AD" in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it. We will date-stamp your postcard and mail it back to you.

Are there any specific portions of this proposed AD I should pay attention to? We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. If you contact us through a nonwritten communication and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend this proposed AD in light of those comments and contacts.

Discussion

What events have caused this proposed AD? The Civil Aviation Authority (CAA), which is the airworthiness authority for the Czech Republic, recently notified FAA that an unsafe condition may exist on certain LET Model Blanik L–13 AC sailplanes. The CAA reports one occurrence of cracks in the attachment of control levers on the bridge of controls (Drawing No. A71 210N) on a Model Blanik L–13 AC sailplane after 130 hours time-in-service (TIS) of aerobatics. The cracks are due to material fatigue.

What are the consequences if the condition is not corrected? Failure of the bridge of controls for the sailplane could lead to loss of sailplane control.

Is there service information that applies to this subject? LET has issued Letecke Zavody Mandatory Bulletin No.: L13/095a, dated October 18, 2001.

What are the provisions of this service information? The service bulletin includes procedures for:

—Inspecting the bedding of the front and rear control levers (Drawing (DWG) No. A741 215N and DWG No. A741 210N) for cracks; and
—if any cracks are found, replacing with parts found free of cracks.

What action did the CAA take? The CAA classified this service bulletin as mandatory and issued Czech AD Number CAA–AD–090/2001, dated October 25, 2001, to ensure the continued airworthiness of these sailplanes in the Czech Republic.

Did the CAA inform the United States under the bilateral airworthiness agreement? These LET Model Blanik L–13 AC sailplanes are manufactured in the Czech Republic and are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Under this bilateral airworthiness agreement, the CAA has kept us informed of the situation described above.

FAA's Determination and Requirements of This Proposed AD

What has FAA decided? We have examined the CAA's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since the unsafe condition described previously is likely to exist or develop on other LET Model Blanik L–13 AC sailplanes of the same type design that are registered in the United States, we are proposing AD action to detect and correct cracks in the bedding of the front and rear control levers, which could result in failure of the bridge of controls for the sailplane.

What would this proposed AD require? This proposed AD would require you to incorporate the actions in the previously-referenced service bulletin.

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

Costs of Compliance

How many sailplanes would this proposed AD impact? We estimate that this proposed AD affects 5 sailplanes in the U.S. registry.

What would be the cost impact of this proposed AD on owners/operators of the affected sailplanes? We estimate the following costs to accomplish this proposed inspection:

Labor cost	Parts cost	Total cost per sailplane	Total cost on U.S. operators
1 workhour × $65 per hour = $65	Not Applicable.	$65	$65 × 5 = $325

Since the replacement of parts will vary based on the damage found as a result of the proposed inspection, we are unable to estimate the costs to do any necessary replacements.

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this proposed AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "AD Docket No. 2003–CE–57–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

LET a.s.: Docket No. 2003–CE–57–AD

When Is the Last Date I Can Submit Comments on This Proposed AD?

(a) We must receive comments on this proposed airworthiness directive (AD) by April 16, 2004.

What Other ADs Are Affected by This Action?

(b) None.

What Sailplanes Are Affected by This AD?

(c) This AD affects Model Blanik L–13 AC sailplanes, serial numbers 988601, 988603, 988604, 008605, and 008606, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the Czech Republic. The actions specified in this AD are intended to detect and correct cracks in the bedding of the front and rear control levers, which could result in failure of the bridge of controls for the sailplane. This failure could lead to loss of sailplane control.

What Must I Do To Address This Problem?

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

Actions	Compliance	Procedures
(1) Inspect the bedding of the front and rear control levers (Drawing (DWG) No. A741 215N and DWG No. A741 210N) for cracks.	Within the next 25 hours time-in-service (TIS) after the effective date of this AD, unless already done. Repetitively inspect thereafter at every 25 hours TIS.	Follow the WORK PROCEDURE paragraph of LET Letecke Zavody Mandatory Bulletin No.: L13/095a, dated October 18, 2001.
(2) If any cracks are found during any inspection required by paragraph (e)(1) of this AD, replace with parts shown free of cracks. Repetitive inspections are still required.	Before further flight after any inspection required by paragraph (e)(1) of this AD..	Follow the WORK PROCEDURE paragraph of LET Letecke Zavody Mandatory Bulletin No.: L13/095a, dated October 18, 2001, and the applicable sailplane maintenance manual.

May I Request an Alternative Method of Compliance?

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

May I Get Copies of the Documents Referenced in This AD?

(g) You may get copies of the documents referenced in this AD from LET a.s., Kunovice 686 04, Czech Republic; telephone: +420 632 55 44 96; facsimile: +420 632 56 41 13. You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

Is There Other Information That Relates to This Subject?

(h) Czech Airworthiness Directive CAA–AD–090/2001, dated October 25, 2001, also addresses the subject of this AD.

Issued in Kansas City, Missouri, on March 2, 2004.

Sandra J. Campbell,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–5264 Filed 3–8–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–D–7584]

Proposed Flood Elevation Determinations

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

ACTION: Proposed rule.

SUMMARY: Technical information or comments are requested on the proposed Base (1% annual chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

ADDRESSES: The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: FEMA proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed base flood and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

National Environmental Policy Act

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

Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to establish and maintain community eligibility in the NFIP. As a result, a regulatory flexibility analysis has not been prepared.

Regulatory Classification

This proposed rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This proposed rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR Part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for Part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
FLORIDA **Leon County**				
East Drainage Ditch	Approximately 0.6 mile upstream of the confluence with Monson Slough.	*41	*40	Leon County (Unincorporated Areas), City of Tallahassee.
	Approximately 800 feet upstream of Apakin Nene Road	None	*142	
West Drainage Ditch	From Mabry Street	*54	*53	Leon County (Unincorporated Areas), City of Tallahassee.
	Approximately 50 feet upstream of New Quincy Highway	*62	*61	
Gum Creek	At the confluence with West Drainage Ditch	*60	*55	Leon County (Unincorporated Areas), City of Tallahassee.
	At the confluence with North Branch Gum Creek	*60	*58	
North Branch Gum Creek	At the confluence with Gum Creek	*60	*58	Leon County (Unincorporated Areas).
	At Gum Road	*60	*59	
West Branch Gum Creek	At the confluence with Gum Creek	*60	*58	Leon County (Unincorporated Areas).
	Just upstream of CSX Transportation	*60	*59	

Leon County (Unincorporated Areas)
Maps available for inspection at the Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida.
Send comments to Mr. Parwez Alam, Leon County Administrator, 301 South Monroe Street, Tallahassee, Florida 32301.
City of Tallahassee
Maps available for inspection at the Tallahassee City Hall, 300 South Adams Street, Tallahassee, Florida.
Send comments to The Honorable John Marks, Mayor of the City of Tallahassee, 300 South Adams Street, Tallahassee, Florida 32301–1731.

KENTUCKY **Pendleton County**				
Ohio River	Approximately 475 feet downstream of the downstream county boundary.	None	*506	Pendleton County (unincorporated Areas).
	Approximately 425 feet upstream of the upstream county boundary.	None	*506	
Licking River	At the confluence of Grassy Creek	None	*530	Pendleton County (Unincorporated Areas).
	Approximately 1.09 miles upstream of State Route 22	None	*556	
South Fork Licking River	At the confluence with Licking River	None	*555	Pendleton County (Unincorporated Areas).
	Approximately 1.32 miles upstream of U.S. Route 27	None	8559	

Pendleton County (Unincorporated Areas)
Maps available for inspection at the Pendleton County Judge's Office, 233 Main Street, Falmouth, Kentucky.
Send comments to The Honorable Henry Bertram, Pendleton County Judge Executive, 233 Main Street, Falmouth, Kentucky 41041.

NORTH CAROLINA **Bladen County**				
Saespan Branch	Approximately 600 feet downstream of the Bladen/Columbus County boundary.	None	•58	Bladen County (Unincorporated Areas).
	At the Bladen/Columbus County boundary	None	•59	

Bladen County (Unincorporated Areas)
Maps available for inspection at the Bladen County Courthouse, 106 East Broad Street, #106, Elizabethtown, North Carolina.
Send comments to Mr. Gregory Martin, Bladen County Manager, P.O. Box 1048, Elizabethtown, North Carolina 28337.

NORTH CAROLINA **Camden County**				
Areneuse Creek	At the upstream side of NC 343	None	•6	Camden County (Unincorporated Areas).
	Approximately 150 feet downstream of Smith Corner Road.	None	•6	

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
Joyce Creek	At the confluence with Dismal Swamp Canal	None	•6	Camden County (Unincorporated Areas).
	Approximately 100 feet upstream of Keeter Barn Road	None	•9	
Tributary 1	At the confluence with Joyce Creek	None	*7	Camden County (Unincorporated Areas).
	Approximately 1.8 miles upstream of the confluence with Joyce Creek.	None	•8	
Mill Dam Creek	At NC 343	None	•6	Camden County (Unincorporated Areas).
	Approximately 1.0 mile upstream of Ivy Neck Road	None	•6	
Tributary 1	At the confluence with Mill Dam Creek	None	•6	Camden County (Unincorporated Areas).
	Approximately 60 feet downstream of NC 343	None	•6	
Tributary 2	At the confluence with Mill Dam Creek	None	•6	Camden County (Unincorporated Areas).
	Approximately 0.7 mile upstream of Mercer Drive	None	•7	
Tributary 3	At the confluence with Mill Dam Creek	None	•6	Camden County (Unincorporated Areas).
	Approximately 0.3 mile upstream of Ivy Neck Road	None	•6	
Tributary 4	At the confluence with Mill Dam Creek	None	•6	Camden County (Unincorporated Areas).
	Approximately 0.7 mile upstream of Bushell Road	None	•6	
Pasquotank River	Approximately 5.9 miles upstream of the confluence of Sawyers Creek.	None	•5	Camden County (Unincorporated Areas).
	Approximately 8.1 miles upstream of Morgans Corner Road.	None	•13	
Sawyers Creek	At the downstream side of Scotland Road	None	•5	Camden County (Unincorporated Areas).
	Approximately 0.6 mile upstream of Trafton Road	None	•8	
Tributary 2	At U.S. Highway 158/NC 34	None	•5	Camden County (Unincorporated Areas).
	Approximately 1.3 miles upstream of U.S. Highway 158/NC 34.	None	•6	
Tributary 3	At the downstream side of U.S. Highway 158/NC 34	None	•5	Camden County (Unincorporated Areas).
	Approximately 0.5 mile upstream of U.S. Highway 158/NC 34.	None	•6	
Tributary 4	At the downstream side of Scotland Road	None	•5	Camden County (Unincorporated Areas).
	Approximately 1,600 feet upstream of Scotland Road	None	•6	
Tributary 5	At the confluence with Sawyers Creek	None	•5	Camden County (Unincorporated Areas).
	Approximately 400 feet downstream of Bourbon Street	None	•6	

Camden County (unincorporated Areas)

Maps available for inspection at the Camden County Offices, 117 North NC 343, Camden, North Carolina.

Send comments to Mr. Randell Woodruff, Camden County Manager, P.O. Box 190, Camden, North Carolina 27921.

NORTH CAROLINA
Pasquotank County

East Branch Knobbs Creek Tributary.	At West Ehringhaus Street	•7	•8	City of Elizabeth City, Pasquotank County (Unincorporated Areas).
	Approximately 550 feet upstream of Roanoke Avenue	None	•9	
Halls Creek	Approximately 0.5 mile upstream of Halls Creek Road	None	•6	Pasquotank County (Unincorporated Areas).
	Approximately 0.3 mile upstream of Simpson Ditch Road	None	•9	
Halls Creek Tributary 1	At the confluence with Halls Creek	None	•6	Pasquotank County (Unincorporated Areas).
	Approximately 2.0 miles upstream of the confluence with Halls Creek.	None	•9	
Knobbs Creek	At Creek Road	None	•6	City of Elizabeth City, Pasquotank County (Unincorporated Areas).
	Approximately 0.6 mile upstream of Berea Church Road	None	•7	

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
Tributary	Approximately 0.2 mile upstream of Providence Road	None	•7	City of Elizabeth City, Pasquotank County (Unincorporated Areas).
	Approximately 0.8 mile upstream of U.S. Highway 17	None	•9	
Little River	Approximately 1.4 miles upstream of U.S. Highway 17	None	•9	Pasquotank County (Unincorporated Areas).
	Approximately 2.7 miles upstream of Foreman Bundy Road.	None	•10	
New Begun Creek	At Florida Road	None	•5	Pasquotank County (Unincorporated Areas).
	Approximately 250 feet downstream of Pitts Chapel Road	None	•6	
Newland Drainage Canal	At the confluence with Pasquotank River	None	•7	Pasquotank County (Unincorporated Areas).
	Approximately 500 feet downstream of Newland Road	None	•14	
Canal Tributary 1	At the confluence with Newland Drainage Canal	None	•7	Pasquotank County (Unincorporated Areas).
	Approximately 0.4 mile upstream of Brothers Lane	None	•11	
Canal Tributary 1A	At the confluence with Newland Drainage Canal Tributary 1.	None	•7	Pasquotank County (Unincorporated Areas).
	Approximately 500 feet downstream of Blindman Road	None	•8	
Pasquotank River	Approximately 9.1 miles upstream of U.S. Highway 158	None	•5	Pasquotank County (Unincorporated Areas).
	Approximately 6.6 miles upstream of the confluence with Newland Drainage Canal.	None	•13	
Tributary 3	At the confluence with Pasquotank River	None	•6	Pasquotank County (Unincorporated Areas).
	Approximately 500 feet downstream of U.S. Highway 17	None	•10	
Symonds Creek	Just upstream of Nixonton Road	None	•5	Pasquotank County (Unincorporated Areas).
	Approximately 0.4 mile upstream of Nixonton Road	None	•6	
Tributary 2	At the confluence with Symonds Creek	None	•5	Pasquotank County (Unincorporated Areas).
	Approximately 0.8 mile upstream of the confluence with Symonds Creek.	None	•6	

City of Elizabeth City

Maps available for inspection at the Elizabeth City Inspections Department, 306 East Colonial Avenue, Elizabeth City, North Carolina.

Send comments to The Honorable Steven Harrell, Mayor of the City of Elizabeth City, P.O. Box 347, Elizabeth City, North Carolina 27907.

Pasquotank County (Unincorporated Areas)

Maps available for inspection at the Pasquotank County Planning Department, 206 East Main Street, 2nd Floor, Elizabeth City, North Carolina.

Send comments to Mr. Randy Keaton, Pasquotank County Manager, P.O. Box 39, Elizabeth City, North Carolina 27907.

NORTH CAROLINA
Robeson County

Aaron Swamp	At the confluence with Horse Swamp	None	•97	Robeson County (Unincorporated Areas).
	Approximately 2,000 feet upstream of Dew Road	None	•147	
Alligator Swamp	Approximately 0.7 mile downstream of Affinity Road	None	•69	Robeson County (Unincorporated Areas).
	Approximately 2,800 feet upstream of Marietta Road	None	•91	
Ashpole Swamp	At the NC/SC State boundary	None	•60	Robeson County (Unincorporated Areas).
	Approximately 0.42 mile upstream of State Route 710	None	•155	
Tributary 1	At the confluence with Ashpole Swamp	None	•100	Robeson County (Unincorporated Areas).
	Approximately 0.8 mile upstream of Butler Road	None	•123	
Tributary 2	At the confluence with Ashpole Swamp	None	•107	Robeson County (Unincorporated Areas).
	Approximately 100 feet downstream of West Horne Road	None	•113	
Tributary 3	At the confluence with Ashpole Swamp	None	•123	Robeson County (Unincorporated Areas).
	Approximately 2,100 feet upstream of State Route 710	None	•143	
Tributary 4	At the confluence with Ashpole Swamp	None	•126	Robeson County (Unincorporated Areas).
	Approximately 0.45 mile upstream of Bridges Road	None	•141	

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
Bay Branch	At the confluence with Indian Swamp	None	•94	Robeson County (Unincorporated Areas).
	Approximately 0.63 mile upstream of the confluence with Indian Swamp.	None	•100	
Bear Swamp	Just upstream of State Route 710	None	•183	Robeson County (Unincorporated Areas).
	Approximately 100 feet downstream of WL Moore Woods Road.	None	•188	
Beaverdam Branch	At the confluence with Little Marsh Swamp	None	•152	Robeson County (Unincorporated Areas).
	Approximately 2,750 feet upstream of Carolina Church Road.	None	•173	
Big Branch (near Town of Marietta).	At the confluence with Ashpole Swamp	None	•76	Robeson County (Unincorporated Areas).
	Approximately 1,800 feet downstream of Shakespeare Road.	None	•86	
Big Branch (near Town of St. Pauls).	At the confluence with Big Marsh Swamp	None	•142	Robeson County (Unincorporated Areas).
	Approximately 3,400 feet upstream of CSX Transportation.	None	•155	
Big Branch Tributary 1	At the confluence with Big Branch	None	•142	Robeson County (Unincorporated Areas).
	Approximately 2,800 feet upstream of the confluence with Big Branch.	None	•152	
Big Branch Tributary 2	At the confluence with Big Branch	None	•145	Robeson County (Unincorporated Areas).
	Approximately 50 feet downstream of U.S. Route 301	None	•156	
Big Branch Canal	At the confluence with Lumber River	•91	•92	Robeson County (Unincorporated Areas).
	Approximately 1,225 feet upstream of Wilmington Highway.	None	•100	
Big Marsh Swamp	At the confluence with Big Swamp	None	•122	Robeson County (Unincorporated Areas).
	Approximately 2,200 feet upstream of Balfort Road	None	•188	
Tributary 1	At the confluence with Big Marsh Swamp	None	•153	Robeson County (Unincorporated Areas).
	Approximately 600 feet upstream of Great Marsh Church Road.	None	•169	
Tributary 2	At the confluence with Big Marsh Swamp	None	•167	Robeson County (Unincorporated Areas).
	Approximately 1,400 feet upstream of Pine Street	None	•185	
Big Swamp	At the upstream side of Railroad	None	•99	Robeson County (Unincorporated Areas).
	At the confluence of Big Marsh Swamp and Galberry Swamp.	None	•122	
Black Branch	At the confluence with Big Marsh Swamp	None	•149	Robeson County (Unincorporated Areas).
	Approximately 800 feet upstream of State Route 20	None	•165	
Black Branch (near Town of Maxton).	At the confluence with Little Bull Branch	None	•151	Robeson County (Unincorporated Areas).
	Approximately 0.5 mile upstream of Morrison Road	None	•171	
Bogue Swamp	At the confluence with Little Marsh Swamp	None	•161	Robeson County (Unincorporated Areas).
	Approximately 1,325 feet upstream of State Route 71	None	•187	
Bracey Swamp	At the confluence with Mitchell Swamp	None	•113	Robeson County (Unincorporated Areas).
	Approximately 250 feet downstream of Bracey Cemetary Road.	None	•128	
Bryant Swamp	At the confluence with Big Swamp	None	•92	Robeson County (Unincorporated Areas).
	Approximately 1.0 mile upstream of the confluence with Big Swamp.	None	•92	
Buckhorn Swamp	At the confluence with Long Branch	None	•149	Robeson County (Unincorporated Areas).
	Approximately 1.2 miles upstream of State Route 301	None	•177	
Bull Branch	Approximately 0.5 mile upstream of the confluence with Leith Creek.	None	•129	Robeson County (Unincorporated Areas).
	Approximately 1,000 feet upstream of Binyamee Road	None	•175	

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
Burnt Swamp	At the confluence with Richland Swamp	None	•140	Robeson County (Unincorporated Areas).
	Approximately 0.44 mile upstream of Melinda Road	None	•190	
Cold Camp Creek	At the confluence with Galberry Swamp	None	•144	Robeson County (Unincorporated Areas).
	Approximately 2.2 miles upstream of the confluence of Cold Camp Creek Tributary 2.	None	•165	
Collection Canal	Approximately 2,000 feet upstream of the confluence with Jacob Swamp.	•114	•113	Robeson County (Unincorporated Areas), City of Lumberton.
	At the confluence with Underpass Overland North	•114	•119	
Contrary Swamp	At the confluence with Michell Swamp	None	•111	Robeson County (Unincorporated Areas).
	Approximately 0.72 mile upstream of Interstate 95	None	•119	
Cotton Mill Branch	At Martin Luther King Jr. Drive	•114	•116	Robeson County (Unincorporated Areas), City of Lumberton.
	At the confluence with Underpass Overland South	•115	•118	
Cowford Swamp	At the confluence with McLeod Mill Branch	None	•105	Robeson County (Unincorporated Areas).
	Approximately 300 feet downstream of Butler Road	None	•121	
Cowpen Branch	At the confluence with Ten Mile Swamp	None	•145	Robeson County (Unincorporated Areas).
	Approximately 2,500 feet upstream of Interstate 95	None	•149	
Cowpen Swamp	Approximately 0.5 mile downstream of Jordache Road	None	•80	Robeson County (Unincorporated Areas).
	Approximately 1,700 feet upstream of State Line Road	None	•92	
Dunn's Marsh Creek	At the confluence with Little Marsh Swamp	None	•155	Robeson County (Unincorporated Areas), Town of Parkton.
	Approximately 300 feet downstream of Mallory Road	None	•187	
Dunn's Marsh Creek	At the confluence with Dunn's Marsh Creek	None	•173	Robeson County (Unincorporated Areas), Town of Parkton.
Tributary 1	Approximately 0.56 mile upstream of Barlow Road	None	•186	
Tributary 2	At the confluence with Dunn's Marsh Creek	None	•177	Robeson County (Unincorporated Areas).
	Approximately 0.35 mile upstream of State Route 71	None	•183	
First Swamp	At the confluence with Wilkinson Creek	None	•129	Robeson County (Unincorporated Areas).
	Approximately 0.5 mile upstream of Quinn Road	None	•169	
Five Mile Branch	At downstream side of Meadow Road	None	•138	Robeson County (Unincorporated Areas), City of Lumberton.
	Approximately 0.5 mile upstream of Meadow Road	None	•139	
Frazier Branch	At the confluence with Shoe Heel Creek	None	•149	Robeson County (Unincorporated Areas).
	Approximately 600 feet upstream of Fairley Road	None	•174	
Fullermore Swamp	At the confluence with Ashpole Swamp	None	•116	Robeson County (Unincorporated Areas).
	Approximately 1,500 feet upstream of NW Railroad Avenue.	None	•139	
Tributary	At the confluence with Fullermore Swamp	None	•126	Robeson County (Unincorporated Areas)
	Approximately 300 feet upstream of State Route 710	None	•126	
Galberry Swamp	At the confluence with Big Swamp	None	•122	Robeson County (Unincorporated Areas).
	At the confluence with Long Branch and Buckhorn Swamp.	None	•149	
Gravel Branch	At the confluence with Ten Mile Swamp	None	•123	Robeson County (Unincorporated Areas).
	At Reagan Church Road	None	•133	
Gum Branch	At the confluence with Big Marsh Swamp	None	•152	Robeson County (Unincorporated Areas).
	Approximately 800 feet upstream of Covington Farm Road.	None	•169	
Gum Swamp	At the upstream side of CSX Transportation	None	•169	Robeson County (Unincorporated Areas).

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
Hog Swamp	Approximately 0.47 mile upstream of McNeill Road	None	•219	Robeson County (Unincorporated Areas).
	At the confluence with Ashpole Swamp	None	•74	
Holy Swamp	Approximately 1.9 miles upstream of Pleasant Hope Road.	None	•132	Robeson County (Unincorporated Areas).
	At the confluence with Raft Swamp	None	•126	
Horn Camp Swamp	Approximately 0.75 mile upstream of Evergreen Church Road.	None	•149	Robeson County (Unincorporated Areas).
	At the confluence with Horse Swamp	None	•95	
Horns Millrace	Approximately 500 feet upstream of Horne Camp Road	None	•115	Robeson County (Unincorporated Areas).
	At the confluence with Ashpole Swamp	None	•89	
Horse Branch	Approximately 1,300 feet upstream of Farm Lane	None	•131	Robeson County (Unincorporated Areas).
	At the confluence with Big Marsh Swamp	None	•133	
Horse Swamp	Approximately 100 feet downstream of East Great Marsh Church Road.	None	•144	Robeson County (Unincorporated Areas).
	At the confluence with Ashpole Swamp	None	•94	
Humphrey Branch	Approximately 500 feet downstream of CSX Transportation.	None	•133	Robeson County (Unincorporated Areas).
	At the confluence with Raft Swamp	None	•148	
Indian Swamp	Approximately 1.1 miles upstream of the confluence with Raft Swamp.	None	•165	Robeson County (Unincorporated Areas), Town of Proctorville.
	At the confluence with Coward Swamp	None	•66	
Jackson Swamp	Approximately 0.47 mile upstream of Atkinson Road	None	•109	Robeson County (Unincorporated Areas).
	At the confluence with Big Swamp	None	•101	
Jacob Diversion	Approximately 1,400 feet downstream of Judge Road	None	•125	Robeson County (Unincorporated Areas), City of Lumberton.
	Approximately 0.4 mile downstream of Contempare Drive	•123	•124	
Jacob Swamp	Approximately 0.3 mile upstream of Emery Road	None	•133	Robeson County (Unincorporated Areas), City of Lumberton.
	Approximately 900 feet upstream of the confluence with Lumber River.	•106	•107	
Jordan Swamp	Approximately 0.5 miles upstream of Kenny Biggs Road	•123	•121	Robeson County (Unincorporated Areas).
	At the confluence with Gum Swamp	None	•187	
Jowers Branch	At County boundary	None	•218	Robeson County (Unincorporated Areas).
	At the confluence with Shoe Heel Creek	None	•159	
Juniper Branch	Approximately 0.49 mile upstream of Charlie Watt Road	None	•190	Robeson County (Unincorporated Areas).
	At the confluence with Raft Swamp	None	•170	
Lee's Branch	Approximately 100 feet downstream of Johnson Road	None	•203	Robeson County (Unincorporated Areas).
	At the confluence with Ten Mile Swamp	None	•121	
Leith Creek	Approximately 1,000 feet upstream of Vester Road	None	•132	Robeson County (Unincorporated Areas).
	At State boundary	None	•125	
Little Bear Swamp	At County boundary	None	•126	Robeson County (Unincorporated Areas).
	Approximately 325 feet upstream of the confluence of Bear Swamp.	•183	•185	
Little Bull Branch	Approximately 150 feet upstream of WL Moore Woods Road.	None	•188	Robeson County (Unincorporated Areas).
	At the confluence with Bull Branch	None	•139	
Little Burnt Swamp	Approximately 0.5 mile upstream of Bethea Road	None	•169	Robeson County (Unincorporated Areas).
	At the confluence with Burnt Swamp	None	•163	
	Approximately 0.43 mile upstream of Townsends Chapel Road.	None	•178	

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
Little Hog Swamp	At the confluence with Hog Swamp	None	•106	Robeson County (Unincorporated Areas).
	Approximately 0.42 mile upstream of Greensville Road	None	•123	
Little Indian Swamp	At the confluence with Little Indian Swamp	None	•90	Robeson County (Unincorporated Areas).
	Approximately 400 feet downstream of State Route 130	None	•97	
Little Jacob Swamp	Approximately 250 feet downstream of Lovette Road	•114	•113	Robeson County (Unincorporated Areas), City of Lumberton.
	Approximately 1,000 feet downstream of Kenny Biggs Road.	•123	•122	
Little Juniper Branch	At the upstream side of CSX Transportation	None	•170	Robeson County (Unincorporated Areas).
	Approximately 0.76 mile upstream of Hezekiah Road	None	•186	
Little Marsh Swamp	At the confluence with Galberry Swamp	None	•131	Robeson County (Unincorporated Areas), Town of Lumber Bridge.
	At the County boundary	None	•191	
Tributary	At the confluence with Little Marsh Swamp	None	•171	Robeson County (Unincorporated Areas).
	Approximately 2,750 feet upstream of State Road 20	None	•182	
Little Raft Swamp	At the confluence with Raft Swamp	None	•155	Robeson County (Unincorporated Areas), Town of Red Springs.
	Approximately 100 feet upstream of Springside Road	None	•187	
Little Swamp	At the confluence with Big Swamp	None	•100	Robeson County (Unincorporated Areas).
	Approximately 4,800 feet upstream of Singletary Church Road.	None	•107	
Little Ten Mile Swamp	At the confluence with Ten Mile Swamp	None	•145	Robeson County (Unincorporated Areas).
	Approximately 850 feet upstream of McDuffie Crossing Road.	None	•163	
Long Branch (near City of Lumberton).	At the confluence with Big Swamp	None	•99	Robeson County (Unincorporated Areas).
	Approximately 1.0 mile upstream of McKinnon Rollin Road.	None	•113	
Long Branch (near Town of Parkton).	At the confluence with Galberry Swamp	None	•149	Robeson County (Unincorporated Areas).
	Approximately 1.5 miles upstream of Council Road	None	•169	
Long Swamp	At the confluence with Richland Swamp	None	•194	Robeson County (Unincorporated Areas).
	At County boundary	None	•208	
Lumber River	Approximately 1.9 miles upstream of Willoughby Road	•96	•95	Robeson County (Unincorporated Areas), City of Lumberton.
	Approximately 0.4 mile downstream of NC 72	•112	•111	
McGregor Branch	At the confluence with Shoe Heel Creek	None	•124	Robeson County (Unincorporated Areas).
	Approximately 0.4 mile upstream of Elsie Road	None	•151	
McLeans Branch	At the confluence with Little Raft Swamp	None	•171	Robeson County (Unincorporated Areas), Town of Red Springs.
	Approximately 0.4 mile upstream of State Route 71	None	•204	
McLeod Mill Branch	At the confluence with Ashpole Swamp	None	•98	Robeson County (Unincorporated Areas).
	Approximately 1,800 feet downstream of Butler Road	None	•132	
McLeod Mill Branch	At the confluence with McLeod Mill Branch	None	•103	Robeson County (Unincorporated Areas).
Tributary	Approximately 0.74 mile upstream of the confluence with McLeod Mill Branch.	None	•111	
McRae Branch	At the confluence with Shoe Heel Creek	None	•137	Robeson County (Unincorporated Areas).
	Approximately 0.6 mile upstream of U.S. Route 501	None	•169	
Mercer Branch	At the confluence with Little Marsh Swamp	None	•133	Robeson County (Unincorporated Areas).
	Approximately 1,200 feet upstream of Interstate 95	None	•167	

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
Middle Branch	At the confluence with Wilkinson Creek	None	•131	Robeson County (Unincorporated Areas).
	Approximately 850 feet upstream of McLeod Drive	None	•164	
Mill Branch (near Town of Fairmont).	At the confluence with Ashpole Swamp	None	•85	Robeson County (Unincorporated Areas).
	Approximately 1,700 feet upstream of White Pond Road	None	•103	
Mill Branch (near City of Lumberton).	At the confluence with Raft Swamp	None	•137	Robeson County (Unincorporated Areas).
	Approximately 0.47 mile upstream of East 4th Avenue	None	•154	
Mirey Branch	At the confluence with Big Marsh Swamp	None	•161	Robeson County (Unincorporated Areas).
	Approximately 2,000 feet upstream of the confluence with Big Marsh Swamp.	None	•167	
Mitchell Swamp	At the State boundary	None	•111	Robeson County (Unincorporated Areas).
	Approximately 1,800 feet downstream of Viper Lane	None	•151	
Mitchell Swamp	At the confluence with Mitchell Swamp	None	•119	Robeson County (Unincorporated Areas), Town of Rowland.
Tributary	Approximately 0.89 mile upstream of the confluence with Mitchell Swamp.	None	•129	
Moss Neck Swamp	At the upstream side of Moss Neck Road	None	•144	Robeson County (Unincorporated Areas).
	Approximately 0.6 mile upstream of North Chicken Road	None	•162	
Old Field Branch	At the confluence with Ten Mile Swamp	None	•134	Robeson County (Unincorporated Areas).
	Approximately 2,800 feet upstream of the confluence with Ten Mile Swamp.	None	•139	
Old Field Swamp	At the confluence with Hog Swamp	None	•86	Robeson County (Unincorporated Areas), Town of Fairmont.
	Approximately 150 feet downstream of Interstate 95	None	•135	
Tributary	At the confluence with Old Field Swamp	None	•103	Robeson County (Unincorporated Areas).
	Approximately 500 feet upstream of CSX Transportation	None	•127	
Old Hill Branch	At the confluence with Hog Swamp	None	•93	Robeson County (Unincorporated Areas).
	Approximately 1,300 feet upstream of the confluence with Hog Swamp.	None	•95	
Panther Branch	At the confluence with Richland Swamp	None	•154	Robeson County (Unincorporated Areas).
	Approximately 1,650 feet upstream of Old Lowry Road	None	•201	
Pittman Mill Branch	At the confluence with Old Field Swamp	None	•92	Robeson County (Unincorporated Areas), Town of Fairmont.
	Approximately 0.42 mile upstream of Pittman Street	None	•113	
Raft Swamp	Approximately 0.5 mile upstream of the confluence with the Lumber River.	•124	•123	Robeson County (Unincorporated Areas).
	At the downstream County boundary	None	•182	
Reedy Branch	At the confluence with Old Field Swamp	None	•111	Robeson County (Unincorporated Areas).
	Approximately 0.72 mile upstream of the confluence with Old Field Swamp.	None	•121	
Richland Swamp	At the confluence with Raft Swamp	None	•133	Robeson County (Unincorporated Areas).
	Approximately 0.47 mile upstream of Mt. Zion Church Road.	None	•210	
Saddletree Swamp	Approximately 1,250 feet upstream of McDuffie Crossing Road.	None	•155	Robeson County (Unincorporated Areas).
	Approximately 0.8 mile upstream of McDuffie Crossing Road.	None	•158	
Tributary	At the upstream side of Mt. Moriah Church Road	None	•144	Robeson County (Unincorporated Areas), City of Lumberton.
	Approximately 500 feet upstream of West Powersville Road.	None	•147	
Scotts Mill Branch	At the confluence with Ashpole Swamp	None	•105	Robeson County (Unincorporated Areas).

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	
	Approximately 0.63 mile downstream of U.S. Route 301	None	•134	
Shoe Heel Creek	At State boundary	None	•114	Robeson County (Unincorporated Areas), Town of Maxton.
	At Scotland/Robeson County boundary	None	•164	
Short Swamp	At the confluence with Wilkinson Creek	None	•129	Robeson County (Unincorporated Areas).
	Approximately 100 feet downstream of Cabinet Shop Road.	None	•140	
Ten Mile Swamp	At the confluence with Big Swamp	None	•116	Robeson County (Unincorporated Areas).
	Approximately 1,450 feet upstream of McDuffie Crossing Road.	None	•162	
Tributary	At the confluence with Ten Mile Swamp	None	•127	Robeson County (Unincorporated Areas).
	Approximately 1,050 feet upstream of East Powersville Road.	None	•137	
Thick Branch	At the confluence with Ten Mile Swamp	None	•126	Robeson County (Unincorporated Areas).
	Approximately 1,400 feet upstream of Indian Heritage Road.	None	•133	
Town Ditch	At the confluence with Mitchell Swamp	None	•119	Robeson County (Unincorporated Areas), Town of Rowland.
	Approximately 0.9 mile upstream of the confluence with Mitchell Swamp.	None	•129	
Underpass Overland	At the confluence with Collection Canal	•114	•119	City of Lumberton.
North	At the confluence with Underpass Overland South	None	•119	
South	At the confluence with Cotton Mill Branch	None	•118	City of Lumberton.
	Approximately 150 feet upstream of Interstate 95	None	•124	
Watering Hole Swamp	At the confluence with Wilkinson Creek	None	•135	Robeson County (Unincorporated Areas).
	Approximately 50 feet downstream of O'Quinn Road	None	•167	
White Oak Branch	At the confluence with Raft Swamp	None	•129	Robeson County (Unincorporated Areas).
	Approximately 2,250 feet upstream of Oak Grove Church Road.	None	•148	
White Oak Swamp	At the confluence with Big Swamp	None	•110	Robeson County (Unincorporated Areas).
	Approximately 1,100 feet upstream of Howell Road	None	•135	
Wildcat Branch	At the confluence with Ten Mile Swamp	None	•116	Robeson County (Unincorporated Areas).
	Approximately 2,200 feet upstream of Smith Mill Road	None	•132	
Wilkinson Creek	At the confluence with Shoe Heel Creek	None	•117	Robeson County (Unincorporated Areas).
	Approximately 450 feet downstream of O'Quinn Road	None	•167	
Tributary	At the confluence with Wilkinson Creek	None	•122	Robeson County (Unincorporated Areas)
	Approximately 1.5 miles upstream of Gaddy's Mill Road	None	•154	

Town of Fairmont

Maps available for inspection at the Fairmont Town Hall, 421 South Main Street, Fairmont, North Carolina.

Send comments to The Honorable Nedward Gaddy, Mayor of the Town of Fairmont, Municipal Building, Box 248, Fairmont, North Carolina 28340.

Town of Lumber Bridge

Maps available for inspection at the Lumber Bridge Town Hall, 101 Railroad Street, Lumber Bridge, North Carolina.

Send comments to The Honorable William L. Davis, Mayor of the Town of Lumber Bridge, P.O. Box 91, Lumber Bridge, North Carolina 28357.

City of Lumberton

Maps available for inspection at the City of Lumberton Planning Department, 501 East 5th Street, Lumberton, North Carolina.

Send comments to The Honorable Ray B. Pennington, Mayor of the City of Lumberton, P.O. Box 1388, Lumberton, North Carolina 28359.

Town of Maxton

Maps available for inspection at the Maxton Town Hall, 201 McCaskill Street, Maxton, North Carolina.

Send comments to The Honorable Lillie A. McKoy, Mayor of the Town of Maxton, 201 McCaskill Street, Maxton, North Carolina 28364.

Town of Parkton

Maps available for inspection at the Parkton Town Hall, 28 West Second Street, Parkton, North Carolina.

Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)		Communities affected
		Existing	Modified	

Send comments to The Honorable Tim Parnell, Mayor of the Town of Parkton, P.O. Box 55, Parkton, North Carolina 28371.

Town of Proctorville

Maps available for inspection at the Proctorville Town Hall, Corner of Carolina & Main Street, Proctorville, North Carolina.

Send comments to The Honorable Hal D. Ivey, Mayor of the Town of Proctorville, P.O. Box 190, Proctorville, North Carolina 28375.

Town of Red Springs

Maps available for inspection at the Red Springs Town Hall, 217 South Main Street, Red Springs, North Carolina.

Send comments to The Honorable George T. Paris, Mayor of the Town of Red Springs, 217 South Main Street, Red Springs, North Carolina 28377.

Robeson County (Unincorporated Areas)

Maps available for inspection at the Robeson County Inspections & Zoning Office, 415 Country Club Drive, Lumberton, North Carolina.

Send comments to Mr. Kenneth Windley, Jr., Robeson County Manager, County Administration Building, 701 North Elm Street, Lumberton, North Carolina 28358.

Town of Rowland

Maps available for inspection at the Rowland Town Hall, 202 West Main Street, Rowland, North Carolina.

Send comments to The Honorable Harris McCall, Mayor of the Town of Rowland, P.O. Box 127, Rowland, North Carolina 28383.

NORTH CAROLINA
Town of St. James, Brunswick County

Atlantic Ocean	Approximately 500 feet north of the intersection of Glenscare Lane SE and Pinecrest Drive SE.	None	•11	Town of St. James
	Approximately 1,000 feet south of the intersection of Marshwood Court and Marshpoint Road.	•13	•11	

Town of St. James

Maps available for inspection at the St. James Town Hall, 3628 St. James Drive, Southport, North Carolina.

Send comments to The Honorable Leonard B. Harmon, Mayor of the Town of St. James, 3628 St. James Drive, Southport, North Carolina 28461.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: March 3, 2004.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 04–5245 Filed 3–8–04; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 74, 92, 96, and 87

Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of all Department of Health and Human Services Program Participants

AGENCY: Office of the Secretary, Department of Health and Human Services.

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule is intended to implement executive branch policy that, within the framework of constitutional church-state guidelines, religiously affiliated (or "faith-based") organizations should be able to compete on an equal footing with other organizations for the Department's funding without impairing the religious character of such organizations. It proposes to revise Department regulations at 45 CFR Parts 74, 92, and 96 to remove barriers to the participation of faith-based organizations in Department programs and to ensure that these programs are implemented in a manner consistent with applicable statutes and the requirements of the Constitution, including the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment.

DATES: Comments must be submitted by May 10, 2004.

ADDRESSES: You may submit comments by any of the following methods. All submissions must include the agency name and Regulation Identifier Number (RIN) for this rulemaking:

- *Mail:* HHS/OS Executive Secretariat, Room 603–H, 200 Independence Avenue, SW., Washington, DC 20201.
- *Hand delivery/courier:* HHS/OS Executive Secretariat, Room 603–H, 200 Independence Avenue, SW., Washington, DC 20201. Delivery must be made between 10 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal Rulemaking Portal:* At Regulations.gov located at *http://www.regulations.gov/index.cfm.*

Instructions: At Regulations.gov you may find, review, and submit comments on this and other proposed regulations open for comment and published in the **Federal Register**. Once you have performed a search and located the open proposed regulation, you may submit comments by clicking the "Submit a Comment on this Regulation" link. The link will open a blank comment form in a separate Internet browser window for you to fill out. The form is limited to 4,000 characters or roughly two pages of comments. You may send more than one comment form. In most cases, you may also attach an electronic file as a part of your comment. The comment form that appears when you click the "Submit a Comment on this Regulation" link is specific to the particular Department or Agency that will receive

the comment. The comment form includes instructions on how to submit the comment and what information must be provided for the comment to be considered. Comments must include the full name, postal address, and organizational or agency affiliation (if applicable) of the sender. The completed comment form will include a unique document identification number and a date and time stamp applied automatically by the Regulations.gov Web site. Comments submitted via the Regulations.gov are transmitted from the Regulations.gov Web site to the Department and assigned the Docket Identification Number for the action you are commenting on. All public comments received are then reviewed by the Department and taken into account when the final regulation is developed.

FOR FURTHER INFORMATION CONTACT: For information, contact Bobby J. Polito, Director, Center for Faith-Based and Community Initiatives, Department of Health and Human Services, Room 120F, 200 Independence Avenue, SW., Washington, DC 20201; telephone: (202) 358–3595 (this is not a toll-free number). Hearing or speech-impaired individuals may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

This proposed rule is part of the Department's effort to fulfill its responsibilities under two Executive Orders issued by President Bush. The first of these Orders, Executive Order 13198 of January 29, 2001, published in the **Federal Register** on January 31, 2001 (66 FR 8497), created Centers for Faith-Based and Community Initiatives in five cabinet departments—Housing and Urban Development, Health and Human Services, Education, Labor, and Justice—and directed these Centers to identify and eliminate regulatory, contracting, and other programmatic obstacles to the equal participation of faith-based and community organizations in the provision of social services by their Departments. The second of these Executive Orders, Executive Order 13279 of December 12, 2002, published in the **Federal Register** on December 16, 2002 (67 FR 77141), charged executive branch agencies to give equal treatment to faith-based and community groups that apply for funds to meet social needs in America's communities. President Bush thereby called for an end to discrimination against faith-based organizations and ordered implementation of these policies throughout the executive branch in a manner consistent with the First Amendment to the United States Constitution. He further directed that faith-based organizations be allowed to retain their religious autonomy over their internal governance and composition of boards, and over their display of religious art, icons, scriptures, or other religious symbols, when participating in government-funded programs. The Administration believes that there should be an equal opportunity for all organizations—both religious and nonreligious—to participate as partners in Federal programs.

II. This Proposed Rule

This rule proposes to amend the Department's uniform administrative requirements at 45 CFR Parts 74, 92, and 96 and is applicable only to those grants, agreements, and other financial assistance covered by such requirements.

The objective of the proposed rule is to ensure that the Department's discretionary grants, formula and block grants, and other financial assistance are open to all qualified organizations, regardless of their religious character or affiliation, and to establish clearly the proper uses to which funds could be put and the conditions for receipt of funding. In addition, this proposed rule is designed to ensure that the implementation of the Department's programs is conducted in a manner consistent with the requirements of Federal law and the Constitution, including the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment. The proposed rule has the following specific objectives:

1. *Participation by faith-based organizations in Department of Health and Human Services programs.* The proposed rule provides that organizations are eligible to participate in Department programs without regard to their religious character or affiliation, and that organizations not be excluded from the competition for Department funds simply because they are religious. Specifically, religious organizations are eligible to compete for funding on the same basis, and under the same eligibility requirements, as other organizations. The Department, as well as state and local governments administering funds under Department programs or intermediate organizations with the same duties as a governmental entity under this part, are prohibited from discriminating for or against organizations on the basis of religious character or affiliation in the selection of service providers. Nothing in the rule, however, would preclude those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause.

2. *Inherently religious activities.* The proposed rule describes the requirements that would be applicable to all recipient organizations regarding the use of Department funds for inherently religious activities. Specifically, a participating organization may not use direct financial assistance from the Department to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, it would be required to offer them separately, in time or location, from the programs or services funded with direct Department assistance, and participation must be voluntary, and understood to be voluntary, for the beneficiaries of the Department-funded programs or services. This requirement ensures that direct financial assistance from the Department to religious organizations is not used to support inherently religious activities. Such assistance may not be used, for example, to conduct worship services, prayer meetings, or any other activity that is inherently religious.

The proposed rule clarifies that this restriction does not mean that an organization that receives Department funds may not engage in inherently religious activities, but only that such an organization may not fund these activities with direct financial assistance from the Department. It further provides that the restrictions on inherently religious activities do not apply where Department funds are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary (*e.g.*, under a program that gives a beneficiary a Department-funded voucher, coupon, certificate, or another funding mechanism designed to give that beneficiary a choice among providers) or through other indirect funding mechanisms, provided the religious organizations otherwise satisfy the requirements of the program.

In this proposed rule, the term "direct financial assistance" means that the government or an intermediate organization with the same duties as a governmental entity under this part selects the provider and purchases the needed services straight from the provider (*e.g.*, via a contract or cooperative agreement). In contrast, indirect funding scenarios typically place the choice of service provider in the hands of the beneficiary, and then

pay for the cost of that service through a voucher, certificate, or other similar means of payment.

3. *Independence of faith-based organizations.* The proposed rule also clarifies that a religious organization that participates in Department programs retains its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization could use space in its facilities to provide Department-funded services without removing religious art, icons, scriptures, or other religious symbols. In addition, a Department-funded religious organization may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. *Employment practices.* The proposed rule also clarifies that religious organizations do not forfeit their exemption from the Federal prohibition of employment discrimination on the basis of religion set forth in section 702 (a) of the Civil Rights Act of 1964. Some Department programs, however, have independent statutory nondiscrimination requirements related to employment discrimination. Therefore, organizations should consult with the appropriate grant program office.

5. *Nondiscrimination in providing assistance.* The proposed rule provides that an organization that receives direct financial assistance from the Department may not, in providing program assistance supported by such funding, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

6. *Assurance requirements.* All organizations that participate in Department programs, including organizations with religious character or affiliations are required to carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to engage in inherently religious activities. The Department will not require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any restrictions on the use of financial assistance shall apply equally to religious and non-religious organizations. Thus, the Department intends to create a "level playing field."

III. Findings and Certifications

Executive Order 12866

Executive Order 12866 (as amended by Executive Order 13258) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This rule is considered a "significant regulatory action" under section 3 (f) of the Executive Order, and therefore has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Analysis

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), must review and approve this proposed rule and certify that this rule will not have a significant economic impact on a substantial number of small entities. The proposed rule would not impose any new costs, or modify existing costs, applicable to Department grantees. Rather, the purpose of the proposed rule is to remove policy prohibitions that currently restrict the equal participation of religious or religiously affiliated organizations in the Department=s programs. Notwithstanding the Department's determination that this rule will not have a significant economic effect on a substantial number of small entities, the Department specifically invites comments regarding any less burdensome alternatives to this rule that will meet the Department's objectives as described in this preamble.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by state, local, or tribal governments, in the aggregate, or by the private sector, of $110 million or more. This proposed rule would not mandate any requirements for state, local, or tribal governments, nor would it result in expenditures by the private sector of $110 million or more in any one year.

Executive Order 13132—Federalism

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Consistent with Executive Order 13132, the Department specifically solicits comments from state and local government officials on this proposed rule.

List of Subjects

45 CFR Part 74

Administrative Practice and Procedures, Grants.

45 CFR Part 92

Administrative Practice and Procedures, Grants.

45 CFR Part 96

Administrative Practice and Procedures, Block Grants.

45 CFR Part 87

Administrative Practice and Procedures, Grant Programs-social programs, public assistance programs, nonprofit organizations.

For the reasons stated in the preamble, the Department proposes to amend chapter I of Title 45 of the Code of Federal Regulations as follows:

PART 74—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR AWARDS AND SUBAWARDS TO INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, OTHER NONPROFIT ORGANIZATIONS, AND COMMERCIAL ORGANIZATIONS; AND CERTAIN GRANTS AND AGREEMENTS WITH STATES, LOCAL GOVERNMENTS AND INDIAN TRIBAL GOVERNMENTS

1. The authority citation for part 74 continues to read as follows:

Authority: 5 U.S.C. 301

2. In subpart B add § 74.18 to read as follows:

§ 74.18 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

3. In § 74.17, add paragraph (a) and add and reserve (b) to read as follows:

§ 74.17 Certifications and representations.

* * * * *

(a) The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

(b) [Reserved]

PART 92—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

4. The authority for part 92 continues to read as follows:

Authority: 5 U.S.C. 301.

5. In subpart B add § 92.13 and 92.14 to read as follows:

§ 92.13 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

§ 92.14 Compliance With Part 87

The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

PART 96—BLOCK GRANTS

6. The authority citation for part 96 is revised to read as follows:

Authority: 31 U.S.C. 1243 note, 7501–7507; 42 U.S.C. 300w *et seq.*; 300x *et seq.*, 300y *et seq.*, 701 *et seq.*, 8621 *et seq.*, 9901 *et seq.*, 1397 *et seq.*; 5 U.S.C. 301/

7. In subpart B add § 96.18 to read as follows:

§ 96.18 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 87 (Equal Treatment for Faith-based Organizations) of this chapter.

8. Add Part 87 to read as follows:

PART 87—EQUAL TREATMENT FOR FAITH-BASED ORGANIZATIONS

Sec.

87.1 Discretionary grants

87.2 Formula and block grants

Authority: 5 U.S.C. 301.

§ 87.1 Discretionary grants.

(a) Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any state or local government and other intermediate organizations receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, "program" refers to activities supported by discretionary grants under which recipients are selected through a competitive process. As used in this section, the term "recipient" means an organization receiving financial assistance from an HHS awarding agency to carry out a project or program and includes the term 'grantee' as used in 45 CFR Parts 74, 92, and 96.

(b) Organizations that receive direct financial assistance from the Department under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(c) A religious organization that participates in the Department-funded programs or services will retain its independence from federal, state, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization may use space in its facilities to provide programs or services funded with financial assistance from the Department without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from the Department retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities.

(d) An organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a state or local government in administering financial assistance from the Department shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations. All organizations that participate in Department programs, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance from the Department to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a state or local government in administering financial assistance from the Department shall disqualify religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(f) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives direct or indirect financial assistance from the Department. Some Department programs, however, contain independent statutory provisions requiring that all recipients agree not to discriminate in employment on the basis of religion. Accordingly, recipients should consult with the appropriate Department program office if they have

questions about the scope of any applicable requirement.

(g) In general, the Department does not require that a recipient, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a "nonprofit organization" in order to be eligible for funding. Funding announcements and other grant application solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Recipients should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state or other governmental taxing body or the state secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the state; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (g)(1) through (3) of this section if that item applies to a state or national parent organization, together with a statement by the state or parent organization that the applicant is a local nonprofit affiliate.

(h) If a state or local government contributes its own funds, including but not limited to matching funds, to supplement activities carried out under the applicable programs, the state or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(i) To the extent otherwise permitted by Federal law, the restrictions on inherently religious activities set forth in this section do not apply where Department funds are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary or through other indirect funding mechanisms, provided the religious organizations otherwise satisfy the requirements of the program. A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or through a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a genuine and independent choice among providers.

§ 87.2 Formula and block grants.

(a) Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any state or local government receiving funds under any Department program nor any intermediate organization with the same duties as a governmental entity under this part shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, "program" refers to activities supported by formula or block grants. As used in this section, the term "recipient" means an organization receiving financial assistance from an HHS awarding agency to carry out a project or program and includes the term 'grantee' as used in 45 CFR Parts 74, 92, and 96.

(b) Organizations that receive direct financial assistance from the Department may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

(c) A religious organization that participates in the Department-funded programs or services will retain its independence from federal, state, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization that receives financial assistance from the Department may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from the Department retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities.

(d) An organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

(e) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a state or local government in administering financial assistance from the Department shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any restrictions on the use of grant funds shall apply equally to religious and non-religious organizations. All organizations that participate in Department programs, including organizations with religious character or affiliations, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of Department-funded activities, including those prohibiting the use of direct financial assistance to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a state or local government in administering financial assistance from the Department shall disqualify religious organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide

social services, or because of their religious character or affiliation.

(f) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the religious organization receives direct or indirect financial assistance from Department. Some Department programs, however, contain independent statutory provisions requiring that all recipients agree not to discriminate in employment on the basis of religion. Accordingly, grantees should consult with the appropriate Department program office if they have questions about the scope of any applicable requirement.

(g) In general, the Department does not require that a recipient, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code to be eligible for funding under Department programs. Many grant programs, however, do require an organization to be a "nonprofit organization" in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. In addition, any solicitation that requires an organization to maintain tax-exempt status will expressly state the statutory authority for requiring such status. Grantees should consult with the appropriate Department program office to determine the scope of any applicable requirements. In Department programs in which an applicant must show that it is a nonprofit organization, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state or other governmental taxing body or the state secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the state; and

(ii) No part of its net earnings may benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (g)(1) through (3) of this section if that item applies to a state or national parent organization, together with a statement by the state or parent organization that the applicant is a local nonprofit affiliate.

(h) If a state or local government contributes its own funds, including but not limited to matching funds, to supplement activities carried out under the applicable programs, the state or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this section shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

(i) To the extent otherwise permitted by Federal law, the restrictions on inherently religious activities set forth in this section do not apply where Department funds are provided to religious organizations as a result of a genuine and independent private choice of a beneficiary or through other indirect funding mechanisms, provided the religious organizations otherwise satisfy the requirements of the program. A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or through a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

Dated: March 1, 2004.

Tommy G. Thompson,

Secretary.

[FR Doc. 04–5110 Filed 3–4–04; 8:58 am]

BILLING CODE 4154–07–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT61

Endangered and Threatened Wildlife and Plants; Regulations for Nonessential Experimental Populations of the Western Distinct Population Segment of the Gray Wolf

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) propose regulations for the nonessential experimental populations of the western distinct population segment (DPS) of the gray wolf (*Canis lupus*). In addition, we propose regulations so that States with wolf management plans approved by the Service can apply for additional authorities to manage wolves consistent with those approved plans. These proposed regulations would only have effect in States that have an approved State management plan for gray wolves. Within the western DPS of the gray wolf, only the States of Idaho and Montana have approved State management plans for gray wolves; the State of Wyoming has prepared a wolf management plan which was not approved by the Service; therefore, if finalized, these regulatory changes would not affect existing wolf management in Wyoming. As we discussed in our advance notice of proposed rulemaking regarding delisting the western DPS of the gray wolf, once all the States have approved wolf management plans, we intend to propose removing the western DPS from the List of Endangered and Threatened Vertebrates. This proposed rule would also not affect the eastern DPS or the southwestern DPS of the gray wolf.

DATES: Comments on this proposed rule must be received by May 10, 2004. Public hearings will be scheduled for Boise, ID, and Helena, MT, during the comment period (see "Public Hearings" in the **SUPPLEMENTARY INFORMATION** section). Requests for additional public hearings must be received by April 8, 2004.

ADDRESSES: U.S. Fish and Wildlife Service, Western Gray Wolf Recovery Coordinator, 100 N. Park, #320, Helena, MT 59601. Comments on this proposed rule may be sent to this address, or by electronic mail to *WesternGrayWolf@fws.gov*. If you submit comments by e-mail, please submit them as an ASCII file and avoid the use of special characters and any form of encryption. Please also include "Attn: RIN 1018–AT61" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Helena office at telephone number 406–449–5225.

FOR FURTHER INFORMATION CONTACT: Ed Bangs, Western Gray Wolf Recovery Coordinator, at telephone number 406–449–5225, ext. 204.

SUPPLEMENTARY INFORMATION:

Background

On April 1, 2003, we published in the **Federal Register** (69 FR 15879) an advance notice of proposed rulemaking that announced our intention to propose rulemaking under the Endangered

Species Act of 1973, as amended (Act), to remove the western distinct population segment (DPS) of the gray wolf (*Canis lupus*) from the List of Endangered and Threatened Wildlife in the near future. At the time, we indicated that the numbers of wolves in the western DPS had exceeded our recovery goals; we reported that, at the end of 2001, 563 wolves could be found in 34 packs in the northern U.S. Rockies. We also emphasized the importance of State and tribal wolf management plans to our delisting decision; we believe these plans will be the major determinants of wolf protection and prey availability, and will set and enforce limits on human utilization and other forms of taking, once the wolf is delisted. In short, these State and tribal management plans will determine the overall regulatory framework for the future conservation of gray wolves after delisting. For reasons we discuss in more detail below, we are not yet prepared to propose delisting the western DPS of gray wolves; here, we propose new regulations for the nonessential experimental populations of the western DPS of gray wolves that are found in States with Service-approved State wolf management plans.

Gray wolf (*Canis lupus*) populations were eliminated from Montana, Idaho, and Wyoming, as well as adjacent southwestern Canada, by the 1930s (Young and Goldman 1944). After human-caused mortality of wolves in southwestern Canada was regulated in the 1960s, populations expanded southward (Carbyn 1983). Dispersing individuals occasionally reached the northern Rocky Mountains of the United States (Ream and Mattson 1982, Nowak 1983), but lacked legal protection there until 1974 when they were listed as endangered.

Section 10(j) of the Act gives the Secretary of the Interior the authority to designate populations of listed species that are reintroduced outside their current range, but within their probable historical range, as "experimental populations" for the purposes of promoting the recovery of those species by establishing additional wild populations. Such a designation increases our flexibility in managing reintroduced populations, because experimental populations are generally treated as threatened species under the Act. Threatened status, in comparison to endangered status, allows the promulgation of special regulations to further promote the conservation of the species.

Furthermore, the Secretary is authorized to designate experimental populations as "nonessential" if they are determined to be not essential to the continued existence of the species. For the purposes of section 7(a)(2) of the Act (Interagency Cooperation), nonessential experimental populations, except where they occur within areas of the National Wildlife Refuge System or the National Park System, are treated as species proposed to be listed as threatened or endangered species, rather than as a listed species.

In 1994, we promulgated special regulations under Section 10(j) of the Act for the purposes of wolf reintroduction. Those regulations, codified at 50 CFR 17.84(i), established two non-essential experimental populations, the central Idaho non-essential experimental population area and the Yellowstone non-essential experimental population area, and were meant to address the potential negative impacts or concerns regarding wolf reintroduction.

Since reintroduction began in 1994, wolf populations in both experimental areas have exceeded expectations. This success has prompted the Service to upgrade the current status of gray wolves, outside of the experimental populations, to threatened; we also published an advance notice of proposed rule making indicating our intention to delist the western DPS of gray wolves in the near future (68 FR 15879). However, this reclassification had no effect on the status of the experimental populations in Idaho or Yellowstone, which were already treated as threatened.

In the preamble to the 1994 regulations where we established the nonessential experimental populations, we also identified protective measures and management practices necessary for the populations' conservation and recovery. As wolves in the nonessential experimental populations are treated as a threatened species, these regulations provided additional flexibility in managing wolf populations within the experimental population areas compared to outside, where wolves were listed as endangered. In 2003, however, when we reclassified wolves in the western DPS as threatened, we also published special regulations (found in 50 CFR 17.40(n)) that provided more flexible management for the species outside the experimental population areas.

The rule we adopted in 2003, however, did not apply within the experimental population areas; as a result, State wolf management is currently more flexible outside the experimental population areas. We now propose, under this rule, regulations at 50 CFR 17.84, for States with Service-approved State wolf management plans only, that would adopt similar provisions which expand allowable management for the experimental population areas, providing more consistent management rules both inside and outside experimental population areas. In addition, these proposed regulations also provide for the transition from the provisions of this rule to those provisions of Service-approved State wolf management plans consistent with federal regulations for nonessential experimental wolves within the boundaries of the State, with the exception of lands managed by the National Park Service and the Fish and Wildlife Service. This change would provide States with much of the flexibility in wolf management now limited to the Service, but only where the Secretary has already determined that the State's wolf management would be consistent with the protections already provided to wolves under the Act. For States without approved management plans the existing regulations are retained.

Previous Federal Actions

The northern Rocky Mountain wolf (*Canis lupus irremotus*) was listed as endangered in Montana and Wyoming in the first list of species that were protected under the 1973 Act, published in May 1974 (USDI 1974). To eliminate problems with listing separate subspecies of the gray wolf and identifying relatively narrow geographic areas in which those subspecies are protected, on March 9, 1978, we published a rule (43 FR 9607) relisting the gray wolf at the species level (*Canus lupus*) as endangered throughout the conterminous 48 States and Mexico, except Minnesota, where the gray wolf was reclassified to threatened. In addition, critical habitat was designated in that rulemaking.

On November 22, 1994, we designated areas in Idaho, Montana, and Wyoming as nonessential experimental populations in order to initiate gray wolf reintroduction projects in central Idaho and the Greater Yellowstone area (59 FR 60252, 59 FR 60266). These experimental population designations also contain special regulations that govern the take of wolves within the geographical areas (codified at 50 CFR 17.84(i)). The rules governing these experimental populations allowed for incremental increases in the authority of States to manage the wolves under a State management plan approved by the Service. Specifically, the rules allowed States to define livestock for purposes of managing conflicts between wolves and livestock, and the rule also allowed

States to document adverse effects of wolves on ungulates for the purposes of managing conflicts in this regard.

In January 1995, fifteen young adult wolves captured in Alberta, Canada, were released in central Idaho. During January 1996, an additional twenty wolves from British Columbia were released into the central Idaho experimental population area. In March 1995, fourteen wolves from Alberta, representing three family groups were released in Yellowstone National Park. In April 1996, this procedure was repeated with seventeen wolves from British Columbia.

On January 12, 1998, we established a third nonessential experimental population area to reintroduce the Mexican gray wolf into its historical habitat in the southwestern States (63 FR 1752).

We received several petitions during the past decade requesting consideration to delist the gray wolf in all or part of the 48 conterminous States. We subsequently published findings that these petitions did not present substantial information that delisting gray wolves in all or part of the conterminous 48 States may be warranted (54 FR 16380, April 24, 1989; 55 CFR 48656, November 30, 1990; 63 FR 55839, October 19, 1998).

On July 13, 2000, we published a proposal (65 FR 43450) to revise the current listing of the gray wolf across most of the conterminous United States. On April 1, 2003, we published a final rule establishing three DPSs (Western, Eastern, and Southwestern) and reclassifying the gray wolf from endangered to threatened in the Western and Eastern DPSs except where nonessential experimental populations existed (68 FR 15804). We also established special regulations under section 4(d) of the Act for the reclassified DPSs. Also on April 1, 2003, we published two Advance Notices of Proposed Rulemaking announcing our intent to delist the gray wolf in the Eastern (68 FR 15876) and Western (68 FR 15879) DPSs at some point in the future.

Recovery Goals

Current population figures from the Service indicate that the experimental populations within central Idaho and Yellowstone have exceeded current recovery goals (30 packs well-distributed in recovery areas). In 2002, the Service published population figures for the gray wolf, which indicate there were between 650 to 700 wolves in about 41 breeding pairs equitably distributed throughout Montana (about 120 wolves in 13 breeding packs), Idaho (about 285 wolves in 10 breeding packs), and Greater Yellowstone (270 wolves in 18 breeding packs). 2002 was the third year that the wolf population in the northern Rocky Mountains has had thirty or more breeding pairs.

Currently Designated Nonessential Experimental Populations of Gray Wolves

The Secretary has designated three nonessential experimental population areas for the gray wolf, and wolves have subsequently been reintroduced into these areas. These nonessential experimental population areas are the Yellowstone Nonessential Experimental Population Area, the Central Idaho Nonessential Experimental Population Area, and the Mexican Wolf Nonessential Experimental Population Area. The first two of these are intended to further the recovery of gray wolves in the northern U.S. Rocky Mountains, and the third is part of our Mexican wolf recovery program, as described in their respective recovery plans (Service 1982, 1987).

The Yellowstone Experimental Population Area consists of that portion of Idaho east of Interstate Highway 15; that portion of Montana that is east of Interstate Highway 15 and south of the Missouri River from Great Falls, Montana, to the eastern Montana border; and all of Wyoming (59 FR 60252; November 22, 1994). However, as explained below, the new regulations proposed here will not apply in Wyoming.

The Central Idaho Experimental Population Area consists of that portion of Idaho that is south of Interstate Highway 90 and west of Interstate 15; and that portion of Montana south of Interstate 90, west of Interstate 15, and south of Highway 12 west of Missoula (59 FR 60266; November 22, 1994).

A third similar nonessential experimental population area was established to reintroduce the Mexican gray wolf into its historical habitat in the southwestern States. The Mexican Gray Wolf Nonessential Experimental Population Area consists of that portion of Arizona lying south of Interstate Highway 40 and north of Interstate Highway 10; that portion of New Mexico lying south of Interstate Highway 40 and north of Interstate Highway 10 in the west and north of the Texas-New Mexico border in the east; and that part of Texas lying north of U.S. Highway 62/180 (63 FR 1752; January 12, 1998).

This proposed rule will not affect the Mexican Gray Wolf Nonessential Experimental Population, nor will it affect the existing special regulations that apply to it.

Current Special Regulations for the Western DPS

Two different special regulations currently apply to the Western DPS.

In 1994, the Service established special regulations found at 17.48(i) for these two experimental populations allow flexible management of wolves, including authorization for private citizens to take wolves in the act of attacking livestock on private land. These rules also provide a permit process that similarly allows the taking, under certain circumstances, of wolves in the act of attacking livestock grazing on public land. In addition, they allow opportunistic noninjurious harassment of wolves by livestock producers on private and public grazing lands, and designated government employees may perform lethal and nonlethal control efforts to remove problem wolves under specified circumstances.

As mentioned above, we promulgated a special rule under 4(d) for the Western DPS outside of the nonessential experimental population areas (the Central Idaho and Yellowstone nonessential experimental population areas) found at 17.40(n) (Western DPS 4(d) rule). The Western DPS 4(d) rule allows landowners and permittees on Federal grazing allotments to harass wolves in a noninjurious manner at any time. As discussed in the rule, this type of harassment will not affect the wolf population other than by making some individual wolves more wary of people. Wolves are adept social learners. Harassing wolves that have begun to be comfortable around people will cause those wolves to become more wary. Wolves that are wary of people and places that are frequented by people may be less likely to be involved in livestock and pet depredations. Wolves that are not wary of people are more vulnerable to being illegally killed or being hit by cars and, in rare and the most extreme circumstances, wolves can become habituated to human foods and can become a potential threat to human safety.

In some situations the Western DPS 4(d) rule also allows the injurious harassment (for example, by rubber bullets) of wolves under a permit from us. This type of harassment will permit management of situations (for example, loitering around vulnerable livestock, approaching humans, trying to attack pets) before they have escalated into a situation that calls for more drastic measures such as lethal control. To prevent abuse, this type of activity would be limited by case-by-case

evaluation and controlled by a permit. In the experimental population areas, this type of management has been used in a few situations, and no wolves have been permanently injured.

State Management Plans

In order to delist the Western DPS wolf population due to recovery the demographic criteria (a minimum of 30 breeding pairs of wolves [an adult male and a female wolf] that raise at least 2 pups until December 31 or the biological equivalent of that definition that are equitably distributed through Montana, Idaho, and Wyoming) must be met, and the Service must determine, based on the best scientific and commercial data available, that the species is no longer in danger of extinction and is not likely to be in danger of extinction in the foreseeable future throughout all or a significant portion of its range. The basis for the determination is a review of the status of the species in relation to five factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

State management plans have been determined by the Service as the most appropriate means of maintaining a recovered wolf population and demonstrating adequacy of regulatory mechanisms (*i.e.* addressing factor D) because the primary responsibility for management of the species will rest with the States upon delisting (and subsequent removal of the protections of the ESA). Based on the demographic criteria mentioned above, each State, therefore, needs to maintain at least 10 breeding pairs, so the wolf population will not fall below 30 breeding pairs overall and so that an equitable distribution of wolf breeding pairs is maintained among the three States. All three States submitted wolf management plans to the Service for review. The Service developed an independent review process for these three plans. Twelve recognized authorities in wolf management or research were asked their individual professional review and opinion of whether the State plans of Montana, Idaho, and Wyoming would achieve the stated objectives of each plan, and if collectively the plans will maintain, as a minimum, the Western DPS wolf population at recovery levels into the foreseeable future.

Based on our review of the State management plans, the independent reviewers' comments, and the States' responses to those comments, the Service approved the Montana and Idaho wolf management plans as they were determined to be adequate to maintain their share of the tri-state wolf population above recovery levels. Neither Montana nor Idaho is required to take any additional action in order for the Service to proceed with a delisting proposal.

Wyoming's wolf management plan, however, was not approved by the Service. Consequently, the proposed regulatory changes, which define the expanded authorities, would not affect the portion of the Yellowstone nonessential experimental population area in Wyoming. We intend to continue working with the State of Wyoming as they develop a State wolf management plan that we can approve; once we have approved wolf management plans for all three States, and barring the identification of any new threats to the species, we expect to propose rulemaking to remove the western DPS of the gray wolf from the List of Endangered and Threatened Vertebrates (for additional discussion, see our ANPR at 68 FR 15879).

Idaho

In preparation for delisting, the Idaho Legislature chartered the Legislative Wolf Oversight Committee to prepare an Idaho post-delisting Wolf Management Plan to facilitate the transfer of management authority to the State following delisting. In March 2002 the Legislature adopted the Idaho Wolf Conservation and Management Plan.

The Idaho Department of Fish and Game (IDFG) is charged by statute with the management of Idaho's wildlife (Idaho Code 36–103(a)). Tribes in Idaho, however, manage wildlife with authorities that are similar to, but separate from, the State of Idaho. In managing for wolves, IDFG will consult with Tribes. The Idaho Wolf Conservation and Management Plan is summarized below.

Wolf Classification in Idaho

In order to protect wolf populations by enforcing regulations and issuing citations for illegal take and by limiting and regulating legal take, wolves will be classified as either a big game animal, furbearer, or special classification predator that provides for controlled take after delisting, at the discretion of the Idaho Fish and Game Commission (IC 36–201). This classification will enable IDFG to provide protection for wolves as well as consider the impacts of wolves on other big game species, those sectors of the economy dependent upon sport hunting, livestock, domestic animals and humans.

Idaho Wolf Management Goals

The goal of Idaho's conservation and management plan is to ensure the long-term survival of wolves in Idaho while minimizing wolf-human conflicts that result when wolves and people live in the same vicinity. Management for wolves means ensuring adequate number for long-term persistence of the species as well as ensuring that landowners, land managers, other citizens, and their property are protected. IDFG will manage wolves within the State according to the following table.

Less than 15 packs	More than 15 packs
Management	Management
Control Depredation control becomes increasingly stringent until at <10 packs it reverts to the control plan specified in the final rule (50 CFR 17.40(n)). In the unlikely event the number of packs in Idaho falls below 10, depredations will be addressed with nonlethal control unless unusual circumstances absolutely necessitate the use of lethal control to end the depredation problem.	Control Depredation control is treated like all other large mammalian predators.
Monitoring Monitoring becomes increasingly intensive to the point that each pack contains some radio-collared individuals and reproduction and survival in each pack is monitored on a regular basis.	Monitoring Monitoring is done primarily by indicators such as wolf depredation complaints, autumn scent station surveys, telemetry, winter tracking surveys, and other observations of field personnel.

Less than 15 packs	More than 15 packs
Management	Management
Listing Under ESA Listing remains a possibility for wolves if they are likely to become endangered as determined by Section 4 of the ESA (16 U.S.C. 1533).	

Moreover, the Idaho plan provides:

(1) The wolf populations will be managed at recovery levels that will ensure viable, self-sustaining populations until it can be established that wolves in increasing numbers will not adversely affect big game populations, the economic viability of IDFG, outfitters and guides, and others who depend on a viable population of big game animals. If the population falls below 15 packs, institute remedial management measures.

(2) Assurances that resident wolf populations are able to interchange with wolves in adjacent States and provinces, thereby making Idaho's wolves part of a larger metapopulation. It is expected that adjacent States and provinces will also encourage this interchange.

(3) Management of wolves as part of the native resident wildlife resource. This species will be managed similar to other large mammalian carnivores resident in Idaho.

(4) Minimize wolf-human conflicts by coordinating with USDA Wildlife Services to achieve prompt response to notifications of wolf depredation and prompt resolution of conflicts.

(5) Establish a strong public education program that emphasizes wolf biology, management, and conservation and presents a balanced view of the societal impacts and costs of wolf reintroduction. Outreach should address all issues concerning conservation and management and present a balanced view of the impacts of wolves on big game species, those sectors of the economy dependent upon sport hunting, livestock, domestic animals, and humans. It is expected that Idaho Fish & Game will solicit cooperation and advice from all vested interests in developing educational materials.

Wolf Population Objectives

Wolf management programs will influence the size and distribution of the population, although it will fluctuate with the availability and vulnerability of native prey. Where wolves are causing depredations, their distribution and numbers will have to be altered.

When circumstances cause declines in the natural prey that are demonstrated as being attributable to wolf predation, management may be needed to temporarily reduce populations. In most instances, wolves can be managed similarly to how other large native mammalian predators are traditionally managed. However, sport hunting has not proven effective in the past to effectively manage wolf populations. After delisting, IDFG is authorized to evaluate and use sport hunting or any other means necessary to maintain wolf populations at recovery levels that will ensure a viable, self-sustaining population until such time as all impacts are known.

In the unlikely event the population falls below 10 packs, depredations will be addressed with nonlethal control unless unusual circumstances absolutely necessitate the use of lethal control to end the depredation problem. Except for the lethal control measures, wolf management will revert to the same provisions that were in effect to recover the wolf population prior to delisting.

Incidental Take

Human-related accidental deaths of wolves (capture myopathy, automobile accidents, etc.) are expected to occur occasionally, and inadvertent take of wolves by hunters and trappers during the course of otherwise legal actions is not expected to adversely affect wolf population objectives. In an effort to minimize such accidental take of wolves, IDFG will include a section on wolf identification, and a brief history of the reintroduction and conflict created thereby, as part of all required hunter education classes and provide similar information to all trapping license buyers.

Hunters are responsible for accurately identifying their target before pulling the trigger. Cases of incidental take due to "mistaken identity" of the intended quarry will be subject to the same penalties applicable to other illegally/accidentally taken big game species. Incidents of illegal take deemed deliberate shall be punishable under the rules of illegal take of wildlife (Idaho Code 36–1402 and 36–1404). If convicted of a flagrant violation involving the killing, illegal possession, or illegal waste of a trophy big game animal as defined in Idaho Code 36–202(h), restitution must also be paid to the State for each wolf so killed, possessed, or wasted at the cost specified in Idaho Code 36–1404.

Although wolves may occasionally be captured inadvertently in traps legally set for other furbearer species, relatively few people participate in trapping in Idaho (608 Idaho trapping licenses were sold in 2000). However, in the event that the frequency of nontarget capture is deemed unacceptable (exceeding the lethal capture of >4 wolves per year), IDFG may consider implementing trap-size restrictions on land sets and set a minimum 36-hour check requirement for trappers using traps of that maximum size on land-based sets in the core area.

IDFG may further consider implementing restrictions on the use of snares in occupied wolf areas to require all neck snares set in these areas to be equipped with break-away snare locks designed to hold coyotes or similar sized furbearers (*e.g.*, bobcat) but release large nontarget species such as wolves or ungulates accidentally captured by a leg. After adoption by the Idaho Fish and Game Commission, specific rules and restrictions will be published in the furbearer trapping regulations section of the Upland Game Seasons brochure.

Mandatory trapper education classes would be considered for all new trappers, including first-time nonresident trapping applicants, and education could be provided to all trapping license buyers on protocol for releasing an inadvertently captured wolf and/or contacting IDFG for assistance. Any incidental capture must be reported to IDFG within 5 days of the incident. The complete carcass of any wolf lethally injured as a result of a nontarget capture must be salvaged and turned over to IDFG. The hide and skull will remain the property of IDFG.

Wolf Management

Wolves, when delisted, will become a component of the native resident wildlife in Idaho. The designation of the wolf as a big game species, furbearer, or special classification of predator that provides for controlled take provides legal authorization for Idaho Department of Fish and Game to manage the species. Management includes inventory; predator-prey research; harvest monitoring; cooperation with agencies, individuals, tribes, other

States, and Canada; control to reduce depredations; and dissemination to the public of current, accurate information. In Idaho, hunting and trapping may be considered in the future when populations are at levels that justify public taking. If this is proposed by IDFG, there will be opportunity for full public comment and decisions will be based on sound biological data. Hunting of wolves may be authorized when necessary to meet big game harvest objectives and eliminate conflicts, while at the same time maintaining wolves at recovery levels that will ensure viable, self-sustaining populations.

If management zones, similar to game management units, become helpful to IDFG as experience with wolf management dictates, then such zones may be established. Distribution patterns of the wolf population range from monitoring the movements of individually marked individuals representing study packs to see how their home ranges change, to documentation of the presence of packs using observations of field personnel and the public. Scent station and winter track surveys will also provide information on wolf distribution. The distributions of study packs that persist in a given area are expected to become predictable relative to prey movements and other factors as experience in monitoring grows. Continual monitoring will be needed to determine the pattern, but when it can be predicted with some degree of reliability, changes in that pattern will need to be explained and will provide additional insight into their management.

The major mortality factor accruing to wolves throughout their range is humans (Fuller 1989). Thus, the human dimension is ultimately the most important component in management of this species. Rigorous enforcement of laws and regulations in order to minimize illegal take, and to reduce adverse public perception of management will be needed. When legal harvest is planned, harvest monitoring will be based on a requirement to report the location and sex of animals taken, similar to requirements for mountain lions and bears.

Wolf Monitoring and Prey Base Monitoring

Monitoring wolf populations is the cornerstone of a management program. Wolf numbers, distribution, and breeding success will be estimated and compared with management goals. The monitoring program should focus on selected packs from representative areas across the State as support dictates. Annual, long term monitoring of selected packs allows for assessment of changes, an understanding of factors affecting pack size, and eventually, prediction of pack size relative to major influencing factors. Monitoring of prey populations, especially the deer species and elk, will need to be continued. Similar to the predator, annual census of selected, important prey populations should be conducted by IDFG and compared with data collected prior to wolf reintroduction.

In the future, wolf management will have to evaluate the effects of predation on native prey, specifically other big game (National Research Council 1997). When adverse weather patterns representing combinations of drought and severe winter depress native ungulates, predation in combination with harvest may inhibit big game population recovery. Annual census of selected, important prey populations within the range of study packs should be conducted. It is extremely important that annual census of these populations is conducted in order to detect trends and eventually to aid in developing predictions of population size and trend. Factors that affect prey numbers, including weather, habitat conditions, predation, and hunter harvest, need to be fully assessed for these selected populations.

Some study packs will inevitably range into neighboring States and British Columbia. Coordination in their monitoring with those jurisdictions, including the wildlife agencies, associated tribes and land management agencies will be needed. Eventually a wolf population size range will be reached that appears to be compatible with other uses of the prey base and is at levels that are tolerable as far as livestock depredations are concerned. This level will be ascertained with the population indices that may be used to estimate minimum numbers present, and will consider the distribution of wolves as well. Depredation management considerations will be involved in ascertaining the distribution and numbers of wolves within the State.

Idaho Indian Tribes

Tribes with reservations or reserved rights in Idaho manage fish and wildlife species with authorities that are similar to, but separate from, the State of Idaho. The Nez Perce Tribe has done a commendable job, in conjunction with the Service, of managing wolf recovery efforts in Idaho since 1995. During wolf recovery, under contract with the Service, the Nez Perce Tribe has, in a very professional and successful way, provided such services as wolf monitoring, communications with affected and interested parties, and research. Upon delisting, IDFG shall clearly delineate roles and responsibilities of the several participating agencies and shall do so in consultation with the Nez Perce Tribe.

Coordination With Other Entities

Natural resource land management agencies such as the USDA Forest Service (USFS) and the Bureau of Land Management (BLM) are responsible for managing lands for various goods and services, including providing the habitat necessary to maintain fish and wildlife species. Close coordination is necessary between IDFG and the land management agencies to meet the objectives of each agency. Through a Memorandum of Understanding with the Idaho State Animal Damage Control Board, USDA APHIS Wildlife Services is responsible for dealing with a wide variety of wildlife damage problems including predation on livestock. After delisting, including during the first five years, the Wildlife Services Agency of the U.S. Department of Agriculture, in cooperation with the Idaho Department of Fish and Game, will be responsible for depredation management necessary for the protection of private property.

Upon delisting, IDFG will coordinate monitoring of wolves and their impact on other wildlife populations. IDFG will coordinate among the federal and State land management agencies, USDA Wildlife Services, the Governor's Office of Species Conservation, the FWS, and the Nez Perce Tribe in their respective roles in wolf monitoring during the 5-year post-delisting monitoring period as required by the ESA. IDFG will coordinate monitoring of wolves that border or range into neighboring States with wildlife staffs of those States.

This plan must be flexible enough to be compatible with the dynamics of society and wildlife management. The plan must satisfy the needs of the State of Idaho in its efforts to minimize the impact of wolves on the Idaho outfitting industry, Idaho sportsmen, a diverse public and all others affected by wolf introduction. IDFG will update this plan periodically and submit any changes to the Idaho Legislature as if it were a new plan submitted for approval, amendment or rejection under Section 36–2405, Idaho Code.

Montana

To provide the assurance to the Service that the State of Montana has adequate regulatory mechanisms in place to manage the wolf after the protections of the ESA are removed, the Governor of Montana appointed a 12-member Wolf Management Advisory

Council to provide recommendations to the Governor on an approach for wolf management once the wolf is delisted. In response to the Council's recommendations, Montana Department of Fish, Wildlife & Parks (FWP) undertook the development of the Montana Gray Wolf Conservation and Management Plan EIS, under the Montana Environmental Policy Act, to consider alternative approaches to conserve and manage a recovered gray wolf population in Montana. In September 2003, FWP adopted a conservation and management plan for managing wolves in Montana.

Under Montana statute, FWP is the agency charged with conservation and management of resident wildlife. FWP recognizes the gray wolf as a native species and is committed to recovery of the species within Montana. The purpose of the Montana Gray Wolf Conservation and Management Plan is to manage wolves consistent with Montana's own State laws, policies, rules and regulations, except where management authority is otherwise explicitly reserved to other jurisdictions, such as Montana's Indian tribes. Ultimately, the management and conservation plan will be implemented through combined decisions and actions of FWP, the FWP Commission, the Montana Department of Livestock (MDOL), USDA Wildlife Services (WS), local law enforcement or county authorities, and other cooperators.

The gray wolf remains listed as endangered under the Montana Nongame and Endangered Species Conservation Act of 1973 (87–5–131 MCA). Upon federal delisting, provisions of Montana's SB163 take effect and wolves would automatically be reclassified under State law from "endangered" to a "species in need of management." This statutory classification offers full legal protection under State law. Implementation of SB 163 requires FWP to develop and adopt final administrative rules and regulations under the "species in need of management" designation. In addition SB 163 deletes gray wolf from the list of species designated as "predatory in nature" which are systematically controlled by MDOL. State laws and administrative rules become the regulatory and legal mechanisms guiding management. FWP and the FWP Commission will establish the regulatory framework to manage the species. FWP is responsible for implementing monitoring, research, law enforcement, public outreach, and other functions.

In general Montana's Gray Wolf Conservation and Management Plan provides:

Wolf Management and Population Objectives

FWP would recognize the gray wolf as a native species and would integrate wolves as a valuable part of Montana's wildlife heritage. Wolves will be integrated and sustained in suitable habitats within complex management settings. The wolf program will be based on principles of adaptive management. Management strategies and conflict resolution tools will be more conservative as the number of breeding pairs according to the federal recovery definition decreases, approaching the legal minimum. In contrast, management strategies become more liberal as the number of breeding pairs increases.

Ultimately, the status of the wolf population itself identifies the appropriate management strategies. Fifteen breeding pairs will be used as the signal to change management strategies. An adaptive approach will help FWP implement its wolf program over the wide range of social acceptance values. Sensitivity towards and prompt resolution of conflict where and when it develops is an important condition of not administratively capping wolf numbers or defining distribution. By applying the federal recovery definition of breeding pair, FWP would incorporate an added measure of security and margin for error in the face of unforeseen future events, as well as greater flexibility for management decisions on a day-to-day basis. Successful reproduction would be documented as well. Because not every pack (or social group) of wolves would meet the federal recovery definition as a breeding pair, more groups of wolves would also exist on the landscape in assurance that Montana's minimum contribution towards the tri-state total is achieved.

As the Montana wolf population becomes more established, through the monitoring program, FWP will evaluate a more general definition of a social group (four or more wolves traveling in winter) as a potential proxy for a breeding pair. Wolf distribution in Montana, just as for all wildlife, will ultimately be defined by the interaction of the species ecological requirements and public acceptance, not through artificial delineations. Wolves will be encouraged on large contiguous blocks of public land, managed primarily as back country areas or National Parks where there is the least potential for conflict, particularly with livestock. Wolf packs in areas of interspersed public and private lands will be managed like other free-ranging wildlife in Montana and within the constraints of the biological and social characteristics, the physical attributes of the environment, land ownership, and land uses. Some agency discretion and flexibility will be exercised to accommodate the unique attributes of each pack, its history, the site-specific characteristics of its home range, landowner preferences, or other factors that cannot be reasonably predicted at this time.

Management flexibility will be crucial to address all of the public interests that surround wolves. Wolf population management will include the full range of tools from non-lethal to lethal and will incorporate public outreach, conservation education, law enforcement, and landowner relations. An effective management program should match the management strategies to the environments or setting in which each wolf pack occurs, recognizing that wolves interact with and respond to the environment in which they live, too.

Wolf Monitoring

FWP has the primary responsibility to monitor the wolf population, although collaborative efforts with other agencies and universities will be important. FWP will estimate wolf numbers, pack distribution, as well as document reproduction and tabulate mortality. FWP will also tabulate the number of breeding pairs meeting the federal recovery definition.

Concurrently, FWP would also tabulate packs according to a more general definition of social group, meaning four or more wolves traveling in winter. While there is no guarantee that a group of four wolves traveling in winter would include young of the year, it is indicative of a socially cohesive group holding a territory and capable of reproduction. Four or more wolves traveling together will likely contain a male and female as an alpha pair and that has or will produce young in the spring. Determining pack counts in winter would follow the peak of human-caused mortality on adult wolves associated with summer/fall livestock grazing seasons, potential illegal mortality during the fall big game hunting seasons, and the harvest expected through regulated hunting and trapping seasons.

The monitoring program also will help confirm reproduction. FWP will use the monitoring program to verify that the more general definition is adequate to document that the population is reproducing and secure.

Once FWP becomes more confident that the more general definition is adequate, it will be applied within the adaptive management framework and FWP would not monitor packs using the more rigorous federal recovery definition.

Maintaining the federal recovery definition as the monitoring metric under adaptive management over the long term may be too stringent for a recovered population, especially in light of the difficulty in distinguishing pups from similar sized adults in December and the expense of radio telemetry. FWS data indicate that there is a significant correlation between the number of packs meeting the federal recovery definition as a breeding pair and the number of social groups according to the more general definition of four or more wolves traveling in winter (Maier *et al.* in prep), lending greater confidence that the more general definition will prove adequate for the purposes of the monitoring program as well as the basis for decision-making within an adaptive management framework. When the wolf population no longer fits the definition of a species in need of management, or when wolf numbers have increased and population regulation is needed, the FWP Commission may reclassify the wolf as a big game animal or a furbearer.

Regulated Harvest

Regulated public harvest of wolves by hunting and trapping during designated seasons will help FWP manage wolf numbers, fine tune distribution, and would take place within a comprehensive management program. Regulated wolf harvest would take place within the larger context of multi-species management programs, would be biologically sustainable, and would not compromise the investments made to recover the gray wolf. Within the context of a comprehensive program, regulated harvest should advance overall conservation goals by building social tolerance, interest in, and value for the species among those who would otherwise view wolf recovery as detrimental to their ungulate hunting experiences. Harvest management would proceed adaptively, but all hunting and trapping is precluded if there are fewer than 15 breeding pairs in Montana. The Montana Legislature would establish the license, fees, and penalties for illegal activities. The FWP Commission could then establish season structure and regulations to implement a public harvest program for wolves as it does for other hunting, trapping or fishing seasons. Initiating a public harvest program is a separate administrative process from this EIS. The FWP Commission follows a process that requires public notification of the proposal, public meetings, and a comment period of at least 30 days. The FWP Commission would initiate this process at a later date when a harvest program becomes biologically sustainable.

The Montana Legislature would establish license fees and penalties. FWP would seek State legislation to make the unlawful taking of a gray wolf a misdemeanor under MCA 87–1–102. This statute makes it a misdemeanor to purposely, knowingly, or negligently violate State laws pertaining to taking, killing, possessing, or transporting certain species of wildlife. Including the gray wolf under this statute would be consistent with the inclusion of other legally classified wildlife species, such as deer, elk, moose, mountain lion, or black bear. FWP would also seek legislation to include the gray wolf under the restitution sections of MCA 87–1–111 that require a person convicted of illegally taking, killing, possessing certain wildlife species to reimburse the State for each animal or fish. Restitution values could also defined in MCA 87–1–115 for illegally killing or possessing trophy wildlife.

Wolf and Prey Base Integration

FWP would seek to maintain the public's opportunity to hunt a wide variety of species under a variety of circumstances, and to do so in a sustainable, responsible manner. Wolf presence within the year-long range of a specific ungulate herd adds a new factor that FWP biologists must consider among all environmental and human-related factors. FWP will integrate management of predators and prey in an ecological, proactive fashion to prevent wide fluctuations in both predator and prey populations. To that end, FWP may increase or decrease hunter opportunity for either predators or prey species, depending on the circumstances. If reliable data indicate that a local prey population is significantly impacted by wolf predation in conjunction with other environmental factors, FWP would consider reducing wolf pack size. Wolf management actions would be paired with other corrective management actions to reduce ungulate mortality or enhance recruitment. Concurrent management efforts for wolves and ungulates would continue until the prey population rebounded, recognizing that by the time prey populations begin to respond they may be influenced by a new set of environmental factors.

Prey species are managed according to the policy and direction established by the programmatic review of the wildlife program (FWP 1999) and by species plans. Even though plans are written for individual species, the underlying foundation of those plans is based on an ecosystem perspective and recognizes the inherent variation in wildlife populations in response to the environment and human activities, including hunting. These plans typically describe a management philosophy that protects the long-term sustainability of the resource, with management objectives based on biological and social considerations. Furthermore, populations will be managed to keep them at or near FWP objectives—rather than significantly above or below objectives. As recommended by the council, the gray wolf will be incorporated into ungulate management and future planning efforts. Livestock producers and other landowners provide many benefits to the long-term conservation of gray wolves, not the least of which is the maintenance of open space and habitats that support a wide variety of wildlife, including deer and elk. At the same time, they can suffer financial losses due to wolves. These losses tend to be sheep and young cattle, although occasionally llamas, guarding dogs, or other livestock are lost. Some losses can be documented reliably but others cannot.

Wolf Conflicts

Addressing wolf-livestock conflicts will entail two separate, but parallel elements. One element will be management activities by WS and FWP to minimize the potential for wolf-livestock conflicts and to resolve the conflicts where and when they occur. This would be funded, administered, and implemented by the cooperating agencies. Livestock producers should report any suspected wolf depredations (injuries or death) or the disruption of livestock or guarding animals to WS directly. If the investigating WS agent determines that a wolf or wolves were responsible, management response will be guided by the specific recommendations of the investigator, the provisions of this plan and by the multi-agency MOU. WS will take an incremental approach to address wolf depredations, guided by wolf numbers, depredation history, and the location of the incident.

When wolf numbers are low and incidents take place on remote public lands, WS would use more conservative management tools. WS could apply progressively more liberal methods as wolf numbers increase and for incidents on private lands. Conflict history of the

pack, time of year, attributes of the pack (*e.g.*, size or reproductive status), or the physical setting will all be considered before a management response is selected. FWP will determine the disposition of wolves involved in livestock depredations. FWP may also approve lethal removal of the offending animal by livestock owners or their agents by issuing a special kill permit. A special kill permit is required for lethal action against any legally classified wildlife in Montana, outside the defense of life/property provision or FWP Commission approved regulations. FWP will not issue special kill permits to livestock producers to remove wolves on public lands when wolf numbers are low. If Montana has at least 15 packs, FWP may issue a special kill permit to livestock producers that would be valid for public and private lands. FWP will be more liberal in the number of special kill permits granted as wolf numbers increase and for depredations in mixed land ownership patterns.

In a proactive manner, WS and FWP will also work cooperatively with livestock producers and non-governmental organizations with an increased emphasis on proactive efforts to reduce the risk of wolf-livestock conflicts developing in the first place. Landowners could contact a management specialist (FWP or WS) for help with assessing risk from wolves or other predators and identifying ways to minimize those risks while still acknowledging that the risk of livestock depredation by wolves will never be zero. Incentives may even be provided to participating producers.

Beyond technical assistance from WS or FWP and other collaborative efforts, livestock producers (or their agents) may non-lethally harass wolves when they are close to livestock on public or private lands. Private citizens may also non-lethally harass wolves that come close to homes, domestic pets, or people. Upon delisting, private citizens could kill a wolf if it is threatening human life or domestic dogs. Livestock producers or their agents could also kill a wolf if it is attacking, killing, or threatening to kill livestock. This is consistent with Montana statutes that permit private citizens to defend life or property from imminent danger caused by wildlife. The definition of "livestock" is clarified to mean cattle, sheep, horses, mules, pigs, goats, emu, ostrich, poultry, and herding or guarding animals (llama, donkeys, and certain special-use breeds of dogs commonly used for guarding or herding of livestock) for the purposes of addressing wolf-livestock conflicts.

Dogs used for other purposes such as hunting or as pets are not covered under this definition. FWP also clarifies the use of non-lethal harassment to refer to situations in which a wolf is discovered testing or chasing livestock and the owner attempts to scare or discourage the wolf in a non-injurious manner and without prior attempts to search out, track, attract or wait for the wolf. A special permit would be required to actually injure or kill the wolf or if a person purposefully attracted, tracked, or searched for the wolf. The second element addresses the economic losses of individual livestock producers through a compensation program when livestock are injured or killed by wolves.

Montana Indian Tribes

Montana's Indian Tribes have jurisdictional authority for wildlife conservation and management programs within reservations boundaries. FWP coordinates with tribal authorities on issues of mutual concern. Tribal coordination already takes place for other wildlife species through annual interagency meetings, working agreements and informal contacts at the field level.

Coordination With Other Entities

An MOU will be signed by FWP, MDOL, and WS to address wolf-livestock conflicts. The ongoing interagency, tribal, and interstate coordination activities are important cornerstones of program implementation and administration. The U.S. Forest Service (USFS), the National Park Service (NPS), the Bureau of Land Management (BLM), the Service, or other federal jurisdictions administer federally owned lands. These agencies manage these lands according to their enabling legislation and relevant federal laws, rules and regulations. FWP coordinates with federal agencies on wildlife and habitat issues of mutual concern, but has no jurisdiction over how those lands are managed.

FWP would coordinate with other agencies and responsible parties to resolve any concerns about how cross boundary packs would be managed or how conflicts would be resolved to make sure all entities goals are being met or addressed.

Proposed Special Regulations Under 17.84—Nonessential Experimental Population Established Under Section 10(j) of the ESA (Vertebrates)

The new special regulations proposed in this rule are intended to expand authorities under section 10(j) for States with approved wolf management plans in the experimental population areas. The special regulations are intended to provide that wolves near livestock could be harassed in a noninjurious manner at any time on private land or on public land by the livestock permittee. Intentional or potentially injurious harassment could occur by permit on private land and public land. Wolves attacking not only livestock, but also dogs, on private land could be taken without a permit if they are in the act of attacking such animals; on public land a permit will be required for such take. Permits could be issued by the Service to take wolves on private land if they are a risk to livestock or dogs.

The new special regulations proposed in this rule will allow for take of wolves determined to be causing unacceptable impacts to wild ungulate populations. In addition, the new special regulations define livestock to include herding and guard animals. Finally, the new special regulations do not apply in the portion of the Yellowstone Management Area within the State of Wyoming.

The special regulations also provide for States with wolf management plans approved by the Service to implement a transition from the provisions of this rule to the those provisions of the State wolf management plan consistent with federal regulations for nonessential experimental wolves within the boundaries of the State with the cooperation of the Service. Specifically we intend to provide any State in which the gray wolf is resident and which has a wolf management plan approved by the Service with the discretion to petition the Service to assume management responsibility of nonessential experimental gray wolves within the boundaries of that State.

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we are soliciting comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule.

If you submit comments by e-mail, please submit them as an ASCII file and avoid the use of special characters and any form of encryption. Please also include "Attn: RIN AT61" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Helena Office at telephone number 406–449–5225.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at our Helena office (*see* **ADDRESSES**).

In making any final decision on this proposal, we will take into consideration the comments and any additional information we receive, and such communications may lead to a final regulation that differs from this proposal.

Public Hearings

In anticipation of public interest in this issue, we will schedule public hearings in Boise, ID, and Helena, MT. Anyone wishing to make oral comments for the record at a public hearing is encouraged to provide a written copy of their statement and present it to us at the hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration. We will announce the date, time, and location of the public hearings through a notice in the **Federal Register** and in local media.

Required Determinations

Regulatory Planning and Review

This proposed rule has not been reviewed by the Office of Management and Budget under Executive Order 12866.

(a) This proposed rule would not have an annual economic effect of $100 million, or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. This regulation would result in only minor positive economic effects for a small percentage of livestock producers.

(b) This regulation will not create inconsistencies with other agencies' actions. This regulation reflects continuing success in recovering the gray wolf through long-standing cooperative and complementary programs by a number of Federal, State, and tribal agencies.

(c) This regulation will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) This regulation does not raise any novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the Regulatory Flexibility Act to require a certification statement. Based on the information that is available to us at this time, we are certifying that this proposed rule would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

The majority of wolves in the West are currently protected under nonessential experimental population designations that cover Wyoming, most of Idaho, and southwestern Montana and that treat wolves as a threatened species. Special regulations exist for these experimental populations that currently allow government employees and designated agents, as well as livestock producers, to take problem wolves. An additional, naturally occurring population of wolves is found in northwestern Montana. This proposed rule does not change the nonessential experimental designation, but does propose additional special regulations so that States with wolf management plans approved by the Service can petition the Service to manage nonessential experimental wolves under those approved State management plans. These proposed changes would only have effect in States that have an approved State management plan for gray wolves. Within the Western DPS of the gray wolf, only the States of Idaho and Montana have approved plans. Therefore, the proposed regulation is expected to result in a small economic gain to some livestock producers in States with approved wolf management plans (*i.e.*, Idaho and Montana) within the boundary of the nonessential experimental populations of gray wolves in the Western DPS (Central Idaho nonessential experimental population area and Yellowstone nonessential experimental population area); it will have no economic impact on livestock producers in Wyoming as their plan has not been approved.

We propose special regulations that would adopt certain provisions of the 2003 special rule (under section 4(d)), which covered the area outside of the two nonessential experimental population areas mentioned above, providing for more consistent management both inside and outside of the nonessential experimental population areas, unless identified otherwise. Additionally new regulations were added that expand or clarify current prohibitions. Secondly, we propose to identify a process for transferring authorities within the experimental population boundaries to States with approved plans. Finally, the new special regulations identify the allowable forms of take in the portion of the Yellowstone Management Area within the State of Wyoming.

Expanded or clarified prohibitions proposed in this rule include the following. Intentional or potentially injurious harassment could occur by permit on private land and public land. Wolves attacking not only livestock, but also dogs, on private land could be taken without a permit if they are in the act of attacking such animals; on public land a permit will be required for such take. Permits could be issued by the Service to take wolves on private land if they are a risk to livestock or dogs.

The new special regulations proposed in this rule clarify take of wolves determined to be causing unacceptable impacts to wild ungulate populations. In addition, the new special regulations define livestock to include herding and guard animals.

The new special regulations proposed in this rule provide for States with wolf management plans approved by and in cooperation with the Service to

implement a transition from the provisions of this rule to the provisions of the State wolf management plan for wolves that are consistent with federal regulations within the boundaries of the nonessential experimental population areas. States may, at their discretion, administer this transition through new or existing cooperative agreements or programs with the Service.

In anticipation of delisting the Western DPS of the gray wolf, we have been working very closely with States to insure that their plans provide the protection and flexibility necessary to manage wolves at or above recovery levels. Approved plans are those plans that have passed peer review scrutiny and Service review aimed at insuring that these recovery levels are maintained. It is appropriate to have States which have met this approval standard begin managing wolves according to their approved plans for several reasons. The States already assume an important role in the management of this species, the goals for recovery have been exceeded, and a gradual transfer of responsibilities while the wolves are protected under the ESA will provide an opportunity for both the State wildlife agencies, federal agencies (FWS, USDA), and Tribes an adjustment period. The adjustment period will allow time to work out any unforeseen issues that may arise.

The reduction of the restrictions on taking problem wolves proposed in this rule will make their control easier and more effective, thus reducing the economic losses that result from wolf depredation on livestock and guard animals and dogs. Furthermore, a private program compensates livestock producers if they suffer confirmed livestock losses by wolves. Since 1996, average compensation for livestock losses has been slightly over $10,000 in each recovery area per year. The potential effect on livestock producers in western States is small, but more flexible wolf management will be entirely beneficial to their operation.

Small Business Regulatory Enforcement Fairness Act

This regulation will not be a major rule under 5 U.S.C. 801 *et seq.*, the Small Business Regulatory Enforcement Fairness Act.

(a) This regulation would not produce an annual economic effect of $100 million. The majority of livestock producers within the range of the wolf are small family-owned dairies or ranches and the total number of livestock producers that may be affected by wolves is small. The finalized take regulations will further reduce the effect that wolves will have on individual livestock producers by eliminating permit requirements. Compensation programs are also in place to offset losses to individual livestock producers. Thus, even if livestock producers affected are small businesses, their combined economic effects will be minimal and the effects are a benefit to small business.

(b) This regulation would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) This regulation would not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

The States within the Western DPS for which wolf management plans need approval in order to proceed with delisting of the species are Montana, Idaho, and Wyoming. The proposed regulations define a process for voluntary and cooperative transfer of management responsibilities back to the States. Therefore, in accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*):

(a) The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. As stated above, this regulation will result in only minor positive economic effects for a very small percentage of livestock producers.

(b) This regulation will not produce a Federal mandate of $100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This regulation will not impose any additional wolf management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this regulation will not have significant implications concerning taking of private property by the Federal Government. This regulation will reduce regulatory restrictions on private lands and, as stated above, will result in minor positive economic effects for a small percentage of livestock producers.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, this regulation will not have significant Federalism effects. This regulation will not have a substantial direct effect on the States, on the relationship between the States and the Federal Government, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Department of the Interior has determined that this rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the order.

Paperwork Reduction Act

This regulation does not contain any new collections of information other than those permit application forms already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018–0094.

National Environmental Policy Act

In 1994, the Service issued an Environmental Impact Statement (EIS) (Service 1994) that addressed the impacts of introducing gray wolves to Yellowstone National Park and central Idaho and the nonessential experimental population rule for these reintroductions. The 1994 EIS addressed cooperative agreements whereby the States of Wyoming, Montana, and Idaho could assume the lead for implementing wolf recovery and anticipated that the States and tribes would be the primary agencies implementing the experimental population rule outside National Parks and National Wildlife Refuges. We intend to evaluate whether any revisions to the EIS are required prior to finalizing this proposed regulation.

Government-to-Government Relationship with Tribes (E.O. 13175)

In accordance with the President=s memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and 512 DM 2, we will closely coordinate this proposed rule with the affected tribes within the Western DPS. We intend to fully consider all of their comments on the proposed special regulations submitted during the public comment period.

Energy Supply, Distribution or Use (E.O. 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare

Statements of Energy Effects when undertaking certain actions. This proposed rule is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Clarity of the Rule

Executive Order 12866 requires agencies to write regulations that are easy to understand. We invite your comments on how to make this proposal easier to understand including answers to questions such as the following: Are the requirements in the document clearly stated? Does the proposed rule contain technical language or jargon that interferes with the clarity? Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, *etc.*) aid or reduce its clarity? And is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? What else could we do to make the proposed rule easier to understand?

Send a copy of any written comments about how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You also may e-mail comments to: Exsec@ios.doi.gov.

References Cited

A complete list of all references cited in this rulemaking is available upon request from our Helena office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, the Service proposes to amend part 17, subchapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.84 is amended as follows:

a. Redesignate paragraphs (j) through (m) as paragraphs (k) through (n), respectively; and

b. Add a new paragraph (j) to read as set forth below:

§ 17.84 Special rules—vertebrates

* * * * *

(j) Gray wolf (*Canis lupus*). (1) The gray wolves (wolf) identified in paragraph (j)(11) of this section are nonessential experimental. These wolves will be managed in accordance with the respective provisions of this section in the boundaries of the nonessential experimental population area within any State that has a wolf management plan approved by the Service, as further provided in this paragraph (§ 17.84(j)).

(2) The Service finds that reintroduction of nonessential experimental gray wolves, as defined in this section, will further the conservation of the species.

(3) Definitions of terms used in paragraph (j) of this section follow:

Active den site. A den or a specific aboveground site that is being used on a daily basis by wolves to raise newborn pups during the period April 1 to June 30.

Breeding pair. An adult male and an adult female wolf that, during the previous breeding season, have produced at least two pups that survived until December 31 of the year of their birth.

Designated agent. Includes Federal agencies as directed by the Secretary, and States or Tribes with a management plan approved by the Secretary, cooperatively managing under the provisions of this section.

Domestic animals. Animals that have been selectively bred over many generations to enhance specific traits for their use by humans, including use as pets. This includes livestock (as defined below) and dogs.

In the act. The actual biting, wounding, grasping, molesting, harassing or killing or reasonable belief that such biting, wounding, grasping, molesting, harassing or killing is imminent.

Livestock. Cattle, sheep, horses, mules, goats and herding or guard animals (llamas, donkeys, and certain special-use breeds of dogs commonly used for guarding or herding livestock) or as otherwise defined in any State or tribal wolf management plans as approved by the Service. This excludes dogs that are not being used for livestock guarding or herding.

Noninjurious. Does not cause either temporary or permanent physical damage or death.

Opportunistic harassment. Harassment without the conduct of prior purposeful actions to attract, track, wait for, or search out the wolf.

Problem wolves. Wolves that attack livestock, or wolves that once in a calendar year attack domestic animals other than livestock.

Public land. Federal land and any other public land designated in State and tribal wolf management plans as approved by the Service.

Remove. Place in captivity or kill or release in another location.

Unacceptable impact. Any decline in an ungulate population so that population is not meeting established State population management goals, with recruitment that does not allow the population to recover.

Wounded. Exhibiting torn flesh and bleeding or other evidence of physical damage caused by a wolf bite.

(4) *Allowable forms of take of gray wolves.* The following activities, only in the specific circumstances described under this section, are allowed: opportunistic harassment; intentional harassment; taking on private land; taking on public land; taking in response to impacts on wild ungulates; taking in defense of human life; taking to protect human safety; taking by government agents to remove problem wolves; incidental take; taking under permits; and taking per authorizations for agency employees. Other than as expressly provided in this rule, all other take activities are considered a violation of section 9 of the Act. Any wolf, or wolf part, taken legally must be turned over to the Service unless otherwise specified in paragraph (j) of this section. Any taking of wolves must be reported as outlined in paragraph (j)(7) of this section.

(i) *Opportunistic harassment.* Landowners on their own land and livestock producers or permittees who are legally using public land under valid livestock grazing allotments may conduct opportunistic harassment of any gray wolf in a noninjurious manner at any time. Opportunistic harassment must be reported to the Service within 7 days as outlined in paragraph (j)(7) of this section.

(ii) *Intentional harassment.* After we or our designated agent have confirmed persistent wolf activity on privately owned land or on a public land grazing allotment, we or the State fish and game agency may issue a permit valid for not longer than 1 year, with appropriate conditions, to any landowner to harass wolves in a potentially injurious manner (such as by projectiles designed to be nonlethal to larger mammals). The harassment must occur as specifically identified in the permit.

(iii) *Taking by landowners on private land.* Landowners may take wolves on privately owned land in the following two additional circumstances:

(A) Any landowner may take a gray wolf that is in the act of biting, wounding, grasping, molesting, harassing, or killing livestock, livestock-guarding animals, or domestic animals, provided that the landowner provides evidence of animal(s) freshly (less than 24 hours) wounded, harassed, molested, or killed by wolves, and we or our designated agent are able to confirm that the animal(s) were wounded, harassed, molested, or killed by wolves. The taking of any wolf without such evidence may be referred to the appropriate authorities for prosecution.

(B) A private landowner may be issued a limited duration permit by us or the State fish and game agency to take a gray wolf on the landowner's private land if:

(*1*) This private property or an adjacent private property has had at least one depredation by wolves on livestock, livestock-guarding animals, or domestic animals that has been confirmed by us or our designated agent; or

(*2*) We or our designated agent have determined that wolves are routinely present on that private property and present a significant risk to the health and safety of livestock, livestock-guarding animals, or domestic animals. The landowner must conduct the take in compliance with the permit issued by the Service or a State with an approved management plan.

(iv) *Take on public land.* We or the State fish and game agency may issue permits to take gray wolves under certain circumstances to livestock producers or permittees who are legally using public land under valid livestock grazing allotments. The permits, which may be valid for not more than 1 year, can allow the take of a gray wolf if:

(A) Public land or adjacent public land has had at least one depredation by wolves on livestock, livestock-guarding animals, or domestic animals that has been confirmed by us or our designated agent; or

(B) We or our designated agent have determined that wolves are routinely present on public land and present a significant risk to the health and safety of livestock, livestock-guarding animals, or domestic animals. We or our designated agent will investigate and determine if the previously wounded or killed livestock were wounded or killed by wolves. The taking of any wolf without such evidence may be referred to the appropriate authorities for prosecution.

(v) *Take in response to wild ungulate impacts.* If wolves are causing unacceptable impacts to wild ungulate populations, a State or tribe may remove the wolves. In order for this provision to apply, the States or tribes must consult with the Service and identify possible mitigation measures. Before wolves can be removed we must, in cooperation with the States or tribes, determine that such actions will not inhibit wolf recovery levels.

(vi) *Take in defense of human life.* Any person may take a gray wolf in defense of the individual's life or the life of another person. The unauthorized taking of a wolf without an immediate and direct threat to human life may be referred to the appropriate authorities for prosecution.

(vii) *Take to protect human safety.* We or a Federal land management agency or a State or tribal conservation agency may promptly remove any wolf that we or our designated agent determines to be a demonstrable but nonimmediate threat to human life or safety.

(viii) Take of problem wolves by Service personnel or our designated agent. We or our designated agent may carry out aversive conditioning, nonlethal measures, relocation, permanent placement in captivity, or lethal control of problem wolves. If nonlethal depredation measures occurring on public lands result in the capture, prior to October 1, of a female wolf showing signs that she is still raising pups of the year (*e.g.*, evidence of lactation, recent sightings with pups), whether or not she is captured with her pups, then she and her pups may be released at or near the site of capture. Female wolves with pups may be removed if continued depredation occurs. Problem wolves that depredate on domestic animals more than once in a calendar year, including female wolves with pups regardless of whether on public or private lands, may be removed from the wild. To determine the presence of problem wolves, we or our designated agents will consider all of the following:

(A) Evidence of wounded livestock or other domestic animals or remains of a carcass that shows that the injury or death was caused by wolves;

(B) The likelihood that additional losses may occur if no control action is taken;

(C) Any evidence of unusual attractants or artificial or intentional feeding of wolves; and

(D) Evidence that, on public lands, if animal husbandry practices were previously identified in existing approved allotment plans and annual operating plans for allotments, they were followed.

(ix) *Incidental take.* Take of a gray wolf is allowed if the take was accidental and incidental to an otherwise lawful activity and if reasonable due care was practiced to avoid such taking. Incidental take is not allowed if the take is not accidental or if reasonable due care was not practiced to avoid such taking; we may refer such taking to the appropriate authorities for prosecution. Shooters have the responsibility to identify their target before shooting. Shooting a wolf as a result of mistaking it for another species is not considered accidental and may be referred to the appropriate authorities for prosecution.

(x) *Take under permits.* Any person with a valid permit issued by the Service under § 17.32, or our designated agent, may take wolves in the wild, pursuant to terms of the permit.

(xi) *Additional taking authorizations for agency employees.* When acting in the course of official duties, any employee of the Service or appropriate Federal, State, or tribal agency, who is designated as an agent in writing for such purposes by the Service, may take a wolf or wolf-like canid for the following purposes; such take must be reported to the Service within 15 days as outlined in paragraph (j)(7) of this section and specimens may be retained or disposed of only in accordance with directions from the Service:

(A) Scientific purposes;

(B) Avoiding conflict with human activities;

(C) Improving wolf survival and recovery prospects;

(D) Aiding or euthanizing sick, injured, or orphaned wolves;

(E) Disposing of a dead specimen;

(F) Salvaging a dead specimen that may be used for scientific study;

(G) Aiding in law enforcement investigations involving wolves; or

(H) Preventing wolves with abnormal physical or behavioral characteristics, as determined by the Service, from passing on those traits to other wolves.

(5) Federal land use. Restrictions on the use of any Federal lands may be put in place to prevent the take of wolves at active den sites between April 1 and June 30. Otherwise, no additional land-use restrictions on Federal lands, except for National Parks or National Wildlife Refuges, may be necessary to reduce or prevent take of wolves solely to benefit gray wolf recovery under the Act. This prohibition does not preclude restricting land use when necessary to reduce negative impacts of wolf restoration efforts on other endangered or threatened species.

(6) Reporting requirements. Except as otherwise specified in paragraph (j) of this section or in a permit, any taking of a gray wolf must be reported to the Service within 24 hours. We will allow

additional reasonable time if access to the site is limited. Report wolf takings, including opportunistic harassment, to U.S. Fish and Wildlife Service, Western Gray Wolf Recovery Coordinator, or a Service-designated representative of another Federal, State, or tribal agency. Unless otherwise specified in paragraph (j) of this section, any wolf or wolf part, taken legally must be turned over to the Service, which will determine the disposition of any live or dead wolves.

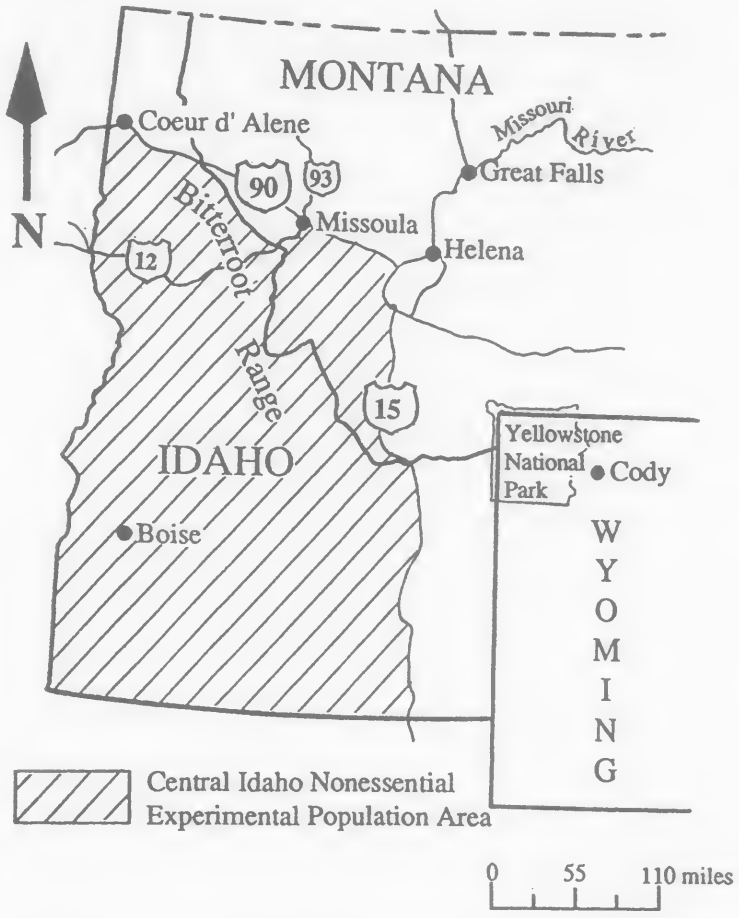
(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any wolf or part thereof from the experimental populations taken in violation of the regulations in paragraph (j) of this section or in violation of applicable State or tribal fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed any offense defined in this section.

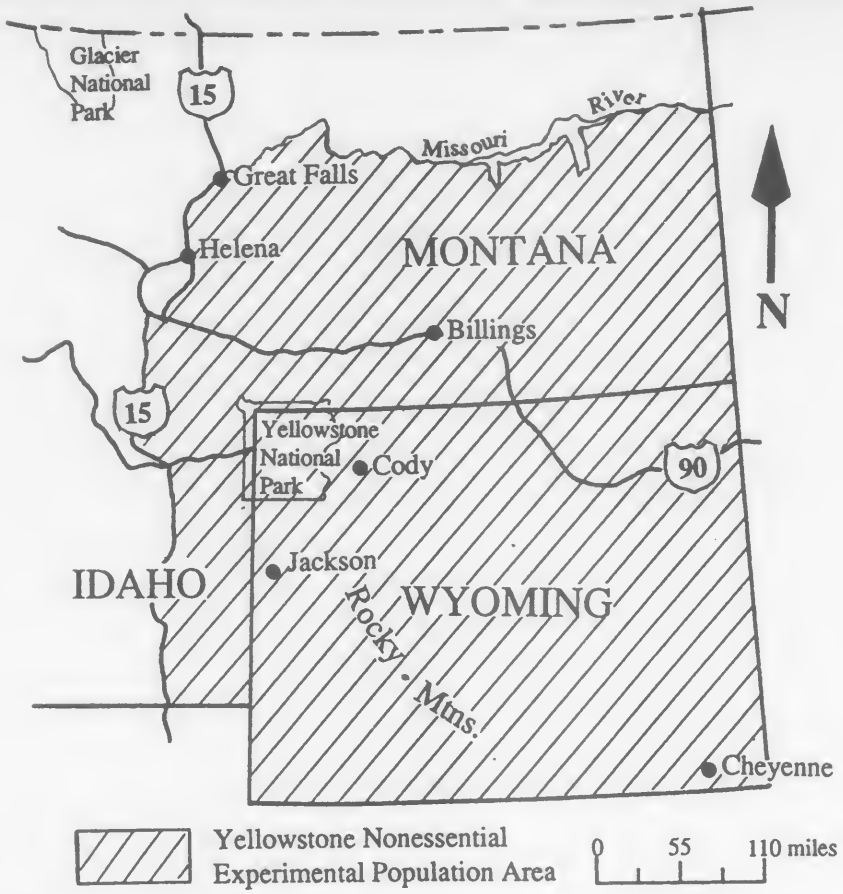
(9) The site for reintroduction is within the historic range of the species:

(i) The central Idaho area is shown on the following map. The boundaries of the nonessential experimental population area will be those portions of Idaho that are south of Interstate Highway 90 and west of Interstate 15, and those portions of Montana south of Interstate 90, Highway 93 and 12 from Missoula, Montana, west of Interstate 15.

BILLING CODE 4310–55–P



(ii) The Yellowstone Management Area is shown on the following map. The boundaries of the nonessential experimental population area will be that portion of Idaho that is east of Interstate Highway 15; that portion of Montana that is east of Interstate Highway 15 and south of the Missouri River from Great Falls, Montana, to the eastern Montana border; and all of Wyoming.



(iii) All wolves found in the wild within the boundaries of this section after the first releases will be considered nonessential experimental animals. In the conterminous United States, a wolf that is outside an experimental area would be considered as threatened unless it is marked or otherwise known to be an experimental animal; such a wolf may be captured for examination and genetic testing by the Service or Service-designated agency. Disposition of the captured animal may take any of the following courses:

(A) If the animal was not involved in conflicts with humans and is determined likely to be an experimental wolf, it may be returned to the reintroduction area.

(B) If the animal is determined likely to be an experimental wolf and was involved in conflicts with humans as identified in the management plan for the closest experimental area, it may be relocated, placed in captivity, or killed.

(C) If the animal is determined not likely to be an experimental animal, it will be managed according to any Service-approved plans for that area or will be marked and released near its point of capture.

(D) If the animal is determined not to be a wild gray wolf or if the Service or agencies designated by the Service determine the animal shows physical or behavioral evidence of hybridization with other canids, such as domestic dogs or coyotes, or of being an animal raised in captivity, it may be returned to captivity or killed.

(10) The reintroduced wolves will be monitored during the life of the project, including by the use of radio telemetry and other remote sensing devices as appropriate. All released animals will be vaccinated against diseases and parasites prevalent in canids, as appropriate, prior to release and during subsequent handling. Any animal that is sick, injured, or otherwise in need of special care may be captured by authorized personnel of the Service or Service-designated agencies and given appropriate care. Such an animal will be released back into its respective reintroduction area as soon as possible, unless physical or behavioral problems make it necessary to return the animal to captivity or euthanize it.

(11) Once recovery goals are met for the species, a rule will be proposed to address delisting, as appropriate.

(12) Any State in which the gray wolf resides and is subject to the terms of § 17.84(j) may petition the Secretary for management responsibility of nonessential experimental gray wolves in that State provided that the State has a wolf management plan approved by the Secretary.

(i) A State petition for wolf management must show:

(A) That authority resides in the State to conserve the gray wolf throughout the geographical range of all experimental populations within the State;

(B) That the State is authorized to conduct investigations to determine the status and requirements for the conservation of the gray wolf throughout the State; and

(C) That the State has an acceptable conservation program for the gray wolf, throughout all of the nonessential experimental population areas within the State, including the requisite

authority and capacity to carry out that conservation program.

(ii) The Secretary shall approve such a petition within 30 days of receipt upon a finding that the applicable criteria are met and the completion of a consultation under section 7 of the Act that concludes that approval is not likely to jeopardize the continued existence of the gray wolf in the Western Distinct Population Segment (DPS), as defined in § 17.11(h).

(iii) If the Secretary approves the petition, the Secretary shall immediately enter into a Memorandum of Agreement (MOA) with the Governor of that State.

(iv) An MOA for State management as provided in this section may allow a State to manage nonessential experimental gray wolf populations within its borders in accordance with the State's management plan approved by the Service, except that:

(A) The MOA may not provide for any form of management that would be inconsistent with the protection provided to the species under the Act, and shall specify those portions of the State's post-delisting management plan for wolves that shall be implemented at this time;

(B) The MOA cannot vest the State with any authority over matters concerning section 4 of the Act; and

(C) It may not provide for sport hunting absent a finding by the Secretary of an extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved.

(v) An MOA for State management must provide for co-law enforcement responsibilities to ensure that the Service has the authority to also enforce the State management program prohibitions on take.

(vi) Upon execution, an MOA, consistent with its terms, may augment the prohibitions on take contained in the experimental population rule applicable to the nonessential experimental gray wolf populations throughout the State, and any other specific section 9 or section 4(d) restrictions that may now apply or that could be applicable in the future, until delisting, so long as the MOA remains in legal effect.

(vii) The MOA will expressly provide that the agreement may be the basis upon which State regulatory measures will be judged for delisting purposes. The authority for the MOA will be the Endangered Species Act, the Fish and Wildlife Act of 1956 and the Fish and Wildlife Cooperation Act.

(viii) In order for the MOA to remain in effect, the Secretary must find, on an annual basis, that the management under the MOA is not jeopardizing the continued existence of the gray wolf in the Western DPS. The Secretary may terminate the MOA upon 90 days notice to the State if:

(A) Management under the MOA is likely to jeopardize the continued existence of the gray wolf in the Western DPS; or

(B) The State has failed materially to comply with the MOA or any relevant provision of the State management plan; or

(C) Biological circumstances within the range of the gray wolf indicate that delisting the species would not be warranted.

* * * * *

Dated: March 3, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–5248 Filed 3–4–04; 2:52 pm]

BILLING CODE 4310–55–C

Notices

Federal Register
Vol. 69, No. 46
Tuesday, March 9, 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

Animal and Plant Health Inspection Service

[Docket No. 04–010–1]

Mycogen c/o Dow; Availability of Petitions and Environmental Assessment for Determinations of Nonregulated Status for Cotton Genetically Engineered for Insect Resistance

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has received two petitions from Mycogen Seeds c/o Dow AgroSciences LLC seeking determinations of nonregulated status for cotton lines designated as Cry1F cotton event 281–24–236 and Cry1Ac cotton event 3006–210–23, which have been genetically engineered for insect resistance. The petitions have been submitted in accordance with our regulations concerning the introduction of certain genetically engineered organisms and products. In accordance with those regulations, we are soliciting public comments on whether these cotton lines present a plant pest risk. We are also making available for public comment an environmental assessment for the proposed determinations of nonregulated status.

DATES: We will consider all comments we receive on or before May 10, 2004.

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

- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 04–010–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 04–010–1.
- E-mail: Address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 04–010–1" on the subject line.
- Agency Web Site: Go to *http://www.aphis.usda.gov/ppd/rad/cominst.html* for a form you can use to submit an e-mail comment through the APHIS Web site.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

Reading Room: You may read the petitions, the environmental assessment, and any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html*.

FOR FURTHER INFORMATION CONTACT: Dr. Susan Koehler, Biotechnology Regulatory Services, APHIS, Suite 5B05, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–4886. To obtain copies of the petitions or the environmental assessment, contact Ms. Kay Peterson at (301) 734–4885; e-mail: *Kay.Peterson@aphis.usda.gov*. The petitions are also available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/03_03601p.pdf* and *http://www.aphis.usda.gov/brs/aphisdocs/03_03602p.pdf*.

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason To Believe Are Plant Pests," regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered "regulated articles."

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

On February 5, 2003, APHIS received two petitions from Mycogen Seeds c/o Dow AgroSciences LLC (Mycogen/Dow) of Indianapolis, IN, requesting determinations of nonregulated status under 7 CFR part 340 for cotton (*Gossypium hirsutum* L.) designated as Cry1F cotton event 281–24–236 (cotton event Cry1F) (APHIS Petition No. 03–036–01p) and Cry1Ac cotton event 3006–210–23 (cotton event Cry1Ac) (APHIS Petition No. 03–036–02p), which have been genetically engineered for resistance to certain lepidopteran insect pests. The Mycogen/Dow petitions state that the subject cotton events should not be regulated by APHIS because they do not present a plant pest risk.

As described in the petitions, cotton events Cry1F and Cry1Ac have been genetically engineered to express synthetic insecticidal proteins derived from the common soil bacterium *Bacillus thuringiensis* (*Bt*). The petitioner states that the Cry1F and Cry1Ac proteins are effective in providing protection from the feeding of lepidopteran insect pests such as tobacco budworm, beet armyworm, soybean looper, and cotton bollworm. The subject cotton events also express the *pat* gene derived from *Streptomyces viridochromogenes*, a non-pathogenic bacterium. The *pat* gene encodes the enzyme phosphinothricin acetyltransferase (PAT), which confers tolerance to glufosinate herbicides and is present in cotton events Cry1F and Cry1Ac as a selectable marker. The subject cotton events were developed through use of the *Agrobacterium*-mediated transformation method.

Cotton events Cry1F and Cry1Ac were developed primarily so that they could be crossed to produce a cotton line which contains both the insecticidal proteins and thereby to maintain a range of effective control options for lepidopteran insect pests and to reduce the potential for the development of resistance to *Bt* insecticides.

Cotton events Cry1F and Cry1Ac have been considered regulated articles under the regulations in 7 CFR part 340 because they contain gene sequences from the plant pathogen *Agrobacterium tumefaciens*. These cotton events have been field tested since 1999 in the United States under APHIS notifications. In the process of reviewing the notifications for field trials of the subject cotton, APHIS determined that the vectors and other elements were disarmed and that the trials, which were conducted under conditions of reproductive and physical confinement or isolation, would not present a risk of plant pest introduction or dissemination.

In § 403 of the Plant Protection Act (7 U.S.C. 7701–7772), plant pest is defined as any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or other pathogen, or any article similar to or allied with any of the foregoing. APHIS views this definition very broadly. The definition covers direct or indirect injury, disease, or damage not just to agricultural crops, but also to plants in general, for example, native species, as well as to organisms that may be beneficial to plants, for example, honeybees, rhizobia, etc.

The U.S. Environmental Protection Agency (EPA) is responsible for the regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (7 U.S.C. 136 *et seq.*). FIFRA requires that all pesticides, including herbicides, be registered prior to distribution or sale, unless exempt by EPA regulation. In cases in which genetically modified plants allow for a new use of a pesticide or involve a different use pattern for the pesticide, EPA must approve the new or different use. Accordingly, Mycogen/Dow has submitted a request to EPA for registration of the stacked Cry1F and Cry1Ac protein construct as a plant-incorporated protectant in cotton.

When the use of the pesticide on the genetically modified plant would result in an increase in the residues in a food or feed crop for which the pesticide is currently registered, or in new residues in a crop for which the pesticide is not currently registered, establishment of a new tolerance or a revision of the existing tolerance would be required. Residue tolerances for pesticides are established by EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended (21 U.S.C. 301 *et seq.*), and the Food and Drug Administration (FDA) enforces tolerances set by EPA under the FFDCA. Mycogen/Dow has submitted a request to EPA for a tolerance exemption for both the Cry1F and Cry1Ac proteins as expressed in the subject cotton events.

FDA published a statement of policy on foods derived from new plant varieties in the **Federal Register** on May 29, 1992 (57 FR 22984–23005). The FDA statement of policy includes a discussion of FDA's authority for ensuring food safety under the FFDCA, and provides guidance to industry on the scientific considerations associated with the development of foods derived from new plant varieties, including those plants developed through the techniques of genetic engineering. Mycogen/Dow has begun consultation with FDA on the subject cotton events.

To provide the public with documentation of APHIS's review and analysis of the environmental impacts and plant pest risk associated with proposed determinations of nonregulated status for Mycogen/Dow's cotton events Cry1F and Cry1Ac, an environmental assessment has been prepared. The EA was prepared in accordance with (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS's NEPA Implementing Procedures (7 CFR part 372).

In accordance with § 340.6(d) of the regulations, we are publishing this notice to inform the public that APHIS will accept written comments regarding the petitions for determinations of nonregulated status from interested persons for a period of 60 days from the date of this notice. We are also soliciting written comments from interested persons on the environmental assessment prepared to examine any environmental impacts of the proposed determinations for the subject cotton events. The petitions and the environmental assessment and any comments received are available for public review, and copies of the petitions and the environmental assessment are available as indicated in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

After the comment period closes, APHIS will review the data submitted by the petitioner, all written comments received during the comment period, and any other relevant information. After reviewing and evaluating the comments on the petitions and the environmental assessment and other data and information, APHIS will furnish a response to the petitioner, either approving the petitions in whole or in part, or denying the petitions. APHIS will then publish a notice in the **Federal Register** announcing the regulatory status of the Mycogen/Dow insect-resistant cotton events Cry1F and Cry1Ac and the availability of APHIS's written decision.

Authority: 7 U.S.C. 1622n and 7701–7772; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 4th day of March, 2004.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–5252 Filed 3–8–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request; Food Stamp Program Regulations, Part 275—Quality Control

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on a proposed information collection. This notice is an extension of the currently approved information collection burden for the Quality Control (QC) system which includes the sampling plan and the arbitration and good cause processes. The reporting and recordkeeping burdens associated with the Food Stamp Program QC System are approved through August 31, 2004, under OMB No. 0584–0303. Part 275 of the Food Stamp Program regulations on QC requires these burdens.

DATES: Written comments must be submitted on or before May 10, 2004.

ADDRESSES: Send comments and requests for copies of this information collection to: Daniel Wilusz, Chief, Quality Control Branch, Program Accountability Division, Food and

Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302. You may FAX comments to us at (703) 305–0928 or e-mail at *Daniel.Wilusz@fns.usda.gov*. You may also download an electronic version of this notice at *http://www.fns.usda.gov/fsp/* and comment via the Internet at the same address. If you do not receive a confirmation from the system that we have received your message, contact us directly at (703) 305–2460.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of 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.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Daniel Wilusz, (703) 305–2460 or e-mail at *Daniel.Wilusz@fns.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Food Stamp Program Regulations, Part 275—Quality Control.

OMB Number: 0584–0303.

Expiration Date: August 31, 2004.

Type of Request: Extension of a currently approved collection of information.

Abstract: There are three components of the QC system that are covered in this proposed information collection. They are: (1) The sampling plan and (2) the arbitration and (3) good cause processes. Each State is required to develop a sampling plan which demonstrates the integrity of its case selection procedures. The QC system is designed to measure each State agency's payment error rate based on a statistically valid sample of food stamp cases. A State's payment error rate represents the proportion of cases that were reported through a QC review as being ineligible, overissued and underissued food stamp benefits. The QC system contains procedures for resolving differences in review findings between State agencies and FNS. This is referred to as the arbitration process. The QC system also contains procedures which provide relief for State agencies from all or a part of a QC liability when a State agency can demonstrate that a part or all of an excessive error rate was due to an unusual event which had an uncontrollable impact on the State agency's payment error rate. This is referred to as the good cause process.

The approved burden for the QC system includes the burden for the QC sampling plan and the arbitration and good cause processes. The annual reporting burden associated with the QC sampling plan is 265 hours per year. There was a minor increase in the burden due to an increase in the number of responses associated with the good cause process. The annual reporting burdens associated with arbitration and good cause processes are estimated to total 1643 and 8480 respectively. The reporting burden for good cause increased from 1917 to 8480 hours. This is a result of a re-determination in the number of responses from 0.226 to 1 per year. The annual recordkeeping burden associated with the QC sampling plan is 1.25 hours per year. The annual recordkeeping burdens associated with arbitration and good cause processes are estimated to total 3.89 and 1.25 respectively. The recordkeeping burden for good cause increased from .28 to 1.25 hours due a re-determination in the number of records from .226 to 1 per year. The total annual burden for the QC system, as proposed by this notice, increased from 3830 to 10,394 hours.

Quality Control System Reporting Burden Associated With the Sampling Plan, Arbitration, and Good Cause

1. Sampling Plan

Affected Public: State agencies.
Estimated Number of Respondents: 53.
Estimated Number of Responses Per Respondent: 1.
Estimated Time Per Response: 5 hours.
Estimated Total Annual Burden Hours: 265.

2. Arbitration Process

Affected Public: State agencies.
Estimated Number of Respondents: 53.
Estimated Number of Responses Per Respondent: 3.1.
Estimated Time Per Response: 10 hours.
Estimated Total Annual Burden Hours: 1643.

3. Good Cause Process

Affected Public: State agencies.
Estimated Number of Respondents: 53.
Estimated Number of Responses: 1.
Estimated Time Per Response: 160 hours.
Estimated Total Annual Burden Hours: 8480.

Quality Control System Recordkeeping Burden Associated With the Sampling Plan, Arbitration, and Good Cause

1. Sampling Plan

Estimated Number of Recordkeepers: 53.
Estimated Number of Records Per Respondent: 1.
Estimated Staff Hours Per Recordkeeping: .0236.
Estimated Total Annual Burden Hours: 1.25.

2. Arbitration Process

Estimated Number of Recordkeepers: 53.
Estimated Number of Records Per Respondent: 3.1.
Estimated Staff Hours Per Recordkeeping: .0236.
Estimated Total Annual Burden Hours: 3.89.

3. Good Cause Process

Estimated Number of Recordkeepers: 53.
Estimated Number of Records: 1.
Estimated Staff Hours Per Recordkeeping: .0236.
Estimated Total Annual Burden Hours: 1.25.

The Combined Quality Control System Burden (includes the burdens associated with the Sampling Plan, Arbitration and Good Cause): 10,394 hours.

Dated: March 1, 2004.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 04–5199 Filed 3–8–04; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Revision of the Land and Resource Management Plan for the Colville, Okanogan and Wenatchee National Forests, Pacific Northwest Region, WA

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to revise the Land and Resource Management Plans (Forest Plans) for the Colville, Okanogan and Wenatchee National Forests.

SUMMARY: This notice announces the intent of the Colville, Okanogan and

Wenatchee National Forests to revise their respective Land and Resource Management Plans (Forest Plans) under the 1982 planning regulations (36 CFR part 219). Initial steps of the revision process will focus on information needs, resource inventory review, organizing data, and establishing the public involvement process.

ADDRESSES: Send written comments concerning this notice to Margaret Hartzell, Plan Revision Group Leader, Okanogan Valley Office, 1240 South Second Avenue, Okanogan, WA 98840. Send electronic correspondence on the Forest Plan Revision to *r6_ewzplanrevision@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Margaret Hartzell, Plan Revision Group Leader (509) 826–3275.

SUPPLEMENTARY INFORMATION: The Forest Plans for the Colville, Okanogan and Wenatchee National Forests will remain in effect and continue to be implemented until the Forest Plans are revised. This notice addresses initiation of plan revision. Once the scope of the revision is better understood the Forests will issue a Notice to prepare an Environmental Impact Statement, which will initiate the National Environmental Policy Act stage of plan revision.

The Forest Service is preparing new planning regulations which may be issued while the Colville, Okanogan and Wenatchee Forest Plans are still in the revision process. These new regulations will reflect the latest national direction on land management planning and the Forests may consider completing the Plan Revision under the new, finalized planning regulations. It is anticipated the new planning regulations will allow such a change. An additional Notice will be issued if the Forests decide to switch to the new, final planning regulations.

Further information is available on the Colville, Okanogan and Wenatchee Forest Plans Revision Web site *http://www.fs.fed.us/r6/colville/cow.*

Dated: February 13, 2004.

Linda Goodman,

Regional Forester.

[FR Doc. 04–5230 Filed 3–8–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn/Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Glenn/Colusa County Resource Advisory Committee (RAC) will meet in Willows, California. Agenda items to be covered income: (1) Introductions, (2) Approval of Minutes, (3) Public Comment, (4) NRCS Representative Dave Rose, (5) Report from Monitoring Sub-Committee, (6) Doe Peak Project Proposal, (7) General Discussion, (8) Next Agenda.

DATES: The meeting will be held on March 22, 2004, from 1:30 p.m. and end at approximately 4:30 p.m.

ADDRESSES: The meeting will be held at the Mendocino National Forest Supervisor's Office, 825 N. Humboldt Ave., Willows, CA 95988. Individuals wishing to speak or propose agenda items must send their names and proposals to Jim Giachino, DFO, 825 N. Humboldt Ave., Willows, CA 95988.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, P.O. Box 164, Elk Creek, CA 95939. (530) 968–5329; e-mail *ggaddini@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by March 22, 2004 will have the opportunity to address the committee at those sessions.

Dated: March 3, 2004.

James F. Giachino,

Designated Federal Official.

[FR Doc. 04–5233 Filed 3–8–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Inviting Rural Business Enterprise Grant Program Preapplications for Technical Assistance for Rural Transportation Systems

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (RBS), an Agency within the Rural Development mission area, announces the availability of two individual grants: one single $497,050 grant from the passenger transportation funds appropriated for the RBS Rural Business Enterprise Grant (RBEG) program and another single $248,525 grant from the Federally Recognized Native American Tribes' funds appropriated for RBS under the RBEG program for fiscal year (FY) 2004. Each grant is to be competitively awarded to a qualified national organization. These grants are to provide technical assistance for rural transportation.

DATES: The deadline for receipt of preapplications in the Rural Development State Office is May 14, 2004. Preapplications received at a Rural Development State Office after that date would not be considered for FY 2004 funding.

ADDRESSES: For further information, entities wishing to apply for assistance should contact a Rural Development State Office to receive further information and copies of the pre-application package. A list of Rural Development State Offices follows:

District of Columbia

Rural Business-Cooperative Service, USDA, Specialty Lenders Division, 1400 Independence Avenue, SW., STOP 3225, Room 6867, Washington, DC 20250–3225, (202) 720–1400.

Alabama

USDA Rural Development State Office, Sterling Center, Suite 601, 4121 Carmichael Road, Montgomery, AL 36106–3683, (334) 279–3400.

Alaska

USDA Rural Development State Office, 800 West Evergreen, Suite 201, Palmer, AK 99645–6539.

Arizona

USDA Rural Development State Office, 3003 North Central Avenue, Suite 900, Phoenix, AZ 85012–2906, (602) 280–8700.

Arkansas

USDA Rural Development State Office, 700 West Capitol Avenue, Room 3416, Little Rock, AR 72201–3225, (501) 301–3200.

California

USDA Rural Development State Office, 430 G Street, Agency 4169, Davis, CA 95616–4169, (530) 792–5800.

Colorado

USDA Rural Development State Office, 655 Parfet Street, Room E–100, Lakewood, CO 80215, (720) 544–2903.

Delaware-Maryland

USDA Rural Development State Office, P.O. Box 400, 4607 South DuPont

Highway, Camden, DE 19934–9998, (302) 697–4300.

Florida/Virgin Islands

USDA Rural Development State Office, P.O. Box 147010, 4440 NW. 25th Place, Gainesville, FL 32606, (352) 338–3482.

Georgia

USDA Rural Development State Office, Stephens Federal Building, 355 E. Hancock Avenue, Athens, GA 30601–2768, (706) 546–2162.

Hawaii

USDA Rural Development State Office, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8380.

Idaho

USDA Rural Development State Office, 9173 West Barnes Dr., Suite A1, Boise, ID 83709, (208) 378–5600.

Illinois

USDA Rural Development State Office, 2118 West Park Court, Suite A, Champaign, IL 61821, (217) 403–6200.

Indiana

USDA Rural Development State Office, 5975 Lakeside Boulevard, Indianapolis, IN 46278, (317) 290–3100.

Iowa

USDA Rural Development State Office, Federal Building, Room 873, 210 Walnut Street, Des Moines, IA 50309–2196, (515) 284–4663.

Kansas

USDA Rural Development State Office, Suite 100, 1303 SW First American Place, Topeka, KS 66604, (785) 271–2700.

Kentucky

USDA Rural Development State Office, 771 Corporate Drive, Suite 200, Lexington, KY 40503, (859) 224–7300.

Louisiana

USDA Rural Development State Office, 3727 Government Street, Alexandria, LA 71302, (318) 473–7920.

Maine

USDA Rural Development State Office, P. O. Box 405, 967 Illinois Avenue, Suite 4, Bangor, ME 04402–0405, (207) 990–9106.

Massachusetts/Rhode Island/ Connecticut

USDA Rural Development State Office, 451 West Street, Suite 2, Amherst, MA 01002–2999, (413) 253–4300.

Michigan

USDA Rural Development State Office, 3001 Coolidge Road, Suite 200, East Lansing, MI 48823, (517) 324–5100.

Minnesota

USDA Rural Development State Office, 410 AgriBank Building, 375 Jackson Street, St. Paul, MN 55101–1853, (651) 602–7800.

Mississippi

USDA Rural Development State Office, Federal Building, Suite 831, 100 West Capitol Street, Jackson, MS 39269, (601) 965–4316.

Missouri

USDA Rural Development State Office, 601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, (573) 876–0976.

Montana

USDA Rural Development State Office, P.O. Box 771, 900 Technology Blvd., Unit 1, Suite B, Bozeman, MT 59715, (406) 585–2580.

Nebraska

USDA Rural Development State Office, Federal Building, Room 152, 100 Centennial Mall North, Lincoln, NE 68508, (402) 437–5551.

Nevada

USDA Rural Development State Office, 1390 South Curry Street, Carson City, NV 89703–9910, (775) 887–1222.

New Jersey

USDA Rural Development State Office, 5th Floor North, Suite 500, 8000 Midlantic Drive, Mt. Laurel, NJ 08054, (856) 787–7700.

New Mexico

USDA Rural Development State Office, 6200 Jefferson Street, NE., Room 255, Albuquerque, NM 87109, (505) 761–4950.

New York

USDA Rural Development State Office, The Galleries of Syracuse, 441 South Salina Street, Suite 357, Syracuse, NY 13202–2541, (315) 477–6400.

North Carolina

USDA Rural Development State Office, 4405 Bland Road. Suite 260, Raleigh, NC 27609, (919) 873–2000.

North Dakota

USDA Rural Development State Office, P.O. Box 1737, Federal Building, Room 208, 220 East Rosser Avenue, Bismarck, ND 58502–1737, (701) 530–2037.

Ohio

USDA Rural Development State Office, Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2418, (614) 255–2500.

Oklahoma

USDA Rural Development State Office, 100 USDA, Suite 108, Stillwater, OK 74074–2654, (405) 742–1000.

Oregon

USDA Rural Development State Office, 101 SW Main Street, Suite 1410, Portland, OR 97204–3222, (503) 414–3300.

Pennsylvania

USDA Rural Development State Office, One Credit Union Place, Suite 330, Harrisburg, PA 17110–2996, (717) 237–2299.

Puerto Rico

USDA Rural Development State Office, 654 Munoz Rivera Avenue, IBM Plaza, Suite 601, Hato Rey, Puerto Rico 00918–6106, (787) 766–5095.

South Carolina

USDA Rural Development State Office, Strom Thurmond Federal Building, 1835 Assembly Street, Room 1007, Columbia, SC 29201, (803) 765–5163.

South Dakota

USDA Rural Development State Office, Federal Building, Room 210, 200 4th Street, SW., Huron, SD 57350, (605) 352–1100.

Tennessee

USDA Rural Development State Office, 3322 West End Avenue, Suite 300, Nashville, TN 37203–1084, (615) 783–1300.

Texas

USDA Rural Development State Office, Federal Building, Suite 102, 101 South Main Street, Temple, TX 76501, (254) 742–9700.

Utah

USDA Rural Development State Office, Wallace F. Bennett Federal Building 1, 25 South State Street, Room 4311, Salt Lake City, UT 84138, (801) 524–4321.

Vermont/New Hampshire

USDA Rural Development State Office, City Center, 3rd Floor, 89 Main Street, Montpelier, VT 05602, (802) 828–6010.

Virginia

USDA Rural Development State Office, Culpeper Building, Suite 238, 1606

Santa Rosa Road, Richmond, VA 23229–5014, (804) 287–1550.

Washington

USDA Rural Development State Office, 1835 Black Lake Boulevard, SW., Suite B, Olympia, WA 98512–5715, (360) 704–7740.

West Virginia

USDA Rural Development State Office, Federal Building, 75 High Street, Room 320, Morgantown, WV 26505–7500, (304) 284–4860.

Wisconsin

USDA Rural Development State Office, 4949 Kirschling Court, Stevens Point, WI 54481, (715) 345–7610.

Wyoming

USDA Rural Development State Office, Federal Building, Room 1005, 100 East B Street, P.O. Box 820, Casper, WY 82602, (307) 261–6300.

SUPPLEMENTARY INFORMATION: The passenger transportation portion of the RBEG program is authorized by section 310B(c)(2) of the Consolidated Farm and Rural Development Act (CONACT) (7 U.S.C. 1932(c)(2)). The RBEG program is administered on behalf of RBS at the State level by the Rural Development State Offices. The primary objective of the program is to improve the economic conditions of rural areas. Assistance provided to rural areas under this program may include on-site technical assistance to local and regional governments, public transit agencies, and related nonprofit and for-profit organizations in rural areas; the development of training materials; and the provision of necessary training assistance to local officials and agencies in rural areas.

Awards under the RBEG passenger transportation program are made on a competitive basis using specific selection criteria contained in 7 CFR part 1942, subpart G, and in accordance with section 310B(c)(2) of the CONACT. That subpart also contains the information required to be in the preapplication package. For the $250,000 grant, at least 75 percent of the benefits of the project must be received by members of Federally Recognized Tribes. The project that scores the greatest number of points based on the selection criteria and Administrator's points will be selected for each grant. Preapplications will be tentatively scored by the State Offices and submitted to the National Office for review, final scoring, and selection.

To be considered "national," a qualified organization is required to provide evidence that it operates in multi-State areas. There is not a requirement to use the grant funds in a multi-State area. Under this notice, grants will be made to qualified, private, non-profit organizations for the provision of technical assistance and training to rural communities for the purpose of improving passenger transportation services or facilities. Public bodies are not eligible for passenger transportation RBEG grants.

The information collection requirements contained within this Notice have received approval by the Office of Management and Budget (OMB) under OMB Control Number 0570–0022 (7 CFR part 1942, subpart G).

Fiscal Year 2004 Preapplications Submission

Each preapplication received in a Rural Development State Office will be reviewed to determine if this preapplication is consistent with the eligible purposes contained in section 310B(c)(2) of the CONACT. Each selection priority criterion outlined in 7 CFR part 1942, subpart G, section 1942.305(b)(3), must be addressed in the preapplication. Failure to address any of the criteria will result in a zero-point score for that criterion and impact the overall evaluation of the preapplication. Copies of 7 CFR part 1942, subpart G, will be provided to any interested applicant making a request to a Rural Development State Office listed in this notice. All projects to receive technical assistance through these passenger transportation grant funds are to be identified when the preapplications are submitted to the Rural Development State Office. Multiple project preapplications must identify each individual project, indicate the amount of funding requested for each individual project, and address the criteria as stated above for each individual project. For multiple-project preapplications, the average of the individual project scores will be the score for that preapplication.

All eligible preapplications, along with tentative scoring sheets and the Rural Development State Director's recommendation, will be referred to the National Office no later than June 15, 2004, for final scoring and selection for an award.

The National Office will score preapplications based on the grant selection criteria and weights contained in 7 CFR part 1942, subpart G and will select a grantee subject to the grantee's satisfactory submission of a formal application and related materials in the manner and timeframe established by RBS in accordance with 7 CFR part 1942, subpart G. It is anticipated that the grantees will be selected by July 30, 2004. All applicants will be notified by RBS of the Agency's decision on the awards.

Nondiscrimination Statement

"The U.S. Department of Agriculture (USDA) (Departmental Regulation 4300–3), prohibits discrimination in all its programs and activities on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status in employment or in any program or activity conducted or funded by the Department. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326–W, Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TDD). USDA is an equal opportunity provider and employer."

Dated: February 26, 2004.

John Rosso,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 04–5260 Filed 3–8–04; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Inviting Applications for Rural Business Opportunity Grants

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (RBS), an Agency within the Rural Development mission area, announces the availability of grants of up to $50,000 per application from the Rural Business Opportunity Grant (RBOG) Program for fiscal year (FY) 2004, to be competitively awarded. For multi-State projects, grant funds of up to $150,000 will be available on a competitive basis.

DATES: The deadline for the receipt of applications in the Rural Development State Office is June 4, 2004. Any applications received at a Rural Development State Office after that date would not be considered for FY 2004 funding.

ADDRESSES: For further information, entities wishing to apply for assistance should contact a Rural Development State Office to receive further information and copies of the application package. Potential applicants located in the District of Columbia must send their applications to the National Office at:

District of Columbia

Rural Business-Cooperative Service, USDA, Specialty Lenders Division, 1400 Independence Avenue, SW., Room 6867, STOP 3225, Washington, DC 20250–3225, (202) 720–1400.

A list of Rural Development State Offices follows:

Alabama

USDA Rural Development State Office, Sterling Center, Suite 601, 4121 Carmichael Road, Montgomery, AL 36106–3683, (334) 279–3400.

Alaska

USDA Rural Development State Office, 800 West Evergreen, Suite 201, Palmer, AK 99645–6539, (907) 761–7705.

Arizona

USDA Rural Development State Office, 3003 North Central Avenue, Suite 900, Phoenix, AZ 85012–2906, (602) 280–8700.

Arkansas

USDA Rural Development State Office, 700 West Capitol Avenue, Room 3416, Little Rock, AR 72201–3225, (501) 301–3200.

California

USDA Rural Development State Office, 430 G Street, Agency 4169, Davis, CA 95616–4169, (530) 792–5800.

Colorado

USDA Rural Development State Office, 655 Parfet Street, Room E–100, Lakewood, CO 80215, (720) 544–2903.

Delaware-Maryland

USDA Rural Development State Office, P.O. Box 400, 4607 South DuPont Highway, Camden, DE 19934–9998, (302) 697–4300.

Florida/Virgin Islands

USDA Rural Development State Office, P.O. Box 147010, 4440 NW. 25th Place, Gainesville, FL 32606, (352) 338–3482.

Georgia

USDA Rural Development State Office, Stephens Federal Building, 355 E. Hancock Avenue, Athens, GA 30601–2768, (706) 546–2162.

Hawaii

USDA Rural Development State Office, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8380.

Idaho

USDA Rural Development State Office, 9173 West Barnes Dr., Suite A1, Boise, ID 83709, (208) 378–5600.

Illinois

USDA Rural Development State Office, 2118 West Park Court, Suite A, Champaign, IL 61821, (217) 403–6200.

Indiana

USDA Rural Development State Office, 5975 Lakeside Boulevard, Indianapolis, IN 46278, (317) 290–3100.

Iowa

USDA Rural Development State Office, Federal Building, Room 873, 210 Walnut Street, Des Moines, IA 50309–2196, (515) 284–4663.

Kansas

USDA Rural Development State Office, Suite 100, 1303 SW. First American Place, Topeka, KS 66604, (785) 271–2700.

Kentucky

USDA Rural Development State Office, 771 Corporate Drive, Suite 200, Lexington, KY 40503, (859) 224–7300.

Louisiana

USDA Rural Development State Office, 3727 Government Street, Alexandria, LA 71302, (318) 473–7921.

Maine

USDA Rural Development State Office, P.O. Box 405, 967 Illinois Avenue, Suite 4, Bangor, ME 04402–0405, (207) 990–9106.

Massachusetts/Rhode Island/ Connecticut

USDA Rural Development State Office, 451 West Street, Suite 2, Amherst, MA 01002–2999, (413) 253–4300.

Michigan

USDA Rural Development State Office, 3001 Coolidge Road, Suite 200, East Lansing, MI 48823, (517) 324–5100.

Minnesota

USDA Rural Development State Office, 410 AgriBank Building, 375 Jackson Street, St. Paul, MN 55101–1853, (651) 602–7800.

Mississippi

USDA Rural Development State Office, Federal Building, Suite 831, 100 West Capitol Street, Jackson, MS 39269, (601) 965–4316.

Missouri

USDA Rural Development State Office, 601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, (573) 876–0976.

Montana

USDA Rural Development State Office, P.O. Box 771, 900 Technology Blvd., Unit 1, Suite B, Bozeman, MT 59715, (406) 585–2580.

Nebraska

USDA Rural Development State Office, Federal Building, Room 152, 100 Centennial Mall North, Lincoln, NE 68508, (402) 437–5551.

Nevada

USDA Rural Development State Office, 1390 South Curry Street, Carson City, NV 89703–9910, (775) 887–1222.

New Jersey

USDA Rural Development State Office, 5th Floor North, Suite 500, 8000 Midlantic Drive, Mt. Laurel, NJ 08054, (856) 787–7700.

New Mexico

USDA Rural Development State Office, 6200 Jefferson Street, NE., Room 255, Albuquerque, NM 87109, (505) 761–4950.

New York

USDA Rural Development State Office, The Galleries of Syracuse, 441 South Salina Street, Suite 357, Syracuse, NY 13202–2541, (315) 477–6400.

North Carolina

USDA Rural Development State Office, 4405 Bland Road, Suite 260, Raleigh, NC 27609, (919) 873–2000.

North Dakota

USDA Rural Development State Office, P.O. Box 1737, Federal Building, Room 208, 220 East Rosser Avenue, Bismarck, ND 58502–1737, (701) 530–2037.

Ohio

USDA Rural Development State Office, Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2418, (614) 255–2500.

Oklahoma

USDA Rural Development State Office, 100 USDA, Suite 108, Stillwater, OK 74074–2654, (405) 742–1000.

Oregon

USDA Rural Development State Office, 101 SW Main Street, Suite 1410,

Portland, OR 97204–3222, (503) 414–3300.

Pennsylvania

USDA Rural Development State Office, One Credit Union Place, Suite 330, Harrisburg, PA 17110–2996, (717) 237–2299.

Puerto Rico

USDA Rural Development State Office, 654 Munoz Rivera Avenue, IBM Plaza, Suite 601, Hato Rey, Puerto Rico 00918–6106, (787) 766–5095.

South Carolina

USDA Rural Development State Office, Strom Thurmond Federal Building, 1835 Assembly Street, Room 1007, Columbia, SC 29201, (803) 765–5163.

South Dakota

USDA Rural Development State Office, Federal Building, Room 210, 200 4th Street, SW., Huron, SD 57350, (605) 352–1100.

Tennessee

USDA Rural Development State Office, 3322 West End Avenue, Suite 300, Nashville, TN 37203–1084, (615) 783–1300.

Texas

USDA Rural Development State Office, Federal Building, Suite 102, 101 South Main Street, Temple, TX 76501, (254) 742–9700.

Utah

USDA Rural Development State Office, Wallace F. Bennett Federal Building, 125 South State Street, Room 4311, Salt Lake City, UT 84138, (801) 524–4321.

Vermont/New Hampshire

USDA Rural Development State Office, City Center, 3rd Floor, 89 Main Street, Montpelier, VT 05602, (802) 828–6010.

Virginia

USDA Rural Development State Office, Culpeper Building, Suite 238, 1606 Santa Rosa Road, Richmond, VA 23229–5014, (804) 287–1550.

Washington

USDA Rural Development State Office, 1835 Black Lake Boulevard, SW., Suite B, Olympia, WA 98512–5715, (360) 704–7740.

West Virginia

USDA Rural Development State Office, Federal Building, 75 High Street, Room 320, Morgantown, WV 26505–7500, (304) 284–4860.

Wisconsin

USDA Rural Development State Office, 4949 Kirschling Court, Stevens Point, WI 54481, (715) 345–7610.

Wyoming

USDA Rural Development State Office, Federal Building, Room 1005, 100 East B Street, P.O. Box 820, Casper, WY 82602, (307) 261–6300.

SUPPLEMENTARY INFORMATON: The RBOG program is authorized under section 306 of the Consolidated Farm and Rural Development Act (CONACT) (7 U.S.C. 1926(a)(11)). The Rural Development State Offices administer the RBOG program on behalf of RBS at the State level. The primary objective of the program is to improve the economic conditions of rural areas. Assistance provided to rural areas under this program may include technical assistance for business development and economic development planning. A total of $1.064 million of non-earmarked funds is available for the RBOG program for FY 2004. To ensure that a broad range of communities have the opportunity to benefit from the available funds, no grant will exceed $50,000, unless it is a multi-State project where funds may not exceed $150,000. Pursuant to the Consolidated Appropriations Act for 2004 (Pub. L. 108–199), a total of $1,988,200 has been earmarked for Native Americans and Empowerment Zones, Enterprise Communities, and Rural Economic Area Partnerships. There is no project dollar amount limitation on applications for earmarked funds. Awards are made on a competitive basis using specific selection criteria contained in 7 CFR part 4284, subpart G, 7 CFR part 4284, subpart G, also contains the information required to be in the application package. The State Director may assign up to 15 discretionary points to an application, and the Agency Administrator may assign up to 20 additional discretionary points based on geographic distribution of funds, special importance for implementation of a strategic plan in partnership with other organizations, or extraordinary potential for success due to superior project plans or qualifications of the grantee. To ensure the equitable distribution of funds, two projects from each State that score the greatest number of points based on the selection criteria and discretionary points will be considered for funding. Applications will be tentatively scored by the State Offices and submitted to the National Office for final review and selection.

The National Office will review the scores based on the grant selection criteria and weights contained in 7 CFR part 4284, subpart G. All applicants will be notified by RBS of the Agency's decision on the awards.

In accordance with the Paperwork Reduction Act of 1995, the information collection requirement contained in this Notice is approved by the Office of Management and Budget (MB) under OMB Control Number 0570–0024.

Nondiscrimination Statement

"The U.S. Department of Agriculture (USDA) (Departmental Regulation 4300–3), prohibits discrimination in all its programs and activities on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status in employment or in any program or activity conducted or funded by the Department. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326–W, Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TDD). USDA is an equal opportunity provider and employer."

Dated: February 26, 2004.

John Rosso,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 04–5261 Filed 3–8–04; 8:45 am]

BILLING CODE 3410–XY–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Idaho Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a conference call of the Idaho State Advisory Committee will convene at 1 p.m. (PST) and adjourn at 2 p.m., Thursday, March 18, 2004. The purpose of the conference call is to discuss the Seattle Commission meeting of February 20, 2004, and the State Advisory Committee Handbook.

This conference call is available to the public through the following call-in number: 1–800–659–8290, access code number 22241918. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls not initiated using the provided

call-in number or made over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls using the call-in number over land-line connections. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and access code.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Arthur Palacios of the Western Regional Office, (213) 894–3437, by 3 p.m. on Wednesday, March 17, 2004.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, March 24, 2004.

Dawn Sweet,

Editor.

[FR Doc. 04–5197 Filed 3–8–04; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–791–819]

Notice of Postponement of Preliminary Determination of Sales at Less Than Fair Value: Certain Aluminum Plate From South Africa

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

SUMMARY: We are postponing the preliminary determination in the antidumping duty investigation of certain aluminum plate from South Africa.

EFFECTIVE DATE: March 9, 2004.

FOR FURTHER INFORMATION CONTACT: Rebecca Trainor or Kate Johnson, Office 2, AD/CVD Enforcement Group I, Import Administration–Room B099, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4007 or (202) 482–4929, respectively.

Postponement of Preliminary Determination:

On November 12, 2003, the Department published the initiation of the antidumping duty investigation of imports of certain aluminum plate from South Africa. *See Notice of Initiation of Antidumping Duty Investigation: Certain Aluminum Plate from South Africa*, 68 FR 64081. The notice of initiation stated that we would make our preliminary determination for this antidumping duty investigation no later than 140 days after the date of issuance of the initiation (*i.e.*, March 23, 2004).

On February 13, 2004, Alcoa Inc. (the petitioner) timely alleged that Hulett Aluminium (Pty) Limited is selling below its cost of production. Therefore, in accordance with section 733(c)(1) of the Tariff Act of 1930, as amended ("the Act"), we are postponing the preliminary determination in order to provide the Department sufficient time in which to consider this allegation and the potential complexities it may impose on the dumping margin calculation should the Department initiate a cost investigation. We will make our preliminary determination no later than May 13, 2004.

This notice is published pursuant to sections 733(f) and 777(i) of the Act.

Dated: March 3, 2004.

Jeffrey May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 04–5279 Filed 3–8–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–805]

Extruded Rubber Thread from Malaysia: Notice of Initiation of Changed Circumstances Review of the Antidumping Duty Order, Preliminary Results of Changed Circumstances Review, and Intent To Revoke Antidumping Duty Order

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

ACTION: Notice of initiation and preliminary results of antidumping duty changed circumstances review, and intent to revoke antidumping duty order.

SUMMARY: In accordance with 19 CFR 351.216(b), Heveafil Sdn Bhd., Filmax Sdn. Bhd., and Heveafil USA Inc. (collectively "Heveafil"), a producer/exporter of subject merchandise and an interested party in this proceeding, filed a request for a changed circumstances review of the antidumping duty order on extruded rubber thread from Malaysia, as described below. In response to this request, the Department of Commerce is initiating a changed circumstances review and issuing a notice of intent to revoke the antidumping duty order on extruded rubber thread from Malaysia. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: March 9, 2004.

FOR FURTHER INFORMATION CONTACT: Irina Itkin or Elizabeth Eastwood, Office 2, AD/CVD Enforcement Group I, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0656 or (202) 482–3874, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 7, 1992, the Department published in the **Federal Register** the antidumping duty order on extruded rubber thread from Malaysia. *See Antidumping Duty Order and Amendment of Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread From Malaysia*, 57 FR 46150 (Oct. 7, 1992). On January 23, 2004, Heveafil, a producer/exporter of subject merchandise and an interested party in this proceeding, requested that the Department revoke the antidumping duty order on extruded rubber thread from Malaysia through a changed circumstances review. According to Heveafil, one of the two U.S. companies producing the domestic like product, Globe Manufacturing Co., exited the extruded rubber thread business on March 17, 2000, leaving the other company, North American Rubber Thread Co., Inc. (North American), as the sole U.S. producer. Heveafil also asserted that in August 2003 North American filed Chapter 7 bankruptcy and ceased all business operations. Additionally, Heveafil asserted that although a third company, Thai Rubber Latex Corporation, purchased the assets of North American, it is moving much of the purchased production equipment to Thailand and has indicated that the remaining machinery will not be used for production. Based on these events, Heveafil contends that there is no longer any U.S. production of the domestic like product, and a changed circumstances review and revocation of the order are warranted.

Scope of the Review

The product covered by this review is extruded rubber thread. Extruded rubber thread is defined as vulcanized rubber thread obtained by extrusion of stable or concentrated natural rubber latex of any cross sectional shape, measuring from 0.18 mm, which is 0.007 inch or 140 gauge, to 1.42 mm, which is 0.056 inch or 18 gauge, in diameter. Extruded rubber thread is currently classifiable

under subheading 4007.00.00 of the *Harmonized Tariff Schedule of the United States* (HTSUS). The HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this review is dispositive.

Initiation of Changed Circumstances Review, Preliminary Results, and Intent To Revoke Antidumping Duty Order

Pursuant to sections 751(d)(1) and 782(h)(2) of the Tariff Act of 1930, as amended (the Act), the Department may revoke an antidumping or countervailing duty order based on a review under section 751(b) of the Act (i.e., a changed circumstances review). Section 751(b)(1) of the Act requires a changed circumstances review to be conducted upon receipt of a request which shows changed circumstances sufficient to warrant a review. Section 351.222(g) of the Department's regulations provides that the Department will conduct a changed circumstances review under 19 CFR 351.216 and may revoke an order (in whole or in part) if it determines that producers accounting for substantially all of the production of the domestic like product to which the order (or the part of the order to be revoked) pertains have expressed a lack of interest in the relief provided by the order, in whole or in part, or if changed circumstances exist sufficient to warrant revocation. In addition, in the event that the Department concludes that expedited action is warranted, 19 CFR 351.221(c)(3)(ii) permits the Department to combine the notices of initiation and preliminary results.

In this case, the Department finds that the information submitted provides sufficient evidence of changed circumstances to warrant a review. Therefore, in accordance with sections 751(d)(1) and 782(h)(2) of the Act, and 19 CFR 351.216 and 351.222(g), based on the information provided by Heveafil, we are initiating this changed circumstances review. Furthermore, since the information on record indicates there is no longer any U.S. production of the domestic like product, we determine that expedited action is warranted and we preliminarily determine that the continued relief provided by the order with respect to extruded rubber thread from Malaysia is no longer of interest to domestic interested parties. Because we have concluded that expedited action is warranted, we are combining these notices of initiation and preliminary results. Therefore, we are hereby notifying the public of our intent to revoke the antidumping duty order with respect to imports of extruded rubber thread from Malaysia.

If we make a final determination to revoke, we intend to instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping duties, and to refund any estimated antidumping duties collected for all entries of extruded rubber thread from Malaysia, made on or after October 1, 2003, the first day of the most recent period of administrative review and the only period for which an administrative review has not been completed, in accordance with 19 CFR 351.222. We will also instruct CBP to pay interest on such refunds in accordance with section 778 of the Act. The current requirement for a cash deposit of estimated antidumping duties on extruded rubber thread from Malaysia will continue unless and until we publish a final determination to revoke.

Public Comment

Interested parties are invited to comment on these preliminary results. Parties who submit argument in this proceeding are requested to submit with the argument: (1) a statement of the issue, and (2) a brief summary of the argument. Any interested party may request a hearing within 10 days of the date of publication of this notice. Any hearing, if requested, will be held no later than 25 days after the date of publication of this notice, or the first workday thereafter. Case briefs may be submitted by interested parties not later than 15 days after the date of publication of this notice. Rebuttal briefs, limited to the issues raised in the case briefs, may be filed not later than 20 days after the date of publication of this notice. All written comments shall be submitted in accordance with 19 CFR 351.303. Persons interested in attending the hearing should contact the Department for the date and time of the hearing. The Department will publish the final results of this changed circumstances review, including the results of its analysis of issues raised in any written comments.

This notice is in accordance with sections 751(b)(1) and 777(i)(1) of the Act and 19 CFR 351.216 and 351.222.

Dated: March 3, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–5278 Filed 3–8–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–337–806]

Individual Quick Frozen Red Raspberries From Chile: Notice of Extension of Time Limit for 2001–2003 Administrative Review

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

ACTION: Notice of extension of time limit.

SUMMARY: The Department of Commerce is extending the time limit for the preliminary results of the current review of the antidumping duty order on individual quick frozen red raspberries from Chile. The period of review is December 31, 2001, through June 30, 2003. This extension is made pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended.

EFFECTIVE DATE: March 9, 2004.

FOR FURTHER INFORMATION CONTACT: Blanche Ziv or Cole Kyle, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4207 or (202) 482–1503, respectively.

Background

On August 22, 2003, the Department of Commerce ("the Department") published a notice of initiation of administrative review of the antidumping duty order on individual quick frozen red raspberries from Chile, covering the period December 31, 2001, through June 30, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, (68 FR 50750). The preliminary results for this review are currently due no later than April 1, 2004.

Extension of Time Limits for Preliminary Results

Section 751(a)(3)(A) of 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 order for which a review is requested and a final determination within 120 days after the date on which the preliminary results are published. If 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.

We are currently analyzing sales information provided by the three

respondents and cost information from one of the respondents in this review. In addition, we are awaiting cost responses from two of the respondents. Because the Department requires time to review and analyze these responses once they are received and to issue supplemental questionnaires if necessary, it is not practicable to complete this review within the originally anticipated time limit (*i.e.*, April 1, 2004). Therefore, the Department is extending the time limit for completion of the preliminary results to not later than July 30, 2004, 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: March 4, 2004.

Jeffrey May,

Deputy Assistant Secretary for AD/CVD Enforcement.

[FR Doc. 04–5282 Filed 3–8–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–839]

Final Results, Reinstatement, Partial Rescission of Countervailing Duty Expedited Reviews, and Company Exclusions: Certain Softwood Lumber Products From Canada

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

ACTION: Final results, reinstatement, partial rescission of countervailing duty expedited reviews, and company exclusions: certain softwood lumber products from Canada.

SUMMARY: On May 8, 2003, the Department of Commerce (the Department) published in the **Federal Register** its preliminary results of 28 expedited reviews of the countervailing duty order on certain softwood lumber products from Canada for the period April 1, 2000 through March 31, 2001. *See Preliminary Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products from Canada*, 68 FR 24717 (May 8, 2003).

Based on our analysis of comments on the *Preliminary Results* and verification of the questionnaire responses, we have made changes to the estimated net subsidy rates determined in the *Preliminary Results*. In addition, one company, Goldwood Industries Ltd. (Goldwood), whose expedited review was rescinded in the *Preliminary Results*, is being reinstated and has received a net subsidy rate in these final results. Further, we are rescinding the expedited review of Westcan Rail Ltd. (Westcan). For information regarding the reinstatement and rescission of the expedited review of individual companies in these final results, refer to the "Partial Rescission" and "Reinstatement" sections of this notice.

In addition, we are excluding three companies from the countervailing duty order. In accordance with these final results of reviews, we will instruct the U.S. Customs and Border Protection (CBP) to refund all collected cash deposits and waive future cash deposits requirements for each of the excluded companies, as detailed in the "Final Results of Reviews" section of this notice. We also intend to instruct the CBP to collect cash deposits for each reviewed company that was not excluded from the order as detailed in the "Final Results of Reviews" section of this notice.

EFFECTIVE DATE: March 9, 2004.

FOR FURTHER INFORMATION CONTACT: Margaret Ward, Office of AD/CVD Enforcement VI, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4161.

SUPPLEMENTARY INFORMATION:

Background

On May 8, 2003, the Department of Commerce (the Department) published in the **Federal Register** the *Preliminary Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products From Canada*, 68 FR 24717 (*Preliminary Results*) covering 28 respondents. In addition, we rescinded the expedited reviews of 12 respondents. Immediately following the issuance of the *Preliminary Results*, Cando Contracting Ltd. (Cando), Goldwood Industries Ltd. (Goldwood), Williamsburg Wood and Garden (Williamsburg), and Power Wood Corp. (Power Wood) submitted comments on the *Preliminary Results*.[1] On May 28, 2003, petitioners[2] responded to Cando's submission.

On June 5 and 6, 2003, petitioners submitted pre-verification comments regarding certain companies verified during this segment of the proceeding. From June 9, through June 20, 2003, the Department verified the information provided by five respondents: Boccam, Inc. (Boccam), Indian River Lumber (Indian River), Les Sceries Jocelyn Lavoie Ltd. (Lavoie), Sechoirs de Beauce, Inc. (Sechoirs de Beauce), and Westcan Rail Ltd. (Westcan). On July 21, 2003, the Department issued verification reports for Boccam, Indian River, Lavoie, Sechoirs de Beauce, and Westcan.

On July 23, 2003, the Department extended the due date for the case briefs for Round 1 and Round 2 companies. On August 14, 2003, petitioners and the Ontario Forest Association (OFIA) and the Ontario Lumber Manufacturers Association (OLMA) filed case briefs. On August 18, 2003, the Department extended the due date for the submission of rebuttal briefs. On August 20, 2003, Westcan and Hudson Mitchell & Sons (HMS) submitted rebuttal briefs. On August 25, 2003, Sechoirs de Beauce, the Government of Canada (GOC), and the OFIA/OLMA filed rebuttal briefs. In addition, American Bayridge Corporation, Aspen Planers Ltd., Downie Timber Ltd., Federated Co-operatives Limited, Gorman Bros. Lumber Ltd., Haida Forest Products Ltd., Kenora Forest Products Ltd., Liskeard Lumber Limited, Mid America Lumber, Mill & Timber Products Ltd., North Enderby Timber Ltd., R. Fryer Forest Products Limited, Selkirk Specialty Wood Ltd., and Tembec Inc. (collectively, the Lumber Companies Group) filed rebuttal briefs on August 25, 2003.

Reinstatement of Expedited Review

In the *Preliminary Results*, we rescinded the expedited review of Goldwood. *See* the "Partial Rescission" section of the *Preliminary Results*. However, our examination of the comments submitted by Goldwood has resulted in reinstatement of this firm in these final results due to a ministerial error made in the *Preliminary Results*. For information regarding the ministerial error and the reinstatement of the review of the company, *see* Comment 8 of the "Issues and Decisions Memorandum: Final Results of Expedited Review of Companies Covered by the May 8, 2003 Notice of Preliminary Results and Partial Rescission of Countervailing Duty Expedited Reviews" (Decision Memorandum), which is dated concurrently with and hereby adopted by this notice.

Partial Rescission of Expedited Review

Our examination of the information submitted by Westcan at verification indicates that this company performed

[1] *See* Cando's May 8, 2003, submission. *See* Goldwood's May 12, 2003, submission. *See* Williamsburg's May 21, 2003, submission. *See* Power Wood's May 22, 2003, submission.

[2] Petitioners are the Coalition for Fair Lumber Imports Executive Committee.

no processing or manufacturing with respect to the subject merchandise it exported to the United States during the period of review (POR), but rather the company resold softwood lumber processed/manufactured by other companies. Moreover, Westcan did not provide the required information from the producers of subject merchandise for the Department to determine that the purchased softwood lumber is non-subsidized. Therefore, we are rescinding the expedited review of Westcan. For more information, *see* Comment 6 of the Decision Memorandum.

Exclusion From Countervailing Duty Order

As discussed above, based on these final results, we have excluded three companies from the countervailing duty order. These companies are: Boccam Inc., Indian River Lumber, and Sechoirs de Beauce Inc. For more information, *see* the "Final Results of Reviews" section of this notice.

Companies Addressed in These Final Results

This notice includes the final results of review for the following 13 Group 1 companies in Round 1:

Alexandre Cote Ltee.;
Boccam Inc.;
Byrnexco Inc.;
Davron Forest Products Ltd.;
Fraser Pacific Forest Products Inc.;
Frontier Mills Inc.;
Haida Forest Products Ltd.;
Landmark Truss & Lumber Inc.;
Les Bois S&P Grondin Inc.;
Les Industries P.F. Inc.;
Sechoirs de Beauce Inc.;
Tyee Timber Products Ltd.;
West Bay Forest Products and Manufacturing Ltd.

This notice also includes the final results of review for the following 15 Group 1 companies in Round 2:

Central Cedar Ltd.;
Forstex Industries Inc.;
Goldwood Industries Ltd.;
Hudson Mitchell & Sons Lumber Inc.;
Indian River Lumber;
Les Scieries Jocelyn Lavoie Inc.;
Leslie Forest Products Ltd.;
Lyle Forest Products Ltd.;
Power Wood Corp.;
Precision Moulding Products;
Ram Co. Lumber Ltd.;
Rielly Industrial Lumber Inc.;
Sylvanex Lumber Products Inc.;
United Wood Frames Inc.;
Williamsburg Woods & Garden.

Further, we are rescinding the review on the following company in Round 1: Westcan Rail Ltd.

Scope of the Reviews

The products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:

(1) Coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters;

(2) Coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed;

(3) Other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood moldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and

(4) Coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this order is dispositive.

As specifically stated in the Issues and Decision Memorandum accompanying the *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada* (67 FR 15539; April 2, 2002) (*see* comment 53, item D, page 116, and comment 57, item B–7, page 126), available at *http://www.ia.ita.doc.gov/*, drilled and notched lumber and angle cut lumber are covered by the scope of this order.

The following softwood lumber products are excluded from the scope of this order provided they meet the specified requirements detailed below:

(1) *Stringers* (pallet components used for runners): if they have at least two notches on the side, positioned at equal distance from the center, to properly accommodate forklift blades, properly classified under HTSUS 4421.90.98.40.

(2) *Box-spring frame kits:* if they contain the following wooden pieces—two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails should be radius-cut at both ends. The kits should be individually packaged, they should contain the exact number of wooden components needed to make a particular box spring frame, with no further processing required. None of the components exceeds 1″ in actual thickness or 83″ in length.

(3) *Radius-cut box-spring-frame components*, not exceeding 1″ in actual thickness or 83″ in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantial cuts so as to completely round one corner.

(4) *Fence pickets* requiring no further processing and properly classified under HTSUS heading 4421.90.70, 1″ or less in actual thickness, up to 8″ wide, 6′ or less in length, and have finials or decorative cuttings that clearly identify them as fence pickets. In the case of dog-eared fence pickets, the corners of the boards should be cut off so as to remove pieces of wood in the shape of isosceles right angle triangles with sides measuring ¾ inch or more.

(5) *U.S. origin lumber* shipped to Canada for minor processing and imported into the United States, is excluded from the scope of this order if the following conditions are met: (1) The processing occurring in Canada is limited to kiln-drying, planing to create smooth-to-size board, and sanding, and (2) if the importer establishes to CBP's satisfaction that the lumber is of U.S. origin.

(6) *Softwood lumber products contained in single family home packages or kits*,[3] regardless of tariff classification, are excluded from the scope of this order if the importer certifies to items 6 A, B, C, D, and requirement 6 E is met:

A. The imported home package or kit constitutes a full package of the number of wooden pieces specified in the plan, design or blueprint necessary to produce a home of at least 700 square feet produced to a specified plan, design or blueprint;

B. The package or kit must contain all necessary internal and external doors and windows, nails, screws, glue, sub floor, sheathing, beams, posts, connectors, and if included in the purchase contract, decking, trim,

[3] To ensure administrability, we clarified the language of exclusion number 6 to require an importer certification and to permit single or multiple entries on multiple days as well as instructing importers to retain and make available for inspection specific documentation in support of each entry.

drywall and roof shingles specified in the plan, design or blueprint.

C. Prior to importation, the package or kit must be sold to a retailer of complete home packages or kits pursuant to a valid purchase contract referencing the particular home design plan or blueprint, and signed by a customer not affiliated with the importer;

D. Softwood lumber products entered as part of a single family home package or kit, whether in a single entry or multiple entries on multiple days, will be used solely for the construction of the single family home specified by the home design matching the entry.

E. For each entry, the following documentation must be retained by the importer and made available to the CBP upon request:

i. A copy of the appropriate home design, plan, or blueprint matching the entry;

ii. A purchase contract from a retailer of home kits or packages signed by a customer not affiliated with the importer;

iii. A listing of inventory of all parts of the package or kit being entered that conforms to the home design package being entered;

iv. In the case of multiple shipments on the same contract, all items listed in E(iii) which are included in the present shipment shall be identified as well.

Lumber products that the CBP may classify as stringers, radius cut box-spring-frame components, and fence pickets, not conforming to the above requirements, as well as truss components, pallet components, and door and window frame parts, are covered under the scope of this order and may be classified under HTSUS subheadings 4418.90.45.90 , 4421.90.70.40, and 4421.90.97.40.

Finally, as clarified throughout the course of the investigation, the following products, previously identified as Group A, remain outside the scope of this order. They are:

1. Trusses and truss kits, properly classified under HTSUS 4418.90;
2. I-joist beams;
3. Assembled box spring frames;
4. Pallets and pallet kits, properly classified under HTSUS 4415.20;
5. Garage doors;
6. Edge-glued wood, properly classified under HTSUS item 4421.90.98.40;
7. Properly classified complete door frames;
8. Properly classified complete window frames;
9. Properly classified furniture.

In addition, this scope language has been further clarified to now specify that all softwood lumber products entered from Canada claiming non-subject status based on U.S. country of origin will be treated as non-subject U.S.-origin merchandise under the countervailing duty order, provided that these softwood lumber products meet the following condition: upon entry, the importer, exporter, Canadian processor and/or original U.S. producer establish to CBP's satisfaction that the softwood lumber entered and documented as U.S.-origin softwood lumber was first produced in the United States as a lumber product satisfying the physical parameters of the softwood lumber scope.[4] The presumption of non-subject status can, however, be rebutted by evidence demonstrating that the merchandise was substantially transformed in Canada.

Analysis of Comments Received

Issues raised by interested parties in comments submitted in response to the *Preliminary Results* are addressed in the Decision Memorandum. As noted in the Decision Memorandum, we are addressing in these final results those issues that are related to the 28 companies included in this notice. A list of the issues which interested parties have raised, and to which we have responded, all of which are included in the Decision Memorandum, is attached to this notice as Appendix I. The Decision Memorandum is on file in the Central Records Unit in room B–099 of the Main Commerce Building. In addition, a complete version of the Decision Memorandum can be accessed directly on the World Wide Web at *http://www.ia.ita.doc.gov/*, under the heading "**Federal Register** Notices." The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual subsidy rate for each producer subject to these expedited reviews. For the period April 1, 2000, to March 31, 2001, we determine the net subsidy to be as follows:

ROUND 1 COMPANIES

Net subsidies—producer/exporter	Net subsidy rate %
Alexandre Cote Ltee.	9.07
Boccam Inc.	0.41
Byrnexco Inc.	8.40
Davron Forest Products Ltd.	10.94
Fraser Pacific Forest Products Inc.	8.61
Frontier Mills Inc.	8.61
Haida Forest Products Ltd.	2.45
Landmark Truss & Lumber Inc.	8.61
Les Bois S&P Grondin Inc.	4.62
Les Industries P.F. Inc.	8.03
Sechoirs de Beauce Inc.	0.60
Tyee Timber Products Ltd.	4.10
West Bay Forest Products and Manufacturing Ltd.	5.50

ROUND 2 COMPANIES

Net subsidies—producer/exporter	Net subsidy rate %
Central Cedar Ltd.	4.96
Forstex Industries Inc.	4.51
Goldwood Industries Ltd.	3.22
Hudson Mitchell & Sons Lumber Inc.	4.31
Indian River Lumber	0.00
Les Scieries Jocelyn Lavoie Inc.	1.52
Leslie Forest Products Ltd.	13.72
Lyle Forest Products Ltd.	3.37
Power Wood Corp.	4.47
Precision Moulding Products	1.41
Ram Co. Lumber Ltd.	8.92
Rielly Industrial Lumber Inc.	5.15
Sylvanex Lumber Products Inc.	7.09
United Wood Frames Inc.	10.69
Williamsburg Woods & Garden	11.95

The Department will instruct the CBP to collect cash deposits of estimated countervailing duties in the amounts indicated above of the f.o.b. invoice price on all shipments of the subject merchandise produced by the reviewed companies, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of these reviews.

Because the rates for Boccam Inc., Indian River Lumber, and Sechoirs de Beauce Inc. are less than one percent *ad valorem*, which is *de minimis*, we determine that these companies are excluded from the countervailing duty order. We will instruct the CBP to refund all cash deposits of estimated countervailing duties collected on all shipments of the subject merchandise produced and exported by these companies. In addition, we will instruct the CBP to waive cash deposit requirements of estimated countervailing duties on all shipments of the subject merchandise produced and exported by these three companies, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of these reviews.

[4] *See* the scope clarification message (#3034202), dated February 3, 2003, to the CBP, regarding treatment of U.S. orgin lumber on file in the Central Records Unit, room B–099 of the main Commerce Building.

These results of expedited reviews cover only those companies that we have specifically identified. We will address in the final results of the expedited reviews the issue of the adjustment of the cash deposit rate for all other non-reviewed companies subject to the country-wide rate, to account for the benefit and the sales values of the companies that have received company-specific rates.

These expedited reviews and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 U.S.C. 1677(i)(1)).

Dated: March 2, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix I

I. Summary and Background
II. Methodology
A. Stumpage Programs
B. Other Programs
III. Analysis of Comments
Comment 1: Adjustment of Country-Wide Rate to Account for Individual Cash Deposit Rates
Comment 2: Whether the Same Stumpage Benefit Should Apply to Logs and Lumber
Comment 3: The Number of Companies Verified During the Expedited Review Process
Comment 4: Inclusion of Certain Non-Scope Items in the Denominator of the Subsidy Calculations
Comment 5: Decision to Rescind the Expedited Review of Cando
Comment 6: Whether to Rescind the Expedited Review of Westcan on the Grounds That it Is a Pure Reseller of Railroad Ties
Comment 7: Power Wood's Benefit Calculation
Comment 8: Goldwood's Benefit Calculation
Comment 9: Williamsburg's Benefit Calculation
Comment 10: Derivation of Boccam's Sales Denominator
Comment 11: Derivation of Sechoirs de Beauce's Sales Denominator
Comment 12: Lavoie's Cord to Cubic Meter Conversion Factor
IV. Total *Ad Valorem* Rates
V. Recommendation

[FR Doc. 04–5280 Filed 3–8–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–839]

Final Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products From Canada

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

ACTION: Notice of final results and partial rescission of countervailing duty expedited reviews.

SUMMARY: On November 24, 2003, the Department of Commerce (the Department) published the preliminary results of the expedited reviews of 16 Group 2 companies and rescinded the reviews of five companies. *See Preliminary Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products from Canada*, 68 FR 65879 (November 24, 2003) (*Preliminary Results*). We are now issuing the final results of review of 14 companies and rescinding the reviews of two additional companies. Based on our analysis of the comments received on the *Preliminary Results*, we have made changes to the estimated net subsidy rates determined in the *Preliminary Results*. For information on estimated net subsidies, *see* the "Final Results of Reviews" section of this notice.

EFFECTIVE DATE: March 9, 2004.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Cindy Lai Robinson, Office of AD/CVD Enforcement VI, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3692 or (202) 482–3797.

SUPPLEMENTARY INFORMATION:

Background

On November 24, 2003, the Department published the preliminary results of review of 16 Group 2 companies and rescinded the review of five companies. *See Preliminary Results*, 68 FR 65879 (November 24, 2003). Since the publication of the *Preliminary Results*, the Department has received timely requests to rescind the expedited review for R. Fryer Forest Products Ltd., and Federated Co-operatives Ltd.

We provided interested parties an opportunity to comment on the *Preliminary Results*. We received comments filed on behalf of the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, Aspen Planers Ltd., Downie Timber Ltd., Gorman Bros. Lumber Ltd., Haida Forest Products Ltd., Kenora Forest Products Ltd. (Kenora), Liskeard Lumber Limited, Mill & Timber Products Ltd., North Enderby Timber Ltd., Olav Haavaldsrud Timber Company Limited, Selkirk Specialty Wood Ltd., Tembec Inc., and Tyee Timber Products Ltd. (the B&H Group) and from the Coalition for Fair Lumber Imports Executive Committee (petitioner). We also received comments filed on behalf of the Gouvernement du Quebec (GOQ). In addition, we received rebuttal comments from Canadian Forest Products, Ltd. (Canfor) and Terminal Forest Products (Terminal), the Government of Canada (GOC), and the B&H Group. We also received ministerial error allegations from Federated Co-operatives Ltd. (Federated) and Kenora.

Companies Addressed in These Final Results

This notice includes the final results of review for 14 of the 16 companies examined in the *Preliminary Results*. The following 11 companies from Group 2, Round 1 are included:

Cambie Cedar Products Ltd.;
Canadian Forest Products Ltd.;
Commonwealth Plywood Co. Ltd.;
E. Tremblay et fils ltee;
Greenwood Forest Products Ltd.;
Kalesnikoff Lumber Co. Ltd.;
Kenora Forest Products Ltd.;
Lakeland Mills Ltd.;
Lulumco Inc.;
Terminal Forest Products Ltd.;
The Pas Lumber Company Ltd.

These final results also include the final results of review of the following three Group 2, Round 2 companies:

Shawood Lumber Inc.;
St. Jean Lumber (1984) Ltd.;
Wynndel Box & Lumber Co. Ltd.

In addition, the expedited reviews of the following two Round 1 companies included in the *Preliminary Results*, were rescinded:

Federated Co-operatives Ltd.;
R. Fryer Forest Products Ltd.

These final results also include the rescission of the expedited review of five additional companies:

Kootenay Innovate Wood Inc. (Group 1, Round 1);
Lukwa Mills Ltd. (Group 2, Round 2);
South East Forest Products Ltd. (Group 2, Round 2);
Teal Cedar Products Ltd. (Group 2, Round 2);
West Fraser Mills Ltd. (Group 1, Round 2).

Scope of the Reviews

The products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:

(1) Coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters;

(2) Coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed;

(3) Other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood moldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and

(4) Coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this order is dispositive.

As specifically stated in the Issues and Decision Memorandum accompanying the *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*see* comment 53, item D, page 116, and comment 57, item B–7, page 126), available at *www.ia.ita.doc.gov*, drilled and notched lumber and angle cut lumber are covered by the scope of this order.

The following softwood lumber products are excluded from the scope of this order provided they meet the specified requirements detailed below:

(1) *Stringers* (pallet components used for runners): if they have at least two notches on the side, positioned at equal distance from the center, to properly accommodate forklift blades, properly classified under HTSUS 4421.90.98.40.

(2) *Box-spring frame kits*: if they contain the following wooden pieces—two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails should be radius-cut at both ends. The kits should be individually packaged, they should contain the exact number of wooden components needed to make a particular box spring frame, with no further processing required. None of the components exceeds 1" in actual thickness or 83" in length.

(3) *Radius-cut box-spring-frame components*, not exceeding 1" in actual thickness or 83" in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantial cuts so as to completely round one corner.

(4) *Fence pickets* requiring no further processing and properly classified under HTSUS heading 4421.90.70, 1" or less in actual thickness, up to 8" wide, 6' or less in length, and have finials or decorative cuttings that clearly identify them as fence pickets. In the case of dog-eared fence pickets, the corners of the boards should be cut off so as to remove pieces of wood in the shape of isosceles right angle triangles with sides measuring ¾ inch or more.

(5) *U.S. origin lumber* shipped to Canada for minor processing and imported into the United States, is excluded from the scope of this order if the following conditions are met: (1) The processing occurring in Canada is limited to kiln-drying, planing to create smooth-to-size board, and sanding, and (2) if the importer establishes to the satisfaction of the United States Customs and Border Protection (CBP) that the lumber is of U.S. origin.

(6) *Softwood lumber products contained in single family home packages or kits*,[1] regardless of tariff classification, are excluded from the scope of this order if the importer certifies to items 6 A, B, C, D, and requirement 6 E is met:

A. The imported home package or kit constitutes a full package of the number of wooden pieces specified in the plan, design or blueprint necessary to produce a home of at least 700 square feet produced to a specified plan, design or blueprint;

B. The package or kit must contain all necessary internal and external doors and windows, nails, screws, glue, sub floor, sheathing, beams, posts, connectors, and if included in the purchase contract, decking, trim, drywall and roof shingles specified in the plan, design or blueprint.

C. Prior to importation, the package or kit must be sold to a retailer of complete home packages or kits pursuant to a valid purchase contract referencing the particular home design plan or blueprint, and signed by a customer not affiliated with the importer;

D. Softwood lumber products entered as part of a single family home package or kit, whether in a single entry or multiple entries on multiple days, will be used solely for the construction of the single family home specified by the home design matching the entry.

E. For each entry, the following documentation must be retained by the importer and made available to the CBP upon request:

i. A copy of the appropriate home design, plan, or blueprint matching the entry;

ii. A purchase contract from a retailer of home kits or packages signed by a customer not affiliated with the importer;

iii. A listing of inventory of all parts of the package or kit being entered that conforms to the home design package being entered;

iv. In the case of multiple shipments on the same contract, all items listed in E(iii) which are included in the present shipment shall be identified as well.

Lumber products that the CBP may classify as stringers, radius cut box-spring-frame components, and fence pickets, not conforming to the above requirements, as well as truss components, pallet components, and door and window frame parts, are covered under the scope of this order and may be classified under HTSUS subheadings 4418.90.45.90 , 4421.90.70.40, and 4421.90.97.40.

Finally, as clarified throughout the course of the investigation, the following products, previously identified as Group A, remain outside the scope of this order. They are:

1. Trusses and truss kits, properly classified under HTSUS 4418.90;
2. I-joist beams;
3. Assembled box spring frames;
4. Pallets and pallet kits, properly classified under HTSUS 4415.20;
5. Garage doors;
6. Edge-glued wood, properly classified under HTSUS item 4421.90.98.40;
7. Properly classified complete door frames;
8. Properly classified complete window frames;
9. Properly classified furniture.

[1] To ensure administrability, we clarified the language of exclusion number 6 to require an importer certification and to permit single or multiple entries on multiple days as well as instructing importers to retain and make available for inspection specific documentation in support of each entry.

In addition, this scope language has been further clarified to now specify that all softwood lumber products entered from Canada claiming non-subject status based on U.S. country of origin will be treated as non-subject U.S.-origin merchandise under the countervailing duty order, provided that these softwood lumber products meet the following condition: upon entry, the importer, exporter, Canadian processor and/or original U.S. producer establish to CBP's satisfaction that the softwood lumber entered and documented as U.S.-origin softwood lumber was first produced in the United States as a lumber product satisfying the physical parameters of the softwood lumber scope.[2] The presumption of non-subject status can, however, be rebutted by evidence demonstrating that the merchandise was substantially transformed in Canada.

Methodology

Stumpage Programs

These final results include companies that source less than a majority of their wood (less than 50 percent of their inputs) from the United States, the Maritime Provinces, Canadian private lands, and/or Canadian companies excluded from the order, and have acquired Crown timber through their own tenure contracts. We included in our subsidy calculations only harvested softwood sawlogs processed by the firm's sawmills. We calculated company-specific benefit rates as follows: for logs harvested under a company's own tenure, we first calculated, on a species-specific basis, an average unit benefit from "Crown land harvesting." We divided the stumpage fees each company paid by the total quantity harvested from Crown land to obtain the stumpage price. The resulting unit stumpage price was adjusted by the company-specific unit tenure costs to derive an adjusted stumpage price for each species.[3] The adjusted species-specific stumpage price then was compared to the appropriate benchmark for that province to determine the species-specific per-unit benefit, which was multiplied by the harvest volume[4] for each species to obtain the total species-specific benefit. Species-specific benefits were summed up to derive the total benefit from Crown land harvesting. For all wood inputs (logs and lumber) acquired from other subsidized sources, we applied the same methodology used in Group1: we calculated the benefit by multiplying the quantity purchased by the province-specific stumpage benefit amount calculated in the underlying investigation (*i.e.*, the average per-unit differential between the calculated adjusted stumpage fee for the relevant province and the appropriate benchmark for that province). Also *see Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 FR 15545 (April 2, 2002) (*Final Determination*), and Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada (*Investigation Decision Memo*).

We then divided the combined stumpage benefit resulting from harvesting under a company's own tenure and from purchases of logs and lumber through other subsidized sources by the appropriate value of the company's sales (scope and non-scope softwood lumber products, net of resales, and softwood lumber by-products) to determine the company's estimated subsidy rate from stumpage and then added any benefit from other programs to obtain the net subsidy rate for the company.

As indicated in the *Notice of Initiation of Expedited Reviews of the Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, 67 FR 46955 (July 17, 2002), we have not attributed a benefit to (1) logs or lumber acquired from the Maritime Provinces, (2) logs or lumber of U.S. origin, (3) lumber produced by companies excluded in the investigation, and (4) logs from Canadian private land. Furthermore, as already stated, we are not including logs which the companies claim to have acquired and resold without any processing in our subsidy rate calculations. In addition, we are also not including in our calculations of company-specific subsidy rates lumber purchased and resold without any further manufacturing.

Other Programs

In the underlying investigation, the Department determined that the province of British Columbia provided countervailable benefits under the Forest Renewal program and the Job Protection program, while the province of Quebec provided countervailable benefits under the Private Forest Development Program (PFDP). In addition, the Department examined loans issued by Investment Quebec, lending under Article 28 of the Society for the Industrial Development of Quebec (SDI), and loans issued by the Society for the Recuperation and Development of Quebec Forests (Rexfor). Based upon our decision in the underlying investigation, the Department requested information from companies regarding the use of these programs.

Kalesnikoff was the only company that reported using one such program, the Forest Renewal program. However, Kalesnikoff reported that it did not receive any grants or loans under this program during the POR; rather it acted as a delivery agent for silviculture and resource inventory activities. Kalesnikoff was reimbursed for non-profit activities on behalf of the Forest Renewal Program for the administration and overhead costs incurred in delivering this program to the Province. On this basis, we find that Kalesnikoff did not receive countervailable benefits under this program. No other company reported using any of the British Columbia or Quebec programs during the POR.

Analysis of Comments Received

Issues raised by interested parties in comments submitted in response to the *Preliminary Results* are addressed in the "Issues and Decision Memorandum: Final Results of Expedited Review of 16 Group 2 Companies," dated concurrently with this notice, which is hereby adopted by this notice. A list of the issues which interested parties have raised, and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as Appendix I. The Decision Memorandum is on file in the Central Records Unit in room B–099 of the Main Commerce Building. In addition, a complete version of the Decision Memorandum can be accessed directly on the World Wide Web at *http://ia.ita.doc.gov*, under the heading "**Federal Register** Notices." The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual subsidy rate for each producer/exporter subject to these expedited reviews. For the period April 1, 2000 to March 31, 2001, we

[2] *See* the scope clarification message (#3034202), dated February 3, 2003, to the CBP, regarding treatment of U.S. origin lumber on file in the Central Records Unit, Room B–099 of the main Commerce Building.

[3] These cost adjustments were limited to those granted in the underlying investigation.

[4] Certain companies reported that certain harvested softwood sawlogs were not used in lumber production. These were excluded from our calculations.

determine the net subsidy to be as follows:

Net subsidies—producer/exporter	Net subsidy rate percent
Cambie Cedar Products Ltd	14.59
Canadian Forest Products Ltd	12.24
Commonwealth Plywood Co. Ltd	2.89
E. Tremblay et fils ltee	6.36
Greenwood Forest Products Ltd	7.95
Kalesnikoff Lumber Co. Ltd	12.10
Kenora Forest Products Ltd	7.39
Lakeland Mills Ltd	8.85
Lulumco Inc	13.74
Terminal Forest Products Ltd	10.00
The Pas Lumber Company Ltd	7.45
Shawood Lumber Inc	5.46
St. Jean Lumber (1984) Ltd	33.27
Wynndel Box & Lumber Co. Ltd	12.89

The Department will instruct the CBP to collect cash deposits of estimated countervailing duties in the amounts indicated above of the f.o.b. invoice price on all shipments of the subject merchandise produced by the reviewed companies, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of these reviews.

These results of expedited reviews cover only those companies that we have specifically identified. We will address in the final results of the expedited reviews, the issue of the adjustment of the cash deposit rate for all other non-reviewed companies subject to the country-wide rate to account for the benefit and the sales values of the companies that have received company-specific rates.

These expedited reviews and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 U.S.C. 1677(i)(1)).

Dated: March 2, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix I

List of Comments and Issues in the Decision Memorandum

List of Comments

1. Use of Cross-Border Benchmarks
2. Correction of Kenora's Ministerial Errors
3. Canadian Forest Products, Ltd. (Canfor) Merger
4. Unprocessed Sales
5. Cash Deposit Rates
6. Verification
7. Lumber versus Log Inputs
8. Recalculated Country-Wide Rate
9. Countervailable Benefits of Certain Non-Stumpage Programs in Quebec

[FR Doc. 04–5281 Filed 3–8–04; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 040225071–4071–01]

Radiation Detection Instrument Evaluations

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: On behalf of the Department of Homeland Security (DHS), the National Institute of Standards and Technology (NIST) is coordinating performance tests, supporting the ANSI N42.32, N42.33, N42.34 and N42.35 standards, of commercially available equipment for the DHS by various National laboratories. The tests are designed to determine the effectiveness of radiation detection instruments that may be used by first responders in a radiological incident. The participating National laboratories are: Oak Ridge National Laboratory (ORNL), Pacific Northwest National Laboratory (PNNL), Los Alamos National Laboratory (LANL) and Lawrence Livermore National Laboratory (LLNL).

DATES: Manufacturers who wish to participate in the program must contact NIST for shipping instructions, request and submit an executed Letter of Understanding by April 8, 2004, 5 p.m. eastern standard time.

ADDRESSES: Letters of Understanding may be obtained from and should be submitted to Dr. Leticia Pibida, National Institute of Standards and Technology, Physics Laboratory, Ionizing Radiation Division, 100 Bureau Drive, Mail Stop 8462, Gaithersburg, MD 20899–8462. Letters of Understanding may be faxed to: Dr. Leticia Pibida at (301) 926–7416.

FOR FURTHER INFORMATION CONTACT: For shipping and further information, you may telephone Dr. Leticia Pibida at (301) 975–5538 or Dr. Michael Unterweger at (301) 975–5536 or e-mail: *leticia.pibida@nist.gov* or *michael.unterweger@nist.gov*.

SUPPLEMENTARY INFORMATION: On behalf of the Department of Homeland Security, the National Institute of Standards and Technology (NIST) is coordinating performance tests of commercially available equipment based on the ANSI N42.32, N42.33, N42.34 and N42.35 standards as well as on the test and evaluation protocols for the Department of Homeland Security (DHS) by various National laboratories. The tests are designed to determine the effectiveness of radiation detection instruments that may be used by first responders in a radiological incident. The participating National laboratories are: Oak Ridge National Laboratory (ORNL), Pacific Northwest National Laboratory (PNNL), Los Alamos National Laboratory (LANL) and Lawrence Livermore National Laboratory (LLNL).

Interested manufacturers should contact NIST at the address given above. NIST will supply a Letter of Understanding, which the manufacturer must execute and send to NIST. NIST will then assign the manufacturer's equipment to the National laboratory conducting the testing for that type of device and will provide the manufacturer with shipping instructions for their equipment. All equipment tested under this program must meet the

minimum specifications stated in ANSI Standards N42.32 "Performance Criteria for Alarming Personal Radiation Detectors for Homeland Security," N42.33 "Portable Radiation Detection Instrumentation for Homeland Security," N42.34 "Performance Criteria for Hand-held Instruments for the Detection and Identification of Radionuclides," and N42.35 "Evaluation and Performance of Radiation Detection Portal Monitors for Use in Homeland Security," as detailed below.

The instruments provided will be tested according to the provisions in the standards and will be returned to the manufacturer after the tests by the National laboratory that performed the tests. Manufacturers should be aware that some of the testing protocols may damage or destroy the equipment. At the conclusion of the testing, the equipment will be returned to the Manufacturer, c.o.d., in the condition the equipment is in at the conclusion of the testing. Neither NIST, the Department of Homeland Security, nor any National laboratory will be responsible for the condition of the equipment when returned to the manufacturer. As a condition for participating in this testing program, each manufacturer must agree in advance to hold harmless all of these parties for the condition of the equipment.

The information acquired during the tests will be compiled by the Department of Homeland Security (DHS) and will be copied to the manufacturer for their instruments. A summary of the results of equipment testing will be made publicly available. Manufacturers who do not want the results of the testing of their equipment to be made publicly available should not participate in this program.

Participating manufacturers must provide three units of each instrument model. For portal monitors, two units of each instrument model are required. Manufacturers will pay all shipping costs, but there is no cost to the manufacturer for the testing. For the results to be valid two out of three submitted instruments per model must be operational for all tests. No modifications to the instruments are permitted during the testing process.

Only calibrated instruments will be accepted for the testing program.

The types of instruments and preliminary specifications for each type are as follows:

Type A Instruments: Alarming personal radiation devices designed to detect low levels of radiation and alert the wearer with a visible, audible or vibratory alarm. They are not to be electronic dosimeters, radiation survey meters or other instruments designed for health physics use. If submitted for testing under this category, electronic dosimeters, survey meters, and similar health physics instruments will be returned to the manufacturer without testing.

Preliminary Specifications for Type A:

- Personal sized (less than 20 × 10 × 5 cm and less than 400 g).
- Capable of detecting photon exposure rates from approximately 10 to 3000 micro R/h.
- Capable of detecting photon energies from approximately 10 to 1000 keV.
- Capable of photon exposure rate measurements with ±30% accuracy.
- Audible, visible and/or vibratory alarm less than 2 s after detection.
- Optional response to neutrons.
- Mean time to false alarm greater than 1 h.
- Capable of normal operation over temperature range from −20° +50°C and humidity from 40% to 93%.
- Unaffected by RF from 20 MHz to 1000 MHz, magnetic fields of 1 mT and electrostatic discharges of 6–8 kV.

Type B Instruments: Portable radiation detection instrumentation equipped with gamma- and x-ray detectors. The instruments shall be able to determine exposure rate and be equipped with alarming capabilities. The survey meters should be submitted either as a Type 1 or a Type 2 instrument according to standard N42.33 specifications. If submitted for testing under this category, electronic dosimeters, and personal radiation devices instruments will be returned to the manufacturer without testing.

Preliminary Specifications for Type B:

Type 1: Detection and Interdiction.

- Storage space less than 1 ft^3 excluding extendable probes.
- Weight less than 10 pounds (4.55 kg).
- Outer instrument case shall be rigid, shock resistant, splash proof and dust resistant.
- Capable of detecting photon exposure rates from approximately 1 to 1000 micro R/h (that can be achieved with several probes).

Type 2: Hazard Assessment.

- Storage space less than 0.12 ft^3 excluding extendable probes.
- Weight less than 6 pounds (2.7 kg).
- Outer instrument case shall be rigid, shockproof, waterproof (blowing rain) and dust proof.
- Capable of detecting photon exposure rates from approximately 100 micro R/h to 1000 R/h (that can be achieved with several probes).

For both Type 1 and 2.

- Displays and alarm indications shall be oriented towards the user.
- The instrument case shall be constructed of materials that provide easy decontamination for radioactive materials and other potential surface contaminants.
- Capable of photon exposure rate measurements with ±30% accuracy.
- Instruments shall allow the user to set exposure rate alarm levels.
- Instruments shall indicate at least the following faults: low battery supply; detector failure; and high exposure rate level.
- Batteries shall provide at least 12 hours of continuous use under standard test conditions, *i.e.*, the response of the instrument shall remain unchanged.
- Response time to increase or decrease in exposure rate display (indication of less than 20% from actual exposure rate value) shall be within 4 seconds.
- Instruments readout shall remain "off-scale" for exposure rates greater than the maximum value of the instrument range.
- Capable of normal operation over temperature range from—20°C to +50°C and humidity from 40% to 93%.
- Instruments shall be unaffected by RF interference from 20 MHz to 1000 MHz, magnetic fields of 1 mT, and electrostatic discharges of 6–8 kV.

Type C Instruments: Hand-held instruments for the detection and identification of radionuclides. These instruments shall provide gamma exposure or dose rate measurements, radionuclide identification, and be equipped with indication of neutron radiation. If submitted for testing under this category, instruments that are not equipped with gamma-ray and neutron detectors will be returned to the manufacturer without testing.

Preliminary Specifications for Type C:

- Equipped with neutron detector.
- Capable of detecting photon energies from approximately 25 to 3000 keV.
- The instrument shall have the ability to transfer data to an external device, such as a computer.
- The instrument shall include: a display that is easily readable over the required temperature range and under different lighting conditions, controls that are user-friendly for routine operation, a menu structure that is simple and easy to be followed intuitively, and a user-definable radionuclide library with access via the restricted mode. The instrument shall have at least two different operating modes, one mode for routine operation and the other as a restricted (password

protected) mode. The instrument shall be capable of operation if the user is wearing gloves or if the instrument is enclosed in anti-contamination protection (*e.g.*, plastic bag).

• Instruments shall be designed to prevent water ingress from rain, condensing moisture, or high humidity.

• Batteries shall be such that they provide operation for a minimum of 2 hours of continuous use.

• Capable of normal operation over temperature range from 20%C to +50%C and humidity from 40% to 93%.

• Unaffected by RF from 20 MHz to 1000 MHz, magnetic fields of 1 mT and electrostatic discharges of 6–8 kV.

Type D Instruments: Fixed or Transportable portal monitor systems. These types of monitors include fixed or transportable systems used for detection of radioactive materials concealed in people, packages and vehicles (including rail vehicles). These systems shall be capable of detecting gamma-rays emitted from radioactive sources; neutron detection is optional for all models except for vehicle monitoring. If portal monitors for vehicles are submitted for testing without neutron detection capabilities, instruments will be returned to the manufacturer without testing.

Preliminary Specifications for Type D:

• Pedestrian, vehicles, rail vehicles and package monitors equipped with gamma-ray detection are accepted for testing.

• Vehicle monitors shall be equipped with neutron detectors.

• Instruments shall communicate, save and store time history data for later retrieval including background readings prior to and/or after an alarm, alarm information shall include time and date.

• Monitor shall be capable of providing local indication and alarm signals (these signals should be available at a remote station at a distance of at least 50 m).

• Monitors shall continuously indicate its operational or non-operational condition.

• Capable of normal operation over temperature range from "30°C +55°C and humidity from 10% to 93%.

• Unaffected by RF from 20 MHz to 1000 MHz, magnetic fields of 1 mT and electrostatic discharges of 6–8 kV.

Dated: March 2, 2004.

Hratch G. Semerjian,

Deputy Director.

[FR Doc. 04–5289 Filed 3–8–04; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 040303081–4081–01; I.D. 010904D]

RIN 0648–AR98

2005 Mid-Atlantic Research Set-Aside Program

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

ACTION: Notice and request for proposals.

SUMMARY: NMFS announces that for fishing year 2005 the Mid-Atlantic Fishery Management Council (Council) may set aside up to 3 percent of the total allowable landings (TAL) in certain Mid-Atlantic fisheries to be used for research endeavors under a research set-aside (RSA) program. The RSA program provides a mechanism to fund research and compensate vessel owners through the sale of fish harvested under the research quota. Vessels participating in an approved research project may be authorized by the Northeast Regional Administrator, NMFS, to harvest and to land species in excess of any imposed trip limit or during fishery closures. Landings from such trips would be sold to generate funds that would help defray the costs associated with research projects. No Federal funds would be provided for research under this notification. NMFS is soliciting proposals for research activities concerning the summer flounder, scup, black sea bass, *Loligo* squid, *Illex* squid, Atlantic mackerel, butterfish, bluefish, and tilefish fisheries.

DATES: Proposals must be received by NMFS no later than 5 p.m. EST, April 8, 2004.

ADDRESSES: Proposals must be submitted to NMFS, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: For a copy of the full funding opportunity announcement for this request for proposals and/or an application kit contact Paul Perra (see **ADDRESSES**), or by phone at 978–281–9153, or fax to 978–281–9135, or via internet at *paul.perra@ noaa.gov*. The text of the full funding opportunity announcement can also be accessed at NOAA's web site: *http://www.ofa.noaa.gov/~amd/SOLINDEX.HTML*.

SUPPLEMENTARY INFORMATION: NMFS announces that for fishing year 2005 the Council may set aside up to 3 percent of the TAL in certain Mid-Atlantic fisheries to be used for research endeavors under an RSA program. The RSA program provides a mechanism to fund research and compensate vessel owners through the sale of fish harvested under the research quota. Vessels participating in an approved research project may be authorized by the Northeast Regional Administrator, NMFS, to harvest and to land species in excess of any imposed trip limit or during fishery closures. Landings from such trips would be sold to generate funds that would help defray the costs associated with research projects. No Federal funds would be provided for research under this notification. NMFS is soliciting proposals for research activities concerning the summer flounder, scup, black sea bass, *Loligo* squid, *Illex* squid, Atlantic mackerel, butterfish, bluefish, and tilefish fisheries.

Electronic Access: Applicants should read the full text of the funding opportunity announcement for the NMFS program which can be accessed via web site: *http://www.ofa.noaa.gov/~amd/SOLINDEX.HTML* or by contacting the program official identified above. This announcement will also be available through the Internet at *http://www.Grants.gov*.

Funding Availability: No Federal funds are provided for research under this notification. The Federal Government may issue an Exempted Fishing Permit or Letter of Acknowledgment, as applicable, which may provide special fishing privileges in response to research proposals selected under this program.

Statutory Authority: Issuing grants is consistent with sections 303(b)(11), 402(e), and 404(c) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1853(b)(11), 16 U.S.C. 1881a(e), and 16 U.S.C. 1881c(c), respectively.

CFDA: 11.454, Unallied Management Projects

Eligibility: Eligible applicants are institutions of higher education, hospitals, other nonprofits, commercial organizations, individuals, State, local and Indian tribal governments. Federal agencies or institutions are not eligible to receive Federal assistance under this notice. Also, a person is not eligible to submit an application under this program if he/she is an employee of any Federal agency or a Regional Fishery Management Council. However, Council members who are not Federal employees may submit an application.

Cost Sharing Requirements: None.

Intergovernmental Review: Required, if applicable. Applications under this

program are subject to Executive Order 12372, "Intergovernmental Review of Federal Programs".

Limitation of Liability: In no event will NOAA or the Department of Commerce be responsible for proposal preparation costs if these programs are cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to provide special fishing privileges.

National Environmental Policy Act (NEPA): NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals which are seeking NOAA federal assistance opportunities including special fishing privileges. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA website: *http://www.nepa.noaa.gov/*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216—6—TOC.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm.*

Consequently, as part of an applicant's package, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (e.g., the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of an environmental assessment, if NOAA determines an assessment is required. Applicants will also be required to cooperate with NOAA in identifying and implementing feasible measures to reduce or avoid any identified adverse environmental impacts of their proposal. The failure to do so shall be grounds for the denial of an application.

Evaluation and Selection Procedures: NOAA published its first omnibus notice announcing the availability of grant funds for both projects and fellowships/scholarship/ internships for Fiscal Year 2004 in the **Federal Register** on June 30, 2003 (68 FR 38678). The evaluation criteria and selection procedures contained in the June 30, 2003 omnibus notice are applicable to this solicitation. For a copy of the June 30, 2003, omnibus notice please go to: *http://www/ofa.noaa.gov/~amd/SOLINDEX.HTML.*

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements: The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of October 1, 2001 (66 FR 49917), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109), are applicable to this solicitation.

Classification

Paperwork Reduction Act: This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424 and 424A,424B, SF-LLL, and CD–346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any 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 control number.

Executive Order 12866: This notice has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism): It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act: Prior notice and an opportunity for public comments are not required by the Administrative Procedure Act or any other law for this notice concerning grants, benefits, and contracts (5 U.S.C. section 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. section 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated:March 04, 2004.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 04–5293 Filed 3–8–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 021704A]

Marine Mammals; File No. 1049–1718

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

ACTION: Receipt of amendment to application for a new permit.

SUMMARY: Notice is hereby given that Kate M. Wynne, University of Alaska Fairbanks, School of Fisheries and Ocean Sciences, 118 Trident Way, Kodiak, Alaska 99615 has submitted an amendment to a permit application to add a request for takes of humpback whales (*Megaptera novaeangliae*) and fin whales (*Balaenoptera physalis*) by attachment of scientific instruments for the purposes of scientific research.

DATES: Comments or requests for a public hearing must be received at the appropriate address or facsimilie (fax) number (see **ADDRESSES**) on or before April 8, 2004.

ADDRESSES: Written comments or requests for a public hearing on these applications should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 1049–1718.

Comments may be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

The permit application and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910, (301) 713–2289; and Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668, (907) 586–7221.

FOR FURTHER INFORMATION CONTACT: Jill Lewandowski or Jennifer Jefferies at (301) 713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

The original permit application (file no. 1049–1718) was published in the **Federal Register** on July 18, 2003 (68 FR 42689) and requested a five-year scientific research permit to assess life history parameters of humpback whales, killer whales (*Orcinus orca*), sperm whales (*Physeter macrocephalus*), fin whales, sei whales (*Balaenoptera borealis*), minke whales (*Balaenoptera acutorostrata*), and gray whales (*Eschrichtius robustus*). Requested takes included photo-identification, behavioral observation, passive acoustic recording, biopsy sampling, incidental harassment, and collection and/or export of dead parts from the following prey species during killer whale predation studies: humpback, gray, minke, sei, fin and sperm whales, harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*), harbor seals (*Phoca vitulina*), Pacific white-sided dolphins (*Lagenorhynchus obliquidens*), Northern fur seals (*Callorhinus ursinus*), and Steller sea lions (*Eumetopias jubatus*). All research will take place in Alaskan waters.

The applicant has now amended the application to add a request for 60 annual takes of humpback whales and 60 annual takes of fin whales through the attachment of VHF and TDR tags by suction cup. The applicant has also requested an increase of 270 annual takes by incidental harassment of these two species during tagging activities. In addition, skin cells retained by the suction cup after its release from the whale will be collected for genetic analyses. The newly requested takes are in addition to the takes already requested in the original application and outlined in the paragraph above.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: March 3, 2004.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–5292 Filed 3–8–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 030404B]

Strategic Plan for Fisheries Research (2004)

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

ACTION: Notice of availability.

SUMMARY: The NMFS announces the availability of the Strategic Plan for Fisheries Research (2004). The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) requires the Secretary of Commerce to develop, triennially, a strategic plan for fisheries research for the subsequent 5 years.

ADDRESSES: Requests for copies of the NMFS Strategic Plan for Fisheries Research (2004) should be directed to Mark Chandler, Research, Analysis, and Coordination Division, Office of Science and Technology, NMFS, NOAA, 1315 East-West Highway, Silver Spring, MD 20910. Phone: (301) 713–2363. Fax: (301) 713–1875.

FOR FURTHER INFORMATION CONTACT: Mark Chandler at 301–713–2363 ext. 152. e-mail: *Mark.Chandler@noaa.gov*

SUPPLEMENTARY INFORMATION:

Electronic Access

The NMFS Strategic Plan for Fisheries Research (2004) may be viewed in its entirety on the World Wide Web at *http://www.st.nmfs.gov/st2/index.html.* Section 404 of the MSFCMA requires the Secretary of Commerce to publish in the **Federal Register** a strategic plan for fisheries research for the 5 years immediately following its publication. The MSFCMA requires that the plan address four major areas of research: (1) Research to support fishery conservation and management; (2) conservation engineering research; (3) research on the fisheries; and (4) information management research. The MSFCMA specifies that the plan shall contain a limited number of priority objectives for each of these research areas; indicate goals and timetables; provide a role for commercial fishermen in such research; provide for collection and dissemination of complete and accurate information concerning fishing activities; and be developed in cooperation with the Councils and affected states.

This plan is based upon and entirely consistent with the overarching NOAA Fisheries Strategic Plan (NFSP) recently released in July 2003. The objectives under each goal in the NMFS Strategic Plan for Fisheries Research (2004) correspond to strategies in the NFSP.

The scope of the NMFS Strategic Plan for Fisheries Research (2004) is solely fisheries research to support the MSFCMA. It does not include the regulatory and enforcement components of the NMFS' mission. The NMFS currently conducts a comprehensive program of fisheries research and involves industry and others interested in fisheries in planning and implementing its objectives.

Dated: March 4, 2004.

William Fox, Jr.,

Director, Office of Science and Technology, National Marine Fisheries Service.

[FR Doc. 04–5294 Filed 3–8–04; 8:45 am]

BILLING CODE 3510–22–S

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 May 10, 2004.

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: March 3, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Elementary and Secondary Education

Type of Review: Reinstatement.

Title: State Data Collection for the McKinney-Vento Homeless Assistance Act.

Frequency: Annually.

Affected Public: State, local, or tribal gov't, SEAs or LEAs (primary).

Reporting and Recordkeeping Hour Burden: Responses: 51. Burden Hours: 4,089.

Abstract: State Education Agencies will submit information to the Department of Education to be able to determine the extent to which States ensure homeless children and youth have access to a free, appropriate public education under Title X Part C of the No Child Left Behind Act of 2001. The purpose of the Education for Homeless Children and Youth Program is to improve the educational outcomes for children and youth in homeless situations. The statues for this program are designed to ensure all homeless children and youth have equal access to public school education and for States and LEAs to review and revise policies and regulations to remove barriers to enrolling, attendance and academic achievement.

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 2476. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov.* Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–708–9346. 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 her e-mail address *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. 04–5217 Filed 3–8–04; 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 May 10, 2004.

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: March 4, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Special Education and Rehabilitative Services

Type of Review: Extension.

Title: Grantee Reporting Form.

Frequency: Annually.

Affected Public: Businesses or other for-profit; Not-for-profit institutions, State, local, or tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden: Responses: 350.

Burden Hours: 400.

Abstract: The Grantee Reporting Form is an information collection form that has been approved and extended with minor modifications by OMB until February 29, 2004. RSA currently uses the Grantee Reporting Form to assess grantees' compliance with program requirements and to report to Congress performance and progress in meeting the purpose for training programs as mandated in Title III of the Rehabilitation Act of 1973, as amended: to "ensure that skilled personnel are available to provide rehabilitation services to individuals with disabilities through vocational, medical, social, and psychological rehabilitation programs * * *" The Grantee Reporting Form will provide specific information in this regard, including the number of RSA scholars entering the public vocational rehabilitation workforce, in what rehabilitation field, and in what type of employment (*e.g.* State VR agency, nonprofit service provider or practice group).

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 2464. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov*. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to (202) 708–9346. 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 Shelia Carey at her e-mail address *SheliaCarey@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. 04–5268 Filed 3–8–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On March 3, 2004, the Department of Education published a 30-day public comment period notice in the **Federal Register** (Page 10005, Column 3) for the information collection, "U.S. Department of Education Budget Information—Non-Construction Programs Form and Grant Performance Report Form. The notice incorrectly referred to the Institute of Education Sciences. The correct office is the office of the Chief Financial Officer.

FOR FURTHER INFORMATION CONTACT: Sheila Carey at her e-mail address *Sheila.Carey@ed.gov*.

Dated: March 3, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

[FR Doc. 04–5267 Filed 3–8–04; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Office of Science Financial Assistance Program Notice DE–FG01–04ER04–15; Institutes for the Advancement of Computational Biology Research and Education

AGENCY: U.S. Department of Energy.

ACTION: Notice inviting grant applications.

SUMMARY: The Office of Advanced Scientific Computing Research (ASCR) of the Office of Science (SC), U.S. Department of Energy (DOE), hereby announces its interest in receiving applications for institutes for the advancement of computational biology research and education, in support of the ASCR computational biology program, the ASCR–BER (Office of Biological and Environmental Research) DOE Genomic: GTL program, and the broader SC research programs. Prospective applicants should observe that:

(1) Applications serving two complementary objectives—the advancement of computational biology research as an intellectual pursuit; and innovative approaches to educating biologists as computational scientists—are sought;

(2) The focus of the proposed effort should be on advancing computational biology research and education as counterbalancing and complementary activities to experimental biology—rather than on computation as a support activity to experimental biology;

(3) Proposed research and educational activities should be relevant to the mission of the Office of Science and, in particular to the long term goals of the GTL program;

(4) Proposed activities should include a plan for an active dialogue with industry, universities, and other laboratories and centers in order to maximize the dissemination of information, promote and support technology commercialization, and avoid unnecessary duplication of effort;

(5) Multiple year funding is not guaranteed, although applicants may request periods of performance ranging up to 3 years.

More specific information on this solicitation is outlined in the Supplementary Information section below.

DATES: The deadline for receipt of formal applications is 4:30 p.m., eastern time, Tuesday, April 6, 2004, in order to be accepted for merit review and to permit timely consideration for award in Fiscal Year 2004.

ADDRESSES: Formal applications in response to this solicitation are to be electronically submitted by an authorized institutional business official through DOE's Industry Interactive Procurement System (IIPS) at: *http://e-center.doe.gov/*. IIPS provides for the posting of solicitations and receipt of applications in a paperless environment via the Internet. In order to submit applications through IIPS your business official will need to register at the IIPS Web site. It is suggested that this registration be completed several days prior to the date on which you plan to submit the formal application. The Office of Science will include attachments as part of this notice that provide the appropriate forms in PDF fillable format that are to be submitted through IIPS. IIPS offers the option of using multiple files, please limit submissions to one volume and one file if possible, with a maximum of no more than four PDF files. Color images should be submitted in IIPS as a separate file in PDF format and identified as such. These images should be kept to a minimum due to the limitations of reproducing them. They should be numbered and referred to in the body of the technical scientific proposal as Color image 1, Color image 2, etc. Questions regarding the operation of IIPS may be e-mailed to the IIPS Help Desk at: *helpdesk@pr.doe.gov* or you may call the help desk at: (800) 683–0751. Further information on the use of IIPS by the Office of Science is available at: *http://www.sc.doe.gov/production/grants/grants.html*.

If you are unable to submit the application through IIPS, please contact the Grants and Contracts Division, Office of Science at: (301) 903–5212 or (301) 903–3604, in order to gain assistance for submission through IIPS or to receive special approval and instruction on how to submit printed applications.

SUPPLEMENTARY INFORMATION: DOE's Office of Science, in order to accomplish its mission, is faced with the need for computational biology capabilities that far exceed what is currently available. In particular, the Office of Science's needs for its GTL program are documented at the DOE Genomics: GTL Web site: *http://www.doegenomestolife.org/*

The goals of the GTL program are:

- *Identify the protein machines* that carry out critical life functions;
- *Characterize the gene regulatory networks* that control these machines;
- *Explore the functional repertoire* of complex microbial communities in their natural environments to provide a

foundation for understanding and using their remarkably diverse capabilities to address DOE missions; and

• *Develop the computational capabilities* to integrate and understand these data and begin to model complex biological systems.

This solicitation announces ASCR's interest in receiving applications for institutes for the advancement of computational biology research and education, serving two complementary objectives:

• *Computational Biology Research:* Developing new computational approaches to support the Office of Science's missions in microbial biology and GTL: and

• *Computational Biology Education:* Developing and implementing programs to educate biologists in the use of computation as a principal tool for biological research and discovery.

As integrated activities are sought, applicants should craft applications that respond to both of these objectives, rather than selecting just one.

With regard to the computational biology research objective, the proposed activity should provide an intellectual home for a scientific community carrying out research enabling the solution of cutting-edge biology problems. Activities should be designed to support interdisciplinary and inter-institutional collaborations. Activities should embrace interdisciplinary teams of researchers, drawn from the physical and life sciences, computational mathematics and computer science. These teams should focus on application development to harness the power of computational science for the solution of data-intensive and/or computation-intensive biology problems. No experimental activities are foreseen. Researchers should draw upon the biological data available from the GTL community, as well as, the broader community. The research objectives should focus on advancing computation as a tool for biological discovery, hypothesis formulation, and providing guidance to future experimentation.

With regard to the computational biology education objective, the proposed activity should develop, implement and disseminate materials for the education of computational biologists at the graduate level. The education program should be tested through actual prototyping and use. The courseware developed should cover as broad a spectrum of both data-intensive and computation-intensive biology problems as possible. Illustrative examples should be drawn from biology applications of interest to the Office of Science, to the extent possible.

The proposed activities should include a plan for playing an active role in maintaining a dialogue with industry, universities, and other laboratories and centers in order to maximize the dissemination of information, promote and support technology commercialization, and avoid unnecessary duplication of effort.

Collaboration

Applicants are encouraged to collaborate with researchers in other institutions, such as universities, industry, non-profit organizations, federal laboratories and Federally Funded Research and Development Centers (FFRDCs), including the DOE National Laboratories, where appropriate, and to include cost sharing wherever feasible. Additional information on collaboration is available in the Application Guide for the Office of Science Financial Assistance Program that is available via the Internet at: *http://www.sc.doe.gov/production/grants/Colab.html.*

Program Funding

It is anticipated that up to $3 million will be available in Fiscal Year 2004, contingent upon availability of appropriated funds. It is anticipated that no more than 4 awards will be made. Multiple year funding is not guaranteed, although applicants may request periods of performance ranging up to 3 years.

Merit Review

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria, which are listed in descending order of importance codified at 10 CFR 605.10(d):

(1) Scientific and/or Technical Merit of the Project,

(2) Appropriateness of the Proposed Method or Approach,

(3) Competency of Applicant's Personnel and Adequacy of Proposed Resources,

(4) Reasonableness and Appropriateness of the Proposed Budget.

The evaluation under item 1, Scientific and/or Technical Merit of the Project, will also consider the following elements:

(a) The relevance of the proposed program of computational biology research and education to the mission of the Office of Science.

(b) The extent to which the focus of the proposed effort is on advancing computational biology research and education as counterbalancing and complementary activities to experimental biology—rather than on computation as a support activity to experimental biology.

(c) The potential of the proposed project to make a significant impact on computational biology research and education.

(d) The potential of the proposed project to identify and advance the development of new research and educational techniques intended to accelerate the adoption of computation as a principal mode of research for biologists.

The evaluation under item 2, Appropriateness of the Proposed Method or Approach, will also consider the following elements:

(a) The degree to which the project adheres to the management philosophy of integrating both research and education into the project execution.

(b) The extent to which the project incorporates broad community (industry/academia/other federal programs) interaction and outreach.

(c) Quality and clarity of proposed work schedule and deliverables.

(d) Extent to which materials developed under this project will be available to the public (*e.g.* as "open source").

The evaluation under item 3, Competency of Applicant's Personnel and Adequacy of Proposed Resources, will also consider the following element: quality of the physical and intellectual environment for both research and educational activities in computational biology.

The evaluation will include program policy factors, such as the relevance of the proposed research to the terms of the announcement and the agency's programmatic needs. Note: External peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers will often be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution.

Submission Information

The Project Description must be 20 pages or less, exclusive of attachments. It must contain an abstract or project summary on a separate page with the name of the applicant, mailing address, phone, FAX and e-mail listed. The application must include letters of intent from collaborators (briefly describing the intended contribution of each to the research), and short curriculum vitaes for the applicant and any co-PIs.

Applicants must disclose all information on their current and pending grants. To provide a consistent

format for the submission, review and solicitation of grant applications submitted under this notice, the preparation and submission of grant applications must follow the guidelines given in the Application Guide for the Office of Science Financial Assistance Program, 10 CFR Part 605. Access to SC's Financial Assistance Application Guide is possible via the World Wide Web at: *http://www.science.doe.gov/production/grants/grants.html.* DOE is under no obligation to pay for any costs associated with the preparation or submission of applications if an award is not made.

The Catalog of Federal Domestic Assistance number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR part 605.

Issued in Washington, DC on February 25, 2004.

Martin Rubinstein,

Acting Director, Grants and Contracts Division, Office of Science.

[FR Doc. 04–5125 Filed 3–8–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

International Energy Agency Meeting

AGENCY: Department of Energy.

ACTION: Notice of meetings.

SUMMARY: The Industry Advisory Board (IAB) to the International Energy Agency (IEA) will meet on March 17, 2004, at the headquarters of the IEA in Paris, France, in connection with a meeting of the IEA's Standing Group on Emergency Questions. A meeting involving members of the IAB in connection with a meeting of the IEA's Emergency Response Exercise (ERE3) Design Group will be held at the headquarters of the IEA on March 17–18, 2004.

FOR FURTHER INFORMATION CONTACT: Samuel M. Bradley, Assistant General Counsel for International and National Security Programs, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, 202–586–6738.

SUPPLEMENTARY INFORMATION: In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(i)) (EPCA), the following notice of meeting is provided:

A meeting of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held at the headquarters of the IEA, 9, rue de la Fédération, Paris, France, on March 17, 2004, beginning at 8:30 a.m. The purpose of this notice is to permit attendance by representatives of U.S. company members of the IAB at a meeting of the IEA's Standing Group on Emergency Questions (SEQ), which is scheduled to be held at the IEA on March 17, beginning at 10:30 a.m., including a preparatory encounter among company representatives from 8:30 a.m. to 9:15 a.m. The agenda for the preparatory encounter is as follows:

I. Welcome, Review of Agenda, and Introductions
II. Report on Expiration of European Community Exemption for IAB Activities
III. Update on International Energy Forum
IV. Comments on New IAB Web site Prepared by IEA
V. Closing and Review of Meetings of Interest to IAB Members

The agenda for the SEQ meeting is under the control of the SEQ. It is expected that the SEQ will adopt the following agenda:

1. Adoption of the Agenda
2. Approval of the Summary Record of the 109th Meeting
3. Program of Work
   —Follow-up to Surplus Publication Revenues Projects
   —Progress Report on Planning of Emergency Response Exercise (ERE) 3
   —First Steps in Program of Work 2005–2006
   —4. Update on Compliance with IEP Stockholding Commitments
   —Reports by Non-Complying Member Countries
   —Report on Recent Emergency Response Review of Portugal
5. Relations with the New European Union Member Countries
6. Report on Current Activities of the IAB
7. Policy and Other Developments in Member Countries
   —United States
   —Japan
8. Emergency Response Activities
   —Preliminary Assessment of Economic Impacts of Oil Supply Crises
   —Bilateral Stocks and Tickets in IEA Member Countries
   —Update on IEA/EU Data Harmonization
9. Activities with Non-Member Countries and International Organizations
   —The IEA-India Workshop on Emergency Oil Stock Issues
   —ASCOPE Meeting in Cambodia
   —International Energy Forum Meeting in Bangkok
   —The EU Antitrust Situation
10. Emergency Response Reviews of IEA Member Countries
   —Revised Schedule of Emergency Response Reviews for 2004–2005
   —Emergency Response Review of Ireland
   —Emergency Response Review of the United Kingdom
11. Other Documents for Information
   —Emergency Reserve Situation of IEA Member Countries on January 1, 2004
   —Emergency Reserve Situation of IEA Candidate Countries on January 1, 2004
   —Monthly Oil Statistics: December 2003
   —Base Period Final Consumption: 1Q2003–4Q2003
   —Quarterly Oil Forecast: First Quarter 2004
   —Update of Emergency Contacts List
12. Other Business
   —Dates of Next Meetings:

June 29, 2004: 111th Meeting of the SEQ

June 30, 2004: Workshop on Near-Term Risk Assessment in the Oil Market

June 30, 2004: ERE 3 Design Group Meeting

October 25–28, 2004: ERE 3

   —Changes in the EPPD Secretariat and Delegations

A meeting involving members of the IAB in connection with a meeting of the IEA's ERE3 Design Group will be held on March 17–18, 2004, at the headquarters of the IEA from approximately 9:30 a.m. to 10:15 a.m. on March 17 and continuing on March 18 at 9:30 a.m. The purpose of this meeting is to discuss the structure of an oil supply disruption simulation exercise in connection with the SEQ, which is scheduled to be held at IEA headquarters between October 25–28, 2004.

The March 17 meeting will be a preparatory briefing session, the agenda for which is a review of the agenda for the March 18 meeting. The agenda for the March 18 meeting is under the control of the SEQ. It is expected that the SEQ will adopt the following agenda:

Phase 1: Workshop on Risk Assessment and Scenario-Building in the Present and Near-Term Oil Market
   —One-day Workshop in Paris, June 26, 2004
Phase 2: A "Real-Time" IEA Emergency Response Exercise for Member Countries
   —Late September 2004, Member Countries Participate from Capitals
Phase 3: Emergency Response Training and Disruption Simulation Exercise for Non-Member Countries and New SEQ Participants
   —Tentative Schedule, October 25–26,

2004
Phase 4: The Third IEA SEQ Disruption Simulation Exercise
—Tentative Schedule, October 27–28, 2004 Other Agenda Items
—Date of the Next Design Group Meeting

As provided in section 252(c)(1)(A)(ii) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(ii)), the meetings of the IAB are open to representatives of members of the IAB and their counsel; representatives of members of the IEA's Standing Group on Emergency Questions (SEQ); representatives of the Departments of Energy, Justice, and State, the Federal Trade Commission, the General Accounting Office, Committees of Congress, the IEA, and the European Commission; and invitees of the IAB, the SEQ, or the IEA.

Issued in Washington, DC, March 3, 2004.

Samuel M. Bradley,

Assistant General Counsel for International and National Security Programs.

[FR Doc. 04–5253 Filed 3–8–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency information collection activities: proposed collection; comment request.

SUMMARY: The EIA is soliciting comments on the proposed revision and three-year extension to the Form EIA–63A, "Annual Solar Thermal Collector Manufacturers Survey," and EIA–63B, "Annual Photovoltaic Module/Cell Manufacturers Survey."

DATES: Comments must be filed by May 10, 2004. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to Fred Mayes. To ensure receipt of the comments by the due date, submission by FAX (301–287–1964) or e-mail (*Fred.Mayes@eia.doe.gov*) is recommended. The mailing address is Energy Information Administration, Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Alternatively, Fred Mayes may be contacted by telephone at (202) 287–1750.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of any forms and instructions should be directed to (name of contact listed above) at the address listed above.

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Request for Comments

I. Background

The Federal Energy Administration Act of 1974 (Pub. L. 93–275, 15 U.S.C. 761 *et seq.*) and the DOE Organization Act (Pub. L. 95–91, 42 U.S.C. 7101 *et seq.*) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer term domestic demands.

The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35), provides the general public and other Federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with the EIA. Any comments received help the EIA to prepare data requests that maximize the utility of the information collected, and to assess the impact of collection requirements on the public. Also, the EIA will later seek approval by the Office of Management and Budget (OMB) under Section 3507(a) of the Paperwork Reduction Act of 1995.

Form EIA–63A collects information on the distribution of solar thermal panels by manufacturers. Form EIA–63B collects information on the distribution by manufacturers of photovoltaic (PV) cells and modules. Specifically, the forms collect information on manufacturing, imports, exports, and shipments. The EIA has been collecting this information annually and proposes to continue the surveys. The data collected will be published in the Renewable Energy Annual and will also be available through EIA's Internet site at *http://www.eia.doe.gov/fuelrenewable.html.*

Please refer to the proposed forms and instructions for more information about the purpose, who must report, when to report, where to submit, the elements to be reported, detailed instructions, provisions for confidentiality, and uses (including possible nonstatistical uses) of the information. For instructions on obtaining materials, see the **FOR FURTHER INFORMATION CONTACT** section.

II. Current Actions

The EIA will request a revision and three-year extension to continue using Forms EIA–63A and EIA–63B. The only substantial change involves requesting respondents to allocate imports according to country of origin, in an analogous manner to how the current form requests them to allocate their export countries of destination.

III. Request for Comments

Prospective respondents and other interested parties should comment on the actions discussed in item II. The following guidelines are provided to assist in the preparation of comments. Please indicate to which form(s) your comments apply (EIA–63A or EIA–63B).

General Issues

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility? Practical utility is defined as the actual usefulness of information to or for an agency, taking into account its accuracy, adequacy, reliability, timeliness, and the agency's ability to process the information it collects.

B. What enhancements can be made to the quality, utility, and clarity of the information to be collected?

As a Potential Respondent to the Request for Information

A. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information to be collected?

B. Are the instructions and definitions clear and sufficient? If not, which instructions need clarification?

C. Can the information be submitted by the due date?

D. Public reporting burden for this collection is estimated to average 3.25 hours per response. The estimated burden includes the total time necessary to provide the requested information. In your opinion, how accurate is this estimate?

E. The agency estimates that the only cost to a respondent is for the time it will take to complete the collection. Will a respondent incur any start-up costs for reporting, or any recurring annual costs for operation, maintenance, and purchase of services associated with the information collection?

F. What additional actions could be taken to minimize the burden of this collection of information? Such actions may involve the use of automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology.

G. Does any other Federal, State, or local agency collect similar information? If so, specify the agency, the data element(s), and the methods of collection.

H. Do respondents maintain information on the quantities by country of solar/PV products imported?

As a Potential User of the Information To Be Collected

A. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information disseminated?

B. Is the information useful at the levels of detail to be collected?

C. For what purpose(s) would the information be used? Be specific.

D. Are there alternate sources for the information and are they useful? If so, what are their weaknesses and/or strengths?

E. Are the proposed new data on solar/PV imports useful, or would alternative information be preferable?

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

Statutory Authority: Section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35).

Issued in Washington, DC, March 3, 2004.

Jay H. Casselberry,

Agency Clearance Officer, Statistics and Methods Group, Energy Information Administration.

[FR Doc. 04–5254 Filed 3–8–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC04–69–000]

ACN Power, Inc. and ACN Utility Services, Inc.; Notice of Filing

March 2, 2004.

Take notice that on February 27, 2004, ACN Power, Inc. and ACN Utility Services, Inc. filed a joint application pursuant to Section 203 of the Federal Power Act for authorization to dispose of all of the wholesale power contacts of ACN Power, Inc. to ACN Utility Services, Inc.

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary (FERRIS) link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. 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.

Comment Date: March 19, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–495 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–281–003]

Columbia Gas Transmission Corporation; Notice of Complaince Filing

March 3, 2004.

Take notice that on February 27, 2004, Columbia Gas Transmission Corporation (Columbia), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the tariff sheets and effective dates listed on Attachment A to the filing.

Columbia explains that, in an order issued on February 12, 2004, in Docket No. RP03–281, the Commission directed Columbia to modify the EPCA rates placed into effect subject to refund in this docket for the period beginning April 1, 2003, and to make refunds as necessary based upon the revised rates. Columbia states that it has recalculated its April 1, 2003, EPCA rates in compliance with the February 12 Order, and is herein submitting the tariff sheets containing the recalculated EPCA rates that were effective from April 1, 2003, to the present.

Columbia states that copies of its filing have been mailed to all firm customers, interruptible customers, affected state commissions, and parties on the official service list in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–487 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–336–026]

El Paso Natural Gas Company; Notice of Compliance Filing

March 3, 2004.

Take notice that on February 13, 2004, El Paso Natural Gas Company (El Paso) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1A, Eighth Revised Sheet No. 117, with an effective date of January 29, 2004:

El Paso states that this tariff sheet is revised to provide flexibility in the number of contracts for converted full requirements capacity that a shipper

must hold. El Paso further states that the tariff sheet is filed in compliance with the Commission's January 29, 2004, order in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–486 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–188–000]

Great Lakes Gas Transmission Limited Partnership; Notice of Tariff Filing

March 3, 2004.

Take notice that on February 27, 2004, Great Lakes Gas Transmission Limited Partnership (Great Lakes) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, proposed to be effective April 1, 2004:

Fifteenth Revised Sheet No. 1
Fourth Revised Sheet No. 21
Sixth Revised Sheet No. 22
Tenth Revised Sheet No. 40
Eighth Revised Sheet No. 40A
Second Revised Sheet No. 44
Original Sheet No. 50R
Original Sheet No. 50S
Original Sheet No. 50T
Second Revised Sheet No. 56
Fourth Revised Sheet No. 57
First Revised Sheet No. 57K
First Revised Sheet No. 57L
Fourth Revised Sheet No. 61
Second Revised Sheet No. 62
Third Revised Sheet No. 63G
First Revised Sheet No. 63H
Second Revised Sheet No. 68
First Revised Sheet No. 69

Great Lakes acknowledges the Commission's recent Notice of Proposed Rulemaking (NOPR) in Docket No. RM04–4–000, Creditworthiness Standards for Interstate Natural Gas Pipelines Great Lakes states that it reserves the right to submit comments on the matters and issues proposed in the NOPR, including any related matters or alternate proposals, as well as the right to file revisions to the creditworthiness standards of its tariff consistent with the final rule in that proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–490 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–181–000]

Kern River Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

March 2, 2004.

Take notice that on February 27, 2004, Kern River Gas Transmission Company (Kern River) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, to be effective as indicated below:

Twelfth Revised Sheet No. 5
Eighth Revised Sheet No. 5–A
Tenth Revised Sheet No. 6

Kern River states that the purpose of this filing is to adjust the electric compressor fuel surcharges applicable to both rolled-in rate and incremental rate shippers for quantities of gas scheduled for delivery downstream of the Daggett compressor station and to incorporate the revised surcharges into Kern River's tariff, to be effective April 1, 2004.

Kern River further states that in conjunction with this filing, and in compliance with the Commission's "Order Issuing Certificate" dated July 26, 2001, pertaining to Kern River's 2002 Expansion Project, Kern River also is submitting a work paper showing the 2003 net benefit to vintage shippers of rolling in Kern River's 2002 expansion project after actual fuel costs are considered.

Kern River states that it has served a copy of this filing upon its customers and interested State regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter

the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–500 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–189–000]

Maritimes & Northeast Pipeline, L.L.C.; Notice of Tariff Filing

March 3, 2004.

Take notice that on February 27, 2004, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Sheet Nos. 146–149, to become effective March 1, 2004.

Maritimes states that the purpose of this filing is to reflect in a new mailing address in Maritimes' FERC Gas Tariff, update the person responsible for receiving communications concerning the tariff, and correct a range of reserved tariff sheets.

Maritimes states that copies of this filing were mailed to all affected customers of Maritimes and interested State commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–481 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–622–001]

National Fuel Gas Supply Corporation; Notice of Compliance Filing

March 2, 2004.

Take notice that on February 25, 2004, National Fuel Gas Supply Corporation (National Fuel) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, Third Revised Sheet No. 478, with an effective date of March 15, 2004.

National Fuel states that the instant filing is being made in compliance with the Letter Order issued by the Commission on October 30, 2003, in Docket No. RP03–622–000, granting National Fuel's request for waiver of certain tariff provisions relating to cost contributions, financial assurance and real-time measurement in connection with a transportation service for EOG Resources, Inc. (EOG) National Fuel states that the Letter Order directed National Fuel to revise section 34 of its General Terms and Conditions and to file its non-conforming service agreement for transportation service with EOG, showing the deviations from the Form of Service Agreement for Firm Transportation contained in its FERC Gas Tariff.

National Fuel states that copies of this filing were served upon its customers and interested State commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–497 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–180–000]

National Fuel Gas Supply Corporation; Notice of Tariff Filing

March 2, 2004.

Take notice that on February 27, 2004, National Fuel Gas Supply Corporation (National) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, Sixty First Revised Sheet No. 9, to become effective March 1, 2004.

National states that Article II, Sections 1 and 2 of the settlement approved by a Letter Order issued February 16, 1996, in Docket No. RP 94–367–000 *et.al.*, and revised by a Letter Order issued on February 7, 2001, provide that National will recalculate the maximum Interruptible Gathering (IG) rate semi-annually and monthly.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference

Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–499 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–187–000]

Northwest Pipeline Corporation; Notice of Proposed Changes In FERC Gas Tariff

March 3, 2004.

Take notice that on February 27, 2004, Northwest Pipeline Corporation (Northwest) tendered for filing as part of its FERC Gas Tariff, the following tariff sheets, to be effective April 1, 2004:

Third Revised Volume No. 1

Twenty-Second Revised Sheet No. 14

Original Volume No. 2

Thirty-Seventh Revised Sheet No. 2.1

Northwest states that a copy of this filing has been served upon Northwest's customers and interested state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–489 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. RP04–183–000]

Stingray Pipeline Company, L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

March 2, 2004.

Take notice that on February 27, 2004, Stingray Pipeline Company, L.L.C. (Stingray) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No 1, Second Revised Sheet No. 4, to become effective on March 31, 2004.

Stingray states that the purpose of this filing is to update Stingray's System Map to reflect changes that were made prior to the change of ownership which occurred January 29, 2001.

Stingray states that copies of this filing have been sent to all of Stingray's customers and interested State regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–502 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–162–009]

Trailblazer Pipeline Company; Notice of Compliance Filing

March 2, 2004.

Take notice that on February 27, 2004, Trailblazer Pipeline Company (Trailblazer) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, Sixth Revised Sheet No. 1; Eleventh Revised Sheet No. 5; Eleventh Revised Sheet No. 6; Fourth Revised Sheet No. 7; Original Sheet No. 7A, to be effective March 1, 2004.

Trailblazer states that the purpose of this filing is to implement lower rates and refunds for Trailblazer consistent with an Offer of Settlement and Stipulation and Agreement filed by Trailblazer on September 22, 2003 in Docket No. RP03–162, as approved by a Commission order issued January 23, 2004, 106 FERC ¶ 61,034.

Trailblazer states that copies of the filing are being mailed to all parties set out on the Commission's official service list in Docket No. RP03–162, Trailblazer's customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket

number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–496 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–184–000]

TransColorado Gas Transmission Company; Notice of Tariff Filing

March 2, 2004.

Take notice that on February 27, 2004, TransColorado Gas Transmission Company (TransColorado) tendered for filing: (1) Its Annual Fuel Gas Reimbursement Percentage (FGRP) report pursuant to Section 12.9 of the General Terms and Conditions of its FERC Gas Tariff, First Revised Volume No. 1; and (2) the following revised tariff sheets to become part of TransColorado's FERC Gas Tariff, First Revised Volume No. 1, to be effective April 1, 2004 concerning the inclusion in the calculation of the FGRP variance adjustment of the unamortized balances at December 31, 2003:

First Revised Sheet No. 247,
First Revised Sheet No. 247A, and
First Revised Sheet No. 247B.

TransColorado states that it has served copies of this filing upon all customers, interested State Commissions, and other interested parties.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–503 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–186–000]

Transcontinental Gas Pipe Line Corporation; Notice of Tariff Filing

March 3, 2004.

Take notice that on February 27, 2004, Tanscontinental Gas Pipe Line Corporation (Transco) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the tariff sheets listed on Appendix A to the filing, with a proposed effective date of March 1, 2004.

Transco states that the purpose of the instant filing is to submit an interim Great Plains Surcharge Filing (GPS) in accordance with section 39.9 of Transco's General Terms and Conditions to its FERC Gas Tariff. Transco notes that the GPS is being revised to include the effects of the buy out and termination of the Gas Purchase Agreement with Dakota Gasification Company, and the termination of certain related firm transportation contracts. Transco further states that the instant filing is made pursuant to a letter order issued by the Commission on January 21, 2004 in Docket No. RP04–118–000, and that the revised GPS proposed in the instant filing is to be collected over the Buyout Recovery Period, March 1, 2004 through February 28, 2005. Transco states that Appendix B attached to the filing supports the recalculation of the revised GPS Surcharge.

Transco states that copies of the filing are being mailed to affected customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–488 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. TM99–6–29–008, RP00–209–006, RP01–253–009, and RP02–171–007]

Transcontinental Gas Pipe Line Corporation; Notice of Report of Refund

March 2, 2004.

Take notice that on February 20, 2004, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing its Report of Refund detailing the refunds or surcharges distributed to its customers, as applicable, in the referenced proceedings pursuant to section 154.501 of the Commission's regulations.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such protests must be filed on or before the protest date as shown below. Protests will be considered by the Commission in determining the appropriate action to be

taken, but will not serve to make protestants parties to the proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Protest Date: March 9, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–494 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–178–000]

Viking Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

March 2, 2004.

Take notice that on February 26, 2004, Viking Gas Transmission Company (Viking) tendered for filing to be part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to become effective April 1, 2004:

Seventh Revised Sheet No. 5
Fifth Revised Sheet No. 5A
Fifth Revised Sheet No. 5B
Fifth Revised Sheet No. 5C
Fifth Revised Sheet No. 5D
Fifth Revised Sheet No. 5E
Fifth Revised Sheet No. 5F
Fifth Revised Sheet No. 5G
Eighth Revised Sheet No. 5H
First Revised Sheet No. 5H.01

Viking states that the purpose of this filing is to make Viking's semi-annual adjustment to its Fuel and Loss Retention Percentages (FLRP) in accordance with section 154.403 of the Commission's Rules and Regulations, 18 CFR 154.403 (2003) and section 26 of the General Terms and Conditions of Viking's FERC Gas Tariff.

Viking states that copies of the filing have been mailed to all of its contracted shippers and to interested State regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–498 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–182–000]

Western Gas Interstate Company; Notice of Tariff Filing

March 2, 2004.

Take notice that on February 27, 2004, Western Gas Interstate Company (WGI), tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, Second Revised Sheet No. 240, to become effective March 1, 2004.

WGI states that the purpose of the filing is to report changes in the identity of its shared operating employees and the name of its marketing affiliate.

WGI states that copies of this filing were served on its customers and interested State commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–501 Filed 3–8–4; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC04–68–000, et al.]

KeySpan-Ravenswood, LLC, et al.; Electric Rate and Corporate Filings

March 1, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. KeySpan-Ravenswood, LLC

[Docket No. EC04–68–000]

Take notice that on February 27, 2004, KeySpan-Ravenswood, LLC (Ravenswood) submitted for filing an application for approval of a sale leaseback transaction and disclaimer of jurisdiction over the passive participants, pursuant to sections 201 and 203 of the Federal Power Act. Ravenswood states that the proposed sale leaseback transaction will not change the operation or maintenance of the facilities. Ravenswood has requested waivers of the Commission's regulations so that the filing may become effective at the earliest possible date, but no later than the date the New York Public Service Commission approves the sale leaseback transaction.

Ravenswood states that a copy of the application has been served on the New York Public Service Commission.

Comment Date: March 18, 2004.

2. Puna Geothermal Venture

[Docket No. EG04–36–000]

On February 27, 2004, Puna Geothermal Venture (PGV) filed with the Federal Energy Regulatory Commission an application for redetermination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

PGV, a Hawaii general partnership states that it will be engaged directly and exclusively in the business of operating all or part of one or more eligible facilities located in Hawaii. PGV also states that the eligible facilities consist of an approximately 30 MW geothermal electric generation plant and related interconnection facilities. PGV further states that the output of the eligible facilities is sold at wholesale.

Comment Date: March 19, 2004.

3. Michigan Electric Transmission Company, LLC

[Docket No. ER01–2126–008]

Take notice that on February 26, 2004, Michigan Electric Transmission Company, LLC (METC) submitted an executed and revised Generator Interconnection and Operating Agreement with Renaissance Power, L.L.C. (Renaissance) intended to resolve the issue still pending in Docket No. ER01–2126. METC requests an effective date of March 1, 2004, for this filing.

METC states that copies of this filing have been served upon Renaissance.

Comment Date: March 18, 2004.

4. Cross-Sound Cable Company, LLC

[Docket No. ER03–600–002]

Take notice that on February 26, 2004, Cross-Sound Cable Company, LLC (CSC LLC) filed procedures for customers to reassign their firm transmission rights over the Cross Sound Cable (CSC). CSC LLC states that the filing is intended to achieve compliance with the Commission's February 11, 2004, order, 106 FERC ¶ 61,116, approving the reassignment procedures subject to a required compliance filing. CSC LLC requests that the Commission allow the reassignment procedures to become effective February 11, 2004.

CSC LLC states that a copy of this filing has been mailed to each person designated on the official service list compiled by the Secretary of the Commission in Docket No. ER03–600–000.

Comment Date: March 18, 2004.

5. Central Vermont Public Service Corporation

[Docket No. ER04–515–001]

Take notice that on February 25, 2004, Central Vermont Public Service Corporation (Central Vermont) tendered for filing an executed version of Substitute Original Service Agreement No. 45, a Network Integration Transmission Service Agreement and Network Operating Agreement with the Public Service Company of New Hampshire (PSNH) under Central Vermont's FERC Electric Tariff, Second Revised Volume No. 7. Central Vermont requests an effective date of January 1, 2004, the day service commenced.

Central Vermont states that copies of the filing were served upon the PSNH and the Vermont Public Service Board.

Comment Date: March 17, 2004.

6. Black River Generation, LLC

[Docket No. ER04–526–000]

Take notice that on February 26, 2004, Black River Generation, LLC (Black River Generation) submitted a Notice of Withdrawal of its February 3, 2004, application in the above-referenced proceeding.

Comment Date: March 18, 2004.

7. Hartford Steam Company

[Docket No. ER04–582–000]

Take notice that on February 25, 2004, Hartford Steam Company (Hartford Steam) submitted for filing pursuant to Schedule 205 of the Federal Power Act an Application for Acceptance of Initial Rate Schedule, which would allow Hartford Steam to engage in the sale of electric energy and capacity at market-based rates. Hartford Steam states that it owns and operates a 7.5 MW cogeneration facility located in Hartford, Connecticut. Hartford Steam seeks certain waivers, blanket approvals, and authorizations under the Commission(s regulations. Hartford Steam requests an effective date of February 25, 2004.

Comment Date: March 17, 2004.

8. MidAmerican Energy Company

[Docket No. ER04–583–000]

Take notice that on February 25, 2004, MidAmerican Energy Company (MidAmerican) tendered for filing with the Commission an Emergency Electric Interconnection and Operating Agreement between MidAmerican Energy Company and East River Electric Power Cooperative, which incorporates the First Amendment to the Agreement dated January 26, 2004. MidAmerican proposes that the Agreement become effective on the first day of the month in which the Sioux River ethanol plant becomes operational for commercial purposes.

MidAmerican states that copies of the filing were served upon the Iowa Utilities Board, the Illinois Commerce Commission and the South Dakota Public Utilities Commission.

Comment Date: March 17, 2004.

9. EnergyWindow, Inc.

[Docket No. ER04–584–000]

Take notice that on February 25, 2004, EnergyWindow, Inc. (EnergyWindow) petitioned the Commission for acceptance of EnergyWindow Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission regulations.

EnergyWindow states that it intends to engage in wholesale electric power and energy purchases and sales as a marketer. EnergyWindow also states that it is not in the business of generating or transmitting electric power.

Comment Date: March 17, 2004.

10. PJM Interconnection, L.L.C.

[Docket No. ER04–585–000]

Take notice that on February 25, 2004, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed interconnection service agreement (ISA) among PJM, Mannington Mills, Inc., and Atlantic City Electric Company d/b/a Conectiv Power Delivery. PJM requests a waiver of the Commission's 60-day notice requirement to permit a January 27, 2004, effective date for the ISA.

PJM states that copies of this filing were served upon the parties to the agreements and the State regulatory commissions within the PJM region.

Comment Date: March 17, 2004.

11. Michigan Electric Transmission Company, LLC Docket No. ER04–586–000

Take notice that on February 25, 2004, Michigan Electric Transmission Company, LLC (METC) submitted a Letter Agreement between the Wolverine Power Supply Cooperative, Inc. (Wolverine) and Michigan Electric Transmission Company, LLC intended to establish the terms and conditions for engineering and related activities to be performed by METC in connection with a proposed interconnection to the METC transmission system by Wolverine.

Comment Date: March 17, 2004.

12. Ameren Services Company

[Docket No. ER04–587–000]

Take notice that on February 26, 2004, Ameren Services Company (ASC)

tendered for filing an executed Network Integration Transmission Service and Network Operating Agreement between ASC and the City of California, Missouri. ASC states that the purpose of the Agreements is to permit ASC to provide transmission service to the City of California, Missouri, pursuant to Ameren's Open Access Transmission Tariff.

Comment Date: March 18, 2004.

13. Virginia Electric and Power Company

[Docket No. ER04–588–000]

Take notice that on February 26, 2004, Virginia Electric and Power Company doing business as Dominion Virginia Power, tendered for filing a Generator Imbalance Service Schedule as Schedule 4G under its Open Access Transmission Tariff to match the differences in any given hour of the amount of energy scheduled by a generating facility and actually generated and delivered in that hour. Dominion Virginia Power respectfully requests that the Commission permit the Generator Imbalance Service Schedule to become effective on April 26, 2004.

Dominion Virginia Power states that the filings were served upon the Virginia State Corporation Commission and Dominion Virginia Power's jurisdictional customers.

Comment Date: March 18, 2004.

14. Commonwealth Edison Company

[Docket No. ER04–589–000]

Take notice that on February 26, 2004, Commonwealth Edison Company (ComEd) submitted for filing fourteen (14) unexecuted Service Agreements entered into between ComEd and Edison Mission Marketing & Trading Inc. under ComEd's Open Access Transmission Tariff. ComEd requests an effective date of April 1, 2004, for all of the Service Agreements.

ComEd states that copies of the filing were served upon Edison Mission Marketing & Trading Inc. and the Illinois Commerce Commission.

Comment Date: March 18, 2004.

15. Northeast Utilities Service Company

[Docket No. TX04–1–000]

On February 26, 2004, Northeast Utilities Service Company (NUSCO) filed an Application for an Order Directing the Physical Connection of Facilities Pursuant to sections 210 and 212 of the Federal Power Act and for Interim Procedures. NUSCO states that the Application was served on the Long Island Power Authority, the Connecticut Department of Public Utility Control, the New York Public Service Commission, the Connecticut Department of Environmental Protection, the New York Department of Environmental Conservation, the Independent System Operator of New England, and the New York Independent System Operator.

Comment Date: March 26, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–492 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC04–62–000, et al.]

Black River Power, LLC, et al.; Electric Rate and Corporate Filings

February 27, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Black River Power, LLC, Carlyle/Riverstone Global Energy, and Power Fund II, L.P.

[Docket No. EC04–62–000]

Take notice that on February 26, 2004, Black River Power, LLC and Carlyle/Riverstone Global Energy and Power Fund II, L.P. submitted a Notice of Withdrawal of their February 3, 2004, application in the above-referenced proceeding.

Comment Date: March 8, 2004.

2. El Paso Electric Company

[Docket No. EL02–113–005]

Take notice that on January 30, 2004, El Paso Electric Company (EPE), submitted for filing a compliance filing pursuant to the Commission's Letter Order issued October 23, 2003. 105 FERC ¶ 61,107.

Comment Date: March 8, 2004.

3. American Electric Power Service Corporation, Commonwealth Edison Company, Dayton Power and Light Company

[Docket No. EL03–212–009]

Take notice that on February 25, 2004, American Electric Power Service Corporation (AEP), as well as Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc. (ComEd) on behalf of Appalachian Power Service Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company and Dayton Power and Light Company (DP&L) filed revisions to their respective open access transmission tariffs (OATTs) in accordance with changes made by the Commission's order issued in Docket Nos. EL02–111–004 and EL03–212–002, on February 6, 2004, Midwest Independent Transmission System Operator, *et al.*, 106 FERC ¶ 61,106 (2004).

AEP, ComEd and DP& L state that they have served copies of this filing on all parties on the Commission's service list for this proceeding, as well as on state public utility commissions having jurisdiction over the companies.

Comment Date: April 1, 2004.

4. California Independent System Operator Corporation

[Docket Nos. ER02–1656–017 and ER02–1656–018]

As announced in the Notice of Technical Conference issued on February 6, 2004, the Commission Staff will convene a technical conference on March 3–5, 2004, in San Francisco, California, to discuss with state

representatives and market participants in California various substantive issues related to the California Independent System Operator's (CAISO) Revised MD02 proposal, including the flexible offer obligation proposal, the residual unit commitment process, pricing for constrained-output generators, marginal losses, ancillary services, and market power mitigation issues.

The conference will focus on the issue areas identified in the agenda, which is appended to this notice. With respect to the issues on the conference agenda, which were previously discussed at the January 28–29, 2004, technical conference, the CAISO is expected to present its proposals, as filed on February 24, 2004, in the above-captioned dockets. The CAISO's presentations will be followed by an open discussion amongst all participants. The discussion of the topics related to the market power mitigation issues will begin with a short presentation by the Commission Staff to frame the issue, followed by an open discussion amongst all participants. Participants are encouraged to be prepared to discuss the issues substantively.

For more information about the conference, please contact: Olga Kolotushkina at (202) 502–6024 or at *olga.kolotushkina@ferc.gov*.

5. New York Independent System Operator, Inc.

[Docket Nos. ER03–552–007 and ER03–984–005]

Take notice that on February 24, 2004, the New York Independent System Operator, Inc. (NYISO) submitted responses to the Commission(s Data Requests, dated February 2, 2004, regarding proposed creditworthiness requirements for customers participating in the NYISO-administered markets.

NYISO states that it has served a copy of this filing upon all parties named on the official service list for this proceeding.

Comment Date: March 16, 2004.

6. DeSoto County Generating Co., LLC, et al.

[Docket No. ER03–1383–001]

Take notice that, on February 24, 2004, Progress Energy, Inc., (Progress Energy) submitted for filing on behalf of various Progress Energy subsidiaries a status report in compliance with Ordering Paragraph M of the Commission's Order issued November 24, 2003, in Docket No. ER03–1383–000, 105 FERC ¶ 61,245 (2003).

Progress Energy states that the filing was served on the official service list in Docket No. ER03–1383–000, the Florida Public Service Commission and the North Carolina Public Utilities Commission.

Comment Date: March 16, 2004.

7. Central Hudson Gas & Electric Corporation

[Docket No. ER04–346–000]

Take notice that on February 18, 2004, Central Hudson Gas & Electric Corporation (Central Hudson) submitted for filing a Notice of Withdrawal of FERC Rate Schedule No. 205, in Docket No. ER04–346–000, filed December 30, 2003. Central Hudson states that it is withdrawing the referenced filing because the subject agreement is currently not under the Commission's jurisdiction.

Comment Date: March 9, 2004.

8. Southern California Edison Company

[Docket No. ER04–435–002]

Take notice that on February 25, 2004, Southern California Edison Company (SCE) tendered for filing revisions to its Wholesale Distribution Access Tariff (WDAT) in compliance with Commission(s Order No. 2003, Standardization of Generator Interconnection Agreements and Procedures.

SCE states that copies of this filing were served upon the Public Utilities Commission of the State of California, the California Independent System Operator Corporation, the California Electricity Oversight Board, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and the Cities of Anaheim, Azusa, Banning, Riverside, and Vernon, California, and any persons on the Service List for this proceeding.

Comment Date: March 17, 2004.

9. Diverse Power Incorporated

[Docket No. ER04–444–001]

Take notice that on February 12, 2004, Diverse Power Incorporated (Diverse) submitted its proposed Revised Tariff Sheet No. 1 of its Original FERC Rate Schedule No. 1. The revised tariff sheet is being filed to reflect a change in name from Troup Electric Membership Corp. to Diverse Power Incorporated.

Comment Date: March 8, 2004.

10. Diverse Power Incorporated

[Docket No. ER04–555–000]

Take notice that on February 17, 2004, the Commission issued a "Notice of Filing" in Docket No. ER04–555–000. This notice was issued in error and is hereby rescinded.

11. Southwest Power Pool, Inc.

[Docket No. ER04–579–000]

Take notice that on February 24, 2004, Southwest Power Pool, Inc. (SPP) submitted for filing an executed service agreement for Firm Point-to-Point Transmission Service with Western Resources Generation Service d/b/a Westar (Westar). SPP seeks an effective date of June 1, 2004, for the service agreement.

SPP states that Westar was served with a copy of this filing.

Comment Date: March 16, 2004.

12. PJM Interconnection, L.L.C.

[Docket No. ER04–580–000]

Take notice that on February 24, 2004, PJM Interconnection, L.L.C. (PJM), submitted for filing an executed construction service agreement (CSA) among PJM, Bethesda Triangle, LLC, and Potomac Electric Power Company. PJM requests a waiver of the Commission's 60-day notice requirement to permit a February 12, 2004, effective date for the CSA.

PJM states that copies of this filing were served upon the parties to the agreements and the State regulatory commissions within the PJM region.

Comment Date: March 16, 2004.

13. American Electric Power Service Corporation

[Docket No. ER04–581–000]

Take notice that on February 24, 2004, AEP Service Corporation (AEPSC) on behalf of Indiana Michigan Power Company (I&M), tendered for filing a revised Repair and Maintenance Agreement between I&M and Wabash Valley Power Association (O&M Agreement) designated agreement as Eight Revised I&M FERC Rate Schedule No. 81. AEPSC requests waiver of notice to permit the new O&M Agreement to be effective on/or after March 1, 2004.

AEP states that a copy of the filing was served upon the Parties and the State utility regulatory commissions of Indiana and Michigan.

Comment Date: March 16, 2004.

14. Wilbur Power LLC

[Docket Nos. QF83–168–007 and EL04–86–000]

Take notice that on February 26, 2004, Wilbur Power LLC (Wilbur Power), tendered for filing a Request for Limited Waiver of Qualifying Cogeneration Operating and Efficiency Standards, Status Report, and Request for Expedited Consideration.

Comment Date: March 18, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the

Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–493 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Non-Project Use of Project Lands and Soliciting Comments, Motions to Intervene, and Protests

March 3, 2004.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-project use of project lands.

b. *Project No.:* 2210–101.

c. *Date Filed:* February 3, 2004.

d. *Applicant:* Appalachian Power Company (APC).

e. *Name of Project:* Smith Mountain Pumped Storage Project.

f. *Location:* The project is located on the Roanoke River, in Bedford, Pittsylvania, Franklin, and Roanoke Counties, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a) 825(r) and 799 and 801.

h. *Applicant Contact:* Teresa P. Rogers, Hydro Generation Department, American Electric Power, P.O. Box 2021, Roanoke, VA 24022–2121, (540) 985–2441.

i. *FERC Contact:* Any questions on this notice should be addressed to Mrs. Heather Campbell at (202) 502–6182, or e-mail address: *heather.campbell@ferc.gov.*

j. *Deadline for filing comments and or motions:* April 5, 2004.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–2210–101) on any comments or motions filed. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link. The Commission strongly encourages e-filings.

k. *Description of Request:* APC is requesting approval to permit Highland Lake Inc.(permittee) to install and operate two docks, each with four double slips for a total of 16 floating boat slips. Development will take place along the Bull Run portion of the Blackwater River on Smith Mountain Lake. The proposed facilities will serve 16 off-water lots in the Highland Lake subdivision. Highland Lake subdivision is located off of Route 663 in the Union Hall area of Franklin County. No dredging is proposed.

l. *Location of the Application:* This filing is available for review at the Commission in the Public Reference Room, 888 First Street, NE, Room 2A, Washington, D.C. 20426 or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "e-library" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. Copies of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–482 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Non-Project Use of Project Lands and Waters and Soliciting Comments, Motions To Intervene, and Protests

March 3, 2004.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use Of Project Lands And Waters.

b. *Project No:* 2232–460.

c. *Date Filed:* February 10, 2004.

d. *Applicant:* Duke Power, a Division of Duke Energy Corporation.

e. *Name of Project:* Catawba-Wateree Hydroelectric Project.

f. *Location:* The project is located in Alexander, Burke, Caldwell, Catawba, Gaston, Iredell, Lincoln, McDowell and Mecklenburg Counties, North Carolina and Chester, Fairfield, Kershaw, Lancaster, and York Counties, South

Carolina. This project does not occupy any federal or tribal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a), 825(r) and §§ 799 and 801.

h. *Applicant Contact:* Mr. Joe Hall, Lake Management Representative, Duke Energy Corporation, P.O. Box 1006, Charlotte, North Carolina, 28201–1006, (704) 382–8576.

i. *FERC Contact:* Any questions on this notice should be addressed to Brittany Schoenen at (202) 502–6097, or e-mail address: *bschoenen@ferc.gov.*

j. *Deadline for filing comments and or motions:* April 5, 2004.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. Please include the project number (P–2232–460) on any comments or motions filed. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages e-filings.

k. *Description of Request:* Duke Power (Duke) is seeking Commission approval to reduce an existing boat marina from 39 to 34 slips, and to construct a 200 boat dry storage facility with a forklift pad. A permit would be issued by Duke to Crown Harbor Dry Boat Dock Storage, LLC for the construction and operation of the marina, and 0.74 acres will be leased for the facility. The marina will be used by the residents of the Crown Harbor Subdivision on Lake Norman.

l. *Location of the Application:* This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described applications. A copy of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–483 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application To Reclassify Project Shoreline and for Non-Project Use of Project Lands and Waters and Soliciting Comments, Motions To Intervene, and Protests

March 3, 2004.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Reclassification of Project Shoreline and Non-Project Use of Project Lands and Waters.

b. *Project No:* 2232–461.

c. *Date Filed:* February 18, 2004.

d. *Applicant:* Duke Power, a Division of Duke Energy Corporation.

e. *Name of Project:* Catawba-Wateree Hydroelectric Project.

f. *Location:* The project is located in Alexander, Burke, Caldwell, Catawba, Gaston, Iredell, Lincoln, McDowell and Mecklenburg Counties, North Carolina and Chester, Fairfield, Kershaw, Lancaster, and York Counties, South Carolina. This project does not occupy any federal or tribal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a), 825(r) and 799 and 801.

h. *Applicant Contact:* Mr. Joe Hall, Lake Management Representative, Duke Energy Corporation, P.O. Box 1006, Charlotte, North Carolina, 28201–1006, (704) 382–8576.

i. *FERC Contact:* Any questions on this notice should be addressed to Brittany Schoenen at (202) 502–6097, or e-mail address: *bschoenen@ferc.gov.*

j. *Deadline for filing comments and or motions:* April 5, 2004.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. Please include the project number (P–2232–461) on any comments or motions filed. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages e-filings.

k. *Description of Request:* Duke Power (Duke) is seeking Commission approval to reclassify 30′ of project shoreline on Lake Norman, Catawba County, from "Natural" to "Business Industrial". Duke also seeks approval of an existing pump station for Crescent Resources, LLC, which is used for drip irrigation at its ornamental nursery. The pump facility removes an average of 6,000 gallons of water per day and 15,000 gallons per day during the summer when rainfall is sufficient.

l. *Location of the Application:* This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to

take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described applications. A copy of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E4–484 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of License and Soliciting Comments, Motions to Intervene, and Protests

March 3, 2004.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of license.

b. *Project No:* 2532–044.

c. *Date Filed:* October 6, 2003.

d. *Applicant:* Minnesota Power, Minnesota.

e. *Name of Project:* Little Falls, Project.

f. *Location:* The project is located on the Mississippi River in Morrison County, Minnesota.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a—825r.

h. *Applicant Contact:* John A. Niemela, P.E., Minnesota Power, 30 West Superior Street, Duluth, MN 55802–2093.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Eric Gross at (202) 502–6213, or e-mail address: *eric.gross@ferc.gov.*

j. *Deadline for filing comments and or motions:* April 5, 2004.

k. *Description of Request:* Minnesota Power Company is requesting to add and remove lands from the project boundary at the former Hennepin Paper Mill site. The amendment would remove a portion of the former canal adjacent to mill sites 12–25. This land would be transferred to the City of Little Falls to be developed into a public park. The amendment would also add mill sites 4–11 to the project boundary for use as a security buffer and storage area. The one-foot strip on the south shore of the Mississippi River, east of the line between mill sites 11 and 12, would be changed from fee to flowage rights.

l. *Locations of Application:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*— Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–485 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2183–035]

Grand River Dam Authority; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

March 3, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* P–2183–035.

c. *Date filed:* June 2, 2003.

d. *Applicant:* Grand River Dam Authority (GRDA).

e. *Name of Project:* Markham Ferry Hydroelectric Project.

f. *Location:* On the Grand (Neosho) River, in Mayes County, Oklahoma. This project would not use federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Robert W. Sullivan, Assistant General Manager, Risk Management & Regulatory Compliance, GRDA, P.O. Box 409, Vinita, Oklahoma 74301 (918)–256–5545.

i. *FERC Contact:* John Ramer, *john.ramer@ferc.gov* (202) 502–8969.

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Motions to intervene and protests may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link. The Commission encourages electronic filings.

k. This application has been accepted, but is not ready for environmental analysis at this time.

l. *Project Description:* The Markham Ferry Hydroelectric Project consists of the following existing facilities: (1) The 3,744-foot-long by 90-foot-high Robert S. Kerr dam, which includes an 824-foot-long gated spillway, topped with 17, 40-foot-long by 27-foot-high, steel Taintor gates and two 80-ton capacity traveling gate hoists; (2) the 15-mile-long Lake Hudson, which has a surface area of 10,900 acres, 200,300 acre-feet of operating storage, and 444,500 acre-feet total of flood storage capacity; (3) the 6,200-foot-long by 45-foot-high Salina Dike; (4) a concrete powerhouse containing four Kaplan turbines with a total maximum hydraulic capacity of 28,000 cubic feet per second (cfs) and four generating units with a total installed generating capacity of 108,000 kilowatts (kW), and producing an average of 257,107,000 kilowatt hours (kWh) annually; (5) one unused 110-kilovolt (kV) transmission line; and (6) appurtenant facilities. The dam and existing project facilities are owned by GRDA.

m. A copy of the application is on file with the Commission and is available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link—select "Docket #" and follow the instructions. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676 or for TTY, contact (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

n. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

o. *Procedural schedule:* The Commission staff proposes to issue one Environmental Assessment (EA) rather than issuing a draft and final EA. Staff intends to allow 30 days for entities to comment on the EA, and will take into consideration all comments received on the EA before final action is taken on the license application. The application will be processed according to the following schedule, but revisions to the schedule may be made as appropriate:

Action	Date
Issue Scoping Document	April 2004.
Notice Application Ready for Environmental Assessment.	March 2005.
Notice Availability of EA	September 2005.
Ready for Commission Decision on Application.	December 2005.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

Magalie R. Salas,

Secretary.

[FR Doc. E4–491 Filed 3–8–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ORD–2003–0010; FRL–7633–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Personal Exposure of High-Risk Subpopulations to Particles (Addition of Detroit Exposure and Aerosol Research Study (DEARS)), EPA ICR Number 1887.03, OMB Control Number 2080–0058

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This ICR is scheduled to expire on October 31, 2005. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before April 8, 2004.

ADDRESSES: Submit your comments, referencing docket ID number ORD–2003–0010, to (1) EPA online using EDOCKET (our preferred method), by email to *oei.docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Office of Environmental Information Docket, Mail Code 28221T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Barbara Blackwell, MD E205–01,

Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–2886; fax number: (919) 541–0905; email address: *blackwell.barbara@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On October 3, 2003 (68 FR 57441), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA has addressed the comments received.

EPA has established a public docket for this ICR under Docket ID No. ORD–2003–0010, which is available for public viewing at the Office of Environmental Information Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Office of Environmental Information Docket is (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the 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 docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public 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 EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 *FR* 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

Title: Personal Exposure of High-Risk Subpopulations to Particles (Addition of Detroit Exposure and Aerosol Research Study (DEARS)).

Abstract: EPA's Office of Research and Development proposes to conduct a residential and personal exposure field monitoring study in the city of Detroit, Michigan, over a three-year period from 2004 to 2006. The primary goal of the study is to evaluate and describe the relationship between air toxics and PM constituents measured at a central site monitor and measurements of residential and personal concentrations. An emphasis is placed on understanding the impact of local sources (point and mobile) on outdoor residential concentrations and the impact of housing type and house operation on indoor concentrations. Personal air pollutant monitoring will be conducted to determine the impact of time spent in nonresidential locations and personal activities on exposure. Approximately 120 persons will voluntarily agree to wear certain personal air monitors and to allow their homes to be equipped with other monitors to measure indoor and outdoor residential air quality. Each home will be monitored for five consecutive days in the summer and five consecutive days in the winter. The study is a continuation and expansion of previous OMB-approved studies of human exposure to particles, undertaken in response to recommendations of the National Academy of Sciences.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 8 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Residents of Wayne County, Michigan.

Estimated Number of Respondents: 40.

Frequency of Response: Semi-annually.

Estimated Total Annual Hour Burden: 300.

Estimated Total Annual Cost: $2,880, includes $0 annualized capital or O&M costs.

Dated: March 1, 2004.

Richard T. Westlund,

Acting Director, Collection Strategies Division.

[FR Doc. 04–5287 Filed 3–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7634–5]

Draft National Coastal Condition Report II

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability and request for comments.

SUMMARY: Notice of availability is hereby given for a 90-day public comment period on the draft *National Coastal Condition Report II* describing the condition of the Nation's coastal waters. Coastal waters are valuable from both an environmental and economic perspective. These waters are vulnerable to pollution from diverse sources. EPA expects that this report on the condition of coastal waters will support more informed decisions concerning protection of this resource and will increase public awareness of the extent and seriousness of pollution in these waters. EPA seeks public input concerning the information in the report, the availability of additional data, and the appropriateness of conclusions drawn from the information presented.

DATES: Written comments must be received by June 7, 2004.

ADDRESSES: Address comments concerning this notice to Barry Burgan, U.S. Environmental Protection Agency (4504 T), Office of Water, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone (202) 566–1242; fax (202) 566–1336 or Kevin Summers, U.S. Environmental Protection Agency, Office of Research

and Development, 1 Sabine Island Drive, Gulf Breeze, Florida 32561; telephone (850) 934–9237; fax (850) 934–9201.

FOR FURTHER INFORMATION CONTACT: Barry Burgan, U.S. Environmental Protection Agency (4504 T), Office of Water, 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or Kevin Summers, U.S. Environmental Protection Agency, Office of Research and Development, 1 Sabine Island Drive, Gulf Breeze, Florida 32561. See **SUPPLEMENTARY INFORMATION** section for electronic access and filing address.

SUPPLEMENTARY INFORMATION:

I. Background

In 2001, the first National Coastal Condition Report was released, characterizing about 70% of the estuarine resources of the United States. Using available data from 1990–1996, EPA, the National Oceanic and Atmospheric Administration (NOAA), U.S. Geological Survey (USGS), U.S. Fish and Wildlife Service (USFWS), and U.S. Department of Agriculture determined that the Nation's estuarine resources were in fair condition and presented this information in the first Report. This second edition of the National Coastal Condition Report serves as a continuing foundation for the Nation's efforts to protect, manage, and restore coastal ecosystems. Four Federal agencies (EPA, NOAA, USGS and the USFWS) and several State and regional/local organizations have come together to report on the current condition of the Nation's coasts.

The *National Coastal Condition Report II* describes the condition of coastal waters based on several available data sets from different agencies and areas of the country and summarizes them to present a continuing picture of the condition of coastal waters. Although the data sets presented do not cover all coastal areas (*e.g.*, no data for Alaska and Hawaii), they do provide a multi-regional assessment of coastal condition in the conterminous United States and Puerto Rico. For example, EPA's National Coastal assessment is conducting estuarine monitoring in all 23 coastal States and Puerto Rico, accounting for 99.8% of estuarine acreage in the continental U.S. and Puerto Rico. Data from several regional and national programs conducted by NOAA, USGS and the USFWS are included in this assessment of coastal condition. This report serves as a useful tool for analyzing the progress of coastal programs implemented since the first Report and as a benchmark for the future. This report will be followed in subsequent years by reports focusing on continuing assessments of ecological condition, examinations of the trends in coastal condition, and assessments of more specialized coastal issues.

II. Electronic Access and Filing

You may view and download the draft *Report* on EPA's Internet site at the Office of Water homepage at *http://www.epa.gov/owow/oceans/nccr2/index.html* under *Recent Additions*. Comments may be sent to Barry Burgan or Kevin Summers via U.S. Postal Service, electronic mail (e-mail) or fax. Please send comments to Barry Burgan at U.S. Environmental Protection Agency (4504 T), Office of Water, 1200 Pennsylvania Avenue, NW., Washington, DC 20460 (mail), *burgan.barry@epa.gov* (e-mail), or (202) 566–1336 (fax); or Kevin Summers, U.S. Environmental Protection Agency, Office of Research and Development, 1 Sabine Island Drive, Gulf Breeze, FL 32561 (mail), *summers.kevin@epa.gov* (e-mail), or (850) 934–9201 (fax). Submit electronic comments as an ASCII file avoiding the use of special characters and any form of encryption.

Dated: March 4, 2004.

Benjamin H. Grumbles,

Acting Assistant Administrator for Water.

[FR Doc. 04–5355 Filed 3–8–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–OW–7633–4]

Notice of Availability of Draft Aquatic Life Criteria Document for Copper and Request for Scientific Views; Reopening the Period To Submit Scientific Views

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability and request for scientific views; reopening the period to submit scientific views.

SUMMARY: Due to requests from the public, EPA is reopening the period for submitting scientific views on the draft document containing updated aquatic life criteria for copper. EPA announced the availability of the draft criteria on December 31, 2003 (68 FR 75552). The period for submission of scientific views ended on March 1, 2004. Today, the Agency is reopening the period to submit scientific views for an additional 30 days.

DATES: EPA will accept scientific views on the 2003 Draft Updated of Ambient Water Quality Criteria for Copper document on or before April 8, 2004.

ADDRESSES: Scientific views may be submitted electronically, by mail or through hand-delivery/courier. Follow the detailed instructions as provided in Section I.C. of the **SUPPLEMENTARY INFORMATION** section of the December 31, 2003, **Federal Register**. Electronic files may be e-mailed to: *OW-Docket@epa.gov*. Scientific views may be mailed to the Water Docket, Environmental Protection Agency, Mail Code: 4101T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention Docket ID No. OW–2003–0079. Instructions for couriers and other hand delivery are provided in section I.C.3 of the December 31, 2003, **Federal Register**. The Agency will not accept facsimiles (faxes).

FOR FURTHER INFORMATION CONTACT: Cindy Roberts, Health and Ecological Criteria Division (4304T), U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC, 20460; (202) 566–1124; *roberts.cindy@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. What Are Water Quality Criteria?

Water quality criteria are scientifically-derived concentrations of a pollutant that protect aquatic life or human health from the harmful effects of pollutants in ambient water. Section 304(a)(1) of the Clean Water Act requires EPA to develop and publish and, from time to time, revise criteria for water quality to accurately reflect the latest scientific knowledge. Water quality criteria developed under section 304(a) are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. Section 304(a) criteria do not consider economic impacts or the technological feasibility of meeting the chemical concentrations in ambient water. Section 304(a) criteria help States and authorized Tribes adopt water quality standards that ultimately provide a basis for controlling discharges or releases of pollutants. The criteria also help EPA promulgate federal regulations under section 303(c) when such action is necessary.

Once established, an EPA water quality criterion does not substitute for the CWA or EPA regulations; nor is it a regulation. It cannot impose legally binding requirements on the EPA, States, authorized Tribes or the regulated community. State and Tribal decision-makers have the discretion to adopt approaches that differ from EPA's guidance on a case-by-case basis.

II. Why Is EPA Reopening the Period for Request of Scientific Views?

On December 31, 2003, EPA published a **Federal Register** notice (68 FR 75552) announcing the availability and requesting scientific views on the updated criteria in the 2003 Draft Update of Ambient Water Quality for Copper document and on the application of the biotic ligand model (BLM) used to derived the fresh water criteria. EPA received requests to extend the period for submission of scientific views on these documents. In order to give the public enough time to review, EPA is reopening the period to submit scientific views.

To submit your scientific views, or access the official docket, please follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section of the December 31, 2003 **Federal Register** (68 FR 75552). If you have any questions, consult the person listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Dated: March 4, 2004.

Benjamin H. Grumbles,

Acting Assistant Administrator, Office of Water.

[FR Doc. 04–5288 Filed 3–8–04; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

Date and Time: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on March 11, 2004, from 9 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Jeanette C. Brinkley, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. *Approval of Minutes*
- February 10, 2004 (Open and Closed)

B. *Reports*
- Corporate/Non-corporate Report
- FCS Building Association Quarterly Report
- Update on Notice of a Request to Provide New Related Services
- Allowance for Loan Losses—Update

C. *Unfinished Business*
- Consolidation of FCA Training Programs
- Webcast of FCA Public Meetings

D. *New Business*

1. *Regulations*
- Draft Final Rule—Young, Beginning and Small (YBS) Farmers and Ranchers
- Draft Final Rule—Effective Interest Rate Disclosure

2. *Other*
- Public Notice with Request for Comment on the Systematic Collection of Standardized Loan Data

Closed Session*

Reports

- OSMO Quarterly Report

* Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

Dated: March 4, 2004.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

[FR Doc. 04–5323 Filed 3–5–04; 9:21 am]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested.

February 26, 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 May 10, 2004. 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 Number: 3060–0192.

Title: Section 87.103, Posting Station License.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, individuals or household, and state, local and tribal government.

Number of Respondents: 47,800.

Estimated Time per Response: 15 minutes (.25 hours).

Frequency of Response: Recordkeeping requirement.

Total Annual Burden: 11,950 hours.

Total Annual Cost: N/A.

Needs and Uses: The recordkeeping requirement in 47 CFR section 87.103 is necessary to demonstrate that all transmitters in the Aviation Service are properly licensed in accordance with the requirements of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301, No. 2020 of the International Radio Regulations, and Article 30 of the Convention on International Civil Aviation. This requirement facilitates the quick resolution of any harmful interference problems and ensures that the station is operation in accordance with the appropriate rules, statutes, and treaties.

The Commission is seeking an extension (no change in requirements) in order to obtain the full three year OMB clearance.

OMB Control Number: 3060–0957.

Title: Wireless Enhanced 911 Service, Fourth Memorandum Opinion and Order.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, state, local or tribal government and individuals or household.

Number of Respondents: 2,500.

Estimated Time per Response: 3 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 7,500 hours.

Total Annual Cost: N/A.

Needs and Uses: The Fourth Memorandum Opinion and Order (MO&O) responded to petitions for reconsideration of certain aspects of the Third Report and Order (R&O) in this proceeding concerning establishment of a nationwide wireless enhanced 911 emergency communications service. This decision revised, among other things, the deployment schedule that must be followed by wireless carriers that choose to implement E911 service using a handset-based technology. The public burden involves guidelines for filing successful requests for waiver of the E911 Phase II rules. Also, an existing approved burden is slightly changed (but not resubmitted) by extending the deadline for filing reports.

OMB Control Number: 3060–0975.

Title: Promotion of Competitive Networks in Local Telecommunications Markets Multiple Environments (47 C.F.R. Parts 1, 64 & 68).

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, Federal government, State, local or tribal government and individuals or household.

Number of Respondents: 6,421.

Estimated Time per Response: .50–120 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Total Annual Burden: 623,910 hours.

Total Annual Cost: N/A.

Needs and Uses: This collection involves information regarding the location of the demarcation point, antennas placed on subscriber premised, and the state of the market. This information will be used to foster competition in local telecommunications markets by ensuring that competing telecommunications providers are able to provide services to customers in multiple tenant environments. The Commission is seeking an extension (no change) to obtain the full three year OMB clearance.

OMB Control Number: 3060–0979.

Title: Spectrum Audit Letter.

Form No.: N/A.

Type of Review: Revision of currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, State, local or tribal government and individuals or household.

Number of Respondents: 310,000.

Estimated Time per Response: .50 hours.

Frequency of Response: One time reporting requirement.

Total Annual Burden: 155,000 hours.

Total Annual Cost: N/A.

Needs and Uses: The information collected is required for audits of the construction/buildout requirements and/or operational status of various Wireless Radio services in the Commission's licensing database that are subject to rule-based construction/buildout and operational requirements. The Commission's rules for these radio services require construction/buildout within a specified timeframe and require a station to remain operational in order for the license to remain valid.

The Commission is revising this information collection to reflect that automation of the audit process will increase electronic filing from 20% to 80% and reduce the cost to the government.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–5269 Filed 3–8–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval.

February 23, 2004.

SUMMARY: The Federal Communications Commissions, 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, as required by the Paperwork Reduction Act 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 comments should be submitted on or before April 8, 2004. 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 comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov* or Kristy L. LaLonde, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3562 or via Internet at *Kristy_L._LaLonde@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–1040.

Title: Broadcast Ownership Rules, MB Docket No. 02–277 and MM Docket Nos. 02–235, 02–327, and 00–244.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 12.

Estimated Time per Response: 2–10 hours.

Frequency of Response: One-time reporting requirement.

Total Annual Burden: 12 hours.

Total Annual Cost: None.

Needs and Uses: On June 2, 2003, the Commission adopted a Report and Order and Notice of Proposed Rulemaking (R&O), *In the Matter of 2002 Biennial Regulatory Review—*

Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 02–277, *Cross Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01–235, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01–317, *Definition of Radio Markets*, MM Docket No. 00–244, and *Definition of Radio Markets for Areas Not Located in an Arbitron Survey Areas Not Located in an Arbitron Survey Area*, MB Docket No. 03–130, FCC 03–127. That R&O contained several one-time reporting requirements which were outside of form collections, affecting licensees with: temporary waivers, conditional waivers, pending waiver requests, extensions of waiver, or requests for permanent waivers of the broadcast ownership rules. These reporting requirements were adopted to ensure compliance with the new broadcast ownership rules and to ensure the rules' effectiveness.

OMB Control Number: 3060–1032.

Title: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment, CS Docket No. 97–80 and PP Docket No. 00–67.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 587.

Estimated Time per Response: 30 seconds to 40 hours.

Frequency of Response: Recordkeeping; On occasion reporting requirements; Third party disclosure.

Total Annual Burden: 72,402 hours.

Total Annual Costs: None.

Needs and Uses: On October 9, 2003, the FCC released the Second Report and Order and Second Further Notice of Proposed Rulemaking (2nd R&O), *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97–80, PP Docket No. 00–67, FCC 03–225, the Commission adopted final rules that set technical and other criteria that manufacturers would have to meet in order to label or market unidirectional digital cable televisions and other unidirectional digital cable products as "digital cable ready." This regime includes testing and self-certification standards, certification recordkeeping requirements, and consumer information disclosures in appropriate post-sale materials that describe the functionality of these devices and the need to obtain a security module from their cable operator. To the extent manufacturers have complaints regarding the certification process, they may file formal complaints with the Commission. In addition, should manufacturers have complaints regarding administration of the Dynamic Feedback Arrangement Scrambling Technique or DFAST license which governs the scrambling technology needed to build unidirectional digital cable products, they may also file complaints with the FCC. The 2nd R&O also prohibits MVPDs from encoding content to activate selectable output controls on unidirectional digital cable products, or the down-resolution of unencrypted broadcast television programming. MVPDs are also limited in the levels of copy protection that could be applied to various categories of programming. As a part of these encoding rules is a petition process for new services within existing business models, a PR Newswire Notice relating to initial classification of new business models, and a complaints process for disputes regarding new business models.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–5270 Filed 3–8–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting

Date: March 4, 2004.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, March 11, 2004, which is scheduled to commence at 9:30 a.m. in Room TW-C305, at 445 12th Street, SW., Washington, DC.

Item no.	Bureau	Subject
1	Consumer & Governmental Affairs	*Title:* Policy and Rules Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; and Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Docket No. 02–278). *Summary:* The Commission will consider a Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking concerning rules to protect consumers from unwanted mobile service commercial messages under the CAN-SPAM Act and possible revisions to the TCPA rules involving the national do-not-call registry, respectively.
2	International	*Title:* International Settlements Policy Reform (IB Docket No. 02–324); and International Settlement Rates (IB Docket No. 96–261). *Summary:* The Commission will consider a Report and Order to reform existing international regulatory policies governing the relationship between U.S. and foreign carriers in the provision of services over U.S. international routes.
3	Wireline Competition	*Title:* Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates (WC Docket No. 03–228); Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation, and Maintenance Conditions Contained in the SBC/Ameritech Merger Order (CC Docket Nos. 96–149 and 98–141); Petition of BellSouth Corporation for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2)–(3) of the Commission's Rules (CC Docket No. 96–149); and Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services (CC Docket No. 01–337). *Summary:* The Commission will consider a Report and Order and Memorandum Opinion and Order concerning the Commission's rules implementing the Section 272(b)(1) "operate independently" requirement.
4	Consumer & Governmental Affairs	*Title:* Rules and Regulations Implementing Minimum Customer Account Record Exchange Obligations on All Local and Interexchange Carriers.

Item no.	Bureau	Subject
5	Wireline Competition	*Summary:* The Commission will consider a Notice of Proposed Rulemaking concerning whether the Commission should impose mandatory minimum Customer Account Record Exchange ("CARE") obligations on all local and interexchange carriers. *Title:* Inquiry Concerning the Development of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996. *Summary:* The Commission will consider a Notice of Inquiry concerning the deployment of advanced telecommunications capability for all Americans pursuant to Section 706 of the Telecommunications Act of 1996.

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322.

Audio/Video coverage of the meeting will be broadcast live over the Internet from the FCC's Audio/Video Events Web page at *www.fcc.gov/realaudio.*

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to *www.capitolconnection.gmu.edu.* Audio and video tapes of this meeting can be purchased from CACI Productions, 341 Victory Drive, Herndon, VA 20170, (703) 834–1470, Ext. 19; Fax (703) 834–0111.

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Qualex International (202) 863–2893; Fax (202) 863–2898; TTY (202) 863–2897. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio tape. Qualex International may be reached by e-mail at *Qualexint@aol.com.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–5415 Filed 3–5–04; 3:46 pm]

BILLING CODE 6712–01–U

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10 a.m. on Wednesday, March 10, 2004, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous Board of Directors' meetings.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

Discussion Agenda: Memorandum and resolution re: notice of proposed rulemaking: Part 324—Transactions with Affiliates, and Part 303—Filing Procedures.

Memorandum and resolution re: proposed revisions to guidelines for appeals of material supervisory determinations and proposed guidelines for appeals of deposit insurance assessment determinations.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street, NW., Washington, DC.

The FDIC will provide attendees with auxiliary aids (*e.g.*, sign language interpretation) required for this meeting. Those attendees needing such assistance should call (202) 416–2089 (Voice); (202) 416–2007 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898–7043.

Federal Deposit Insurance Corporation.

Dated: March 3, 2004.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E4–480 Filed 3–8–04; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the previously announced meeting of the Board of Directors scheduled to be held on Wednesday, March 10, 2004, at 10 a.m. has been rescheduled for 8:30 a.m. that same day.

No earlier notice of the change in time of this meeting was practicable.

Dated: March 5, 2004.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E4–507 Filed 3–8–04; 12:45 pm]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION.

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 9 a.m. on Wednesday, March 10, 2004, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, pursuant to sections 552b(c)(2), (c)(6), (c)(8), and (c)(9)(A)(ii) of title 5, United States Code, to consider matters relating to the Corporation's corporate, supervisory, and personnel activities.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street, NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898-7043.

Dated: March 5, 2004.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E4–508 Filed 3–8–04; 12:45 pm]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

DATE AND TIME: Thursday, March 11, 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: Eligibility Report—Rev. Alfred C. Sharpton/Sharpton 2004

PERSON TO CONTACT FOR INFORMATION: Robert Biersack, Acting Press Officer, Telephone (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 04–5342 Filed 3–5–04; 11:12 am]

BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than March 23, 2004.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. Marla Marantz, Springfield, Missouri, Natalie Marantz, Jennifer Marantz, Gregory Marantz, and Melissa Hayner, all of Springfield, Illinois, to retain their existing ownership of Staun Bancorp, Inc., Staunton, Illinois, and thereby become members of the Marantz Family control group. The Marantz Family control group consists of the aforementioned individuals, Tom E. Marantz and the Marantz Investments, L.P., both of Springfield, Illinois.

Board of Governors of the Federal Reserve System, March 3, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–5251 Filed 3–8–04; 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 April 2, 2004.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106–2204:

1. Seacoast Financial Services Corporation, New Bedford, Massachusetts; to acquire 100 percent of the voting shares of, and thereby merge with Abington Bancorp, Inc., Weymouth, Massachusetts, and thereby indirectly acquire voting shares of Abington Savings Bank, Abington, Massachusetts.

B. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. Capital One Financial Corporation, McLean, Virginia; to become a bank holding company by acquiring 100 percent of the voting shares of Capital One Bank, Glen Allen, Virginia.

In connection with this application, Applicant also has applied to acquire Capital One, F.S.B., McLean, Virginia, and thereby engage in operating a federal savings association, pursuant to section 225.28(b)(4)(ii) of Regulation Y; and thereby indirectly acquire Capital One Auto Finance, Inc., Plano, Texas, and thereby engage in automobile financing, including direct loans and sales finance contracts, and in servicing of those loans, pursuant to section 225.28(b)(1) of Regulation Y; North Hill Advisors, Inc., Boston, Massachusetts, and thereby engage in providing investment management and advisory services, pursuant to section 225.28(b)(6)(i) of Regulation Y; New Moon, LLC, Plano, Texas, and thereby engage in facilitating sales of motor vehicle receivables to third parties, pursuant to section 225.28(b)(1) of Regulation Y; The Westmoreland Agency, Inc., Boise, Idaho, and thereby engage in debt collection, pursuant to section 225.28(b)(2)(iv) of Regulation Y; AmeriFee LLC, Southboro, Massachusetts, and thereby engage in consumer finance activities, pursuant to section 225.28(b)(1) of Regulation Y; COSI Receivables Management, Inc., McLean, Virginia, and thereby engage in holding liquidating balances of consumer installment loan receivables, pursuant to section 225.28(b)(1) of Regulation Y; and Community Historic Credit Fund V Limited Partnership, Raleigh, North Carolina, and thereby engage in making investments in entities that own or lease properties eligible to claim federal historic tax credits, pursuant to section 225.28(b)(12)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, March 3, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–5249 Filed 3–8–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged In Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity

that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 23, 2004.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Community Bancshares, Inc., Blountsville, Alabama; to engage *de novo* through its subsidiary, Community Funding Corporation, Blountsville, Alabama, in making acquiring, brokering, or servicing loans or other extension of credit, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, March 3, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.04–5250 Filed 3–8–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Employee Thrift Advisory Council; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), a notice is hereby given of the following committee meeting:

Name: Employee Thrift Advisory Council.
Time: 10 a.m.
Date: March 24, 2004.
Place: 4th Floor, Conference Room, Federal Retirement Thrift Investment Board, 1250 H Street, NW., Washington, DC.
Status: Open.
Matters to be Considered:
1. Approval of the minutes of the September 23, 2003, meeting.
2. Report of the Executive Director on Thrift Savings Plan status.
3. Pending loan program changes.
4. "Life" funds.
5. Status of parallel call center.
6. Legislation.
7. New business.

FOR FURTHER INFORMATION CONTACT: Elizabeth S. Woodruff, Committee Management Officer, on (202) 942–1660.

Dated: March 4, 2004.

Elizabeth S. Woodruff,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 04–5275 Filed 3–8–04; 8:45 am]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0302]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Certain Biologics Labeling

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Certain Biologics Labeling" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 31, 2003 (68 FR 62084), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0527. The approval expires on February 28, 2007. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets.*

Dated: March 2, 2004.

Jeffery Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–5192 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0379]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by April 8, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition

FDA's regulation in 21 CFR 25.20 specifies the types of actions related to food additive petitions, color additive petitions, requests for exemption from regulation as a food additive under § 170.39 (21 CFR 170.39), notifications for food contact substances under section 409(h) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(h)), generally recognized as safe (GRAS) affirmation petitions, and citizen petitions for certain food labeling regulations that require at least

the preparation of an environmental assessment (EA), unless the action qualifies for a categorical exclusion under 21 CFR 25.30 or 25.32. FDA's regulations in part 25 (21 CFR part 25) are based upon the requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*). The agency's collection of information on food additives and food-contact substances is based upon the requirements in section 409 of the act. Likewise, section 721 of the act (21 U.S.C. 379(e)) provides for the collection of information on color additives. The submission to FDA by interested parties of a GRAS affirmation petition is voluntary. The information to be submitted with a GRAS affirmation petition is listed in §170.35 (21 CFR 170.35), including, in § 170.35(c)(1)(viii), the environmental information to be submitted. The environmental information to be submitted with petitions for certain food labeling regulations is listed in 21 CFR 101.12(h)(12) and 101.69(h) and in paragraph F of the form for petitions for a health claim in 21 CFR 101.70(f).

Thus, FDA collects information on the potential for environmental impacts of its actions in the form of environmental assessments and claims for categorical exclusions from interested parties who request agency action by submitting to the agency any of the above listed petitions, requests for exemption, or food contact substance notifications. After this information has been collected, the agency will use it to determine whether its action may significantly affect the quality of the human environment.

FDA has collected information from interested parties requesting agency action for many years. Over the years, this collected information has taken several different forms. The agency amended its environmental regulations in the 1997 rule to reduce the number of NEPA evaluations by providing for categorical exclusions for additional classes of actions that do not individually or cumulatively have a significant affect on the quality of the human environment. In the 1997 rule, FDA also removed the formats for EAs from its regulations and, instead, now directs interested parties to the agency's centers for information on what is needed in EAs. This draft guidance is FDA's current thinking on what information is needed for the environmental documentation of the actions that are most often requested. The draft guidance contains requests for certain information that has not been requested routinely in the past. FDA is now requesting that submitters provide certain information to support their claims that the categorical exclusions listed in §25.32(i), (o), and (q) will be applicable to their requested actions. Since these informational requests are new, FDA is requesting approval from OMB for this collection of information. The remainder of the environmental information requests are covered by the information collection approvals for the underlying actions, i.e., the OMB control number for food additive petitions is 0910–0016; for color additive petitions, 0910–0185; for requests for exemption from regulation as a food additive under § 170.39, 0910–0298; for notifications for food contact substances, 0910–0480; for GRAS affirmation petitions, 0910–0132; and for petitions for food labeling regulations, 0910–0183.

Description of Respondents: The likely respondents include businesses engaged in the manufacture or sale of food, food ingredients, and substances used in materials that come into contact with food.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
25.32(i)	68	2	136	1	136
25.32(o)	1	1	1	1	1
25.32(q)	5	2	10	1	10
Total					147

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

The above estimates for respondents and numbers of responses are based on the annualized numbers of petitions and notifications qualifying for §25.32(i) and (q) that the agency has received since its environmental regulations were amended to include additional categorical exclusions. Please note that, since the agency revised its environmental regulations, there have been no submissions that requested an action that would have been subject to the categorical exclusion in §25.32(o). To avoid counting this burden as zero, we have estimated the burden for this categorical exclusion at one respondent making one submission a year for a total of one annual submission. The hours per response values were estimated as follows: First, we assumed that the new information requested in this guidance for each of these three categorical exclusions is readily available to the submitter. For the new information requested for the exclusion in §25.32(i), we expect that submitter will need to gather information from appropriate persons in the submitter's company and to prepare this information for attachment to the claim for categorical exclusion. We believe that this effort should take no longer than 1 hour per submission. For the new information requested for the exclusions in §25.32(o) and (q), the submitters will almost always merely need to copy existing documentation and attach it to the claim for categorical exclusion. We believe that collecting this information should also take no longer than 1 hour per submission.

Dated: March 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–5193 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0508]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Focus Groups as Used by the Food and Drug Administration

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by April 8, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Focus Groups as Used by the Food and Drug Administration—(OMB Control Number 0910–0497)—Extension

FDA will collect and use information gathered through the focus group vehicle. This information will be used to develop programmatic proposals, and as such, compliments other important research findings to develop these proposals. Focus groups do provide an important role in gathering information because they allow for a more in-depth understanding of consumers' attitudes, beliefs, motivations, and feelings than do quantitative studies.

Also, information from these focus groups will be used to develop policy and redirect resources, when necessary, to our constituents. If this information is not collected, a vital link in information gathering by FDA to develop policy and programmatic proposals will be missed causing further delays in policy and program development.

FDA estimates the burden for completing the forms for this collection of information in table 1 of this document.

The total annual estimated burden imposed by this collection of information is 2,830 hours annually.

In the **Federal Register** of November 24, 2003 (68 FR 65938), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Center	Subject	No. of Focus Groups per Study	No. of Focus Groups Sessions Conducted Annually	No. of Participants per Group	Hours of Duration for Each Group (includes screening)	Total Hours
Center for Biologics Evaluation and Research	May use focus groups when appropriate	1	5	9	1.58	71
Center for Drug Evaluation and Research	Varies (e.g., direct-to-consumer Rx drug promotion, physician labeling of Rx drugs, medication guides, over-the-counter drug labeling, risk communication	10	100	9	1.58	1,422
Center for Devices and Radiological Health	Varies (e.g., FDA Seal of Approval, patient labeling, tampons, on-line sales of medical products, latex gloves	4	16	9	2.08	300
Center for Food Safety and Applied Nutrition	Varies (e.g., food safety, nutrition, dietary supplements, consumer education)	8	40	9	1.58	569
Center for Veterinary Medicine	Varies (e.g., animal nutrition, supplements, labeling of animal Rx)	5	25	9	2.08	468
Total		28	186		1.78	2,830

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Annually, FDA projects about 28 focus group studies using 186 focus groups lasting an average of 1.78 hours each. FDA has allowed burden for unplanned focus groups to be completed so as not to restrict the agency's ability to gather information on public sentiment for its proposals in its regulatory as well as other programs.

Dated: March 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–5194 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0079]

Agency Information Collection Activities; Proposed Collection; Comment Request; Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Addition of "Geriatric Use" Subsection in the Labeling

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the "Geriatric Use" subsection in the labeling for human prescription drugs.

DATES: Submit written or electronic comments on the collection of information by May 10, 2004.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Addition of "Geriatric Use" Subsection in the Labeling (OMB Control Number 0910–0370)—Extension

Section 201.57(f)(10) (21 CFR 201.57(f)(10)) requires that the "Precautions" section of prescription drug labeling must include a subsection on the use of the drug in elderly or geriatric patients (aged 65 and over). The information collection burden imposed by this regulation is necessary to facilitate the safe and effective use of prescription drugs in older populations. The geriatric use subsection enables physicians to more effectively access geriatric information in physician prescription drug labeling.

Section 201.57(f)(10) requires that a specific geriatric indication, if any, that is supported by adequate and well-controlled studies in the geriatric population must be described under the "Indications and Usage" section of the labeling, and appropriate geriatric dosage must be stated under the "Dosage and Administration" section of the labeling. The "Geriatric use" subsection must cite any limitations on the geriatric indication, need for specific monitoring, specific hazards associated with the geriatric indication, and other information related to the safe and effective use of the drug in the geriatric population. The data summarized in this subsection of the labeling must be discussed in more detail, if appropriate, under "Clinical Pharmacology" or the "Clinical Studies" section. As appropriate, this information must also be contained in "Contraindications," "Warnings," and elsewhere in "Precautions." Specific statements on geriatric use of the drug for an indication approved for adults generally, as distinguished from a specific geriatric indication, must be contained in the "Geriatric use" subsection and must reflect all information available to the sponsor that is relevant to the appropriate use of the drug in elderly patients. These statements are described further in § 201.57(f)(10).

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
201.57(f)(10)—new drug applications (NDAs)	73	1.48	108	8	864

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
201.57(f)(10)—abbreviated new drug applications (ANDAs)	96	4.67	449	2	898
Total					1,762

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: March 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–5195 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0542]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Premarket Notification Submissions

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by April 8, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Premarket Notification 510(k) Submissions—21 CFR Part 807 (OMB Control Number 0910–0120)—Extension

Section 510(k) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360(k)) requires a person who intends to market a medical device to submit a 510(k) submission to FDA at least 90 days before proposing to begin the introduction, or delivery for introduction into interstate commerce, for commercial distribution of a device intended for human use. The definition of "person" has been expanded to include hospitals who re-use or re-manufacture single-use medical devices. The Medical Device User Fee and Modernization Act of 2002 (MDUFMA) (Public Law 107–250), added section 510(o) to the act to establish new regulatory requirements for reprocessed single-use devices (SUDs) (section 302(b) of MDUFMA, section 510(o) of the act). MDUFMA was signed into law on October 26, 2002. Section 301(b) of MDUFMA adds new requirements for reprocessed SUDs to section 510 of the act. The estimated submissions below include those submitted by hospitals re-manufacturing single-use medical devices.

Section 510(k) of the act allows for exemptions to the 510(k) submissions, i.e., a 510(k) submission would not be required if FDA determines that premarket notification is not necessary for the protection of the public health, and they are specifically exempted through the regulatory process. Under 21 CFR 807.85, "Exemption from premarket notification," a device is exempt from premarket notification if the device intended for introduction into commercial distribution is not generally available in finished form for purchase and is not offered through labeling and advertising by the manufacturer, importer, or distributor for commercial distribution. In addition, the device must meet one of the following conditions: (1) It is intended for use by a patient or dentist (or other specially qualified persons), or (2) it is intended solely for use by a physician or dentist and is not generally available to other physicians or dentists.

A commercial distributor who places a device into commercial distribution for the first time under their own name and a repackager who places their own name on a device and does not change any other labeling or otherwise affect the device, shall be exempted from premarket notification if the device was legally in commercial distribution before May 28, 1976, or a premarket notification was submitted by another person.

One of MDUFMA's provisions requires the submission of validation data specified in the statute for certain reprocessed SUDs (as identified by FDA) such as cleaning and sterilization data, and functional performance data. FDA offers a guidance document to assist reprocessors of single use devices in submitting MDUFMA mandated validation data for the devices.

MDUFMA requires that FDA review the types of reprocessed SUDs not subject to premarket notification requirements and identify which of these devices require the submission of validation data to ensure their substantial equivalence to predicate devices. MDUFMA also requires that FDA review critical and semi-critical reprocessed SUDs that are currently exempt from premarket notification requirements and determine which of these devices require the submissions of 510(k)s to ensure their substantial equivalence to predicate devices. Under MDUFMA, FDA will use the validation data submitted for a reprocessed SUD to determine whether the device will remain substantially equivalent in terms of safety and effectiveness to its predicate after the maximum number of times the device is reprocessed as intended by the person submitting the premarket notification.

The information collected in a premarket notification is used by the medical, scientific, and engineering staffs of FDA in making determinations as to whether or not devices can be allowed to enter the U.S. market. The premarket notification review process

allows for scientific and/or medical review of devices, subject to section 510(k) of the act, to confirm that the new devices are as safe and as effective as legally marketed predicate devices. This review process, therefore, prevents potentially unsafe and/or ineffective devices, including those with fraudulent claims, from entering the U.S. market.

This information will allow FDA to collect data to ensure that the use of the device will not present an unreasonable risk for the subject's rights. The respondents to this information collection will primarily be medical device manufacturers and businesses.

FDA Form 3514 was developed to assist respondents in categorizing 510(k) data for submission to FDA. This form also assists respondents in organizing and submitting data for other FDA medical device programs such as premarket approval applications, investigational device exemptions, and humanitarian device exemptions.

FDA estimates the burden of this collection of information to be as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	Form No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
807 Subpart E (807.81 & 807.87–510(k))		4,000	1	4,000	80	320,000
	FDA 3514	2,000	1	2,000	.5	1,000
Submission of Validation Data (2003)		20	5	100	40	28,000
Totals						349,000

[1]There are no capitol costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN [2]

21 CFR Section	Form No.	No. of Record-keepers	Annual Frequency per Record-keeping	Total Annual Records	Hours per Record-keeper	Total Hours
807.93		2,000	10	20,000	.5	10,000
Totals						10,000

[2] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA has based these estimates on conversations with industry and trade association representatives, and from internal review of the documents listed in tables 1 and 2 of this document.

The total burden for using voluntary FDA Form 3514 is estimated to be approximately 1,000 hours and has been included in this collection of information. Once this collection of information has been approved, the burden for FDA Form 3514 will be reported and approved in each of the following OMB information collections: (1) Investigational device exemption reports and records (OMB control number 0910–0078), (2) premarket approval of medical devices OMB control number 0910–0231), and (3) medical devices, humanitarian devices (OMB control number 0910–0332).

Dated: March 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–5196 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0222]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Product Jurisdiction: Assignment of Agency Component for Review of Premarket Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Product Jurisdiction: Assignment of Agency Component for Review of Premarket Applications" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 15, 2003 (68 FR 53980), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0523. The approval expires on February 28, 2007. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets.*

Dated: March 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–5240 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Docket No. [2004N–0089]

Antimicrobial Drug Development; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop, cosponsored with the Infectious Diseases Society of America (IDSA) and the International Society of Anti-Infective Pharmacology (ISAP), regarding clinical trial design of antimicrobial agents. The public workshop is intended to provide information for and gain perspectives from advocacy groups, interested health care providers, academia, and industry organizations on various aspects of antimicrobial drug development, including a discussion of microbiological surrogate endpoints in clinical trials to evaluate treatments of infectious diseases and issues regarding dose selection in the drug development process for antimicrobials. The input from this public workshop will help to develop topics for further exploration.

Date and Time: The public workshop will be held on Thursday, April 15, 2004, and Friday, April 16, 2004, from 9 a.m. to 5 p.m.

Location: The public workshop will be held in the Center for Drug Evaluation and Research Advisory Committee conference room, 5630 Fishers Lane, rm. 1066, Rockville, MD. Seating is limited and available only on a first-come, first-served basis. Please note there is very limited parking in the vicinity of 5630 Fishers Lane, but it is near the Twinbrook Metro station. Please bring picture identification in order to clear building security.

Contact Person: John Powers or Leo Chan, Center for Drug Evaluation and Research (HFD–104), Food and Drug Administration, 9201 Corporate Blvd., Rockville, MD 20850, 301–827–2350.

Registration: Because seating is limited, we are asking interested persons to register on a first-come, first-served basis. To register electronically, e-mail registration information (including name, title, organization, address, telephone, fax number, and e-mail address) to *antimicrobial@cder.fda.gov* by April 7, 2004. Persons without access to the Internet may call 301–827–2350 to register. There is no registration fee for the public workshop. Space is limited; therefore, interested parties are encouraged to register early.

Persons needing a sign language interpreter or other special accommodations should notify the contact person at least 7 days in advance.

SUPPLEMENTARY INFORMATION: FDA is announcing a public workshop, cosponsored with IDSA and ISAP, regarding antimicrobial drug development. This public workshop will focus on general considerations in designing clinical trials for antimicrobial products. Additional topics include the utility of microbiological surrogate endpoints in clinical trials to evaluate treatments of infectious diseases and issues regarding dose selection in the drug development process for antimicrobials.

The agency encourages individuals, patient advocates, industry, consumer groups, health care professionals, researchers, and other interested persons to attend this public workshop.

Transcripts: You may request a copy of the transcript in writing from the Freedom of Information Staff (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 12A–16, Rockville, MD 20857, approximately 20 working days after the public workshop at a cost of 10 cents per page. You may also examine the transcript Monday through Friday between 9 a.m. and 4 p.m. in the Division of Dockets Management Public Reading Room, Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and on the Internet at *http://www.fda.gov/ohrms/dockets/dockets.htm*.

Dated: March 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–5191 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Blood Products Advisory Committee; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an amendment to the notice of meeting of the Blood Products Advisory Committee. This meeting was announced in the **Federal Register** of February 25, 2004 (69 FR 8666). The amendment is being made to reflect a change in the *Location* portion of the document. The street address of the hotel was originally posted as 2 Montgomery Ave. The correct street address is 2 Montgomery Village Ave. There are no other changes.

FOR FURTHER INFORMATION CONTACT: Linda A. Smallwood, Center for Biologics Evaluation and Research (HFM–302), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–3514.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of February 25, 2004, FDA announced that a meeting of the Blood Products Advisory Committee would be held on March 18 and 19, 2004. On page 8666, in the first column, the *Location* portion of the document is amended to read as follows:

Location: Holiday Inn, Gaithersburg, 2 Montgomery Village Ave., Gaithersburg, MD 20877.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to the advisory committees.

Dated: March 3, 2004.

Peter J. Pitts,

Associate Commissioner for External Relations.

[FR Doc. 04–5239 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0553]

Draft Guidance for Industry on Vaccinia Virus—Developing Drugs to Mitigate the Complications Associated With Vaccinia Virus Used for Smallpox Vaccination; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled "Vaccinia Virus—Developing Drugs to Mitigate the Complications from Smallpox Vaccination." In this draft guidance, FDA provides recommendations on the development of drugs to be used to treat complications that may occur from smallpox vaccination with vaccinia virus. This draft guidance is intended to help research sponsors plan and design appropriate nonclinical and clinical studies during the development of these drugs.

DATES: Submit written or electronic comments on the draft guidance by May 10, 2004. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Lewis Schrager, Center for Drug Evaluation and Research (HFD–970), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7265, or Debra Birnkrant, CDER (HFD–530) 301–827–2330.

Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–6210; or

Steve Gutman, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 301–594–3084.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Vaccinia Virus—Developing Drugs to Mitigate the Complications from Smallpox Vaccination." This draft guidance provides recommendations on the development of drugs to be used to treat complications that may occur from smallpox vaccination with vaccinia virus. The study of vaccinia complications poses challenges in drug development, such as sparse human data. Therefore, this draft guidance focuses on the design and characterization of animal models and of clinical trials and on the use of combinations of animal and human data. In addition, this draft guidance addresses data collection encompassing both preterrorism event controlled vaccination and postterrorism event emergent vaccination. It also addresses the collection of long-term and special population safety data.

This level 1 draft guidance is being issued consistent with FDA's good guidance practice regulation (21 CFR 10.115). The guidance represents the agency's current thinking on developing drugs to mitigate the complications associated with vaccinia virus used for smallpox vaccination. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes or regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the draft guidance. Two copies of mailed comments are to be submitted, 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 draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain this document at either *http://www.fda.gov/cder/guidance/index.htm*, *http://www.fda.gov/cber/guidelines.htm*, or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: March 2, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–5241 Filed 3–8–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; The National Diabetes Education Program Comprehensive Evaluation Plan

Summary: Under provisions of section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on September 9, 2003, pages 53176–53177, and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institute of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: The National Diabetes Educations Program Comprehensive Evaluation Plan. *Type of Information Collection Request:* New. *Need and Use of Information Collection:* The National Diabetes Education Program (NDEP) is a partnership of the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC) and more than 200 public and private organizations. The long-term goals of the NDEP are to improve the treatment and health outcomes of people with diabetes, to promote early diagnosis, and, ultimately, to prevent the onset of diabetes. The NDEP objectives are: (1) To increase awareness of the seriousness of diabetes, its risk factors, and strategies for preventing diabetes and its complications among people at risk for diabetes; (2) to improve understanding about diabetes and its control and to promote better self-management behaviors among people with diabetes; (3) to improve health care providers' understanding of diabetes and its control and to promote an integrated approach to care; (4) to promote health care policies that improve the quality of and access to diabetes care.

Multiple strategies have been devised to address the NDEP objectives. These have been described in the NDEP Strategic Plan and include: (1) Creating partnerships with other organizations concerned about diabetes; (2) developing and implementing awareness and education activities with special emphasis on reaching the racial and ethnic populations disproportionately affected by diabetes; (3) identifying, developing, and disseminating educational tools and resources for the program's diverse audiences; (4) promoting policies and activities to improve the quality of and access to diabetes care.

The NDEP evaluation will document the extent to which the NDEP program has been implemented, and how successful it has been in meeting program objectives. The evaluation relies heavily on data gathered from existing national surveys such as National Health and Nutrition Examination Survey (NHANES), the National Health Interview Survey

(NHIS), the Behavioral Risk Factor Surveillance System (BRFSS), among others for this information. This generic clearance request is for the collection of additional primary data from NDEP target audiences on some key process and impact measures that are necessary to effectively evaluate the program. Approval is requested for up to 4 surveys of audiences targeted by the National Diabetes Education Program including people at risk for diabetes, people with diabetes and their families, health care providers, payers and purchasers of health care and health care system policy makers.

Frequency of Response: On occasion. *Affected Public:* Individuals or households; businesses or other for-profit organizations; not-for-profit institutions; Federal government; and State, local or tribal government. *Type of Respondents:* Adults. The annual reporting burden is as follows:

Estimated Number of Respondents: 2200, *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours Per Response:* .25; and *Estimated Total Annual Burden Hours Requested:* 200. The annualized cost to respondents is estimated at $5,437.50. There are not Capital Costs to report. There are no Operating or Maintenance Costs to report.

ESTIMATES OF HOUR BURDEN

Type of respondents	Number of respondents	Frequency of response	Average time per response	Total hour burden
Patients and their family members	1000	1	.25	250
People at risk for diabetes	600	1	.25	150
Physicians or other health care providers	600	1	.25	150
Heath care systems	200	1	.25	50
Totals	2,200			600

COST TO RESPONDENTS

Type of respondents	Number of respondents	Frequency of response	Hourly wage rate	Respondent cost
Patients and their family members	1000	1	$20.00	$5,000.00
People at risk for diabetes	600	1	20.00	3,000.00
Physicians or other health care providers	600	1	75.00	11,250.00
Health care system	200	1	50	2,500.00
Total				$21,750.00

(**Note:** On an annual basis, the average number of respondents is 800; the average number of hours is 200 and the average annual respondent cost is $5,437.50)

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and aassumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimze the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments To OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Joanne Gallivan, M.S., R.D., Director, National Diabetes Education Program, NIDDK, NIH, Building 31, Room 9A04, 31 Center Drive, Bethesda, MD 20892, or call non-toll-free number 301–494–6110 or E-mail your request, including your address to: *Joanne—Gallivan@nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

Dated: February 26, 2004.

Barbara Merchant,

Executive Officer, NIDDK, National Institutes of Health.

[FR Doc. 04–5298 Filed 3–8–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by contacting Brenda Hefti, Ph.D., Technology Licensing Specialist, Office

of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/435–4632; fax: 301/402–0220; e-mail: *heftib@mail.nih.gov*. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

LMB–2, An Immunotoxin That Shows Efficacy in Phase I Clinical Trials in Treating Patients With Chemotherapy-Resistant Hairy Cell Leukemia and Other Hematologic Malignancies

A number of patents and patent applications cover this technology, including but not limited to:

"Reduction of the nonspecific animal toxicity of immunotoxins by mutating the framework regions of the Fv to lower the isoelectric point," PCT/US01/43602, by Pastan, Onda, Nagata, Tsutsumi, Vincent, Kreitman, Vasmatzis, and Lee. (DHHS Ref. E–146–1999/0); and

"Recombinant antibody-toxin fusion protein," PCT/US90/02097, U.S. Patents 6,051,405, 5.863,745, and 5,696,237, by Fitzgerald, Chaudhary, Pastan, and Waldmann. (DHHS Ref. E–135–1989/0)

The invention provides a recombinant immunotoxin, LMB–2 [anti-Tac(Fv)–PE38], that has been used in Phase I trials to treat hematologic malignancies. The antibody portion of the immunotoxin is an Fv fragment (antigen-binding fragment) of the anti-Tac antibody, and it is fused to truncated Pseudomonas Exotoxin (PE38). This immunotoxin has been used in a Phase I clinical trial (Kreitman *et al.*, 2000; J Clin Oncol 18:1622–1636). Thirty five (35) patients with CD25-expressing hematologic malignancies, for whom standard and salvage therapies failed, were treated with LMB–2. All four patients with hairy cell leukemia (HCL) responded to treatment, and one patient achieved a complete remission that lasted for more than 20 months. Seven partial responses were observed; including responses in patients with cutaneous T-cell lymphoma (one patient), HCL (three patients), chronic lymphocytic leukemia (one patient), Hodgkin's disease (one patient), and adult T-cell leukemia (one patient). Responding patients had 2- to 5-log reductions of circulating malignant cells, improvement in skin lesions, and regression of lymphomatous masses and splenomegaly.

Several improvements on the original immunotoxin have been made (and are also the subject of patents and patent applications). One is the replacement of the single chain Fv with a more stable disulfide stabilized Fv. Another is recombinant immunotoxins that have been modified from a parental immunotoxin to lower liver toxicity. Still another discloses a polyethylene glycol modified form that is less immunogenic and has a longer half life in animals.

BL22, An Immunotoxin That Shows Efficacy in Clinical Trials in Treating Patients With Chemotherapy-Resistant Hairy Cell Leukemia, and Ha22, a Newly Engineered Immunotoxin, Which Shows Improved Cytotoxic Activity Over BL22

A number of patents and patent applications cover this technology, including but not limited to:

"Reduction of the nonspecific animal toxicity of immunotoxins by mutating the framework regions of the Fv to lower the isoelectric point," PCT/US01/43602, by Pastan, Onda, Nagata, Tsutsumi, Vincent, Kreitman, Vasmatzis, and Lee. (DHHS Ref. E–146–1999/0);

"Immunotoxin containing a disulfide-stabilized antibody fragment joined to a Pseudomonas Exotoxin that does not require proteolytic activation," PCT/US94/06678, by Pastan and Kuan. (DHHS Ref. E–163–1993/0,1);

"Recombinant antibody-toxin fusion protein," PCT/US90/02097, U.S. Patents 6,051,405, 5.863,745, and 5,696,237, by Fitzgerald, Foudhary, Pastan, and Waldmann. (DHHS Ref. E–135–1989/0); and

"PEGylation of linkers improves antitumor activity and decreases toxicity of immunoconjugates," PCTUS01/18503, by Pastan, Tsutsumi, Onda, Nagata, Lee and Kreitman. (DHHS Ref. E–216–2000/2)

The invention provides recombinant immunotoxins one of which has been used in a clinical trial to treat hematologic malignancies. The antibody portion of the parental immunotoxin is an anti-CD22 RFB4(dsFv) antibody or antigen-binding fragment, and it is fused to truncated Pseudomonas Exotoxin (PE38), creating the BL22 immunotoxin.

BL22 has been used in a phase I clinical trial for CD22 expressing malignancies and a high complete response rate observed in refractory Hairy Cell Leukemia (HCL). Of 16 cladribine-resistant patients, 11 had a complete remission and 2 had a partial remission with BL22 (Kreitman *et al.*, N Engl J Med. 2001 Jul 26;345(4):241–7). Further responses have been observed since this publication and a phase 2 trial in HCL has just opened. Phase 2 trials in CLL and pediatric ALL should open soon.

HA22 is an improved form of BL22 with mutations in the antibody portion that increase its binding affinity for CD22 and its ability to kill cells from patients with low CD22 expression as occurs in CLL.

Several improvements on the original immunotoxin are also disclosed in these patents and patent applications. One of these is an application disclosing recombinant immunotoxins that have been modified from a parental immunotoxin to lower liver toxicity. Another generally discloses several different immunotoxins that might prove useful in treating hematological malignancies. Still another discloses methods of increasing immunotoxin stability by connecting the antibody chains with a disulfide bond.

Dated: March 2, 2004.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–5223 Filed 3–8–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Carbohydrate-Encapsulated Quantum Dots For Cell-Specific Biological Imaging

Joseph Barchi, Sergey Svarovsky (NCI).

PCT Application No. PCT/US03/34897 filed 05 Nov 2003 (DHHS Reference No. E–325–2003/0–PCT–01).

Licensing Contact: Michael Shmilovich; 301/435–5019; *shmilovm@mail.nih.gov.*

Available for licensing is intellectual property covering carbohydrate-encapsulated quantum dots (QD) for use in medical imaging and methods of making the same. Certain carbohydrates, especially those included on tumor glycoproteins are known to have affinity for certain cell types. One notable glycan used in the present invention is the Thomsen-Freidenreich disaccharide (Galβ1–3GalNAc) that is readily detectable in 90% of all primary human carcinomas and their metastases. These glycans can be exploited for medical imaging. Quantum Dots (QDs) are semiconductor nanocrystals (CdSe or CdTe) with detectable luminescent properties. Encapsulating luminescent QDs with target-specific glycans permits efficient imaging of the tissue to which the glycans bind with high affinity. Accurate imaging of diseased cells (*e.g.*, primary and metastatic tumors) is of primary importance in disease management. The inventors describe the only *stable* synthesis of glycan encapsulated Qds and the Qds per se.

Method and Apparatus for Bioweapon Decontamination

Deborah S. Wilson (ORS).

U.S. Provisional Application filed 16 Jan 2004 (DHHS Reference No. E–218–2003/0–US–01).

Licensing Contact: Michael Shmilovich; 301/435–5019; *shmilovm@mail.nih.gov.*

It is in the interest of the public health and national security that the Public Health Service find a licensee for the commercial development and rapid dissemination of the apparatus and method of this invention.

The apparatus enables the decontamination of articles contaminated with bioweapons, more particularly sporolated bioweapons of which anthrax (*Bacillus anthracis*) is of notable concern. The system includes enclosing the article to be decontaminated in a humidified environment thus enhancing the susceptibility of spores to decontamination gases such as chlorine dioxide. Vacuum sealing the chamber and exposing the contaminated article to decontamination gases kills 100% of the spores.

Methods and Devices for Intramuscular Stimulation in Dysphonia

Christy L. Ludlow, Eric Mann, Theresa Burnett, Steve Bielamowicz (NINDS).

U.S. Provisional Application No. 60/413,733 filed 27 Sep 2002 (DHHS Reference No. E–181–2002/0–US–01); PCT Application No. PCT/US03/30032 filed 27 Sep 2003 (DHHS Reference No. E–181–2002/0–PCT–02).

Licensing Contact: Michael Shmilovich; 301/435–5019; *shmilovm@mail.nih.gov.*

The invention is presently being licensed to two entities for treating dysphagia. The method and device of the invention can also be used for treating dysphonia, and the Public Health Service seeks a licensee to commercially develop this invention for that purpose. Qualified applicants are preferably those having implantable stimulators capable of inducing intramuscular stimulation of the laryngeal musculature to improve voice in humans. This invention will assist those persons who have chronic long-standing dysphonia. The invention comprises three unique components: (1) Intramuscular implantation to produce two synergistic actions; (2) independent long term control of stimulation during speech by patients; and, (3) a unique system of combining indwelling intramuscular electrodes and controllers.

Methods and Compositions To Detect Nucleic Acid

Dougbeh C. Nyan (NIDDK).

U.S. Provisional Application No. 60/468,341 filed 06 May 2003 (DHHS Reference No. E–146–2002/0–US–01).

Licensing Contact: Michael Ambrose; 301/594–6565; *ambrosem@mail.nih.gov.*

This technology involves the isolation and identification of Helicobacter within fecal matter. The technology provides for the methods and nucleic acid primer reagents and sequences specific for H. pylori. Specifically, it addresses the identification of the common human species of H. pylori. H. pylori is a major infectious agent of the human gastric intestinal tract, affecting about 50% of the world population with various degrees of severity. H. pylori infection is associated with 95% of duodenal ulcers and 80% of gastric ulcers. Without treatment, 80% of duodenal ulcers will return. Further, gastric ulcers have been linked as precursors to the more life-threatening gastric cancers.

Current diagnostics are expensive, invasive, or require the patient to ingest radioactive substances. The technology presented provides for a quick, specific, inexpensive, non-invasive method for diagnosis of H. pylori infection as well the ability to repeat such tests for patient follow up on treatment effectiveness. Also included is the ability to develop kits for commercial purposes.

Novel Spore Wall Proteins and Genes From Microsporidia

Russell J. Hayman, John T. Conrad, Theodore Nash (NIAID).

PCT Application No. PCT/US01/47182 filed 04 Dec 2001, which published as WO 03/048299 on 12 Jun 2003 (DHHS Reference No. E–125–2001/0–PCT–02).

Licensing Contact: Michael Ambrose; 301/594–6565; *ambrosem@mail.nih.gov.*

Microsporidia are obligate, intracellular organisms that infect a wide range of hosts, including humans. Disease occurs mostly in immunosuppressed individuals, particularly those with AIDS, but infections have been documented in immunocompetent persons with diarrhea. Effective treatment is available for disease caused by some species. However, the most common type can only be treated with an experimental drug that is not available.

The invention presented here involves the isolation and use of two spore wall proteins of E. intestinalis, spore wall protein 1 (SWP–1) and spore wall protein 2 (SWP–2). These form the wall of the spore and enable the parasite to survive outside the host and therefore enable transmission. Although infection occurs after the spore contents are injected through the cell membrane into the host cell, proximity to the cell and a high likelihood of infection occurs because the spore wall attaches to the cell. Therefore, prevention of binding by antibodies, for instance, is likely to prevent infection. Some spores may also be infectious after being taken up by certain host cells. After infection, multiplication by merogony and sporogony occurs, releasing more infectious spores into the host and/or environment.

The invention claims SWP–1 and SWP–2 as isolate proteins and as immunogenic fragments of these parent proteins. Further claims include the nucleic acids that encode the whole proteins as well as the immunogenic fragments. A second series of claims include the methods and use of these reagents for diagnostic kit development as well as prevention of infectivity using

the proteins as well as nucleic acid constructs of SWP–1 and SWP–2. A third series of claims covers the administration and use of SWP–1 and SWP–2, either as whole proteins, immunogenic fragments or nucleic acid expression constructs along with a pharmaceutically acceptable carrier for the treatment of microsporidiosis. A final set of claims include the administration of certain ligands to SWP–2 in pharmaceutically acceptable carriers for the prevention and treatment of microsporidiosis.

Dated: March 2, 2004.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–5224 Filed 3–8–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health Announcement of Scientific Conference

ACTION: Notice.

UPCOMING CONFERENCE: Carnitine: The Science Behind a Conditionally Essential Nutrient

SUMMARY: The National Institute of Child Health and Human Development, the National Center for Complementary and Alternative Medicine, the National Institute of Mental Health, and the Office of Dietary Supplements are sponsoring a conference, *Carnitine: The Science Behind a Conditionally Essential Nutrient.* The conference will take place on March 25 and 26, 2004 at the Natcher Conference Center on the campus of the National Institutes of Health in Bethesda, Maryland.

This conference will address the following topics related to Carnitine:

- Basic physiology and pharmacology;
- Carnitine replacement in primary and secondary carnitine deficiency syndromes; and
- Carnitine supplementation in exercise, cardiovascular disease, obesity, diabetes, HIV infection, aging, cancer, and infertility.

The overall conference goals are to:

- Provide the scientific and lay communities with the most updated, evidence-based information regarding the role of carnitine in health and disease prevention;
- Clarify issues relevant to appropriate uses of carnitine; and
- Propose new areas of research for future studies in this nutrient.

ACCREDITATIONS: The American College of Nutrition is accredited by the Accreditation Council for Continuing Medical Education (ACCME) to sponsor continuing medical education for physicians.

The American College of Nutrition designates this continuing medical education activity for 12.5 CME credit hours in Category 1 of the Physician's Recognition Award of the American Medical Association.

The Certification Board for Nutrition Specialist (CBNS) authorizes 12.5 CNE credits hours for Certified Nutrition Specialists (CNS).

FOR FURTHER INFORMATION CONTACT: The conference Web site at *www.scgcorp.com/carnitine2004/index.htm.*

Dated: March 4, 2004.

Christy Thomsen,

Director, Office of Communications and Public Liaison, National Center for Complementary and Alternative Medicine, National Institutes of Health.

[FR Doc. 04–5297 Filed 3–8–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Consensus Development Conference on Celiac Disease; Notice

Notice is hereby given of the National Institutes of Health (NIH) Consensus Development Conference on "Celiac Disease" to be held June 28–30, 2004, in the NIH Natcher Conference Center, 45 Center Drive, Bethesda, Maryland 20892. The conference will begin at 8:30 a.m. on June 28 and 29, and at 9 a.m. on June 30, and will be open to the public.

Celiac disease is a disorder primarily affecting the gastrointestinal tract that is characterized by chronic inflammation of the mucosa, which leads to atrophy of intestinal villi, malabsorption, and protean clinical manifestations which may begin either in childhood or adult life. Symptoms can include abdominal cramping, bloating, and distention, and untreated celiac disease may lead to vitamin and mineral deficiencies, osteoporosis and other problems.

At the present time, celiac disease is widely considered to be a rare disease in the United States. However, recent studies, primarily in Europe but also in the United States, suggest that its prevalence is much higher than previous estimates, raising the concern that the disease is widely under-recognized. Recent progress in identification of autoantigens in celiac disease have led to the development of new serological diagnostic tests, but the appropriate use of testing strategies has not been well defined. Some patients with celiac disease may be at risk for non-Hodgkin's lymphoma, a rare cancer affecting the gastrointestinal tract. It is not yet clear, however, what the impact of this observation should be on diagnostic and treatment strategies.

This tow-and-a-half-day conference will examine the current state of knowledge regarding celiac disease and identify directions for future research.

During the first day-and-a-half of the conference, experts will present the latest research findings on celiac disease to an independent panel. After weighing all of the scientific evidence, the panel will draft a statement, addressing the following key questions:

—How is celiac disease diagnosed?
—How prevalent is celiac disease?
—What are the manifestations and long-term consequences of celiac disease?
—Who should be tested for celiac disease?
—What is the management of celiac disease?
—What are the recommendations for future research on celiac disease and related conditions?

On the final day of the conference, the panel chairperson will read the draft statement to the conference audience and invite comments and questions. A press conference will follow, to allow the panel and chairperson to respond to questions from the media.

The primary sponsors of this meeting are the National Institute of Diabetes and Digestive and Kidney Diseases and the NIH Office of Medical Applications of Research.

Advance information about the conference and conference registration materials may be obtained from American Institutes for Research of Silver Spring, Maryland, by calling 888–644–2667, or by sending e-mailing to *celiac@air.org.* American Institutes for Research's mailing address is 10720 Columbia Pike, Silver Spring, MD, 20901. Registration information is also available on the NIH consensus Development Program Web site at *http://consensus.nih.gov.*

Please Note: The NIH has recently instituted new security measures to ensure the safety of NIH employees and property. All visitors must be prepared to show a photo ID upon request. Visitors may be required to pass through a metal detector and have bags, backpacks, or purses inspected or x-rayed as they enter NIH buildings. For

more information about the new security measures at NIH, please visit the Web site at *http://www.nih.gov/about/visitorssecurity.htm.*

Dated: March 2, 2004.

Raynard S. Kington,

Deputy Director, National Institutes of Health.

[FR Doc. 04–5221 Filed 3–8–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commerical property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Review of Mentored Patient-Oriented Research Car. Devel. (K23), Midcareer Investigator Award in Patient-Oriented Res. (K24), and Mentored Quantitative Res. Career Develop. (K25) Awards.

Date: June 3–4, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Nancy L. Di Fronzo, PhD, Scientific Review Administrator, Review Branch, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, NIH, 6701 Rockledge II, Room 7196 (MSC 7924), Bethesda, MD 20892, (301) 435–0288.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: March 2, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–5220 Filed 3–8–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group Reproduction, Andrology, and Gynecology Subcommittee.

Date: April 1–2, 2004.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: American Inn of Bethesda, 8130 Wisconsin Ave., Bethesda, MD 20814.

Contact Person: Jon M. Ranhand, PhD, Scientist Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892, *ranhandj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 2, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–5219 Filed 3–8–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Immunoconjugate for the Treatment of Mesothelin-Expressing Cancers

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR part 404.7(a)(1)(i), that the Food and Drug Administration and the Department of Health and Human Services is contemplating the grant of an exclusive license to practice the inventions embodied in: E–002–1996/0: Nucleic Acid Encoding Mesothelin, a Differentiation Antigen Present on Mesothelium, Mesotheliomas and Ovarian Cancers (issued as U.S. patent 6,153,430); E–002–1996/1: Mesothelium Antigen and Methods and Kits for Targeting It (issued as U.S. patent 6,083,502); E–021–1998/0: Antibodies, Including Fv Molecules, and Immunoconjugates Having High Binding Affinity for Mesothelin and Methods for Their Use (filed as PCT/US98/25270 on November 25, 1998); and E–216–2000/1 (PCT application PCT/US01/18503, combining 60/211,331 and 60/213,804): Pegylation of Linkers Improves Antitumor Activity and Reduces Toxicity of Immunoconjugates, to Enzon Pharmaceuticals, Inc., which is located in Needham, MA. The patent rights in these inventions have been assigned to the United States of America.

The prospective exclusive license territory will be worldwide and the field of use may be limited to the use of the SS1P immunoconjugate for the treatment of mesothelin-expressing cancers.

DATES: Only written comments and/or license applications which are received by the National Institutes of Health on or before May 10, 2004, will be considered.

ADDRESSES: Requests for copies of the patent, inquiries, comments and other materials relating to the contemplated exclusive license should be directed to: Brenda J. Hefti, Technology Licensing Specialist, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD. 20852–3804; Telephone: (301) 435–4632; Facsimile: (301) 402–0220; E-mail: *heftib@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: This technology is an immunocongugate, consisting of an anti-mesothelin antibody coupled to a killing moiety, specifically pseudomonas exotoxin (PE38). This immunotoxin is targeted towards mesothelin, and might be useful as a therapeutic for the treatment of mesothelin-expressing cancers such as mesotheliomas, ovarian cancers and pancreatic cancers.

The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR part 404.7. The

prospective exclusive license may be granted unless within sixty (60) days from the date of this published notice, the NIH receives written evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.7.

Applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: March 2, 2004.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–5222 Filed 3–8–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: SAMHSA Exhibit Program Request Form—New—The Substance Abuse and Mental Health Services Administration (SAMHSA) has developed a new SAMHSA Exhibit Program for conferences and events. The new exhibit booth supports SAMHSA's vision of "A Life in the Community for Everyone" and its mission of "Building Resilience and Facilitating Recovery."

The Exhibit Program was developed to raise visibility for program priorities in targeted forums, share information with the public on agency services, and to ensure consistent and coordinated messages about SAMHSA's vision and mission. This brief form requests information needed by SAMHSA to respond to requests from outside organizations that would like SAMHSA's participation in their conference.

Number of respondents	Responses per respondent	Burden per response (hrs.)	Total annual burden (hrs.)
20	1	.083	2

Send comments to Nancy Pearce, SAMHSA Reports Clearance Officer, Room 16–105, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: March 2, 2004.

Anna Marsh,

Executive Officer, SAMHSA.

[FR Doc. 04–5231 Filed 3–8–04; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No.FR–4903–N–9]

Notice of Submission of Proposed Information Collection to OMB: Request for Construction Change

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This is a request for reinstatement of the approval to collect the subject information. The information is submitted by contractors and architects through mortgagees/lenders to obtain approval of proposed changes to previously approved contract drawings and/or specifications.

DATES: *Comments Due Date:* April 8, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2502–0011) should be sent to: HUD Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–6974; E-mail *Melanie_Kadlic@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35). The notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement;

and (10) the contact information of an agency official familiar with the proposal and the OMB Desk Officer for the Department.

This notice also lists the following information:

Title of Proposal: Request for Construction Change.

OMB Approval Number: 2502–0011.

Form Numbers: HUD–92437, HUD–92441, HUD–92442, HUD–92442–A,HUD–92442–CA, HUD–92442–A–CA.

Description of the Need for the Information and Its Proposed Use: This is a request for reinstatement of the approval to collect the subject information. The information is submitted by contractors and architects through mortgagees/lenders to obtain approval of proposed changes to previously approved contract drawings and/or specifications.

Respondents: Business or other for-profit, Not-for-profit institutions.

Frequency of Submission: On occasion.

Reporting Burden:

Number of respondents	Annual responses	×	Hours per response	=	Burden hours
900	5		4.6		20,700

Total Estimated Burden Hours: 20,700.

Status: Reinstatement, without change, of previously approved collection

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: February 3, 2004.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 04–5202 Filed 3–8–04; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4800–FA–04]

Announcement of Funding Awards for the Assisted Living Conversion Program Fiscal Year 2003

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of funding awards.

SUMMARY: In accordance with section 102 (a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Super Notice of Funding Availability (SuperNOFA) for the Assisted Living Conversion Program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

FOR FURTHER INFORMATION CONTACT: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, 451 7th Street, SW., Washington, DC 20410–8000; telephone (202) 708–3000 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number via TTY by calling the Federal Relay Service toll-free at 1–800–877–8339. For general information on this and other HUD programs, visit the HUD Web site at *http://www.hud.gov.*

SUPPLEMENTARY INFORMATION: The Assisted Living Conversion Program is authorized by Section 202(b) of the Housing Act of 1959 (12 U.S.C. 1701q–2). The competition was announced in the SuperNOFA published in the **Federal Register** on April 25, 2003 (68 FR 21793). Applications were rated and selected for funding on the basis of selection criteria contained in that Notice.

The Catalog of Federal Domestic Assistance number for this program is 14.314.

The Assisted Living Conversion Program is designed to provide funds to private nonprofit owners to convert their projects (that is, projects funded under Section 202, Section 8 project-based (including Rural Housing Services' Section 515), Section 221(d)(3) BMIR, Section 236, and unused and underutilized commercial properties) to assisted living facilities. Grant funds are used to convert the units and related space for the assisted living facility.

A total of $15,371,991 was awarded to nine projects for 178 units nationwide. In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987. 42 U.S.C. 3545), the Department is publishing the grantees and amounts of the awards in Appendix A of this document.

Dated: February 19, 2004.

John C. Weicher,

Assistant Secretary for Housing-Federal Housing Commissioner.

Appendix A

FY2003 GRANTEES FOR THE ASSISTED LIVING CONVERSION PROGRAM

Grantees	Amount
Lutheran Senior, 1201 N. Harrison St., Wilmington, DE 19806	$2,709,721.00
Immanuel House, 15 Woodland Street, Hartford, CT 06105	408,850.00
The Bernardine, 700 East Brighton, Syracuse, NY 13205	1,087,987.00
Allamakee Housing Inc., 607 2nd St. SW, Waukon, IA 52172	1,217,714.00
Mercy Manor Inc., 334 Golf View Drive, Albany, MN 56307	1,169,465.00
New Hope Volunteers, 1660 Duke Street, Alexandria, VA 22314	1,568,208.00
Kivel Manor, 3020 North 36th Street, Phoenix, AZ 85018	3,540,574.00
Menorah Plaza Housing, 4925 Minnetonka Blvd, St. Louis Park, MN 55416	1,391,850.00
Jewish Apartments, 15100 West Ten Mile, Oak Park, MI 48237	2,277,622.00

[FR Doc. 04–5200 Filed 3–8–04; 8:45 am]
BILLING CODE 4210–27–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4922–N–01]

Privacy Act of 1974; Notice of Matching Program: Matching Tenant Data in Assisted Housing Programs

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of a computer matching program between the Department of Housing and Urban Development (HUD) and the Social Security Administration (SSA) and the Internal Revenue Service (IRS).

SUMMARY: Pursuant to the Computer Matching and Privacy Protection Act of 1988, as amended, and the Office of Management and Budget's (OMB) Guidance on the statute, HUD is updating its notice of a matching program involving comparisons between income data provided by applicants or participants in HUD's assisted housing programs and independent sources of income information. The matching program will be carried out to detect inappropriate (excessive or insufficient) housing assistance under the National Housing Act, the United States Housing Act of 1937, section 101 of the Housing and Community Development Act of 1965, the Native American Housing Assistance and Self-Determination Act of 1996, and the Quality Housing and Work Responsibility Act of 1998. The program provides for the verification of the matching results and the initiation of appropriate administrative or legal actions, primarily through public housing agencies (HAs) and owners and agents (all collectively referred to as POAs). Indian tribes and tribally designated housing entities (TDHEs) are not a mandatory component of the computer matching program. Participation by Indian tribes and TDHEs is discretionary; however, they may receive and use social security and supplemental security income matching information provided by HUD.

This notice provides an overview of computer matching for HUD's assisted housing programs. Specifically, the notice describes HUD's program for computer matching of its tenant data to: (a) The SSA's earned income and the IRS's unearned income data, (b) SSA's wage, social security, supplemental security income and special veterans benefits data, (c) State Wage Information Collection Agencies' (SWICAs') wage and unemployment benefit claim information, and (d) the Office of Personnel Management's (OPM) personnel data.

DATES: *Effective Date:* Computer matching is expected to begin on April 8, 2004, unless comments are received which will result in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later.

Comments Due Date: April 8, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: *For Privacy Act:* Jeanette Smith, Departmental Privacy Act Officer, Room P8001, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, telephone number (202) 708–2374. A telecommunications device for hearing- and speech-impaired individuals (TTY) is available at 1–800–877–8339 (Federal Information Relay Service).

For further information from recipient agency: Elking Tarver, Project Manager, Tenant Assessment Sub-System, Real Estate Assessment Center, Department of Housing and Urban Development, 1280 Maryland Avenue, SW., Suite 800, Washington, DC 20024–2635, telephone number (202) 708–4932, extension 3235.

SUPPLEMENTARY INFORMATION: This notice supersedes a similar notice published in the **Federal Register** on May 5, 2003 (68 FR 23753). Since that time, the matching program has been implemented on a large scale. In previous years, the computer matching was carried out for random samples of households receiving rental assistance or for selected POAs. During calendar year 1999, HUD used the matching program for a large-scale computer matching project involving over 2 million households. HUD announced plans for the large-scale implementation of the program in 64 FR 49817 (September 14, 1999).

The Computer Matching and Privacy Protection Act (CMPPA) of 1988, an amendment to the Privacy Act of 1974 (5 U.S.C. 552a), OMB's guidance on this statute entitled "Final Guidance Interpreting the Provisions of Public Law 100–503, the CMPPA of 1988" (OMB Guidance), and OMB Circular No. A–130 requires publication of notices of computer matching programs. Appendix I to OMB's Revision of Circular No. A–130, "Transmittal Memorandum No. 4," Management of Federal Information Resources," prescribes Federal agency responsibilities for maintaining records about individuals. In with the CMPPA and Appendix I to OMB Circular No. A–130, copies of this notice are being provided to the Committee on Government Reform and Oversight of the House of Representatives, the Committee on Governmental Affairs of the Senate, and OMB's Office of Information and Regulatory Affairs.

I. Authority

This matching program is being conducted pursuant to sections 3003 and 13403 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66, approved August 10, 1993); section 542(b) of the 1998 Appropriations Act (Pub. L. 105–65); section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (42 U.S.C. 3544); section 165 of the Housing and Community Development Act of 1987 (42 U.S.C. 3543); the National Housing Act (12 U.S.C. 1701–1750g); the United States Housing Act of 1937 (42 U.S.C. 1437–1437z); section 101 of the Housing and Community Development Act of 1965 (12 U.S.C. 1701s); the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*); and the Quality Housing and Work Responsibility Act of 1998 (42 U.S.C. 1437a(f)).

The Omnibus Budget Reconciliation Act of 1993 (Budget Reconciliation Act) authorizes HUD to request from the SSA and the IRS Federal tax information as prescribed in section 6103(l)(7) of title 26 of the United States Code (Internal Revenue Code). Section 542(b) of HUD's 1998 Appropriation Act (Pub. L. 105–65; October 27, 1997) eliminated a September 30, 1998, sunset provision to 26 U.S.C. 6103(l)(7)(D)(ix) of the Internal Revenue Code, effectively making permanent the authority for SSA and IRS disclosures of federal tax information to HUD.

The Federal tax information that HUD receives includes income data that individuals receive from employers and financial institutions (*e.g.*, income data that would be shown on IRS Form W–2 and Form 1099) for use in preparing tax returns. The Budget Reconciliation Act prohibits HUD redisclosure of tax data to POAs. However, it allows HUD to disclose the fact that discrepancies

exist between income information provided by tenants and Federal tax information, and to request that POAs reverify tenant incomes when income comparisons indicate uncertain eligibility benefits or an inappropriate level of benefits.

Section 3003 of the Budget Reconciliation Act authorizes HUD to require applicants and participants in assisted housing programs sign a consent form authorizing the Secretary of HUD to request that the Commissioner of Social Security and the Secretary of the Treasury release the Federal tax information. The final rule regarding participants' consent to the release of information was published by HUD in the **Federal Register** on March 20, 1995 (61 FR 11112).

The Stewart B. McKinney Homeless Assistance Amendments Act of 1988 authorizes HUD and HAs (but not private owners/management agents for subsidized multifamily projects) to request wage and claim information from SWICAs responsible for administering State unemployment laws in order to undertake computer matching. This Act authorizes HUD to require applicants and participants to sign a consent form authorizing HUD or the HA to request wage and claim information from the SWICAs.

The Housing and Community Development Act of 1987 authorizes HUD to require applicants and participants (as well as members of their household six years of age and older) in HUD-administered programs involving rental assistance to disclose to HUD their social security numbers (SSNs) as a condition of initial or continuing eligibility for participation in the programs.

The Quality Housing and Work Responsibility Act of 1998 (QHWRA), section 508(d), 42 U.S.C. 1437a(f) authorizes the Secretary of HUD to require disclosure by the tenant to the public housing agency of income information received by the tenant from HUD as part of income verification procedures of HUD. The QHWRA was amended by Public Law 106–74, which extended the disclosure requirements to participants in section 8, section 202, and section 811 assistance programs. The participants are required to disclose the HUD-provided income information to owners responsible for determining the participants' eligibility or level of benefits.

II. Objectives To Be Met by the Matching Program

HUD's primary objective in implementing the computer matching program is to increase the availability of rental assistance to individuals who meet the requirements of the rental assistance programs. Other objectives include determining the appropriate level of rental assistance, and deterring and correcting abuse in assisted housing programs. In meeting these objectives HUD also is carrying out a responsibility under 42 U.S.C. 1437f(K) to ensure that income data provided to POAs by household members is complete and accurate. Using Federal tax information, HUD conducts a computer matching and income verification program annually for a random sample of households that received rental assistance. Based on the computer matching and subsequent HUD analysis of tenant-provided information, HUD develops nationwide estimates of the extent of excess rental assistance, and uses the estimates for financial statement reporting purposes. HUD implemented a large-scale computer matching project in Fiscal Year 2000 that used 1998 information from other Federal agencies. HUD sends letters to tenants and notices to POAs so that these parties may resolve the income discrepancies.

HUD's various assisted housing programs, available through POAs, require that applicants meet certain income and other criteria to be eligible for rental assistance. In addition, tenants generally are required to report the amounts and sources of their income at least annually. However, under the QHWRA of 1998, public housing agencies may now offer tenants the option to pay a flat rent, or an income-based rent. Those tenants who select a flat rent will be required to recertify income at least every three years. In addition, the Changes to the Admissions and Occupancy Final Rule (65 FR 16692; March 29, 2000) specified that household composition must be recertified annually for tenants who select a flat rent or and income-based rent.

The matching program identifies tenants receiving inappropriate (excessive or insufficient) rental assistance resulting from under or over-reported household income. When excessive rental assistance amounts are identified, some tenants move out of assisted housing units; other tenants agree to repay excessive rental assistance. These actions may increase rental assistance or number of units available to serve other beneficiaries of HUD programs. When tenants continue to be eligible for rental assistance, but at a reduced level, the tenants will be required to increase their contributions toward rent.

Tribes and TDHEs set admission and eligibility requirements pursuant to the requirements contained in the Native American Housing Assistance and Self-Determination Act of 1996. They are not required to provide tenant data to the Department. Therefore, their participation is discretionary.

III. Program Description

In this computer matching program, tenant-provided information included in HUD's automated files will be compared to data from the SSA and the IRS. HUD will normally request that the SSA conduct matching of earned income information and that the IRS conduct matching of unearned income information at least annually. The Federal tax information matching normally occurs in the first quarter of the Federal fiscal year, which begins in October and uses Federal tax information for the prior tax year.

HUD will also request SSA matching of social security, supplemental security income, and special veterans benefits information monthly for residents due to be recertified in four months, and daily (on the receipt of new certifications) for residents. The daily process is currently used only for HUD's Office of Housing's Rental Assistance Programs and may be expanded to the Office of Public and Indian Housing's rental assistance programs. Indian Tribes and Tribally Designated Housing Entities may receive and use social security and supplemental security income matching information provided by HUD.

HUD may also request SWICA matching to supplement SSA and IRS matching and income verification. Public housing agencies, but not owners and management agents, may also request SWICA matching.

HUD will disclose to the SSA, IRS, and SWICAs only tenant personal identifiers, *i.e.*, SSNs, surnames, and dates of birth. The SSA, IRS, and SWICAs will conduct the matching of the HUD-provided personal identifiers to personal identifiers included in their automated files. Those agencies will provide income data to HUD only for individuals with matching personal identifiers. The process of income matching between HUD and the OPM varies from the above. The OPM will disclose its data to HUD, and HUD will conduct the computer matching to OPM data.

HUD will then compare income data obtained from the sources cited above to tenant-reported income data included in HUD's system of records known as the Tenant Eligibility Verification Files (HUD/REAC–1) published at 65 FR

52777; August 30, 2000. HUD/REAC–1 receives tenant data from the Tenant Housing Assistance and Contract Verification Data (HUD/H–11), published at 62 FR 11909, March 13, 1997. The tenant income comparisons identify, based on criteria established by HUD, tenants whose incomes require further verification to determine if the tenants received appropriate levels of rental assistance.

A. Income Verification

HUD will normally request that POAs verify matching results as described below. However, under certain circumstances, HUD Program staff or HUD Office of Inspector General (OIG), may verify tenant incomes with independent income sources. For example, such circumstances may include: (a) when HUD declares a public housing agency in breach of an annual contributions contract; or

(b) when tenants fail to disclose SSA and IRS data, or the tenants commit other serious violations, and HUD's analysis of the data could support legal actions. HUD may send letters to employers to request income data, but HUD will not disclose tax data to POAs.

(1) Verification of SSA and IRS Data Referenced in Section 6103(l)(7) of the Internal Revenue Code

Since HUD cannot redisclose tax data directly to POAs, HUD will notify tenants of discrepancies between the tenant-reported income and the SSA and IRS data. HUD will supply the tenants with their income information taken directly from SSA and IRS data and request that the tenants provide this information to the POA. Concurrently, HUD will notify the POA that a discrepancy exists between information provided by the tenants and other sources and will request reverification of the tenants' incomes. The notifications to the POAs will not include any tax information.

Income information that tenants disclose to the POAs will be verified directly with the income source or with the tenant. HUD has determined that POAs may consider the Federal tax information that tenants disclose to the POAs as verified if the tenant does not contest the accuracy of this information when offered an opportunity to do so. If the tenant contests the Federal tax information, the POA must verify it with the entities that provided the information to the SSA or the IRS.

The SSA and the IRS have advised HUD that the process described in the preceding paragraph is consistent with the intent of section 6103(l)(7) of the Internal Revenue Code, as the intent of the matching is to create a dialogue between the benefit recipient and the benefit provider.

(2) Verification of Social Security, Supplemental Security Income and Special Veterans Benefits Data

Unlike the income information supplied by the SSA and the IRS for tax purposes, SSA's social security, supplemental security income and special veterans benefits data may be disclosed to POAs. (The Foster Care Independence Act of 1999; Public Law 106–169 provided a new Title VIII of the Social Security Act, which authorized special benefits for certain World War II veterans.) Therefore, after receiving this data from the SSA and comparing it to tenant-reported income, HUD will disclose the SSA social security, supplemental security income and special veterans benefits data to POAs. These disclosures will include information on monthly social security, supplemental security income, and special veterans benefits data and, where applicable, income discrepancy information between tenant-reported data, as reported by POAs, and the income amounts provided by the SSA. POAs will use this information in periodic verifications of tenant incomes that are required to determine program eligibility and rental assistance amounts. HUD has implemented secure electronic facilities for transmitting social security, supplemental security income and special veterans benefits data to all POAs.

(3) Verification of SWICAs Data

HUD will disclose matching results for SWICAs wage and unemployment claim data directly to HAs. The comparison of SWICAs data and the tenant-reported data will reveal whether income verification is necessary. If the tenant contest the accuracy of the SWICA reported information, HAs must then obtain wage information directly from the tenants' employers, including information from prior years, when appropriate. The SWICAs unemployment claim data must be verified with the tenants. Verification of the income data with employers would only be required if tenants dispute the SWICAs data.

(4) Verification of OPM Data

HUD will disclose matching results for OPM personnel data to POAs. The OPM data, when compared to the tenant-reported data, provides an indicator that income verification is necessary. The POA may then obtain current or prior wage information directly from employers when appropriate.

B. Administrative or Legal Actions

Regarding all the matching described in this notice, HUD anticipates that POAs will take appropriate action in consultation with tenants to: (1) resolve income disparities between tenant-reported and independent income source data, and (2) use correct income amounts in determining housing rental assistance.

POAs must compute the rent in full compliance with all applicable occupancy regulations. POAs must ensure that they use the correct income and correctly compute the rent.

The POAs may not suspend, terminate, reduce, or make a final denial of any housing assistance to any tenant as the result of information produced by this matching program until: (a) The tenant has received notice from the POA of its findings and informing the tenant of the opportunity to contest such findings and (b) either the notice period provided in applicable regulations of the program, or 30 days, whichever is later, has expired. In most cases, POAs will resolve income discrepancies in consultation with tenants.

Additionally, serious violations, which POAs, HUD Program staff, or HUD OIG verify, should be referred for full investigation and appropriate civil and/or criminal proceedings.

IV. Records To Be Matched

SSA and IRS will conduct the matching of tenant SSNs and additional identifiers (such as surnames and dates of birth) to tenant data that HUD supplies from its system of records known as the Tenant Housing Assistance and Contract Verification Data (HUD/H–11). Within HUD, this system of records includes two automated systems known as the Multifamily Tenant Characteristics System (a system for programs under the Office of the Assistant Secretary for Public and Indian Housing) and the Tenant Rental Assistance Certification System (a system for programs under the Office of the Assistant Secretary for Housing—Federal Housing Commissioner). POAs provide HUD with the tenant data that is included in HUD/H–11.

The SSA will match the HUD/H–11 records to the SSA's Earnings Recording and Self-Employment Income System (HHS/SSA/OSR, 09–60–0059) (Earnings Record); Master Beneficiary Record (HHS/SSA/OSR, 09–60–0090) (MBR); and Supplemental Security Income Record (HHS/SSA/OSR, 09–60–0103) (SSR). The IRS will match the HUD/H–

11 records to its Wage and Information Returns (IRP) Master File (Treas/IRS 22.061). The IRS also refers to this file as the Information Return Master File (IRMF).

HUD will place matching data into its system of records known as the Tenant Eligibility Verification Files (HUD/REAC–1). The HUD/REAC–1 records are specifically exempt from certain provisions of the Privacy Act, as described in notices published on February 28, 1994 (59 FR 9406) and March 30, 1994 (59 FR 14869).

HUD may also coordinate SWICAs income computer matches for its rental assistance programs using tenants' SSNs and surnames. SWICAs will match tenant records to machine-readable files of quarterly wage data and unemployment insurance benefit data. Results from this matching will be provided to HUD or HAs, which will then determine whether tenants have unreported or underreported income. The matching will be done in accordance with a written agreement between the SWICAs and HUD.

In addition, tenants SSNs may be matched to the OPM's General Personnel Records (OPM/GOVT–1) and the Civil Service Retirement and Insurance Records System (OPM/Central-1). Tenant data may be matched to the SSA's Master Files of Social Security Number Holders (HHS/SSA/OSR, 09–60–0058) and Death Master Files for the purpose of validating SSNs contained in tenant records. These records will also be used to validate SSNs for all applicants, tenants, and household members who are six (6) years of age and over to identify noncompliance with program eligibility requirements. HUD will compare tenant SSNs provided by POAs to reveal duplicate SSNs and potential duplicate housing assistance.

V. Period of the Match

The computer matching program will be conducted according to agreements between HUD and the SSA, IRS, OPM, and SWICA. The computer matching agreements for the planned matches will terminate either when the purpose of the computer matching program is accomplished, or 18 months from the date the agreement is signed, whichever comes first.

The agreements may be extended for one 12-month period, with the mutual agreement of all involved parties, if the following conditions are met:

(1) Within 3 months of the expiration date, all Data Integrity Boards review the agreement, find that the program will be conducted without change, and find a continued favorable examination of benefit/cost results; and

(2) All parties certify that the program has been conducted in compliance with the agreement.

The agreement may be terminated, prior to accomplishment of the computer matching purpose or 18 months from the date the agreement is signed (whichever comes first), by the mutual agreement of all involved parties within 30 days of written notice.

Dated: March 1, 2004.

Karen S. Jackson,

General Deputy Technology Officer.

[FR Doc. 04–5201 Filed 3–8–04; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Submission of Paperwork Reduction Act Request to Office of Management and Budget

AGENCY: Office of Self-Governance and Self-Determination, Interior.

ACTION: Notice.

SUMMARY: This notice announces that the Information Collection Request regarding revision of the Job Placement and Training Application, OMB Control No. 1076–0062, has been submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act.

DATES: Submit your comments and suggestions on or before April 8, 2004.

ADDRESSES: Written comments should be sent directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior. You may submit your comments by e-mail at *OIRA_DOCKET@omb.eop.gov* or by facsimile to 202–395–6566.

Send a copy of your comments to Lynn Forcia, Office of Self-Governance and Self-Determination, 1849 C Street, NW., Mail-Stop 2412 MIB, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Copies of the information collection form may be obtained by contacting Lynn Forcia at 202–219–5270. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION:

Abstract

The information collection process is necessary to assess work history and training needs of adult Indians who reside on or near Indian reservations and who desire to obtain reasonable and satisfactory employment. The information collection document provides data necessary to administer the Job Placement and Training program. A previous version of this document has already been approved by OMB and is now in use. The document has been revised to better meet its purposes. The Secretary is authorized to undertake a program of Job Placement, which may include financial assistance, vocational training (including apprenticeships and on-the-job training), counseling, guidance, and related services for any recognized vocation. The program is available to Indians who are not less than 18 years old and who reside on or near an Indian reservation (and in Alaska). Public Law 84–959, as amended, authorizes the Secretary to enter into contracts or agreements with Federal, State or local government agencies, or with associations with programs, apprenticeship programs or on-the-job training programs that lead to skilled employment. Eligible tribes and tribal organizations may administer the Job Placement portion of these programs or the Job Training portion or both. The same application form is used for both 25 CFR Parts 26, Employment Assistance for Adult Indians, and 27, Vocational Training for Adult Indians. Information of a confidential nature is protected by the Privacy Act. A request for comments on this information collection was published in the **Federal Register** on November 7, 2003 (68 FR 63127). No comments were received.

Request for Comments

Comments are invited on (a) whether the information collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of the information on the respondents, including through the use of automated collection techniques or other forms of information technology.

The Office of Management and Budget has up to 60 days to approve or disapprove the information collection form, but may respond after 30 days; therefore, comments submitted in response to this notice should be submitted to OMB within 30 days in

order to assure their maximum consideration.

Please note that all comments are available for public review during regular office hours. If you wish to have your name and/or address withheld, you must state this prominently at the beginning of your comments. We will honor your request to the extent allowed by law. All comments from businesses or representatives of businesses will be open for public review.

Title: Job Placement and Training Program Application Form (changed to be consistent with other similar federal programs).

OMB approval number: 1076–0062.

Summary of Collection of Information: The collection of information provides pertinent data concerning the individual's previous training, employment background, current training, and employment plans, and is used to determine eligibility for program services.

Frequency: Applications are filed on an as-needed basis.

Description of respondents: Individual tribal members residing on or near reservations seeking training for purposes of job placement services, or job-ready individual tribal members seeking employment services.

Estimated completion time: ½ hour.

Number of Annual responses: 4,900.

Annual Burden hours: 2,450 hours.

Dated: February 25, 2004.

Dave Anderson,

Assistant Secretary—Indian Affairs.

[FR Doc. 04–5255 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–4M–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–961–1410–HY–P; AA–14015, SEA–2]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Sealaska Corporation in Tps. 75 S., Rs. 81 and 82 E., Copper River Meridian, located in Trocadero Bay, Alaska, aggregating approximately 316 acres. Notice of the decision will also be published four times in the *Juneau Empire.*

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until April 8, 2004, to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599.

FOR FURTHER INFORMATION CONTACT: Sherri Belenski, by phone at (907) 271–3333, or by e-mail at *Sherri_Belenski@ak.blm.gov.*

Sherri D. Belenski,

Land Law Examiner, Branch of Land Transfer Services.

[FR Doc. 04–5236 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–932–5420–EU–L021; AA–085085]

Notice of Application for Recordable Disclaimer of Interest for Lands Underlying Porcupine River in Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The State of Alaska has submitted an application for a recordable disclaimer of interest pursuant to section 315 of the Federal Land Policy and Management Act and the regulations contained in 43 CFR 1864. A recordable disclaimer of interest, if issued, will confirm the United States has no valid interest in the subject lands. This notice is intended to notify the public of the pending application and the State's grounds supporting it.

DATES: A final decision on the merit of the application will not be made until 90 days has elapsed from the date of publication of this notice. During the 90-day period, interested parties may submit comments on the State's application, BLM Serial number AA–085085.

ADDRESSES: Comments should be sent to the Chief, Branch of Lands and Realty, BLM Alaska State Office, 222 West 7th Avenue, No. 13, Anchorage, Alaska 99513–7599.

FOR FURTHER INFORMATION CONTACT: Mike Haskins, Branch of Lands and Realty at 907–271–3248 or visit the recordable disclaimer of interest Web site at *http://www.ak.blm.gov/ak930/rdi/index.html.*

SUPPLEMENTARY INFORMATION: On December 10, 2003, the State of Alaska filed an application for a recordable disclaimer of interest for lands underlying the Porcupine River. The State asserts the river is navigable, and under the Equal Footing Doctrine and Submerged Lands Act of 1953, ownership of the submerged lands automatically passed from the United States to the State at the time of statehood in 1959. The State's evidence of navigability of the Porcupine River includes: a letter dated May 13, 1974, from the BLM Alaska State Director, an administrative navigability determination made by the BLM dated April 21, 1983, and a reference to the Washington Treaty signed on May 8, 1871, by the United States and Great Britain. The treaty guaranteed the use of certain navigable rivers crossing the International Boundary between Alaska and Canada, and pursuant to Article XXVI of the treaty, navigation rights "for the purposes of commerce" on the Porcupine River were permanently established.

The application is for the bed of the Porcupine River and all interconnecting sloughs between the ordinary high water marks on its banks from the Alaska/Canada International Border in sections 22 and 27, T. 30 N., R. 30 E., Fairbanks Meridian (FM), Alaska, downstream about 225 miles to its confluence with the Yukon River within T. 20 N., R. 10 E. and T. 20 N., R. 11 E., FM.

The State did not identify any known adverse claimant or occupant of the affected lands.

Dated: January 30, 2004.

Mike Haskins,

Chief, Branch of Lands and Realty.

[FR Doc. 04–5237 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–930–04–1310–DB]

Notice of Extension of Comment Period for the Alpine Satellite Development Plan, Draft Environmental Impact Statement; National Petroleum Reserve-Alaska, and Colville River Delta

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Extension of Comment Period for the Alpine Satellite Development Plan, Draft Environmental Impact Statement; National Petroleum Reserve-Alaska, and Colville River Delta.

SUMMARY: The Bureau of Land Management (BLM) announces an extension of the comment period on the Alpine Satellite Development Plan Draft Environmental Impact Statement (DEIS). The original notice issued January 16, 2004 provided for a comment period to end on March 1, 2004. BLM is extending the comment period for one week to March 8, 2004.

FOR FURTHER INFORMATION CONTACT: Jim Ducker, BLM Alaska State Office, 907–271–3130; email *Jim_Ducker@ak.blm.gov.*

SUPPLEMENTARY INFORMATION: The original Notice of Availability issued on January 16, 2004 provided for comments on the Draft EIS to be received through March 1. The North Slope Borough, the local government for the plan area, has requested a one-week extension in the comment period. BLM has decided to accede to the borough's request. Comments on the Draft EIS and on issues relevant to the review of the proposed project by the cooperating agencies will now be accepted through March 8.

Dated: March 2, 2004.

Peter Ditton,

Associate State Director.

[FR Doc. 04–5229 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–AG–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–912–04–1990–PP–241A–005F]

Sierra Front-Northwestern Great Basin & Northeast California Resource Advisory Councils; Notice of Joint Meeting Location and Time

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of joint Meeting Location and Time for the Sierra Front-Northwestern Great Basin & Northeast California Resource Advisory Council (California & Nevada).

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972 (FACA), a joint meeting of the U.S. Department of the Interior, Bureau of Land Management (BLM) Sierra Front-Northwestern Great Basin & Northeast California Resource Advisory Councils (RAC), California & Nevada, will be held as indicated below. Topics for discussion at the meeting will include, but are not limited to: manager's reports of current field office activities; an interagency panel to discuss increasing tourism/recreation use and program challenges on public lands in NV/CA; discussion of a Pershing County Land Bill; an update on the Black Rock-High Rock NCA; a report on the BLM Law Enforcement Program; an update on sage grouse planning issues; a planning session for the Soldier Meadows Project in the Winnemucca Field Office; Northeast California land use planning; juniper management for Northeast California; rail banking update and additional topics the council may raise during the meeting.

Date & Time: The RACs will meet jointly on Thursday, April 29, 2004, from 8 a.m. to 5 p.m., and separately on Friday, April 30, 2004, from 8 a.m. to 3 p.m., at John Ascuaga's Nugget Hotel & Convention Center, 1100 Nugget Avenue, Sparks, Nevada. All meetings are open to the public. A general public comment period, where the public may submit oral or written comments to the RACs, will be held at 4 p.m. on Thursday, April 29, 2004.

A final detailed agenda, with any additions/corrections to agenda topics and meeting times, will be available on the internet no later than April 15, 2004, at *http://www.nv.blm.gov/rac;* hard copies can also be mailed or sent via FAX. Individuals who need special assistance such as sign language interpretation or other reasonable accommodations, or who wish a hard copy of the agenda, should contact Mark Struble, Carson City Field Office, 5665 Morgan Mill Road, Carson City, NV 89701, telephone (775) 885–6107, no later than April 22, 2004.

FOR FURTHER INFORMATION CONTACT: Mark Struble, Public Affairs Officer, BLM Carson City Field Office, 5665 Morgan Mill Road, Carson City, NV 89701. Telephone: (775) 885–6107. E-mail: *mstruble@nv.blm.gov.*

Dated: March 2, 2004.

Dayne Barron,

Field Office Manager, BLM-Eagle Lake Field Office.

[FR Doc. 04–5198 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–070–04–1610–PH]

Notice of Public Meeting, Western Montana Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM), the Western Montana Resource Advisory Council will meet as indicated below.

DATES: For the Western Montana RAC, a "working meeting" dedicated to review of the Draft Dillon Resource Management Plan will be held April 19, 2004 at the BLM Dillon Field Office, 1005 Selway Drive, Dillon, Montana beginning at 10 a.m. The public comment period will begin at 11:30 a.m. and the meeting is expected to adjourn by 3 p.m.

The next regular meeting of the Western Montana RAC will be held June 24 and 25, 2004 at the Missoula Field Office, 3255 Fort Missoula Road, Missoula, Montana beginning at 10 a.m. on June 24. The public comment period will begin at 11:30 a.m. on June 24 and the meeting is expected to adjourn by 5 p.m. On June 25 the Missoula Field Office will host a field trip for RAC members to the Blackfoot River corridor that will conclude early afternoon.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in western Montana. At the April 19 meeting, we plan to discuss and possibly make recommendations on the Draft Dillon Resource Management Plan.

At the June 24 business meeting, the council members will finish the Draft Dillon RMP discussion, hear a presentation on the hazardous fuels/risk assessment program, discuss a possible allotment stewardship project proposal, hear an update on the national RAC

chair meeting, and possibly hear from a biologist familiar with big horn sheep issues.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, or other reasonable accommodations, should contact the BLM as provided below.

FOR FURTHER INFORMATION CONTACT: For the Western Montana RAC, contact Marilyn Krause, Resource Advisory Council Coordinator, at the Butte Field Office, 106 North Parkmont, Butte, Montana 59701, telephone 406–533–7617 or Tim Bozorth, Field Manager, Dillon Field Office, (406) 683–2337 or Nancy Anderson, Field Manager, Missoula Field Office, (406) 329–3914.

Dated: March 1, 2004.

Mark Goeden,

Acting Field Manager.

[FR Doc. 04–5228 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–060–01–1020–PG]

Notice of Public Meeting; Central Montana Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Central Montana Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held April 7 & 8, 2004, at the BLM's Lewistown Field Office, on Airport Road in Lewistown, Montana. The April 7 meeting will begin at 1 p.m. with a 60-minute public comment period. The meeting is scheduled to adjourn at 6 p.m.

The April 8, meeting will begin at 8 a.m. with a 30-minute public comment period and will adjourn at 3 p.m.

SUPPLEMENTRAY INFORMATION: This 15-member council advises the Secretary of the Interior on a variety of management issues associated with public lands in Montana. At this meeting the council will discuss: A working alternative for the Access and Transportation issue in the Upper Missouri River Breaks National Monument.

All meetings are open to the public. The public may present written comment to the RAC. Each formal RAC meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

FOR FURTHER INFORMATION CONTACT: Dave Mari, Lewistown Field Manager, Lewistown Field Office, Airport Road, Lewistown, Montana 59457, (406) 538–7461.

Dated: March 3, 2004.

David L. Mari,

Lewistown Field Manager.

[FR Doc. 04–5266 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–922–04–1310–FI; COC60770]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease COC60770

AGENCY: Bureau of Land Management; Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

SUMMARY: Pursuant to the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), a petition for reinstatement of oil and gas lease COC60770 for lands in Garfield County, Colorado, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Beverly A. Derringer, Chief, Fluid Minerals Adjudication, at 303.239.3765.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $166 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease COC60770 effective September 1, 2003, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Dated: January 29, 2004.

Beverly A. Derringer,

Chief, Fluid Minerals Adjudication.

[FR Doc. 04–5235 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1310–01; WYW152470]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Pursuant to the provisions of 30 U.S.C. 188 (d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), a petition for reinstatement of oil and gas lease WYW152470 for lands in Sweetwater County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Fluid Minerals Adjudication.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $166 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW152470 effective November 1, 2002, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Pamela J. Lewis,

Chief, Fluid Minerals Adjudication.

[FR Doc. 04–5234 Filed 3–8–04; 8:45 am]

BILLING CODE 4310–22–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731–TA–1073–1075 (Preliminary)]

Certain Circular Welded Carbon Quality Line Pipe From China, Korea, and Mexico

AGENCY: International Trade Commission.

ACTION: Institution of antidumping investigations and scheduling of preliminary phase investigations.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping investigations Nos. 731–TA–1073–1075 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that 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 imports from China, Korea, and Mexico of certain circular welded carbon quality line pipe, provided for in subheadings 7306.10.10 and 7306.10.50 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach preliminary determinations in antidumping investigations in 45 days, or in this case by April 19, 2004. The Commission's views are due at Commerce within five business days thereafter, or by April 26, 2004.

For further information concerning the conduct of these investigations 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 B (19 CFR part 207).

EFFECTIVE DATE: March 3, 2004.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), 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. These investigations are being instituted in response to petitions filed on March 3, 2004, by American Steel Pipe Division of American Cast Iron Pipe Co. ("ACIPCO"), Birmingham, AL; IPSCO Tubulars, Inc., Camanche, IA; Lone Star Steel Co., Dallas, TX; Maverick Tube Corp., Chesterfield, MO; Northwest Pipe Co., Portland, OR; and Stupp Corp., Baton Rouge, LA.

Participation in the investigations and public service list. Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register.** Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

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 these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register.** A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference. The Commission's Director of Operations has scheduled a conference in connection with these investigations for 9:30 a.m. on March 24, 2004, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Parties wishing to participate in the conference should contact Mary Messer (202–205–3193) not later than March 22, 2004, to arrange for their appearance. Parties in support of the imposition of antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions. As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before March 29, 2004, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must 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).

In accordance with sections 201.16(c) and 207.3 of the 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 207.12 of the Commission's rules.

By order of the Commission.

Issued: March 5, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–5400 Filed 3–8–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731–TA–1048 and 1050–1053 (Final)]

Electrolytic Manganese Dioxide From Australia, Greece, Ireland, Japan, and South Africa

AGENCY: International Trade Commission.

ACTION: Termination of investigations.

SUMMARY: On March 2, 2004, the Commission received notice from the Department of Commerce stating that, having received a letter from petitioner in the subject investigations (Kerr-McGee Chemical LLC) withdrawing its petitions, Commerce was terminating its antidumping investigations on electrolytic manganese dioxide from Australia, Greece, Ireland, Japan, and South Africa. Accordingly, pursuant to section 207.40(a) of the Commission's Rules of Practice and Procedure (19 CFR 207.40(a)), the antidumping investigations concerning electrolytic manganese dioxide from Australia, Greece, Ireland, Japan, and South Africa (investigations Nos. 731–TA–1048 and 1050–1053 (Final)) are terminated.

EFFECTIVE DATE: March 2, 2004.

FOR FURTHER INFORMATION CONTACT: George Deyman (202–205–3197), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained 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*.

Authority: These investigations are being terminated under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.40 of the Commission's rules (19 CFR 207.40).

By order of the Commission.

Issued: March 3, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–5226 Filed 3–8–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1071–1072 (Preliminary)]

Magnesium From China and Russia

AGENCY: International Trade Commission.

ACTION: Institution of antidumping investigations and scheduling of preliminary phase investigations.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping investigations Nos. 731–TA–1071–1072 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that 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 imports from China of alloy magnesium and imports from Russia of pure and alloy magnesium, provided for in subheadings 8104.11.00, 8104.19.00, and 8104.30.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping investigations in 45 days, or in this case by April 12, 2004. The Commission's views are due at Commerce within five business days thereafter, or by April 19, 2004.

For further information concerning the conduct of these investigations 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 B (19 CFR part 207).

EFFECTIVE DATE: February 27, 2004.

FOR FURTHER INFORMATION CONTACT: Fred Fischer (202–205–3179 / *Fred.Fischer@usitc.gov*), 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. These investigations are being instituted in response to a petition filed on February 27, 2004, by U.S. Magnesium Corp., Salt Lake City, UT; United Steelworkers of America, Local 8319, Salt Lake City, UT; and Glass, Molders, Pottery, Plastics & Allied Workers International, Local 374, Long Beach, CA.

Participation in the investigations and public service list. Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

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 these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. § 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference. The Commission's Director of Operations has scheduled a conference in connection with these investigations for 9:30 a.m. on March 19, 2004, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Parties wishing to participate in the conference should contact Fred Fischer (202–205–3179 / *Fred.Fischer@usitc.gov*) not later than March 15, 2004, to arrange for their appearance. Parties in support of the imposition of antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions. As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before

March 24, 2004, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must 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).

In accordance with sections 201.16(c) and 207.3 of the 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 207.12 of the Commission's rules.

By order of the Commission.

Issued: March 1, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–5227 Filed 3–8–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. Nos. TA–131–29 and TA–2104–12]

U.S.-Thailand Free Trade Agreement: Advice Concerning the Probable Economic Effect of Providing Duty-Free Treatment for Imports

AGENCY: International Trade Commission.

ACTION: Institution of investigations and scheduling of hearing.

EFFECTIVE DATE: March 3, 2004.

SUMMARY: Following receipt on February 19, 2004, of a request from the United States Trade Representative (USTR), the Commission instituted investigation Nos. TA–131–29 and TA–2104–12, *U.S.-Thailand Free Trade Agreement: Advice Concerning the Probable Economic Effect of Providing Duty-Free Treatment for Imports*, under section 131 of the Trade Act of 1974 and section 2104(b)(2) of the Trade Act of 2002.

FOR FURTHER INFORMATION CONTACT: Information specific to these investigations may be obtained from Tracy Quilter (202–205–3437; *tracy.quilter@usitc.gov*) or Falan Yinug (202–205–2160; *falan.yinug@usitc.gov*), Office of Industries, United States International Trade Commission, Washington, DC 20436. For information on the legal aspects of these investigations, contact William Gearhart of the Office of the General Counsel (202–205–3091; *william.gearhart@usitc.gov*). General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*).

Background

On February 12, 2004, the USTR notified the Congress of the President's intent to initiate free trade agreement negotiations with Thailand. Accordingly, the USTR, pursuant to section 131 of the Trade Act of 1974 (19 U.S.C. 2151), requested the Commission to provide a report including advice as to the probable economic effect of providing duty-free treatment for imports of products of Thailand (i) on industries in the United States producing like or directly competitive products, and (ii) on consumers. In preparing the advice, the Commission's analysis will consider each article in chapters 1 through 97 of the Harmonized Tariff Schedule of the United States for which U.S. tariffs will remain after the United States fully implements its Uruguay Round tariff commitments. The import advice will be based on the 2004 Harmonized Tariff System nomenclature and 2003 trade data. The advice with respect to the removal of U.S. duties on imports from Thailand will assume that any known U.S. nontariff barrier will not be applicable to such imports. The Commission will note in its report any instance in which the continued application of a U.S. nontariff barrier to such imports would result in different advice with respect to the effect of the removal of the duty.

Also as requested, pursuant to section 2104(b)(2) of the Trade Act of 2002 (19 U.S.C. 3804(b)(2)), the Commission will provide advice as to the probable economic effect of eliminating tariffs on imports of certain agricultural products of Thailand on (i) industries in the United States producing the product concerned, and (ii) the U.S. economy as a whole.

The Commission expects to provide its report to the USTR by August 19, 2004. The USTR indicated that the Commission's report will be classified and that USTR considered it to be an interagency memorandum containing pre-decisional advice and subject to the deliberative process privilege.

Public Hearing

A public hearing in connection with these investigations is scheduled to begin at 9:30 a.m. on April 20, 2004, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Requests to appear at the public hearing should be filed with the Secretary, no later than 5:15 p.m., April 2, 2004, in accordance with the requirements in the "Submissions" section below. In the event that, as of the close of business on April 2, 2004, no witnesses are scheduled to appear, the hearing will be canceled. Any person interested in attending the hearing as an observer or non-participant may call the Secretary (202–205–2000) after April 2, 2004, to determine whether the hearing will be held.

Statements and Briefs

In lieu of or in addition to participating in the hearing, interested parties are invited to submit written statements or briefs concerning these investigations in accordance with the requirements in the "Submissions" section below. Any prehearing briefs or statements should be filed not later than 5:15 p.m., April 6, 2004; the deadline for filing post-hearing briefs or statements is 5:15 p.m., April 27, 2004.

Submissions

All written submissions including requests to appear at the hearing, statements, and briefs should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. All written submissions must conform with the provisions of section 201.8 of the *Commission's rules of practice and procedure* (19 CFR 201.8); any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the *Commission's rules of practice and procedure* (19 CFR 201.6). Section 201.8 of the rules require that a signed original (or a copy designated as an original) and fourteen (14) copies of each document be filed.

In the event that confidential treatment of the document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted. Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "nonconfidential" version, and that the

confidential business information be clearly identified by means of brackets.

All written submissions, except for confidential business information, will be made available for inspection by interested parties. The Commission may include confidential business information submitted in the course of these investigations in the report it sends to the USTR. However, should the Commission publish a public version of this report, such confidential business information will not be published in a manner that would reveal the operations of the firm supplying the information.

The Commission's rules do not authorize filing submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules of practice and procedure (19 CFR 201.8) (*see* Handbook for Electronic Filing Procedures, *ftp://ftp.usitc.gov/pub/reports/electronic_filing_handbook.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000 or *edis@usitc.gov*).

The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Secretary at 202–205–2000.

List of Subjects

Thailand, tariffs, and imports.

By order of the Commission.

Issued: March 4, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–5296 Filed 3–8–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11203]

Proposed Class Exemption for the Establishment, Investment and Maintenance of Certain Individual Retirement Plans Pursuant to an Automatic Rollover of a Mandatory Distribution

AGENCY: Employee Benefits Security Administration.

ACTION: Correction.

SUMMARY: In 69 FR, published at page 9846, on March 2, 2004, make the following corrections:

1. On page 9849, in the second column in the 23rd line, delete "29 CFR 2550.401a–2" and insert therein "29 CFR 2550.404a–2."

2. On page 9851, in the third column in the 23rd line under section IV(e), delete "liquality" and insert therein "liquidity."

Signed at Washington, DC, this 4th day of March, 2004.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 04–5277 Filed 3–8–04; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Administrative Procedures

AGENCY: Employment and Training Administration, DOL.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. A copy of the proposed information collection request can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Submit comments on or before May 10, 2004.

ADDRESSES: Send comments to Robert Johnston, Room C–4512, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, telephone: (202) 693–3005 (this is not a toll-free number); Internet address: *johnston.robert@dol.gov*, fax: (202) 693–2874.

SUPPLEMENTARY INFORMATION:

I. Background

Department of Labor Employment and Training Administration regulations, 20 CFR part 601, Administrative Procedures, contains collection of information requirements at §§ 601.2 and 601.3. Section 601.2 requires states to submit copies of their unemployment compensation laws for approval by the Secretary of Labor so that the Secretary may determine the status of state laws and plans of operation. Section 601.3 requires states to "submit all relevant state materials such as statutes, executive and administrative orders, legal opinions, rules, regulations, interpretations, court decisions, etc." These materials are used by the Secretary to determine whether the state law contains provisions required by section 3304(a) of the Internal Revenue Code of 1986. Grants of funds are made to states for the administration of their employment security laws if their unemployment compensation laws and their plans of operation for public employment offices meet required conditions of Federal laws. The information transmitted by Form MA 8–7 is used by the Secretary to make findings (as specified in the above cited Federal laws) required for certification to the Secretary of the Treasury for payment to states or for certification of the state law for purposes of additional tax credit. If this information is not available, the Secretary cannot make such certifications. To facilitate transmittal of required material, the Department prescribes the use of Form MA 8–7, Transmittal for Unemployment Insurance Materials. This simple check off form is used by the states to identify material being transmitted to the National Office and allows the material to be routed to appropriate staff for prompt action.

II. Desired Focus of Comments

Currently, the Employment and Training Administration is soliciting comments concerning the proposed extension of the MA 8–7, Transmittal for Unemployment Insurance Materials.

The Department of Labor is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. Current Actions

States cannot be certified if this information is not collected and Form MA 8–7 greatly facilitates the collection and transmittal process.

Type of Review: Extension without change.

Agency: Employment and Training Administration.

Title: Transmittal for Unemployment Insurance Materials.

OMB Number: 1205–0222.

Agency Number: MA 8–7.

Affected Public: State Governments.

Cite/Reference/Form/etc: MA 8–7.

Total Respondents: 53.

Frequency: As needed.

Total Responses: 3,120.

Average Time per Response: 1 minute.

Estimated Total Burden Hours: 52 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintaining): None.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: March 1, 2004.

Emily Stover DeRocco,

Assistant Secretary for Employment and Training.

[FR Doc. 04–5242 Filed 3–8–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Federal Advisory Council on Occupational Safety and Health: Notice of Meeting

Notice is hereby given of the date and location of the next meeting of the Federal Advisory Council on Occupational Safety and Health (FACOSH), established under Section 1–5 of Executive Order 12196 on February 6, 1980, published in the **Federal Register**, February 27, 1980 (45 FR 1279).

FACOSH will meet on March 29, 2004 starting at 1:30 p.m., in Room N–3437 A/B/C of the Department of Labor Frances Perkins Building, 200 Constitution Avenue, NW., Washington, DC 20210. The meeting will adjourn at approximately 4:30 p.m., and will be open to the public. Anyone wishing to attend this meeting must exhibit photo identification to security personnel upon entering the building.

Agenda items will include:

1. Call to Order.

2. Old Business:

a. Federal Recordkeeping Change.

b. SHARE Initiative.

c. Federal Safety and Health Awards Ceremony and Training Conference.

d. Federal Safety and Health Councils.

e. Young Worker Safety and Health Initiative.

3. New Business:

a. VPP/Partnerships/Alliances.

b. World Safety Congress.

4. Adjournment.

Written data, views, or comments may be submitted, preferably with 20 copies, to the Office of Federal Agency Programs at the address provided below. All such submissions received by March 22, 2004 will be provided to the Federal Advisory Council members and included in the meeting record.

Anyone wishing to make an oral presentation should notify the Office of Federal Agency Programs by the close of business on March 24, 2004. The request should state the amount of time desired, the capacity in which the person will appear, and a brief outline of the presentation's content. Those who request the opportunity to address the Federal Advisory Council may be allowed to speak, as time permits, at the discretion of the Chairperson. Individuals with disabilities who need special accommodations and wish to attend the meeting should contact Thomas Marple at the address indicated below.

For additional information, please contact Thomas K. Marple, Director, Office of Federal Agency Programs, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–3622, 200 Constitution Avenue, NW., Washington, DC 20210, telephone number (202) 693–2122. An official record of the meeting will be available for public inspection at the Office of Federal Agency Programs.

Signed at Washington, DC, this 3rd day of March, 2004.

John L. Henshaw,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 04–5243 Filed 3–8–04; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL SCIENCE FOUNDATION

Business and Operations Advisory Committee; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Business and Operations Advisory Committee (9556).

Date/Time: March 31, 2004; 8 a.m. to 5:30 p.m. (e.s.t.)

Place: National Science Foundation, 4201 Wilson Boulevard, Room 1235, Arlington, VA.

Type of Meeting: Open.

Contact Person: Joan Miller, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230; (703) 292–8200.

Purpose of Meeting: To provide advice concerning issues related to the oversight, integrity, development and enhancement of NSF's business operations.

Agenda: March 31, 2004

AM: Welcome and Introduction of new members; Updates—Office of Budget, Finance, and Award Management and Office of Information and Resource Management activities. Presentation and Discussion—Updates on recent reports; update on Business Analysis.

PM: Presentation and Discussion—NSF Strategic Goal for Organizational Excellence; Meeting with NSF Deputy Director; Committee Discussion; Planning for next meeting; feedback; other business.

Dated: March 3, 2004.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 04–5215 Filed 3–8–04; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel in Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Proposal Review Panel in Materials Reserach (1203).

Dates and Times: March 29, 2004; 1 p.m.–6 p.m.
March 30, 2004; 8:30 a.m.–9 p.m.
March 31, 2004; 8:30 a.m.–1:30 p.m.

Place: Synchrotron Radiation Center (SRC), PSL Conference Room, University of Wisconsin, Stoughton, WI 53589.

Type of Meeting: Partially-Open.

Contact Person: Dr. Hugh Van Horn, Director, National Facilities, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–4920, E-mail: *hvanhorn@nsf.gov.*

Purpose of Meeting: To provide advice and recommendations concerning progress of the Synchrotron Radiation Center (SRC) of the University of Wisconsin.

Agenda

Monday, March 29

1 p.m.–2 p.m. Closed—Executive Session
2 p.m.–5:45 p.m. Open—Tour of SRC, with user presentations
Welcome
Introduction to site review
Discussion

Tuesday, March 30

8:30 a.m.–12:10 p.m. Open—User Science Programs
12:10 p.m.–1 p.m. Closed—Executive Session
1 p.m.–4:15 p.m. Open—Education & outreach
CNTech
Beamlines & instrumentation
Machine physics & operations
Plans for the future
4:15 p.m.–9 p.m. Closed—Executive Session

Wednesday, March 31

8:30 a.m.–1:30 p.m. Closed—Meetings with Institutional Representatives Review and prepare site visit report

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information, financial data, such as salaries and personal information concerning individuals associated with the proposal. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: March 3, 2004.

Susanne E. Bolton,

Committee Management Officer.

[FR Doc. 04–5214 Filed 3–8–04; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* NRC Forms 366, 366A, and 366B, "Licensee Event Report."

2. *Current OMB approval number:* 3150–0104.

3. *How often the collection is required:* On occasion, as defined reactor events are reportable on occurrence.

4. *Who is required or asked to report:* Holders of operating licenses for commercial nuclear power plants.

5. *The number of annual respondents:* 104.

6. *The number of hours needed annually to complete the requirement or request:* 20,000 (Reporting: 20,000 Hours 400 responses = 50 hrs per response).

7. *Abstract:* With NRC Forms 366, 366A, and 366B, the NRC collects reports of the types of reactor events and problems that are believed to be significant and useful to the NRC in its efforts to identify and resolve threats to public safety. They are designed to provide the information necessary for engineering studies of operational anomalies and trends and patterns analysis of operational occurrences. The same information can be used for other analytic procedures that will aid in identifying accident precursors.

Submit, by May 10, 2004, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear Regulatory Commission, T–5 F52, Washington, DC 20555–0001, by telephone at 301–415–7233, or by Internet electronic mail to *infocollects@nrc.gov.*

Dated at Rockville, Maryland, this 3rd day of March 2004.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 04–5232 Filed 3–8–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of March 8, 15, 22, 29; April 5, 12, 2004.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

MATTERS TO BE CONSIDERED:

Week of March 8, 2004

Tuesday, March 9, 2004

9:30 a.m.: Briefing on Status of Office of Nuclear Material Safety and Safeguards (NMSS) Programs, Performance, and Plans—Material Safety (Public Meeting) (Contact: Claudia Seelig, (301) 415–7243). The meeting will be webcast live at the Web address—*www.nrc.gov.*

1:30 p.m.: Discussion of Security Issues (Closed—Ex. 1).

Week of March 15, 2004—Tentative

There are no meetings scheduled for the Week of March 15, 2004.

Week of March 22, 2004—Tentative

Tuesday, March 23, 2004

1:30 p.m.: Briefing on Status of Office of Nuclear Security and Incident Response (NSIR) Programs, Performance, and Plans (Public Meeting) (Contact: Jack Davis, (301) 415–7256). This meeting will be webcast live at the Web address—*www.nrc.gov.*

2:30 p.m.: Discussion of Security Issues (Closed—Ex. 1).

Wednesday, March 24, 2004

9:30 a.m.: Briefing on Status of Office of Nuclear Reactor Regulation (NRR) Programs, Performance, and Plans (Public Meeting) (Contact: Mike Case, (301) 415–1275). This

meeting will be webcast live at the Web address—*www.nrc.gov*.

Week of March 29, 2004—Tentative

There are no meetings scheduled for the Week of March 29, 2004.

Week of April 5, 2004—Tentative

There are no meetings scheduled for the Week of April 5, 2004.

Week of April 12, 2004—Tentative

Tuesday, April 13, 2004

9:30 p.m.: Briefing on Status of Office of Nuclear Regulatory Research (RES) Programs, Performance, and Plans (Public Meeting) (Contact: Alan Levin, (301) 415–6656). This meeting will be webcast live at the Web address—*www.nrc.gov*.

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Dave Gamberoni, (301) 415–1651.

ADDITIONAL INFORMATION: By a vote of 3–0 on February 27, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that "Discussion of Security Issues (Closed—Ex. 1)" be held March 2, and on less than one week's notice to the public.

By a vote of 3–0 on March 1, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that "Affirmation of (1) Private Fuel Storage (Independent Spent Fuel Storage Installation) Docket No. 72–22–ISFSI, and (2) Requests for Application of New Part 2 Rules to Early Site Permit Hearings in *North Anna, Clinton*, and *Grand Gulf*" be held on March 2, and on less than one week's notice to the public.

"Briefing on Status of Office of Nuclear Regulatory Research (RES) Programs, Performance, and Plans (Public Meeting)," originally scheduled for March 23, was rescheduled for April 13.

The NRC Commission Meeting Schedule can be found on the Internet at *www.nrc.gov/what-we-do/policy-making/schedule.html*.

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 ((301) 415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: March 4, 2004.

Dave Gamberoni,

Office of the Secretary.

[FR Doc. 04–5335 Filed 3–5–04; 10:33 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Filing and Information Services, Washington, DC 20549.

Extension:

Rule 17Ad–10; SEC File No. 270–265; OMB Control No. 3235–0273.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

• Rule 17Ad–10: Prompt posting of certificate detail to master securityholder files, maintenance of accurate securityholder files, communications between co-transfer agents and recordkeeping transfer agents, maintenance of current control book, retention of certificate detail and "buy-in" of physical over-issuance.

Rule 17Ad–10, 17 CFR 240.17Ad–10, under the Securities Exchange Act of 1934, requires a registered transfer agent to create and maintain minimum information on securityholders' ownership of an issue of securities for which it performs transfer agent functions, including the purchase, transfer and redemptions of securities. In addition, the rule also requires transfer agents that maintain securityholder records to keep certificate detail that has been cancelled from those records for a minimum of six years and to maintain and keep current an accurate record of the number of shares or principle dollar amount of debt securities that the issuer has authorized to be outstanding (a "control book"). These recordkeeping requirements assist in the creation and maintenance of accurate securityholder records, the ability to research errors, and ensure the transfer agent is ware of the number of securities that are properly authorized by the issuer, thereby avoiding overissuance.

There are approximately 950 transfer agents currently registered with the Commission. The staff estimates that the average number of hours necessary for each transfer agent to comply with Rule 17Ad–10 is approximately 20 hours per year, totaling 19,000 hours industry-wide. The average cost per hour is approximately $20 per hour, with the industry-wide cost estimated at approximately $380,000. However, the information required by Rule 17Ad–10 generally already is maintained by registered transfer agents. The amount of time devoted to compliance with Rule 17Ad–10 varies according to differences in business activity.

The retention period for the recordkeeping requirements under Rule 17Ad–10 is six years for certificate detail that has been cancelled and to maintain and keep current an accurate record of the number of shares or principle dollar amount of debt securities that the issuer has authorized to be outstanding. The recordkeeping requirement under Rule 17Ad–10 is mandatory to ensure accurate securityholder records and to assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rule. This rule does not involve the collection of confidential information. Persons should note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the estimated burden hours should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: March 1, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5204 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Filing and

Information Services, Washington, DC 20549.

Extension:
Rule 35d–1; SEC File No. 270–491; OMB Control No. 3235–0548.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)("Act") the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

The title for the collection of information is "Rule 35d–1 under the Investment Company Act of 1940, Investment Company Names."

Rule 35d–1 under the Investment Company Act of 1940 [17 CFR 270.35d–1] generally requires that investment companies with certain names invest at least 80% of their assets according to what their names suggests. The rule provides that an affected investment company must either adopt this 80% requirement as a fundamental policy or adopt a policy to provide notice to shareholders at least 60 days prior to any change in its 80% investment policy. This preparation and delivery of the notice to existing shareholders is a collection of information within the meaning of the Act.

The Commission estimates that there are 7,200 open-end and closed-end management investment companies and series that have descriptive names that are governed by the rule. The Commission estimates that of these 7,200 investment companies, approximately 24 provide prior notice to their shareholders of a change in their investment policies per year. The Commission estimates that the annual burden associated with the notice requirement of the rule is 20 hours per affected investment company or series. The total burden hours for Rule 35d–1 is 480 per year in the aggregate (24 responses x 20 hours per response). Estimates of average burden hours are made solely for the purposes of the Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

The collection of information under Rule 35d–1 is mandatory. The information provided under Rule 35d–1 is not kept confidential. 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.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: March 2, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5205 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Filing and Information Services, Washington, DC 20549.

Extension:
Rule 17Ad–16; SEC File No. 270–363; OMB Control No. 3235–0413.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

- Rule 17Ad–16—Notice of Assumption or Termination of Transfer Agent Services. Certificate Detail

Rule 17Ad–16, 17 CFR 240.17Ad–16, under the Securities Exchange Act of 1934, requires a registered transfer agent to provide written notice to a qualified registered securities depository when assuming or terminating transfer agent services on behalf of an issuer or when changing its name or address. These recordkeeping requirements address the problem of certificate transfer delays caused by transfer requests that are directed to the wrong transfer agent or the wrong address.

Given that there are approximately 450 transfer agents that submit approximately 14 Rule 17Ad–16 notices each, the staff estimates that the average number of hours necessary for each transfer agent to comply with Rule 17Ad–16 is approximately 15 minutes per notice or 3.5 hours per year (15 minutes multiplied by 14 notices filed annually), totaling 1,575 hours industry-wide.

Since the Commission estimates that approximately 450 transfer agents each file approximately 14 notices per year, and because the information needed by transfer agents is already readily available to them and the report is simple and straightforward, the cost is minimal. The average cost to prepare and send a notice is approximately $7.50 (15 minutes at $30 per hour), generating an annual cost of $105 per transfer agent, and an industry-wide cost estimate of $47,250. However, the information required by Rule 17Ad–16 generally already is maintained by registered transfer agents. The amount of time devoted to compliance with Rule 17Ad–16 varies according to differences in business activity.

The retention period for the recordkeeping requirements under Rule 17Ad–16 is two years for both the clearing agencies and transfer agents. The recordkeeping requirement under Rule 17Ad–16 is mandatory to ensure accurate securityholder records, prompt and efficient clearance and settlement, and to assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rule. This rule does not involve the collection of confidential information. Please note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the estimated burden hours should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5 fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: March 1, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5206 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549–0004.

Extension:
Rule 88 and Form U–13–1; SEC File No. 270–80; OMB Control No. 3235–0182

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the matters relating to the previously approved collections of information discussed below.

Form U–13–1, [17 CFR 259.113] under the Public Utility Holding Company Act of 1935, as amended ("Act"), 15 U.S.C. 79, *et seq.*, is required to be filed under Rule 88 of the Act by companies seeking Commission approval to become mutual service companies under the Act.

Rule 88 under the Act, which implements Section 13 of the Act requires the information collection prescribed by Form U–13–1. The Commission estimates that the total annual reporting and recordkeeping burden of collections for Form U–13–1 is 88 hours (22 responses × 4 hours = 88 hours).

The estimate of average burden hours are made for purposes of the Paperwork Reduction Act and are not derived from a comprehensive or representative survey or study of the costs of complying with the requirements of Commission rules and forms.

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.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: March 3, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5207 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:
Rule 17Ad–2(c), (d), and (h); SEC File No. 270–149; OMB Control No. 3235–0130

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

• Rule 17Ad–2(c), (d), and (h)—Transfer Agent Turnaround, Processing and Forwarding Requirements

Rule 17Ad–2(c), (d), and (h), 17 CFR 240.17Ad–2(c), (d), and (h), under the Securities Exchange Act of 1934, enumerate the requirements with which transfer agents must comply to inform the Commission or the appropriate regulator of a transfer agent's failure to meet the minimum performance standards set by the Commission rule by filing a notice.

While it is estimated there are 900 transfer agents, approximately ten notices pursuant to 17Ad–2(c), (d), and (h) are filed annually. The estimated annual cost to respondents is minimal. In view of: (a) The readily available nature of most of the information required to be included in the notice (since that information must be compiled and retained pursuant to other Commission rules); (b) the summary fashion that such information must be presented in the notice (most notices are one page or less in length); and (c) the experience of the staff regarding the notices, the Commission staff estimates that, on average, most notices require approximately one-half hour to prepare. The Commission staff estimates that transfer agents spend an average of five hours per year complying with the rule.

The retention period for the recordkeeping requirement under Rule 17Ad–2(c), (d), and (h) is not less than two years following the date the notice is submitted. The recordkeeping requirement under this rule is mandatory to assist the Commission in monitoring transfer agents who fail to meet the minimum performance standards set by the Commission rule. This rule does not involve the collection of confidential information. Please note that a transfer agent is not required to file under the rule unless it does not meet the minimum performance standards for turnaround, processing or forwarding items received for transfer during a month. Persons should note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the estimated burden hours should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: March 1, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5208 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Form U–6B–2, SEC File No. 270–169, OMB Control No. 3235–0163.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (the "Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

The Public Utility Holding Company Act of 1935 (15 U.S.C. section 79a *et seq.*) requires the filing of an application

and/or declaration on Form U–1 for prior Commission approval both for the issue and sale of a security and its acquisition by a company in a registered holding company system.[1] Section 6(b) provides that the Commission shall exempt from the requirement of filing a declaration on Form U–1, by rules and regulations or orders and subject to such terms and conditions, as it deems appropriate in the public interest or for the protection of investors or consumers, certain security issuances and sales.

Section 6(b) also contains a reporting requirement. It directs the issuer of securities exempted under section 6(b) to file with the Commission within ten days of the issue or sale a certificate of notification and directs the Commission to prescribe the form of and information required in this certificate. Rule 20(d) (17 CFR 250.20d) prescribes Form U–6B–2 as the form of certificate of notification to be filed pursuant to section 6(b). Form U–6B–2 is also prescribed by rule 52(c) (17 CFR 250.52 (c)) and rule 47(b) (17 CFR 250. 47(b)) as the form of certificate of notification to be filed by a public utility subsidiary company of a registered holding company to notify the Commission of exempt issuances and sales of securities under rule 52 Exemption of Issue and Sale of Certain Securities approved by state commissions and rule 47 Exemption of Public Utility Subsidiaries as to Certain Securities Issued to the Rural Electrification Administration. The Commission receives about 177 . Form U–6B–2s per year from 67 respondents who each file once, which imposes an annual burden of about 177 hours.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

[1] *See* section 6(a) (requiring prior Commission approval under the standards of section 7 for the issue and sale of securities) and section 9(a)(1) (requiring prior Commission approval under the standards of section 10 for the acquisition of securities).

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: March 3, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5272 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26377; File No. 812–13052]

Access Variable Insurance Trust, *et al.*; Notice of Application

March 3, 2004.

AGENCY: The Securities and Exchange Commission ("SEC" or the "Commission").

ACTION: Notice of Application for Exemption under section 6(c) of the Investment Company Act of 1940, as amended (the "1940 Act"), for an exemption from the provisions of sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e-2(b)(15) and 6e-3(T)(b)(15) thereunder.

Applicants: Access Variable Insurance Trust ("the Trust") and Access Fund Management, LLC ("AFM") (collectively, the "Applicants").

Summary of Application: Applicants seek an order pursuant to section 6(c) of the 1940 Act exempting certain life insurance companies and their separate accounts that currently invest or may hereafter invest in the Trust (and to the extent necessary, any investment adviser, principal underwriter and depositor of such an account) from the provisions of sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e-2(b)(15) and 6e-3(T)(b)(15) thereunder, to the extent necessary to permit shares of the Trust and shares of any other investment company or portfolio that is designed to fund insurance products and for which AFM or any of its affiliates may serve in the future as investment adviser, manager, principal underwriter, sponsor, or administrator ("Future Trusts") (the Trust, together with Future Trusts, are the "Trusts") to be sold to and held by: (i) Separate accounts funding variable annuity and variable life insurance contracts (collectively referred to herein as "Variable Contracts") issued by both affiliated and unaffiliated life insurance companies; (ii) qualified pension and retirement plans ("Qualified Plans") outside of the separate account context; (iii) separate accounts that are not registered as investment companies under the 1940 Act pursuant to exemptions from registration under section 3(c) of the 1940 Act; (iv) AFM or its affiliates (collectively "AFM"); and (v) any other person permitted to hold shares of the Trusts pursuant to Treasury Regulation 1.817–5 ("General Accounts").

Filing Dates: The application was filed on December 22, 2003 and amended and restated on February 23, 2004.

Hearing or Notification of Hearing: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on March 25, 2004, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, Donald Mendelsohn, Esq., Thompson Hine LLP, 312 Walnut Street, 14th Floor, Cincinnati, Ohio 45202–4089.

FOR FURTHER INFORMATION CONTACT: Mark Cowan, Senior Counsel, or Zandra Bailes, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 (telephone (202) 942–8090).

Applicants' Representations

1. The Trust is registered with the Commission as an open-end management investment company and is organized as an Ohio business trust. AFM is registered with the Commission as an investment adviser under the Investment Advisers Act of 1940, as amended, and serves as the investment adviser to the Trust. The Trust currently consists of four investment portfolios that are sold only to separate accounts of insurance companies in conjunction with variable life and variable annuity contracts: Wells S&P REIT Index℠

Portfolio, Potomac Dow 30SM Plus Portfolio, Potomac OTC Plus Portfolio, and Access U.S. Government Money Market Portfolio (each, a "Portfolio," and collectively, the "Portfolios"). The Trust or any Future Trusts may offer one or more additional investment portfolios in the future (also referred to as "Portfolios").

2. Shares of the Portfolios will be offered to separate accounts of affiliated and unaffiliated insurance companies (each, a "Participating Insurance Company") to serve as investment vehicles to fund Variable Contracts (as hereinafter defined). These separate accounts either will be registered as investment companies under the 1940 Act or will be exempt from such registration pursuant to exemptions from registration under section 3(c) of the 1940 Act (individually, a "Separate Account" and collectively, the "Separate Accounts"). Shares of the Portfolios may also be offered to Qualified Plans, AFM or its affiliates in compliance with Treasury Regulation 1.817–5 (collectively, "AFM") and any other person permitted to hold shares of the Trusts pursuant to Treasury Regulation 1.817–5 ("General Accounts"), including the general account of any life insurance company whose separate account holds, or will hold, shares of the Trusts or certain related corporations.

3. The Participating Insurance Companies at the time of their investment in the Trusts either have or will establish their own Separate Accounts and design their own Variable Contracts. Each Participating Insurance Company has or will have the legal obligation of satisfying all applicable requirements under both State and Federal law. Each Participating Insurance Company, on behalf of its Separate Accounts, has or will enter into an agreement with the Trusts concerning such Participating Insurance Company's participation in the Portfolios. The role of the Trusts under this agreement, insofar as the federal securities laws are applicable, will consist of, among other things, offering shares of the Trusts to the participating Separate Accounts and complying with any conditions that the Commission may impose upon granting the order requested herein.

Applicants' Legal Analysis

1. Applicants seek an order pursuant to section 6(c) of the 1940 Act exempting certain life insurance companies and their separate accounts that currently invest or may hereafter invest in the Trust (and to the extent necessary, any investment adviser, principal underwriter and depositor of such an account) from the provisions of sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e-2(b)(15) and 6e-3(T){b)(15) thereunder, to the extent necessary to permit shares of the Trust and shares of any Future Trusts to be sold to and held by: (a) Separate accounts funding Variable Contracts issued by both affiliated and unaffiliated life insurance companies; (b) Qualified Plans outside of the separate account context; (c) separate accounts that are not registered as investment companies under the 1940 Act pursuant to exemptions from registration under section 3(c) of the 1940 Act; (d) AFM; and (e) any General Accounts, including the general account of any life insurance company whose separate account holds, or will hold, shares of the Trusts.

2. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered as a unit investment trust ("UIT") under the 1940 Act, Rule 6e-2(b)(15) provides partial exemptions from sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The relief provided by Rule 6e-2 is also granted to the investment adviser, principal underwriter, and depositor of the separate account. Section 9(a)(2) of the 1940 Act makes it unlawful for any company to serve as an investment adviser or principal underwriter of any UIT, if an affiliated person of that company is subject to a disqualification enumerated in sections 9(a)(1) or (2) of the 1940 Act. Sections 13(a), 15(a) and 15(b) of the 1940 Act have been deemed by the Commission to require "pass-through" voting with respect to an underlying investment company's shares. Rule 6e-2(b)(15) provides these exemptions apply only where all of the assets of the UIT are shares of management investment companies "which offer their shares exclusively to variable life insurance separate accounts of the life insurer or of any affiliated life insurance company." Therefore, the relief granted by Rule 6e-2(b)(15) is not available with respect to a scheduled premium life insurance separate account that owns shares of an underlying fund that also offers its shares to a variable annuity separate account or flexible premium variable life insurance separate account of the same company or any other affiliated insurance company. The use of a common management investment company as the underlying investment vehicle for both variable annuity and variable life insurance separate accounts of the same life insurance company or of any affiliated life insurance company is referred to herein as "mixed funding."

3. The relief granted by Rule 6e–2(b)(15) also is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to separate accounts funding Variable Contracts of one or more unaffiliated life insurance companies. The use of a common management investment company as the underlying investment vehicle for variable annuity and/or variable life insurance separate accounts of unaffiliated life insurance companies is referred to herein as "shared funding."

4. The relief under Rule 6e–2(b)(15) is available only where shares are offered exclusively to variable life insurance separate accounts of a life insurer or any affiliated life insurance company; additional exemptive relief is necessary if the shares of the Portfolios are also to be sold to Qualified Plans or other eligible holders of shares, as described above. Applicants note that if shares of the Portfolios are sold only to Qualified Plans, exemptive relief under Rule 6e–2 would not be necessary. The relief provided for under this section does not relate to Qualified Plans or to a registered investment company's ability to sell its shares to Qualified Plans. The use of a common management investment company as the underlying investment vehicle for variable annuity and variable life separate accounts of affiliated and unaffiliated insurance companies, and for Qualified Plans, is referred to herein as "extended mixed and shared funding."

5. In connection with flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a UIT, Rule 6e–3(T)(b)(15) provides partial exemptions from sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The exemptions granted by Rule 6e–3(T)(b)(15) are available only where all the assets of the separate account consist of the shares of one or more registered management investment companies that offer to sell their shares "exclusively to separate accounts of the life insurer, or of any affiliated life insurance companies, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company or which offer their shares to any such life insurance company in consideration solely for advances made by the life insurer in connection with the operation of the separate account." Therefore, Rule 6e–3(T)(b)(15) permits mixed

funding but does not permit shared funding.

6. The relief under Rule 6e–3(T) is available only where shares are offered exclusively to variable life insurance separate accounts of a life insurer or any affiliated life insurance company, and additional exemptive relief is necessary if the shares of the Portfolios are also to be sold to Qualified Plans or other eligible holders of shares as described above. Applicants note that if shares of the Portfolios were sold only to Qualified Plans, exemptive relief under Rule 6e–3(T)(b)(15) would not be necessary. The relief provided for under this section does not relate to Qualified Plans or to a registered investment company's ability to sell its shares to Qualified Plans.

7. Applicants maintain, as discussed below, that there is no policy reason for the sale of the Portfolios' shares to Qualified Plans, AFM or General Accounts to result in a prohibition against, or otherwise limit, a Participating Insurance Company from relying on the relief provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15). However, because the relief under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) is available only when shares are offered exclusively to separate accounts, additional exemptive relief may be necessary if the shares of the Portfolios are also to be sold to Qualified Plans, AFM or General Accounts. Applicants therefore request relief in order to have the participating insurance companies enjoy the benefits of the relief granted in Rules 6e–2(b)(15) and 6e–3(T)(b)(15). Applicants note that if the Portfolios' shares were to be sold only to Qualified Plans, AFM, General Accounts and/or separate accounts funding variable annuity contracts, exemptive relief under Rule 6e–2 and Rule 6e–3(T) would be unnecessary. The relief provided for under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) does not relate to Qualified Plans, AFM or General Accounts, or to a registered investment company's ability to sell its shares to such purchasers.

8. Applicants also note that the promulgation of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) preceded the issuance of the Regulations that made it possible for shares of an investment company portfolio to be held by the trustee of a Qualified Plan without adversely affecting the ability of shares in the same investment company portfolio also to be held by the separate accounts of insurance companies in connection with their Variable Contracts. Thus, the sale of shares of the same portfolio to both separate accounts and Qualified Plans was not contemplated at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15).

9. Consistent with the Commission's authority under section 6(c) of the 1940 Act to grant exemptive orders to a class or classes of persons and transactions, this Application requests relief for the class consisting of insurers and Separate Accounts that will invest in the Portfolios, and to the extent necessary, investment advisers, principal underwriters and depositors of such accounts.

10. Section 9(a)(3) of the 1940 Act provides that it is unlawful for any company to serve as investment adviser or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in sections 9(a)(1) or (2). Rules 6e–2(b)(15)(i) and (ii) and Rules 6e–3(T)(b)(15)(i) and (ii) under the 1940 Act provide exemptions from section 9(a) under certain circumstances, subject to the limitations discussed above on mixed and shared funding. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly participate in management of the underlying management company.

11. The partial relief granted in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) under the 1940 Act from the requirements of section 9 of the 1940 Act, in effect, limits the amount of monitoring necessary to ensure compliance with section 9 to that which is appropriate in light of the policy and purposes of section 9. Those rules recognize that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of section 9(a) to individuals in a large insurance company complex, most of whom will have no involvement in matters pertaining to investment companies in that organization. The Participating Insurance Companies and Qualified Plans are not expected to play any role in the management of the Trusts. Those individuals who participate in the management of the Trusts will remain the same regardless of which Separate Accounts or Qualified Plans invests in the Trusts. Applying the monitoring requirements of section 9(a) of the 1940 Act because of investment by separate accounts of other insurers or Qualified Plans would be unjustified and would not serve any regulatory purpose. Furthermore, the increased monitoring costs could reduce the net rates of return realized by contract owners.

12. Moreover, since the Qualified Plans, AFM and General Accounts are not themselves investment companies, and therefore are not subject to section 9 of the 1940 Act and will not be deemed affiliates solely by virtue of their shareholdings, no additional relief is necessary.

13. Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) under the 1940 Act provide exemptions from the pass-through voting requirement with respect to several significant matters, assuming the limitations on mixed and shared funding are observed. Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) provide that the insurance company may disregard the voting instructions of its contract owners with respect to the investments of an underlying fund, or any contract between such a fund and its investment adviser, when required to do so by an insurance regulatory authority (subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of Rules 6e–2 and 6e–3(T), respectively, under the 1940 Act). Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(A)(2) provide that the insurance company may disregard the voting instructions of its contract owners if the contract owners initiate any change in an underlying portfolio's investment policies, principal underwriter, or any investment adviser (provided that disregarding such voting instructions is reasonable and subject to the other provisions of paragraphs (b)(5)(ii), (b)(7)(ii)(B), and (b)(7)(ii)(C), respectively, of Rules 6e–2 and 6e–3(T) under the 1940 Act).

14. Rule 6e–2 under the 1940 Act recognizes that a variable life insurance contract, as an insurance contract, has important elements unique to insurance contracts and is subject to extensive State regulation of insurance. In adopting Rule 6e–2(b)(15)(iii), the Commission expressly recognized that State insurance regulators have authority, pursuant to State insurance laws or regulations, to disapprove or require changes in investment policies, investment advisers, or principal underwriters. The Commission also expressly recognized that State insurance regulators have authority to require an insurer to draw from its general account to cover costs imposed upon the insurer by a change approved by contract owners over the insurer's objection. The Commission, therefore, deemed such exemptions necessary "to assure the solvency of the life insurer and performance of its contractual obligations by enabling an insurance regulatory authority or the life insurer to act when certain proposals reasonably could be expected to increase the risks undertaken by the life insurer. In this respect, flexible premium variable life insurance contracts are identical to

scheduled premium variable life insurance contracts. Therefore, the corresponding provisions of Rule 6e–3(T) under the 1940 Act undoubtedly were adopted in recognition of the same factors.

15. Applicants state that the sale of Portfolio shares to Qualified Plans, AFM and General Accounts will not have any impact on the relief requested herein. With respect to the Qualified Plans, which are not registered as investment companies under the 1940 Act, there is no requirement to pass through voting rights to Qualified Plan participants. Indeed, to the contrary, applicable law expressly reserves voting rights associated with Qualified Plan assets to certain specified persons. Under section 403(a) of ERISA, shares of a portfolio of a fund sold to a Qualified Plan must be held by the trustees of the Qualified Plan. Section 403(a) also provides that the trustee(s) must have exclusive authority and discretion to manage and control the Qualified Plan with two exceptions: (i) When the Qualified Plan expressly provides that the trustee(s) are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees are subject to proper directions made in accordance with the terms of the Qualified Plan and not contrary to ERISA, and (ii) when the authority to manage, acquire, or dispose of assets of the Qualified Plan is delegated to one or more investment managers pursuant to section 402(c)(3) of ERISA. Unless one of the above two exceptions stated in section 403(a) applies, Qualified Plan trustees have the exclusive authority and responsibility for voting proxies.

16. Where a named fiduciary to a Qualified Plan appoints an investment manager, the investment manager has the responsibility to vote the shares held unless the right to vote such shares is reserved to the trustees or the named fiduciary. The Qualified Plans may have their trustee(s) or other fiduciaries exercise voting rights attributable to investment securities held by the Qualified Plans in their discretion. Some of the Qualified Plans, however, may provide for the trustee(s), an investment adviser (or advisers), or another named fiduciary to exercise voting rights in accordance with instructions from participants. Similarly, AFM and General Accounts are not subject to any pass-through voting requirements. Accordingly, unlike the case with insurance company separate accounts, the issue of resolution of material irreconcilable conflicts with respect to voting is not present with Qualified Plans, AFM or General Accounts.

17. Where a Qualified Plan does not provide participants with the right to give voting instructions, the trustee or named fiduciary has responsibility to vote the shares held by the Qualified Plan. In this circumstance, the trustee has a fiduciary duty to vote the shares in the best interest of the Qualified Plan participants. Accordingly, even if AFM or an affiliate of AFM were to serve in the capacity of trustee or named fiduciary with voting responsibilities, AFM or the affiliates would have a fiduciary duty to vote those shares in the best interest of the Qualified Plan participants.

18. In addition, even if a Qualified Plan were to hold a controlling interest in a Portfolio, Applicants do not believe that such control would disadvantage other investors in such portfolio to any greater extent than is the case when any institutional shareholder holds a majority of the voting securities of any open-end management investment company. In this regard, Applicants submit that investment in a Portfolio by a Qualified Plan will not create any of the voting complications occasioned by mixed funding or shared funding. Unlike mixed funding or shared funding, Qualified Plan investor voting rights cannot be frustrated by veto rights of insurers or state regulators.

19. Where a Qualified Plan provides participants with the right to give voting instructions, Applicants see no reason to believe that participants in Qualified Plans generally or those in a particular Qualified Plan, either as a single group or in combination with participants in other Qualified Plans, would vote in a manner that would disadvantage Variable Contract holders. The purchase of shares of the Portfolios by Qualified Plans that provide voting rights does not present any complications not otherwise occasioned by mixed or shared funding.

20. The prohibitions on mixed and shared funding might reflect concern regarding possible different investment motivations among investors. When Rule 6e–2 under the 1940 Act was adopted, variable annuity separate accounts could invest in mutual funds whose shares also were offered to the general public. Therefore, the Commission staff contemplated underlying funds with public shareholders, as well as with variable life insurance separate account shareholders. The Commission staff may have been concerned with the potentially different investment motivations of public shareholders and variable life insurance contract owners. There also may have been some concern with respect to the problems of permitting a State insurance regulatory authority to affect the operations of a publicly available mutual fund and to affect the investment decisions of public shareholders.

21. For reasons unrelated to the 1940 Act, however, Internal Revenue Service Revenue Ruling 81–225 (Sept. 25, 1981) effectively deprived variable annuities funded by publicly available mutual funds of their tax-benefited status. The Tax Reform Act of 1984 codified the prohibition against the use of publicly available mutual funds as an investment vehicle for Variable Contracts (including variable life contracts). Section 817(h) of the Internal Revenue Code of 1986, as amended (the "Code"), in effect requires that the investments made by variable annuity and variable life insurance separate accounts be "adequately diversified." If a separate account is organized as a UIT that invests in a single fund or series, the diversification test will be applied at the underlying fund level, rather than at the separate account level, but only if "all of the beneficial interests" in the underlying fund "are held by one or more insurance companies (or affiliated companies) in their general account or in segregated asset accounts. * * *" Accordingly, a UIT separate account that invests solely in a publicly available mutual fund will not be adequately diversified. In addition, any underlying mutual fund, including any Portfolio, that sells shares to separate accounts, in effect, would be precluded from also selling its shares to the public. Consequently, there will be no public shareholders of any Portfolio.

22. Shared funding by unaffiliated insurance companies does not present any issues that do not already exist where a single insurance company is licensed to do business in several or all States. A particular State insurance regulatory body could require action that is inconsistent with the requirements of other States in which the insurance company offers its policies. The fact that different insurers may be domiciled in different States does not create a significantly different or enlarged problem.

23. Shared funding by unaffiliated insurers, in this respect, is no different than the use of the same investment company as the funding vehicle for affiliated insurers, which Rules 6e–2(b)(15) and 6e–3(T)(b)(15) under the 1940 Act permit. Affiliated insurers may be domiciled in different States and be subject to differing State law requirements. Affiliation does not reduce the potential, if any exists, for differences in State regulatory requirements. In any event, the conditions set forth below are designed to safeguard against, and provide

procedures for resolving, any adverse effects that differences among State regulatory requirements may produce. If a particular State insurance regulator's decision conflicts with the majority of other State regulators, then the affected insurer will be required to withdraw its Separate Account's investment in the affected Trust. This requirement will be provided for in agreements that will be entered into by Participating Insurance Companies with respect to their participation in the relevant Portfolio.

24. Rules 6e–2(b)(15) and 6e–3(T)(b)(15) under the 1940 Act give the insurance company the right to disregard the voting instructions of the contract owners. This right does not raise any issues different from those raised by the authority of State insurance administrators over separate accounts. Under Rules 6e–2(b)(15) and 6e–3(T)(b)(15), an insurer can disregard contract owner voting instructions only with respect to certain specified items. Affiliation does not eliminate the potential, if any exists, for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment adviser initiated by contract owners. The potential for disagreement is limited by the requirements in Rules 6e–2 and 6e–3(T) under the 1940 Act that the insurance company's disregard of voting instructions be reasonable and based on specific good-faith determinations.

25. A particular insurer's disregard of voting instructions, nevertheless, could conflict with the majority of contract owners' voting instructions. The insurer's action possibly could be different than the determination of all or some of the other insurers (including affiliated insurers) that the voting instructions of contract owners should prevail, and either could preclude a majority vote approving the change or could represent a minority view. If the insurer's judgment represents a minority position or would preclude a majority vote, then the insurer may be required, at the affected Trusts' election, to withdraw its Separate Account's investment in such Portfolio. No charge or penalty will be imposed as a result of such withdrawal. This requirement will be provided for in the agreements entered into with respect to participation by the Participating Insurance Companies in each Portfolio.

26. Each Portfolio will be managed to attempt to achieve the investment objective or objectives of such Portfolio, and not to favor or disfavor any particular Participating Insurance Company or type of insurance product. There is no reason to believe that different features of various types of contracts, including the "minimum death benefit" guarantee under certain variable life insurance contracts, will lead to different investment policies for different types of Variable Contracts. To the extent that the degree of risk may differ as between variable annuity contracts and variable life insurance policies, the different insurance charges imposed, in effect, adjust any such differences and equalize the insurers' exposure in either case.

27. Applicants do not believe that the sale of the shares of the Portfolios to Qualified Plans will increase the potential for material irreconcilable conflicts of interest between or among different types of investors. In particular, Applicants see very little potential for such conflicts beyond those that would otherwise exist between variable annuity and variable life insurance contract owners. Moreover, in considering the appropriateness of the requested relief, Applicants have analyzed the following issues to assure themselves that there were either no conflicts of interest or that there existed the ability by the affected parties to resolve the issues without harm to the contract owners in the Separate Accounts or to the participants under the Qualified Plans.

28. Applicants considered whether there are any issues raised under the Code, Regulations, or Revenue Rulings thereunder, if Qualified Plans, variable annuity separate accounts, and variable life insurance separate accounts all invest in the same underlying fund. As noted above, section 817(h) of the Code imposes certain diversification standards on the underlying assets of Variable Contracts held in an underlying mutual fund. The Code provides that a Variable Contract shall not be treated as an annuity contract or life insurance, as applicable, for any period (and any subsequent period) for which the investments are not, in accordance with regulations prescribed by the Treasury Department, adequately diversified.

29. Regulations issued under section 817(h) provide that, in order to meet the statutory diversification requirements, all of the beneficial interests in the investment company must be held by the segregated asset accounts of one or more insurance companies. However, the Regulations contain certain exceptions to this requirement, one of which allows shares in an underlying mutual fund to be held by the trustees of a qualified pension or retirement plan without adversely affecting the ability of such shares also to be held by separate accounts of insurance companies in connection with their Variable Contracts (Treas. Reg. 1.817–5(f)(3)(iii)). Thus, the Regulations specifically permit "qualified pension or retirement plans" and separate accounts to invest in the same underlying fund. For this reason, Applicants have concluded that neither the Code, nor Regulations, nor Revenue Rulings thereunder, present any inherent conflicts of interest if the Qualified Plans and Separate Accounts all invest in the same Portfolio.

30. Applicants note that while there are differences in the manner in which distributions from Variable Contracts and Qualified Plans are taxed, these differences will have no impact on the Trusts. When distributions are to be made, and a Separate Account or Qualified Plan is unable to net purchase payments to make the distributions, the Separate Account and Qualified Plan will redeem shares of the relevant Portfolio at their respective net asset value in conformity with Rule 22c-1 under the 1940 Act (without the imposition of any sales charge) to provide proceeds to meet distribution needs. A Participating Insurance Company then will make distributions in accordance with the terms of its Variable Contract, and a Qualified Plan then will make distributions in accordance with the terms of the Qualified Plan.

31. In connection with any meeting of shareholders, the soliciting Trust will inform each shareholder, including each Separate Account, Qualified Plan, AFM and General Account, of information necessary for the meeting, including their respective share of ownership in the relevant Portfolio. Each Participating Insurance Company then will solicit voting instructions in accordance with Rules 6e-2 and 6e-3(T), as applicable, and its agreement with the Portfolios concerning participation in the relevant Portfolio. Shares of a Portfolio that are held by AFM and any General Account will be voted in the same proportion as all variable contract owners having voting rights with respect to that Portfolio. However, AFM and any General Account will vote their shares in such other manner as the Commission may require. Shares held by Qualified Plans will be voted in accordance with applicable law. The voting rights provided to Qualified Plans with respect to shares of a Portfolio would be no different from the voting rights that are provided to Qualified Plans with respect to shares of funds sold to the general public. Furthermore, if a material irreconcilable conflict arises because of a Qualified Plan's decision to disregard Qualified Plan participant voting instructions, if

applicable, and that decision represents a minority position or would preclude a majority vote, the Qualified Plan may be required, at the election of the affected Trust, to withdraw its investment in such Portfolio, and no charge or penalty will be imposed as a result of such withdrawal.

32. Applicants reviewed whether a "senior security," as such term is defined under section 18(g) of the 1940 Act, is created with respect to any Variable Contract owner as opposed to a participant under a Qualified Plan, AFM or a General Account. Applicants concluded that the ability of the Trusts to sell shares of their Portfolios directly to Qualified Plans, AFM or a General Account does not create a senior security. "Senior security" is defined under section 18(g) of the 1940 Act to include "any stock of a class having priority over any other class as to distribution of assets or payment of dividends." As noted above, regardless of the rights and benefits of participants under Qualified Plans, or contract owners under Variable Contracts, the Qualified Plans, AFM, General Accounts and the Separate Accounts only have rights with respect to their respective shares of the Portfolio. They only can redeem such shares at net asset value. No shareholder of a Portfolio has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

Applicant's Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions, which shall apply to the Trust as well as any Future Trust that relies on the requested order:

1. A majority of the Board of Trustees (the "Board") of the Trust will consist of persons who are not "interested persons" of the Trust, as defined by section 2(a)(19) of the 1940 Act, and the rules thereunder, and as modified by any applicable orders of the Commission, except that if this condition is not met by reason of the death, disqualification, or bona-fide resignation of any Trustee or Trustees, then the operation of this condition will be suspended: (a) For a period of 90 days if the vacancy or vacancies may be filled by the Board; (b) for a period of 150 days if a vote of shareholders is required to fill the vacancy or vacancies; or (c) for such longer period as the Commission may prescribe by order upon application.

2. The Board will monitor the Trust for the existence of any material irreconcilable conflict between the interests of the contract owners of all Separate Accounts and participants of all Qualified Plans investing in such Trust, and determine what action, if any should be taken in response to such conflicts. A material irreconcilable conflict may arise for a variety of reasons, including: (i) An action by any State insurance regulatory authority; (ii) a change in applicable Federal or State insurance tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretative letter, or any similar action by insurance, tax, or securities regulatory authorities; (iii) an administrative or judicial decision in any relevant proceeding; (iv) the manner in which the investments of such Trust are being managed; (v) a difference in voting instructions given by variable annuity contract owners, variable life insurance contract owners, and trustees of the Qualified Plans; (vi) a decision by a Participating Insurance Company to disregard the voting instructions of contract owners; or (vii) if applicable, a decision by a Qualified Plan to disregard the voting instructions of Qualified Plan participants.

3. Participating Insurance Companies (on their own behalf, as well as by virtue of any investment of general account assets in a Portfolio), AFM and any Qualified Plan that executes a participation agreement upon becoming an owner of 10 percent or more of the assets of any Portfolio (collectively, "Participants") will report any potential or existing conflicts to the Board. Participants will be responsible for assisting the Board in carrying out the Board's responsibilities under these conditions by providing the Board with all information reasonably necessary for the Board to consider any issues raised. This responsibility includes, but is not limited to, an obligation by each Participating Insurance Company to inform the Board whenever contract owner voting instructions are disregarded, and, if pass-through voting is applicable, an obligation by each Qualified Plan to inform the Board whenever it has determined to disregard Qualified Plan participant voting instructions. The responsibility to report such information and conflicts, and to assist the Board, will be a contractual obligation of all Participating Insurance Companies under their participation agreements with the Trust, and these responsibilities will be carried out with a view only to the interests of the contract owners. The responsibility to report such information and conflicts, and to assist the Board, also will be contractual obligations of all Qualified Plans with participation agreements, and such agreements will provide that these responsibilities will be carried out with a view only to the interests of Qualified Plan participants.

4. If it is determined by a majority of the Board, or a majority of the disinterested Trustees of the Board, that a material irreconcilable conflict exists, then the relevant Participant will, at its expense and to the extent reasonably practicable (as determined by a majority of the disinterested Trustees), take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, up to and including: (i) withdrawing the assets allocable to some or all of the Separate Accounts from the relevant Portfolio and reinvesting such assets in a different investment vehicle including another Portfolio, or in the case of Participating Insurance Company Participants submitting the question as to whether such segregation should be implemented to a vote of all affected contract owners and, as appropriate, segregating the assets of any appropriate group (*i.e.*, annuity contract owners or life insurance contract owners of one or more Participating Insurance Companies) that votes in favor of such segregation, or offering to the affected contract owners the option of making such a change; and (ii) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of a decision by a Participating Insurance Company to disregard contract owner voting instructions, and that decision represents a minority position or would preclude a majority vote, then the insurer may be required, at the election of the Trust, to withdraw such insurer's Separate Account's investment in the Trust, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Qualified Plan's decision to disregard Qualified Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Qualified Plan may be required, at the election of the Trust, to withdraw its investment in theTrust, and no charge or penalty will be imposed as a result of such withdrawal. The responsibility to take remedial action in the event of a Board determination of a material irreconcilable conflict and to bear the cost of such remedial action will be a contractual obligation of all Participants under their agreements governing participation in the Trust, and these responsibilities will be carried out with

a view only to the interests of contract owners and Qualified Plan participants.

For purposes of this Condition 4, a majority of the disinterested members of the Board will determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but, in no event will the Trust, AFM or an affiliate of AFM, as relevant, be required to establish a new funding vehicle for any Variable Contract. No Participating Insurance Company will be required by this Condition 4 to establish a new funding vehicle for any Variable Contract if any offer to do so has been declined by vote of a majority of the contract owners materially and adversely affected by the material irreconcilable conflict. Further, no Qualified Plan will be required by this Condition 4 to establish a new funding vehicle for the Qualified Plan if: (i) A majority of the Qualified Plan participants materially and adversely affected by the irreconcilable material conflict vote to decline such offer, or (ii) pursuant to documents governing the Qualified Plan, the Qualified Plan makes such decision without a Qualified Plan participant vote.

5. The Board's determination of the existence of a material irreconcilable conflict and its implications will be made known in writing promptly to all Participants.

6. As to Variable Contracts issued by Separate Accounts registered under the 1940 Act, Participating Insurance Companies will provide pass-through voting privileges to all Variable Contract owners as required by the 1940 Act as interpreted by the Commission. However, as to Variable Contracts issued by unregistered Separate Accounts, pass-through voting privileges will be extended to contract owners to the extent granted by the issuing insurance company. Accordingly, such Participants, where applicable, will vote shares of the applicable Portfolio held in their Separate Accounts in a manner consistent with voting instructions timely received from Variable Contract owners. Participating Insurance Companies will be responsible for assuring that each Separate Account investing in a Portfolio calculates voting privileges in a manner consistent with other Participants.

The obligation to calculate voting privileges as provided in the Application will be a contractual obligation of all Participating Insurance Companies under their agreement with the Trusts governing participation in a Portfolio. Each Participating Insurance Company will vote shares for which it has not received timely voting instructions, as well as shares it owns through its Separate Accounts, in the same proportion as it votes those shares for which it has received voting instructions. Each Qualified Plan will vote as required by applicable law and governing Qualified Plan documents.

7. As long as the 1940 Act requires pass-through voting privileges to be provided to variable contract owners, AFM or any of its affiliates, and any General Account will vote its shares of any Portfolio in the same proportion of all variable contract owners having voting rights with respect to that Portfolio; provided, however, that AFM, any of its affiliates or any insurance company General Account shall vote its shares in such other manner as may be required by the Commission or its staff.

8. The Trust will comply with all provisions of the 1940 Act requiring voting by shareholders, which for these purposes, shall be the persons having a voting interest in the shares of the respective Portfolio, and, in particular, the Trust will either provide for annual meetings (except to the extent that the Commission may interpret section 16 of the 1940 Act not to require such meetings) or comply with section 16(c) of the 1940 Act (although the Trust is not one of the funds of the type described in the section 16(c) of the 1940 Act), as well as with section 16(a) of the 1940 Act and, if and when applicable, section 16(b) of the 1940 Act. Further, the Portfolios will act in accordance with the Commission's interpretation of the requirements of section 16(a) with respect to periodic elections of trustees and with whatever rules the Commission may promulgate with respect thereto.

9. The Trust will notify all Participants that Separate Account prospectus disclosure or Qualified Plan prospectuses or other Qualified Plan disclosure documents regarding potential risks of mixed and shared funding may be appropriate. The Trust will disclose in its prospectus that (i) Shares of the Trust may be offered to Separate Accounts of Variable Contracts and, if applicable, to Qualified Plans; (ii) due to differences in tax treatment and other considerations, the interests of various contract owners participating in the Trust and the interests of Qualified Plans investing in the Trust, if applicable, may conflict; and (iii) the Trust's Board will monitor events in order to identify the existence of any material irreconcilable conflicts and to determine what action, if any, should be taken in response to any such conflict.

10. If and to the extent that Rule 6e–2 and Rule 6e–3(T) under the 1940 Act are amended, or proposed Rule 6e–3 under the 1940 Act is adopted, to provide exemptive relief from any provision of the 1940 Act, or the rules promulgated thereunder, with respect to mixed or shared funding, on terms and conditions materially different from any exemptions granted in the order requested in the Application, then the Trust and/or Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with Rules 6e–2 and 6e–3(T), or Rule 6e–3, as such rules are applicable.

11. The Participants, at least annually, will submit to the Board such reports, materials, or data as a Board reasonably may request so that the trustees of the Board may fully carry out the obligations imposed upon the Board by the conditions contained in the Application. Such reports, materials, and data will be submitted more frequently if deemed appropriate by the Board. The obligations of the Participants to provide these reports, materials, and data to the Board, when it so reasonably requests, will be a contractual obligation of all Participants under their agreements governing participation in the Portfolios.

12. All reports of potential or existing conflicts received by the Board, and all Board action with regard to determining the existence of a conflict, notifying Participants of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the Board or other appropriate records, and such minutes or other records shall be made available to the Commission upon request.

13. The Trust will not accept a purchase order from a Qualified Plan if such purchase would make the Qualified Plan shareholder an owner of 10 percent or more of the assets of such Portfolio unless such Qualified Plan executes an agreement with the Trust governing participation in such Portfolio that includes the conditions set forth herein to the extent applicable. A Qualified Plan or Qualified Plan participant will execute an application containing an acknowledgment of this condition at the time of its initial purchase of shares of any Portfolio.

Conclusion

Applicants submit, based on the grounds summarized above, that the exemptions requested are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5209 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27806]

Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

March 3, 2004.

Notice is hereby given that the following filing(s) has/have been made with the Commission under provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by March 26, 2004, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After March 26, 2004, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Jersey Central Power & Light Company (70–10191)

Jersey Central Power & Light Company ("JCP&L"), 76 South Main Street, Akron, Ohio, 44308, a direct, wholly-owned public-utility subsidiary of FirstEnergy Corp. ("FirstEnergy"), a registered holding company, has filed a declaration under section 13(b) of the Act and rules 54, 90 and 91 under the Act. JCP&L seeks an exemption from the "at cost" requirements of the Act in regard to a service agreement that it will enter into with a wholly-owned subsidiary ("Special Purpose Issuer") in connection with its proposed issuance of transition bonds.[1] The proceeds from the transition bonds will allow JCP&L to recover certain costs associated with electric restructuring in New Jersey.

Beginning in 1999, New Jersey has enacted several laws aimed at restructuring its electric and natural gas industries. The restructuring legislation required JCP&L to unbundle electric services into separate charges for, among other things, metering and billing, distribution, transmission and generation. The legislation also authorizes the recovery, through securitization, of a number of costs incurred by electric utilities, including costs associated with the purchase of power in connection with a utility's "provider of last resort" responsibilities incurred during the transition period of electric utility restructuring. Utilities must apply to the New Jersey Board of Public Utilities ("BPU") for a bondable stranded costs rate order, authorizing the issuance of transition bonds and approving the amount of the initial transition bond charge ("TBC") to be imposed on all retail electric distribution customers. The TBC is a separate, non-bypassable charge that will be assessed against all retail electric distribution customers, regardless of whether they continue to purchase electricity from the distribution utility.

JCP&L has filed a petition with the BPU requesting that the BPU issue a bondable stranded costs rate order authorizing the issuance of up to $277 million of transition bonds by the Special Purpose Issuer.[2] The transition bonds will be secured by the TBC revenue stream and the bondable transition property ("BTP"), which is the statutory and regulatory right to collect the TBC. JCP&L will transfer its interest in the BTP to the Special Purpose Issuer in exchange for the net proceeds from the issuance of the transition bonds. The transfer will be treated as a true sale, and the Special Purpose Issuer will be structured as a bankruptcy remote assignee. As a result, the TBC and BTP will be isolated from any credit risk associated with JCP&L. The transition bonds will constitute a debt only of the Special Purpose Issuer. Neither the state of New Jersey nor JCP&L will have any liability with regard to the transition bonds.

JCP&L will act as the servicer of the TBC revenue stream and in this capacity will, among other things: (1) Bill customers and make collections on behalf of the Special Purpose Issuer, and (2) file with the BPU for periodic adjustments to the TBC to achieve a level which allows for payment of all debt service and full recovery of amounts authorized by the BPU. JCP&L may, subject to certain conditions, subcontract with other companies to carry out some of its servicing responsibilities. JCP&L expects that the servicing agreement will remain in effect until the legal final maturity of the transition bonds, which will not exceed seventeen years.

JCP&L will receive a servicing fee for its servicing activities and reimbursement for certain of its expenses. JCP&L's servicing fee will be set at an amount equal to no more than 0.125% of the initial principal amount of the transition bonds. This fee may not reflect JCP&L's actual costs of providing the services and may not meet the "at cost" requirements of the Act. JCP&L states that the rating agencies will require that the servicing fee be set at a level comparable to one negotiated at arm's-length and which would be reasonable and sufficient for a similarly situated third party performing similar services. JCP&L maintains that to do otherwise would most likely lower the credit rating of the transition bonds. This arm's length fee assures that the Special Purpose Issuer would be able to operate independently and strengthens the position that it is a bankruptcy remote entity.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5210 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

[1] The formation of the Special Purpose Issuer by JCP&L and JCP&L's acquisition of the common stock of the Special Purpose Issuer, along with the Special Purpose Issuer's issuance of the transition bonds and, if necessary, related hedge agreements was authorized by an order of the Commission dated June 30, 2003. *See* Holding Company Act Rel. 35–27694.

[2] JCP&L has reserved the right to appeal any decision of the BPU regarding the amount of costs it is allowed to recover. As a result, the initial principal balance of the transition bonds that may be issued by the Special Purpose Issuer may be as high as $400 million.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49356]

Order Pursuant to Section 11A of the Securities Exchange Act of 1934 and Rule 11Aa3–2(f) Thereunder Extending a *De Minimis* Exemption for Transactions in Certain Exchange-Traded Funds From the Trade-Through Provisions of the Intermarket Trading System

March 3, 2004.

This order extends, for an additional nine-month period, a *de minimis* exemption to the provisions of the Intermarket Trading System Plan ("ITS Plan"),[1] a national market system plan,[2] governing intermarket trade-throughs. The *de minimis* exemption was originally issued by the Commission on August 28, 2002 [3] and extended on May 30, 2003.[4]

The ITS Plan system is an order routing network designed to facilitate intermarket trading in exchange-listed securities among participating SROs based on current quotation information emanating from their markets. Quotations in exchange-listed securities are collected and disseminated by the Consolidated Quote System ("CQS"), which is governed by a national market system plan that the Commission has approved pursuant to Rule 11Aa3–2 under the Act.[5] Under the ITS Plan, a member of a participating SRO may access the best bid or offer displayed in CQS by another Participant by sending an order (a "commitment to trade") through ITS to that Participant. Exchange members participate in ITS through facilities provided by their respective exchanges. NASD members participate in ITS through a facility of the Nasdaq Stock Market ("Nasdaq") known as the Computer Assisted Execution System ("CAES"). Market makers and electronic communications networks ("ECNs") that are members of the NASD and seek to display their quotes in exchange-listed securities through Nasdaq must register with the NASD as ITS/CAES Market Makers.[6]

The May 2003 Order granted a *de minimis* exemption from compliance with section 8(d)(i) of the ITS Plan with respect to three specific exchange-traded funds ("ETFs"), the Nasdaq-100 Index ETF ("QQQ"), the Dow Jones Industrial Average ETF ("DIA"), and the Standard & Poor's 500 Index ETF ("SPY").[7] Section 8(d)(i) of the ITS Plan provides that participants should not purchase or sell any security that trades on the ITS Plan system at a price that is worse than the price at which that security is otherwise being offered on the ITS Plan system.[8] By its terms, the May 2003 Order exempts from the trade-through provisions of the ITS Plan any transactions in the three ETFs that are effected at prices at or within three cents away from the best bid and offer quoted in the CQS for a period of nine months, which ends on March 4, 2004.

The three cent *de minimis* exemption allows ITS participants and their members to execute transactions, through automated execution or otherwise, without attempting to access the quotes of other participants when the expected price improvement would not be significant. In providing the three cent *de minimis* exemption, the Commission believed that, on balance, exempting the specified transactions from the ITS trade-through provisions would provide investors increased liquidity and expand the choice of execution venues, while limiting the possibility that investors would receive significantly inferior prices.[9]

In May 2003, the Commission extended the three cent *de minimis* exemption for an additional nine-months, in order to assess trading data associated with the *de minimis* exemption and to consider whether to adopt the *de minimis* exemption on a permanent basis, to adopt some other alternative solution, or to allow the exemption to expire. As a result of its review of trading data associated with the *de minimis* exemption, the Commission has proposed, as part of its market structure initiatives, Regulation NMS under the Act, which would include a new rule relating to trade-throughs.[10] Over the next several months, the Commission intends to consider proposed Regulation NMS, together with any comments received, and determine whether to adopt the proposed trade-through rule or an alternative.

In view of the foregoing, the Commission believes that an extension of the *de minimis* exemption for an additional nine-month period is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system. Depending on the action the Commission takes on proposed Regulation NMS prior to December 4, 2004, the Commission may determine to modify, withdraw, or

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[1] The self-regulatory organizations ("SROs") participating in the ITS Plan include the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the Chicago Stock Exchange, Inc., the National Stock Exchange, Inc. (formerly the Cincinnati Stock Exchange, Inc.), the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc. (collectively, the "participants"). *See* Securities Exchange Act Release No. 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983).

[2] Securities Exchange Act of 1934 ("Act") Rule 11Aa3–2(d), 17 CFR 240.11Aa3–2(d), promulgated under section 11A, 15 U.S.C. 78k–1, of the Act requires each self-regulatory organization ("SRO") to comply with, and enforce compliance by its members and their associated persons with, the terms of any effective national market system plan of which it is a sponsor or participant. Rule 11Aa3–2(f), 17 CFR 240.11Aa3–2(f), under the Act authorizes the Commission to exempt, either unconditionally or on specified terms and conditions, any SRO, member of an SRO, or specified security from the requirement of the rule if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

[3] *See* Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) (the "August 2002 Order"). The August 2002 Order granted relief through June 4, 2003.

[4] *See* Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003) (the "May 2003 Order"). The May 2003 Order granted relief through March 4, 2004.

[5] 17 CFR 240.11Aa3–2.

[6] *See* Securities Exchange Act Release No. 42536 (March 16, 2000), 65 FR 15401 (March 22, 2000). Market Makers and ECNs are required to provide their best-priced quotations and customer limit orders in certain exchange-listed and Nasdaq securities to an SRO for public display under Commission Rule 11Ac1–1 and Regulation ATS. 17 CFR 240.11Ac1–1 and 242.301(b)(3).

[7] The Commission limited the *de minimis* exemption to these three securities because they share certain characteristics that may make immediate execution of their shares highly desirable to certain investors. In particular, trading in the three ETFs is highly liquid and market participants may value an immediate execution at a displayed price more than the opportunity to obtain a slightly better price.

[8] Each ITS participant has adopted a trade-through rule substantially similar to the rule of the ITS Plan. *See* ITS Plan, section 8(d)(ii); *See, e.g.*, NYSE Rule 15A, NASD Rule 5262.

[9] *See* August 2002 Order, *supra* note 3. The Commission's Office of Economic Analysis conducted an analysis of trading in the QQQs in 2002, comparing trading on a day before the *de minimis* exemption was implemented, a day after the exemption was implemented before Island, an ECN, stopped displaying its orders to anyone, even its subscribers (going "dark"), and a day after the exemption was implemented when Island was "dark." The analysis showed that the percent of trades executed outside the NBBO did not increase, and that less than 1% of total trades were executed more than three cents away from the NBBO, after the *de minimis* exemption was implemented. A copy of the analysis is available in File No. S7–10–04.

[10] On February 24, 2004, the Commission proposed Regulation NMS for public comment. Securities Exchange Act Release No. 49325 (February 26, 2004). In part, proposed Rule 611 of Regulation NMS would require certain identified market centers to establish, maintain, and enforce policies and procedures reasonably designed to prevent trade-throughs. Extension of the *de minimis* pilot in no way prejudges or determines what actions the Commission may take with respect to any rule proposal.

extend the *de minimis* exemption. The Commission emphasizes, as it did in the May 2003 Order and in the August 2002 Order, that the *de minimis* exemption does not relieve brokers and dealers of their best execution obligations under the federal securities laws and SRO rules.

Accordingly, *it is ordered*, pursuant to section 11A of the Act and Rule 11Aa3–2(f) thereunder,[11] that participants of the ITS Plan and their members are hereby exempt from section 8(d) of the ITS Plan during the period covered by this Order with respect to transactions in QQQs, DIAs, and SPYs that are executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS. This Order extends the *de minimis* exemption from March 4, 2004 through December 4, 2004.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5211 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49355; File No. SR–SCCP–2004–02]

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Trade Ticket Adjustment Fees

March 2, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], notice is hereby given that on January 29, 2004, the Stock Clearing Corporation of Philadelphia ("SCCP") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared primarily by SCCP. 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

SCCP proposes to amend its fee schedule by adopting a trade ticket adjustment fee ranging from $50 to $300 for each erroneous trade ticket that creates a false margin deficit.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP 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 Items IV below. SCCP has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[3]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend SCCP's fee schedule to adopt a trade ticket adjustment fee ranging from $50 to $300 for each erroneous trade ticket that creates a false margin deficit. Trade ticket adjustments occur whenever a SCCP margin member submits a trade ticket for an adjustment or correction due, for example, to clerical errors or missing or incorrect trade tickets. Incorrect trade tickets may cause a false impression of a margin deficiency and thereby result in a false margin call.

The recalculation of account margin and the correction of incorrect or incomplete trade data using trade ticket adjustments is a manually intensive process that requires special handling and oversight by SCCP staff. Trade ticket adjustments take up considerable SCCP resources expended in researching the source of a trade ticket error. The trade ticket adjustment fee would apply only to those trade ticket adjustments that, prior to correction, resulted in a false margin deficiency in the SCCP margin member's margin account. The new trade ticket adjustment fee was effective on February 1, 2004.

SCCP believes that the proposed rule change is consistent with section 17A(b)(3)(D) of the Act[4] because it provides for the equitable allocation of dues, fees, and other charges.

B. Self-Regulatory Organization's Statement on Burden on Competition

SCCP does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

SCCP has not solicited or received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act[5] and Rule 19b–4(f)(2)[6] thereunder because it establishes or changes a due, fee, or other charge. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th Street NW, Washington, DC 20549–0069. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–SCCP–2004–02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the rule filing that are filed with the Commission, and all written communications relating to the rule filing between the Commission and any person, other than those that may be withheld from the public in accordance with provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of

[11] 17 CFR 240.11Aa3–2(f).

[1] 15 U.S.C. 78s(b)(1).

[2] A copy of SCCP's fee schedule is attached as an exhibit to SCCP's rule filing.

[3] The Commission has modified the text of the summaries prepared by SCCP.

[4] 15 U.S.C. 78q-1(b)(3)(D).

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240.19b-4(f)(2).

such filing will also be available for inspection and copying at SCCP's principal office and on SCCP's Web site at *http://www.phlx.com/SCCP/memindex_sccpproposals.html*. All submissions should refer to File No. SR–SCCP–2004–02 and should be submitted by March 30, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–5273 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3568]

State of South Carolina

Orangeburg County and the contiguous counties of Aiken, Bamberg, Barnwell, Berkeley, Calhoun, Clarendon, Colleton, Dorchester and Lexington in the State of South Carolina constitute a disaster area due to damages caused by severe ice storms that occurred on January 26–27, 2004. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on May 3, 2004 and for economic injury until the close of business on December 3, 2004 at the address listed below or other locally announced locations: Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	6.125
Homeowners Without Credit Available Elsewhere	3.125
Businesses With Credit Available Elsewhere	5.800
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	2.900
Others (Including Non-Profit Organizations) With Credit Available Elsewhere	4.875
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	2.900

The number assigned to this disaster for physical damage is 356811 and the number for economic injury is 9Z4800.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

[7] 17 CFR 200.30–3(a)(12).

Dated: March 3, 2004.

Hector V. Barreto,

Administrator.

[FR Doc. 04–5256 Filed 3–8–04; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Finance Docket 34395]

City of Peoria, IL, d/b/a Peoria, Peoria Heights & Western Railroad—Construction of Connecting Track Exemption—in Peoria County, IL

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of availability of the environmental assessment and request for comments.

SUMMARY: On February 3, 2004, the City of Peoria, IL, d/b/a Peoria, Peoria Heights & Western (PPHW), filed a verified notice of exemption under 49 CFR 1150.36 to construct approximately 1,800 feet of track in Peoria, Peoria County, IL, over land that it owns or over which it has an easement for railroad purposes. The track to be constructed would connect a 1.9-mile segment of track that the City of Peoria (the City) purchased from Union Pacific Railroad Company (UP) with an 8.29-mile segment of track known as the Keller Branch that the City acquired from the Chicago, Rock Island & Pacific Railroad Company (Rock Island).

The former UP segment connects at its west end with a UP main line that extends in a generally north-south direction between Nelson, IL, and St. Louis, MO. It was acquired by the City in 2001 and there are no active shippers currently located on that segment.

The former Rock Island segment was acquired by the City in 1984 from the Rock Island Trustee. It connects at its east end with a rail line of the Peoria & Pekin Union Railway Company (P&PU). P&PU initially operated the segment pursuant to a lease from the City. Thereafter, the Village of Peoria Heights, IL, acquired a 25-percent interest in the segment, which was referred to under the doing-business designation of PPHW. In 1998, Pioneer Industrial Railway Co., the current operator, began operations over the segment pursuant to an assignment of P&PU's lease from the City (consented to by the Village of Peoria Heights). There are three active shippers located on the segment, two of which are located near its northwestern end and one of which is located near its southeastern end.

Should the proposed construction of connecting trackage be completed, the two shippers located near the northwestern end of the segment would be served from the west by DOT Rail Service, Inc., or its designee under an operating agreement with the City. No part of the line that would continue to be operated would be located in the Village of Peoria Heights and the shipper located near the southeastern end of the segment would be served from the southeast by the same or a different rail operator. Service over the approximately 7.5 miles of the segment that would no longer be required to serve shippers would be discontinued and the right-of-way proposed for use as a recreational trail.

The proposed new connecting track would be located adjacent to an active industrial area in which no residences are located but would result in the construction of a new highway/rail at-grade crossing at University Street and the reactivation of an existing highway/rail at-grade crossing at North Allen Road. Because PPHW is proposing to construct the new connecting track over land which it owns or over which it has an easement for railroad purposes, the Board's Section of Environmental Analysis (SEA) has determined that the preparation of an Environmental Assessment (EA) is appropriate. Therefore, SEA has prepared this EA and is now issuing for public review and comment from all interested parties.

ADDRESSES: SEA encourages the public to participate in the environmental review of PPHW's proposed activities by commenting on this EA during the 30-day comment period. Comments may be submitted to the address below. When submitting comments, please provide one original and two copies to: Surface Transportation Board, Case Control Unit, 1925 K Street, NW, Suite 700, Washington, DC 20423–0001.

The following information should appear in the lower left-hand corner of the envelope: Attention: Troy Brady, Finance Docket No. 34395.

DATES: Comments are due by April 8, 2004.

FOR FURTHER INFORMATION CONTACT: Troy Brady, the environmental contact for this case, by phone at (202) 565–1643, by fax at (202) 565–9000, or by e-mail at *bradyt@stb.dot.gov*.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams,

Secretary.

[FR Doc. 04–5119 Filed 3–8–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34470]

Norfolk Southern Railway Company—Trackage Rights Exemption—Western New York & Pennsylvania Railroad, LLC

Pursuant to a trackage rights agreement dated February 10, 2004, between Norfolk Southern Railway Company (NSR) and Western New York & Pennsylvania Railroad, LLC (WNYP), WNYP has agreed to grant NSR overhead trackage rights over a line of railroad between Hornell, NY, and Meadville, PA, mileposts OS332.0–OS394.9, OS395.2–OS414.0, SA1.4–SA47.0, CE0.0–CE13.2, and SA56.3–SA102.3, with ingress and egress rights at Hornell, NY, Olean, NY, Corry, PA, and Meadville, PA, a distance of approximately 186.5 miles.[1]

The transaction was scheduled to be consummated on or after the February 25, 2004, effective date of the exemption.

The purpose of the trackage rights is to allow NSR to efficiently route traffic between Meadeville, PA, and Hornell, NY, for further transportation beyond those points and, thereby, reducing the current route through the congested Buffalo, NY terminal 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 it 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. 34470, 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 John V. Edwards, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA, 23510.

[1] A redacted version of the trackage rights agreement between NSR and WNYP was filed with the notice of exemption. The full version of the agreement, as required by 49 CFR 1180.6(a)(7)(ii), was concurrently filed under seal along with a motion for protective order. A protective order is being served on March 3, 2004.

Board decisions and notices are available on our Web site at *www.stb.dot.gov*.

Decided: March 3, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–5257 Filed 3–8–04; 8:45 am]

BILLING CODE 4915 –01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[PS–66–93 and PS–120–90]

Proposed Collection; Comment Request for Regulation Project

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 existing final regulations, PS–66–93 (TD 8609), Gasohol; Compressed Natural Gas, and PS–120–90 (TD 8241), Gasoline Excise Tax (§§ 48.4041–21, 48.4081–2(c)(2), 48.4081–3(d)(2)(iii), 48.4081–3(e)(2)(ii), 48.4081–3(f)(3)(ii), 48.4081–4(b)(2)(ii), 48.4081–4(b)(3)(i), 48–4081–4(c), 48.4081–6(c)(1)(ii), 48.4081–7, and 48.4081–9).

DATES: Written comments should be received on or before May 10, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: PS–66–93, Gasohol; Compressed Natural Gas; and PS–120–90, Gasoline Excise Tax.

OMB Number: 1545–1270.

Regulation Project Number: PS–66–93 and PS–120–90.

Abstract: PS–66–93: This regulation relates to gasohol blending and the tax on compressed natural gas (CNG). The sections relating to gasohol blending affect certain blenders, enterers, refiners, and throughputters. The sections relating to CMG affect persons that sell or buy CNG for use as a fuel in a motor vehicle or motorboat. PS–120–90: This regulation relates to the federal excise tax on gasoline. It affects refiners, importers, and distributors of gasoline and provides guidance relating to taxable transactions, persons liable for tax, gasoline blendstocks, and gasohol.

Current Actions: Section 48–4081–7(d)(3) was removed by TD 8609.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit organizations; not-for-profit institutions; farms; and State, local or tribal governments.

Estimated Number of Respondents: 3,410.

Estimated Time Per Respondent: 7 minutes.

Estimated Total Annual Burden Hours: 366.

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: March 3, 2004.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. 04–5295 Filed 3–8–04; 8:45 am]

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Federal Register

Tuesday,
March 9, 2004

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 660

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Annual Specifications and Management Measures; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 031216314–4068–02; I.D. 112803A]

RIN 0648–AR54

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Annual Specifications and Management Measures

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement the 2004 fishery specifications and management measures for groundfish taken in the U.S. exclusive economic zone (EEZ) off the coasts of Washington, Oregon, and California. This final rule includes the levels of the acceptable biological catch (ABC) and optimum yields (OYs). The commercial OYs (the total catch OYs reduced by tribal allocations and by amounts expected to be taken in recreational and resource survey compensation fisheries) in this rule are allocated between the limited entry and open access fisheries and between different sectors of the limited entry fleet. Management measures for 2004 are intended to: Achieve but not exceed OYs; prevent overfishing; rebuild overfished species; reduce and minimize the bycatch and discard of overfished and depleted stocks; provide equitable harvest opportunity for both recreational and commercial sectors; and, within the commercial fisheries, achieve harvest guidelines and limited entry and open access allocations to the extent practicable.

DATES: The amendments to 50 CFR part 660 are effective March 1, 2004, except for amendments to § 660.370, which are effective April 8, 2004. These specifications and management measures are effective from March 1, 2004, through December 31, 2004.

ADDRESSES: Copies of the Final Environmental Impact Statement (FEIS) for this action are available from Donald McIsaac, Executive Director, Pacific Fishery Management Council (Council), 7700 NE Ambassador Place, Portland, OR 97220, phone: 503–820–2280. Copies of additional reports referred to in this document may also be obtained from the Council. Copies of the Record of Decision (ROD), final regulatory flexibility analysis (FRFA), and the Small Entity Compliance Guide are available from D. Robert Lohn, Administrator, Northwest Region (Regional Administrator), NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070.

FOR FURTHER INFORMATION CONTACT: Yvonne deReynier or Becky Renko (Northwest Region, NMFS), phone: 206–526–6150; fax: 206–526–6736 and; e-mail: *yvonne.dereynier@noaa.gov, becky.renko@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Access

The final rule also is accessible via the Internet at the Office of the Federal Register's Web site at *http://www.access.gov/fr/index.html.* Background information and documents are available at the NMFS Northwest Region Web site at *http://www.nwr.noaa.gov/1sustfsh/gdfsh01.htm* and at the Council's Web site at *http://www.pcouncil.org/groundfish/ gfspex/gfspex04.html.*

Background

A proposed rule to implement the 2004 specifications and management measures for Pacific Coast groundfish was published on January 8, 2004 (69 FR 1380). NMFS requested public comment on the proposed rule through February 9, 2004. During the comment period on the proposed rule, NMFS received four letters of comment, which are addressed later in the preamble to this final rule. *See* the preamble to the proposed rule for additional background information on the fishery and on this final rule.

The Pacific Coast Groundfish Fishery Management Plan (FMP) requires that fishery specifications for groundfish be biennially or annually evaluated and revised, as necessary, that OYs be specified for species or species groups in need of particular protection, and that management measures designed to achieve the OYs be published in the **Federal Register** and made effective by January 1, the beginning of the fishing year. To ensure that new 2004 fishery management measures were effective January 1, 2004, NMFS published an emergency rule announcing final management measures for January–February 2004 (69 FR 1322, January 8, 2004). Annual specifications for 2004 and management measures for March–December 2004 were proposed in a separate rule, also published on January 8, 2004 (69 FR 1380).

Specifications and management measures announced in this final rule for 2004 are designed to rebuild overfished stocks through constraining direct and incidental mortality, to prevent overfishing, and to achieve as much of the OYs as practicable for more abundant groundfish stocks managed under the FMP.

Comments and Responses

During the comment period for the 2004 specifications and management measures, which ended on February 9, 2004, NMFS received four letters of comment. Three of these letters of comment addressed different portions of the proposed rule and were received from: a non-governmental organization representing environmental interests, the California Department of Fish and Game (CDFG), and the Council. NMFS also received a letter of comment from a non-governmental organization representing trawl vessel operators that, in part, addressed the proposed rule. Comments received on the proposed rule are addressed here:

Comment 1: In November, we asked the Council's Groundfish Management Team (GMT) to calculate whether the trawl trip limits could be increased given that 91 limited entry trawl vessels were to be removed from the fleet by early December. We asked for a 200 percent increase in trawl trip limits, but we have seen only a token increase for the first quarter of the year. We demand that the current trawl trip limits be overturned so that the trawl fleet can have higher trip limits immediately.

Response: In December 2004, NMFS bought 91 trawl vessels and their limited entry permits out of the West Coast groundfish fisheries. The funds for this purchase were provided by a Congressional appropriation and will, in part, be re-paid by the fishing fleets affected by the reduction in number of participants (groundfish trawl, pink shrimp trawl, Dungeness crab trap/pot).

At the November 2003 Council meeting, several groundfish trawlers had made comments on the Council floor that they would appreciate a NMFS review of 2004 trawl trip limits in light of the expected trawl permit/vessel buyback program. These trawl fishery participants believed that the vessel/permit buyback program would successfully reduce capacity in the fleet enough to warrant an increase in trawl trip limits.

After hearing the trawl industry's comments, Council members suggested that NMFS look only at increasing trip limits for the Dover sole, shortspine thornyhead, longspine thornyhead, sablefish (DTS) complex species. DTS

complex species tend to aggregate for spawning in the winter and may be taken in the winter with lower bycatch of overfished species. Also, DTS are deepwater species and fishing for these species usually occurs offshore of the ranges of overfished continental shelf species.

Following the Council meeting, the NMFS Northwest Fisheries Science Center (NWFSC) looked at the historic fishing effort of each of the vessels removed from the groundfish trawl fishery through the buyback program. NMFS then calculated the amount of each DTS species that would likely be taken by the remaining fleet operating under the trip limits initially recommended by the Council for 2004. Based on that calculation, NMFS expected that the now-reduced fleet would take notably less of each of the DTS species than if the buyback program had not occurred. NMFS then calculated expected harvest by the reduced fleet if the agency were to implement DTS trip limits that were 50 percent higher than those recommended by the Council in September 2003. Under that scenario, the reduced fleet operating with increased trip limits was still expected to harvest less of each DTS complex species (sablefish—63 percent, longspine thornyhead—77 percent, shortspine thornyhead—74 percent, Dover sole—72 percent) than the whole fleet would have harvested with the initially recommended trip limits. NMFS further expected that the reduced fleet operating with increased DTS trip limits would still take smaller amounts of overfished species than the whole fleet would have taken with the initially recommended trip limits.

Given the expected DTS catch levels under a 50 percent increase in trip limits, however, it is clear that a 200 percent increase in trip limits would have allowed the current fleet to exceed even the expected harvest levels of the pre-buyback fleet. NMFS, the Council, and its advisory bodies will have several opportunities during the 2004 fishing season to review the effects of the buyback's effort reduction on the current fleet's expected harvesting behavior. Thus, NMFS will implement for March–April the 50 percent-increased DTS trip limits it had proposed and expects that the Council's 2004 inseason management process will accommodate any trawl trip limit increases that may be possible through the remainder of the year.

Comment 2: With Oregon Department of Fish and Wildlife (ODFW), Oregon trawlers have developed a small footrope trawl net design with a cutback headrope. Nets of this design can catch flatfish while avoiding encounters with most roundfish. If fishermen are using a conservation tool, the cutback headrope trawl, they should be allowed to have higher trip limits than those currently set for small footrope trawl vessels.

Response: Many flatfish species are abundant and support important Pacific Coast groundfish fisheries. Flatfish species such as Dover sole, petrale sole, English sole, rex sole, and arrowtooth flounder have historically been caught by vessels using trawl gear in depths of 50–150 fathoms (91–274 meters). Many of these areas are within the Trawl Rockfish Conservation Area (RCA) where fishing with bottom trawl gear is prohibited.

In 2001 and 2002, ODFW worked on developing a trawl net design with a cutback headrope that was intended to be more selective for flatfish species while resulting in lower catch rates of overfished rockfish species. (A trawl net with a "cutback headrope" is one in which the curve of the headrope away from the trawl tow lines is deeper than the curve of the footrope away from those same lines.) During this research, ODFW scientists contracted commercial fishing vessels and did comparative testing between the new net and net configurations that are typically used in the fishery. Significant reductions in the catch of overfished rockfish species relative to flatfish catch were observed in hauls where the new net was used. Because this net design meets the requirements of small footrope bottom trawl gear as defined by regulations at 50 CFR part 660, it has the potential to become an effective way for fishers to reduce the bycatch rates of overfished rockfish species in the flatfish fisheries.

To understand how the new net performed under normal commercial fishing conditions, further testing was necessary over a broader range of the fishery. In 2003, ODFW and CDFG applied for and were issued exempted fishing permits (EFPs) to collect data needed to measure the selectivity of the new trawl net design when used by commercial fishers. Vessels fishing under the EFP were allowed to operate in the Trawl RCA. To encourage participation, increased trip limits for flatfish were available to the vessels that were willing to modify their existing gear or purchase new gear that was consistent with the design requirements and who were willing to carry an observer or sampler on board their vessel during all EFP fishing. For 2004, ODFW, CDFG and Washington Department of Fish and Wildlife (WDFW) have applied for EFPs to collect additional data that can be used to assess the selectivity of the new net over a broader range of areas.

Because 2003 was the first year in which data was collected through the use of EFPs, and because the EFP fishing did not end until October 2003, a full assessment of the selectivity of the new net under normal fishing conditions was not available at the Council's June and September meetings, when the 2004 management measures were developed. When the data analysis is completed and made available to the Council and NMFS, consideration may be given to measures like differential trip limits for users of lower bycatch gear that further the management objectives defined under the FMP.

Comment 3: When a vessel carries an observer on board, the vessel should be allowed to exceed its trip limits for each species by the amount of discard estimated for that species. Species with low trip limits or "no-take" species should not be discarded, but should be landed for scientific purposes and then processed and sold. Fish discarded because the vessel operator is highgrading his catch of a particular species in order to retain only the highest-priced size fish of that species should be retained and donated to charity.

Response: The West Coast Groundfish Observer Program (WCGOP) is a scientific observation program intended to collect data from fishing vessels operating in a normal mode of fishing. If vessels were essentially permitted to take higher limits than those targeted by unobserved vessels in the fleet, then the observed vessels would not be operating in a normal fishing mode. Data from those vessels' activities would then be less useful as a snapshot of the fishing behavior of the fleet as a whole. Additionally, vessel operators would lack incentives to develop methods to reduce their discards if they could simply retain their overages and profit from them. In order to implement the program described in the comment, NMFS would have to place an observer on every vessel and the agency does not now have, nor does it anticipate having, funds to deploy observers on every vessel. The feasibility of a regulations allowing full retention of rockfish species is under examination through EFP programs. If the results of these EFP programs show that a full retention program can be implemented and effectively monitored, full retention regulations that meet the scope of Federal groundfish management objectives may be adopted for specific portions of the groundfish fleet.

Observers already retain scientific samples from overfished and other

groundfish species that would have otherwise been discarded. At-sea sampling is preferable to at-dock sampling because the fish are not yet mixed in the hold and can be identified with a particular tow/haul, noting location, depth and other haul-defining data. Data that can be identified to a particular haul generally provide better quality information than when fish are sampled from a delivery comprised of several different hauls, which may be from different fishing locations.

Landings overages are currently confiscated by the states and such fish may be sold to the benefit of the state or donated to charity. NMFS' preference, of course, would be to reduce incentives for highgrading, rather than encouraging highgrading through allowing landings of size-related discards. To that end, NMFS has recently announced a new EFP application from ODFW to examine revisions to the market categories of key target species such as Dover sole, sablefish, thornyheads, and rockfish (February 2, 2004, 69 FR 5837.) NMFS currently supports bycatch donation programs in the at-sea whiting fisheries, and through EFPs in the shore-based whiting fishery and the arrowtooth and other flatfish trawl fisheries.

Comment 4: The harvest levels NMFS has proposed for nearly all of the overfished species fail to comply with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) at 304(e)(4)(A) because they do not rebuild these species within the shortest period possible.

Response: NMFS believes that the OY levels specified for overfished species in this final rule are consistent with the legal requirements of the Magnuson-Stevens Act and with the national standard guidelines. The Magnuson-Stevens Act does not state that rebuilding must be completed in the shortest time possible, rather it requires the time for rebuilding to be as short as possible, taking into account certain factors. The Magnuson-Stevens Act, section 304(e)(4)(A), and the national standards guideline at 50 CFR 600.310(e)(4)(A) recognize the following factors that enter into the specification of a time period for rebuilding: The status and biology of the stock or stock complex; interactions between stocks or stock complexes and the marine ecosystem; the needs of fishing communities; recommendations of international organizations in which the U.S. is a participant; and management measures under an international agreement in which the U.S. participates.

According to the national standard guidelines at 50 CFR 600.310(e)(ii)(B)*(2)*, if the year the stock would be rebuilt in the absence of fishing (T_{MIN}) is 10 years or less, then the specified time period for rebuilding may be adjusted upward to the extent warranted by the needs of fishing communities and recommendations of international organizations in which the U.S. is a participant. However, the rebuilding period may not exceed 10 years unless international agreements that the United States is a party to dictate otherwise.

Of the nine overfished groundfish stocks, lingcod was the only species in which T_{MIN} was estimated to be 10 years or less. As permitted by the Magnuson-Stevens Act and the national standard guidelines, the needs of the fishing community were taken into consideration when the rebuilding period for lingcod was established. It should be noted that the difference between the T_{MIN} rebuilding year of 2007 and the T_{TARGET} rebuilding year of 2009 intended to be achieved by these harvest specifications is just 2 years.

According to the national standard guidelines at 50 CFR 600.310(e)(4)(ii)(B)*(3)*, if T_{MIN} is 10 years or greater, "then the specified time period for rebuilding (T_{TARGET}) may be adjusted upward to the extent warranted by the needs of fishing communities and recommendations by international organizations in which the U.S. participates, except that no such upward adjustment can exceed the rebuilding period calculated in the absence of fishing mortality, plus one mean generation time or equivalent period based on the species' life-history characteristics (T_{MAX})." No harvest specifications have been set such that they would allow rebuilding periods for any of the other overfished species to exceed T_{MAX}.

Comment 5: The harvest levels NMFS has proposed for overfished species conflict with NMFS's "Technical Guidance on the Use of Precautionary Approaches to Implementing National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act" (Technical Guidance). They conflict with the Technical Guidance because that document directs the agency to select harvest levels that have at least a 90-percent probability of rebuilding before T_{MAX} and that result in a rebuilding period no longer than the midpoint between T_{MIN} and T_{MAX}.

Response: The Technical Guidance has been provided by NMFS "for those aspects of scientific fishery management advice that have biological underpinnings, such as the response of fish to exploitation. The drafting team recognizes that there are many other important aspects to managing fisheries, such as socioeconomic factors, which are key to defining optimum yield, and which Fishery Management Councils must consider." As such, the Technical Guidance does not direct NMFS, but rather makes suggestions on how to use scientific information to implement the policy guidance of the Magnuson-Stevens Act and the national standard guidelines to achieve the biological goals of national standard 1.

The Technical Guidance at page 38 suggests addressing uncertainty with the guideline that "rebuilding plans be designed to possess a 50-percent or higher chance of achieving B_{MSY} within T_{TARGET} years, and a 90-percent or higher chance of achieving B_{MSY} within T_{MAX} years." Harvest levels finalized by this action have been set such that overfished species would have a 50-percent chance of achieving B_{MSY} within T_{TARGET} years. However, only harvest levels for darkblotched and yelloweye rockfish have been set such that their rebuilding plans would have a greater than 90-percent chance of achieving B_{MSY} within T_{MAX} years. Each species was considered individually in its species-specific rebuilding analysis.

As discussed in the preamble to the proposed rule for this action (69 FR 1380, January 8, 2004,) the rebuilding measures for the remaining overfished West Coast groundfish species except whiting have the following probabilities of achieving B_{MSY} within T_{MAX} years: Pacific ocean perch (POP), >70 percent; canary rockfish, 60 percent; lingcod, 60 percent; bocaccio, ≥70 percent; cowcod, 55 percent, and; widow rockfish, 60 percent. NMFS will discuss whiting and its probability of achieving B_{MSY} in a separate **Federal Register** document once the Council has reviewed and discussed the recently completed whiting stock assessment, and has recommended whiting ABC and OY levels for 2004. These probabilities of rebuilding and the harvest levels associated with them were set to achieve rebuilding, but also to acknowledge that these species are usually taken with other, co-occurring and more abundant species. OY levels for overfished species are set to allow some level of fishing for the more abundant stocks that co-occur with overfished species. At the same time, management measures such as conservation areas are set to minimize opportunities for the vessels targeting more abundant stocks to intercept overfished species. This approach to multi-species management is consistent with the Magnuson-Stevens Act and

meets the criteria in the Act at section 304(e)(4) and the national standard guidelines at 600.310(e)(4)(ii).

According to the national standard guidelines at 50 CFR 600.310(e)(4)(ii)(B)(*3*), if T_{MIN} is 10 years or greater, "then the specified time period for rebuilding [T_{TARGET}] may be adjusted upward to the extent warranted by the needs of fishing communities and recommendations by international organizations in which the United States participates, except that no such upward adjustment can exceed the rebuilding period calculated in the absence of fishing mortality, plus one mean generation time or equivalent period based on the species' life-history characteristics [T_{MAX}]." While the Technical Guidance at page 38 suggests that T_{TARGET} be set no higher than the midpoint between T_{MIN} and T_{MAX}, adopting that as a binding criterion in all cases would not be consistent with the Magnuson-Stevens Act. It would not be consistent with the Magnuson-Stevens Act because it would not allow the criteria in the Act at section 304(e)(4) and the national standard guidelines at 600.310(e)(4)(ii) to be taken into account. For further discussion on this issue, see the preamble to the Amendment 16–1 final rule (69 FR 8861, February 26, 2004.)

Comment 6: NMFS has proposed to implement a new and greatly increased harvest level for bocaccio that is based on a new stock assessment and a series of assumptions that are not precautionary. NMFS has also unreasonably rejected the proposal of the State of California that the 2004 OY for bocaccio be 199 mt rather than 250 mt, claiming that bocaccio will be managed to a 199 mt catch level.

Response: The assertion that the proposed harvest of 250 mt is "not precautionary" is not supported by the evidence. Of the three rebuilding scenarios (modeled using STARb1, STARb2 and STATc) considered in the assessment, a 250 mt harvest is associated with a 70 percent probability of successful rebuilding within the prescribed timeframe in the *worst* of the three cases (STARb2). Thus the proposed harvest level is actually precautionary in two ways. First, the probability of rebuilding within T_{MAX} is at least 70 percent, which is substantially higher than the minimum required probability level of 50 percent, and second, because this harvest policy is based on the worst case scenario, two out of the three rebuilding scenarios place the probability at even greater than 70 percent.

The proposed OY is larger than previous OY levels. The new OY, however, is based on the most recent (2003) stock assessment results. This assessment incorporates the most recent fishery and survey data, and revises some aspects of the stock assessment model, including the assumed rate of natural mortality. The assessment was peer reviewed both by a panel of experts and by the Council's Scientific and Statistical Committee (SSC), and constitutes the best currently available science. To base the proposed OY on previous assessments that do not include the most recent data would violate the Magnuson-Stevens Act requirement (section 301(a)(2)) to use the best available scientific information.

The Magnuson-Stevens Act, section 304(e)(4)(A), and the national standard guidelines at 50 CFR 600.310(e)(4)(A) recognize a number of factors that enter into the specification of a time period for rebuilding, including: the status and biology of the stock or stock complex; interactions between stocks or stock complexes and the marine ecosystem; the needs of fishing communities; recommendations of international organizations in which the U.S. is a participant; and management measures under an international agreement in which the U.S. participates.

NMFS believes that choosing the Council-preferred alternative is consistent with the Magnuson-Stevens Act requirements (including section 301(a)(2) requiring a basis of the best scientific information) and is a reasonable and precautionary accommodation that meets both biological needs of the stock for rebuilding and the needs of the fishing communities.

Comment 7: NMFS has proposed to implement a widow rockfish OY with only a 60 percent probability of rebuilding and has ignored any OY options with a higher probability of rebuilding success. Moreover, the harvest alternatives that NMFS considered for widow rockfish are misleading and confusing because they are based on different modeling assumptions. These assumptions suggest that a higher level of fishing harvest would result in faster rebuilding of the species, which is plainly untrue.

Response: Stock assessments report on the health of a stock and include information used to maintain or restore stock size. Stock assessments include information about the biology of the species as well as information about the fishing activities on the stock. Fishery independent data contributes valuable biological information to the stock assessment, including age structure of the stock, trends in abundance, mortality rates, growth rates, and spawning behavior. Reliable fishery dependent data, including sufficient landings and effort data can be used to detect changes in the relative abundance of the stock, but with less certainty than when fishery independent data are available. When a stock assessment is conducted, stock assessment scientists must use the best available information to estimate the most suitable values for inclusion in the stock assessment model.

Because widow rockfish are commonly caught with mid-water trawl gear, not the bottom trawl gear that is used for the triennial bottom trawl survey, fishery data has been used for the stock abundance indices. However, reduced trip limits and other fishery restrictions have resulted in little and non-comparable fishery data being available for the years after 1999. The absence of a fishery independent stock size index and the lack of reliable fishery dependent data indices of stock size are limiting factors in assessing the status of widow rockfish.

To address data deficiencies and modeling uncertainties, a range of model scenarios based on different groupings of the following three variables were prepared and presented to the Council and its advisory bodies: (1) Whether recruitment should be pre-specified for 2003–2005 based on a midwater juvenile trawl survey, (2) the methods by which future recruitment estimates should be generated, and (3) what range of power coefficient should be used to analyze the midwater juvenile trawl survey. As described in the proposed rule preamble, the SSC considered the different model scenarios and identified a preference for a model scenario in which recruitment was pre-specified and a stock recruitment relationship was also used. The SSC recommendation narrowed the model scenarios to three (identified as models 7, 8, and 9 in the rebuilding analysis). The SSC discussed the use of power coefficients to estimate juvenile indices, but concluded that the different values were equally likely, leaving no statistical basis for choosing among them. The SSC did, however, determine that there was a biological basis for recommending a power coefficient range between 2.0 and 4.0.

Growth of the spawning stock biomass depends on the rate at which juvenile fish mature and enter the fishery (recruitment) as well as the applied exploitation rates. The range of accepted models produce different expected levels of future recruitment and will result in different levels of expected growth in the spawning stock. This range of reasonable values was

reviewed by the SSC and Stock Assessment Review panels as the best available information. A more conclusive determination was not possible with the available data.

The simplicity of the commenter's statement that modeling assumptions suggest that a higher level of fishing harvest would result in faster rebuilding of the species fails to recognize how recruitment levels influence the results. Plausible higher future recruitment levels support both faster rebuilding and a higher level of fishing harvest during rebuilding. The reverse assumptions would apply for lower levels of recruitment.

The Council considered three OYs based on each of the three model scenarios (7, 8, and 9) with the application of a fishing exploitation rate for 2004 that corresponded with a 60 percent probability of rebuilding the stock to B_{MSY} by 2042 (T_{MAX}). For 2004, the Council recommended the mid-range OY of 284 mt with a corresponding ABC of 3,460, with a target rebuilding date (T_{TARGET}) of 2037. Given the complexity in identifying the most suitable model, NMFS believes that holding T_{MAX} and T_{TARGET} constant to those applied in 2003 was reasonable, particularly considering that Amendment 16–3, which will provide a rebuilding plan for widow rockfish, will be prepared through the Council in early 2004 and considers a full range of rebuilding probabilities.

Comment 8: NMFS has proposed to increase the fishing rates for POP and darkblotched rockfish, which would delay rebuilding of these species. Maintaining the previous catch rates would have rebuilt these species faster. The increase violates the Magnuson-Stevens Act requirements to rebuild species as quickly as possible.

Response: The proposed rule for the 2004 fishery specifications and management measures, which was published on January 8, 2004, contained revisions to the harvest control rules for POP and darkblotched rockfish from what had been published in the Amendment 16–2 proposed rule on December 5, 2003 (68 FR 67998). The POP rebuilding parameters published in the Amendment 16–2 proposed rule were based on a 2000 stock assessment that resulted in a target rebuilding year of 2027 and a harvest control rule of F=0.0082. The 2004 OY presented in the proposed rule to implement the 2004 fishery specifications and management measures was based on a new stock assessment prepared in 2003. Because POP rebuilding parameters such as the unfished biomass and B_{MSY} were updated with the new stock assessment, the POP harvest control rule was revised to F=0.0257 from F=0.0082. However, the target rebuilding year (2027) is the same as was announced for POP in the Amendment 16–2 proposed rule. Similarly, the darkblotched rockfish rebuilding parameters in the Amendment 16–2 proposed rule were based on a 2000 stock assessment that had resulted in a target rebuilding year of 2030 and a harvest control rule of F=0.027. The 2004 OY presented in the proposed rule to implement the 2004 fishery specifications and management measures was based on a new stock assessment that was prepared in 2003 and results in the same target rebuilding year (2030) as was announced in the Amendment 16–2 proposed rule for the darkblotched rockfish rebuilding plan. However, because other rebuilding parameters such as the unfished biomass and B_{MSY} were updated with the new stock assessment, the harvest control rule was revised to F=0.032 from F=0.027. Based on the new stock assessments, there were modest increases in the harvest rates for these species and harvest levels in 2004 are higher than in 2003. Nonetheless, the projected times for rebuilding for these species have not changed. Although the stock may rebuild faster if the harvest rates had been held to the same rates as in 2003, that is not required by the Magnuson-Stevens Act, as explained above in the response to Comment 4. The Magnuson-Steven Act does not state that rebuilding must be completed in the shortest time possible, rather it requires that time for rebuilding to be as short as possible, taking into account certain factors. NMFS and the Council considered the appropriate factors discussed in the response to Comment 4, above, in setting the 2004 harvest levels.

Comment 9: NMFS has not given proper consideration to the effect of Pacific whiting harvest on other overfished species, presumably because NMFS has yet to decide on the 2004 whiting OY. NMFS cannot reasonably conclude that its proposed management measures will be sufficient to constrain the mortality of overfished species that co-occur with whiting if it does not yet know the whiting harvest levels.

Response: A new whiting stock assessment and rebuilding analysis will be available to the Council at its March 2004 meeting in Tacoma, Washington. The upcoming whiting stock assessment incorporates additional fishery dependent data collected since the last stock assessment, and new fishery independent data from the 2003 hydroacoustical survey and pre-recruit survey work. These added data points are expected to provide much needed information both on changes to the spawning stock biomass since the 1999 year class began entering the fishery, and on potential future whiting recruitment.

In anticipation of the new stock assessment and given the small amount of whiting that is typically landed under trip limits prior to the April 1 start of the primary season, the Council delayed adoption of a final ABC and OY until the results of the new stock assessment and rebuilding analysis are available at its March 2004 meeting. The Council will recommend the ABC and OY in March and it will be implemented through a final rule that is separate from the final rule for the rest of these groundfish specifications and management measures.

In anticipation of the new assessment, the Council considered and the EIS analyzed a range of ABCs and OYs that were expected to encompass results of the new stock assessment. This range was consistent with historical values. The four ABC and OY options considered by the Council were: an ABC of 94,000 mt with an OY of 74,100 mt, which represents 50 percent of the 2003 ABC and OY; an ABC of 188,000 mt with an OY of 148,200 mt, which was the 2003 ABC and OY; an ABC of 282,000 mt with an OY of 222,300 mt, which is 50 percent greater than the 2003 ABC and OY; and an ABC of 325,000 mt with an OY of 250,000 mt, which was a value recommended by the Council. The Council recommended a preferred OY of 250,000 mt to accommodate possible high end estimates that could result from the 2004 stock assessment, while recognizing the limitations that incidental catch of widow rockfish is likely to have on harvest levels of whiting.

NMFS believes that proper consideration was given to the effect of Pacific whiting harvest on other overfished species. In June 2003, the Council asked the GMT to review widow rockfish bycatch in the whiting fishery. At the September Council meeting (Exhibit C.6.0 Supplemental GMT report 3), the GMT reported that historical data from 1998–2002, indicated that the availability of the whiting OY would likely need to be constrained to around 120,000 mt to stay within the widow rockfish OY of 284 mt. The 2004 alternative scorecards presented in the Draft Environmental Impact Statement (DEIS) (Tables 2.2.2–1, 2.2.3–1, 2.2.4–1, and 2.2.5–1) display the estimated mortality for each overfished species resulting from the alternative whiting OYs. The scorecard

for Council's preferred alternative estimates the amount of each overfished species, except widow rockfish, that would be taken by the whiting fishery participants under the medium OY of 148,000 mt. For widow rockfish, the maximum availability of this species to the whiting fisheries was identified as being 200.5 mt regardless of the whiting OY from the new assessment. The impacts of the alternative whiting OYs were also discussed in section 4.2.1.2 of the DEIS, with particular attention being given to the impacts on widow rockfish.

The 2004 management measures adopted for overfished species were designed to result in total mortality levels that are lower than that species' OY, which effectively creates an OY buffer. Providing this OY buffer for overfished species will allow for flexibility in establishing a whiting OY while reducing the risk of exceeding an OY. Because scorecards are updated throughout the year as new information becomes available, the estimates of the incidental catch of overfished species will be adjusted when the final whiting OY is adopted, and will be updated as necessary during the fishing year. Whiting is a unique fishery in that it is a mid-water trawl fishery, takes little bycatch, and has a high level of catch monitoring (in 2003, nearly 100 percent of the hauls were sampled in the at-sea processing fishery and about 30 percent of the shore-based landings were sampled). NMFS believes that the 2004 management measures, including the use of OY buffers and inseason adjustments, will be sufficient to keep the mortality of overfished species that co-occur with whiting within the established OYs. If NMFS finds that the final OY recommendation for whiting is significantly different from the range of OYs that was analyzed in the DEIS, new information addressing the impacts will be provided. When approving the final OY for whiting, NMFS will ensure that the projected harvests of overfished species will not exceed their OYs.

Comment 10: NMFS has failed to give adequate consideration to past levels of actual fishing catch in setting the 2004 harvest specifications. NMFS has failed to assess and disclose the total levels of fishing mortality for overfished species in 2002 and 2003, which means that it and the public lack the information necessary to determine whether lower harvest levels might be necessary to compensate for past overharvests. Without this information, NMFS also does not know whether the proposed management measures for 2004 are likely to keep fishing mortality at or below the necessary levels.

Response: NMFS develops and implements the annual specifications and management measures through a notice-and-comment rulemaking and with a National Environmental Policy Act analysis, such as an EIS. For the 2004 fisheries, the Council began much of its work in April 2003 and finalized its recommendations in early September 2003. NMFS published its proposed rule to implement the 2004 specifications and management measures on January 8, 2004, and will make this action final by March 1, 2004.

NMFS, the State fisheries agencies, and the Council monitor fisheries landings inseason. Commercial fisheries landings are monitored by a fish ticket system managed by the three States. State fish ticket data is compiled by the Pacific States Marine Fisheries Commission (PSMFC). Estimated commercial landings amounts are provided to the agencies and the public via the Pacific Fisheries Information Network (PacFIN), which has its Web site at *http://www.psmfc.org/pacfin*. Fish ticket data available through PacFIN are not up-to-the-minute. For example, if a person were to check the PacFIN Web site on March 15th for total coastwide catch of widow rockfish, the estimates available would not include all widow rockfish landed up through March 14th. Depending on State funding and staffing levels, groundfish landings may be recorded in PacFIN anywhere from several days to a few months after the landings have been made. For this reason, fishery managers must estimate current landings levels of a particular species by extrapolating what we know has already been landed out to an estimate based on several different variables, such as past harvest rates in particular months, number of vessels participating in the fishery in those months, etc. With the time delays in this landings monitoring system, the Council making its recommendations in September 2003 and even NMFS finalizing its decision in March 2004 would not have fully up-to-date landings information from the 2003 commercial fisheries. For this reason, the December 2003 FEIS for this action based its analyses on the more complete landings estimates from 2002 and prior years. The partial 2003 data that was available at the time that the analysis was conducted would not have accurately depicted 2003 annual landings.

In this comment, the commenter refers to fishing "catch," not to fishing landings. The State fish ticket system and PacFIN monitor commercial fisheries landings. These systems do not include fish taken at sea and lost or discarded. While NMFS monitors total catch levels through at-sea observer sampling programs, the agency does not have the staff, funding, or technology to monitor the thousands of trawl tows and trap and longline hauls that result in the fishery's total commercial catch. Instead, NMFS monitors a portion of the commercial fleet through observers and extrapolates total catch for the fleet based on modeling observer data with fish ticket and other data. In the preamble to the proposed rule for this action, NMFS described a bycatch model that is used both pre-season to develop management measures and inseason to modify management measures. This model is a "total catch" model, *i.e.* it calculates the total expected catch, not just fish that are actually landed. The model is updated annually with new WCGOP data. Observer data from the 2001–2002 fisheries was used to develop 2004 management measures and discard estimates. NMFS just completed its analysis of 2002–2003 WCGOP data (*http://www.nwfsc.noaa.gov/research/divisions/fram/Observer/*), and that analysis will inform the Council's inseason management for 2004, and development of the 2005–2006 fishery specifications and management measures.

Recreational fisheries are also monitored inseason, although monitoring methods vary by State. As with the commercial fisheries, PSMFC maintains a database for recreational fisheries, the Recreational Fisheries Information Network (RecFIN). Estimates of recreational fisheries catch and landings are available on the Internet at *http://www.recfin.org/*. All three States deploy port samplers for at-dock sampling of recreational groundfish fisheries. Even more so than in commercial fisheries, recreational fisheries data may not be available to fisheries managers until several months after the subject fishing trips have occurred. Because the States of Washington and Oregon have smaller coastlines and smaller populations than California, they tend to directly sample a much greater proportion of their recreational fisheries catch than California does.

In past years, California has relied on NMFS' Marine Recreational Fisheries Statistical Survey (MRFSS) for its estimates of recreational fisheries catch. MRFSS uses a telephone survey of the general population to determine which persons in the population are anglers, and, of the anglers, how much of which species they are catching and landing. MRFSS was initially designed as an annual sampling program that would

provide a snapshot of an entire year's harvest of different recreational species. Because MRFSS was the only tool for estimating recreational catch, the Council has used it for inseason management in recent years. In developing the 2004 fishery specifications and management measures, NMFS and the state agencies used RecFIN data, including MRFSS data for California, from 2002 and prior years. Data from the 2003 fisheries is not yet complete and was even less complete when the 2004 fisheries regulations were developed. Partial data from 2003 was not used both because the data delivery times from the three States varies and because the database managers do not release the data as complete until several months after the fisheries have occurred. However, NMFS has used preliminary data from 2003 to adjust 2004 lingcod management measures in this final rule in order to immediately address early evidence of excessive harvest in 2003 of lingcod, an overfished species. Reasons for this are explained below in the response to Comment 12.

Recreational fisheries data needs have increased notably since the Council first began managing the fisheries to rebuild overfished stocks in 2000. All three States, the Council, and NMFS have been concerned that data generated from MRFSS was not accurate or timely enough to support inseason management of recreational fisheries. Over 2002–2003, the agencies met through the PSMFC's RecFIN Data Committee and worked together to update their monitoring programs so as to better meet the coastwide need for improved recreational fisheries catch data. PSMFC reported to the Council on the planned changes to recreational fisheries data gathering in the three States at the Council's November 2003 meeting. All three States have eliminated MRFSS as a sampling tool, focusing instead on at-dock sampling and angler interviews. While California will continue to use telephone interviews as one of its data-gathering methods, its survey population will be licensed California anglers, not the entire population of the State of California. California will also be increasing its at-dock sampling presence and providing some on-board observation of charterboats. Oregon and Washington will also be replacing their MRFSS general-population surveys with surveys specific to licensed anglers, and with increased at-dock and at-sea monitoring.

Finally, in addition to commenting on the timeliness of the data used in developing 2004 fishery regulations, the commenter questioned whether overall 2004 harvest levels would need to be adjusted based on 2003 fisheries catch. The purpose of harvest limits is to achieve, "on a continuing basis, the OY from each fishery" (50 CFR 600.310(a).) It is not NMFS' practice to adjust OYs for one year by the overages or underages from previous years. NMFS makes adjustments to OYs after conducting an assessment of the population of a particular species, an assessment that occurs every 2–4 years. (Previously, NMFS had been on a 3-year stock assessment cycle. With the adoption of Amendment 17, the science and management cycle has shifted from annual to biennial management. Under the biennial management cycle, stock assessments will be conducted every 2–4 years. The decisions on which stock assessments to do which year will depend on the status of the stocks, and the availability of data and stock assessment personnel. In the years between assessments, NMFS and the Council address over- and under-harvests by adjusting management measures to try to achieve, but not exceed, OYs (OYs of several of the more abundant stocks will, of necessity, not be achieved in order to protect co-occurring overfished species.) Management measures are adjusted inseason using the best available scientific information. For example, although the 2002–2003 WCGOP data was not available until January 2004, it will be incorporated into the bycatch model for use in management of the 2004 fisheries. Additionally, as 2003 fisheries data are finalized, 2003 management measures will be evaluated for whether they were effective at keeping the fisheries within expected harvest levels for each 2-month management period. Management measures for 2004 will be evaluated and, if necessary, adjusted inseason based in part on the effectiveness of the 2003 management measures. For example, at the March 2004 Council meeting, the GMT will be considering inseason revisions to management measures for 2004 and will be informed, in part, by estimates of effectiveness of management measures for 2003. In this final rule, the preliminary 2003 information has been used to adjust the proposed California recreational fisheries management measures for lingcod, as discussed in the response to Comment 12. This is being done now rather than as an inseason adjustment after consideration by the Council at the March or April Council meeting because NMFS believes that the preliminary data from the 2003 season indicate that stricter management measures will be required to keep harvests within the 2004 OY, and because the magnitude of the necessary changes are such that they should be made as early in the year as possible. A more complete discussion of these changes is found in the response to Comment 12. Changes must also be made in California state regulations for the area between the shore and 3-miles from shore, and making the changes in the Federal rules now provides the opportunity for the California Fish and Game (Commission) to consider these changes at its meeting on March 4 and 5.

Comment 11: The proposed specifications fail to adopt all practicable bycatch reduction measures, particularly failing to adopt individual vessel discard caps. On a related matter, NMFS has failed to establish adequate bycatch assessment requirements for the fishery because there are no bycatch assessment requirements in the proposed specifications.

Response: These fishery specifications and management measures are not the only regulations that affect West Coast groundfish fisheries and vessel discard caps are not the only potential tool for reducing bycatch. In addition, these management measures contain many provisions to reduce discard as described here. In the past several years, NMFS has implemented a variety of bycatch reduction programs. The agency has supported full retention or full utilization EFP programs for the Washington arrowtooth flounder trawl, yellowtail rockfish trawl and longline dogfish fisheries, and for the California flatfish trawl fishery. Shorter-than-year-round fishing seasons have been set for various species and sectors of the groundfish fleet in order to protect different overfished groundfish species. Amendment 14 to the FMP implemented a permit stacking program for the limited entry fixed gear fleet. In 2003, NMFS implemented a buyback of limited entry trawl vessels and their permits, reducing the limited entry groundfish trawl fleet by about one-third. NMFS has implemented gear modification requirements that restrict the use of trawl gear in rockier habitat where many overfished species are found and constrain the catching capacity of recreational fishing gear. Higher groundfish landings limits have been made available for trawl vessels using gear or operating in areas where overfished species are less likely to be taken. Species-to-species landings limit ratios have been thoroughly re-examined in a groundfish bycatch model first introduced in 2002 and modified and used to develop

management measures in each intervening year as new observer program data became available. The RCAs first implemented in September 2002 and implemented with this action for 2004 are large time/area closures that affect the entire West Coast and are specifically designed to reduce the incidental catch of overfished groundfish species in fisheries targeting more abundant stocks.

"Discard caps" generally refers to a management tool whereby an entire fishery, or fishing by an individual vessel, is halted when discard quotas for designated species are reached. Administration of such a system requires real-time information on discards as the fishery progresses, either through comprehensive, direct observation by fishery observers, or for a fleetwide discard cap, by a combination of observer and landings data that can be extrapolated to yield a real-time reliable estimate of discards. There is no data collection system in place on which to base a system of discard caps. NMFS has examined discard caps more fully in a Draft Environmental Impact Statement on bycatch management in the West Coast groundfish fisheries, a draft of which was made available to the public on February 27, 2004 (69 FR 9314).

These 2004 fishery specifications and management measures regulate the activities of fishery participants. Bycatch assessment, which is comprised of bycatch monitoring and the modeling of the data derived from bycatch monitoring programs, is the responsibility of NMFS and other government agencies. NMFS has a bycatch monitoring program in place, the WCGOP, and groundfish vessels are required to participate in that program under 50 CFR 660.360. NMFS NWFSC manages that program and models the data derived from the program to estimate bycatch and discard in the groundfish fisheries. *See* the preamble to the proposed rule for this action for further explanation of the agency's bycatch modeling (January 8, 2004, 69 FR 1380). The regulations implemented by this action are not the only regulations governing the fishery. By not including bycatch assessment requirements in this particular action, NMFS has not failed to assess bycatch. As discussed here, NMFS has already implemented the necessary bycatch monitoring program and is using data from that program to assess bycatch and discard levels and to manage the fishery.

Comment 12: NMFS admits that there were substantial overharvests in the California recreational fisheries in 2003, but has failed to propose any changes to the 2004 management measures that would avoid similar overharvests in 2004. NMFS has failed to conduct an adequate inquiry into whether the 2003 revisions to recreational fisheries management have been sufficient to constrain total mortality for lingcod and other overfished species to the levels necessary in order to avoid further exceeding the fishing harvest levels NMFS has proposed for 2004. It is not appropriate to wait until the April 2004 Council meeting to make revisions to the California recreational fisheries management measures and revisions to the management of those fisheries must be made now.

Response: NMFS agrees that it is necessary to make revisions to the California recreational fisheries management measures as soon as possible. Therefore, NMFS has consulted with CDFG on potential regulatory revisions, and has determined that additional restrictive regulatory measures are needed to protect lingcod. Of the 925 mt of estimated lingcod landings and dead discard in the 2003 recreational fisheries, 681 mt were estimated to have been taken by vessels operating in waters between the Oregon/California border (42° N. lat.) and Point Conception, CA (34°27′ N. lat.). These estimates are taken from RecFIN's MRFSS and estimates for landings in the latter months of 2003 are considered preliminary.

Recreational fisheries tend to be concentrated in waters closer to shore where they are easily accessed by vessels on day trips. Thus, in order to effectively reduce recreational take of lingcod, both State and Federal regulations need to be revised. NMFS discussed with CDFG how to revise both State and Federal regulations to reduce recreational lingcod landings as quickly as possible. Under California State law, State regulations may be changed on an emergency basis to conform to Federal regulations. Thus, NMFS is revising Federal regulations with this final rule, and CDFG is initiating its emergency regulations process to alter recreational fisheries regulations for lingcod inside State waters. State regulatory changes would otherwise take 4–5 months, under the State's notice-and-comment procedures. Under the expedited emergency procedures, these changes could be made by late March 2004.

Under the proposed regulations for recreational groundfish fisheries off California, fishing in both state and Federal waters would have been closed between 40°10′ N. lat. and 34°27′ N. lat. for the months of March and April, but open north of 40°10′ N. lat. to the border with Oregon. Coastwide, the current lingcod size limit is 24 inches (61 cm) and there is a 2-fish bag limit for lingcod. With this final rule, NMFS will revise the recreational lingcod size and bag limits such that on April 1, 2004, the size limit will be increased to 30 inches (77 cm) and the daily bag limit will be decreased to one fish per day. This increase in size limit and reduction in bag limit will apply to recreational fisheries off the entire coast of California, from the Oregon/California border to the California/Mexico border. CDFG has estimated that, given current information about recreational effort off California in recent years, these changes would result in the fisheries taking 291 mt in 2004. This is 55.8 mt less than the 346.8 mt of lingcod that was estimated pre-season to be taken in this fishery in 2004.

NMFS believes that revising the regulations that particularly affect the California recreational fishery is appropriate because these regulatory revisions are specifically aimed at the fishery with the greatest contribution to overall lingcod landings in 2002 and 2003. These changes are needed, in part, to prevent the closure of other recreational and commercial fisheries early in the year to prevent total lingcod catch from exceeding lingcod harvest levels.

The Commission will meet on March 4–5, 2004. At that meeting, CDFG will propose State regulatory revisions to match these new Federal regulations. Once the Commission has approved the changes, CDFG will be able to implement the regulatory revisions within 2–3 weeks. NMFS expects that this issue will be discussed at the upcoming March 8–12, 2004 Council meeting, at which time CDFG may have an expected implementation date. NMFS expects that California will be able to make these changes by the end of March. If for some reason California cannot make the anticipated changes in a timely manner, NMFS will immediately initiate further changes in the groundfish fishery regulations in order to keep the lingcod mortality under the lingcod OY for 2004.

Preliminary 2003 data indicate that lingcod was the only overfished species with its ABC exceeded in 2003. As 2003 fisheries data is finalized and the bycatch model is updated, the Council and NMFS will look at whether further 2004 inseason adjustments need to be made for recreational and commercial fisheries. In addition, CDFG is developing further measures to reduce the pace of both groundfish harvest in general and lingcod harvest in particular

in 2004, some of which are dealt with below in Comment 13. The State expects to implement a series of management changes in the spring and summer to provide greater protection for lingcod and other groundfish species, with particular attention to nearshore and shelf rockfish species. NMFS anticipates that, as it has done in the past, CDFG will bring its recommendations to the Council for discussion and adoption as inseason actions during 2004.

Comment 13: The CDFG requests that NMFS consider implementing a recreational and commercial groundfish fisheries closure at Cordell Bank for 2004. The bank habitat supports large populations of many species of rockfish, including canary rockfish. This action is requested to help reduce incidental fisheries landings of canary rockfish and other overfished species, and to be consistent with state groundfish regulations in effect for 2004. Based on data from a 1988–1998 CDFG study of recreational charterboat fishing, the relative catch of overfished rockfish species from the Cordell Bank area was notably higher than for other fishing grounds off central California. Catches of widow, bocaccio, canary, and yelloweye rockfish and lingcod comprised 27 percent of the landings from Cordell Bank, as compared to 15 percent of landings from all other areas. Federal regulations for the Cordell Bank area currently close waters around the bank deeper than 30 fm (55 m). State regulations, however, close recreational fishing within a 5-nautical mile radius around Cordell Bank, located at 38°02′ N. lat., 123°25′ W. long. The combination of current state and Federal regulations currently allows fishing in waters shallower than 30 fm (55 m) in this area of high canary rockfish abundance. We are requesting that NMFS implement Federal regulations similar to state regulations, such that recreational and commercial fishing would be closed at all times for rockfish, lingcod, cabezon, greenlings of the species *Hexagrammos,* California scorpionfish, California sheephead, and ocean whitefish.

Response: NMFS agrees with this recommendation but notes that immediate implementation of the full scope of CDFG's recommendations may not be practical or possible. The groundfish FMP does not cover California sheephead, ocean whitefish or greenlings of the species *Hexagrammos* other than kelp greenling (*Hexagrammos decagrammus*). Fisheries for these species are managed by the State of California, are covered by California regulations, and will not be addressed via Federal regulation.

With this final rule, NMFS will implement this closure for the recreational fisheries only, which have the greater effect on overfished species and which are currently subject to RCA boundaries that do not conflict with the suggested closure. If NMFS were to implement this recommendation for commercial fisheries at this time, the Cordell Bank closure would intersect with several different Trawl RCA and Non-trawl RCA boundaries. These intersections would create a series of confusing closed and open areas such that groundfish fisheries would be entirely closed where the current RCAs and the Cordell Bank closure intersect, but closed only for certain species in waters covered only by the Cordell Bank closure and not by the RCAs. NMFS and CDFG are discussing how to revise the commercial RCA boundaries so that the boundaries for Cordell Bank closure may be incorporated within the RCAs. NMFS expects that these boundary revisions would be discussed at either the March or April Council meetings and implemented through Federal inseason action.

Comment 14: The Council sent a letter of comment to note that, at its November meeting, it had recommended that NMFS implement regulations for non-trawl limited entry vessels that would prohibit those vessels from operating within the non-trawl RCAs except in cases when those vessels are transiting the non-trawl RCAs.

Response: As discussed in the proposed rule for this action, NMFS accepted the Council's recommendation from its November meeting and included the prohibition in its proposed rule to implement the 2004 specifications and management measures. Because this revision was recommended at the November Council meeting, NMFS did not implement the provision via emergency rule for January–February 2004. NMFS agrees with the Council's recommendation and has implemented the provision at 50 CFR 660.306(bb).

Changes From the Proposed Rule

This final rule is revising the Pacific Coast Groundfish Specifications and Management Measures for March-December 2004, which were set forth in the proposed rule published in the **Federal Register** on January 8, 2004 (69 FR 1380). This final rule includes changes made in a correction document to the Specifications and Management Measures implemented via emergency rule for January-February 2003 (69 FR 4084, January 28, 2004). Changes to the emergency rule included: A clarification that where the phrase "North and South" is used in Table 5 (North), that refers to north and south of 40°10′ N. lat.; a correction in Table 5 (South) that between 40°10′ N. lat. and 34°27′ N. lat., the Trawl RCA is measured from the mainland coast of California, between boundary lines approximating the 75 fm (137 m) and 150 fm (274 m) depth contours; a correction to a typographic error in one of the coordinates for the boundary line approximating the 60-fm (110-m) depth contour around the Channel Islands.

In addition, this final rule makes the changes described above in the responses to Comments 12 and 13. In response to comments from CDFG and the public, NMFS has made the following revisions from the proposed rule to regulations affecting fisheries off California: Closed recreational fisheries off California for rockfish, lingcod, cabezon, kelp greenling, and California scorpionfish within a 5-nm radius around Cordell Bank, located at 38°02′ N. lat., 123°25′ W. long.; clarified that the recreational fisheries closure around the Farallon Islands applies only to fisheries for rockfish, lingcod, cabezon, kelp greenling, and California scorpionfish, rather than to all groundfish; implemented a 1 fish bag limit and a 30 inch (77 cm) size limit beginning April 1, 2004, for recreational lingcod fisheries off California.

Finally, this final rule also makes changes to Federal regulations. In 50 CFR 660.302, Federal regulations provide definitions for different terms used in groundfish regulation and management. For many years, NMFS has also provided definitions of terms in the annual specifications and management measures implementing final rules at section IV.A. In some cases, the definitions provided in the specifications and management measures have been more precise than or have added to the definitions provided at 50 CFR 660.302. This practice is confusing. Thus, NMFS has amended 50 CFR 660.302 to revise the definitions for the terms "Closure," "Fishery management area," and "Trip limits," and has added a definition for "Legal fish" to conform to those provided herein at IV.A. These revisions and additions in no way change the effect of Federal regulations on the groundfish fishery, they simply ensure that the same language is used wherever those definitions are found. These definitions were included in the proposed specifications and management measures and are included

here in the management measures, and also at 50 CFR part 660.

The definition for "Trip limit" that has been incorporated into 50 CFR 660.302 is more detailed than the definition for this term previously found in 50 CFR 660.302. Among other things, this definition details specific types of trip limit periods, such as the 2-month "major" cumulative limit periods. Federal regulations at 660.335(e)(3)(i) restrict the frequency of permit transfers such that they are made effective only on the first date of a major cumulative limit period. This final rule also revises that sub-paragraph to clarify the start dates for the major cumulative limit periods as they are defined under 50 CFR 660.302. Again, this is a minor change and in no way alters the effect of Federal groundfish regulations on fishery participants.

At 50 CFR 660.304, coordinates are provided for management areas, including conservation areas. The final rule at 68 FR 62374 (November 4, 2003) inadvertently mis-labeled sub-paragraph § 660.304(c)(2)(ii) as § 660.304(c)(2)(2). This final rule corrects that labeling mistake. Further, that same final rule inadvertently neglected to characterize the Yelloweye Rockfish Conservation (YRCA) as a Groundfish Conservation Area (GCA) and set the YRCA apart from other GCAs in paragraph § 660.304(d). This final rule corrects that mistake by re-designating § 660.304(d) as § 660.304(c)(3).

I. Final Specifications

Final fishery specifications include ABCs, the designation of OYs (which may be represented by harvest guidelines (HGs) or quotas for species that need individual management), and the allocation of commercial OYs between the open access and limited entry segments of the fishery. These specifications include fish caught in State ocean waters (0–3 nautical miles (nm) offshore) as well as fish caught in the EEZ (3–200 nm offshore).

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Table 1a. 2003 Specifications of Acceptable Biological Catch (ABC), Optimum Yields (Oys), and Limited Entry and Open Access Allocations, by International North Pacific Fisheries Commission (INPFC) Areas (weights in metric tons).

Species	ACCEPTABLE BIOLOGICAL CATCH (ABC)						OY (Total catch)	Commercial OY (Total Catch) and Harvest guidelines	Allocations total catch			
	Vancouver a/	Columbia	Eureka	Monterey	Conception	Total Catch			Limited Entry		Open Access	
									Mt	%	Mt	%
ROUNDFISH												
Lingcod b/	1,385					1,385	735	180.7	--	81.0	--	19.0
Pacific Cod	3,200		c/			3,200	3,200	3,200	--	--	--	--
Pacific Whiting d/	94,000-325,000					94,000-325,000	74,100-250,000		--	--	--	--
Sablefish e/ (north of 36°)	8,185				--	8,185	7,510	6,687	6,059	90.6	629	9.4
Sablefish f/ (south of 36°)	--				302	302	276	276	--	--	--	--
FLATFISH												
Dover sole g/	8,510					8,510	7,440	7,380	--	--	--	--
English sole	2,000		1,100			3,100	na	-	-	-	-	-
Petrale sole h/	1,262		500	800	200	2,762	na	-	-	-	-	-
Arrowtooth flounder	5,800					5,800	na	-	-	-	-	-
Other flatfish i/	700	3,000	1,700	1,800	500	7,700	na	-	-	-	-	-

Species	ACCEPTABLE BIOLOGICAL CATCH (ABC)						OY (Total catch)	Commercial OY (Total Catch) and Harvest guidelines	Allocations total catch			
	Vancouver	Columbia	Eureka	Monterey	Conception	ABC			Limited Entry		Open Access	
									Mt	%	Mt	%
ROCKFISH:												
Pacific Ocean Perch j/	980					980	444	117.7	--	--	--	--
Shortbelly k/	13,900					13,900	13,900	13,900	--	--	--	--
Widow l/	3,460					3,460	284	280.4	--	97.0	--	3.0
Canary m/	256					256	47.3	24.2	--	87.7	--	12.3
Chilipepper n/	c/			2,700		2,700	2,000	1,985	1,106	55.7	879	44.3
Bocaccio o/	c/			400		400	250	108.5	--	52.7	--	44.3
Splitnose p/	c/			615		615	461	461	--	--	--	--
Yellowtail q/	4,320			c/		4,320	4,320	4,291	3,935	91.7	356	8.3
Shortspine thornyhead r/ north of 34°27'	1,030					1,030	983	974	971	99.7	3	0.27
Longspine thornyhead s/ north of 36°	2,461				--	2,461	2,443		--	--	--	--
south of 36° t/	--				390	390	195	195	--	--	--	--
Cowcod u/	c/			19	--	19	2.4	0	--	--	--	--
	c/			--	5	5	2.4	0	--	--	--	--
Darkblotched v/	240					240	240	122.1		--		--
Yelloweye w/	53					53	22	5.8		--		-
Black x/	540	775			--	1,315	1,315					

Species	ACCEPTABLE BIOLOGICAL CATCH (ABC)						OY (Total catch)	Commercial OY (Total Catch) and Harvest guidelines	Allocations total catch			
	Vancouver	Columbia	Eureka	Monterey	Conception	Total Catch			Limited Entry		Open Access	
									Mt	%	Mt	%
Minor Rockfish North y/	3,680			--		3,680	2,250	2,128	1,979	91.7	179	8.3
Minor Rockfish South z/	--			3,412		3,412	1,968	1,390	774	55.7	616	44.3
Remaining Rockfish	1,612			854		--	--	--	--	--	--	--
bank aa/	c/			350		350	--	--	--	--	--	--
blackgill bb/	c/			75	268	343	--	--	--	--	--	--
bocaccio - north	318					318	--	--	--	--	--	--
chilipepper-north	32					32	--	--	--	--	--	--
redstripe	576			c/		576	--	--	--	--	--	--
sharpchin	307			45		352	--	--	--	--	--	--
silvergrey	38			c/		38	--	--	--	--	--	--
splitnose	242			c/		242	--	--	--	--	--	--
yellowmouth	99			c/		99	--	--	--	--	--	--
yellowtail-south				116		116	--	--	--	--	--	--
Other rockfish cc/	2,068			2,558		--	--	--	--	--	--	--
OTHER FISH dd/	2,500	7,000	1,200	2,000	2,000	14,700	na	-	--	--	--	-

Table 1b. 2003 OYs for minor rockfish by depth sub-groups (weights in metric tons).

Species	Total Catch ABC	OY (Total Catch)			Harvest Guidelines (total catch)			
					Limited Entry		Open Access	
		Total Catch OY	Recreational Estimate	Commercial OY for minor rockfish and HG for depth sub-groups	Mt	%	Mt	%
Minor Rockfish North x/	3,680	2,250 x/	78	2,158	1,979	91.7	179	8.3
Nearshore		122 x/	68	40				
Shelf		968	10	958				
Slope		1,160	0	1,160				
Minor Rockfish South y/	3,412	1,968 y/	435	1,390	774	55.7	616	44.3
Nearshore		615 y/	375	97				
Shelf		714	60	654				
Slope		639	0	639				

a/ ABC applies to the U.S. portion of the Vancouver area, except as noted under individual species.

b/ Lingcod was declared overfished on March 3, 1999. A stock assessment, that included parts of Canadian waters, was done in 2000 and updated for 2001. Lingcod was believed to be at 15 percent of its unfished biomass coastwide in 2000, 17 percent in the north and 15 percent in the south. The U.S. portion of the ABC for the Vancouver area was set at 44 percent of the total for that area. The ABC projection for 2004 is 1,385 mt and was calculated using an F_{MSY} proxy of F45%. The total catch OY of 735 mt is based on a rebuilding plan with a 60 percent probability of rebuilding the stock to B_{MSY} by the year 2009 (T_{MAX}). The harvest control rule will be 0.0531 in the north and 0.0610 in the south. The total catch OY is reduced by 473.6 mt for the amount that is estimated to be taken by the recreational fishery, 3 mt for the amount estimated to be taken during research fishing, 2.8 mt for the amount estimated to be taken in non-groundfish fisheries, and 49.8 mt which will be held in a buffer (see the preamble section "OY Management for overfished species" for the discussion of buffers), the resulting commercial harvest guideline of 205.8 mt. The tribes do not have a specific allocation at this time but are expected to take 25.5 mt of the commercial OY.

c/ "Other species", these are neither common nor important to the commercial and recreational fisheries in the areas footnoted. Accordingly, Pacific cod is included in the non-commercial OY of "other fish" and rockfish species are included in either "other rockfish" or "remaining rockfish" for the areas footnoted.

d/ Pacific whiting - The most recent stock assessment was prepared in 2002 and a new assessment and rebuilding analysis are expected in early 2004. Therefore, a range is presented for the ABC and OY values. Final adoption of the ABC and OY have been deferred until the March 2004 Council meeting. Final adoption of the ABC and OY will be published by early April after Council and NMFS consideration of the new stock assessment.

e/ Sablefish north of 36° N lat. - A new sablefish assessment was done in 2001 for the area north of Point Conception (34°27'N lat.) and updated for 2002. Following the assessment update, sablefish north of 34° 27'N lat. was believed to be between 31 percent and 38 percent of its unfished biomass. The coastwide ABC of 8,487 mt is based on environmentally driven projections with the F_{MSY} proxy of F45%. The ABC for the management area north of 36° N lat. is 8,185 mt (96.45 percent of the coastwide ABC). The coastwide OY of 7,786 mt is based on the density-dependent model and the application of the 40-10 harvest policy. The total catch OY for the area north of 36° N lat is 7,510 mt and is 96.05 percent of the coastwide OY of 7,786 mt. The total catch OY is reduced by 10 percent (751 mt) for the tribal set aside, 53.0 mt for the amount estimated to be taken as research catch, and 18.5 mt for the amount estimated to be taken in non-groundfish fisheries. The remainder (6,687 mt) is the commercial total catch OY. The open access allocation is 9.4 percent of the commercial OY, resulting in an open access total catch OY of 629 mt. The limited entry total catch OY is 6,059 mt. The limited entry total catch OY is further divided with 58 percent (3,514 mt) allocated to the trawl fishery and 42 percent (2,545 mt) allocated to the non-trawl fishery. To provide for bycatch in the at-sea whiting fishery 15 mt of the limited entry trawl allocation will be set aside.

f/ Sablefish south of 36° N lat. - The ABC of 302 mt is 3.55 percent of the ABC from the 2002 coastwide assessment update. The total catch OY of 276 mt is 3.55 percent of the OY from the 2002 coastwide assessment update. There are no limited entry or open access allocations in the Conception area at this time.

g/ Dover sole north of 34° 27'N lat. was assessed in 2001 and was believed to be at 29 percent of its unfished biomass. The ABC of 8,510 mt is based on an F_{MSY} proxy of F40%. The total catch OY of 7,440 mt is the three year average OY for

2002-2004 as forecast in the 2001 stock assessment. Because the biomass is estimated to be in the precautionary zone, the 40-10 harvest rate policy was applied to the total catch OY. The OY is reduced by 58 mt for the amount estimated to be taken as research catch, and 2 mt for estimated catch in non-groundfish fisheries resulting in commercial OY of 7,380 mt.

h/ Petrale Sole was believed to be at 42 percent of its unfished biomass following a 1999 assessment. For 2004, the ABC for the Vancouver-Columbia area (1,262 mt) is based on a four year average projection from 2000-2003 with a F40% F_{MSY} proxy. Management measures to constrain the harvest of overfished species, have reduced the availability of these stocks to the fishery during the past several years. Because the harvest assumptions (from the most recent assessment) used to forecast future harvest were likely overestimates, carrying the previously used ABCs and OYs forward into 2004 was considered to be conservative and based on the best available data. The ABCs for the Eureka, Monterey, and Conception areas (1,500 mt) are based on historical landings data and continue at the same level as 2003.

i/ Other flatfish are those species that do not have individual ABC/OYs and include butter sole, curlfin sole, flathead sole, Pacific sand dab, rex sole, rock sole, sand sole, and starry flounder. The ABC is based on historical catch levels.

j/ Pacfic ocean perch (POP) was declared as overfished on March 3, 1999. A new stock assessmet was prepared in 2003 and POP was determined to be at 25 percent of its unfished biomass. The ABC of 980 mt was projected from a new assessment and is based on an F_{MSY} proxy of F50%. The OY of 444 mt is based on a 70 percent probability of rebuilding the stock to B_{MSY} by the year 2042 (T_{MAX}). The harvest control rule will be 0.0257. The OY is reduced by 3 mt for the amount estimated to be taken during research fishing and 323.3 mt which will be placed in a buffer (see the preamble section "OY Management for overfished species" for the discussion of buffers) resulting in a commercial harvest guideline of 117.7 mt.

k/ Shortbelly rockfish remains as an unexploited stock and is difficult to assess quantitatively. The 1989 assessment provided 2 alternative yield calculations of 13,900 mt and 47,000 mt. NMFS surveys have shown poor recruitment in most years since 1989, indicating low recent productivity and a naturally declining population in spite of low fishing pressure. The ABC and OY therefore are set at 13,900 mt, the low end of the range in the assessment.

l/ The widow rockfish stock was declared overfished on January 11, 2001 (66 FR 2338). A new assessment was prepared for widow rockfish in 2003. The spawning stock biomass is believed to be at 22.4 percent of its unfished biomass. The ABC of 3,460 mt is based an F50% F_{MSY} proxy. The OY 284 mt is based on a 60.1 percent probability of rebuilding the stock to B_{MSY} by the year 2042 (T_{MAX}). The harvest control rule is 0.0093. The OY is reduced by 2 mt for the amount estimated to be taken as recreational catch, 1.5 mt for the amount estimated to be taken during research fishing, 0.1 mt for the amount estimated to be taken in non-groundfish fisheries resulting in a commercial OY of 280.4 mt. Specific open access/limited entry allocations have been suspended during the rebuilding period as necessary to meet the overall rebuilding target while allowing harvest of healthy stocks. Tribal vessels are estimated to land about 40 mt of widow rockfish in 2004, but do not have a specific allocation at this time. Set asides for widow rockfish taken in the Pacific whiting fisheries will be announced in 2004 with the whiting specifications.

m/ Canary rockfish was declared overfished on January 4, 2000 (65 FR 221). A new assessment was completed in 2002 for canary rockfish and the stock was believed to be at 8 percent of its unfished biomass coastwide. The coastwide ABC of 256 mt is based on a F_{MSY} proxy of F50%. The coastwide OY of 47.3 mt is based on the rebuilding plan which has a 60 percent probability of rebuilding

the stock to B_{MSY} by the year 2076 (T_{MAX}) and a catch sharing arrangement which has 64.5 percent going to the commercial fisheries and 35.5 percent going to the recreational fishery. The harvest control rule will be 0.0220. The OY is reduced by 15.5 mt for the amount estimated to be taken in the recreational fishery, 1 mt for the amount estimated to be taken during research fishing, 2.1 mt for the amount estimated to be taken in non-groundfish fisheries, and 4.6 mt to be held in a buffer (see the preamble section "OY Management for overfished species" for the discussion of buffers), resulting in a commercial harvest guideline of 24.2 mt. Specific open access/limited entry allocations have been suspended during the rebuilding period as necessary to meet the overall rebuilding target while allowing harvest of healthy stocks. Tribal vessels are estimated to land about 3.6 mt of canary rockfish under the commercial OY, but do not have a specific allocation at this time.

n/ Chilipepper rockfish - the ABC (2,700 mt) for the Monterey-Conception area is based on a three year average projection from 1999-2001 with a F50% F_{MSY} proxy. Because the unfished biomass is believed to be above 40 percent the default OY could be set equal the ABC. However, the OY is set at 2,000 mt to discourage effort on chilipepper, which is taken with bocaccio rockfish. Management measures to constrain the harvest of overfished species, have reduced the availability of these stocks to the fishery during the past several years. Because the harvest assumptions (from the most recent assessment) used to forecast future harvest were likely overestimates, carrying the previously used ABCs and OYs forward into 2004 was considered to be conservative and based on the best available data. The OY is reduced by 15 mt for the amount estimated to be taken in the recreational fishery, resulting in a commercial OY of 1,985 mt. Open access is allocated 44.3 percent (879 mt) of the commercial OY and limited entry is allocated 55.7 percent (1,106 mt) of the commercial OY.

o/ Bocaccio rockfish was declared overfished on March 3, 1999. A new stock assessment and a new rebuilding analysis was prepared for bocaccio rockfish in 2003. The bocaccio rockfish stock is believed to be at 7.4 percent of its unfished biomass. The ABC of 400 mt is based on a F50% F_{MSY} proxy. The OY of 250 mt is based on the rebuilding analysis and has a >70 percent probability of rebuilding the stock to B_{MSY} by the year 2032 (T_{MAX}). The harvest control rule is 0.041. The OY is reduced by 2.0 mt for the amount estimated to be taken during research fishing and 1.3 mt for the amount estimated to be taken in the non-groundfish fisheries. Of the remaining 246.7 mt, 56 percent (138.2 mt) will be applied to the recreational fishery and 44 percent (108.5 mt) will be applied to the commercial harvest guideline. The recreational fishery is estimated to take 62.8 mt, leaving a buffer (see the preamble section "OY Management for overfished species" for the discussion of buffers) of 75.4 mt and the commercial fishery is estimated to take to take 70.8 mt, leaving a buffer of 37.7 mt.

p/ Splitnose rockfish - The 2001 ABC is 615 mt in the southern area (Monterey-Conception). The 461 mt OY for the southern area reflects a 25 percent precautionary adjustment because of the less rigorous assessment for this stock. In the north, splitnose is included in the minor slope rockfish OY.

q/ Yellowtail rockfish - A new yellowtail rockfish stock assessment was prepared in 2003 for the Vancouver-Columbia-Eureka areas. Yellowtail rockfish is believed to be at 46 percent of its unfished biomass. The ABC of 4,320 mt is based on the 2003 stock assessment with the F_{MSY} Proxy of F50%. The OY of 4,320 mt was set equal to the ABC, because the stock is above the precautionary threshold. The OY is reduced by 15 mt for the amount estimated to be taken in the recreational fishery, 8 mt for the amount estimated to be taken during research fishing, and 5.8 mt for the amount taken in non-groundfish fisheries, resulting in a commercial OY of 4,291 mt. The open access allocation (356 mt) is 8.3 percent of the commercial OY. The limited entry allocation (3,935 mt) is 91.7 percent the commercial OY. For anticipated bycatch in the at-sea whiting fishery, 300 mt is subtracted from the limited entry allocation. Tribal vessels are estimated to land about 407 mt of yellowtail rockfish in 2003, but

do not have a specific allocation at this time.

r/ Shortspine thornyhead was last assessed in 2001 and the stock was believed to be between 25 and 50 percent of its unfished biomass. The ABC (1,030 mt) for the area north of Pt. Conception (34° 27'N lat.) is based on a F50% F_{MSY} proxy. The OY of 983 mt is based on the 2001 survey with the application the 40-10 harvest policy. The OY is reduced by 9 mt for the amount estimated to be taken during research fishing, resulting in a commercial OY of 974 mt. Open access is allocated 0.27 percent (3 mt) of the commercial OY and limited entry is allocated 99.73 percent (971 mt) of the commercial OY. There is no ABC or OY for the southern Conception area. Tribal vessels are estimated to land about 3 mt of shortspine thornyhead in 2004, but do not have a specific allocation at this time.

s/ Longspine thornyhead is believed to be above 40 percent of its unfished biomass. The ABC (2,461 mt) in the north (Vancouver-Columbia-Eureka-Monterey) is based on the average of the 3-year individual ABCs at a F50%. The total catch OY (2,461 mt) is set equal to the ABC. The OY is further reduced by 18 mt for the amount estimated to be taken during research fishing, resulting in a commercial OY of 2,443 mt.

t/ Longspine thornyhead - A separate ABC (390 mt) is established for the Conception area and is based on historical catch for the portion of the Conception area north of 34°27' N. lat. (Point Conception). To address uncertainty in the stock assessment due to limited information, the ABC was reduced by 50 percent to obtain the OY, 195 mt. There is no ABC or OY for the southern Conception Area.

u/ Cowcod in the Conception area was assessed in 1999 and was believed to be less than 10 percent of its unfished biomass. Cowcod was declared as overfished on January 4, 2000 (65 FR 221). The ABC in the Conception area (5 mt) is based on the 1999 assessment, while the ABC for the Monterey (19 mt) is based on average landings from 1993-1997. An OY of 4.8 mt (2.4 mt in each area) is based on the rebuilding plan which has a 55 percent probability of rebuilding the stock to B_{MSY} by the year 2099 (T_{MAX}). The harvest control rule is 0.0136. Cowcod retention will not be permitted in 2004. The OY will be used to accommodate discards of cowcod rockfish resulting from incidental take.

v/ Darkblotched rockfish was assessed in 2000 and an assessment update was prepared in 2003. The darkblotched rockfish stock was declared overfished on January 11, 2001 (66 FR 2338). Following the 2003 assessment update, the Darkblotched rockfish stock is believed to be at 11 percent of its unfished biomass. The ABC is projected to be 240 mt and is based on an F_{MSY} proxy of F50%. The OY of 240 mt is based on the rebuilding analysis and has a >80% probability of rebuilding the stock to B_{MSY} by the year 2047 (T_{MAX}). The harvest control rule will be 0.032. The OY is reduced by 1.6 mt and 116.3 mt to be held in a buffer (see the preamble section "OY Management for overfished species" for the discussion of buffers), resulting in a 122.1 mt commercial harvest guideline. For anticipated bycatch in the at-sea whiting fishery, 6.7 mt is set aside.

w/ Yelloweye rockfish was assessed in 2001 and updated for 2002. On January 11, 2002 yelloweye rockfish was declared overfished (67 FR 1555). In 2002 following the assessment update, yelloweye rockfish was believed to be at 24.1 percent of its unfished biomass coastwide. The 53 mt coastwide ABC is based on an F_{MSY} proxy of F50%. The OY of 22 mt is based on a revised rebuilding analysis (August 2002) with a 50% probability of rebuilding to B_{MSY} by the year 2050 (T_{MID}), which can also be expressed as 92 percent probability of rebuilding to B_{MSY} by the year 2071 (T_{MAX}). The harvest control rule is 0.0139. The OY is reduced by 7.7 mt for the amount estimated to be taken in the recreational fishery, 1.1 mt for the amount estimated to be taken during research fishing, 0.8 mt for the amount taken in non-groundfish fisheries, and 6.6 mt to be held

in a buffer (see the preamble section "OY Management for overfished species" for the discussion of buffers), resulting in a commercial harvest guideline of 5.8 mt. Tribal vessels are estimated to land about 2.3 mt of yelloweye rockfish of the commercial OY in 2004, but do not have a specific allocation at this time.

x/ Black rockfish - the ABC of 1,315 mt is the sum of the ABC (775 mt) from the 2003 Columbia and Eureka area assessment plus the ABC (540 mt) for the Vancouver area from the 2000 assessment. Because the two assessments overlap in the area between Cape Falcon and the Columbia river, projections from the 2000 assessment were adjusted downward by 12 percent to account for the overlap. The ABCs were derived using an F_{MSY} proxy of F50%. Because the unfished biomass is believed to be above 40 percent, the the OY was set equal to the ABC. The black rockfish OY is subdivided between the three states as follows: 540 mt will be attributed to the area north of 46°16' N. lat. (Washington/Oregon border), 450 mt will be attributed to the area between 46°16' N. lat. and 42°00' N. lat. (Oregon/California border), and 326 mt will be attributed to the area south of 42°00' N. lat. Of the 326 mt attributed to the area south of 42°00' N. lat., 194 mt of black rockfish will be applied to the area north of 40°10 min N. lat. and 131 mt to the area south of 40°10 min N. lat. Black rockfish was included in the minor rockfish north category until 2004.

y/ Minor rockfish north includes the "remaining rockfish" and "other rockfish" categories in the Vancouver, Columbia, and Eureka areas combined. These species include "remaining rockfish", which generally includes species that have been assessed by less rigorous methods than stock assessments, and "other rockfish", which includes species that do not have quantifiable assessments. The ABC of 3,680 mt is the sum of the individual "remaining rockfish" ABCs plus the "other rockfish" ABCs. The remaining rockfish ABCs continue to be reduced by 25 percent (F=0.75M) as a precautionary adjustment. To obtain the total catch OY of 2,250 mt, the remaining rockfish ABCs are further reduced by 25 percent and other rockfish ABCs were reduced by 50 percent. This was a precautionary measure due to limited stock assessment information. The OY is reduced by 78 mt for the amount estimated to be taken in the recreational fishery and 2,158 mt the amount estimated to be taken in the commercial fishery, leaving 14 mt in a buffer. Open access is allocated 8.3 percent (179 mt) of the commercial OY and limited entry is allocated 91.7 percent (1,979 mt) of the commercial OY. Tribal vessels are estimated to land about 14 mt of minor rockfish (10 mt of shelf rockfish, and 4 mt of slope rockfish) in 2004, but do not have a specific allocation at this time.

z/ Minor rockfish south includes the "remaining rockfish" and "other rockfish" categories in the Monterey and Conception areas combined. These species include "remaining rockfish" which generally includes species that have been assessed by less rigorous methods than stock assessment, and "other rockfish" which includes species that do not have quantifiable assessments. The ABC of 3,412 is the sum of the individual "remaining rockfish" ABCs plus the "other rockfish" ABCs. The remaining rockfish ABCs continue to be reduced by 25 percent (F=0.75M) as a precautionary adjustment. To obtain total catch OY of 1,968 mt, the remaining rockfish ABCs are further reduced by 25 percent, with the exception of blackgill rockfish, and the other rockfish ABCs were reduced by 50 percent. This was a precautionary measure due to limited stock assessment information. The OY is reduced by 435 mt for the amount estimated to be taken in the recreational fishery and 1,390 mt the amount estimated to be taken in the commercial fishery, leaving 143 mt in a buffer. Open access is allocated 44.3 percent (616 mt) of the commercial OY and limited entry is allocated 55.7 percent (774 mt) of the commercial OY.

aa/ Bank rockfish -- The ABC is 350 mt which is based on a 2000 assessment for the Monterey and Conception areas. This stock contributes 263 mt towards the minor rockfish OY in the south.

bb/ Blackgill rockfish is believed to be at 51 percent of its unfished biomass.

The ABC of 343 mt is the sum of the Conception area ABC of 268 mt, based on the 1998 assessment with an F_{MSY} proxy of F50%, and the Monterey area ABC of 75 mt. This stock contributes 306 mt towards minor rockfish south (268 mt for the Conception area ABC and 38 mt for the Monterey area). The OY for the Monterey area is the ABC reduced by 50 percent as a precautionary measure because of lack of information.

cc/ "Other rockfish" includes rockfish species listed in 50 CFR 660.302 and California scorpionfish. The ABC is based on the 1996 review of commercial Sebastes landings and includes an estimate of recreational landings. These species have never been assessed quantitatively.

dd/ "Other fish" includes sharks, skates, rays, ratfish, morids, grenadiers, and other groundfish species noted above in footnote c/.

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II. Fisheries Allocations

Since 1994, the non-tribal commercial groundfish fishery has been divided into limited entry and open access sectors, each with its own set of allocations and management measures. Species or species group allocations between the two sectors are based on the relative amounts of a species or species group taken by each component of the fishery during the 1984–1988 limited entry permit qualification period (50 CFR 660.332). The FMP allows suspension of this allocation formula for overfished species when changes to the traditional allocation formula are needed to better protect overfished species (FMP, section 5.3.2). Historically, groundfish species and/or species groups have not been allocated between the commercial and recreational fisheries. Fishery managers have instead estimated the amount that would be taken in the recreational fisheries and have set that amount aside before determining the allowable harvest for the non-tribal commercial sectors. Species-specific allocations for 2004, including recreational fishery set asides and research catch deductions from total catch OYs, are provided in the footnotes to Tables 1a and 1b. Following the procedures specified in the FMP, the Regional Administrator calculated the amounts of allocations that are presented in Tables 1a and 1b of this document. Unless otherwise specified, the limited entry and open access allocations would be treated as harvest guidelines in 2004. There may be slight discrepancies from the Council's recommendations due to rounding.

III. 2004 Management Measures

Federal and State Jurisdiction

The management measures herein, as well as Federal regulations at 50 CFR part 660, subpart G, govern groundfish fishing vessels of the United States in the U.S. EEZ from 3–200 nautical miles offshore off the coasts of Washington, Oregon, and California. The States of Washington, Oregon, and California retain jurisdiction in State waters from 0–3 miles offshore. This is true even though boundaries of some fishing areas cross between Federal and State waters. Under their own legal authorities, the States generally conform their State regulations to the Federal management measures, so the management measures that apply to Federal and State waters are the same. This is not true in every case, however, and fishers are advised to consult State as well as Federal regulations if they intend to fish in both State and Federal waters.

Groundfish stocks are distributed throughout Federal and State waters. Therefore, the Federal harvest limits (OYs) include fish taken in both Federal and State waters, as do vessel trip limits for individual groundfish species. Other Federal management measures related to federally-regulated groundfish fishing also apply to landings and other shoreside activities in Washington, Oregon, and California.

Trip Limit Tables and Management Measures

Management measures for limited entry and open access commercial fisheries and recreational fisheries are found in section IV. Boundary line coordinates for RCAs are designated at IV.A.(17). Cumulative trip limits are set into tables, with explanations in section IV. Tables for each fishing sector are separated into northern and southern area tables. The industry is cautioned not to rely on the tables alone. The text in section IV. provides cumulative trip limit definitions and periods, size limit definitions and conversions, and other information that cannot be readily included in a table but must be understood in order to correctly use the tables. The sablefish allocations and nontrawl sablefish management, Pacific whiting allocations and seasons, and "per trip" limits for black rockfish off Washington State are presented in text in paragraphs IV.B. Trip limits for exempted trawl gear in the open access fishery (Table 5 and paragraph IV.C.), recreational management measures (paragraph IV.D.), and tribal allocations and management measures (paragraph V.) still remain in the text.

IV. NMFS Actions

For the reasons stated above, the Assistant Administrator for Fisheries, (AA), NMFS, concurs with the Council's recommendations and announces the following management actions for 2004, including measures that are unchanged from 2003 and new measures. In addition to the measures described herein, the states of Washington, Oregon, and California may have additional regulations that apply to vessels fishing in State waters or registered to any of those States.

A. General Definitions and Provisions

The following definitions and provisions apply to the 2004 management measures, unless otherwise specified in a subsequent **Federal Register** document:

(1) *Trip limits.* Trip limits are used in the commercial fishery to specify the maximum amount of a fish species or species group that may legally be taken and retained, possessed, or landed, per vessel, per fishing trip, or cumulatively per unit of time, or the number of landings that may be made from a vessel in a given period of time, as follows:

(a) A per trip limit is the total allowable amount of a groundfish species or species group, by weight, or by percentage of weight of legal fish on board, that may be taken and retained, possessed, or landed per vessel from a single fishing trip.

(b) A daily trip limit is the maximum amount of a groundfish species or species group that may be taken and retained, possessed, or landed per vessel in 24 consecutive hours, starting at 0001 hours local time (l.t.). Only one landing of groundfish may be made in that 24-hour period. Daily trip limits may not be accumulated during multiple day trips.

(c) A weekly trip limit is the maximum amount of a groundfish species or species group that may be taken and retained, possessed, or landed per vessel in 7 consecutive days, starting at 0001 hours l.t. on Sunday and ending at 2400 hours l.t. on Saturday. Weekly trip limits may not be accumulated during multiple week trips. If a calendar week includes days within two different months, a vessel is not entitled to two separate weekly limits during that week.

(d) A cumulative trip limit is the maximum amount of a groundfish species or species group that may be taken and retained, possessed, or landed per vessel in a specified period of time without a limit on the number of landings or trips, unless otherwise specified. The cumulative trip limit periods for limited entry and open access fisheries, which start at 0001 hours l.t. and end at 2400 hours l.t., are as follows, unless otherwise specified:

(i) The 2–month periods are: January 1–February 29, March 1–April 30, May 1–June 30, July 1–August 31, September 1–October 31, and, November 1–December 31.

(ii) One month means the first day through the last day of the calendar month.

(iii) One week means 7 consecutive days, Sunday through Saturday.

(e) As stated at 50 CFR 660.302 (in the definition of "Landing"), once the offloading of any species begins, all fish aboard the vessel are counted as part of the landing and must be reported as such.

(f) The cumulative trip limits in section IV.B. and C., including Tables 3–5 of this proposed rule, must not be exceeded.

(2) *Fishing ahead.* Unless the fishery is closed, a vessel that has landed its cumulative or daily limit may continue

to fish on the limit for the next legal period, so long as no fish (including, but not limited to, groundfish with no trip limits, shrimp, prawns, or other nongroundfish species or shellfish) are landed (offloaded) until the next legal period. As stated at 50 CFR 660.302 (in the definition of "landing"), once the offloading of any species begins, all fish aboard the vessel are counted as part of the landing. Fishing ahead is not allowed during or before a closed period (*see* paragraph IV.A.(7)). *See* paragraph IV.A.(9) for information on inseason changes to limits.

(3) *Weights.* All weights are round weights or round-weight equivalents unless otherwise specified.

(4) *Percentages.* Percentages are based on round weights, and, unless otherwise specified, apply only to legal fish on board.

(5) *Legal fish.* "Legal fish" means fish legally taken and retained, possessed, or landed in accordance with the provisions of 50 CFR part 660, the Magnuson-Stevens Act, any document issued under part 660, and any other regulation promulgated or permit issued under the Magnuson-Stevens Act.

(6) *Size limits, length measurement, and weight limits.*

(a) *Size limits and length measurement.* Unless otherwise specified, size limits in the commercial and recreational groundfish fisheries apply to the "total length," which is the longest measurement of the fish without mutilation of the fish or the use of force to extend the length of the fish. No fish with a size limit may be retained if it is in such condition that its length has been extended or cannot be determined by these methods. For conversions not listed here, contact the state where the fish will be landed.

(i) *Whole fish.* For a whole fish, total length is measured from the tip of the snout (mouth closed) to the tip of the tail in a natural, relaxed position.

(ii) *"Headed" fish.* For a fish with the head removed ("headed"), the length is measured from the origin of the first dorsal fin (where the front dorsal fin meets the dorsal surface of the body closest to the head) to the tip of the upper lobe of the tail; the dorsal fin and tail must be left intact.

(iii) *Filets.* A filet is the flesh from one side of a fish extending from the head to the tail, which has been removed from the body (head, tail, and backbone) in a single continuous piece. Filet lengths may be subject to size limits for some groundfish taken in the recreational fishery off California (*see* paragraph IV. D.). A filet is measured along the length of the longest part of the filet in a relaxed position; stretching or otherwise manipulating the filet to increase its length is not permitted.

(b) *Weight limits and conversions.* The weight limit conversion factor established by the state where the fish is or will be landed will be used to convert the processed weight to round weight for purposes of applying the trip limit. Weight conversions provided herein are those conversions currently in use by the States of Washington, Oregon and California and may be subject to change by those states. Fishery participants should contact fishery enforcement officials in the State where the fish will be landed to determine that State's official conversion factor. To determine the round weight, multiply the processed weight times the conversion factor.

(c) *Sablefish.* The following conversion applies to both the limited entry and open access fisheries when trip limits are in effect for those fisheries. For headed and gutted (eviscerated) sablefish, the weight conversion factor is 1.6 for headed and gutted sablefish.

(d) *Lingcod.* The following conversions apply in both limited entry and open access fisheries.

(i) For lingcod with the head removed, the minimum size limit is 19.5 inches (49.5 cm), which corresponds to 24 inches (61 cm) total length for whole fish.

(ii) The weight conversion factor for headed and gutted lingcod is 1.5. The conversion factor for lingcod that has only been gutted with the head on is 1.1.

(7) *Closure.* "Closure," when referring to closure of a fishery, means that taking and retaining, possessing, or landing the particular species or species group is prohibited. (See 50 CFR 660.302.) Unless otherwise announced in the **Federal Register**, offloading must begin before the time the fishery closes. The provisions at paragraph IV.A.(2) for fishing ahead do not apply during a closed period. It is unlawful to transit through a closed area with any prohibited species on board, no matter where that species was caught, except as provided for in the CCA at IV.A.(17)(b).

(8) *Fishery management area.* As defined at 50 CFR 660.302, the fishery management area for these species is the EEZ off the coasts of Washington, Oregon, and California between 3 and 200 nm offshore, bounded on the north by the Provisional International Boundary between the United States and Canada, and bounded on the south by the International Boundary between the United States and Mexico. All groundfish possessed between 0–200 nm offshore or landed in Washington, Oregon, or California are presumed to have been taken and retained from the EEZ, unless otherwise demonstrated by the person in possession of those fish.

(9) *Routine management measures.* Most trip, bag, and size limits, and area closures in the groundfish fishery have been designated "routine," which means they may be changed rapidly after a single Council meeting (*see* 50 CFR 660.323(b)). Council meetings in 2004 will be held in the months of March, April, June, September, and November. In-season changes to routine management measures are announced in the **Federal Register** pursuant to the requirements of the Administrative Procedure Act (APA). Information concerning changes to routine management measures is available from the NMFS Northwest Regional Office (*see* **ADDRESSES**). Changes to trip limits are effective at the times stated in the **Federal Register**. Once a change is effective, it is illegal to take and retain, possess, or land more fish than allowed under the new trip limit. This means that, unless otherwise announced in the **Federal Register**, offloading must begin before the time a fishery closes or a more restrictive trip limit takes effect.

(10) *Limited entry limits.* It is unlawful for any person to take and retain, possess, or land groundfish in excess of the landing limit for the open access fishery without having a valid limited entry permit for the vessel affixed with a gear endorsement for the gear used to catch the fish (50 CFR 660.306(p)).

(11) *Operating in both limited entry and open access fisheries.* The open access trip limit applies to any fishing conducted with open access gear, even if the vessel has a valid limited entry permit with an endorsement for another type of gear. A vessel that operates in both the open access and limited entry fisheries is not entitled to two separate trip limits for the same species. If a vessel has a limited entry permit and uses open access gear, but the open access limit is smaller than the limited entry limit, the open access limit may not be exceeded and counts toward the limited entry limit. If a vessel has a limited entry permit and uses open access gear, but the open access limit is larger than the limited entry limit, the smaller limited entry limit applies, even if taken entirely with open access gear.

(12) *Operating in north-south management areas with different trip limits.* NMFS uses different types of management areas for West Coast groundfish management. One type of management area is the north-south management area, a large ocean area with northern and southern boundary

lines wherein trip limits, seasons, and conservation areas follow a single theme. For example, in the area between the U.S. border with Canada and the 40°10′ N. lat. line, trip limits and conservation areas are generally intended to protect darkblotched and yelloweye rockfish while providing harvesting opportunities for northern flatfish and deepwater species. Within each north-south management area, there may be one or more conservation areas, detailed at IV.A.(17) and at 50 CFR 660.304. The provisions within this paragraph IV.A.(12) apply to vessels operating in different north-south management areas. Trip limits for a species or a species group may differ in different north-south management areas along the coast. The following "crossover" provisions apply to vessels operating in different geographical areas that have different cumulative or "per trip" trip limits for the same species or species group. Such crossover provisions do not apply to species that are subject only to daily trip limits, or to the trip limits for black rockfish off Washington (*see* 50 CFR 660.323(a)(1)). In 2004, the cumulative trip limit periods for the limited entry and open access fisheries are specified in paragraph IV.A(1)(d), but may be changed during the year if announced in the **Federal Register** pursuant to the requirements of the APA.

(a) *Going from a more restrictive to a more liberal area.* If a vessel takes and retains any groundfish species or species group of groundfish in an area where a more restrictive trip limit applies before fishing in an area where a more liberal trip limit (or no trip limit) applies, then that vessel is subject to the more restrictive trip limit for the entire period to which that trip limit applies, no matter where the fish are taken and retained, possessed, or landed.

(b) *Going from a more liberal to a more restrictive area.* If a vessel takes and retains a groundfish species or species group in an area where a higher trip limit or no trip limit applies, and takes and retains, possesses or lands the same species or species group in an area where a more restrictive trip limit applies, that vessel is subject to the more restrictive trip limit for the entire period to which that trip limit applies, no matter where the fish are taken and retained, possessed, or landed.

(c) *Operating in two different areas where a species or species group is managed with different types of trip limits.* During the fishing year, NMFS may implement management measures for a species or species group that set different types of trip limits (for example, per trip limits versus cumulative trip limits) for different areas. If a vessel fishes for a species or species group that is managed with different types of trip limits in two different areas within the same cumulative limit period, then that vessel is subject to the most restrictive overall cumulative limit for that species, regardless of where fishing occurs.

(d) *Minor rockfish.* Several rockfish species are designated with species-specific limits on one side of the 40°10 N. lat. management line, and are included as part of a minor rockfish complex on the other side of the line.

(i) If a vessel takes and retains minor slope rockfish north of 38° N. lat., that vessel is also permitted to take and retain, possess or land splitnose rockfish up to its cumulative limit south of 38° N. lat., even if splitnose rockfish were a part of the landings from minor slope rockfish taken and retained north of 38° N. lat. (**Note:** A vessel that takes and retains minor slope rockfish on both sides of the management line in a single cumulative limit period is subject to the more restrictive cumulative limit for minor slope rockfish during that period.)

(ii) If a vessel takes and retains minor slope rockfish south of 38° N. lat., that vessel is also permitted to take and retain, possess or land POP up to its cumulative limit north of 38° N. lat., even if POP were a part of the landings from minor slope rockfish taken and retained south of 38° N. lat. (**Note:** A vessel that takes and retains minor slope rockfish on both sides of the management line in a single cumulative limit period is subject to the more restrictive cumulative limit for minor slope rockfish during that period.)

(iii) If a trawl vessel takes and retains minor shelf rockfish south of 40°10′ N. lat., that vessel is also permitted to take and retain, possess, or land yellowtail rockfish up to its cumulative limits north of 40°10′ N. lat., even if yellowtail rockfish is part of the landings from minor shelf rockfish taken and retained south of 40°10′ N. lat. Yellowtail rockfish is included in overall shelf rockfish limits for limited entry fixed gear and open access gear groups. Widow rockfish is included in overall shelf rockfish limits for all gear groups. (**Note:** A vessel that takes and retains minor shelf rockfish on both sides of the management line in a single cumulative limit period is subject to the more restrictive cumulative limit for minor shelf rockfish during that period.)

(e) *"DTS complex."* There are differential trawl trip limits for the "DTS complex" north and south of the management line at 40°10′ N. lat. Vessels operating in the limited entry trawl fishery are subject to the crossover provisions in this paragraph IV.A.(12) when making landings that include any one of the four species in the "DTS complex."

(f) *Flatfish complex.* There are differential trip limits for the flatfish complex (butter, curlfin, English, flathead, petrale, rex, rock, and sand soles, Pacific sanddab, and starry flounder) north and south of the management line at 40°10′ N. lat. Vessels operating in the limited entry trawl fishery are subject to the crossover provisions in this paragraph IV.A.(12) when making landings that include any one of the species in the flatfish complex.

(13) *Sorting.* It is unlawful for any person to "fail to sort, prior to the first weighing after offloading, those groundfish species or species groups for which there is a trip limit, size limit, quota, or commercial OY, if the vessel fished or landed in an area during a time when such trip limit, size limit, commercial OY, or quota applied." The States of Washington, Oregon, and California may also require that vessels record their landings as sorted on their state fish tickets. This provision applies to both the limited entry and open access fisheries. (*See* 50 CFR 660.306(h).) The following species must be sorted in 2004:

(a) For vessels with a limited entry permit:

(i) Coastwide—widow rockfish, canary rockfish, darkblotched rockfish, yelloweye rockfish, shortbelly rockfish, black rockfish, minor nearshore rockfish, minor shelf rockfish, minor slope rockfish, shortspine and longspine thornyhead, Dover sole, arrowtooth flounder, rex sole, petrale sole, arrowtooth flounder, other flatfish, lingcod, sablefish, and Pacific whiting

(**Note:** Although black rockfish, yelloweye rockfish, and darkblotched rockfish are considered minor rockfish managed under the minor shelf and minor slope rockfish complexes, respectively, they have separate OYs and therefore must be sorted by species.)

(ii) North of 40°10′ N. lat.—POP, yellowtail rockfish, and, for fixed gear, blue rockfish;

(iii) South of 40°10′ N. lat.—minor shallow nearshore rockfish, minor deeper nearshore rockfish, California scorpionfish, chilipepper rockfish, bocaccio rockfish, splitnose rockfish, and Pacific sanddabs.

(b) For open access vessels (vessels without a limited entry permit):

(i) Coastwide—widow rockfish, canary rockfish, darkblotched rockfish,

yelloweye rockfish, black rockfish, minor nearshore rockfish, minor shelf rockfish, minor slope rockfish, Dover sole, arrowtooth flounder, petrale sole, rex sole, other flatfish, lingcod, sablefish, Pacific whiting, and Pacific sanddabs;

(ii) North of 40°10′ N. lat.—blue rockfish, POP, yellowtail rockfish;

(iii) South of 40°10′ N. lat.—minor shallow nearshore rockfish, minor deeper nearshore rockfish, chilipepper rockfish, bocaccio rockfish, splitnose rockfish;

(iv) South of Point Conception, CA—thornyheads.

(14) *Trawl gear restrictions.* Limited entry trip limits may vary depending on the type of trawl gear that is on board a vessel during a fishing trip: large footrope, small footrope, or midwater trawl gear.

(a) *Types of trawl gear*—Large footrope, small footrope, and midwater or pelagic trawl gears are defined at 50 CFR 660.302 and 660.322(b). Trawl vessels may include: Those vessels registered to a limited entry permit with a trawl endorsement; any vessel using trawl gear, including exempted trawl gear used to take pink shrimp, ridgeback prawns, California halibut, or sea cucumber; or any tribal vessel using trawl gear.

(b) *Cumulative trip limits and prohibitions by limited entry trawl gear type*—(i) *Large footrope trawl.* If Table 3 does not provide a large footrope trawl cumulative or trip limit for a particular species or species group, it is unlawful to take and retain, possess or land that species or species group if large footrope gear is on board. It is unlawful for any vessel using large footrope gear to exceed large footrope gear limits for any species or to use large footrope gear to exceed small footrope gear or midwater trawl gear limits for any species. It is unlawful for any vessel using large footrope gear or that has large footrope trawl gear on board to fish for groundfish shoreward of the RCAs defined at paragraph (17) of this section. The presence of rollers or bobbins larger than 8 inches (20 cm) in diameter on board the vessel, even if not attached to a trawl, will be considered to mean a large footrope trawl is on board.

(ii) *Small footrope or midwater trawl gear.* Cumulative trip limits for canary rockfish, widow rockfish (South of 40°10′ N. lat.,) yellowtail rockfish (North of 40°10′ N. lat.,) minor shelf rockfish (North of 40°10′ N. lat.,) minor nearshore rockfish, and lingcod, as indicated in Table 3 to section IV., are allowed only if small footrope gear or midwater trawl gear is used, and if that gear meets the specifications in paragraph IV.A.(14) and at 50 CFR 660.322. For Dover sole, longspine thornyhead, shortspine thornyhead, flatfish complex species including petrale sole, rex sole, or arrowtooth flounder there are or may be cumulative trip limits that are more restrictive for vessels using small footrope gear than for large footrope gear or midwater gear. These more restrictive limits recognize that small footrope gear may be used inshore of the RCAs and are intended to limit trawl effort in the nearshore area. Where limits are more restrictive for small footrope gear, those limits apply to and constrain any vessel using small footrope gear at any time during the cumulative limit period to which the landings limits apply.

(iii) *Midwater trawl gear.* North of 40°10′ N. lat., higher yellowtail and widow rockfish cumulative trip limits are available for limited entry vessels using midwater trawl gear in November-December. For the first part of the year, yellowtail and widow rockfish are only available to trawl vessels using midwater trawl gear when those vessels are fishing for Pacific whiting during the primary whiting season. Each landing that contains yellowtail or widow rockfish is attributed to the gear on board with the most restrictive trip limit for those species. Landings attributed to small footrope trawl must not exceed the small footrope limit, and landings attributed to midwater trawl must not exceed the midwater trawl limit. If a vessel has landings attributed to both types of trawls during a cumulative trip limit period, all landings are counted toward the most restrictive gear-specific cumulative limit.

(iv) *More than one type of trawl gear on board.* The cumulative trip limits in Table 3 must not be exceeded. A vessel may have more than one type of limited entry bottom trawl gear on board, but the most restrictive trip limit associated with the gear on board applies for that trip and will count toward the cumulative trip limit for that gear. (Example: If a vessel has large footrope gear on board, it cannot land yellowtail rockfish, even if the yellowtail rockfish is caught with a small footrope trawl.) A vessel that is trawling within a GCA with trawl gear authorized for use within a GCA may not have any other type of trawl gear on board.

(c) *State landing receipts.* Washington, Oregon, and California will require the type of trawl gear on board to be recorded on the state landing receipt(s) for each trip or on an attachment to the state landing receipt.

(d) *Gear inspection.* All trawl gear and trawl gear components, including unattached rollers or bobbins, must be readily accessible and made available for inspection at the request of an authorized officer. No trawl gear may be removed from the vessel prior to offloading. All footropes shall be uncovered and clearly visible except when in use for fishing.

(15) *Permit transfers.* Limited entry permit transfers are to take effect no earlier than the first day of a major cumulative limit period following the day NMFS receives the transfer form and original permit (50 CFR 660.335(e)(3)). Those days in 2004 are January 1, March 1, May 1, July 1, September 1, and November 1.

(16) *Exempted fisheries.* U.S. vessels operating under an exempted fishing permit (EFP) issued under 50 CFR part 600 are also subject to these restrictions, unless otherwise provided in the permit. EFPs may include the collecting of scientific samples of groundfish species that would otherwise be prohibited for retention.

(17) *Groundfish Conservation Areas.* Groundfish Conservation Area (GCA) means a geographic area defined by coordinates expressed in degrees latitude and longitude, created and enforced for the purpose of contributing to the rebuilding of overfished West Coast groundfish species. The Yelloweye Rockfish Conservation Area (YRCA), the Cowcod Conservation Areas (CCAs), and the depth-based Rockfish Conservation Areas (RCAs) are all Groundfish Conservation Areas.

(a) *Yelloweye Rockfish Conservation Area.* The YRCA is a C-shaped area off the northern Washington coast intended to protect yelloweye rockfish. The specific latitude and longitude coordinates of the YRCA are defined at § 660.304(c)(3). Recreational fishing for groundfish is prohibited within the YRCA. It is unlawful for recreational fishing vessels to take, retain, possess, or land groundfish within the YRCA.

(b) *Cowcod Conservation Areas.* The CCAs are two areas off the southern California coast intended to protect cowcod. The specific latitude and longitude coordinates of the Cowcod Conservation Areas (CCAs) are defined at § 660.304(c)(2). During January 1–December 31, commercial fishing is prohibited within the CCAs, except that commercial fishing for rockfish and lingcod is permitted shoreward of the 20-fm (37-m) depth contour. In general, during March 1–December 31, recreational fishing for all groundfish, except sanddabs, is prohibited within the CCAs. However, recreational fishing for the following species is permitted shoreward of the 20-fm (37-m) depth contour: the RCG complex (including all rockfish (except cowcod, canary

rockfish, and yelloweye rockfish), cabezon, and kelp greenling), lingcod, California scorpionfish, and sanddabs. (**Note:** California state regulations also permit recreational fishing for all greenlings of the genus Hexogrammas shoreward of the 20-fm (37-m) depth contour in the CCAs.) It is unlawful to take and retain, possess, or land groundfish within the CCAs, except for species stated in this section, when those waters are open to fishing. Commercial fishing vessels may transit through the Western CCA with their gear stowed and groundfish on board only in a corridor through the Western CCA bounded on the north by the latitude line at 33°00′30″ N. lat., and bounded on the south by the latitude line at 32°59′30″ N. lat.

(c) *Trawl (Limited Entry and Open Access Exempted Trawl Gears) Rockfish Conservation Area.* (i) Trawl RCAs are intended to protect a complex of species, such as overfished shelf rockfish species, and have boundaries defined by specific latitude and longitude coordinates intended to approximate particular depth contours, such as 75 fm (137 m), 150 fm (274 m), and 200 fm (366 m). The trawl RCA is closed coastwide to limited entry groundfish trawl fishing, except for mid-water trawl vessels participating in the primary whiting season. The trawl RCA is also closed coastwide to open access exempted trawl fishing, except for pink shrimp trawling. Fishing with any trawl gear is prohibited within the trawl RCA coastwide, unless that vessel is participating in the primary whiting season with mid-water trawl gear, trawling with midwater gear for yellowtail or widow rockfish when that is permitted, or trawling for pink shrimp. Coastwide, it is unlawful to take and retain, possess, or land any species of fish taken with trawl gear within the trawl RCA, except as permitted for vessels participating in the primary whiting season with mid-water trawl gear or for vessels participating in the pink shrimp trawl fishery. Throughout the year, boundaries for the trawl RCA are provided in Table 3 of section IV.B. and in Table 5 of section IV.C. and may be modified by NMFS inseason pursuant to the requirements of the APA. Trawl RCA boundaries are defined by specific latitude and longitude coordinates and are provided below at paragraph (e) of this section.

(ii) Trawl vessels may transit through the trawl RCA, with or without groundfish on board, provided all groundfish trawl gear is stowed either: (1) Below deck; or (2) if the gear cannot readily be moved, in a secured and covered manner, detached from all towing lines, so that it is rendered unusable for fishing; or (3) remaining on deck uncovered if the trawl doors are hung from their stanchions and the net is disconnected from the doors. These restrictions do not apply to vessels fishing with mid-water trawl gear for Pacific whiting or taking and retaining yellowtail rockfish or widow rockfish in association with Pacific whiting caught with mid-water trawl gear or to taking and retaining yellowtail or widow rockfish with mid-water trawl gear when trip limits are authorized for those species (November–December 2004.)

(iii) If a vessel fishes in the trawl RCA, it may not participate in any fishing on that trip that is prohibited by the restrictions that apply within the trawl RCA. For example, if a vessel participates in the pink shrimp fishery within the RCA, the vessel cannot on the same trip participate in the DTS fishery outside of the RCA. Nothing in these Federal regulations supercede any State regulations that may prohibit trawling shoreward of the 3-nm state waters boundary line.

(d) *Non-Trawl (Limited Entry Fixed Gear and Open Access Non-trawl Gears) Rockfish Conservation Area.* (i) Non-trawl RCAs are intended to protect a complex of species, such as overfished shelf rockfish species, and have boundaries defined by specific latitude and longitude coordinates intended to approximate particular depth contours, such as 27 fm (49 m), 100 fm (183 m), and 150 fm (274 m). The non-trawl RCA is closed to non-trawl gear (limited entry or open access longline and pot or trap, open access hook-and-line, pot or trap, gillnet, set net, trammel net and spear) fishing for groundfish. Fishing for groundfish with non-trawl gear is prohibited within the non-trawl RCA. It is unlawful to take and retain, possess, or land groundfish taken with non-trawl gear within the non-trawl RCA. Limited entry fixed gear and open access non-trawl gear vessels may transit through the non-trawl RCA, with or without groundfish on board. These restrictions do not apply to vessels fishing for species other than groundfish with non-trawl gear, although non-trawl vessels on a fishing trip for species other than groundfish that occurs within the non-trawl RCA may not retain any groundfish taken on that trip. If a vessel fishes in the non-trawl RCA, it may not participate in any fishing on that trip that is prohibited by the restrictions that apply within the non-trawl RCA. For example, if a vessel participates in the salmon troll fishery within the RCA, the vessel cannot on the same trip participate in the sablefish fishery outside of the RCA. Throughout the year, boundaries for the non-trawl RCA are provided in Table 4 of section IV.B. and in Table 5 of section IV.C. and may be modified by NMFS inseason pursuant to the requirements of the APA. Non-trawl RCA boundaries are defined by specific latitude and longitude coordinates and are provided below at paragraph (e) of this section.

(e) *Recreational Rockfish Conservation Area.* (i) Recreational RCAs are closed areas intended to protect overfished rockfish species. Recreational RCAs may either have (1) boundaries defined by general depth contours or (2) boundaries defined by specific latitude and longitude coordinates intended to approximate particular depth contours. The recreational RCA is closed to recreational fishing for groundfish. Fishing for groundfish with recreational gear is prohibited within the recreational RCA. It is unlawful to take and retain, possess, or land groundfish taken with recreational gear within the recreational RCA. These restrictions do not apply to recreational vessels fishing for species other than groundfish with recreational gear. If a vessel fishes in the recreational RCA, it may not participate in any fishing on that trip that is prohibited by the restrictions that apply within the recreational RCA. For example, if a vessel participates in the recreational salmon fishery within the RCA, the vessel cannot on the same trip participate in the recreational groundfish fishery shoreward of the RCA. Throughout the year, boundaries for the recreational RCAs are provided in the text in section IV.D. under each State (Washington, Oregon and California) and may be modified by NMFS inseason. Recreational RCA boundaries that are defined by specific latitude and longitude coordinates are provided below at paragraph (f) of this section.

(f) *RCA Boundary Coordinates.* Specific latitude and longitude coordinates for RCA boundaries that approximate the depth contours selected for both trawl, non-trawl, and recreational RCAs are provided here. Also provided here are references to islands and rocks that serve as reference points for the RCAs.

(i) The 27-fm (49-m) depth contour used between 46°16′ N. lat. and 40°10′ N. lat. is defined by straight lines connecting all of the following points in the order stated:

(1) 46°16.00′ N. lat., 124°12.39′ W. long.;
(2) 46°14.85′ N. lat., 124°12.39′ W. long.;
(3) 46°03.95′ N. lat., 124°03.64′ W. long.;
(4) 45°43.14′ N. lat., 124°00.17′ W. long.;
(5) 45°23.33′ N. lat., 124°01.99′ W. long.;
(6) 45°09.54′ N. lat., 124°01.65′ W. long.;

(7) 44°39.99′ N. lat., 124°08.67′ W. long.;
(8) 44°20.86′ N. lat., 124°10.31′ W. long.;
(9) 43°37.11′ N. lat., 124°14.91′ W. long.;
(10) 43°27.54′ N. lat., 124°18.98′ W. long.;
(11) 43°20.68′ N. lat., 124°25.53′ W. long.;
(12) 43°15.08′ N. lat., 124°27.17′ W. long.;
(13) 43°06.89′ N. lat., 124°29.65′ W. long.;
(14) 43°01.02′ N. lat., 124°29.70′ W. long.;
(15) 42°52.67′ N. lat., 124°36.10′ W. long.;
(16) 42°45.96′ N. lat., 124°37.95′ W. long.;
(17) 42°45.80′ N. lat., 124°35.41′ W. long.;
(18) 42°38.46′ N. lat., 124°27.49′ W. long.;
(19) 42°35.29′ N. lat., 124°26.85′ W. long.;
(20) 42°31.49′ N. lat., 124°31.40′ W. long.;
(21) 42°29.06′ N. lat., 124°32.24′ W. long.;
(22) 42°14.26′ N. lat., 124°26.27′ W. long.;
(23) 42°04.86′ N. lat., 124°21.94′ W. long.;
(24) 42°00.10′ N. lat., 124°20.99′ W. long.;
(25) 42°00.00′ N. lat., 124°21.03′ W. long.;
(26) 41°56.33′ N. lat., 124°20.34′ W. long.;
(27) 41°50.93′ N. lat., 124°23.74′ W. long.;
(28) 41°41.83′ N. lat., 124°16.99′ W. long.;
(29) 41°35.48′ N. lat., 124°16.35′ W. long.;
(30) 41°23.51′ N. lat., 124°10.48′ W. long.;
(31) 41°04.62′ N. lat., 124°14.44′ W. long.;
(32) 40°54.28′ N. lat., 124°13.90′ W. long.;
(33) 40°40.37′ N. lat., 124°26.21′ W. long.;
(34) 40°34.03′ N. lat., 124°27.36′ W. long.;
(35) 40°28.88′ N. lat., 124°32.41′ W. long.;
(36) 40°24.82′ N. lat., 124°29.56′ W. long.;
(37) 40°22.64′ N. lat., 124°24.05′ W. long.;
(38) 40°18.67′ N. lat., 124°21.90′ W. long.;
(39) 40°14.23′ N. lat., 124°23.72′ W. long.;
and
(40) 40°10.00′ N. lat., 124°17.22′ W. long.

(ii) The 30-fm (55-m) depth contour between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°24.79′ N. lat., 124°44.07′ W. long.;
(2) 48°24.80′ N. lat., 124°44.74′ W. long.;
(3) 48°23.94′ N. lat., 124°44.70′ W. long.;
(4) 48°23.51′ N. lat., 124°45.01′ W. long.;
(5) 48°22.59′ N. lat., 124°44.97′ W. long.;
(6) 48°21.75′ N. lat., 124°45.26′ W. long.;
(7) 48°21.23′ N. lat., 124°47.78′ W. long.;
(8) 48°20.32′ N. lat., 124°49.53′ W. long.;
(9) 48°16.72′ N. lat., 124°51.58′ W. long.;
(10) 48°10.48′ N. lat., 124°52.58′ W. long.;
(11) 48°05.63′ N. lat., 124°52.91′ W. long.;
(12) 47°53.37′ N. lat., 124°47.37′ W. long.;
(13) 47°40.28′ N. lat., 124°40.07′ W. long.;
(14) 47°25.67′ N. lat., 124°34.79′ W. long.;
(15) 47°12.82′ N. lat., 124°29.12′ W. long.;
(16) 46°52.94′ N. lat., 124°22.58′ W. long.;
(17) 46°44.18′ N. lat., 124°18.00′ W. long.;
(18) 46°36.33′ N. lat., 124°15.38′ W. long.;
(19) 46°29.53′ N. lat., 124°15.89′ W. long.;
(20) 46°19.27′ N. lat., 124°14.15′ W. long.;
(21) 46°16.00′ N. lat., 124°13.13′ W. long.;
(22) 46°16.00′ N. lat., 124°13.05′ W. long.;
(23) 46°07.00′ N. lat., 124°07.01′ W. long.;
(24) 45°55.95′ N. lat., 124°02.23′ W. long.;
(25) 45°54.53′ N. lat., 124°02.57′ W. long.;
(26) 45°50.65′ N. lat., 124°01.62′ W. long.;
(27) 45°48.20′ N. lat., 124°02.16′ W. long.;
(28) 45°43.47′ N. lat., 124°01.28′ W. long.;
(29) 45°40.48′ N. lat., 124°01.03′ W. long.;
(30) 45°39.04′ N. lat., 124°01.68′ W. long.;
(31) 45°35.48′ N. lat., 124°01.89′ W. long.;
(32) 45°29.81′ N. lat., 124°02.45′ W. long.;
(33) 45°27.96′ N. lat., 124°01.89′ W. long.;
(34) 45°27.22′ N. lat., 124°02.67′ W. long.;
(35) 45°24.20′ N. lat., 124°02.94′ W. long.;
(36) 45°20.60′ N. lat., 124°01.74′ W. long.;
(37) 45°16.44′ N. lat., 124°03.22′ W. long.;
(38) 45°13.63′ N. lat., 124°02.70′ W. long.;
(39) 45°11.04′ N. lat., 124°03.59′ W. long.;
(40) 45°08.55′ N. lat., 124°03.47′ W. long.;
(41) 45°02.82′ N. lat., 124°04.64′ W. long.;
(42) 44°58.06′ N. lat., 124°05.03′ W. long.;
(43) 44°53.97′ N. lat., 124°06.92′ W. long.;
(44) 44°48.89′ N. lat., 124°07.04′ W. long.;
(45) 44°46.94′ N. lat., 124°08.25′ W. long.;
(46) 44°42.72′ N. lat., 124°08.98′ W. long.;
(47) 44°38.16′ N. lat., 124°11.48′ W. long.;
(48) 44°33.38′ N. lat., 124°11.54′ W. long.;
(49) 44°28.51′ N. lat., 124°12.03′ W. long.;
(50) 44°27.65′ N. lat., 124°12.56′ W. long.;
(51) 44°19.67′ N. lat., 124°12.37′ W. long.;
(52) 44°10.79′ N. lat., 124°12.22′ W. long.;
(53) 44°09.22′ N. lat., 124°12.28′ W. long.;
(54) 44°00.22′ N. lat., 124°12.80′ W. long.;
(55) 43°51.56′ N. lat., 124°13.17′ W. long.;
(56) 43°44.26′ N. lat., 124°14.50′ W. long.;
(57) 43°33.82′ N. lat., 124°16.28′ W. long.;
(58) 43°28.66′ N. lat., 124°18.72′ W. long.;
(59) 43°23.12′ N. lat., 124°24.04′ W. long.;
(60) 43°20.49′ N. lat., 124°25.90′ W. long.;
(61) 43°16.41′ N. lat., 124°27.52′ W. long.;
(62) 43°14.23′ N. lat., 124°29.28′ W. long.;
(63) 43°14.03′ N. lat., 124°28.31′ W. long.;
(64) 43°11.92′ N. lat., 124°28.26′ W. long.;
(65) 43°11.02′ N. lat., 124°29.11′ W. long.;
(66) 43°10.13′ N. lat., 124°29.15′ W. long.;
(67) 43°09.27′ N. lat., 124°31.03′ W. long.;
(68) 43°07.73′ N. lat., 124°30.92′ W. long.;
(69) 43°05.93′ N. lat., 124°29.64′ W. long.;
(70) 43°01.59′ N. lat., 124°30.64′ W. long.;
(71) 42°59.73′ N. lat., 124°31.16′ W. long.;
(72) 42°53.75′ N. lat., 124°36.09′ W. long.;
(73) 42°49.37′ N. lat., 124°38.81′ W. long.;
(74) 42°46.42′ N. lat., 124°37.69′ W. long.;
(75) 42°46.07′ N. lat., 124°38.56′ W. long.;
(76) 42°45.29′ N. lat., 124°37.95′ W. long.;
(77) 42°45.61′ N. lat., 124°36.87′ W. long.;
(78) 42°44.28′ N. lat., 124°33.64′ W. long.;
(79) 42°42.75′ N. lat., 124°31.84′ W. long.;
(80) 42°40.04′ N. lat., 124°29.19′ W. long.;
(81) 42°38.09′ N. lat., 124°28.39′ W. long.;
(82) 42°36.72′ N. lat., 124°27.54′ W. long.;
(83) 42°36.56′ N. lat., 124°28.40′ W. long.;
(84) 42°35.76′ N. lat., 124°28.79′ W. long.;
(85) 42°34.03′ N. lat., 124°29.98′ W. long.;
(86) 42°34.19′ N. lat., 124°30.58′ W. long.;
(87) 42°31.27′ N. lat., 124°32.24′ W. long.;
(88) 42°27.07′ N. lat., 124°32.53′ W. long.;
(89) 42°24.21′ N. lat., 124°31.23′ W. long.;
(90) 42°20.47′ N. lat., 124°28.87′ W. long.;
(91) 42°14.60′ N. lat., 124°26.80′ W. long.;
(92) 42°10.90′ N. lat., 124°24.57′ W. long.;
(93) 42°07.04′ N. lat., 124°23.35′ W. long.;
(94) 42°02.16′ N. lat., 124°22.59′ W. long.;
(95) 42°00.00′ N. lat., 124°21.81′ W. long.;
(96) 41°59.95′ N. lat., 124°21.56′ W. long.;
(97) 41°55.75′ N. lat., 124°20.72′ W. long.;
(98) 41°50.93′ N. lat., 124°23.76′ W. long.;
(99) 41°42.53′ N. lat., 124°16.47′ W. long.;
(100) 41°37.20′ N. lat., 124°17.05′ W. long.;
(101) 41°24.58′ N. lat., 124°10.51′ W. long.;
(102) 41°20.73′ N. lat., 124°11.73′ W. long.;
(103) 41°17.59′ N. lat., 124°10.66′ W. long.;
(104) 41°04.54′ N. lat., 124°14.47′ W. long.;
(105) 40°54.26′ N. lat., 124°13.90′ W. long.;
(106) 40°40.31′ N. lat., 124°26.24′ W. long.;
(107) 40°34.00′ N. lat., 124°27.39′ W. long.;
(108) 40°28.89′ N. lat., 124°32.43′ W. long.;
(109) 40°24.77′ N. lat., 124°29.51′ W. long.;
(110) 40°22.47′ N. lat., 124°24.12′ W. long.;
(111) 40°19.73′ N. lat., 124°23.59′ W. long.;
(112) 40°18.64′ N. lat., 124°21.89′ W. long.;
(113) 40°17.67′ N. lat., 124°23.07′ W. long.;
(114) 40°15.58′ N. lat., 124°23.61′ W. long.;
(115) 40°13.42′ N. lat., 124°22.94′ W. long.;
(116) 40°10.00′ N. lat., 124°16.65′ W. long.;
(117) 40°09.46′ N. lat., 124°15.28′ W. long.;
(118) 40°08.89′ N. lat., 124°15.24′ W. long.;
(119) 40°06.40′ N. lat., 124°10.97′ W. long.;
(120) 40°06.08′ N. lat., 124°09.34′ W. long.;
(121) 40°06.64′ N. lat., 124°08.00′ W. long.;
(122) 40°05.08′ N. lat., 124°07.57′ W. long.;
(123) 40°04.29′ N. lat., 124°08.12′ W. long.;
(124) 40°00.61′ N. lat., 124°07.35′ W. long.;
(125) 39°58.60′ N. lat., 124°05.51′ W. long.;
(126) 39°54.89′ N. lat., 124°04.67′ W. long.;
(127) 39°53.01′ N. lat., 124°02.33′ W. long.;
(128) 39°53.20′ N. lat., 123°58.18′ W. long.;
(129) 39°48.45′ N. lat., 123°53.21′ W. long.;
(130) 39°43.89′ N. lat., 123°51.75′ W. long.;
(131) 39°39.60′ N. lat., 123°49.14′ W. long.;
(132) 39°34.43′ N. lat., 123°48.48′ W. long.;
(133) 39°30.63′ N. lat., 123°49.71′ W. long.;
(134) 39°21.25′ N. lat., 123°50.54′ W. long.;
(135) 39°08.87′ N. lat., 123°46.24′ W. long.;
(136) 39°03.79′ N. lat., 123°43.91′ W. long.;
(137) 38°59.65′ N. lat., 123°45.94′ W. long.;
(138) 38°56.80′ N. lat., 123°46.48′ W. long.;
(139) 38°51.16′ N. lat., 123°41.48′ W. long.;
(140) 38°45.77′ N. lat., 123°35.14′ W. long.;
(141) 38°42.21′ N. lat., 123°28.17′ W. long.;
(142) 38°34.05′ N. lat., 123°20.96′ W. long.;
(143) 38°22.47′ N. lat., 123°07.48′ W. long.;
(144) 38°16.52′ N. lat., 123°05.62′ W. long.;
(145) 38°14.42′ N. lat., 123°01.91′ W. long.;
(146) 38°08.24′ N. lat., 122°59.79′ W. long.;
(147) 38°02.69′ N. lat., 123°01.96′ W. long.;
(148) 37°59.73′ N. lat., 123°04.75′ W. long.;
(149) 37°58.41′ N. lat., 123°02.93′ W. long.;
(150) 37°58.25′ N. lat., 122°56.49′ W. long.;
(151) 37°50.30′ N. lat., 122°52.23′ W. long.;
(152) 37°43.36′ N. lat., 123°04.18′ W. long.;
(153) 37°40.77′ N. lat , 123°01.62′ W. long.;
(154) 37°40.13′ N. lat., 122°57.30′ W. long.;
(155) 37°42.59′ N. lat., 122°53.64′ W. long.;
(156) 37°29.62′ N. lat., 122°36.00′ W. long.;
(157) 37°22.38′ N. lat., 122°31.66′ W. long.;
(158) 37°13.86′ N. lat., 122°28.27′ W. long.;
(159) 37°08.01′ N. lat., 122°24.75′ W. long.;
(160) 37°05.84′ N. lat., 122°22.47′ W. long.;
(161) 36°58.77′ N. lat., 122°13.03′ W. long.;
(162) 36°53.74′ N. lat., 122°03.39′ W. long.;
(163) 36°52.71′ N. lat., 122°00.14′ W. long.;
(164) 36°52.51′ N. lat., 121°56.77′ W. long.;
(165) 36°49.44′ N. lat., 121°49.63′ W. long.;
(166) 36°48.01′ N. lat., 121°49.92′ W. long.;
(167) 36°48.25′ N. lat., 121°47.66′ W. long.;
(168) 36°46.26′ N. lat., 121°51.27′ W. long.;
(169) 36°39.14′ N. lat., 121°52.05′ W. long.;
(170) 36°38.00′ N. lat., 121°53.57′ W. long.;
(171) 36°39.14′ N. lat., 121°55.45′ W. long.;
(172) 36°38.50′ N. lat., 121°57.09′ W. long.;
(173) 36°36.75′ N. lat., 121°59.44′ W. long.;
(174) 36°34.97′ N. lat., 121°59.37′ W. long.;
(175) 36°33.07′ N. lat., 121°58.32′ W. long.;
(176) 36°33.27′ N. lat., 121°57.07′ W. long.;
(177) 36°32.68′ N. lat., 121°57.03′ W. long.;
(178) 36°32.04′ N. lat., 121°55.98′ W. long.;
(179) 36°31.61′ N. lat., 121°55.72′ W. long.;
(180) 36°31.59′ N. lat., 121°57.12′ W. long.;
(181) 36°31.52′ N. lat., 121°57.57′ W. long.;
(182) 36°30.88′ N. lat., 121°57.90′ W. long.;
(183) 36°30.25′ N. lat., 121°57.37′ W. long.;
(184) 36°29.47′ N. lat., 121°57.55′ W. long.;
(185) 36°26.72′ N. lat., 121°56.40′ W. long.;
(186) 36°24.33′ N. lat., 121°56.00′ W. long.;

(187) 36°23.36′ N. lat., 121°55.45′ W. long.;
(188) 36°18.86′ N. lat., 121°56.15′ W. long.;
(189) 36°16.21′ N. lat., 121°54.81′ W. long.;
(190) 36°15.30′ N. lat., 121°53.79′ W. long.;
(191) 36°12.04′ N. lat., 121°45.38′ W. long.;
(192) 36°11.87′ N. lat., 121°44.45′ W. long.;
(193) 36°12.13′ N. lat., 121°44.25′ W. long.;
(194) 36°11.89′ N. lat., 121°43.65′ W. long.;
(195) 36°10.56′ N. lat., 121°42.62′ W. long.;
(196) 36°09.90′ N. lat., 121°41.57′ W. long.;
(197) 36°08.14′ N. lat., 121°40.44′ W. long.;
(198) 36°06.69′ N. lat., 121°38.79′ W. long.;
(199) 36°05.85′ N. lat., 121°38.47′ W. long.;
(200) 36°03.08′ N. lat., 121°36.25′ W. long.;
(201) 36°02.92′ N. lat., 121°35.89′ W. long.;
(202) 36°01.53′ N. lat., 121°36.13′ W. long.;
(203) 36°00.59′ N. lat., 121°35.40′ W. long.;
(204) 35°59.93′ N. lat., 121°33.81′ W. long.;
(205) 35°59.69′ N. lat., 121°31.84′ W. long.;
(206) 35°58.59′ N. lat., 121°30.30′ W. long.;
(207) 35°54.02′ N. lat., 121°29.71′ W. long.;
(208) 35°51.54′ N. lat., 121°27.67′ W. long.;
(209) 35°50.42′ N. lat., 121°25.79′ W. long.;
(210) 35°48.37′ N. lat., 121°24.29′ W. long.;
(211) 35°47.02′ N. lat., 121°22.46′ W. long.;
(212) 35°42.28′ N. lat., 121°21.20′ W. long.;
(213) 35°41.57′ N. lat., 121°21.82′ W. long.;
(214) 35°39.24′ N. lat., 121°18.84′ W. long.;
(215) 35°35.14′ N. lat., 121°10.45′ W. long.;
(216) 35°30.11′ N. lat., 121°05.59′ W. long.;
(217) 35°25.86′ N. lat., 121°00.07′ W. long.;
(218) 35°22.82′ N. lat., 120°54.68′ W. long.;
(219) 35°17.96′ N. lat., 120°55.54′ W. long.;
(220) 35°14.83′ N. lat., 120°55.42′ W. long.;
(221) 35°08.87′ N. lat., 120°50.22′ W. long.;
(222) 35°05.55′ N. lat., 120°44.89′ W. long.;
(223) 35°02.91′ N. lat., 120°43.94′ W. long.;
(224) 34°53.80′ N. lat., 120°43.94′ W. long.;
(225) 34°34.89′ N. lat., 120°41.92′ W. long.;
(226) 34°32.48′ N. lat., 120°40.05′ W. long.;
(227) 34°30.12′ N. lat., 120°32.81′ W. long.;
(228) 34°27.00′ N. lat., 120°30.46′ W. long.;
(229) 34°27.00′ N. lat., 120°30.31′ W. long.;
(230) 34°25.84′ N. lat., 120°27.40′ W. long.;
(231) 34°25.16′ N. lat., 120°20.18′ W. long.;
(232) 34°25.88′ N. lat., 120°18.24′ W. long.;
(233) 34°27.26′ N. lat., 120°12.47′ W. long.;
(234) 34°26.27′ N. lat., 120°02.22′ W. long.;
(235) 34°23.41′ N. lat., 119°53.40′ W. long.;
(236) 34°23.33′ N. lat., 119°48.74′ W. long.;
(237) 34°22.31′ N. lat., 119°41.36′ W. long.;
(238) 34°21.72′ N. lat., 119°40.14′ W. long.;
(239) 34°21.25′ N. lat., 119°41.18′ W. long.;
(240) 34°20.25′ N. lat., 119°39.03′ W. long.;
(241) 34°19.87′ N. lat., 119°33.65′ W. long.;
(242) 34°18.67′ N. lat., 119°30.16′ W. long.;
(243) 34°16.95′ N. lat., 119°27.90′ W. long.;
(244) 34°13.02′ N. lat., 119°26.99′ W. long.;
(245) 34°08.62′ N. lat., 119°20.89′ W. long.;
(246) 34°06.95′ N. lat., 119°17.68′ W. long.;
(247) 34°05.93′ N. lat., 119°15.17′ W. long.;
(248) 34°08.42′ N. lat., 119°13.11′ W. long.;
(249) 34°05.23′ N. lat., 119°13.34′ W. long.;
(250) 34°04.98′ N. lat., 119°11.39′ W. long.;
(251) 34°04.55′ N. lat., 119°11.09′ W. long.;
(252) 34°04.15′ N. lat., 119°09.35′ W. long.;
(253) 34°04.89′ N. lat., 119°07.86′ W. long.;
(254) 34°04.08′ N. lat., 119°07.33′ W. long.;
(255) 34°04.10′ N. lat., 119°06.89′ W. long.;
(256) 34°05.08′ N. lat., 119°07.02′ W. long.;
(257) 34°05.27′ N. lat., 119°04.95′ W. long.;
(258) 34°04.51′ N. lat., 119°04.70′ W. long.;
(259) 34°02.26′ N. lat., 118°59.88′ W. long.;
(260) 34°01.08′ N. lat., 118°59.77′ W. long.;
(261) 34°00.94′ N. lat., 118°51.65′ W. long.;
(262) 33°59.77′ N. lat., 118°49.26′ W. long.;
(263) 34°00.04′ N. lat., 118°48.92′ W. long.;
(264) 33°59.65′ N. lat., 118°48.43′ W. long.;
(265) 33°59.46′ N. lat., 118°47.25′ W. long.;
(266) 33°59.80′ N. lat., 118°45.89′ W. long.;
(267) 34°00.21′ N. lat., 118°37.64′ W. long.;
(268) 33°59.26′ N. lat., 118°34.58′ W. long.;
(269) 33°58.07′ N. lat., 118°33.36′ W. long.;
(270) 33°53.76′ N. lat., 118°30.14′ W. long.;
(271) 33°51.00′ N. lat., 118°25.19′ W. long.;
(272) 33°50.07′ N. lat., 118°24.70′ W. long.;
(273) 33°50.16′ N. lat., 118°23.77′ W. long.;
(274) 33°48.80′ N. lat., 118°25.31′ W. long.;
(275) 33°47.07′ N. lat., 118°27.07′ W. long.;
(276) 33°46.12′ N. lat., 118°26.87′ W. long.;
(277) 33°44.15′ N. lat., 118°25.15′ W. long.;
(278) 33°43.54′ N. lat., 118°23.02′ W. long.;
(279) 33°41.35′ N. lat., 118°18.86′ W. long.;
(280) 33°39.96′ N. lat., 118°17.37′ W. long.;
(281) 33°40.12′ N. lat., 118°16.33′ W. long.;
(282) 33°39.28′ N. lat., 118°16.21′ W. long.;
(283) 33°38.04′ N. lat., 118°14.86′ W. long.;
(284) 33°36.57′ N. lat., 118°14.67′ W. long.;
(285) 33°34.93′ N. lat., 118°10.94′ W. long.;
(286) 33°35.14′ N. lat., 118°08.61′ W. long.;
(287) 33°35.69′ N. lat., 118°07.68′ W. long.;
(288) 33°36.21′ N. lat., 118°07.53′ W. long.;
(289) 33°36.43′ N. lat., 118°06.73′ W. long.;
(290) 33°36.05′ N. lat., 118°06.15′ W. long.;
(291) 33°36.32′ N. lat., 118°03.91′ W. long.;
(292) 33°35.69′ N. lat., 118°03.64′ W. long.;
(293) 33°34.62′ N. lat., 118°00.04′ W. long.;
(294) 33°34.80′ N. lat., 117°57.73′ W. long.;
(295) 33°35.57′ N. lat., 117°56.62′ W. long.;
(296) 33°35.46′ N. lat., 117°55.99′ W. long.;
(297) 33°35.98′ N. lat., 117°55.99′ W. long.;
(298) 33°35.46′ N. lat., 117°55.38′ W. long.;
(299) 33°35.21′ N. lat., 117°53.46′ W. long.;
(300) 33°33.61′ N. lat., 117°50.45′ W. long.;
(301) 33°31.41′ N. lat., 117°47.28′ W. long.;
(302) 33°27.54′ N. lat., 117°44.36′ W. long.;
(303) 33°26.63′ N. lat., 117°43.17′ W. long.;
(304) 33°25.21′ N. lat., 117°40.90′ W. long.;
(305) 33°20.33′ N. lat., 117°35.99′ W. long.;
(306) 33°16.35′ N. lat., 117°31.51′ W. long.;
(307) 33°11.53′ N. lat., 117°26.81′ W. long.;
(308) 33°07.59′ N. lat., 117°21.13′ W. long.;
(309) 33°02.21′ N. lat., 117°19.05′ W. long.;
(310) 32°56.55′ N. lat., 117°17.70′ W. long.;
(311) 32°54.61′ N. lat., 117°16.60′ W. long.;
(312) 32°52.32′ N. lat., 117°15.97′ W. long.;
(313) 32°51.48′ N. lat., 117°16.15′ W. long.;
(314) 32°51.85′ N. lat., 117°17.26′ W. long.;
(315) 32°51.55′ N. lat., 117°19.01′ W. long.;
(316) 32°49.55′ N. lat., 117°19.63′ W. long.;
(317) 32°46.71′ N. lat., 117°18.32′ W. long.;
(318) 32°36.35′ N. lat., 117°15.68′ W. long.; and
(319) 32°32.85′ N. lat., 117°15.44′ W. long.

(A) The 30-fm (55-m) depth contour around the Farallon Islands off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 37°46.73′ N. lat., 123°6.37′ W. long.;
(2) 37°45.79′ N. lat., 123°07.91′ W. long.;
(3) 37°45.28′ N. lat., 123°07.75′ W. long.;
(4) 37°44.98′ N. lat., 123°07.11′ W. long.;
(5) 37°45.51′ N. lat., 123°06.26′ W. long.;
(6) 37°45.14′ N. lat., 123°05.41′ W. long.;
(7) 37°45.31′ N. lat., 123°04.82′ W. long.;
(8) 37°46.11′ N. lat., 123°05.23′ W. long.;
(9) 37°46.44′ N. lat., 123°05.63′ W. long.; and
(10) 37°46.73′ N. lat., 123°06.37′ W. long.

(B) The 30-fm (55-m) depth contour around Noon Day Rock off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 37°47.83′ N. lat., 123°10.83′ W. long.;
(2) 37°47.51′ N. lat., 123°11.19′ W. long.;
(3) 37°47.33′ N. lat., 123°10.68′ W. long.;
(4) 37°47.02′ N. lat., 123°10.59′ W. long.;
(5) 37°47.21′ N. lat., 123°09.85′ W. long.;
(6) 37°47.56′ N. lat., 123°09.72′ W. long.;
(7) 37°47.87′ N. lat., 123°10.26′ W. long.; and
(8) 37°47.83′ N. lat., 123°10.83′ W. long.

(C) The 30-fm (55-m) depth contour around the northern Channel Islands off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 34°01.41′ N. lat., 119°20.61′ W. long.;
(2) 34°00.98′ N. lat., 119°20.46′ W. long.;
(3) 34°00.53′ N. lat., 119°20.98′ W. long.;
(4) 34°00.17′ N. lat., 119°21.83′ W. long.;
(5) 33°59.65′ N. lat., 119°24.45′ W. long.;
(6) 33°59.68′ N. lat., 119°25.20′ W. long.;
(7) 33°59.95′ N. lat., 119°26.25′ W. long.;
(8) 33°59.87′ N. lat., 119°27.27′ W. long.;
(9) 33°59.55′ N. lat., 119°28.02′ W. long.;
(10) 33°58.63′ N. lat., 119°36.48′ W. long.;
(11) 33°57.62′ N. lat., 119°41.13′ W. long.;
(12) 33°57.00′ N. lat., 119°42.20′ W. long.;
(13) 33°56.93′ N. lat., 119°48.00′ W. long.;
(14) 33°57.70′ N. lat., 119°48.00′ W. long.;
(between coordinates (14) and (15), the boundary follows the shoreline)
(15) 33°58.00′ N. lat., 119°51.00′ W. long.;
(16) 33°58.00′ N. lat., 119°52.00′ W. long.;
(17) 33°58.54′ N. lat., 119°52.80′ W. long.;
(18) 33°59.74′ N. lat., 119°54.19′ W. long.;
(19) 33°59.97′ N. lat., 119°54.66′ W. long.;
(20) 33°59.83′ N. lat., 119°56.00′ W. long.;
(21) 33°59.18′ N. lat., 119°57.17′ W. long.;
(22) 33°57.83′ N. lat., 119°56.74′ W. long.;
(23) 33°55.71′ N. lat., 119°56.89′ W. long.;
(24) 33°53.89′ N. lat., 119°57.68′ W. long.;
(25) 33°52.93′ N. lat., 119°59.80′ W. long.;
(26) 33°52.79′ N. lat., 120°01.81′ W. long.;
(27) 33°52.51′ N. lat., 120°03.08′ W. long.;
(28) 33°53.12′ N. lat., 120°04.88′ W. long.;
(29) 33°53.12′ N. lat., 120°05.80′ W. long.;
(30) 33°52.94′ N. lat., 120°06.50′ W. long.;
(31) 33°53.80′ N. lat., 120°06.50′ W. long.;
(between coordinates (31) and (32), the boundary follows the shoreline)
(32) 33°55.00′ N. lat., 120°10.00′ W. long.;
(33) 33°54.03′ N. lat., 120°10.00′ W. long.;
(34) 33°54.58′ N. lat., 120°11.82′ W. long.;
(35) 33°57.08′ N. lat., 120°14.58′ W. long.;
(36) 33°59.50′ N. lat., 120°16.72′ W. long.;
(37) 33°59.63′ N. lat., 120°17.88′ W. long.;
(38) 34°00.30′ N. lat., 120°19.14′ W. long.;
(39) 34°00.02′ N. lat., 120°19.68′ W. long.;
(40) 34°00.08′ N. lat., 120°21.73′ W. long.;
(41) 34°00.94′ N. lat., 120°24.82′ W. long.;
(42) 34°00.97′ N. lat., 120°25.30′ W. long.;
(43) 34°01.50′ N. lat., 120°25.30′ W. long.;
(between coordinates (43) and (44), the boundary follows the shoreline)
(44) 34°01.80′ N. lat., 120°26.60′ W. long.;
(45) 34°01.05′ N. lat., 120°26.60′ W. long.;
(46) 34°01.11′ N. lat., 120°27.43′ W. long.;
(47) 34°00.96′ N. lat., 120°28.09′ W. long.;
(48) 34°01.56′ N. lat., 120°28.71′ W. long.;
(49) 34°01.80′ N. lat., 120°28.31′ W. long.;

(50) 34°03.60′ N. lat., 120°28.87′ W. long.;
(51) 34°03.60′ N. lat., 120°28.20′ W. long.;
(52) 34°05.35′ N. lat., 120°28.20′ W. long.;
(53) 34°05.30′ N. lat., 120°27.33′ W. long.;
(54) 34°05.65′ N. lat., 120°26.79′ W. long.;
(55) 34°05.69′ N. lat., 120°25.82′ W. long.;
(56) 34°07.24′ N. lat., 120°24.98′ W. long.;
(57) 34°06.00′ N. lat., 120°23.30′ W. long.;
(58) 34°03.10′ N. lat., 120°23.30′ W. long.;
(between coordinates (58) and (59), the boundary follows the shoreline)
(59) 34°03.50′ N. lat., 120°21.30′ W. long.;
(60) 34°02.90′ N. lat., 120°20.20′ W. long.;
(between coordinates (60) and (61), the boundary follows the shoreline)
(61) 34°01.80′ N. lat., 120°18.40′ W. long.;
(62) 34°03.61′ N. lat., 120°18.40′ W. long.;
(63) 34°03.25′ N. lat., 120°16.64′ W. long.;
(64) 34°04.33′ N. lat., 120°14.22′ W. long.;
(65) 34°04.11′ N. lat., 120°11.17′ W. long.;
(66) 34°03.72′ N. lat., 120°09.93′ W. long.;
(67) 34°03.81′ N. lat., 120°08.96′ W. long.;
(68) 34°03.36′ N. lat., 120°06.52′ W. long.;
(69) 34°04.80′ N. lat., 120°04.00′ W. long.;
(70) 34°04.00′ N. lat., 120°04.00′ W. long.;
(71) 34°04.00′ N. lat., 120°05.20′ W. long.;
(72) 34°01.30′ N. lat., 120°05.20′ W. long.;
(between coordinates (72) and (73), the boundary follows the shoreline)
(73) 34°00.50′ N. lat., 120°02.80′ W. long.;
(74) 34°00.49′ N. lat., 120°01.01′ W. long.;
(75) 34°04.00′ N. lat., 120°01.00′ W. long.;
(76) 34°03.99′ N. lat., 120°00.15′ W. long.;
(77) 34°03.51′ N. lat., 119°59.42′ W. long.;
(78) 34°03.79′ N. lat., 119°58.15′ W. long.;
(79) 34°04.72′ N. lat., 119°57.61′ W. long.;
(80) 34°05.14′ N. lat., 119°55.17′ W. long.;
(81) 34°04.85′ N. lat., 119°53.00′ W. long.;
(82) 34°04.50′ N. lat., 119°53.00′ W. long.;
(between coordinates (82) and (83), the boundary follows the shoreline)
(83) 34°04.00′ N. lat., 119°51.00′ W. long.;
(84) 34°04.49′ N. lat., 119°51.01′ W. long.;
(85) 34°03.79′ N. lat., 119°48.86′ W. long.;
(86) 34°03.79′ N. lat., 119°45.46′ W. long.;
(87) 34°03.27′ N. lat., 119°44.17′ W. long.;
(88) 34°03.29′ N. lat., 119°43.30′ W. long.;
(89) 34°01.71′ N. lat., 119°40.83′ W. long.;
(90) 34°01.74′ N. lat., 119°37.92′ W. long.;
(91) 34°02.07′ N. lat., 119°37.17′ W. long.;
(92) 34°02.93′ N. lat., 119°36.52′ W. long.;
(93) 34°03.48′ N. lat., 119°35.50′ W. long.;
(94) 34°02.94′ N. lat., 119°35.50′ W. long.;
(between coordinates (94) and (95), the boundary follows the shoreline)
(95) 34°02.80′ N. lat., 119°32.80′ W. long.;
(96) 34°03.56′ N. lat., 119°32.80′ W. long.;
(97) 34°02.72′ N. lat., 119°31.84′ W. long.;
(98) 34°02.20′ N. lat., 119°30.53′ W. long.;
(99) 34°01.49′ N. lat., 119°30.20′ W. long.;
(100) 34°00.66′ N. lat., 119°28.62′ W. long.;
(101) 34°00.66′ N. lat., 119°27.57′ W. long.;
(102) 34°01.40′ N. lat., 119°26.94′ W. long.;
(103) 34°01.35′ N. lat., 119°26.70′ W. long.;
(104) 34°00.80′ N. lat., 119°26.70′ W. long.;
(between coordinates (104) and (105), the boundary follows the shoreline)
(105) 34°00.40′ N. lat., 119°24.60′ W. long.;
(between coordinates (105) and (106), the boundary follows the shoreline)
(106) 34°01.00′ N. lat., 119°21.40′ W. long.;
(107) 34°01.49′ N. lat., 119°21.40′ W. long.; and
(108) 34°01.41′ N. lat., 119°20.61′ W. long.

(D) The 30-fm (55-m) depth contour around San Clemente Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°03.37′ N. lat., 118°37.76′ W. long.;
(2) 33°02.72′ N. lat., 118°38.12′ W. long.;
(3) 33°02.18′ N. lat., 118°37.46′ W. long.;
(4) 33°00.66′ N. lat., 118°37.36′ W. long.;
(5) 33°00.08′ N. lat., 118°36.94′ W. long.;
(6) 33°00.11′ N. lat., 118°36.00′ W. long.;
(7) 32°58.02′ N. lat., 118°35.41′ W. long.;
(8) 32°56.00′ N. lat., 118°33.59′ W. long.;
(9) 32°54.76′ N. lat., 118°33.58′ W. long.;
(10) 32°53.97′ N. lat., 118°32.45′ W. long.;
(11) 32°51.18′ N. lat., 118°30.83′ W. long.;
(12) 32°50.00′ N. lat., 118°29.68′ W. long.;
(13) 32°49.72′ N. lat., 118°28.33′ W. long.;
(14) 32°47.88′ N. lat., 118°26.90′ W. long.;
(15) 32°47.30′ N. lat., 118°25.73′ W. long.;
(16) 32°47.28′ N. lat., 118°24.83′ W. long.;
(17) 32°48.12′ N. lat., 118°24.33′ W. long.;
(18) 32°48.74′ N. lat., 118°23.39′ W. long.;
(19) 32°48.69′ N. lat., 118°21.75′ W. long.;
(20) 32°49.06′ N. lat., 118°20.53′ W. long.;
(21) 32°50.28′ N. lat., 118°21.90′ W. long.;
(22) 32°51.73′ N. lat., 118°23.86′ W. long.;
(23) 32°52.79′ N. lat., 118°25.08′ W. long.;
(24) 32°54.03′ N. lat., 118°26.83′ W. long.;
(25) 32°54.70′ N. lat., 118°27.55′ W. long.;
(26) 32°55.49′ N. lat., 118°29.04′ W. long.;
(27) 32°59.58′ N. lat., 118°32.51′ W. long.;
(28) 32°59.89′ N. lat., 118°32.52′ W. long.;
(29) 33°00.29′ N. lat., 118°32.73′ W. long.;
(30) 33°00.85′ N. lat., 118°33.50′ W. long.;
(31) 33°01.70′ N. lat., 118°33.64′ W. long.;
(32) 33°02.90′ N. lat., 118°35.35′ W. long.;
(33) 33°02.61′ N. lat., 118°36.96′ W. long.; and
(34) 33°03.37′ N. lat., 118°37.76′ W. long.

(E) The 300-fm (55-m) depth contour around Santa Catalina Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°19.13′ N. lat., 118°18.04′ W. long.;
(2) 33°18.32′ N. lat., 118°18.20′ W. long.;
(3) 33°17.82′ N. lat., 118°18.73′ W. long.;
(4) 33°17.54′ N. lat., 118°19.52′ W. long.;
(5) 33°17.99′ N. lat., 118°21.71′ W. long.;
(6) 33°18.48′ N. lat., 118°22.82′ W. long.;
(7) 33°18.77′ N. lat., 118°26.95′ W. long.;
(8) 33°19.69′ N. lat., 118°28.87′ W. long.;
(9) 33°20.53′ N. lat., 118°30.52′ W. long.;
(10) 33°20.46′ N. lat., 118°31.47′ W. long.;
(11) 33°20.98′ N. lat., 118°31.39′ W. long.;
(12) 33°20.81′ N. lat., 118°30.49′ W. long.;
(13) 33°21.38′ N. lat., 118°30.07′ W. long.;
(14) 33°23.12′ N. lat., 118°29.31′ W. long.;
(15) 33°24.95′ N. lat., 118°29.70′ W. long.;
(16) 33°25.39′ N. lat., 118°30.50′ W. long.;
(17) 33°25.21′ N. lat., 118°30.79′ W. long.;
(18) 33°25.65′ N. lat., 118°31.60′ W. long.;
(19) 33°25.65′ N. lat., 118°32.04′ W. long.;
(20) 33°25.94′ N. lat., 118°32.96′ W. long.;
(21) 33°25.86′ N. lat., 118°33.49′ W. long.;
(22) 33°26.06′ N. lat., 118°34.12′ W. long.;
(23) 33°28.28′ N. lat., 118°36.60′ W. long.;
(24) 33°28.83′ N. lat., 118°36.42′ W. long.;
(25) 33°28.72′ N. lat., 118°34.93′ W. long.;
(26) 33°28.71′ N. lat., 118°33.61′ W. long.;
(27) 33°28.81′ N. lat., 118°32.95′ W. long.;
(28) 33°28.73′ N. lat., 118°32.07′ W. long.;
(29) 33°27.55′ N. lat., 118°30.14′ W. long.;
(30) 33°27.86′ N. lat., 118°29.41′ W. long.;
(31) 33°26.98′ N. lat., 118°29.06′ W. long.;
(32) 33°26.96′ N. lat., 118°28.58′ W. long.;
(33) 33°26.76′ N. lat., 118°28.40′ W. long.;
(34) 33°26.52′ N. lat., 118°27.66′ W. long.;
(35) 33°26.31′ N. lat., 118°27.41′ W. long.;
(36) 33°25.09′ N. lat., 118°23.13′ W. long.;
(37) 33°24.80′ N. lat., 118°22.86′ W. long.;
(38) 33°24.60′ N. lat., 118°22.02′ W. long.;
(39) 33°22.82′ N. lat., 118°21.04′ W. long.;
(40) 33°20.23′ N. lat., 118°18.45′ W. long.; and
(41) 33°19.13′ N. lat., 118°18.04′ W. long.

(iii) The 40-fm (73-m) depth contour between 46°16′ N. lat. and 42°00′ N. lat. is defined by straight lines connecting all of the following points in the order stated:

(1) 46°16.00′ N. lat., 124°16.10′ N. lat.;
(2) 46°15.29′ N. lat., 124°15.60′ N. lat.;
(3) 46°11.90′ N. lat., 124°13.59′ N. lat.;
(4) 46°06.93′ N. lat., 124°10.15′ N. lat.;
(5) 46°05.33′ N. lat., 124°08.30′ N. lat.;
(6) 45°58.69′ N. lat., 124°05.60′ N. lat.;
(7) 45°57.71′ N. lat., 124°05.82′ N. lat.;
(8) 45°53.97′ N. lat., 124°05.04′ N. lat.;
(9) 45°49.75′ N. lat., 124°05.14′ N. lat.;
(10) 45°47.88′ N. lat., 124°05.16′ N. lat.;
(11) 45°47.07′ N. lat., 124°04.21′ N. lat.;
(12) 45°44.34′ N. lat., 124°05.09′ N. lat.;
(13) 45°40.64′ N. lat., 124°04.90′ N. lat.;
(14) 45°33.00′ N. lat., 124°04.46′ N. lat.;
(15) 45°32.27′ N. lat., 124°04.74′ N. lat.;
(16) 45°29.26′ N. lat., 124°04.22′ N. lat.;
(17) 45°19.99′ N. lat., 124°04.62′ N. lat.;
(18) 45°17.50′ N. lat., 124°04.91′ N. lat.;
(19) 45°11.29′ N. lat., 124°05.19′ N. lat.;
(20) 45°05.79′ N. lat., 124°05.40′ N. lat.;
(21) 45°05.07′ N. lat., 124°05.93′ N. lat.;
(22) 45°01.70′ N. lat., 124°06.53′ N. lat.;
(23) 44°58.75′ N. lat., 124°07.14′ N. lat.;
(24) 44°51.28′ N. lat., 124°10.21′ N. lat.;
(25) 44°49.49′ N. lat., 124°10.89′ N. lat.;
(26) 44°44.96′ N. lat., 124°14.39′ N. lat.;
(27) 44°43.44′ N. lat., 124°14.78′ N. lat.;
(28) 44°42.27′ N. lat., 124°13.81′ N. lat.;
(29) 44°41.68′ N. lat., 124°15.38′ N. lat.;
(30) 44°34.87′ N. lat., 124°15.80′ N. lat.;
(31) 44°33.74′ N. lat., 124°14.43′ N. lat.;
(32) 44°27.66′ N. lat., 124°16.99′ N. lat.;
(33) 44°19.13′ N. lat., 124°19.22′ N. lat.;
(34) 44°15.35′ N. lat., 124°17.37′ N. lat.;
(35) 44°14.38′ N. lat., 124°17.78′ N. lat.;
(36) 44°12.80′ N. lat., 124°17.18′ N. lat.;
(37) 44°09.23′ N. lat., 124°15.96′ N. lat.;
(38) 44°08.38′ N. lat., 124°16.80′ N. lat.;
(39) 44°01.18′ N. lat., 124°15.42′ N. lat.;
(40) 43°51.60′ N. lat., 124°14.68′ N. lat.;
(41) 43°42.66′ N. lat., 124°15.46′ N. lat.;
(42) 43°40.49′ N. lat., 124°15.74′ N. lat.;
(43) 43°38.77′ N. lat., 124°15.64′ N. lat.;
(44) 43°34.52′ N. lat., 124°16.73′ N. lat.;
(45) 43°28.82′ N. lat., 124°19.52′ N. lat.;
(46) 43°23.91′ N. lat., 124°24.28′ N. lat.;
(47) 43°17.96′ N. lat., 124°28.81′ N. lat.;
(48) 43°16.75′ N. lat., 124°28.42′ N. lat.;
(49) 43°13.98′ N. lat., 124°31.99′ N. lat.;
(50) 43°13.71′ N. lat., 124°33.25′ N. lat.;
(51) 43°12.26′ N. lat., 124°34.16′ N. lat.;
(52) 43°10.96′ N. lat., 124°32.34′ N. lat.;
(53) 43°05.65′ N. lat., 124°31.52′ N. lat.;
(54) 42°59.66′ N. lat., 124°32.58′ N. lat.;
(55) 42°54.97′ N. lat., 124°36.99′ N. lat.;
(56) 42°53.81′ N. lat., 124°38.58′ N. lat.;
(57) 42°49.14′ N. lat., 124°39.92′ N. lat.;
(58) 42°46.47′ N. lat., 124°38.65′ N. lat.;
(59) 42°45.60′ N. lat., 124°39.04′ N. lat.;

(60) 42°44.79′ N. lat., 124°37.96′ N. lat.;
(61) 42°45.00′ N. lat., 124°36.39′ N. lat.;
(62) 42°44.14′ N. lat., 124°35.16′ N. lat.;
(63) 42°42.15′ N. lat., 124°32.82′ N. lat.;
(64) 42°38.82′ N. lat., 124°31.09′ N. lat.;
(65) 42°35.91′ N. lat., 124°31.02′ N. lat.;
(66) 42°31.34′ N. lat., 124°34.84′ N. lat.;
(67) 42°28.13′ N. lat., 124°34.83′ N. lat.;
(68) 42°26.73′ N. lat., 124°35.58′ N. lat.;
(69) 42°23.85′ N. lat., 124°34.05′ N. lat.;
(70) 42°21.68′ N. lat., 124°30.64′ N. lat.;
(71) 42°19.62′ N. lat., 124°29.02′ N. lat.;
(72) 42°15.01′ N. lat., 124°27.72′ N. lat.;
(73) 42°11.38′ N. lat., 124°25.62′ N. lat.;
(74) 42°04.66′ N. lat., 124°24.39′ N. lat.;
and
(75) 42°00.00′ N. lat., 124°23.55′ N. lat.

(iv) The 50-fm (91-m) depth contour between the U.S. border with Canada and the Swiftsure Bank is defined by straight lines connecting all of the following points in the order stated:

(1) 48°30.15′ N. lat., 124°56.12′ N. lat.;
(2) 48°28.29′ N. lat., 124°56.30′ W. long.;
(3) 48°29.23′ N. lat., 124°53.63′ W. long.;
and
(4) 48°30.31′ N. lat., 124°51.73′ W. long.

(A) The 50-fm (91-m) depth contour between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°22.15′ N. lat., 124°43.15′ W. long.;
(2) 48°22.15′ N. lat., 124°49.10′ W. long.;
(3) 48°20.03′ N. lat., 124°51.18′ W. long.;
(4) 48°16.61′ N. lat., 124°53.72′ W. long.;
(5) 48°14.68′ N. lat., 124°54.50′ W. long.;
(6) 48°12.02′ N. lat., 124°55.29′ W. long.;
(7) 48°03.14′ N. lat., 124°57.02′ W. long.;
(8) 47°56.05′ N. lat., 124°55.60′ W. long.;
(9) 47°52.58′ N. lat., 124°54.00′ W. long.;
(10) 47°50.18′ N. lat., 124°52.36′ W. long.;
(11) 47°45.34′ N. lat., 124°51.07′ W. long.;
(12) 47°40.96′ N. lat., 124°48.84′ W. long.;
(13) 47°34.59′ N. lat., 124°46.24′ W. long.;
(14) 47°27.86′ N. lat., 124°42.12′ W. long.;
(15) 47°22.34′ N. lat., 124°39.43′ W. long.;
(16) 47°17.66′ N. lat., 124°38.75′ W. long.;
(17) 47°06.25′ N. lat., 124°39.74′ W. long.;
(18) 47°00.43′ N. lat., 124°38.01′ W. long.;
(19) 46°52.00′ N. lat., 124°32.44′ W. long.;
(20) 46°35.41′ N. lat., 124°25.51′ W. long.;
(21) 46°25.43′ N. lat., 124°23.46′ W. long.;
(22) 46°16.00′ N. lat., 124°16.90′ W. long.;
(23) 45°50.88′ N. lat., 124°09.68′ W. long.;
(24) 45°12.99′ N. lat., 124°06.71′ W. long.;
(25) 44°52.48′ N. lat., 124°11.22′ W. long.;
(26) 44°42.41′ N. lat., 124°19.70′ W. long.;
(27) 44°38.80′ N. lat., 124°26.58′ W. long.;
(28) 44°24.99′ N. lat., 124°31.22′ W. long.;
(29) 44°18.11′ N. lat., 124°43.74′ W. long.;
(30) 44°15.23′ N. lat., 124°40.47′ W. long.;
(31) 44°18.80′ N. lat., 124°35.48′ W. long.;
(32) 44°19.62′ N. lat., 124°27.18′ W. long.;
(33) 43°56.65′ N. lat., 124°16.86′ W. long.;
(34) 43°34.95′ N. lat., 124°17.47′ W. long.;
(35) 43°12.60′ N. lat., 124°35.80′ W. long.;
(36) 43°08.96′ N. lat., 124°33.77′ W. long.;
(37) 42°59.66′ N. lat., 124°34.79′ W. long.;
(38) 42°54.29′ N. lat., 124°39.46′ W. long.;
(39) 42°46.50′ N. lat., 124°39.99′ W. long.;
(40) 42°41.00′ N. lat., 124°34.92′ W. long.;
(41) 42°36.29′ N. lat., 124°34.70′ W. long.;
(42) 42°28.36′ N. lat., 124°37.90′ W. long.;
(43) 42°25.53′ N. lat., 124°37.68′ W. long.;
(44) 42°18.64′ N. lat., 124°29.47′ W. long.;
(45) 42°12.95′ N. lat., 124°27.34′ W. long.;
(46) 42°03.04′ N. lat., 124°25.81′ W. long.;
(47) 42°00.00′ N. lat., 124°26.21′ W. long.;
(48) 41°57.60′ N. lat., 124°27.35′ W. long.;
(49) 41°52.53′ N. lat., 124°26.51′ W. long.;
(50) 41°50.17′ N. lat., 124°25.63′ W. long.;
(51) 41°46.01′ N. lat., 124°22.16′ W. long.;
(52) 41°26.50′ N. lat., 124°21.78′ W. long.;
(53) 41°15.66′ N. lat., 124°16.42′ W. long.;
(54) 41°05.45′ N. lat., 124°16.89′ W. long.;
(55) 40°54.55′ N. lat., 124°19.53′ W. long.;
(56) 40°42.22′ N. lat., 124°28.29′ W. long.;
(57) 40°39.68′ N. lat., 124°28.37′ W. long.;
(58) 40°36.76′ N. lat., 124°27.39′ W. long.;
(59) 40°34.44′ N. lat., 124°28.89′ W. long.;
(60) 40°32.57′ N. lat., 124°32.43′ W. long.;
(61) 40°30.95′ N. lat., 124°33.87′ W. long.;
(62) 40°28.90′ N. lat., 124°34.59′ W. long.;
(63) 40°24.36′ N. lat., 124°31.42′ W. long.;
(64) 40°23.66′ N. lat., 124°28.35′ W. long.;
(65) 40°22.54′ N. lat., 124°24.71′ W. long.;
(66) 40°21.52′ N. lat., 124°24.86′ W. long.;
(67) 40°21.25′ N. lat., 124°25.59′ W. long.;
(68) 40°20.63′ N. lat., 124°26.47′ W. long.;
(69) 40°19.18′ N. lat., 124°25.98′ W. long.;
(70) 40°18.42′ N. lat., 124°24.77′ W. long.;
(71) 40°18.64′ N. lat., 124°22.81′ W. long.;
(72) 40°15.31′ N. lat., 124°25.28′ W. long.;
(73) 40°15.37′ N. lat., 124°26.82′ W. long.;
(74) 40°11.91′ N. lat., 124°22.68′ W. long.;
(75) 40°10.01′ N. lat., 124°19.97′ W. long.;
(76) 40°10.00′ N. lat., 124°19.97′ W. long.;
(77) 40°09.20′ N. lat., 124°15.81′ W. long.;
(78) 40°07.51′ N. lat., 124°15.29′ W. long.;
(79) 40°05.22′ N. lat., 124°10.06′ W. long.;
(80) 40°06.51′ N. lat., 124°08.01′ W. long.;
(81) 40°00.72′ N. lat., 124°08.45′ W. long.;
(82) 39°56.60′ N. lat., 124°07.12′ W. long.;
(83) 39°52.58′ N. lat., 124°03.57′ W. long.;
(84) 39°50.65′ N. lat., 123°57.98′ W. long.;
(85) 39°40.16′ N. lat., 123°52.41′ W. long.;
(86) 39°30.12′ N. lat., 123°52.92′ W. long.;
(87) 39°24.53′ N. lat., 123°55.16′ W. long.;
(88) 39°11.58′ N. lat., 123°50.93′ W. long.;
(89) 38°55.13′ N. lat., 123°51.14′ W. long.;
(90) 38°28.58′ N. lat., 123°22.84′ W. long.;
(91) 38°14.60′ N. lat., 123°09.92′ W. long.;
(92) 38°01.84′ N. lat., 123°09.75′ W. long.;
(93) 37°59.56′ N. lat., 123°09.25′ W. long.;
(94) 37°55.24′ N. lat., 123°08.30′ W. long.;
(95) 37°52.06′ N. lat., 123°09.19′ W. long.;
(96) 37°50.21′ N. lat., 123°14.90′ W. long.;
(97) 37°35.67′ N. lat., 122°55.43′ W. long.;
(98) 37°03.06′ N. lat., 122°24.22′ W. long.;
(99) 36°50.20′ N. lat., 122°03.58′ W. long.;
(100) 36°51.46′ N. lat., 121°57.54′ W. long.;
(101) 36°44.14′ N. lat., 121°58.10′ W. long.;
(102) 36°36.76′ N. lat., 122°01.16′ W. long.;
(103) 36°15.62′ N. lat., 121°57.13′ W. long.;
(104) 36°10.41′ N. lat., 121°42.92′ W. long.;
(105) 36°02.56′ N. lat., 121°36.37′ W. long.;
(106) 36°01.04′ N. lat., 121°36.47′ W. long.;
(107) 35°58.26′ N. lat., 121°32.88′ W. long.;
(108) 35°40.38′ N. lat., 121°22.59′ W. long.;
(109) 35°24.35′ N. lat., 121°02.53′ W. long.;
(110) 35°02.66′ N. lat., 120°51.63′ W. long.;
(111) 34°39.52′ N. lat., 120°48.72′ W. long.;
(112) 34°31.26′ N. lat., 120°44.12′ W. long.;
(113) 34°27.00′ N. lat., 120°33.31′ W. long.;
(114) 34°23.47′ N. lat., 120°24.76′ W. long.;
(115) 34°25.83′ N. lat., 120°17.26′ W. long.;
(116) 34°24.65′ N. lat., 120°04.83′ W. long.;
(117) 34°23.18′ N. lat., 119°56.18′ W. long.;
(118) 34°19.20′ N. lat., 119°41.64′ W. long.;
(119) 34°16.82′ N. lat., 119°35.32′ W. long.;
(120) 34°13.43′ N. lat., 119°32.29′ W. long.;
(121) 34°05.39′ N. lat., 119°15.13′ W. long.;
(122) 34°08.22′ N. lat., 119°13.64′ W. long.;
(123) 34°07.64′ N. lat., 119°13.10′ W. long.;
(124) 34°04.56′ N. lat., 119°13.73′ W. long.;
(125) 34°03.90′ N. lat., 119°12.66′ W. long.;
(126) 34°03.66′ N. lat., 119°06.82′ W. long.;
(127) 34°04.58′ N. lat., 119°04.91′ W. long.;
(128) 34°01.35′ N. lat., 119°00.30′ W. long.;
(129) 34°00.24′ N. lat., 119°03.18′ W. long.;
(130) 33°59.63′ N. lat., 119°03.20′ W. long.;
(131) 33°59.54′ N. lat., 119°00.88′ W. long.;
(132) 34°00.82′ N. lat., 118°59.03′ W. long.;
(133) 33°59.11′ N. lat., 118°47.52′ W. long.;
(134) 33°59.07′ N. lat., 118°36.33′ W. long.;
(135) 33°55.06′ N. lat., 118°32.86′ W. long.;
(136) 33°53.56′ N. lat., 118°37.75′ W. long.;
(137) 33°51.22′ N. lat., 118°36.14′ W. long.;
(138) 33°50.48′ N. lat., 118°32.16′ W. long.;
(139) 33°51.86′ N. lat., 118°28.71′ W. long.;
(140) 33°50.09′ N. lat., 118°27.88′ W. long.;
(141) 33°49.95′ N. lat., 118°26.38′ W. long.;
(142) 33°50.73′ N. lat., 118°26.17′ W. long.;
(143) 33°49.86′ N. lat., 118°24.25′ W. long.;
(144) 33°48.10′ N. lat., 118°26.87′ W. long.;
(145) 33°47.54′ N. lat., 118°29.66′ W. long.;
(146) 33°44.10′ N. lat., 118°25.25′ W. long.;
(147) 33°41.78′ N. lat., 118°20.28′ W. long.;
(148) 33°38.18′ N. lat., 118°15.69′ W. long.;
(149) 33°37.50′ N. lat., 118°16.71′ W. long.;
(150) 33°35.98′ N. lat., 118°16.54′ W. long.;
(151) 33°34.15′ N. lat., 118°11.22′ W. long.;
(152) 33°34.29′ N. lat., 118°08.35′ W. long.;
(153) 33°35.85′ N. lat., 118°07.00′ W. long.;
(154) 33°36.12′ N. lat., 118°04.15′ W. long.;
(155) 33°34.97′ N. lat., 118°02.91′ W. long.;
(156) 33°34.00′ N. lat., 117°59.53′ W. long.;
(157) 33°35.44′ N. lat., 117°55.67′ W. long.;
(158) 33°35.15′ N. lat., 117°53.55′ W. long.;
(159) 33°31.12′ N. lat., 117°47.40′ W. long.;
(160) 33°27.99′ N. lat., 117°45.19′ W. long.;
(161) 33°26.88′ N. lat., 117°43.87′ W. long.;
(162) 33°25.44′ N. lat., 117°41.63′ W. long.;
(163) 33°19.50′ N. lat., 117°36.08′ W. long.;
(164) 33°12.74′ N. lat., 117°28.53′ W. long.;
(165) 33°10.29′ N. lat., 117°25.68′ W. long.;
(166) 33°07.36′ N. lat., 117°21.23′ W. long.;
(167) 32°59.39′ N. lat., 117°18.56′ W. long.;
(168) 32°56.10′ N. lat., 117°18.37′ W. long.;
(169) 32°54.43′ N. lat., 117°16.93′ W. long.;
(170) 32°51.89′ N. lat., 117°16.42′ W. long.;
(171) 32°52.24′ N. lat., 117°19.36′ W. long.;
(172) 32°47.06′ N. lat., 117°21.92′ W. long.;
(173) 32°45.09′ N. lat., 117°20.68′ W. long.;
(174) 32°43.62′ N. lat., 117°18.68′ W. long.;
and
(175) 32°33.43′ N. lat., 117°17.00′ W. long.

(B) The 50-fm (91-m) depth contour around the northern Channel Islands off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 34°08.40′ N. lat., 120°33.78′ W. long.;
(2) 34°08.40′ N. lat., 120°28.20′ W. long.;
(3) 34°08.68′ N. lat., 120°26.61′ W. long.;
(4) 34°05.85′ N. lat., 120°17.13′ W. long.;
(5) 34°05.57′ N. lat., 119°51.35′ W. long.;
(6) 34°07.08′ N. lat., 119°52.43′ W. long.;
(7) 34°04.42′ N. lat., 119°35.35′ W. long.;
(8) 34°06.20′ N. lat., 119°35.35′ W. long.;
(9) 34°06.20′ N. lat., 119°32.80′ W. long.;
(10) 34°04.73′ N. lat., 119°32.77′ W. long.;

(11) 34°03.56′ N. lat., 119°26.70′ W. long.;
(12) 34°04.00′ N. lat., 119°26.70′ W. long.;
(13) 34°04.00′ N. lat., 119°21.40′ W. long.;
(14) 34°02.57′ N. lat., 119°21.40′ W. long.;
(15) 34°02.02′ N. lat., 119°19.18′ W. long.;
(16) 34°01.03′ N. lat., 119°19.50′ W. long.;
(17) 33°59.45′ N. lat., 119°22.38′ W. long.;
(18) 33°58.68′ N. lat., 119°32.36′ W. long.;
(19) 33°56.43′ N. lat., 119°41.13′ W. long.;
(20) 33°56.09′ N. lat., 119°48.00′ W. long.;
(21) 33°55.20′ N. lat., 119°48.00′ W. long.;
(22) 33°55.20′ N. lat., 119°53.00′ W. long.;
(23) 33°58.00′ N. lat., 119°53.00′ W. long.;
(24) 33°59.32′ N. lat., 119°55.59′ W. long.;
(25) 33°57.52′ N. lat., 119°55.19′ W. long.;
(26) 33°56.26′ N. lat., 119°54.29′ W. long.;
(27) 33°54.30′ N. lat., 119°54.83′ W. long.;
(28) 33°50.97′ N. lat., 119°57.03′ W. long.;
(29) 33°50.03′ N. lat., 120°03.00′ W. long.;
(30) 33°51.06′ N. lat., 120°03.23′ W. long.;
(31) 33°52.35′ N. lat., 120°06.51′ W. long.;
(32) 33°51.37′ N. lat., 120°06.48′ W. long.;
(33) 33°51.37′ N. lat., 120°09.99′ W. long.;
(34) 33°53.50′ N. lat., 120°10.08′ W. long.;
(35) 33°54.49′ N. lat., 120°12.85′ W. long.;
(36) 33°58.48′ N. lat., 120°18.50′ W. long.;
(37) 34°00.06′ N. lat., 120°25.30′ W. long.;
(38) 33°58.50′ N. lat., 120°25.30′ W. long.;
(39) 33°58.50′ N. lat., 120°26.60′ W. long.;
(40) 34°00.34′ N. lat., 120°26.60′ W. long.;
(41) 34°00.71′ N. lat., 120°28.21′ W. long.;
(42) 34°03.60′ N. lat., 120°30.60′ W. long.;
(43) 34°03.60′ N. lat., 120°34.20′ W. long.;
(44) 34°06.96′ N. lat., 120°34.22′ W. long.;
(45) 34°08.01′ N. lat., 120°35.24′ W. long.; and
(46) 34°08.40′ N. lat., 120°33.78′ W. long.

(C) The 50-fm (91-m) depth contour around San Clemente Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°03.73′ N. lat., 118°36.98′ W. long.;
(2) 33°02.56′ N. lat., 118°34.12′ W. long.;
(3) 32°55.54′ N. lat., 118°28.87′ W. long.;
(4) 32°55.02′ N. lat., 118°27.69′ W. long.;
(5) 32°49.73′ N. lat., 118°20.99′ W. long.;
(6) 32°48.55′ N. lat., 118°20.24′ W. long.;
(7) 32°47.92′ N. lat., 118°22.45′ W. long.;
(8) 32°45.25′ N. lat., 118°24.59′ W. long.;
(9) 32°50.23′ N. lat., 118°30.80′ W. long.;
(10) 32°55.28′ N. lat., 118°33.83′ W. long.;
(11) 33°00.45′ N. lat., 118°37.88′ W. long.;
(12) 33°03.27′ N. lat., 118°38.56′ W. long.; and
(13) 33°03.73′ N. lat., 118°36.98′ W. long.

(D) The 50-fm (91-m) depth contour around Santa Catalina Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°28.01′ N. lat., 118°37.42′ W. long.;
(2) 33°29.02′ N. lat., 118°36.33′ W. long.;
(3) 33°28.97′ N. lat., 118°33.16′ W. long.;
(4) 33°28.71′ N. lat., 118°31.22′ W. long.;
(5) 33°26.66′ N. lat., 118°27.48′ W. long.;
(6) 33°25.35′ N. lat., 118°22.83′ W. long.;
(7) 33°22.61′ N. lat., 118°19.18′ W. long.;
(8) 33°20.06′ N. lat., 118°17.35′ W. long.;
(9) 33°17.58′ N. lat., 118°17.42′ W. long.;
(10) 33°17.05′ N. lat., 118°18.72′ W. long.;
(11) 33°17.87′ N. lat., 118°24.47′ W. long.;
(12) 33°18.63′ N. lat., 118°28.16′ W. long.;
(13) 33°20.17′ N. lat., 118°31.69′ W. long.;
(14) 33°20.85′ N. lat., 118°31.82′ W. long.;
(15) 33°23.19′ N. lat., 118°29.78′ W. long.;
(16) 33°24.85′ N. lat., 118°31.22′ W. long.;
(17) 33°25.65′ N. lat., 118°34.11′ W. long.; and
(18) 33°28.01′ N. lat., 118°37.42′ W. long.

(v) The 60-fm (110-m) depth contour used between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°26.70′ N. lat., 125°09.43′ W. long.;
(2) 48°23.76′ N. lat., 125°06.77′ W. long.;
(3) 48°23.01′ N. lat., 125°03.48′ W. long.;
(4) 48°22.42′ N. lat., 124°57.84′ W. long.;
(5) 48°22.62′ N. lat., 124°48.97′ W. long.;
(6) 48°18.61′ N. lat., 124°52.52′ W. long.;
(7) 48°16.62′ N. lat., 124°54.03′ W. long.;
(8) 48°15.39′ N. lat., 124°54.79′ W. long.;
(9) 48°13.81′ N. lat., 124°55.45′ W. long.;
(10) 48°10.51′ N. lat., 124°56.56′ W. long.;
(11) 48°06.90′ N. lat., 124°57.72′ W. long.;
(12) 48°02.23′ N. lat., 125°00.20′ W. long.;
(13) 48°00.87′ N. lat., 125°00.37′ W. long.;
(14) 47°56.30′ N. lat., 124°59.51′ W. long.;
(15) 47°46.84′ N. lat., 124°57.34′ W. long.;
(16) 47°36.49′ N. lat., 124°50.93′ W. long.;
(17) 47°32.01′ N. lat., 124°48.45′ W. long.;
(18) 47°27.19′ N. lat., 124°46.47′ W. long.;
(19) 47°21.76′ N. lat., 124°43.29′ W. long.;
(20) 47°17.82′ N. lat., 124°42.12′ W. long.;
(21) 47°08.87′ N. lat., 124°43.10′ W. long.;
(22) 47°03.16′ N. lat., 124°42.61′ W. long.;
(23) 46°49.70′ N. lat., 124°36.80′ W. long.;
(24) 46°42.91′ N. lat., 124°33.20′ W. long.;
(25) 46°39.67′ N. lat., 124°30.59′ W. long.;
(26) 46°32.47′ N. lat., 124°26.34′ W. long.;
(27) 46°23.69′ N. lat., 124°25.41′ W. long.;
(28) 46°20.84′ N. lat., 124°24.24′ W. long.;
(29) 46°16.00′ N. lat., 124°19.10′ W. long.;
(30) 46°15.97′ N. lat., 124°18.81′ W. long.;
(31) 46°11.23′ N. lat., 124°19.96′ W. long.;
(32) 46°02.51′ N. lat., 124°19.84′ W. long.;
(33) 45°59.05′ N. lat., 124°16.52′ W. long.;
(34) 45°51.00′ N. lat., 124°12.83′ W. long.;
(35) 45°45.85′ N. lat., 124°11.54′ W. long.;
(36) 45°38.53′ N. lat., 124°11.91′ W. long.;
(37) 45°30.90′ N. lat., 124°10.94′ W. long.;
(38) 45°21.20′ N. lat., 124°09.12′ W. long.;
(39) 45°12.43′ N. lat., 124°08.74′ W. long.;
(40) 44°59.89′ N. lat., 124°11.95′ W. long.;
(41) 44°51.96′ N. lat., 124°15.15′ W. long.;
(42) 44°44.64′ N. lat., 124°20.07′ W. long.;
(43) 44°39.24′ N. lat., 124°28.09′ W. long.;
(44) 44°30.61′ N. lat., 124°31.66′ W. long.;
(45) 44°26.19′ N. lat., 124°35.88′ W. long.;
(46) 44°18.88′ N. lat., 124°45.16′ W. long.;
(47) 44°14.69′ N. lat., 124°45.51′ W. long.;
(48) 44°10.97′ N. lat., 124°38.78′ W. long.;
(49) 44°08.71′ N. lat., 124°33.54′ W. long.;
(50) 44°04.92′ N. lat., 124°24.55′ W. long.;
(51) 43°57.49′ N. lat., 124°20.05′ W. long.;
(52) 43°50.26′ N. lat., 124°21.84′ W. long.;
(53) 43°41.69′ N. lat., 124°21.94′ W. long.;
(54) 43°35.52′ N. lat., 124°21.51′ W. long.;
(55) 43°25.77′ N. lat., 124°28.47′ W. long.;
(56) 43°20.25′ N. lat., 124°31.59′ W. long.;
(57) 43°12.73′ N. lat., 124°36.69′ W. long.;
(58) 43°08.08′ N. lat., 124°36.10′ W. long.;
(59) 43°00.33′ N. lat., 124°37.57′ W. long.;
(60) 42°53.99′ N. lat., 124°41.04′ W. long.;
(61) 42°46.66′ N. lat., 124°41.13′ W. long.;
(62) 42°41.74′ N. lat., 124°37.46′ W. long.;
(63) 42°37.42′ N. lat., 124°37.22′ W. long.;
(64) 42°27.35′ N. lat., 124°39.90′ W. long.;
(65) 42°23.94′ N. lat., 124°38.28′ W. long.;
(66) 42°17.72′ N. lat., 124°31.10′ W. long.;
(67) 42°10.35′ N. lat., 124°29.11′ W. long.;
(68) 42°00.00′ N. lat., 124°28.00′ W. long.;
(69) 42°00.00′ N. lat., 124°29.61′ W. long.;
(70) 41°54.87′ N. lat., 124°28.50′ W. long.;
(71) 41°45.80′ N. lat., 124°23.89′ W. long.;
(72) 41°34.40′ N. lat., 124°24.03′ W. long.;
(73) 41°28.33′ N. lat., 124°25.46′ W. long.;
(74) 41°15.80′ N. lat., 124°18.90′ W. long.;
(75) 41°09.77′ N. lat., 124°17.99′ W. long.;
(76) 41°02.26′ N. lat., 124°18.71′ W. long.;
(77) 40°53.54′ N. lat., 124°21.18′ W. long.;
(78) 40°49.93′ N. lat., 124°23.02′ W. long.;
(79) 40°43.15′ N. lat., 124°28.74′ W. long.;
(80) 40°40.19′ N. lat., 124°29.07′ W. long.;
(81) 40°36.77′ N. lat., 124°27.61′ W. long.;
(82) 40°34.13′ N. lat., 124°29.39′ W. long.;
(83) 40°33.15′ N. lat., 124°33.46′ W. long.;
(84) 40°29.57′ N. lat., 124°35.84′ W. long.;
(85) 40°24.72′ N. lat., 124°33.06′ W. long.;
(86) 40°23.91′ N. lat., 124°31.28′ W. long.;
(87) 40°23.67′ N. lat., 124°28.35′ W. long.;
(88) 40°22.53′ N. lat., 124°24.72′ W. long.;
(89) 40°21.51′ N. lat., 124°24.86′ W. long.;
(90) 40°21.02′ N. lat., 124°27.70′ W. long.;
(91) 40°19.75′ N. lat., 124°27.06′ W. long.;
(92) 40°18.23′ N. lat., 124°25.30′ W. long.;
(93) 40°18.60′ N. lat., 124°22.86′ W. long.;
(94) 40°15.43′ N. lat., 124°25.37′ W. long.;
(95) 40°15.55′ N. lat., 124°28.16′ W. long.;
(96) 40°11.27′ N. lat., 124°22.56′ W. long.;
(97) 40°10.00′ N. lat., 124°19.97′ W. long.;
(98) 40°09.20′ N. lat., 124°15.81′ W. long.;
(99) 40°07.51′ N. lat., 124°15.29′ W. long.;
(100) 40°05.22′ N. lat., 124°10.06′ W. long.;
(101) 40°06.51′ N. lat., 124°08.01′ W. long.;
(102) 40°00.72′ N. lat., 124°08.45′ W. long.;
(103) 39°56.60′ N. lat., 124°07.12′ W. long.;
(104) 39°52.58′ N. lat., 124°03.57′ W. long.;
(105) 39°50.65′ N. lat., 123°57.98′ W. long.;
(106) 39°40.16′ N. lat., 123°52.41′ W. long.;
(107) 39°30.12′ N. lat., 123°52.92′ W. long.;
(108) 39°24.53′ N. lat., 123°55.16′ W. long.;
(109) 39°11.58′ N. lat., 123°50.93′ W. long.;
(110) 38°55.13′ N. lat., 123°51.14′ W. long.;
(111) 38°28.58′ N. lat., 123°22.84′ W. long.;
(112) 38°08.57′ N. lat., 123°14.74′ W. long.;
(113) 38°00.00′ N. lat., 123°15.61′ W. long.;
(114) 37°56.98′ N. lat., 123°21.82′ W. long.;
(115) 37°48.01′ N. lat., 123°15.90′ W. long.;
(116) 37°36.73′ N. lat., 122°58.48′ W. long.;
(117) 37°07.58′ N. lat., 122°37.64′ W. long.;
(118) 37°02.08′ N. lat., 122°25.49′ W. long.;
(119) 36°48.20′ N. lat., 122°03.32′ W. long.;
(120) 36°51.46′ N. lat., 121°57.54′ W. long.;
(121) 36°44.14′ N. lat., 121°58.10′ W. long.;
(122) 36°36.76′ N. lat., 122°01.16′ W. long.;
(123) 36°15.62′ N. lat., 121°57.13′ W. long.;
(124) 36°10.42′ N. lat., 121°42.90′ W. long.;
(125) 36°02.55′ N. lat., 121°36.35′ W. long.;
(126) 36°01.04′ N. lat., 121°36.47′ W. long.;
(127) 35°58.25′ N. lat., 121°32.88′ W. long.;
(128) 35°40.38′ N. lat., 121°22.59′ W. long.;
(129) 35°24.35′ N. lat., 121°02.53′ W. long.;
(130) 35°02.66′ N. lat., 120°51.63′ W. long.;
(131) 34°39.52′ N. lat., 120°48.72′ W. long.;
(132) 34°31.26′ N. lat., 120°44.12′ W. long.;
(133) 34°27.00′ N. lat., 120°36.00′ W. long.;
(134) 34°23.00′ N. lat., 120°25.32′ W. long.;
(135) 34°25.68′ N. lat., 120°17.46′ W. long.;
(136) 34°23.18′ N. lat., 119°56.17′ W. long.;
(137) 34°18.73′ N. lat., 119°41.89′ W. long.;
(138) 34°11.18′ N. lat., 119°31.21′ W. long.;
(139) 34°10.01′ N. lat., 119°25.84′ W. long.;

(140) 34°03.88′ N. lat., 119°12.46′ W. long.;
(141) 34°03.58′ N. lat., 119°06.71′ W. long.;
(142) 34°04.52′ N. lat., 119°04.89′ W. long.;
(143) 34°01.28′ N. lat., 119°00.27′ W. long.;
(144) 34°00.20′ N. lat., 119°03.18′ W. long.;
(145) 33°59.60′ N. lat., 119°03.14′ W. long.;
(146) 33°59.45′ N. lat., 119°00.87′ W. long.;
(147) 34°00.71′ N. lat., 118°59.07′ W. long.;
(148) 33°59.05′ N. lat., 118°47.34′ W. long.;
(149) 33°59.06′ N. lat., 118°36.30′ W. long.;
(150) 33°55.05′ N. lat., 118°32.85′ W. long.;
(151) 33°53.56′ N. lat., 118°37.73′ W. long.;
(152) 33°51.22′ N. lat., 118°36.13′ W. long.;
(153) 33°50.19′ N. lat., 118°32.19′ W. long.;
(154) 33°51.28′ N. lat., 118°29.12′ W. long.;
(155) 33°49.89′ N. lat., 118°28.04′ W. long.;
(156) 33°49.95′ N. lat., 118°26.38′ W. long.;
(157) 33°50.73′ N. lat., 118°26.16′ W. long.;
(158) 33°49.87′ N. lat., 118°24.37′ W. long.;
(159) 33°47.54′ N. lat., 118°29.65′ W. long.;
(160) 33°44.10′ N. lat., 118°25.25′ W. long.;
(161) 33°41.77′ N. lat., 118°20.32′ W. long.;
(162) 33°38.17′ N. lat., 118°15.69′ W. long.;
(163) 33°37.48′ N. lat., 118°16.72′ W. long.;
(164) 33°35.98′ N. lat., 118°16.54′ W. long.;
(165) 33°34.15′ N. lat., 118°11.22′ W. long.;
(166) 33°34.09′ N. lat., 118°08.15′ W. long.;
(167) 33°35.73′ N. lat., 118°05.01′ W. long.;
(168) 33°33.75′ N. lat., 117°59.82′ W. long.;
(169) 33°35.44′ N. lat., 117°55.65′ W. long.;
(170) 33°35.15′ N. lat., 117°53.54′ W. long.;
(171) 33°31.12′ N. lat., 117°47.39′ W. long.;
(172) 33°27.49′ N. lat., 117°44.85′ W. long.;
(173) 33°16.42′ N. lat., 117°32.92′ W. long.;
(174) 33°06.66′ N. lat., 117°21.59′ W. long.;
(175) 33°00.08′ N. lat., 117°19.02′ W. long.;
(176) 32°56.11′ N. lat., 117°18.41′ W. long.;
(177) 32°54.43′ N. lat., 117°16.93′ W. long.;
(178) 32°51.89′ N. lat., 117°16.42′ W. long.;
(179) 32°52.61′ N. lat., 117°19.50′ W. long.;
(180) 32°46.96′ N. lat., 117°22.69′ W. long.;
(181) 32°44.98′ N. lat., 117°21.87′ W. long.;
(182) 32°43.52′ N. lat., 117°19.32′ W. long.;
and
(183) 32°33.56′ N. lat., 117°17.72′ W. long.

(A) The 60-fm (110-m) depth contour around the northern Channel Islands off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 34°08.80′ N. lat., 120°34.58′ W. long.;
(2) 34°09.16′ N. lat., 120°26.31′ W. long.;
(3) 34°06.69′ N. lat., 120°16.43′ W. long.;
(4) 34°06.38′ N. lat., 120°04.00′ W. long.;
(5) 34°07.36′ N. lat., 119°52.06′ W. long.;
(6) 34°04.84′ N. lat., 119°36.94′ W. long.;
(7) 34°04.84′ N. lat., 119°35.50′ W. long.;
(8) 34°06.20′ N. lat., 119°35.50′ W. long.;
(9) 34°06.20′ N. lat., 119°32.80′ W. long.;
(10) 34°05.04′ N. lat., 119°32.80′ W. long.;
(11) 34°04.00′ N. lat., 119°26.70′ W. long.;
(12) 34°04.00′ N. lat., 119°21.40′ W. long.;
(13) 34°28.00′ N. lat., 119°21.40′ W. long.;
(14) 34°02.36′ N. lat., 119°18.97′ W. long.;
(15) 34°00.65′ N. lat., 119°19.42′ W. long.;
(16) 33°59.45′ N. lat., 119°22.38′ W. long.;
(17) 33°58.68′ N. lat., 119°32.36′ W. long.;
(18) 33°56.14′ N. lat., 119°41.09′ W. long.;
(19) 33°55.84′ N. lat., 119°48.00′ W. long.;
(20) 33°55.20′ N. lat., 119°48.00′ W. long.;
(21) 33°55.20′ N. lat., 119°53.00′ W. long.;
(22) 33°58.00′ N. lat., 119°53.00′ W. long.;
(23) 33°59.32′ N. lat., 119°55.59′ W. long.;
(24) 33°57.52′ N. lat., 119°55.19′ W. long.;
(25) 33°56.10′ N. lat., 119°54.25′ W. long.;
(26) 33°50.28′ N. lat., 119°56.02′ W. long.;
(27) 33°48.51′ N. lat., 119°59.67′ W. long.;
(28) 33°49.14′ N. lat., 120°03.58′ W. long.;
(29) 33°51.93′ N. lat., 120°06.50′ W. long.;
(30) 33°51.40′ N. lat., 120°06.50′ W. long.;
(31) 33°51.40′ N. lat., 120°10.00′ W. long.;
(32) 33°53.16′ N. lat., 120°10.00′ W. long.;
(33) 33°54.36′ N. lat., 120°13.06′ W. long.;
(34) 33°58.53′ N. lat., 120°20.46′ W. long.;
(35) 33°59.52′ N. lat., 120°25.30′ W. long.;
(36) 33°58.50′ N. lat., 120°25.30′ W. long.;
(37) 33°58.50′ N. lat., 120°26.60′ W. long.;
(38) 33°59.84′ N. lat., 120°26.60′ W. long.;
(39) 34°00.12′ N. lat., 120°28.12′ W. long.;
(40) 34°03.60′ N. lat., 120°31.46′ W. long.;
(41) 34°03.60′ N. lat., 120°34.20′ W. long.;
(42) 34°06.41′ N. lat., 120°34.20′ W. long.;
(43) 34°08.09′ N. lat., 120°35.85′ W. long.;
and
(44) 34°08.80′ N. lat., 120°34.58′ W. long.

(B) The 60-fm (110-m) depth contour around San Clemente Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°04.06′ N. lat., 118°37.32′ W. long.;
(2) 33°02.56′ N. lat., 118°34.12′ W. long.;
(3) 32°55.54′ N. lat., 118°28.87′ W. long.;
(4) 32°55.02′ N. lat., 118°27.69′ W. long.;
(5) 32°49.78′ N. lat., 118°20.88′ W. long.;
(6) 32°48.32′ N. lat., 118°19.89′ W. long.;
(7) 32°47.60′ N. lat., 118°22.00′ W. long.;
(8) 32°44.59′ N. lat., 118°24.52′ W. long.;
(9) 32°49.97′ N. lat., 118°31.52′ W. long.;
(10) 32°53.62′ N. lat., 118°32.94′ W. long.;
(11) 32°55.63′ N. lat., 118°34.82′ W. long.;
(12) 33°00.71′ N. lat., 118°38.42′ W. long.;
(13) 33°03.31′ N. lat., 118°38.74′ W. long.;
and
(14) 33°04.06′ N. lat., 118°37.32′ W. long.

(C) The 60-fm (110-m) depth contour around Santa Catalina Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°28.15′ N. lat., 118°37.85′ W. long.;
(2) 33°29.23′ N. lat., 118°36.27′ W. long.;
(3) 33°28.85′ N. lat., 118°30.85′ W. long.;
(4) 33°26.69′ N. lat., 118°27.37′ W. long.;
(5) 33°25.35′ N. lat., 118°22.83′ W. long.;
(6) 33°22.60′ N. lat., 118°18.82′ W. long.;
(7) 33°19.49′ N. lat., 118°16.91′ W. long.;
(8) 33°17.13′ N. lat., 118°16.58′ W. long.;
(9) 33°16.72′ N. lat., 118°18.07′ W. long.;
(10) 33°18.35′ N. lat., 118°27.86′ W. long.;
(11) 33°20.03′ N. lat., 118°32.04′ W. long.;
(12) 33°21.86′ N. lat., 118°31.72′ W. long.;
(13) 33°23.15′ N. lat., 118°29.89′ W. long.;
(14) 33°25.13′ N. lat., 118°32.16′ W. long.;
(15) 33°25.73′ N. lat., 118°34.88′ W. long.;
and
(16) 33°28.15′ N. lat., 118°37.85′ W. long.

(vi) The 75-fm (137-m) depth contour used between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°16.80′ N. lat., 125°34.90′ W. long.;
(2) 48°14.50′ N. lat., 125°29.50′ W. long.;
(3) 48°12.08′ N. lat., 125°28.00′ W. long.;
(4) 48°09.00′ N. lat., 125°28.00′ W. long.;
(5) 48°07.80′ N. lat., 125°31.70′ W. long.;
(6) 48°04.28′ N. lat., 125°29.00′ W. long.;
(7) 48°02.50′ N. lat., 125°25.70′ W. long.;
(8) 48°10.00′ N. lat., 125°20.19′ W. long.;
(9) 48°21.70′ N. lat., 125°17.56′ W. long.;
(10) 48°23.12′ N. lat., 125°10.25′ W. long.;
(11) 48°21.99′ N. lat., 125°02.59′ W. long.;
(12) 48°23.05′ N. lat., 124°48.80′ W. long.;
(13) 48°17.10′ N. lat., 124°54.82′ W. long.;
(14) 48°05.10′ N. lat., 124°59.40′ W. long.;
(15) 48°04.50′ N. lat., 125°02.00′ W. long.;
(16) 48°04.70′ N. lat., 125°04.08′ W. long.;
(17) 48°05.20′ N. lat., 125°04.90′ W. long.;
(18) 48°06.80′ N. lat., 125°06.15′ W. long.;
(19) 48°05.91′ N. lat., 125°08.30′ W. long.;
(20) 48°07.00′ N. lat., 125°09.80′ W. long.;
(21) 48°06.93′ N. lat., 125°11.48′ W. long.;
(22) 48°04.98′ N. lat., 125°10.02′ W. long.;
(23) 47°54.00′ N. lat., 125°04.98′ W. long.;
(24) 47°44.52′ N. lat., 125°00.00′ W. long.;
(25) 47°42.00′ N. lat., 124°58.98′ W. long.;
(26) 47°35.52′ N. lat., 124°55.50′ W. long.;
(27) 47°22.02′ N. lat., 124°44.40′ W. long.;
(28) 47°16.98′ N. lat., 124°45.48′ W. long.;
(29) 47°10.98′ N. lat., 124°48.48′ W. long.;
(30) 47°04.98′ N. lat., 124°49.02′ W. long.;
(31) 46°57.98′ N. lat., 124°46.50′ W. long.;
(32) 46°54.00′ N. lat., 124°45.00′ W. long.;
(33) 46°48.48′ N. lat., 124°44.52′ W. long.;
(34) 46°40.02′ N. lat., 124°36.00′ W. long.;
(35) 46°34.09′ N. lat., 124°27.03′ W. long.;
(36) 46°24.64′ N. lat., 124°30.33′ W. long.;
(37) 46°19.98′ N. lat., 124°36.00′ W. long.;
(38) 46°18.14′ N. lat., 124°34.26′ W. long.;
(39) 46°18.72′ N. lat., 124°22.68′ W. long.;
(40) 46°16.00′ N. lat., 124°19.49′ W. long.;
(41) 46°14.64′ N. lat., 124°22.54′ W. long.;
(42) 46°11.08′ N. lat., 124°30.74′ W. long.;
(43) 46°04.28′ N. lat., 124°31.49′ W. long.;
(44) 45°55.97′ N. lat., 124°19.95′ W. long.;
(45) 45°44.97′ N. lat., 124°15.96′ W. long.;
(46) 45°43.14′ N. lat., 124°21.86′ W. long.;
(47) 45°34.44′ N. lat., 124°14.44′ W. long.;
(48) 45°15.49′ N. lat., 124°11.49′ W. long.;
(49) 44°57.31′ N. lat., 124°15.03′ W. long.;
(50) 44°43.90′ N. lat., 124°28.88′ W. long.;
(51) 44°28.64′ N. lat., 124°35.67′ W. long.;
(52) 44°25.31′ N. lat., 124°43.08′ W. long.;
(53) 44°17.15′ N. lat., 124°47.98′ W. long.;
(54) 44°13.67′ N. lat., 124°54.41′ W. long.;
(55) 43°56.85′ N. lat., 124°55.32′ W. long.;
(56) 43°57.50′ N. lat., 124°41.23′ W. long.;
(57) 44°01.79′ N. lat., 124°38.00′ W. long.;
(58) 44°02.16′ N. lat., 124°32.62′ W. long.;
(59) 43°58.15′ N. lat., 124°30.39′ W. long.;
(60) 43°53.25′ N. lat., 124°31.39′ W. long.;
(61) 43°35.56′ N. lat., 124°28.17′ W. long.;
(62) 43°21.84′ N. lat., 124°36.07′ W. long.;
(63) 43°19.73′ N. lat., 124°34.86′ W. long.;
(64) 43°09.38′ N. lat., 124°39.30′ W. long.;
(65) 43°07.11′ N. lat., 124°37.66′ W. long.;
(66) 42°56.27′ N. lat., 124°43.29′ W. long.;
(67) 42°45.00′ N. lat., 124°41.50′ W. long.;
(68) 42°39.72′ N. lat., 124°39.11′ W. long.;
(69) 42°32.88′ N. lat., 124°40.13′ W. long.;
(70) 42°32.30′ N. lat., 124°39.04′ W. long.;
(71) 42°26.96′ N. lat., 124°44.31′ W. long.;
(72) 42°24.11′ N. lat., 124°42.16′ W. long.;
(73) 42°21.10′ N. lat., 124°35.46′ W. long.;
(74) 42°14.72′ N. lat., 124°32.30′ W. long.;
(75) 42°09.24′ N. lat., 124°32.04′ W. long.;
(76) 42°01.89′ N. lat., 124°32.70′ W. long.;
(77) 42°00.03′ N. lat., 124°32.02′ W. long.;
(78) 42°00.00′ N. lat., 124°32.02′ W. long.;
(79) 41°46.18′ N. lat., 124°26.60′ W. long.;
(80) 41°29.22′ N. lat., 124°28.04′ W. long.;

(81) 41°09.62′ N. lat., 124°19.75′ W. long.;
(82) 40°50.71′ N. lat., 124°23.80′ W. long.;
(83) 40°43.35′ N. lat., 124°29.30′ W. long.;
(84) 40°40.24′ N. lat., 124°29.86′ W. long.;
(85) 40°37.50′ N. lat., 124°28.68′ W. long.;
(86) 40°34.42′ N. lat., 124°29.65′ W. long.;
(87) 40°34.74′ N. lat., 124°34.61′ W. long.;
(88) 40°31.70′ N. lat., 124°37.13′ W. long.;
(89) 40°25.03′ N. lat., 124°34.77′ W. long.;
(90) 40°23.58′ N. lat., 124°31.49′ W. long.;
(91) 40°23.64′ N. lat., 124°28.35′ W. long.;
(92) 40°22.53′ N. lat., 124°24.76′ W. long.;
(93) 40°21.46′ N. lat., 124°24.86′ W. long.;
(94) 40°21.74′ N. lat., 124°27.63′ W. long.;
(95) 40°19.76′ N. lat., 124°28.15′ W. long.;
(96) 40°18.00′ N. lat., 124°25.38′ W. long.;
(97) 40°18.54′ N. lat., 124°22.94′ W. long.;
(98) 40°15.55′ N. lat., 124°25.75′ W. long.;
(99) 40°16.06′ N. lat., 124°30.48′ W. long.;
(100) 40°15.75′ N. lat., 124°31.69′ W. long.;
(101) 40°10.00′ N. lat., 124°21.28′ W. long.;
(102) 40°08.37′ N. lat., 124°17.99′ W. long.;
(103) 40°09.00′ N. lat., 124°15.77′ W. long.;
(104) 40°06.93′ N. lat., 124°16.49′ W. long.;
(105) 40°03.60′ N. lat., 124°11.60′ W. long.;
(106) 40°06.20′ N. lat., 124°08.23′ W. long.;
(107) 40°00.94′ N. lat., 124°08.57′ W. long.;
(108) 40°00.01′ N. lat., 124°09.84′ W. long.;
(109) 39°57.75′ N. lat., 124°09.53′ W. long.;
(110) 39°55.56′ N. lat., 124°07.67′ W. long.;
(111) 39°52.21′ N. lat., 124°05.54′ W. long.;
(112) 39°48.07′ N. lat., 123°57.48′ W. long.;
(113) 39°41.60′ N. lat., 123°55.12′ W. long.;
(114) 39°30.39′ N. lat., 123°55.03′ W. long.;
(115) 39°29.48′ N. lat., 123°56.12′ W. long.;
(116) 39°13.76′ N. lat., 123°54.65′ W. long.;
(117) 39°05.21′ N. lat., 123°55.38′ W. long.;
(118) 38°55.90′ N. lat., 123°54.35′ W. long.;
(119) 38°48.59′ N. lat., 123°49.61′ W. long.;
(120) 38°28.82′ N. lat., 123°27.44′ W. long.;
(121) 38°09.70′ N. lat., 123°18.66′ W. long.;
(122) 38°01.81′ N. lat., 123°19.22′ W. long.;
(123) 38°04.67′ N. lat., 123°25.85′ W. long.;
(124) 38°04.33′ N. lat., 123°29.68′ W. long.;
(125) 38°02.38′ N. lat., 123°30.13′ W. long.;
(126) 38°00.00′ N. lat., 123°27.84′ W. long.;
(127) 37°56.73′ N. lat., 123°25.22′ W. long.;
(128) 37°55.59′ N. lat., 123°25.62′ W. long.;
(129) 37°52.79′ N. lat., 123°23.85′ W. long.;
(130) 37°49.13′ N. lat., 123°18.83′ W. long.;
(131) 37°46.01′ N. lat., 123°12.28′ W. long.;
(132) 37°36.12′ N. lat., 123°00.33′ W. long.;
(133) 37°03.52′ N. lat., 122°37.57′ W. long.;
(134) 36°59.69′ N. lat., 122°27.32′ W. long.;
(135) 37°01.41′ N. lat., 122°24.41′ W. long.;
(136) 36°58.75′ N. lat., 122°23.81′ W. long.;
(137) 36°59.17′ N. lat., 122°21.44′ W. long.;
(138) 36°57.51′ N. lat., 122°20.69′ W. long.;
(139) 36°51.46′ N. lat., 122°10.01′ W. long.;
(140) 36°48.43′ N. lat., 122°06.47′ W. long.;
(141) 36°48.66′ N. lat., 122°04.99′ W. long.;
(142) 36°47.75′ N. lat., 122°03.33′ W. long.;
(143) 36°51.23′ N. lat., 121°57.79′ W. long.;
(144) 36°49.72′ N. lat., 121°57.87′ W. long.;
(145) 36°48.84′ N. lat., 121°58.68′ W. long.;
(146) 36°47.89′ N. lat., 121°58.53′ W. long.;
(147) 36°48.66′ N. lat., 121°50.49′ W. long.;
(148) 36°45.56′ N. lat., 121°54.11′ W. long.;
(149) 36°45.30′ N. lat., 121°57.62′ W. long.;
(150) 36°38.54′ N. lat., 122°01.13′ W. long.;
(151) 36°35.76′ N. lat., 122°00.87′ W. long.;
(152) 36°32.58′ N. lat., 121°59.12′ W. long.;
(153) 36°32.95′ N. lat., 121°57.62′ W. long.;
(154) 36°31.96′ N. lat., 121°56.27′ W. long.;
(155) 36°31.74′ N. lat., 121°58.24′ W. long.;
(156) 36°30.57′ N. lat., 121°59.66′ W. long.;
(157) 36°27.80′ N. lat., 121°59.30′ W. long.;
(158) 36°26.52′ N. lat., 121°58.09′ W. long.;
(159) 36°23.65′ N. lat., 121°58.94′ W. long.;
(160) 36°20.93′ N. lat., 122°00.28′ W. long.;
(161) 36°18.23′ N. lat., 122°03.10′ W. long.;
(162) 36°14.21′ N. lat., 121°57.73′ W. long.;
(163) 36°14.68′ N. lat., 121°55.43′ W. long.;
(164) 36°10.42′ N. lat., 121°42.90′ W. long.;
(165) 36°02.55′ N. lat., 121°36.35′ W. long.;
(166) 36°01.04′ N. lat., 121°36.47′ W. long.;
(167) 35°58.25′ N. lat., 121°32.88′ W. long.;
(168) 35°39.35′ N. lat., 121°22.63′ W. long.;
(169) 35°24.44′ N. lat., 121°02.23′ W. long.;
(170) 35°10.84′ N. lat., 120°55.90′ W. long.;
(171) 35°04.35′ N. lat., 120°51.62′ W. long.;
(172) 34°55.25′ N. lat., 120°49.36′ W. long.;
(173) 34°47.95′ N. lat., 120°50.76′ W. long.;
(174) 34°39.27′ N. lat., 120°49.16′ W. long.;
(175) 34°31.05′ N. lat., 120°44.71′ W. long.;
(176) 34°27.00′ N. lat., 120°36.54′ W. long.;
(177) 34°22.60′ N. lat., 120°25.41′ W. long.;
(178) 34°25.45′ N. lat., 120°17.41′ W. long.;
(179) 34°22.94′ N. lat., 119°56.40′ W. long.;
(180) 34°18.37′ N. lat., 119°42.01′ W. long.;
(181) 34°11.22′ N. lat., 119°32.47′ W. long.;
(182) 34°09.58′ N. lat., 119°25.94′ W. long.;
(183) 34°03.89′ N. lat., 119°12.47′ W. long.;
(184) 34°03.57′ N. lat., 119°06.72′ W. long.;
(185) 34°04.53′ N. lat., 119°04.90′ W. long.;
(186) 34°02.84′ N. lat., 119°02.37′ W. long.;
(187) 34°01.30′ N. lat., 119°00.26′ W. long.;
(188) 34°00.22′ N. lat., 119°03.20′ W. long.;
(189) 33°59.60′ N. lat., 119°03.16′ W. long.;
(190) 33°59.46′ N. lat., 119°00.88′ W. long.;
(191) 34°00.49′ N. lat., 118°59.08′ W. long.;
(192) 33°59.07′ N. lat., 118°47.34′ W. long.;
(193) 33°58.73′ N. lat., 118°36.45′ W. long.;
(194) 33°55.24′ N. lat., 118°33.42′ W. long.;
(195) 33°53.71′ N. lat., 118°38.01′ W. long.;
(196) 33°51.22′ N. lat., 118°36.17′ W. long.;
(197) 33°49.85′ N. lat., 118°32.31′ W. long.;
(198) 33°49.61′ N. lat., 118°28.07′ W. long.;
(199) 33°49.95′ N. lat., 118°26.38′ W. long.;
(200) 33°50.36′ N. lat., 118°25.84′ W. long.;
(201) 33°49.84′ N. lat., 118°24.78′ W. long.;
(202) 33°47.53′ N. lat., 118°30.12′ W. long.;
(203) 33°44.11′ N. lat., 118°25.25′ W. long.;
(204) 33°41.77′ N. lat., 118°20.32′ W. long.;
(205) 33°38.17′ N. lat., 118°15.70′ W. long.;
(206) 33°37.48′ N. lat., 118°16.73′ W. long.;
(207) 33°36.01′ N. lat., 118°16.55′ W. long.;
(208) 33°33.76′ N. lat., 118°11.37′ W. long.;
(209) 33°33.76′ N. lat., 118°07.94′ W. long.;
(210) 33°35.59′ N. lat., 118°05.05′ W. long.;
(211) 33°33.75′ N. lat., 117°59.82′ W. long.;
(212) 33°35.10′ N. lat., 117°55.68′ W. long.;
(213) 33°34.91′ N. lat., 117°53.76′ W. long.;
(214) 33°30.77′ N. lat., 117°47.56′ W. long.;
(215) 33°27.50′ N. lat., 117°44.87′ W. long.;
(216) 33°16.89′ N. lat., 117°34.37′ W. long.;
(217) 33°06.66′ N. lat., 117°21.59′ W. long.;
(218) 33°03.35′ N. lat., 117°20.92′ W. long.;
(219) 33°00.07′ N. lat., 117°19.02′ W. long.;
(220) 32°55.99′ N. lat., 117°18.60′ W. long.;
(221) 32°54.43′ N. lat., 117°16.93′ W. long.;
(222) 32°52.13′ N. lat., 117°16.55′ W. long.;
(223) 32°52.61′ N. lat., 117°19.50′ W. long.;
(224) 32°46.95′ N. lat., 117°22.81′ W. long.;
(225) 32°45.01′ N. lat., 117°22.07′ W. long.;
(226) 32°43.40′ N. lat., 117°19.80′ W. long.; and
(227) 32°33.74′ N. lat., 117°18.67′ W. long.

(A) The 75-fm (137-m) depth contour around the northern Channel Islands off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 34°09.12′ N. lat., 120°35.03′ W. long.;
(2) 34°09.99′ N. lat., 120°27.85′ W. long.;
(3) 34°07.19′ N. lat., 120°16.28′ W. long.;
(4) 34°06.56′ N. lat., 120°04.00′ W. long.;
(5) 34°07.27′ N. lat., 119°57.76′ W. long.;
(6) 34°07.48′ N. lat., 119°52.08′ W. long.;
(7) 34°05.18′ N. lat., 119°37.94′ W. long.;
(8) 34°05.22′ N. lat., 119°35.52′ W. long.;
(9) 34°06.18′ N. lat., 119°35.50′ W. long.;
(10) 34°06.16′ N. lat., 119°32.76′ W. long.;
(11) 34°05.12′ N. lat., 119°32.74′ W. long.;
(12) 34°04.32′ N. lat., 119°27.32′ W. long.;
(13) 34°04.06′ N. lat., 119°26.60′ W. long.;
(14) 34°04.00′ N. lat., 119°21.34′ W. long.;
(15) 34°03.00′ N. lat., 119°21.36′ W. long.;
(16) 34°02.32′ N. lat., 119°18.46′ W. long.;
(17) 34°00.65′ N. lat., 119°19.42′ W. long.;
(18) 33°59.45′ N. lat., 119°22.38′ W. long.;
(19) 33°58.68′ N. lat., 119°32.36′ W. long.;
(20) 33°56.12′ N. lat., 119°41.10′ W. long.;
(21) 33°55.74′ N. lat., 119°48.00′ W. long.;
(22) 33°55.21′ N. lat., 119°48.00′ W. long.;
(23) 33°55.21′ N. lat., 119°53.00′ W. long.;
(24) 33°57.78′ N. lat., 119°53.04′ W. long.;
(25) 33°59.06′ N. lat., 119°55.38′ W. long.;
(26) 33°57.57′ N. lat., 119°54.93′ W. long.;
(27) 33°56.35′ N. lat., 119°53.91′ W. long.;
(28) 33°54.43′ N. lat., 119°54.07′ W. long.;
(29) 33°52.67′ N. lat., 119°54.78′ W. long.;
(30) 33°48.33′ N. lat., 119°55.09′ W. long.;
(31) 33°47.28′ N. lat., 119°57.30′ W. long.;
(32) 33°47.36′ N. lat., 120°00.39′ W. long.;
(33) 33°49.16′ N. lat., 120°05.06′ W. long.;
(34) 33°51.41′ N. lat., 120°06.49′ W. long.;
(35) 33°51.41′ N. lat., 120°10.00′ W. long.;
(36) 33°52.99′ N. lat., 120°10.01′ W. long.;
(37) 33°56.64′ N. lat., 120°18.88′ W. long.;
(38) 33°58.02′ N. lat., 120°21.41′ W. long.;
(39) 33°58.73′ N. lat., 120°25.22′ W. long.;
(40) 33°58.49′ N. lat., 120°25.22′ W. long.;
(41) 33°58.48′ N. lat., 120°26.55′ W. long.;
(42) 33°59.08′ N. lat., 120°26.58′ W. long.;
(43) 33°59.95′ N. lat., 120°28.21′ W. long.;
(44) 34°03.54′ N. lat., 120°32.23′ W. long.;
(45) 34°03.54′ N. lat., 120°34.19′ W. long.;
(46) 34°05.57′ N. lat., 120°34.23′ W. long.;
(47) 34°08.13′ N. lat., 120°36.05′ W. long.; and
(48) 34°09.12′ N. lat., 120°35.03′ W. long.

(B) The 75-fm (137-m) depth contour around San Clemente Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°04.54′ N. lat., 118°37.54′ W. long.;
(2) 33°02.56′ N. lat., 118°34.12′ W. long.;
(3) 32°55.54′ N. lat., 118°28.87′ W. long.;
(4) 32°55.02′ N. lat., 118°27.69′ W. long.;
(5) 32°49.78′ N. lat., 118°20.88′ W. long.;
(6) 32°48.32′ N. lat., 118°19.89′ W. long.;
(7) 32°47.41′ N. lat., 118°21.98′ W. long.;
(8) 32°44.39′ N. lat., 118°24.49′ W. long.;
(9) 32°47.93′ N. lat., 118°29.90′ W. long.;
(10) 32°49.69′ N. lat., 118°31.52′ W. long.;
(11) 32°53.57′ N. lat., 118°33.09′ W. long.;
(12) 32°55.42′ N. lat., 118°35.17′ W. long.;
(13) 33°00.49′ N. lat., 118°38.56′ W. long.;
(14) 33°03.23′ N. lat., 118°39.16′ W. long.; and
(15) 33°04.54′ N. lat., 118°37.54′ W. long.

(C) The 75-fm (137-m) depth contour around Santa Catalina Island off the

State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°28.17′ N. lat., 118°38.16′ W. long.;
(2) 33°29.35′ N. lat., 118°36.23′ W. long.;
(3) 33°28.85′ N. lat., 118°30.85′ W. long.;
(4) 33°26.69′ N. lat., 118°27.37′ W. long.;
(5) 33°26.31′ N. lat., 118°25.14′ W. long.;
(6) 33°25.35′ N. lat., 118°22.83′ W. long.;
(7) 33°22.47′ N. lat., 118°18.53′ W. long.;
(8) 33°19.51′ N. lat., 118°16.82′ W. long.;
(9) 33°17.07′ N. lat., 118°16.38′ W. long.;
(10) 33°16.58′ N. lat., 118°17.61′ W. long.;
(11) 33°18.35′ N. lat., 118°27.86′ W. long.;
(12) 33°20.07′ N. lat., 118°32.12′ W. long.;
(13) 33°21.77′ N. lat., 118°31.85′ W. long.;
(14) 33°23.15′ N. lat., 118°29.99′ W. long.;
(15) 33°24.96′ N. lat., 118°32.21′ W. long.;
(16) 33°25.67′ N. lat., 118°34.88′ W. long.;
(17) 33°27.80′ N. lat., 118°37.90′ W. long.;
and
(18) 33°28.17′ N. lat., 118°38.16′ W. long.

(vii) The 100-fm (183-m) depth contour used between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°15.00′ N. lat., 125°41.00′ W. long.;
(2) 48°14.00′ N. lat., 125°36.00′ W. long.;
(3) 48°09.50′ N. lat., 125°40.50′ W. long.;
(4) 48°08.00′ N. lat., 125°38.00′ W. long.;
(5) 48°05.00′ N. lat., 125°37.25′ W. long.;
(6) 48°02.60′ N. lat., 125°34.70′ W. long.;
(7) 47°59.00′ N. lat., 125°34.00′ W. long.;
(8) 47°57.26′ N. lat., 125°29.82′ W. long.;
(9) 47°59.87′ N. lat., 125°25.81′ W. long.;
(10) 48°01.80′ N. lat., 125°24.53′ W. long.;
(11) 48°02.08′ N. lat., 125°22.98′ W. long.;
(12) 48°02.97′ N. lat., 125°22.89′ W. long.;
(13) 48°04.47′ N. lat., 125°21.75′ W. long.;
(14) 48°06.11′ N. lat., 125°19.33′ W. long.;
(15) 48°07.95′ N. lat., 125°18.55′ W. long.;
(16) 48°09.00′ N. lat., 125°18.00′ W. long.;
(17) 48°11.31′ N. lat., 125°17.55′ W. long.;
(18) 48°14.60′ N. lat., 125°13.46′ W. long.;
(19) 48°16.67′ N. lat., 125°14.34′ W. long.;
(20) 48°18.73′ N. lat., 125°14.41′ W. long.;
(21) 48°19.67′ N. lat., 125°13.70′ W. long.;
(22) 48°19.70′ N. lat., 125°11.13′ W. long.;
(23) 48°22.95′ N. lat., 125°10.79′ W. long.;
(24) 48°21.61′ N. lat., 125°02.54′ W. long.;
(25) 48°23.00′ N. lat., 124°49.34′ W. long.;
(26) 48°17.00′ N. lat., 124°56.50′ W. long.;
(27) 48°06.00′ N. lat., 125°00.00′ W. long.;
(28) 48°04.62′ N. lat., 125°01.73′ W. long.;
(29) 48°04.84′ N. lat., 125°04.03′ W. long.;
(30) 48°06.41′ N. lat., 125°06.51′ W. long.;
(31) 48°06.00′ N. lat., 125°08.00′ W. long.;
(32) 48°07.08′ N. lat., 125°09.34′ W. long.;
(33) 48°07.28′ N. lat., 125°11.14′ W. long.;
(34) 48°03.45′ N. lat., 125°16.66′ W. long.;
(35) 47°59.50′ N. lat., 125°18.88′ W. long.;
(36) 47°58.68′ N. lat., 125°16.19′ W. long.;
(37) 47°56.62′ N. lat., 125°13.50′ W. long.;
(38) 47°53.71′ N. lat., 125°11.96′ W. long.;
(39) 47°51.70′ N. lat., 125°09.38′ W. long.;
(40) 47°49.95′ N. lat., 125°06.07′ W. long.;
(41) 47°49.00′ N. lat., 125°03.00′ W. long.;
(42) 47°46.95′ N. lat., 125°04.00′ W. long.;
(43) 47°46.58′ N. lat., 125°03.15′ W. long.;
(44) 47°44.07′ N. lat., 125°04.28′ W. long.;
(45) 47°43.32′ N. lat., 125°04.41′ W. long.;
(46) 47°40.95′ N. lat., 125°04.14′ W. long.;
(47) 47°39.58′ N. lat., 125°04.97′ W. long.;
(48) 47°36.23′ N. lat., 125°02.77′ W. long.;
(49) 47°34.28′ N. lat., 124°58.66′ W. long.;
(50) 47°32.17′ N. lat., 124°57.77′ W. long.;
(51) 47°30.27′ N. lat., 124°56.16′ W. long.;
(52) 47°30.60′ N. lat., 124°54.80′ W. long.;
(53) 47°29.26′ N. lat., 124°52.21′ W. long.;
(54) 47°28.21′ N. lat., 124°50.65′ W. long.;
(55) 47°27.38′ N. lat., 124°49.34′ W. long.;
(56) 47°25.61′ N. lat., 124°48.26′ W. long.;
(57) 47°23.54′ N. lat., 124°46.42′ W. long.;
(58) 47°20.64′ N. lat., 124°45.91′ W. long.;
(59) 47°17.99′ N. lat., 124°45.59′ W. long.;
(60) 47°18.20′ N. lat., 124°49.12′ W. long.;
(61) 47°15.01′ N. lat., 124°51.09′ W. long.;
(62) 47°12.61′ N. lat., 124°54.89′ W. long.;
(63) 47°08.22′ N. lat., 124°56.53′ W. long.;
(64) 47°08.50′ N. lat., 124°57.74′ W. long.;
(65) 47°01.92′ N. lat., 124°54.95′ W. long.;
(66) 47°01.14′ N. lat., 124°59.35′ W. long.;
(67) 46°58.48′ N. lat., 124°57.81′ W. long.;
(68) 46°56.79′ N. lat., 124°56.03′ W. long.;
(69) 46°58.01′ N. lat., 124°55.09′ W. long.;
(70) 46°55.07′ N. lat., 124°54.14′ W. long.;
(71) 46°59.60′ N. lat., 124°49.79′ W. long.;
(72) 46°58.72′ N. lat., 124°48.78′ W. long.;
(73) 46°54.45′ N. lat., 124°48.36′ W. long.;
(74) 46°53.99′ N. lat., 124°49.95′ W. long.;
(75) 46°54.38′ N. lat., 124°52.73′ W. long.;
(76) 46°52.38′ N. lat., 124°52.02′ W. long.;
(77) 46°48.93′ N. lat., 124°49.17′ W. long.;
(78) 46°41.50′ N. lat., 124°43.00′ W. long.;
(79) 46°34.50′ N. lat., 124°28.50′ W. long.;
(80) 46°29.00′ N. lat., 124°30.00′ W. long.;
(81) 46°20.00′ N. lat., 124°36.50′ W. long.;
(82) 46°18.00′ N. lat., 124°38.00′ W. long.;
(83) 46°17.52′ N. lat., 124°35.35′ W. long.;
(84) 46°17.00′ N. lat., 124°22.50′ W. long.;
(85) 46°16.00′ N. lat., 124°20.62′ W. long.;
(86) 46°13.52′ N. lat., 124°25.49′ W. long.;
(87) 46°12.17′ N. lat., 124°30.75′ W. long.;
(88) 46°10.63′ N. lat., 124°37.95′ W. long.;
(89) 46°09.29′ N. lat., 124°39.01′ W. long.;
(90) 46°02.40′ N. lat., 124°40.37′ W. long.;
(91) 45°56.45′ N. lat., 124°38.00′ W. long.;
(92) 45°51.92′ N. lat., 124°38.49′ W. long.;
(93) 45°47.19′ N. lat., 124°35.58′ W. long.;
(94) 45°46.41′ N. lat., 124°32.36′ W. long.;
(95) 45°41.75′ N. lat., 124°28.12′ W. long.;
(96) 45°36.96′ N. lat., 124°24.48′ W. long.;
(97) 45°31.84′ N. lat., 124°22.04′ W. long.;
(98) 45°27.10′ N. lat., 124°21.74′ W. long.;
(99) 45°18.14′ N. lat., 124°17.59′ W. long.;
(100) 45°11.08′ N. lat., 124°16.97′ W. long.;
(101) 45°04.38′ N. lat., 124°18.36′ W. long.;
(102) 44°58.05′ N. lat., 124°21.58′ W. long.;
(103) 44°47.67′ N. lat., 124°31.41′ W. long.;
(104) 44°44.55′ N. lat., 124°33.58′ W. long.;
(105) 44°39.88′ N. lat., 124°35.01′ W. long.;
(106) 44°32.90′ N. lat., 124°36.81′ W. long.;
(107) 44°30.33′ N. lat., 124°38.56′ W. long.;
(108) 44°30.04′ N. lat., 124°42.31′ W. long.;
(109) 44°26.84′ N. lat., 124°44.91′ W. long.;
(110) 44°17.99′ N. lat., 124°51.03′ W. long.;
(111) 44°13.68′ N. lat., 124°56.38′ W. long.;
(112) 43°56.67′ N. lat., 124°55.45′ W. long.;
(113) 43°56.47′ N. lat., 124°34.61′ W. long.;
(114) 43°42.73′ N. lat., 124°32.41′ W. long.;
(115) 43°30.93′ N. lat., 124°34.43′ W. long.;
(116) 43°17.45′ N. lat., 124°41.16′ W. long.;
(117) 43°07.04′ N. lat., 124°41.25′ W. long.;
(118) 43°03.45′ N. lat., 124°44.36′ W. long.;
(119) 43°03.90′ N. lat., 124°50.81′ W. long.;
(120) 42°55.70′ N. lat., 124°52.79′ W. long.;
(121) 42°54.12′ N. lat., 124°47.36′ W. long.;
(122) 42°44.00′ N. lat., 124°42.38′ W. long.;
(123) 42°38.23′ N. lat., 124°41.25′ W. long.;
(124) 42°33.03′ N. lat., 124°42.38′ W. long.;
(125) 42°31.89′ N. lat., 124°42.04′ W. long.;
(126) 42°30.09′ N. lat., 124°42.67′ W. long.;
(127) 42°28.28′ N. lat., 124°47.08′ W. long.;
(128) 42°25.22′ N. lat., 124°43.51′ W. long.;
(129) 42°19.23′ N. lat., 124°37.92′ W. long.;
(130) 42°16.29′ N. lat., 124°36.11′ W. long.;
(131) 42°05.66′ N. lat., 124°34.92′ W. long.;
(132) 42°00.00′ N. lat., 124°35.27′ W. long.;
(133) 42°00.00′ N. lat., 124°35.26′ W. long.;
(134) 41°47.04′ N. lat., 124°27.64′ W. long.;
(135) 41°32.92′ N. lat., 124°28.79′ W. long.;
(136) 41°24.17′ N. lat., 124°28.46′ W. long.;
(137) 41°10.12′ N. lat., 124°20.50′ W. long.;
(138) 40°51.41′ N. lat., 124°24.38′ W. long.;
(139) 40°43.71′ N. lat., 124°29.89′ W. long.;
(140) 40°40.14′ N. lat., 124°30.90′ W. long.;
(141) 40°37.35′ N. lat., 124°29.05′ W. long.;
(142) 40°34.76′ N. lat., 124°29.82′ W. long.;
(143) 40°36.78′ N. lat., 124°37.06′ W. long.;
(144) 40°32.44′ N. lat., 124°39.58′ W. long.;
(145) 40°24.82′ N. lat., 124°35.12′ W. long.;
(146) 40°23.30′ N. lat., 124°31.60′ W. long.;
(147) 40°23.52′ N. lat., 124°28.78′ W. long.;
(148) 40°22.43′ N. lat., 124°25.00′ W. long.;
(149) 40°21.72′ N. lat., 124°24.94′ W. long.;
(150) 40°21.87′ N. lat., 124°27.96′ W. long.;
(151) 40°21.40′ N. lat., 124°28.74′ W. long.;
(152) 40°19.68′ N. lat., 124°28.49′ W. long.;
(153) 40°17.73′ N. lat., 124°25.43′ W. long.;
(154) 40°18.37′ N. lat., 124°23.35′ W. long.;
(155) 40°15.75′ N. lat., 124°26.05′ W. long.;
(156) 40°16.75′ N. lat., 124°33.71′ W. long.;
(157) 40°16.29′ N. lat., 124°34.36′ W. long.;
(158) 40°10.00′ N. lat., 124°21.12′ W. long.;
(159) 40°10.00′ N. lat., 124°21.50′ W. long.;
(160) 40°07.70′ N. lat., 124°18.44′ W. long.;
(161) 40°08.84′ N. lat., 124°15.86′ W. long.;
(162) 40°06.53′ N. lat., 124°17.39′ W. long.;
(163) 40°03.15′ N. lat., 124°14.43′ W. long.;
(164) 40°02.19′ N. lat., 124°12.85′ W. long.;
(165) 40°02.89′ N. lat., 124°11.78′ W. long.;
(166) 40°02.78′ N. lat., 124°10.70′ W. long.;
(167) 40°04.57′ N. lat., 124°10.08′ W. long.;
(168) 40°06.06′ N. lat., 124°08.30′ W. long.;
(169) 40°04.05′ N. lat., 124°08.93′ W. long.;
(170) 40°01.17′ N. lat., 124°08.80′ W. long.;
(171) 40°01.03′ N. lat., 124°10.06′ W. long.;
(172) 39°58.07′ N. lat., 124°11.89′ W. long.;
(173) 39°56.39′ N. lat., 124°08.71′ W. long.;
(174) 39°54.64′ N. lat., 124°07.30′ W. long.;
(175) 39°53.86′ N. lat., 124°07.95′ W. long.;
(176) 39°51.95′ N. lat., 124°07.63′ W. long.;
(177) 39°48.78′ N. lat., 124°03.29′ W. long.;
(178) 39°47.36′ N. lat., 124°03.31′ W. long.;
(179) 39°40.08′ N. lat., 123°58.37′ W. long.;
(180) 39°36.16′ N. lat., 123°56.90′ W. long.;
(181) 39°30.75′ N. lat., 123°55.86′ W. long.;
(182) 39°31.62′ N. lat., 123°57.33′ W. long.;
(183) 39°30.91′ N. lat., 123°57.88′ W. long.;
(184) 39°01.79′ N. lat., 123°56.59′ W. long.;
(185) 38°59.42′ N. lat., 123°55.67′ W. long.;
(186) 38°58.89′ N. lat., 123°56.28′ W. long.;
(187) 38°54.72′ N. lat., 123°55.68′ W. long.;
(188) 38°48.95′ N. lat., 123°51.85′ W. long.;
(189) 38°36.67′ N. lat., 123°40.20′ W. long.;
(190) 38°33.82′ N. lat., 123°39.23′ W. long.;
(191) 38°29.02′ N. lat., 123°33.52′ W. long.;
(192) 38°18.88′ N. lat., 123°25.93′ W. long.;
(193) 38°14.12′ N. lat., 123°23.26′ W. long.;
(194) 38°11.07′ N. lat., 123°22.07′ W. long.;
(195) 38°03.19′ N. lat., 123°20.70′ W. long.;
(196) 38°06.30′ N. lat., 123°24.96′ W. long.;
(197) 38°06.34′ N. lat., 123°29.25′ W. long.;
(198) 38°04.57′ N. lat., 123°31.23′ W. long.;

(199) 38°02.32′ N. lat., 123°31.00′ W. long.;
(200) 38°00.00′ N. lat., 123°28.41′ W. long.;
(201) 37°58.08′ N. lat., 123°26.68′ W. long.;
(202) 37°55.07′ N. lat., 123°26.81′ W. long.;
(203) 37°50.66′ N. lat., 123°23.06′ W. long.;
(204) 37°45.18′ N. lat., 123°11.88′ W. long.;
(205) 37°36.21′ N. lat., 123°01.20′ W. long.;
(206) 37°15.58′ N. lat., 122°48.36′ W. long.;
(207) 37°03.18′ N. lat., 122°38.15′ W. long.;
(208) 37°00.48′ N. lat., 122°33.93′ W. long.;
(209) 36°58.70′ N. lat., 122°27.22′ W. long.;
(210) 37°00.85′ N. lat., 122°24.70′ W. long.;
(211) 36°58.00′ N. lat., 122°24.14′ W. long.;
(212) 36°58.74′ N. lat., 122°21.51′ W. long.;
(213) 36°56.97′ N. lat., 122°21.32′ W. long.;
(214) 36°51.52′ N. lat., 122°10.68′ W. long.;
(215) 36°48.39′ N. lat., 122°07.60′ W. long.;
(216) 36°47.43′ N. lat., 122°03.22′ W. long.;
(217) 36°50.95′ N. lat., 121°58.03′ W. long.;
(218) 36°49.92′ N. lat., 121°58.01′ W. long.;
(219) 36°48.88′ N. lat., 121°58.90′ W. long.;
(220) 36°47.70′ N. lat., 121°58.75′ W. long.;
(221) 36°48.37′ N. lat., 121°51.14′ W. long.;
(222) 36°45.74′ N. lat., 121°54.17′ W. long.;
(223) 36°45.51′ N. lat., 121°57.72′ W. long.;
(224) 36°38.84′ N. lat., 122°01.32′ W. long.;
(225) 36°35.62′ N. lat., 122°00.98′ W. long.;
(226) 36°32.46′ N. lat., 121°59.15′ W. long.;
(227) 36°32.79′ N. lat., 121°57.67′ W. long.;
(228) 36°31.98′ N. lat., 121°56.55′ W. long.;
(229) 36°31.79′ N. lat., 121°58.40′ W. long.;
(230) 36°30.73′ N. lat., 121°59.70′ W. long.;
(231) 36°30.31′ N. lat., 122°00.22′ W. long.;
(232) 36°29.35′ N. lat., 122°00.36′ W. long.;
(233) 36°27.66′ N. lat., 121°59.80′ W. long.;
(234) 36°26.22′ N. lat., 121°58.35′ W. long.;
(235) 36°21.20′ N. lat., 122°00.72′ W. long.;
(236) 36°20.47′ N. lat., 122°02.92′ W. long.;
(237) 36°18.46′ N. lat., 122°04.51′ W. long.;
(238) 36°15.92′ N. lat., 122°01.33′ W. long.;
(239) 36°13.76′ N. lat., 121°57.27′ W. long.;
(240) 36°14.43′ N. lat., 121°55.43′ W. long.;
(241) 36°10.24′ N. lat., 121°43.08′ W. long.;
(242) 36°07.66′ N. lat., 121°40.91′ W. long.;
(243) 36°02.49′ N. lat., 121°36.51′ W. long.;
(244) 36°01.07′ N. lat., 121°36.82′ W. long.;
(245) 35°57.84′ N. lat., 121°33.10′ W. long.;
(246) 35°50.36′ N. lat., 121°29.32′ W. long.;
(247) 35°39.03′ N. lat., 121°22.86′ W. long.;
(248) 35°24.30′ N. lat., 121°02.56′ W. long.;
(249) 35°16.53′ N. lat., 121°00.39′ W. long.;
(250) 35°04.82′ N. lat., 120°53.96′ W. long.;
(251) 34°52.51′ N. lat., 120°51.62′ W. long.;
(252) 34°43.36′ N. lat., 120°52.12′ W. long.;
(253) 34°37.64′ N. lat., 120°49.99′ W. long.;
(254) 34°30.80′ N. lat., 120°45.02′ W. long.;
(255) 34°27.00′ N. lat., 120°39.00′ W. long.;
(256) 34°21.90′ N. lat., 120°25.25′ W. long.;
(257) 34°24.86′ N. lat., 120°16.81′ W. long.;
(258) 34°22.80′ N. lat., 119°57.06′ W. long.;
(259) 34°18.59′ N. lat., 119°44.84′ W. long.;
(260) 34°15.04′ N. lat., 119°40.34′ W. long.;
(261) 34°14.40′ N. lat., 119°45.39′ W. long.;
(262) 34°12.32′ N. lat., 119°42.41′ W. long.;
(263) 34°09.71′ N. lat., 119°28.85′ W. long.;
(264) 34°04.70′ N. lat., 119°15.38′ W. long.;
(265) 34°03.33′ N. lat., 119°12.93′ W. long.;
(266) 34°02.72′ N. lat., 119°07.01′ W. long.;
(267) 34°03.90′ N. lat., 119°04.64′ W. long.;
(268) 34°01.80′ N. lat., 119°03.23′ W. long.;
(269) 33°59.32′ N. lat., 119°03.50′ W. long.;
(270) 33°59.00′ N. lat., 118°59.55′ W. long.;
(271) 33°59.51′ N. lat., 118°57.25′ W. long.;
(272) 33°58.82′ N. lat., 118°52.47′ W. long.;
(273) 33°58.54′ N. lat., 118°41.86′ W. long.;
(274) 33°55.07′ N. lat., 118°34.25′ W. long.;
(275) 33°54.28′ N. lat., 118°38.68′ W. long.;
(276) 33°51.00′ N. lat., 118°36.66′ W. long.;
(277) 33°39.77′ N. lat., 118°18.41′ W. long.;
(278) 33°35.50′ N. lat., 118°16.85′ W. long.;
(279) 33°32.68′ N. lat., 118°09.82′ W. long.;
(280) 33°34.09′ N. lat., 117°54.06′ W. long.;
(281) 33°31.60′ N. lat., 117°49.28′ W. long.;
(282) 33°16.07′ N. lat., 117°34.74′ W. long.;
(283) 33°07.06′ N. lat., 117°22.71′ W. long.;
(284) 32°59.28′ N. lat., 117°19.69′ W. long.;
(285) 32°55.36′ N. lat., 117°19.54′ W. long.;
(286) 32°53.35′ N. lat., 117°17.05′ W. long.;
(287) 32°53.34′ N. lat., 117°19.13′ W. long.;
(288) 32°46.39′ N. lat., 117°23.45′ W. long.;
(289) 32°42.79′ N. lat., 117°21.16′ W. long.; and
(290) 32°34.22′ N. lat., 117°21.20′ W. long.

(A) The 100-fm (183-m) depth contour around San Clemente Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°04.73′ N. lat., 118°37.98′ W. long.;
(2) 33°02.67′ N. lat., 118°34.06′ W. long.;
(3) 32°55.80′ N. lat., 118°28.92′ W. long.;
(4) 32°49.78′ N. lat., 118°20.88′ W. long.;
(5) 32°48.01′ N. lat., 118°19.49′ W. long.;
(6) 32°47.53′ N. lat., 118°21.76′ W. long.;
(7) 32°44.03′ N. lat., 118°24.70′ W. long.;
(8) 32°49.75′ N. lat., 118°32.10′ W. long.;
(9) 32°53.36′ N. lat., 118°33.23′ W. long.;
(10) 32°55.17′ N. lat., 118°34.64′ W. long.;
(11) 32°55.13′ N. lat., 118°35.31′ W. long.;
(12) 33°00.22′ N. lat., 118°38.68′ W. long.;
(13) 33°03.13′ N. lat., 118°39.59′ W. long.; and
(14) 33°04.73′ N. lat., 118°37.98′ W. long.

(B) The 100-fm (183-m) depth contour around Santa Catalina Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°28.23′ N. lat., 118°39.38′ W. long.;
(2) 33°29.60′ N. lat., 118°36.11′ W. long.;
(3) 33°29.14′ N. lat., 118°30.81′ W. long.;
(4) 33°26.97′ N. lat., 118°27.57′ W. long.;
(5) 33°25.68′ N. lat., 118°23.00′ W. long.;
(6) 33°22.67′ N. lat., 118°18.41′ W. long.;
(7) 33°19.72′ N. lat., 118°16.25′ W. long.;
(8) 33°17.14′ N. lat., 118°14.96′ W. long.;
(9) 33°16.09′ N. lat., 118°15.46′ W. long.;
(10) 33°18.10′ N. lat., 118°27.95′ W. long.;
(11) 33°19.84′ N. lat., 118°32.16′ W. long.;
(12) 33°20.83′ N. lat., 118°32.83′ W. long.;
(13) 33°21.91′ N. lat., 118°31.98′ W. long.;
(14) 33°23.05′ N. lat., 118°30.11′ W. long.;
(15) 33°24.87′ N. lat., 118°32.45′ W. long.;
(16) 33°25.30′ N. lat., 118°34.32′ W. long.; and
(17) 33°28.23′ N. lat., 118°39.38′ W. long.

(viii) The 125-fm (229-m) depth contour used between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°15.00′ N. lat., 125°41.13′ W. long.;
(2) 48°13.05′ N. lat., 125°37.43′ W. long.;
(3) 48°08.62′ N. lat., 125°41.68′ W. long.;
(4) 48°07.42′ N. lat., 125°42.38′ W. long.;
(5) 48°04.20′ N. lat., 125°36.57′ W. long.;
(6) 48°02.79′ N. lat., 125°35.55′ W. long.;
(7) 48°00.48′ N. lat., 125°37.84′ W. long.;
(8) 47°54.90′ N. lat., 125°34.79′ W. long.;
(9) 47°58.37′ N. lat., 125°26.58′ W. long.;
(10) 47°59.84′ N. lat., 125°25.20′ W. long.;
(11) 48°01.85′ N. lat., 125°24.12′ W. long.;
(12) 48°02.13′ N. lat., 125°22.80′ W. long.;
(13) 48°03.31′ N. lat., 125°22.46′ W. long.;
(14) 48°06.83′ N. lat., 125°17.73′ W. long.;
(15) 48°10.08′ N. lat., 125°15.56′ W. long.;
(16) 48°11.24′ N. lat., 125°13.72′ W. long.;
(17) 48°12.41′ N. lat., 125°14.48′ W. long.;
(18) 48°13.01′ N. lat., 125°13.77′ W. long.;
(19) 48°13.59′ N. lat., 125°12.83′ W. long.;
(20) 48°12.22′ N. lat., 125°12.28′ W. long.;
(21) 48°11.15′ N. lat., 125°12.26′ W. long.;
(22) 48°10.18′ N. lat., 125°10.44′ W. long.;
(23) 48°10.18′ N. lat., 125°06.32′ W. long.;
(24) 48°15.39′ N. lat., 125°02.83′ W. long.;
(25) 48°18.32′ N. lat., 125°01.00′ W. long.;
(26) 48°21.67′ N. lat., 125°01.86′ W. long.;
(27) 48°25.70′ N. lat., 125°00.10′ W. long.;
(28) 48°26.43′ N. lat., 124°56.65′ W. long.;
(29) 48°24.28′ N. lat., 124°56.48′ W. long.;
(30) 48°23.27′ N. lat., 124°59.12′ W. long.;
(31) 48°21.79′ N. lat., 124°59.30′ W. long.;
(32) 48°20.71′ N. lat., 124°58.74′ W. long.;
(33) 48°19.84′ N. lat., 124°57.09′ W. long.;
(34) 48°22.06′ N. lat., 124°54.78′ W. long.;
(35) 48°22.45′ N. lat., 124°53.35′ W. long.;
(36) 48°22.74′ N. lat., 124°50.96′ W. long.;
(37) 48°21.04′ N. lat., 124°52.60′ W. long.;
(38) 48°18.07′ N. lat., 124°55.85′ W. long.;
(39) 48°15.03′ N. lat., 124°58.16′ W. long.;
(40) 48°11.31′ N. lat., 124°58.53′ W. long.;
(41) 48°06.25′ N. lat., 125°00.06′ W. long.;
(42) 48°04.70′ N. lat., 125°01.80′ W. long.;
(43) 48°04.93′ N. lat., 125°03.92′ W. long.;
(44) 48°06.44′ N. lat., 125°06.50′ W. long.;
(45) 48°07.34′ N. lat., 125°09.35′ W. long.;
(46) 48°07.62′ N. lat., 125°11.37′ W. long.;
(47) 48°03.71′ N. lat., 125°17.63′ W. long.;
(48) 48°01.35′ N. lat.. 125°18.66′ W. long.;
(49) 48°00.05′ N. lat., 125°19.66′ W. long.;
(50) 47°59.51′ N. lat., 125°18.90′ W. long.;
(51) 47°58.29′ N. lat., 125°16.64′ W. long.;
(52) 47°54.67′ N. lat., 125°13.20′ W. long.;
(53) 47°53.15′ N. lat., 125°12.53′ W. long.;
(54) 47°48.46′ N. lat., 125°04.72′ W. long.;
(55) 47°46.10′ N. lat., 125°04.00′ W. long.;
(56) 47°44.60′ N. lat., 125°04.49′ W. long.;
(57) 47°42.90′ N. lat., 125°04.72′ W. long.;
(58) 47°40.71′ N. lat., 125°04.68′ W. long.;
(59) 47°39.02′ N. lat., 125°05.63′ W. long.;
(60) 47°34.86′ N. lat., 125°02.11′ W. long.;
(61) 47°31.64′ N. lat., 124°58.11′ W. long.;
(62) 47°29.69′ N. lat., 124°55.71′ W. long.;
(63) 47°29.35′ N. lat., 124°53.23′ W. long.;
(64) 47°28.56′ N. lat., 124°51.34′ W. long.;
(65) 47°25.31′ N. lat., 124°48.20′ W. long.;
(66) 47°23.92′ N. lat., 124°47.15′ W. long.;
(67) 47°18.09′ N. lat., 124°45.74′ W. long.;
(68) 47°18.65′ N. lat., 124°51.51′ W. long.;
(69) 47°18.12′ N. lat., 124°52.58′ W. long.;
(70) 47°17.64′ N. lat., 124°50.45′ W. long.;
(71) 47°16.31′ N. lat., 124°50.92′ W. long.;
(72) 47°15.60′ N. lat., 124°52.62′ W. long.;
(73) 47°14.25′ N. lat., 124°52.49′ W. long.;
(74) 47°11.32′ N. lat., 124°57.19′ W. long.;
(75) 47°09.14′ N. lat., 124°57.46′ W. long.;
(76) 47°08.83′ N. lat., 124°58.47′ W. long.;
(77) 47°05.88′ N. lat., 124°58.26′ W. long.;
(78) 47°03.60′ N. lat., 124°55.84′ W. long.;
(79) 47°02.91′ N. lat., 124°56.15′ W. long.;
(80) 47°01.08′ N. lat., 124°59.46′ W. long.;
(81) 46°58.13′ N. lat., 124°58.83′ W. long.;
(82) 46°57.44′ N. lat., 124°57.78′ W. long.;

(83) 46°55.98′ N. lat., 124°54.60′ W. long.;
(84) 46°54.90′ N. lat., 124°54.14′ W. long.;
(85) 46°58.47′ N. lat., 124°49.65′ W. long.;
(86) 46°54.44′ N. lat., 124°48.79′ W. long.;
(87) 46°54.41′ N. lat., 124°52.87′ W. long.;
(88) 46°49.36′ N. lat., 124°52.77′ W. long.;
(89) 46°40.06′ N. lat., 124°45.34′ W. long.;
(90) 46°39.64′ N. lat., 124°42.21′ W. long.;
(91) 46°34.27′ N. lat., 124°34.63′ W. long.;
(92) 46°33.58′ N. lat., 124°29.10′ W. long.;
(93) 46°25.64′ N. lat., 124°32.57′ W. long.;
(94) 46°21.33′ N. lat., 124°36.36′ W. long.;
(95) 46°20.59′ N. lat., 124°36.15′ W. long.;
(96) 46°19.38′ N. lat., 124°38.21′ W. long.;
(97) 46°17.94′ N. lat., 124°38.10′ W. long.;
(98) 46°16.00′ N. lat., 124°35.35′ W. long.;
(99) 46°16.00′ N. lat., 124°22.17′ W. long.;
(100) 46°13.37′ N. lat., 124°30.70′ W. long.;
(101) 46°12.20′ N. lat., 124°36.04′ W. long.;
(102) 46°11.01′ N. lat., 124°38.68′ W. long.;
(103) 46°09.73′ N. lat., 124°39.91′ W. long.;
(104) 46°03.23′ N. lat., 124°42.03′ W. long.;
(105) 46°01.17′ N. lat., 124°42.06′ W. long.;
(106) 46°00.35′ N. lat., 124°42.26′ W. long.;
(107) 45°52.81′ N. lat., 124°41.62′ W. long.;
(108) 45°49.70′ N. lat., 124°41.14′ W. long.;
(109) 45°45.18′ N. lat., 124°38.39′ W. long.;
(110) 45°43.24′ N. lat., 124°37.77′ W. long.;
(111) 45°34.75′ N. lat., 124°28.59′ W. long.;
(112) 45°19.90′ N. lat., 124°21.34′ W. long.;
(113) 45°12.44′ N. lat., 124°19.35′ W. long.;
(114) 45°07.48′ N. lat., 124°19.73′ W. long.;
(115) 44°59.96′ N. lat., 124°22.91′ W. long.;
(116) 44°54.72′ N. lat., 124°26.84′ W. long.;
(117) 44°51.15′ N. lat., 124°31.41′ W. long.;
(118) 44°49.97′ N. lat., 124°32.37′ W. long.;
(119) 44°47.06′ N. lat., 124°34.43′ W. long.;
(120) 44°41.37′ N. lat., 124°36.51′ W. long.;
(121) 44°32.78′ N. lat., 124°37.86′ W. long.;
(122) 44°29.44′ N. lat., 124°44.25′ W. long.;
(123) 44°27.95′ N. lat., 124°45.13′ W. long.;
(124) 44°24.73′ N. lat., 124°47.42′ W. long.;
(125) 44°19.67′ N. lat., 124°51.17′ W. long.;
(126) 44°17.96′ N. lat., 124°52.53′ W. long.;
(127) 44°13.70′ N. lat., 124°56.45′ W. long.;
(128) 44°12.26′ N. lat., 124°57.53′ W. long.;
(129) 44°07.57′ N. lat., 124°57.19′ W. long.;
(130) 44°04.78′ N. lat., 124°56.31′ W. long.;
(131) 44°01.14′ N. lat., 124°56.07′ W. long.;
(132) 43°57.39′ N. lat., 124°57.01′ W. long.;
(133) 43°54.58′ N. lat., 124°52.18′ W. long.;
(134) 43°53.18′ N. lat., 124°47.41′ W. long.;
(135) 43°53.60′ N. lat., 124°37.45′ W. long.;
(136) 43°53.04′ N. lat., 124°36.00′ W. long.;
(137) 43°47.93′ N. lat., 124°35.18′ W. long.;
(138) 43°39.32′ N. lat., 124°35.14′ W. long.;
(139) 43°32.38′ N. lat., 124°35.26′ W. long.;
(140) 43°30.32′ N. lat., 124°36.79′ W. long.;
(141) 43°27.81′ N. lat., 124°36.42′ W. long.;
(142) 43°23.73′ N. lat., 124°39.66′ W. long.;
(143) 43°17.78′ N. lat., 124°42.84′ W. long.;
(144) 43°10.48′ N. lat., 124°43.54′ W. long.;
(145) 43°04.77′ N. lat., 124°45.51′ W. long.;
(146) 43°05.94′ N. lat., 124°49.77′ W. long.;
(147) 43°03.38′ N. lat., 124°51.86′ W. long.;
(148) 42°59.32′ N. lat., 124°51.93′ W. long.;
(149) 42°56.80′ N. lat., 124°53.38′ W. long.;
(150) 42°54.54′ N. lat., 124°52.72′ W. long.;
(151) 42°52.89′ N. lat., 124°47.45′ W. long.;
(152) 42°48.10′ N. lat., 124°46.75′ W. long.;
(153) 42°46.34′ N. lat., 124°43.53′ W. long.;
(154) 42°41.66′ N. lat., 124°42.70′ W. long.;
(155) 42°32.53′ N. lat., 124°42.77′ W. long.;
(156) 42°29.74′ N. lat., 124°43.81′ W. long.;
(157) 42°28.07′ N. lat., 124°47.65′ W. long.;
(158) 42°21.58′ N. lat., 124°41.41′ W. long.;
(159) 42°15.17′ N. lat., 124°36.25′ W. long.;
(160) 42°08.28′ N. lat., 124°36.08′ W. long.;
(161) 42°00.00′ N. lat., 124°35.46′ W. long.;
(162) 42°00.00′ N. lat., 124°35.45′ W. long.;
(163) 41°47.67′ N. lat., 124°28.67′ W. long.;
(164) 41°32.91′ N. lat., 124°29.01′ W. long.;
(165) 41°22.57′ N. lat., 124°28.66′ W. long.;
(166) 41°13.38′ N. lat., 124°22.88′ W. long.;
(167) 41°06.42′ N. lat., 124°22.02′ W. long.;
(168) 40°50.19′ N. lat., 124°25.58′ W. long.;
(169) 40°44.08′ N. lat., 124°30.43′ W. long.;
(170) 40°40.54′ N. lat., 124°31.75′ W. long.;
(171) 40°37.36′ N. lat., 124°29.17′ W. long.;
(172) 40°35.30′ N. lat., 124°30.03′ W. long.;
(173) 40°37.02′ N. lat., 124°37.10′ W. long.;
(174) 40°35.82′ N. lat., 124°39.58′ W. long.;
(175) 40°31.70′ N. lat., 124°39.97′ W. long.;
(176) 40°29.71′ N. lat., 124°38.08′ W. long.;
(177) 40°24.77′ N. lat., 124°35.39′ W. long.;
(178) 40°23.22′ N. lat., 124°31.87′ W. long.;
(179) 40°23.40′ N. lat., 124°28.65′ W. long.;
(180) 40°22.30′ N. lat., 124°25.27′ W. long.;
(181) 40°21.91′ N. lat., 124°25.18′ W. long.;
(182) 40°21.91′ N. lat., 124°27.97′ W. long.;
(183) 40°21.37′ N. lat., 124°29.03′ W. long.;
(184) 40°19.74′ N. lat., 124°28.71′ W. long.;
(185) 40°18.52′ N. lat., 124°27.26′ W. long.;
(186) 40°17.57′ N. lat., 124°25.49′ W. long.;
(187) 40°18.20′ N. lat., 124°23.63′ W. long.;
(188) 40°15.89′ N. lat., 124°26.00′ W. long.;
(189) 40°17.00′ N. lat., 124°35.01′ W. long.;
(190) 40°15.97′ N. lat., 124°35.91′ W. long.;
(191) 40°10.01′ N. lat., 124°22.00′ W. long.;
(192) 40°07.35′ N. lat., 124°18.64′ W. long.;
(193) 40°08.46′ N. lat., 124°16.24′ W. long.;
(194) 40°06.26′ N. lat., 124°17.54′ W. long.;
(195) 40°03.26′ N. lat., 124°15.30′ W. long.;
(196) 40°02.00′ N. lat., 124°12.97′ W. long.;
(197) 40°02.60′ N. lat., 124°10.61′ W. long.;
(198) 40°03.63′ N. lat., 124°09.12′ W. long.;
(199) 40°02.18′ N. lat., 124°09.07′ W. long.;
(200) 40°01.26′ N. lat., 124°09.86′ W. long.;
(201) 39°58.05′ N. lat., 124°11.87′ W. long.;
(202) 39°56.39′ N. lat., 124°08.70′ W. long.;
(203) 39°54.64′ N. lat., 124°07.31′ W. long.;
(204) 39°53.87′ N. lat., 124°07.95′ W. long.;
(205) 39°52.42′ N. lat., 124°08.18′ W. long.;
(206) 39°42.50′ N. lat., 124°00.60′ W. long.;
(207) 39°34.23′ N. lat., 123°56.82′ W. long.;
(208) 39°33.00′ N. lat., 123°56.44′ W. long.;
(209) 39°30.96′ N. lat., 123°56.00′ W. long.;
(210) 39°32.03′ N. lat., 123°57.44′ W. long.;
(211) 39°31.43′ N. lat., 123°58.16′ W. long.;
(212) 39°05.56′ N. lat., 123°57.24′ W. long.;
(213) 39°01.75′ N. lat., 123°56.83′ W. long.;
(214) 38°59.52′ N. lat., 123°55.95′ W. long.;
(215) 38°58.98′ N. lat., 123°56.57′ W. long.;
(216) 38°53.91′ N. lat., 123°56.00′ W. long.;
(217) 38°42.57′ N. lat., 123°46.60′ W. long.;
(218) 38°28.72′ N. lat., 123°35.61′ W. long.;
(219) 38°28.01′ N. lat., 123°36.47′ W. long.;
(220) 38°20.94′ N. lat., 123°31.26′ W. long.;
(221) 38°15.94′ N. lat., 123°25.33′ W. long.;
(222) 38°10.95′ N. lat., 123°23.19′ W. long.;
(223) 38°05.52′ N. lat., 123°22.90′ W. long.;
(224) 38°08.46′ N. lat., 123°26.23′ W. long.;
(225) 38°06.95′ N. lat., 123°28.03′ W. long.;
(226) 38°06.34′ N. lat., 123°29.80′ W. long.;
(227) 38°04.57′ N. lat., 123°31.24′ W. long.;
(228) 38°02.33′ N. lat., 123°31.02′ W. long.;
(229) 38°00.00′ N. lat., 123°28.23′ W. long.;
(230) 37°58.10′ N. lat., 123°26.69′ W. long.;
(231) 37°55.46′ N. lat., 123°27.05′ W. long.;
(232) 37°51.51′ N. lat., 123°24.86′ W. long.;
(233) 37°45.01′ N. lat., 123°12.09′ W. long.;
(234) 37°36.47′ N. lat., 123°01.56′ W. long.;
(235) 37°26.62′ N. lat., 122°56.21′ W. long.;
(236) 37°14.41′ N. lat., 122°49.07′ W. long.;
(237) 37°03.19′ N. lat., 122°38.31′ W. long.;
(238) 37°00.99′ N. lat., 122°35.51′ W. long.;
(239) 36°58.23′ N. lat., 122°27.36′ W. long.;
(240) 37°00.54′ N. lat., 122°24.74′ W. long.;
(241) 36°57.81′ N. lat., 122°24.65′ W. long.;
(242) 36°58.54′ N. lat., 122°21.67′ W. long.;
(243) 36°56.52′ N. lat., 122°21.70′ W. long.;
(244) 36°55.37′ N. lat., 122°18.45′ W. long.;
(245) 36°52.16′ N. lat., 122°12.17′ W. long.;
(246) 36°51.53′ N. lat., 122°10.67′ W. long.;
(247) 36°48.05′ N. lat., 122°07.59′ W. long.;
(248) 36°47.35′ N. lat., 122°03.27′ W. long.;
(249) 36°50.71′ N. lat., 121°58.17′ W. long.;
(250) 36°48.89′ N. lat., 121°58.90′ W. long.;
(251) 36°47.70′ N. lat., 121°58.76′ W. long.;
(252) 36°48.37′ N. lat., 121°51.15′ W. long.;
(253) 36°45.74′ N. lat., 121°54.18′ W. long.;
(254) 36°45.50′ N. lat., 121°57.73′ W. long.;
(255) 36°44.02′ N. lat., 121°58.55′ W. long.;
(256) 36°38.84′ N. lat., 122°01.32′ W. long.;
(257) 36°35.63′ N. lat., 122°00.98′ W. long.;
(258) 36°32.47′ N. lat., 121°59.17′ W. long.;
(259) 36°32.52′ N. lat., 121°57.62′ W. long.;
(260) 36°30.16′ N. lat., 122°00.55′ W. long.;
(261) 36°24.56′ N. lat., 121°59.19′ W. long.;
(262) 36°22.19′ N. lat., 122°00.30′ W. long.;
(263) 36°20.62′ N. lat., 122°02.93′ W. long.;
(264) 36°18.89′ N. lat., 122°05.18′ W. long.;
(265) 36°14.45′ N. lat., 121°59.44′ W. long.;
(266) 36°13.73′ N. lat., 121°57.38′ W. long.;
(267) 36°14.41′ N. lat., 121°55.45′ W. long.;
(268) 36°10.25′ N. lat., 121°43.08′ W. long.;
(269) 36°07.67′ N. lat., 121°40.92′ W. long.;
(270) 36°02.51′ N. lat., 121°36.76′ W. long.;
(271) 36°01.08′ N. lat., 121°36.82′ W. long.;
(272) 35°57.84′ N. lat., 121°33.10′ W. long.;
(273) 35°45.57′ N. lat., 121°27.26′ W. long.;
(274) 35°39.02′ N. lat., 121°22.86′ W. long.;
(275) 35°25.92′ N. lat., 121°05.52′ W. long.;
(276) 35°16.26′ N. lat., 121°01.50′ W. long.;
(277) 35°07.60′ N. lat., 120°56.49′ W. long.;
(278) 34°57.77′ N. lat., 120°53.87′ W. long.;
(279) 34°42.30′ N. lat., 120°53.42′ W. long.;
(280) 34°37.69′ N. lat., 120°50.04′ W. long.;
(281) 34°30.13′ N. lat., 120°44.45′ W. long.;
(282) 34°27.00′ N. lat., 120°39.24′ W. long.;
(283) 34°24.71′ N. lat., 120°35.37′ W. long.;
(284) 34°21.63′ N. lat., 120°24.86′ W. long.;
(285) 34°24.39′ N. lat., 120°16.65′ W. long.;
(286) 34°22.48′ N. lat., 119°56.42′ W. long.;
(287) 34°18.54′ N. lat., 119°46.26′ W. long.;
(288) 34°16.37′ N. lat., 119°45.12′ W. long.;
(289) 34°15.91′ N. lat., 119°47.29′ W. long.;
(290) 34°13.80′ N. lat., 119°45.40′ W. long.;
(291) 34°11.69′ N. lat., 119°41.80′ W. long.;
(292) 34°09.98′ N. lat., 119°31.87′ W. long.;
(293) 34°08.12′ N. lat., 119°27.71′ W. long.;
(294) 34°06.35′ N. lat., 119°32.65′ W. long.;
(295) 34°06.80′ N. lat., 119°40.08′ W. long.;
(296) 34°07.48′ N. lat., 119°47.54′ W. long.;
(297) 34°08.21′ N. lat., 119°54.90′ W. long.;
(298) 34°06.85′ N. lat., 120°05.60′ W. long.;
(299) 34°06.99′ N. lat., 120°10.37′ W. long.;
(300) 34°08.53′ N. lat., 120°17.89′ W. long.;
(301) 34°10.00′ N. lat., 120°23.05′ W. long.;
(302) 34°12.53′ N. lat., 120°29.82′ W. long.;
(303) 34°09.02′ N. lat., 120°37.47′ W. long.;
(304) 34°01.01′ N. lat., 120°31.17′ W. long.;
(305) 33°58.07′ N. lat., 120°28.33′ W. long.;
(306) 33°53.37′ N. lat., 120°14.43′ W. long.;
(307) 33°50.53′ N. lat., 120°07.20′ W. long.;
(308) 33°45.88′ N. lat., 120°04.26′ W. long.;
(309) 33°38.19′ N. lat., 119°57.85′ W. long.;
(310) 33°38.19′ N. lat., 119°50.42′ W. long.;

(311) 33°42.36′ N. lat., 119°49.60′ W. long.;
(312) 33°53.95′ N. lat., 119°53.81′ W. long.;
(313) 33°55.85′ N. lat., 119°43.34′ W. long.;
(314) 33°58.48′ N. lat., 119°27.90′ W. long.;
(315) 34°00.34′ N. lat., 119°19.22′ W. long.;
(316) 34°04.48′ N. lat., 119°15.32′ W. long.;
(317) 34°02.80′ N. lat., 119°12.95′ W. long.;
(318) 34°02.39′ N. lat., 119°07.17′ W. long.;
(319) 34°03.75′ N. lat., 119°04.72′ W. long.;
(320) 34°01.82′ N. lat., 119°03.24′ W. long.;
(321) 33°59.33′ N. lat., 119°03.49′ W. long.;
(322) 33°59.01′ N. lat., 118°59.56′ W. long.;
(323) 33°59.51′ N. lat., 118°57.25′ W. long.;
(324) 33°58.83′ N. lat., 118°52.50′ W. long.;
(325) 33°58.55′ N. lat., 118°41.86′ W. long.;
(326) 33°55.10′ N. lat., 118°34.25′ W. long.;
(327) 33°54.30′ N. lat., 118°38.71′ W. long.;
(328) 33°50.88′ N. lat., 118°37.02′ W. long.;
(329) 33°39.78′ N. lat., 118°18.40′ W. long.;
(330) 33°35.50′ N. lat., 118°16.85′ W. long.;
(331) 33°32.46′ N. lat., 118°10.90′ W. long.;
(332) 33°34.11′ N. lat., 117°54.07′ W. long.;
(333) 33°31.61′ N. lat., 117°49.30′ W. long.;
(334) 33°16.36′ N. lat., 117°35.48′ W. long.;
(335) 33°06.81′ N. lat., 117°22.93′ W. long.;
(336) 32°59.28′ N. lat., 117°19.69′ W. long.;
(337) 32°55.37′ N. lat., 117°19.55′ W. long.;
(338) 32°53.35′ N. lat., 117°17.05′ W. long.;
(339) 32°53.36′ N. lat., 117°19.12′ W. long.;
(340) 32°46.42′ N. lat., 117°23.45′ W. long.;
(341) 32°42.71′ N. lat., 117°21.45′ W. long.; and
(342) 32°34.54′ N. lat., 117°23.04′ W. long.

(A) The 125-fm (229-m) depth contour around San Clemente Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°04.73′ N. lat., 118°37.99′ W. long.;
(2) 33°02.67′ N. lat., 118°34.07′ W. long.;
(3) 32°55.97′ N. lat., 118°28.95′ W. long.;
(4) 32°49.79′ N. lat., 118°20.89′ W. long.;
(5) 32°48.02′ N. lat., 118°19.49′ W. long.;
(6) 32°47.37′ N. lat., 118°21.72′ W. long.;
(7) 32°43.58′ N. lat., 118°24.54′ W. long.;
(8) 32°49.74′ N. lat., 118°32.11′ W. long.;
(9) 32°53.36′ N. lat., 118°33.44′ W. long.;
(10) 32°55.03′ N. lat., 118°34.64′ W. long.;
(11) 32°54.89′ N. lat., 118°35.37′ W. long.;
(12) 33°00.20′ N. lat., 118°38.72′ W. long.;
(13) 33°03.15′ N. lat., 118°39.80′ W. long.; and
(14) 33°04.73′ N. lat., 118°37.99′ W. long.

(B) The 125-fm (229-m) depth contour around Santa Catalina Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°28.42′ N. lat., 118°39.85′ W. long.;
(2) 33°29.99′ N. lat., 118°36.14′ W. long.;
(3) 33°29.47′ N. lat., 118°33.66′ W. long.;
(4) 33°29.31′ N. lat., 118°30.53′ W. long.;
(5) 33°27.24′ N. lat., 118°27.71′ W. long.;
(6) 33°25.77′ N. lat., 118°22.57′ W. long.;
(7) 33°23.76′ N. lat., 118°19.27′ W. long.;
(8) 33°17.61′ N. lat., 118°13.61′ W. long.;
(9) 33°16.16′ N. lat., 118°13.98′ W. long.;
(10) 33°15.86′ N. lat., 118°15.27′ W. long.;
(11) 33°18.11′ N. lat., 118°27.96′ W. long.;
(12) 33°19.83′ N. lat., 118°32.16′ W. long.;
(13) 33°20.81′ N. lat., 118°32.94′ W. long.;
(14) 33°21.99′ N. lat., 118°32.04′ W. long.;
(15) 33°23.09′ N. lat., 118°30.37′ W. long.;
(16) 33°24.78′ N. lat., 118°32.46′ W. long.;
(17) 33°25.43′ N. lat., 118°34.93′ W. long.; and
(18) 33°28.42′ N. lat., 118°39.85′ W. long.

(C) The 125-fm (229-m) depth contour around Lasuen Knoll off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°24.57′ N. lat., 118°00.15′ W. long.;
(2) 33°23.42′ N. lat., 117°59.43′ W. long.;
(3) 33°23.69′ N. lat., 117°58.72′ W. long.;
(4) 33°24.72′ N. lat., 117°59.51′ W. long.; and
(5) 33°24.57′ N. lat., 118°00.15′ W. long.

(ix) The 150-fm (274-m) depth contour used between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°14.96′ N. lat., 125°41.24′ W. long.;
(2) 48°12.89′ N. lat., 125°37.83′ W. long.;
(3) 48°11.49′ N. lat., 125°39.27′ W. long.;
(4) 48°08.72′ N. lat., 125°41.84′ W. long.;
(5) 48°07.00′ N. lat., 125°45.00′ W. long.;
(6) 48°06.13′ N. lat., 125°41.57′ W. long.;
(7) 48°05.00′ N. lat., 125°39.00′ W. long.;
(8) 48°04.15′ N. lat., 125°36.71′ W. long.;
(9) 48°03.00′ N. lat., 125°36.00′ W. long.;
(10) 48°01.65′ N. lat., 125°36.96′ W. long.;
(11) 48°01.00′ N. lat., 125°38.50′ W. long.;
(12) 47°57.50′ N. lat., 125°36.50′ W. long.;
(13) 47°54.50′ N. lat., 125°35.00′ W. long.;
(14) 47°56.53′ N. lat., 125°30.33′ W. long.;
(15) 47°57.28′ N. lat., 125°27.89′ W. long.;
(16) 47°59.00′ N. lat., 125°25.50′ W. long.;
(17) 48°01.77′ N. lat., 125°24.05′ W. long.;
(18) 48°02.13′ N. lat., 125°22.80′ W. long.;
(19) 48°03.00′ N. lat., 125°22.50′ W. long.;
(20) 48°03.46′ N. lat., 125°22.10′ W. long.;
(21) 48°04.29′ N. lat., 125°20.37′ W. long.;
(22) 48°02.00′ N. lat., 125°18.50′ W. long.;
(23) 48°00.01′ N. lat., 125°19.90′ W. long.;
(24) 47°58.75′ N. lat., 125°17.54′ W. long.;
(25) 47°53.50′ N. lat., 125°13.50′ W. long.;
(26) 47°48.88′ N. lat., 125°05.91′ W. long.;
(27) 47°47.18′ N. lat., 125°06.60′ W. long.;
(28) 47°48.50′ N. lat., 125°05.00′ W. long.;
(29) 47°45.98′ N. lat., 125°04.26′ W. long.;
(30) 47°45.00′ N. lat., 125°05.50′ W. long.;
(31) 47°42.11′ N. lat., 125°04.74′ W. long.;
(32) 47°39.00′ N. lat., 125°06.00′ W. long.;
(33) 47°35.53′ N. lat., 125°04.55′ W. long.;
(34) 47°30.90′ N. lat., 124°57.31′ W. long.;
(35) 47°29.54′ N. lat., 124°56.50′ W. long.;
(36) 47°29.50′ N. lat., 124°54.50′ W. long.;
(37) 47°28.57′ N. lat., 124°51.50′ W. long.;
(38) 47°25.00′ N. lat., 124°48.00′ W. long.;
(39) 47°23.95′ N. lat., 124°47.24′ W. long.;
(40) 47°23.00′ N. lat., 124°47.00′ W. long.;
(41) 47°21.00′ N. lat., 124°46.50′ W. long.;
(42) 47°18.20′ N. lat., 124°45.84′ W. long.;
(43) 47°18.50′ N. lat., 124°49.00′ W. long.;
(44) 47°19.17′ N. lat., 124°50.86′ W. long.;
(45) 47°18.07′ N. lat., 124°53.29′ W. long.;
(46) 47°17.78′ N. lat., 124°51.39′ W. long.;
(47) 47°16.81′ N. lat., 124°50.85′ W. long.;
(48) 47°15.96′ N. lat., 124°53.15′ W. long.;
(49) 47°14.31′ N. lat., 124°52.62′ W. long.;
(50) 47°11.87′ N. lat., 124°56.90′ W. long.;
(51) 47°12.39′ N. lat., 124°58.09′ W. long.;
(52) 47°09.50′ N. lat., 124°57.50′ W. long.;
(53) 47°09.00′ N. lat., 124°59.00′ W. long.;
(54) 47°06.06′ N. lat., 124°58.80′ W. long.;
(55) 47°03.62′ N. lat., 124°55.96′ W. long.;
(56) 47°02.89′ N. lat., 124°56.89′ W. long.;
(57) 47°01.04′ N. lat., 124°59.54′ W. long.;
(58) 46°58.47′ N. lat., 124°59.08′ W. long.;
(59) 46°58.29′ N. lat., 125°00.28′ W. long.;
(60) 46°56.30′ N. lat., 125°00.75′ W. long.;
(61) 46°57.09′ N. lat., 124°58.86′ W. long.;
(62) 46°55.95′ N. lat., 124°54.88′ W. long.;
(63) 46°54.79′ N. lat., 124°54.14′ W. long.;
(64) 46°58.00′ N. lat., 124°50.00′ W. long.;
(65) 46°54.50′ N. lat., 124°49.00′ W. long.;
(66) 46°54.53′ N. lat., 124°52.94′ W. long.;
(67) 46°49.52′ N. lat., 124°53.41′ W. long.;
(68) 46°39.50′ N. lat., 124°47.00′ W. long.;
(69) 46°39.50′ N. lat., 124°42.50′ W. long.;
(70) 46°37.50′ N. lat., 124°41.00′ W. long.;
(71) 46°36.50′ N. lat., 124°38.00′ W. long.;
(72) 46°33.85′ N. lat., 124°36.99′ W. long.;
(73) 46°33.50′ N. lat., 124°29.50′ W. long.;
(74) 46°32.00′ N. lat., 124°31.00′ W. long.;
(75) 46°30.53′ N. lat., 124°30.55′ W. long.;
(76) 46°25.50′ N. lat., 124°33.00′ W. long.;
(77) 46°23.00′ N. lat., 124°35.00′ W. long.;
(78) 46°21.50′ N. lat., 124°37.00′ W. long.;
(79) 46°20.64′ N. lat., 124°36.21′ W. long.;
(80) 46°20.36′ N. lat., 124°37.85′ W. long.;
(81) 46°19.48′ N. lat., 124°38.35′ W. long.;
(82) 46°18.09′ N. lat., 124°38.30′ W. long.;
(83) 46°16.00′ N. lat., 124°36.00′ W. long.;
(84) 46°14.87′ N. lat., 124°26.15′ W. long.;
(85) 46°13.38′ N. lat., 124°31.36′ W. long.;
(86) 46°12.09′ N. lat., 124°38.39′ W. long.;
(87) 46°09.46′ N. lat., 124°40.64′ W. long.;
(88) 46°07.30′ N. lat., 124°40.68′ W. long.;
(89) 46°02.76′ N. lat., 124°44.01′ W. long.;
(90) 46°02.64′ N. lat., 124°47.96′ W. long.;
(91) 46°01.22′ N. lat., 124°43.47′ W. long.;
(92) 45°51.82′ N. lat., 124°42.89′ W. long.;
(93) 45°45.95′ N. lat., 124°40.72′ W. long.;
(94) 45°44.11′ N. lat., 124°43.09′ W. long.;
(95) 45°34.50′ N. lat., 124°30.27′ W. long.;
(96) 45°21.10′ N. lat., 124°23.11′ W. long.;
(97) 45°09.69′ N. lat., 124°20.45′ W. long.;
(98) 44°56.25′ N. lat., 124°27.03′ W. long.;
(99) 44°44.47′ N. lat., 124°37.85′ W. long.;
(100) 44°31.81′ N. lat., 124°39.60′ W. long.;
(101) 44°31.48′ N. lat., 124°43.30′ W. long.;
(102) 44°12.04′ N. lat., 124°58.16′ W. long.;
(103) 44°07.38′ N. lat., 124°57.87′ W. long.;
(104) 43°57.06′ N. lat., 124°57.20′ W. long.;
(105) 43°52.52′ N. lat., 124°49.00′ W. long.;
(106) 43°51.55′ N. lat., 124°37.49′ W. long.;
(107) 43°47.83′ N. lat., 124°36.43′ W. long.;
(108) 43°31.79′ N. lat., 124°36.80′ W. long.;
(109) 43°29.34′ N. lat., 124°36.77′ W. long.;
(110) 43°26.46′ N. lat., 124°40.02′ W. long.;
(111) 43°16.15′ N. lat., 124°44.37′ W. long.;
(112) 43°09.33′ N. lat., 124°45.35′ W. long.;
(113) 43°08.85′ N. lat., 124°48.92′ W. long.;
(114) 43°03.23′ N. lat., 124°52.41′ W. long.;
(115) 43°00.25′ N. lat., 124°51.93′ W. long.;
(116) 42°56.62′ N. lat., 124°53.93′ W. long.;
(117) 42°54.84′ N. lat., 124°54.01′ W. long.;
(118) 42°52.31′ N. lat., 124°50.76′ W. long.;
(119) 42°47.78′ N. lat., 124°47.27′ W. long.;
(120) 42°46.32′ N. lat., 124°43.59′ W. long.;
(121) 42°41.63′ N. lat., 124°44.07′ W. long.;
(122) 42°38.83′ N. lat., 124°42.77′ W. long.;
(123) 42°35.37′ N. lat., 124°43.22′ W. long.;
(124) 42°32.78′ N. lat., 124°44.68′ W. long.;
(125) 42°32.19′ N. lat., 124°42.40′ W. long.;
(126) 42°30.28′ N. lat., 124°44.30′ W. long.;
(127) 42°28.16′ N. lat., 124°48.38′ W. long.;
(128) 42°18.34′ N. lat., 124°38.77′ W. long.;

(129) 42°13.65′ N. lat., 124°36.82′ W. long.;
(130) 42°00.15′ N. lat., 124°35.81′ W. long.;
(131) 42°00.00′ N. lat., 124°35.99′ W. long.;
(132) 41°47.80′ N. lat., 124°29.41′ W. long.;
(133) 41°23.51′ N. lat., 124°29.50′ W. long.;
(134) 41°13.29′ N. lat., 124°23.31′ W. long.;
(135) 41°06.23′ N. lat., 124°22.62′ W. long.;
(136) 40°55.60′ N. lat., 124°26.04′ W. long.;
(137) 40°49.62′ N. lat., 124°26.57′ W. long.;
(138) 40°45.72′ N. lat., 124°30.00′ W. long.;
(139) 40°40.56′ N. lat., 124°32.11′ W. long.;
(140) 40°37.33′ N. lat., 124°29.27′ W. long.;
(141) 40°35.60′ N. lat., 124°30.49′ W. long.;
(142) 40°37.38′ N. lat., 124°37.14′ W. long.;
(143) 40°36.03′ N. lat., 124°39.97′ W. long.;
(144) 40°31.59′ N. lat., 124°40.74′ W. long.;
(145) 40°29.76′ N. lat., 124°38.13′ W. long.;
(146) 40°28.22′ N. lat., 124°37.23′ W. long.;
(147) 40°24.86′ N. lat., 124°35.71′ W. long.;
(148) 40°23.01′ N. lat., 124°31.94′ W. long.;
(149) 40°23.39′ N. lat., 124°28.64′ W. long.;
(150) 40°22.29′ N. lat., 124°25.25′ W. long.;
(151) 40°21.90′ N. lat., 124°25.18′ W. long.;
(152) 40°22.02′ N. lat., 124°28.00′ W. long.;
(153) 40°21.34′ N. lat., 124°29.53′ W. long.;
(154) 40°19.74′ N. lat., 124°28.95′ W. long.;
(155) 40°18.13′ N. lat., 124°27.08′ W. long.;
(156) 40°17.45′ N. lat., 124°25.53′ W. long.;
(157) 40°17.97′ N. lat., 124°24.12′ W. long.;
(158) 40°15.96′ N. lat., 124°26.05′ W. long.;
(159) 40°17.00′ N. lat., 124°35.01′ W. long.;
(160) 40°15.97′ N. lat., 124°35.90′ W. long.;
(161) 40°10.00′ N. lat., 124°22.96′ W. long.;
(162) 40°07.00′ N. lat., 124°19.00′ W. long.;
(163) 40°08.10′ N. lat., 124°16.70′ W. long.;
(164) 40°05.90′ N. lat., 124°17.77′ W. long.;
(165) 40°02.99′ N. lat., 124°15.55′ W. long.;
(166) 40°02.00′ N. lat., 124°12.97′ W. long.;
(167) 40°02.60′ N. lat., 124°10.61′ W. long.;
(168) 40°03.63′ N. lat., 124°09.12′ W. long.;
(169) 40°02.18′ N. lat., 124°09.07′ W. long.;
(170) 39°58.25′ N. lat., 124°12.56′ W. long.;
(171) 39°57.03′ N. lat., 124°11.34′ W. long.;
(172) 39°56.30′ N. lat., 124°08.96′ W. long.;
(173) 39°54.82′ N. lat., 124°07.66′ W. long.;
(174) 39°52.57′ N. lat., 124°08.55′ W. long.;
(175) 39°45.34′ N. lat., 124°03.30′ W. long.;
(176) 39°34.75′ N. lat., 123°58.50′ W. long.;
(177) 39°34.22′ N. lat., 123°56.82′ W. long.;
(178) 39°32.98′ N. lat., 123°56.43′ W. long.;
(179) 39°31.47′ N. lat., 123°58.73′ W. long.;
(180) 39°05.68′ N. lat., 123°57.81′ W. long.;
(181) 39°00.24′ N. lat., 123°56.74′ W. long.;
(182) 38°54.31′ N. lat., 123°56.73′ W. long.;
(183) 38°41.42′ N. lat., 123°46.75′ W. long.;
(184) 38°39.61′ N. lat., 123°46.48′ W. long.;
(185) 38°37.52′ N. lat., 123°43.78′ W. long.;
(186) 38°35.25′ N. lat., 123°42.00′ W. long.;
(187) 38°28.79′ N. lat., 123°37.07′ W. long.;
(188) 38°19.88′ N. lat., 123°32.54′ W. long.;
(189) 38°14.43′ N. lat., 123°25.56′ W. long.;
(190) 38°08.75′ N. lat., 123°24.48′ W. long.;
(191) 38°10.10′ N. lat., 123°27.20′ W. long.;
(192) 38°07.16′ N. lat., 123°28.18′ W. long.;
(193) 38°06.42′ N. lat., 123°30.18′ W. long.;
(194) 38°04.28′ N. lat., 123°31.70′ W. long.;
(195) 38°01.88′ N. lat., 123°30.98′ W. long.;
(196) 38°00.75′ N. lat., 123°29.72′ W. long.;
(197) 38°00.00′ N. lat., 123°28.60′ W. long.;
(198) 37°58.23′ N. lat., 123°26.90′ W. long.;
(199) 37°55.32′ N. lat., 123°27.19′ W. long.;
(200) 37°51.47′ N. lat., 123°24.92′ W. long.;
(201) 37°44.47′ N. lat., 123°11.57′ W. long.;
(202) 37°36.33′ N. lat., 123°01.76′ W. long.;
(203) 37°15.16′ N. lat., 122°51.64′ W. long.;
(204) 37°01.68′ N. lat., 122°37.28′ W. long.;
(205) 36°59.70′ N. lat., 122°33.71′ W. long.;
(206) 36°58.00′ N. lat., 122°27.80′ W. long.;
(207) 37°00.25′ N. lat., 122°24.85′ W. long.;
(208) 36°57.50′ N. lat., 122°24.98′ W. long.;
(209) 36°58.38′ N. lat., 122°21.85′ W. long.;
(210) 36°55.85′ N. lat., 122°21.95′ W. long.;
(211) 36°52.02′ N. lat., 122°12.10′ W. long.;
(212) 36°47.63′ N. lat., 122°07.37′ W. long.;
(213) 36°47.26′ N. lat., 122°03.22′ W. long.;
(214) 36°50.34′ N. lat., 121°58.40′ W. long.;
(215) 36°48.83′ N. lat., 121°59.14′ W. long.;
(216) 36°44.81′ N. lat., 121°58.28′ W. long.;
(217) 36°39.00′ N. lat., 122°01.71′ W. long.;
(218) 36°29.60′ N. lat., 122°00.49′ W. long.;
(219) 36°23.43′ N. lat., 121°59.76′ W. long.;
(220) 36°18.90′ N. lat., 122°05.32′ W. long.;
(221) 36°15.38′ N. lat., 122°01.40′ W. long.;
(222) 36°13.79′ N. lat., 121°58.12′ W. long.;
(223) 36°10.12′ N. lat., 121°43.33′ W. long.;
(224) 36°02.57′ N. lat., 121°37.02′ W. long.;
(225) 36°01.01′ N. lat., 121°36.95′ W. long.;
(226) 35°57.74′ N. lat., 121°33.45′ W. long.;
(227) 35°51.32′ N. lat., 121°30.08′ W. long.;
(228) 35°45.84′ N. lat., 121°28.84′ W. long.;
(229) 35°38.94′ N. lat., 121°23.16′ W. long.;
(230) 35°26.00′ N. lat., 121°08.00′ W. long.;
(231) 35°07.42′ N. lat., 120°57.08′ W. long.;
(232) 34°42.76′ N. lat., 120°55.09′ W. long.;
(233) 34°37.75′ N. lat., 120°51.96′ W. long.;
(234) 34°29.29′ N. lat., 120°44.19′ W. long.;
(235) 34°27.00′ N. lat., 120°40.42′ W. long.;
(236) 34°21.89′ N. lat., 120°31.36′ W. long.;
(237) 34°20.79′ N. lat., 120°21.58′ W. long.;
(238) 34°23.97′ N. lat., 120°15.25′ W. long.;
(239) 34°22.11′ N. lat., 119°56.63′ W. long.;
(240) 34°19.00′ N. lat., 119°48.00′ W. long.;
(241) 34°15.00′ N. lat., 119°48.00′ W. long.;
(242) 34°08.00′ N. lat., 119°37.00′ W. long.;
(243) 34°08.39′ N. lat., 119°54.78′ W. long.;
(244) 34°07.10′ N. lat., 120°10.37′ W. long.;
(245) 34°10.08′ N. lat., 120°22.98′ W. long.;
(246) 34°13.16′ N. lat., 120°29.40′ W. long.;
(247) 34°09.41′ N. lat., 120°37.75′ W. long.;
(248) 34°03.15′ N. lat., 120°34.71′ W. long.;
(249) 33°57.09′ N. lat., 120°27.76′ W. long.;
(250) 33°51.00′ N. lat., 120°09.00′ W. long.;
(251) 33°38.16′ N. lat., 119°59.23′ W. long.;
(252) 33°37.04′ N. lat., 119°50.17′ W. long.;
(253) 33°42.28′ N. lat., 119°48.85′ W. long.;
(254) 33°53.96′ N. lat., 119°53.77′ W. long.;
(255) 33°59.94′ N. lat., 119°19.57′ W. long.;
(256) 34°03.12′ N. lat., 119°15.51′ W. long.;
(257) 34°01.97′ N. lat., 119°07.28′ W. long.;
(258) 34°03.60′ N. lat., 119°04.71′ W. long.;
(259) 33°59.30′ N. lat., 119°03.73′ W. long.;
(260) 33°58.87′ N. lat., 118°59.37′ W. long.;
(261) 33°58.08′ N. lat., 118°41.14′ W. long.;
(262) 33°50.93′ N. lat., 118°37.65′ W. long.;
(263) 33°39.54′ N. lat., 118°18.70′ W. long.;
(264) 33°35.42′ N. lat., 118°17.14′ W. long.;
(265) 33°32.15′ N. lat., 118°10.84′ W. long.;
(266) 33°33.71′ N. lat., 117°53.72′ W. long.;
(267) 33°31.17′ N. lat., 117°49.11′ W. long.;
(268) 33°16.53′ N. lat., 117°36.13′ W. long.;
(269) 33°06.77′ N. lat., 117°22.92′ W. long.;
(270) 32°58.94′ N. lat., 117°20.05′ W. long.;
(271) 32°55.83′ N. lat., 117°20.15′ W. long.;
(272) 32°46.29′ N. lat., 117°23.89′ W. long.;
(273) 32°42.00′ N. lat., 117°22.16′ W. long.;
(274) 32°39.47′ N. lat., 117°27.78′ W. long.; and
(275) 32°34.83′ N. lat., 117°24.69′ W. long.

(A) The 150-fm (274-m) depth contour used around San Clemente Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 32°47.95′ N. lat., 118°19.31′ W. long.;
(2) 32°49.79′ N. lat., 118°20.82′ W. long.;
(3) 32°55.99′ N. lat., 118°28.80′ W. long.;
(4) 33°03.00′ N. lat., 118°34.00′ W. long.;
(5) 33°05.00′ N. lat., 118°38.00′ W. long.;
(6) 33°03.21′ N. lat., 118°39.85′ W. long.;
(7) 33°01.93′ N. lat., 118°39.85′ W. long.;
(8) 32°54.69′ N. lat., 118°35.45′ W. long.;
(9) 32°53.28′ N. lat., 118°33.58′ W. long.;
(10) 32°48.26′ N. lat., 118°31.62′ W. long.;
(11) 32°43.03′ N. lat., 118°24.21′ W. long.;
(12) 32°47.15′ N. lat., 118°21.53′ W. long.; and
(13) 32°47.95′ N. lat., 118°19.31′ W. long.

(B) The 150-fm (274-m) depth contour used around Santa Catalina Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°17.24′ N. lat., 118°12.94′ W. long.;
(2) 33°23.60′ N. lat., 118°18.79′ W. long.;
(3) 33°26.00′ N. lat., 118°22.00′ W. long.;
(4) 33°27.57′ N. lat., 118°27.69′ W. long.;
(5) 33°29.78′ N. lat., 118°31.01′ W. long.;
(6) 33°30.46′ N. lat., 118°36.52′ W. long.;
(7) 33°28.65′ N. lat., 118°41.07′ W. long.;
(8) 33°23.23′ N. lat., 118°30.69′ W. long.;
(9) 33°20.97′ N. lat., 118°33.29′ W. long.;
(10) 33°19.81′ N. lat., 118°32.24′ W. long.;
(11) 33°18.00′ N. lat., 118°28.00′ W. long.;
(12) 33°15.62′ N. lat., 118°14.74′ W. long.;
(13) 33°16.00′ N. lat., 118°13.00′ W. long.; and
(14) 33°17.24′ N. lat., 118°12.94′ W. long.

(C) The 150-fm (274-m) depth contour used around Lasuen Knoll off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°24.99′ N. lat., 117°59.32′ W. long.;
(2) 33°23.66′ N. lat., 117°58.28′ W. long.;
(3) 33°23.21′ N. lat., 117°59.55′ W. long.;
(4) 33°24.74′ N. lat., 118°00.61′ W. long.; and
(5) 33°24.99′ N. lat., 117°59.32′ W. long.

(x) The 180-fm (329-m) depth contour used between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°14.82′ N. lat., 125°41.61′ W. long.;
(2) 48°12.86′ N. lat., 125°37.95′ W. long.;
(3) 48°11.28′ N. lat., 125°39.67′ W. long.;
(4) 48°10.13′ N. lat., 125°42.62′ W. long.;
(5) 48°08.86′ N. lat., 125°41.92′ W. long.;
(6) 48°08.15′ N. lat., 125°44.95′ W. long.;
(7) 48°07.18′ N. lat., 125°45.67′ W. long.;
(8) 48°05.79′ N. lat., 125°44.64′ W. long.;
(9) 48°06.04′ N. lat., 125°41.84′ W. long.;
(10) 48°04.26′ N. lat., 125°40.09′ W. long.;
(11) 48°04.18′ N. lat., 125°36.94′ W. long.;
(12) 48°03.02′ N. lat., 125°36.24′ W. long.;
(13) 48°01.75′ N. lat., 125°37.42′ W. long.;
(14) 48°01.39′ N. lat., 125°39.42′ W. long.;
(15) 47°57.08′ N. lat., 125°36.51′ W. long.;
(16) 47°55.20′ N. lat., 125°36.62′ W. long.;
(17) 47°54.33′ N. lat., 125°34.98′ W. long.;
(18) 47°54.73′ N. lat., 125°31.95′ W. long.;

(19) 47°56.39′ N. lat., 125°30.22′ W. long.;
(20) 47°55.86′ N. lat., 125°28.54′ W. long.;
(21) 47°58.07′ N. lat., 125°25.72′ W. long.;
(22) 48°00.81′ N. lat., 125°24.39′ W. long.;
(23) 48°01.81′ N. lat., 125°23.76′ W. long.;
(24) 48°02.16′ N. lat., 125°22.71′ W. long.;
(25) 48°03.46′ N. lat., 125°22.01′ W. long.;
(26) 48°04.21′ N. lat., 125°20.40′ W. long.;
(27) 48°03.15′ N. lat., 125°19.50′ W. long.;
(28) 48°01.92′ N. lat., 125°18.69′ W. long.;
(29) 48°00.85′ N. lat., 125°20.02′ W. long.;
(30) 48°00.12′ N. lat., 125°20.04′ W. long.;
(31) 47°58.18′ N. lat., 125°18.78′ W. long.;
(32) 47°58.24′ N. lat., 125°17.26′ W. long.;
(33) 47°52.47′ N. lat., 125°15.30′ W. long.;
(34) 47°52.13′ N. lat., 125°12.95′ W. long.;
(35) 47°50.60′ N. lat., 125°10.65′ W. long.;
(36) 47°49.39′ N. lat., 125°10.59′ W. long.;
(37) 47°48.74′ N. lat., 125°06.07′ W. long.;
(38) 47°47.03′ N. lat., 125°06.95′ W. long.;
(39) 47°47.46′ N. lat., 125°05.20′ W. long.;
(40) 47°45.88′ N. lat., 125°04.50′ W. long.;
(41) 47°44.51′ N. lat., 125°06.64′ W. long.;
(42) 47°42.22′ N. lat., 125°04.86′ W. long.;
(43) 47°38.49′ N. lat., 125°06.32′ W. long.;
(44) 47°34.93′ N. lat., 125°04.34′ W. long.;
(45) 47°30.85′ N. lat., 124°57.42′ W. long.;
(46) 47°28.80′ N. lat., 124°56.51′ W. long.;
(47) 47°29.25′ N. lat., 124°53.92′ W. long.;
(48) 47°28.29′ N. lat., 124°51.32′ W. long.;
(49) 47°24.04′ N. lat., 124°47.38′ W. long.;
(50) 47°18.24′ N. lat., 124°45.97′ W. long.;
(51) 47°19.36′ N. lat., 124°50.96′ W. long.;
(52) 47°18.07′ N. lat., 124°53.38′ W. long.;
(53) 47°17.73′ N. lat., 124°52.83′ W. long.;
(54) 47°17.77′ N. lat., 124°51.56′ W. long.;
(55) 47°16.84′ N. lat., 124°50.94′ W. long.;
(56) 47°16.01′ N. lat., 124°53.36′ W. long.;
(57) 47°14.32′ N. lat., 124°52.73′ W. long.;
(58) 47°11.97′ N. lat., 124°56.81′ W. long.;
(59) 47°12.93′ N. lat., 124°58.47′ W. long.;
(60) 47°09.43′ N. lat., 124°57.99′ W. long.;
(61) 47°09.36′ N. lat., 124°59.29′ W. long.;
(62) 47°05.88′ N. lat., 124°59.06′ W. long.;
(63) 47°03.64′ N. lat., 124°56.07′ W. long.;
(64) 47°01.00′ N. lat., 124°59.69′ W. long.;
(65) 46°58.72′ N. lat., 124°59.17′ W. long.;
(66) 46°58.30′ N. lat., 125°00.60′ W. long.;
(67) 46°55.61′ N. lat., 125°01.19′ W. long.;
(68) 46°56.96′ N. lat., 124°58.85′ W. long.;
(69) 46°55.91′ N. lat., 124°54.98′ W. long.;
(70) 46°54.55′ N. lat., 124°54.21′ W. long.;
(71) 46°56.80′ N. lat., 124°50.55′ W. long.;
(72) 46°54.87′ N. lat., 124°49.59′ W. long.;
(73) 46°54.63′ N. lat., 124°53.48′ W. long.;
(74) 46°52.33′ N. lat., 124°54.75′ W. long.;
(75) 46°45.12′ N. lat., 124°51.82′ W. long.;
(76) 46°39.20′ N. lat., 124°47.02′ W. long.;
(77) 46°33.45′ N. lat., 124°36.61′ W. long.;
(78) 46°33.37′ N. lat., 124°30.21′ W. long.;
(79) 46°31.67′ N. lat., 124°31.41′ W. long.;
(80) 46°27.87′ N. lat., 124°32.04′ W. long.;
(81) 46°21.01′ N. lat., 124°37.63′ W. long.;
(82) 46°18.58′ N. lat., 124°38.92′ W. long.;
(83) 46°16.00′ N. lat., 124°36.17′ W. long.;
(84) 46°15.97′ N. lat., 124°23.57′ W. long.;
(85) 46°12.85′ N. lat., 124°35.52′ W. long.;
(86) 46°12.27′ N. lat., 124°38.69′ W. long.;
(87) 46°08.71′ N. lat., 124°41.27′ W. long.;
(88) 46°05.79′ N. lat., 124°42.12′ W. long.;
(89) 46°02.84′ N. lat., 124°48.05′ W. long.;
(90) 46°02.41′ N. lat., 124°48.15′ W. long.;
(91) 45°58.96′ N. lat., 124°43.98′ W. long.;
(92) 45°47.05′ N. lat., 124°43.25′ W. long.;
(93) 45°44.00′ N. lat., 124°45.37′ W. long.;
(94) 45°34.97′ N. lat., 124°31.95′ W. long.;
(95) 45°13.01′ N. lat., 124°21.71′ W. long.;
(96) 45°09.59′ N. lat., 124°22.78′ W. long.;
(97) 45°00.22′ N. lat., 124°28.31′ W. long.;
(98) 44°53.53′ N. lat., 124°32.98′ W. long.;
(99) 44°40.25′ N. lat., 124°46.34′ W. long.;
(100) 44°28.83′ N. lat., 124°47.09′ W. long.;
(101) 44°22.97′ N. lat., 124°49.38′ W. long.;
(102) 44°13.07′ N. lat., 124°58.34′ W. long.;
(103) 43°57.99′ N. lat., 124°57.84′ W. long.;
(104) 43°51.43′ N. lat., 124°52.02′ W. long.;
(105) 43°50.72′ N. lat., 124°39.23′ W. long.;
(106) 43°39.04′ N. lat., 124°37.82′ W. long.;
(107) 43°27.76′ N. lat., 124°39.76′ W. long.;
(108) 43°20.22′ N. lat., 124°42.92′ W. long.;
(109) 43°13.07′ N. lat., 124°46.03′ W. long.;
(110) 43°10.43′ N. lat., 124°50.27′ W. long.;
(111) 43°03.47′ N. lat., 124°52.80′ W. long.;
(112) 42°56.93′ N. lat., 124°53.95′ W. long.;
(113) 42°54.74′ N. lat., 124°54.19′ W. long.;
(114) 42°49.43′ N. lat., 124°52.03′ W. long.;
(115) 42°47.68′ N. lat., 124°47.72′ W. long.;
(116) 42°46.17′ N. lat., 124°44.05′ W. long.;
(117) 42°41.67′ N. lat., 124°44.36′ W. long.;
(118) 42°38.79′ N. lat., 124°42.87′ W. long.;
(119) 42°32.39′ N. lat., 124°45.38′ W. long.;
(120) 42°32.07′ N. lat., 124°43.44′ W. long.;
(121) 42°30.98′ N. lat., 124°43.84′ W. long.;
(122) 42°28.37′ N. lat., 124°48.91′ W. long.;
(123) 42°20.07′ N. lat., 124°41.59′ W. long.;
(124) 42°15.05′ N. lat., 124°38.07′ W. long.;
(125) 42°07.37′ N. lat., 124°37.25′ W. long.;
(126) 42°04.93′ N. lat., 124°36.79′ W. long.;
(127) 42°00.00′ N. lat., 124°36.26′ W. long.;
(128) 42°00.00′ N. lat., 124°36.33′ W. long.;
(129) 41°47.60′ N. lat., 124°29.75′ W. long.;
(130) 41°22.07′ N. lat., 124°29.55′ W. long.;
(131) 41°13.58′ N. lat., 124°24.17′ W. long.;
(132) 41°06.51′ N. lat., 124°23.07′ W. long.;
(133) 40°55.20′ N. lat., 124°27.46′ W. long.;
(134) 40°49.76′ N. lat., 124°27.17′ W. long.;
(135) 40°45.79′ N. lat., 124°30.37′ W. long.;
(136) 40°40.31′ N. lat., 124°32.47′ W. long.;
(137) 40°37.42′ N. lat., 124°37.20′ W. long.;
(138) 40°36.03′ N. lat., 124°39.97′ W. long.;
(139) 40°31.48′ N. lat., 124°40.95′ W. long.;
(140) 40°29.76′ N. lat., 124°38.13′ W. long.;
(141) 40°24.81′ N. lat., 124°35.82′ W. long.;
(142) 40°22.00′ N. lat., 124°30.01′ W. long.;
(143) 40°16.84′ N. lat., 124°29.87′ W. long.;
(144) 40°17.06′ N. lat., 124°35.51′ W. long.;
(145) 40°16.41′ N. lat., 124°39.10′ W. long.;
(146) 40°10.00′ N. lat., 124°23.56′ W. long.;
(147) 40°06.67′ N. lat., 124°19.08′ W. long.;
(148) 40°08.10′ N. lat., 124°16.71′ W. long.;
(149) 40°05.90′ N. lat., 124°17.77′ W. long.;
(150) 40°02.80′ N. lat., 124°16.28′ W. long.;
(151) 40°01.98′ N. lat., 124°12.99′ W. long.;
(152) 40°01.53′ N. lat., 124°09.82′ W. long.;
(153) 39°58.28′ N. lat., 124°12.93′ W. long.;
(154) 39°57.06′ N. lat., 124°12.03′ W. long.;
(155) 39°56.31′ N. lat., 124°08.98′ W. long.;
(156) 39°55.20′ N. lat., 124°07.98′ W. long.;
(157) 39°52.57′ N. lat., 124°09.04′ W. long.;
(158) 39°42.78′ N. lat., 124°02.11′ W. long.;
(159) 39°34.76′ N. lat., 123°58.51′ W. long.;
(160) 39°34.22′ N. lat., 123°56.82′ W. long.;
(161) 39°32.98′ N. lat., 123°56.43′ W. long.;
(162) 39°32.14′ N. lat., 123°58.83′ W. long.;
(163) 39°07.79′ N. lat., 123°58.72′ W. long.;
(164) 39°00.99′ N. lat., 123°57.56′ W. long.;
(165) 39°00.05′ N. lat., 123°56.83′ W. long.;
(166) 38°56.28′ N. lat., 123°57.53′ W. long.;
(167) 38°56.01′ N. lat., 123°58.72′ W. long.;
(168) 38°52.41′ N. lat., 123°56.38′ W. long.;
(169) 38°46.81′ N. lat., 123°51.46′ W. long.;
(170) 38°45.56′ N. lat., 123°51.32′ W. long.;
(171) 38°43.24′ N. lat., 123°49.91′ W. long.;
(172) 38°41.42′ N. lat., 123°47.22′ W. long.;
(173) 38°40.97′ N. lat., 123°47.80′ W. long.;
(174) 38°38.58′ N. lat., 123°46.07′ W. long.;
(175) 38°37.38′ N. lat., 123°43.80′ W. long.;
(176) 38°33.86′ N. lat., 123°41.51′ W. long.;
(177) 38°29.45′ N. lat., 123°38.42′ W. long.;
(178) 38°28.20′ N. lat., 123°38.17′ W. long.;
(179) 38°24.09′ N. lat., 123°35.26′ W. long.;
(180) 38°16.72′ N. lat., 123°31.42′ W. long.;
(181) 38°15.32′ N. lat., 123°29.33′ W. long.;
(182) 38°14.45′ N. lat., 123°26.15′ W. long.;
(183) 38°10.26′ N. lat., 123°25.43′ W. long.;
(184) 38°12.61′ N. lat., 123°28.08′ W. long.;
(185) 38°11.98′ N. lat., 123°29.35′ W. long.;
(186) 38°08.23′ N. lat., 123°28.04′ W. long.;
(187) 38°06.39′ N. lat., 123°30.59′ W. long.;
(188) 38°04.25′ N. lat., 123°31.81′ W. long.;
(189) 38°02.08′ N. lat., 123°31.27′ W. long.;
(190) 38°00.17′ N. lat., 123°29.43′ W. long.;
(191) 38°00.00′ N. lat., 123°28.55′ W. long.;
(192) 37°58.24′ N. lat., 123°26.91′ W. long.;
(193) 37°55.32′ N. lat., 123°27.19′ W. long.;
(194) 37°51.52′ N. lat., 123°25.01′ W. long.;
(195) 37°44.21′ N. lat., 123°11.38′ W. long.;
(196) 37°36.27′ N. lat., 123°01.86′ W. long.;
(197) 37°14.29′ N. lat., 122°52.99′ W. long.;
(198) 37°00.86′ N. lat., 122°37.55′ W. long.;
(199) 36°59.71′ N. lat., 122°33.73′ W. long.;
(200) 36°57.98′ N. lat., 122°27.80′ W. long.;
(201) 36°59.83′ N. lat., 122°25.17′ W. long.;
(202) 36°57.21′ N. lat., 122°25.17′ W. long.;
(203) 36°57.79′ N. lat., 122°22.28′ W. long.;
(204) 36°55.86′ N. lat., 122°21.99′ W. long.;
(205) 36°52.06′ N. lat., 122°12.12′ W. long.;
(206) 36°47.63′ N. lat., 122°07.40′ W. long.;
(207) 36°47.26′ N. lat., 122°03.23′ W. long.;
(208) 36°49.53′ N. lat., 121°59.35′ W. long.;
(209) 36°44.81′ N. lat., 121°58.29′ W. long.;
(210) 36°38.95′ N. lat., 122°02.02′ W. long.;
(211) 36°23.43′ N. lat., 121°59.76′ W. long.;
(212) 36°19.66′ N. lat., 122°06.25′ W. long.;
(213) 36°14.78′ N. lat., 122°01.52′ W. long.;
(214) 36°13.64′ N. lat., 121°57.83′ W. long.;
(215) 36°09.99′ N. lat., 121°43.48′ W. long.;
(216) 35°57.09′ N. lat., 121°34.16′ W. long.;
(217) 35°52.71′ N. lat., 121°32.32′ W. long.;
(218) 35°51.23′ N. lat., 121°30.54′ W. long.;
(219) 35°46.07′ N. lat., 121°29.75′ W. long.;
(220) 35°34.08′ N. lat., 121°19.83′ W. long.;
(221) 35°31.41′ N. lat., 121°14.80′ W. long.;
(222) 35°15.42′ N. lat., 121°03.47′ W. long.;
(223) 35°07.70′ N. lat., 120°59.31′ W. long.;
(224) 34°57.27′ N. lat., 120°56.93′ W. long.;
(225) 34°44.27′ N. lat., 120°57.65′ W. long.;
(226) 34°32.75′ N. lat., 120°50.08′ W. long.;
(227) 34°27.00′ N. lat., 120°41.50′ W. long.;
(228) 34°20.00′ N. lat., 120°30.99′ W. long.;
(229) 34°19.15′ N. lat., 120°19.78′ W. long.;
(230) 34°23.24′ N. lat., 120°14.17′ W. long.;
(231) 34°21.35′ N. lat., 119°54.89′ W. long.;
(232) 34°09.79′ N. lat., 119°44.51′ W. long.;
(233) 34°07.34′ N. lat., 120°06.71′ W. long.;
(234) 34°09.74′ N. lat., 120°19.78′ W. long.;
(235) 34°13.95′ N. lat., 120°29.78′ W. long.;
(236) 34°09.41′ N. lat., 120°37.75′ W. long.;
(237) 34°03.39′ N. lat., 120°35.26′ W. long.;
(238) 33°56.82′ N. lat., 120°28.30′ W. long.;
(239) 33°50.71′ N. lat., 120°09.24′ W. long.;
(240) 33°38.21′ N. lat., 119°59.90′ W. long.;
(241) 33°35.35′ N. lat., 119°51.95′ W. long.;
(242) 33°35.99′ N. lat., 119°49.13′ W. long.;
(243) 33°42.74′ N. lat., 119°47.80′ W. long.;
(244) 33°53.65′ N. lat., 119°53.29′ W. long.;
(245) 33°57.85′ N. lat., 119°31.05′ W. long.;
(246) 33°56.78′ N. lat., 119°27.44′ W. long.;

(247) 33°58.03′ N. lat., 119°27.82′ W. long.;
(248) 33°59.31′ N. lat., 119°20.02′ W. long.;
(249) 34°02.91′ N. lat., 119°15.38′ W. long.;
(250) 33°59.04′ N. lat., 119°03.02′ W. long.;
(251) 33°57.88′ N. lat., 118°41.69′ W. long.;
(252) 33°50.89′ N. lat., 118°37.78′ W. long.;
(253) 33°39.54′ N. lat., 118°18.70′ W. long.;
(254) 33°35.42′ N. lat., 118°17.15′ W. long.;
(255) 33°31.26′ N. lat., 118°10.84′ W. long.;
(256) 33°32.71′ N. lat., 117°52.05′ W. long.;
(257) 32°58.94′ N. lat., 117°20.05′ W. long.;
(258) 32°46.45′ N. lat., 117°24.37′ W. long.;
(259) 32°42.25′ N. lat., 117°22.87′ W. long.;
(260) 32°39.50′ N. lat., 117°27.80′ W. long.; and
(261) 32°34.83′ N. lat., 117°24.67′ W. long.

(A) The 180-fm (329-m) depth contour used around San Clemente Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°01.90′ N. lat., 118°40.17′ W. long.;
(2) 33°03.23′ N. lat., 118°40.05′ W. long.;
(3) 33°05.07′ N. lat., 118°39.01′ W. long.;
(4) 33°05.00′ N. lat., 118°38.01′ W. long.;
(5) 33°03.00′ N. lat., 118°34.00′ W. long.;
(6) 32°55.92′ N. lat., 118°28.39′ W. long.;
(7) 32°49.78′ N. lat., 118°20.82′ W. long.;
(8) 32°47.32′ N. lat., 118°18.30′ W. long.;
(9) 32°47.46′ N. lat., 118°20.29′ W. long.;
(10) 32°46.21′ N. lat., 118°21.96′ W. long.;
(11) 32°42.25′ N. lat., 118°24.07′ W. long.;
(12) 32°47.73′ N. lat., 118°31.74′ W. long.;
(13) 32°53.16′ N. lat., 118°33.85′ W. long.;
(14) 32°54.51′ N. lat., 118°35.56′ W. long.; and
(15) 33°01.90′ N. lat., 118°40.17′ W. long.

(B) The 180-fm (329-m) depth contour used around Santa Catalina Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°30.00′ N. lat., 118°44.18′ W. long.;
(2) 33°30.65′ N. lat., 118°35.07′ W. long.;
(3) 33°29.88′ N. lat., 118°30.89′ W. long.;
(4) 33°27.54′ N. lat., 118°26.91′ W. long.;
(5) 33°26.11′ N. lat., 118°21.97′ W. long.;
(6) 33°24.20′ N. lat., 118°19.05′ W. long.;
(7) 33°14.58′ N. lat., 118°10.35′ W. long.;
(8) 33°17.91′ N. lat., 118°28.20′ W. long.;
(9) 33°19.14′ N. lat., 118°31.34′ W. long.;
(10) 33°20.79′ N. lat., 118°33.75′ W. long.;
(11) 33°23.14′ N. lat., 118°30.80′ W. long.; and
(12) 33°30.00′ N. lat., 118°44.18′ W. long.

(C) The 180-fm (329-m) depth contour used around Lasuen Knoll off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°25.12′ N. lat., 118°01.09′ W. long.;
(2) 33°25.41′ N. lat., 117°59.36′ W. long.;
(3) 33°23.49′ N. lat., 117°57.47′ W. long.;
(4) 33°23.02′ N. lat., 117°59.58′ W. long.; and
(5) 33°25.12′ N. lat., 118°01.09′ W. long.

(D) The 180-fm (329-m) depth contour used around San Diego Rise off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 32°49.98′ N. lat., 117°50.19′ W. long.;
(2) 32°44.10′ N. lat., 117°45.34′ W. long.;
(3) 32°42.01′ N. lat., 117°46.01′ W. long.;
(4) 32°44.42′ N. lat., 117°48.69′ W. long.;
(5) 32°49.86′ N. lat., 117°50.50′ W. long. and
(6) 32°49.98′ N. lat., 117°50.19′ W. long.

(xi) The 200-fm (366-m) depth contour between the U.S. border with Canada and the U.S. border with Mexico is defined by straight lines connecting all of the following points in the order stated:

(1) 48°14.75′ N. lat., 125°41.73′ W. long.;
(2) 48°12.85′ N. lat., 125°38.06′ W. long.;
(3) 48°11.52′ N. lat., 125°39.45′ W. long.;
(4) 48°10.14′ N. lat., 125°42.81′ W. long.;
(5) 48°08.96′ N. lat., 125°42.08′ W. long.;
(6) 48°08.33′ N. lat., 125°44.91′ W. long.;
(7) 48°07.19′ N. lat., 125°45.87′ W. long.;
(8) 48°05.66′ N. lat., 125°44.79′ W. long.;
(9) 48°05.91′ N. lat., 125°42.16′ W. long.;
(10) 48°04.11′ N. lat., 125°40.17′ W. long.;
(11) 48°04.07′ N. lat., 125°36.96′ W. long.;
(12) 48°03.05′ N. lat., 125°36.38′ W. long.;
(13) 48°01.98′ N. lat., 125°37.41′ W. long.;
(14) 48°01.46′ N. lat., 125°39.61′ W. long.;
(15) 47°57.28′ N. lat., 125°36.87′ W. long.;
(16) 47°55.11′ N. lat., 125°36.92′ W. long.;
(17) 47°54.09′ N. lat., 125°34.98′ W. long.;
(18) 47°54.50′ N. lat., 125°32.01′ W. long.;
(19) 47°56.07′ N. lat., 125°30.17′ W. long.;
(20) 47°55.65′ N. lat., 125°28.46′ W. long.;
(21) 47°57.88′ N. lat., 125°25.61′ W. long.;
(22) 48°01.63′ N. lat., 125°23.75′ W. long.;
(23) 48°02.21′ N. lat., 125°22.43′ W. long.;
(24) 48°03.60′ N. lat., 125°21.84′ W. long.;
(25) 48°03.98′ N. lat., 125°20.65′ W. long.;
(26) 48°03.26′ N. lat., 125°19.76′ W. long.;
(27) 48°01.49′ N. lat., 125°18.80′ W. long.;
(28) 48°01.03′ N. lat., 125°20.12′ W. long.;
(29) 48°00.04′ N. lat., 125°20.26′ W. long.;
(30) 47°58.10′ N. lat., 125°18.91′ W. long.;
(31) 47°58.17′ N. lat., 125°17.50′ W. long.;
(32) 47°52.28′ N. lat., 125°16.06′ W. long.;
(33) 47°51.92′ N. lat., 125°13.89′ W. long.;
(34) 47°49.20′ N. lat., 125°10.67′ W. long.;
(35) 47°48.69′ N. lat., 125°06.50′ W. long.;
(36) 47°46.54′ N. lat., 125°07.68′ W. long.;
(37) 47°47.24′ N. lat., 125°05.38′ W. long.;
(38) 47°45.95′ N. lat., 125°04.61′ W. long.;
(39) 47°44.58′ N. lat., 125°07.12′ W. long.;
(40) 47°42.24′ N. lat., 125°05.15′ W. long.;
(41) 47°38.54′ N. lat., 125°06.76′ W. long.;
(42) 47°34.86′ N. lat., 125°04.67′ W. long.;
(43) 47°30.75′ N. lat., 124°57.52′ W. long.;
(44) 47°28.51′ N. lat., 124°56.69′ W. long.;
(45) 47°29.15′ N. lat., 124°54.10′ W. long.;
(46) 47°28.43′ N. lat., 124°51.58′ W. long.;
(47) 47°24.13′ N. lat., 124°47.51′ W. long.;
(48) 47°18.31′ N. lat., 124°46.17′ W. long.;
(49) 47°19.57′ N. lat., 124°51.01′ W. long.;
(50) 47°18.12′ N. lat., 124°53.66′ W. long.;
(51) 47°17.59′ N. lat., 124°52.94′ W. long.;
(52) 47°17.71′ N. lat., 124°51.63′ W. long.;
(53) 47°16.90′ N. lat., 124°51.23′ W. long.;
(54) 47°16.10′ N. lat., 124°53.67′ W. long.;
(55) 47°14.24′ N. lat., 124°53.02′ W. long.;
(56) 47°12.16′ N. lat., 124°56.77′ W. long.;
(57) 47°13.35′ N. lat., 124°58.70′ W. long.;
(58) 47°09.53′ N. lat., 124°58.32′ W. long.;
(59) 47°09.54′ N. lat., 124°59.50′ W. long.;
(60) 47°05.87′ N. lat., 124°59.29′ W. long.;
(61) 47°03.65′ N. lat., 124°56.26′ W. long.;
(62) 47°00.91′ N. lat., 124°59.73′ W. long.;
(63) 46°58.74′ N. lat., 124°59.40′ W. long.;
(64) 46°58.55′ N. lat., 125°00.70′ W. long.;
(65) 46°55.57′ N. lat., 125°01.61′ W. long.;
(66) 46°55.77′ N. lat., 124°55.04′ W. long.;
(67) 46°53.16′ N. lat., 124°53.69′ W. long.;
(68) 46°52.39′ N. lat., 124°55.24′ W. long.;
(69) 46°44.88′ N. lat., 124°51.97′ W. long.;
(70) 46°33.28′ N. lat., 124°36.96′ W. long.;
(71) 46°33.20′ N. lat., 124°30.64′ W. long.;
(72) 46°27.85′ N. lat., 124°31.95′ W. long.;
(73) 46°18.16′ N. lat., 124°39.39′ W. long.;
(74) 46°16.48′ N. lat., 124°27.41′ W. long.;
(75) 46°16.73′ N. lat., 124°23.20′ W. long.;
(76) 46°16.00′ N. lat., 124°24.88′ W. long.;
(77) 46°14.22′ N. lat., 124°26.28′ W. long.;
(78) 46°11.53′ N. lat., 124°39.58′ W. long.;
(79) 46°08.77′ N. lat., 124°41.71′ W. long.;
(80) 46°05.86′ N. lat., 124°42.27′ W. long.;
(81) 46°03.85′ N. lat., 124°48.20′ W. long.;
(82) 46°02.34′ N. lat., 124°48.51′ W. long.;
(83) 45°58.99′ N. lat., 124°44.42′ W. long.;
(84) 45°46.90′ N. lat., 124°43.50′ W. long.;
(85) 45°44.98′ N. lat., 124°44.93′ W. long.;
(86) 45°43.47′ N. lat., 124°44.93′ W. long.;
(87) 45°34.88′ N. lat., 124°32.58′ W. long.;
(88) 45°13.04′ N. lat., 124°21.92′ W. long.;
(89) 45°00.17′ N. lat., 124°29.28′ W. long.;
(90) 44°55.41′ N. lat., 124°31.84′ W. long.;
(91) 44°48.25′ N. lat., 124°40.62′ W. long.;
(92) 44°41.34′ N. lat., 124°49.20′ W. long.;
(93) 44°23.30′ N. lat., 124°50.17′ W. long.;
(94) 44°13.19′ N. lat., 124°58.66′ W. long.;
(95) 43°57.89′ N. lat., 124°58.13′ W. long.;
(96) 43°50.59′ N. lat., 124°52.80′ W. long.;
(97) 43°50.10′ N. lat., 124°40.27′ W. long.;
(98) 43°39.06′ N. lat., 124°38.55′ W. long.;
(99) 43°28.85′ N. lat., 124°39.99′ W. long.;
(100) 43°20.22′ N. lat., 124°43.05′ W. long.;
(101) 43°13.29′ N. lat., 124°47.00′ W. long.;
(102) 43°13.14′ N. lat., 124°52.61′ W. long.;
(103) 43°04.26′ N. lat., 124°53.05′ W. long.;
(104) 42°53.93′ N. lat., 124°54.60′ W. long.;
(105) 42°49.52′ N. lat., 124°53.16′ W. long.;
(106) 42°47.46′ N. lat., 124°50.24′ W. long.;
(107) 42°47.57′ N. lat., 124°48.12′ W. long.;
(108) 42°46.19′ N. lat., 124°44.52′ W. long.;
(109) 42°41.75′ N. lat., 124°44.69′ W. long.;
(110) 42°38.81′ N. lat., 124°43.09′ W. long.;
(111) 42°31.83′ N. lat., 124°46.23′ W. long.;
(112) 42°32.08′ N. lat., 124°43.58′ W. long.;
(113) 42°30.96′ N. lat., 124°43.84′ W. long.;
(114) 42°28.41′ N. lat., 124°49.17′ W. long.;
(115) 42°24.80′ N. lat., 124°45.93′ W. long.;
(116) 42°19.71′ N. lat., 124°41.60′ W. long.;
(117) 42°15.12′ N. lat., 124°38.34′ W. long.;
(118) 42°12.35′ N. lat., 124°38.09′ W. long.;
(119) 42°04.38′ N. lat., 124°36.83′ W. long.;
(120) 42°00.00′ N. lat., 124°36.80′ W. long.;
(121) 41°59.98′ N. lat., 124°36.70′ W. long.;
(122) 41°47.85′ N. lat., 124°30.41′ W. long.;
(123) 41°43.34′ N. lat., 124°29.89′ W. long.;
(124) 41°23.47′ N. lat., 124°30.29′ W. long.;
(125) 41°21.30′ N. lat., 124°29.36′ W. long.;
(126) 41°13.53′ N. lat., 124°24.41′ W. long.;
(127) 41°06.72′ N. lat., 124°23.30′ W. long.;
(128) 40°54.67′ N. lat., 124°28.13′ W. long.;
(129) 40°49.02′ N. lat., 124°28.52′ W. long.;
(130) 40°40.45′ N. lat., 124°32.74′ W. long.;
(131) 40°37.11′ N. lat., 124°38.03′ W. long.;
(132) 40°34.22′ N. lat., 124°41.13′ W. long.;
(133) 40°32.90′ N. lat., 124°41.83′ W. long.;
(134) 40°31.30′ N. lat., 124°40.97′ W. long.;
(135) 40°29.63′ N. lat., 124°38.04′ W. long.;
(136) 40°24.99′ N. lat., 124°36.37′ W. long.;
(137) 40°22.23′ N. lat., 124°31.78′ W. long.;
(138) 40°16.95′ N. lat., 124°31.93′ W. long.;

(139) 40°17.59′ N. lat., 124°45.23′ W. long.;
(140) 40°13.25′ N. lat., 124°32.36′ W. long.;
(141) 40°10.16′ N. lat., 124°24.57′ W. long.;
(142) 40°06.43′ N. lat., 124°19.19′ W. long.;
(143) 40°07.07′ N. lat., 124°17.75′ W. long.;
(144) 40°05.53′ N. lat., 124°18.02′ W. long.;
(145) 40°04.71′ N. lat., 124°18.10′ W. long.;
(146) 40°02.35′ N. lat., 124°16.57′ W. long.;
(147) 40°01.53′ N. lat., 124°09.82′ W. long.;
(148) 39°58.28′ N. lat., 124°13.51′ W. long.;
(149) 39°56.60′ N. lat., 124°12.02′ W. long.;
(150) 39°55.20′ N. lat., 124°07.96′ W. long.;
(151) 39°52.55′ N. lat., 124°09.40′ W. long.;
(152) 39°42.68′ N. lat., 124°02.52′ W. long.;
(153) 39°35.96′ N. lat., 123°59.49′ W. long.;
(154) 39°34.62′ N. lat., 123°59.59′ W. long.;
(155) 39°33.78′ N. lat., 123°56.82′ W. long.;
(156) 39°33.02′ N. lat., 123°57.07′ W. long.;
(157) 39°32.21′ N. lat., 123°59.13′ W. long.;
(158) 39°07.85′ N. lat., 123°59.07′ W. long.;
(159) 39°00.90′ N. lat., 123°57.88′ W. long.;
(160) 38°59.95′ N. lat., 123°56.99′ W. long.;
(161) 38°56.82′ N. lat., 123°57.74′ W. long.;
(162) 38°56.40′ N. lat., 123°59.41′ W. long.;
(163) 38°50.23′ N. lat., 123°55.48′ W. long.;
(164) 38°46.77′ N. lat., 123°51.49′ W. long.;
(165) 38°45.28′ N. lat., 123°51.56′ W. long.;
(166) 38°42.76′ N. lat., 123°49.76′ W. long.;
(167) 38°41.54′ N. lat., 123°47.76′ W. long.;
(168) 38°40.98′ N. lat., 123°48.07′ W. long.;
(169) 38°38.03′ N. lat., 123°45.78′ W. long.;
(170) 38°37.20′ N. lat., 123°44.01′ W. long.;
(171) 38°33.44′ N. lat., 123°41.75′ W. long.;
(172) 38°29.45′ N. lat., 123°38.42′ W. long.;
(173) 38°27.89′ N. lat., 123°38.38′ W. long.;
(174) 38°23.68′ N. lat., 123°35.40′ W. long.;
(175) 38°19.63′ N. lat., 123°33.98′ W. long.;
(176) 38°16.23′ N. lat., 123°31.83′ W. long.;
(177) 38°14.79′ N. lat., 123°29.91′ W. long.;
(178) 38°14.12′ N. lat., 123°26.29′ W. long.;
(179) 38°10.85′ N. lat., 123°25.77′ W. long.;
(180) 38°13.15′ N. lat., 123°28.18′ W. long.;
(181) 38°12.28′ N. lat., 123°29.81′ W. long.;
(182) 38°10.19′ N. lat., 123°29.04′ W. long.;
(183) 38°07.94′ N. lat., 123°28.45′ W. long.;
(184) 38°06.51′ N. lat., 123°30.89′ W. long.;
(185) 38°04.21′ N. lat., 123°31.96′ W. long.;
(186) 38°02.07′ N. lat., 123°31.30′ W. long.;
(187) 38°00.00′ N. lat., 123°29.55′ W. long.;
(188) 37°58.13′ N. lat., 123°27.21′ W. long.;
(189) 37°55.01′ N. lat., 123°27.46′ W. long.;
(190) 37°51.40′ N. lat., 123°25.18′ W. long.;
(191) 37°43.97′ N. lat., 123°11.49′ W. long.;
(192) 37°36.00′ N. lat., 123°02.25′ W. long.;
(193) 37°13.65′ N. lat., 122°54.18′ W. long.;
(194) 37°00.66′ N. lat., 122°37.84′ W. long.;
(195) 36°57.40′ N. lat., 122°28.25′ W. long.;
(196) 36°59.25′ N. lat., 122°25.54′ W. long.;
(197) 36°56.88′ N. lat., 122°25.42′ W. long.;
(198) 36°57.40′ N. lat., 122°22.62′ W. long.;
(199) 36°55.43′ N. lat., 122°22.43′ W. long.;
(200) 36°52.29′ N. lat., 122°13.18′ W. long.;
(201) 36°47.12′ N. lat., 122°07.56′ W. long.;
(202) 36°47.10′ N. lat., 122°02.11′ W. long.;
(203) 36°43.76′ N. lat., 121°59.11′ W. long.;
(204) 36°38.85′ N. lat., 122°02.20′ W. long.;
(205) 36°23.41′ N. lat., 122°00.11′ W. long.;
(206) 36°19.68′ N. lat., 122°06.93′ W. long.;
(207) 36°14.75′ N. lat., 122°01.51′ W. long.;
(208) 36°09.74′ N. lat., 121°45.00′ W. long.;
(209) 36°06.67′ N. lat., 121°41.06′ W. long.;
(210) 35°57.07′ N. lat., 121°34.32′ W. long.;
(211) 35°52.31′ N. lat., 121°32.45′ W. long.;
(212) 35°51.21′ N. lat., 121°30.91′ W. long.;
(213) 35°46.32′ N. lat., 121°30.30′ W. long.;
(214) 35°33.74′ N. lat., 121°20.10′ W. long.;
(215) 35°31.37′ N. lat., 121°15.23′ W. long.;
(216) 35°23.32′ N. lat., 121°11.44′ W. long.;
(217) 35°15.28′ N. lat., 121°04.45′ W. long.;
(218) 35°07.08′ N. lat., 121°00.30′ W. long.;
(219) 34°57.46′ N. lat., 120°58.23′ W. long.;
(220) 34°44.25′ N. lat., 120°58.29′ W. long.;
(221) 34°32.30′ N. lat., 120°50.22′ W. long.;
(222) 34°27.00′ N. lat., 120°42.55′ W. long.;
(223) 34°19.08′ N. lat., 120°31.21′ W. long.;
(224) 34°17.72′ N. lat., 120°19.26′ W. long.;
(225) 34°22.45′ N. lat., 120°12.81′ W. long.;
(226) 34°21.36′ N. lat., 119°54.88′ W. long.;
(227) 34°09.95′ N. lat., 119°46.18′ W. long.;
(228) 34°09.08′ N. lat., 119°57.53′ W. long.;
(229) 34°07.53′ N. lat., 120°06.35′ W. long.;
(230) 34°10.54′ N. lat., 120°19.07′ W. long.;
(231) 34°14.68′ N. lat., 120°29.48′ W. long.;
(232) 34°09.51′ N. lat., 120°38.32′ W. long.;
(233) 34°03.06′ N. lat., 120°35.54′ W. long.;
(234) 33°56.39′ N. lat., 120°28.47′ W. long.;
(235) 33°50.25′ N. lat., 120°09.43′ W. long.;
(236) 33°37.96′ N. lat., 120°00.08′ W. long.;
(237) 33°34.52′ N. lat., 119°51.84′ W. long.;
(238) 33°35.51′ N. lat., 119°48.49′ W. long.;
(239) 33°42.76′ N. lat., 119°47.77′ W. long.;
(240) 33°53.62′ N. lat., 119°53.28′ W. long.;
(241) 33°57.61′ N. lat., 119°31.26′ W. long.;
(242) 33°56.34′ N. lat., 119°26.40′ W. long.;
(243) 33°57.79′ N. lat., 119°26.85′ W. long.;
(244) 33°58.88′ N. lat., 119°20.06′ W. long.;
(245) 34°02.65′ N. lat., 119°15.11′ W. long.;
(246) 33°59.02′ N. lat., 119°02.99′ W. long.;
(247) 33°57.61′ N. lat., 118°42.07′ W. long.;
(248) 33°50.76′ N. lat., 118°37.98′ W. long.;
(249) 33°38.41′ N. lat., 118°17.03′ W. long.;
(250) 33°37.14′ N. lat., 118°18.39′ W. long.;
(251) 33°35.51′ N. lat., 118°18.03′ W. long.;
(252) 33°30.68′ N. lat., 118°10.35′ W. long.;
(253) 33°32.49′ N. lat., 117°51.85′ W. long.;
(254) 32°58.87′ N. lat., 117°20.36′ W. long.; and
(255) 32°35.53′ N. lat., 117°29.67′ W. long.

(A) The 200-fm (366-m) depth contour used around San Clemente Island is defined by straight lines connecting all of the following points in the order stated:

(1) 33°05.89′ N. lat., 118°39.45′ W. long.;
(2) 33°02.68′ N. lat., 118°33.14′ W. long.;
(3) 32°57.32′ N. lat., 118°29.12′ W. long.;
(4) 32°47.51′ N. lat., 118°17.88′ W. long.;
(5) 32°41.22′ N. lat., 118°23.78′ W. long.;
(6) 32°46.83′ N. lat., 118°32.10′ W. long.;
(7) 33°01.61′ N. lat., 118°40.64′ W. long.; and
(8) 33°5.89′ N. lat., 118°39.45′ W. long.

(B) The 200-fm (66-m) depth contour used around Santa Catalina Island off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°32.06′ N. lat., 118°44.52′ W. long.;
(2) 33°31.36′ N. lat., 118°35.28′ W. long.;
(3) 33°30.10′ N. lat., 118°30.82′ W. long.;
(4) 33°27.91′ N. lat., 118°26.83′ W. long.;
(5) 33°26.27′ N. lat., 118°21.35′ W. long.;
(6) 33°21.34′ N. lat., 118°15.24′ W. long.;
(7) 33°13.66′ N. lat., 118°08.98′ W. long.;
(8) 33°17.15′ N. lat., 118°28.35′ W. long.;
(9) 33°20.94′ N. lat., 118°34.34′ W. long.;
(10) 33°23.32′ N. lat., 118°32.60′ W. long.;
(11) 33°28.68′ N. lat., 118°44.93′ W. long.; and
(12) 33°32.06′ N. lat., 118°44.52′ W. long.

(C) The 200-fm (366-m) depth contour used around Lasuen Knoll off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 33°25.91′ N. lat., 117°59.44′ W. long.;
(2) 33°23.37′ N. lat., 117°56.97′ W. long.;
(3) 33°22.82′ N. lat., 117°59.50′ W. long.;
(4) 33°25.24′ N. lat., 118°01.68′ W. long.; and
(5) 33°25.91′ N. lat., 117°59.44′ W. long.

(D) The 200-fm (366-m) depth contour used around San Diego Rise off the State of California is defined by straight lines connecting all of the following points in the order stated:

(1) 32°50.30′ N. lat., 117°50.18′ W. long.;
(2) 32°44.01′ N. lat., 117°44.46′ W. long.;
(3) 32°41.34′ N. lat., 117°45.86′ W. long.;
(4) 32°45.45′ N. lat., 117°50.09′ W. long.;
(5) 32°50.10′ N. lat., 117°50.76′ W. long.; and
(6) 32°50.30′ N. lat., 117°50.18′ W. long.

(xii) The 200-fm (366-m) depth contour used between the U.S. border with Canada and the U.S. border with Mexico, modified to allow fishing in petrale sole areas, is defined by straight lines connecting all of the following points in the order stated:

(1) 48°14.75′ N. lat., 125°41.73′ W. long.;
(2) 48°12.85′ N. lat., 125°38.06′ W. long.;
(3) 48°11.52′ N. lat., 125°39.45′ W. long.;
(4) 48°10.14′ N. lat., 125°42.81′ W. long.;
(5) 48°08.96′ N. lat., 125°42.08′ W. long.;
(6) 48°08.33′ N. lat., 125°44.91′ W. long.;
(7) 48°07.19′ N. lat., 125°45.87′ W. long.;
(8) 48°05.66′ N. lat., 125°44.79′ W. long.;
(9) 48°05.91′ N. lat., 125°42.16′ W. long.;
(10) 48°04.11′ N. lat., 125°40.17′ W. long.;
(11) 48°04.07′ N. lat., 125°36.96′ W. long.;
(12) 48°03.05′ N. lat., 125°36.38′ W. long.;
(13) 48°01.98′ N. lat., 125°37.41′ W. long.;
(14) 48°01.46′ N. lat., 125°39.61′ W. long.;
(15) 47°57.00′ N. lat., 125°37.00′ W. long.;
(16) 47°55.50′ N. lat., 125°28.50′ W. long.;
(17) 47°57.88′ N. lat., 125°25.61′ W. long.;
(18) 48°01.63′ N. lat., 125°23.75′ W. long.;
(19) 48°02.21′ N. lat., 125°22.43′ W. long.;
(20) 48°03.60′ N. lat., 125°21.84′ W. long.;
(21) 48°03.98′ N. lat., 125°20.65′ W. long.;
(22) 48°03.26′ N. lat., 125°19.76′ W. long.;
(23) 48°01.49′ N. lat., 125°18.80′ W. long.;
(24) 48°01.03′ N. lat., 125°20.12′ W. long.;
(25) 48°00.04′ N. lat., 125°20.26′ W. long.;
(26) 47°58.10′ N. lat., 125°18.91′ W. long.;
(27) 47°58.17′ N. lat., 125°17.50′ W. long.;
(28) 47°52.28′ N. lat., 125°16.06′ W. long.;
(29) 47°51.92′ N. lat., 125°13.89′ W. long.;
(30) 47°49.20′ N. lat., 125°10.67′ W. long.;
(31) 47°48.69′ N. lat., 125°06.50′ W. long.;
(32) 47°46.54′ N. lat., 125°07.68′ W. long.;
(33) 47°47.24′ N. lat., 125°05.38′ W. long.;
(34) 47°45.95′ N. lat., 125°04.61′ W. long.;
(35) 47°44.58′ N. lat., 125°07.12′ W. long.;
(36) 47°42.24′ N. lat., 125°05.15′ W. long.;
(37) 47°38.54′ N. lat., 125°06.76′ W. long.;
(38) 47°34.86′ N. lat., 125°04.67′ W. long.;
(39) 47°30.75′ N. lat., 124°57.52′ W. long.;
(40) 47°28.51′ N. lat., 124°56.69′ W. long.;
(41) 47°29.15′ N. lat., 124°54.10′ W. long.;

(42) 47°28.43′ N. lat., 124°51.58′ W. long.;
(43) 47°24.13′ N. lat., 124°47.51′ W. long.;
(44) 47°18.31′ N. lat., 124°46.17′ W. long.;
(45) 47°19.57′ N. lat., 124°51.01′ W. long.;
(46) 47°18.12′ N. lat., 124°53.66′ W. long.;
(47) 47°17.59′ N. lat., 124°52.94′ W. long.;
(48) 47°17.71′ N. lat., 124°51.63′ W. long.;
(49) 47°16.90′ N. lat., 124°51.23′ W. long.;
(50) 47°16.10′ N. lat., 124°53.67′ W. long.;
(51) 47°14.24′ N. lat., 124°53.02′ W. long.;
(52) 47°12.16′ N. lat., 124°56.77′ W. long.;
(53) 47°13.35′ N. lat., 124°58.70′ W. long.;
(54) 47°09.53′ N. lat., 124°58.32′ W. long.;
(55) 47°09.54′ N. lat., 124°59.50′ W. long.;
(56) 47°05.87′ N. lat., 124°59.29′ W. long.;
(57) 47°03.65′ N. lat., 124°56.26′ W. long.;
(58) 47°00.91′ N. lat., 124°59.73′ W. long.;
(59) 46°58.74′ N. lat., 124°59.40′ W. long.;
(60) 46°58.55′ N. lat., 125°00.70′ W. long.;
(61) 46°55.57′ N. lat., 125°01.61′ W. long.;
(62) 46°55.77′ N. lat., 124°55.04′ W. long.;
(63) 46°53.16′ N. lat., 124°53.69′ W. long.;
(64) 46°52.39′ N. lat., 124°55.24′ W. long.;
(65) 46°44.88′ N. lat., 124°51.97′ W. long.;
(66) 46°33.28′ N. lat., 124°36.96′ W. long.;
(67) 46°33.20′ N. lat., 124°30.64′ W. long.;
(68) 46°27.85′ N. lat., 124°31.95′ W. long.;
(69) 46°18.16′ N. lat., 124°39.39′ W. long.;
(70) 46°16.48′ N. lat., 124°27.41′ W. long.;
(71) 46°16.73′ N. lat., 124°23.20′ W. long.;
(72) 46°16.00′ N. lat., 124°24.88′ W. long.;
(73) 46°14.22′ N. lat., 124°26.28′ W. long.;
(74) 46°11.53′ N. lat., 124°39.58′ W. long.;
(75) 46°08.77′ N. lat., 124°41.71′ W. long.;
(76) 46°05.86′ N. lat., 124°42.27′ W. long.;
(77) 46°03.85′ N. lat., 124°48.20′ W. long.;
(78) 46°02.34′ N. lat., 124°48.51′ W. long.;
(79) 45°58.99′ N. lat., 124°44.42′ W. long.;
(80) 45°49.74′ N. lat., 124°43.69′ W. long.;
(81) 45°49.68′ N. lat., 124°42.37′ W. long.;
(82) 45°40.83′ N. lat., 124°40.90′ W. long.;
(83) 45°34.88′ N. lat., 124°32.58′ W. long.;
(84) 45°13.04′ N. lat., 124°21.92′ W. long.;
(85) 45°00.17′ N. lat., 124°29.28′ W. long.;
(86) 44°50.99′ N. lat., 124°35.40′ W. long.;
(87) 44°46.87′ N. lat., 124°38.20′ W. long.;
(88) 44°48.25′ N. lat., 124°40.62′ W. long.;
(89) 44°41.34′ N. lat., 124°49.20′ W. long.;
(90) 44°23.30′ N. lat., 124°50.17′ W. long.;
(91) 44°13.19′ N. lat., 124°58.66′ W. long.;
(92) 43°57.37′ N. lat., 124°58.71′ W. long.;
(93) 43°52.32′ N. lat., 124°49.43′ W. long.;
(94) 43°51.35′ N. lat., 124°37.94′ W. long.;
(95) 43°49.73′ N. lat., 124°40.26′ W. long.;
(96) 43°39.06′ N. lat., 124°38.55′ W. long.;
(97) 43°28.85′ N. lat., 124°39.99′ W. long.;
(98) 43°20.22′ N. lat., 124°43.05′ W. long.;
(99) 43°13.29′ N. lat., 124°47.00′ W. long.;
(100) 43°10.64′ N. lat., 124°49.95′ W. long.;
(101) 43°04.26′ N. lat., 124°53.05′ W. long.;
(102) 42°53.93′ N. lat., 124°54.60′ W. long.;
(103) 42°47.57′ N. lat., 124°48.12′ W. long.;
(104) 42°46.19′ N. lat., 124°44.52′ W. long.;
(105) 42°41.75′ N. lat., 124°44.69′ W. long.;
(106) 42°38.81′ N. lat., 124°43.09′ W. long.;
(107) 42°31.83′ N. lat., 124°46.23′ W. long.;
(108) 42°32.08′ N. lat., 124°43.58′ W. long.;
(109) 42°30.96′ N. lat., 124°43.84′ W. long.;
(110) 42°28.41′ N. lat., 124°49.17′ W. long.;
(111) 42°24.80′ N. lat., 124°45.93′ W. long.;
(112) 42°19.71′ N. lat., 124°41.60′ W. long.;
(113) 42°15.12′ N. lat., 124°38.34′ W. long.;
(114) 42°12.35′ N. lat., 124°38.09′ W. long.;
(115) 42°00.00′ N. lat., 124°36.83′ W. long.;
(116) 41°59.98′ N. lat., 124°36.80′ W. long.;
(117) 41°47.79′ N. lat., 124°29.48′ W. long.;
(118) 41°21.01′ N. lat., 124°29.01′ W. long.;
(119) 41°13.50′ N. lat., 124°24.40′ W. long.;
(120) 41°11.00′ N. lat., 124°22.99′ W. long.;
(121) 41°06.69′ N. lat., 124°23.30′ W. long.;
(122) 40°54.73′ N. lat., 124°28.15′ W. long.;
(123) 40°53.95′ N. lat., 124°26.04′ W. long.;
(124) 40°49.96′ N. lat., 124°26.04′ W. long.;
(125) 40°44.49′ N. lat., 124°30.81′ W. long.;
(126) 40°40.58′ N. lat., 124°32.06′ W. long.;
(127) 40°36.09′ N. lat., 124°40.11′ W. long.;
(128) 40°34.19′ N. lat., 124°41.20′ W. long.;
(129) 40°32.93′ N. lat., 124°41.86′ W. long.;
(130) 40°31.28′ N. lat., 124°40.98′ W. long.;
(131) 40°29.68′ N. lat., 124°38.06′ W. long.;
(132) 40°25.01′ N. lat., 124°36.36′ W. long.;
(133) 40°22.28′ N. lat., 124°31.83′ W. long.;
(134) 40°16.96′ N. lat., 124°31.91′ W. long.;
(135) 40°17.59′ N. lat., 124°45.28′ W. long.;
(136) 40°13.23′ N. lat., 124°32.40′ W. long.;
(137) 40°10.00′ N. lat., 124°24.55′ W. long.;
(138) 40°06.45′ N. lat., 124°19.24′ W. long.;
(139) 40°07.08′ N. lat., 124°17.80′ W. long.;
(140) 40°05.55′ N. lat., 124°18.11′ W. long.;
(141) 40°04.74′ N. lat., 124°18.11′ W. long.;
(142) 40°02.35′ N. lat., 124°16.53′ W. long.;
(143) 40°01.13′ N. lat., 124°12.98′ W. long.;
(144) 40°01.55′ N. lat., 124°09.80′ W. long.;
(145) 39°58.54′ N. lat., 124°12.43′ W. long.;
(146) 39°55.72′ N. lat., 124°07.44′ W. long.;
(147) 39°42.64′ N. lat., 124°02.52′ W. long.;
(148) 39°35.96′ N. lat., 123°59.47′ W. long.;
(149) 39°34.61′ N. lat., 123°59.58′ W. long.;
(150) 39°34.79′ N. lat., 123°58.47′ W. long.;
(151) 39°33.79′ N. lat., 123°56.77′ W. long.;
(152) 39°33.03′ N. lat., 123°57.06′ W. long.;
(153) 39°32.20′ N. lat., 123°59.12′ W. long.;
(154) 39°07.81′ N. lat., 123°59.06′ W. long.;
(155) 39°03.06′ N. lat., 123°57.77′ W. long.;
(156) 38°52.26′ N. lat., 123°56.18′ W. long.;
(157) 38°50.21′ N. lat., 123°55.48′ W. long.;
(158) 38°46.81′ N. lat., 123°51.49′ W. long.;
(159) 38°45.28′ N. lat., 123°51.55′ W. long.;
(160) 38°42.76′ N. lat., 123°49.73′ W. long.;
(161) 38°41.53′ N. lat., 123°47.80′ W. long.;
(162) 38°41.41′ N. lat., 123°46.74′ W. long.;
(163) 38°38.01′ N. lat., 123°45.74′ W. long.;
(164) 38°37.19′ N. lat., 123°43.98′ W. long.;
(165) 38°35.26′ N. lat., 123°41.99′ W. long.;
(166) 38°33.38′ N. lat., 123°41.76′ W. long.;
(167) 38°19.95′ N. lat., 123°32.90′ W. long.;
(168) 38°14.38′ N. lat., 123°25.51′ W. long.;
(169) 38°09.39′ N. lat., 123°24.39′ W. long.;
(170) 38°10.09′ N. lat., 123°27.21′ W. long.;
(171) 38°03.76′ N. lat., 123°31.90′ W. long.;
(172) 38°02.06′ N. lat., 123°31.26′ W. long.;
(173) 38°00.01′ N. lat., 123°29.56′ W. long.;
(174) 37°58.07′ N. lat., 123°27.21′ W. long.;
(175) 37°55.02′ N. lat., 123°27.44′ W. long.;
(176) 37°51.39′ N. lat., 123°25.22′ W. long.;
(177) 37°43.94′ N. lat., 123°11.49′ W. long.;
(178) 37°35.96′ N. lat., 123°02.23′ W. long.;
(179) 37°23.48′ N. lat., 122°57.76′ W. long.;
(180) 37°23.23′ N. lat., 122°53.78′ W. long.;
(181) 37°13.97′ N. lat., 122°49.91′ W. long.;
(182) 37°09.98′ N. lat., 122°45.61′ W. long.;
(183) 37°07.38′ N. lat., 122°46.38′ W. long.;
(184) 37°00.64′ N. lat., 122°37.70′ W. long.;
(185) 36°57.40′ N. lat., 122°28.36′ W. long.;
(186) 36°59.21′ N. lat., 122°25.64′ W. long.;
(187) 36°56.90′ N. lat., 122°25.42′ W. long.;
(188) 36°57.43′ N. lat., 122°22.55′ W. long.;
(189) 36°55.43′ N. lat., 122°22.43′ W. long.;
(190) 36°52.27′ N. lat., 122°13.16′ W. long.;
(191) 36°47.10′ N. lat., 122°07.53′ W. long.;
(192) 36°47.10′ N. lat., 122°02.08′ W. long.;
(193) 36°43.76′ N. lat., 121°59.15′ W. long.;
(194) 36°38.84′ N. lat., 122°02.20′ W. long.;
(195) 36°30.82′ N. lat., 122°01.13′ W. long.;
(196) 36°30.94′ N. lat., 122°00.54′ W. long.;
(197) 36°25.99′ N. lat., 121°59.50′ W. long.;
(198) 36°26.43′ N. lat., 121°59.76′ W. long.;
(199) 36°22.00′ N. lat., 122°01.02′ W. long.;
(200) 36°19.01′ N. lat., 122°05.01′ W. long.;
(201) 36°14.73′ N. lat., 122°01.55′ W. long.;
(202) 36°14.03′ N. lat., 121°58.09′ W. long.;
(203) 36°09.74′ N. lat., 121°45.01′ W. long.;
(204) 36°06.75′ N. lat., 121°40.73′ W. long.;
(205) 35°58.19′ N. lat., 121°34.63′ W. long.;
(206) 35°52.21′ N. lat., 121°32.46′ W. long.;
(207) 35°51.21′ N. lat., 121°30.94′ W. long.;
(208) 35°46.28′ N. lat., 121°30.29′ W. long.;
(209) 35°33.67′ N. lat., 121°20.09′ W. long.;
(210) 35°31.33′ N. lat., 121°15.22′ W. long.;
(211) 35°23.29′ N. lat., 121°11.41′ W. long.;
(212) 35°15.26′ N. lat., 121°04.49′ W. long.;
(213) 35°07.05′ N. lat., 121°00.26′ W. long.;
(214) 35°07.46′ N. lat., 120°57.10′ W. long.;
(215) 34°44.29′ N. lat., 120°54.28′ W. long.;
(216) 34°44.23′ N. lat., 120°58.27′ W. long.;
(217) 34°32.33′ N. lat., 120°50.23′ W. long.;
(218) 34°27.00′ N. lat., 120°42.55′ W. long.;
(219) 34°19.08′ N. lat., 120°31.21′ W. long.;
(220) 34°17.72′ N. lat., 120°19.26′ W. long.;
(221) 34°22.45′ N. lat., 120°12.81′ W. long.;
(222) 34°21.36′ N. lat., 119°54.88′ W. long.;
(223) 34°09.95′ N. lat., 119°46.18′ W. long.;
(224) 34°09.08′ N. lat., 119°57.53′ W. long.;
(225) 34°07.53′ N. lat., 120°06.35′ W. long.;
(226) 34°10.54′ N. lat., 120°19.07′ W. long.;
(227) 34°14.68′ N. lat., 120°29.48′ W. long.;
(228) 34°09.51′ N. lat., 120°38.32′ W. long.;
(229) 34°03.06′ N. lat., 120°35.54′ W. long.;
(230) 33°56.39′ N. lat., 120°28.47′ W. long.;
(231) 33°50.25′ N. lat., 120°09.43′ W. long.;
(232) 33°37.96′ N. lat., 120°00.08′ W. long.;
(233) 33°34.52′ N. lat., 119°51.84′ W. long.;
(234) 33°35.51′ N. lat., 119°48.49′ W. long.;
(235) 33°42.76′ N. lat., 119°47.77′ W. long.;
(236) 33°53.62′ N. lat., 119°53.28′ W. long.;
(237) 33°57.61′ N. lat., 119°31.26′ W. long.;
(238) 33°56.34′ N. lat., 119°26.40′ W. long.;
(239) 33°57.79′ N. lat., 119°26.85′ W. long.;
(240) 33°58.88′ N. lat., 119°20.06′ W. long.;
(241) 34°02.65′ N. lat., 119°15.11′ W. long.;
(242) 33°59.02′ N. lat., 119°02.99′ W. long.;
(243) 33°57.61′ N. lat., 118°42.07′ W. long.;
(244) 33°50.76′ N. lat., 118°37.98′ W. long.;
(245) 33°39.54′ N. lat., 118°18.70′ W. long.;
(246) 33°37.14′ N. lat., 118°18.39′ W. long.;
(247) 33°35.51′ N. lat., 118°18.03′ W. long.;
(248) 33°30.68′ N. lat., 118°10.35′ W. long.;
(249) 33°32.49′ N. lat., 117°51.85′ W. long.;
(250) 32°58.87′ N. lat., 117°20.36′ W. long.; and
(251) 32°35.53′ N. lat., 117°29.67′ W. long.

(xiii) The 250-fm (457-m) depth contour used between the U.S. border with Canada and 38° N. lat. is defined by straight lines connecting all of the following points in the order stated:

(1) 48°14.68′ N. lat., 125°42.10′ W. long.;
(2) 48°13.00′ N. lat., 125°39.00′ W. long.;
(3) 48°12.73′ N. lat., 125°38.87′ W. long.;
(4) 48°12.43′ N. lat., 125°39.12′ W. long.;
(5) 48°11.83′ N. lat., 125°40.01′ W. long.;
(6) 48°11.78′ N. lat., 125°41.70′ W. long.;
(7) 48°10.62′ N. lat., 125°43.41′ W. long.;
(8) 48°09.23′ N. lat., 125°42.80′ W. long.;
(9) 48°08.79′ N. lat., 125°43.79′ W. long.;
(10) 48°08.50′ N. lat., 125°45.00′ W. long.;
(11) 48°07.43′ N. lat., 125°46.36′ W. long.;

(12) 48°06.00′ N. lat., 125°46.50′ W. long.;
(13) 48°05.38′ N. lat., 125°42.82′ W. long.;
(14) 48°04.19′ N. lat., 125°40.40′ W. long.;
(15) 48°03.50′ N. lat., 125°37.00′ W. long.;
(16) 48°01.50′ N. lat., 125°40.00′ W. long.;
(17) 47°57.00′ N. lat., 125°37.00′ W. long.;
(18) 47°55.21′ N. lat., 125°37.22′ W. long.;
(19) 47°54.02′ N. lat., 125°36.57′ W. long.;
(20) 47°53.67′ N. lat., 125°35.06′ W. long.;
(21) 47°54.14′ N. lat., 125°32.35′ W. long.;
(22) 47°55.50′ N. lat., 125°28.56′ W. long.;
(23) 47°57.03′ N. lat., 125°26.52′ W. long.;
(24) 47°57.98′ N. lat., 125°25.08′ W. long.;
(25) 48°00.54′ N. lat., 125°24.38′ W. long.;
(26) 48°01.45′ N. lat., 125°23.70′ W. long.;
(27) 48°01.97′ N. lat., 125°22.34′ W. long.;
(28) 48°03.68′ N. lat., 125°21.20′ W. long.;
(29) 48°01.96′ N. lat., 125°19.56′ W. long.;
(30) 48°00.98′ N. lat., 125°20.43′ W. long.;
(31) 48°00.00′ N. lat., 125°20.68′ W. long.;
(32) 47°58.00′ N. lat., 125°19.50′ W. long.;
(33) 47°57.65′ N. lat., 125°19.18′ W. long.;
(34) 47°58.00′ N. lat., 125°18.00′ W. long.;
(35) 47°56.59′ N. lat., 125°18.15′ W. long.;
(36) 47°51.30′ N. lat., 125°18.32′ W. long.;
(37) 47°49.88′ N. lat., 125°14.49′ W. long.;
(38) 47°49.00′ N. lat., 125°11.00′ W. long.;
(39) 47°47.99′ N. lat., 125°07.31′ W. long.;
(40) 47°46.47′ N. lat., 125°08.63′ W. long.;
(41) 47°46.00′ N. lat., 125°06.00′ W. long.;
(42) 47°44.50′ N. lat., 125°07.50′ W. long.;
(43) 47°43.39′ N. lat., 125°06.57′ W. long.;
(44) 47°42.37′ N. lat., 125°05.74′ W. long.;
(45) 47°40.61′ N. lat., 125°06.48′ W. long.;
(46) 47°37.43′ N. lat., 125°07.33′ W. long.;
(47) 47°33.68′ N. lat., 125°04.80′ W. long.;
(48) 47°30.00′ N. lat., 125°00.00′ W. long.;
(49) 47°28.00′ N. lat., 124°58.50′ W. long.;
(50) 47°28.88′ N. lat., 124°54.71′ W. long.;
(51) 47°27.70′ N. lat., 124°51.87′ W. long.;
(52) 47°24.84′ N. lat., 124°48.45′ W. long.;
(53) 47°21.76′ N. lat., 124°47.42′ W. long.;
(54) 47°18.84′ N. lat., 124°46.75′ W. long.;
(55) 47°19.82′ N. lat., 124°51.43′ W. long.;
(56) 47°18.13′ N. lat., 124°54.25′ W. long.;
(57) 47°13.50′ N. lat., 124°54.69′ W. long.;
(58) 47°15.00′ N. lat., 125°00.00′ W. long.;
(59) 47°08.00′ N. lat., 124°59.83′ W. long.;
(60) 47°05.79′ N. lat., 125°01.00′ W. long.;
(61) 47°03.34′ N. lat., 124°57.49′ W. long.;
(62) 47°01.00′ N. lat., 125°00.00′ W. long.;
(63) 46°55.00′ N. lat., 125°02.00′ W. long.;
(64) 46°51.00′ N. lat., 124°57.00′ W. long.;
(65) 46°47.00′ N. lat., 124°55.00′ W. long.;
(66) 46°34.00′ N. lat., 124°38.00′ W. long.;
(67) 46°30.50′ N. lat., 124°41.00′ W. long.;
(68) 46°33.00′ N. lat., 124°32.00′ W. long.;
(69) 46°29.00′ N. lat., 124°32.00′ W. long.;
(70) 46°20.00′ N. lat., 124°39.00′ W. long.;
(71) 46°18.16′ N. lat., 124°40.00′ W. long.;
(72) 46°16.00′ N. lat., 124°27.01′ W. long.;
(73) 46°15.00′ N. lat., 124°30.96′ W. long.;
(74) 46°13.17′ N. lat., 124°37.87′ W. long.;
(75) 46°13.17′ N. lat., 124°38.75′ W. long.;
(76) 46°10.50′ N. lat., 124°42.00′ W. long.;
(77) 46°06.21′ N. lat., 124°41.85′ W. long.;
(78) 46°03.02′ N. lat., 124°50.27′ W. long.;
(79) 45°57.00′ N. lat., 124°45.52′ W. long.;
(80) 45°46.85′ N. lat., 124°45.91′ W. long.;
(81) 45°45.81′ N. lat., 124°47.05′ W. long.;
(82) 45°44.87′ N. lat., 124°45.98′ W. long.;
(83) 45°43.44′ N. lat., 124°46.03′ W. long.;
(84) 45°35.82′ N. lat., 124°45.72′ W. long.;
(85) 45°35.70′ N. lat., 124°42.89′ W. long.;
(86) 45°24.45′ N. lat., 124°38.21′ W. long.;
(87) 45°11.68′ N. lat., 124°39.38′ W. long.;
(88) 44°57.94′ N. lat., 124°37.02′ W. long.;
(89) 44°44.28′ N. lat., 124°50.79′ W. long.;
(90) 44°32.63′ N. lat., 124°54.21′ W. long.;
(91) 44°23.20′ N. lat., 124°49.87′ W. long.;
(92) 44°13.17′ N. lat., 124°58.81′ W. long.;
(93) 43°57.92′ N. lat., 124°58.29′ W. long.;
(94) 43°50.12′ N. lat., 124°53.36′ W. long.;
(95) 43°49.53′ N. lat., 124°43.96′ W. long.;
(96) 43°42.76′ N. lat., 124°41.40′ W. long.;
(97) 43°24.00′ N. lat., 124°42.61′ W. long.;
(98) 43°19.74′ N. lat., 124°45.12′ W. long.;
(99) 43°19.62′ N. lat., 124°52.95′ W. long.;
(100) 43°17.41′ N. lat., 124°53.02′ W. long.;
(101) 42°49.15′ N. lat., 124°54.93′ W. long.;
(102) 42°46.74′ N. lat., 124°53.39′ W. long.;
(103) 42°43.76′ N. lat., 124°51.64′ W. long.;
(104) 42°45.41′ N. lat., 124°49.35′ W. long.;
(105) 42°43.92′ N. lat., 124°45.92′ W. long.;
(106) 42°38.87′ N. lat., 124°43.38′ W. long.;
(107) 42°34.78′ N. lat., 124°46.56′ W. long.;
(108) 42°31.47′ N. lat., 124°46.89′ W. long.;
(109) 42°31.00′ N. lat., 124°44.28′ W. long.;
(110) 42°29.22′ N. lat., 124°46.93′ W. long.;
(111) 42°28.39′ N. lat., 124°49.94′ W. long.;
(112) 42°26.28′ N. lat., 124°47.60′ W. long.;
(113) 42°19.58′ N. lat., 124°43.21′ W. long.;
(114) 42°13.75′ N. lat., 124°40.06′ W. long.;
(115) 42°05.12′ N. lat., 124°39.06′ W. long.;
(116) 41°59.99′ N. lat., 124°37.72′ W. long.;
(117) 42°00.00′ N. lat., 124°37.76′ W. long.;
(118) 41°47.93′ N. lat., 124°31.79′ W. long.;
(119) 41°21.35′ N. lat., 124°30.35′ W. long.;
(120) 41°07.11′ N. lat., 124°25.25′ W. long.;
(121) 40°57.37′ N. lat., 124°30.25′ W. long.;
(122) 40°48.77′ N. lat., 124°30.69′ W. long.;
(123) 40°41.03′ N. lat., 124°33.21′ W. long.;
(124) 40°37.40′ N. lat., 124°38.96′ W. long.;
(125) 40°33.70′ N. lat., 124°42.50′ W. long.;
(126) 40°31.31′ N. lat., 124°41.59′ W. long.;
(127) 40°25.00′ N. lat., 124°36.65′ W. long.;
(128) 40°22.42′ N. lat., 124°32.19′ W. long.;
(129) 40°17.17′ N. lat., 124°32.21′ W. long.;
(130) 40°18.68′ N. lat., 124°50.44′ W. long.;
(131) 40°13.55′ N. lat., 124°34.26′ W. long.;
(132) 40°10.11′ N. lat., 124°28.25′ W. long.;
(133) 40°06.72′ N. lat., 124°21.40′ W. long.;
(134) 40°01.63′ N. lat., 124°17.25′ W. long.;
(135) 40°00.68′ N. lat., 124°11.19′ W. long.;
(136) 39°59.09′ N. lat., 124°14.92′ W. long.;
(137) 39°51.85′ N. lat., 124°10.33′ W. long.;
(138) 39°36.90′ N. lat., 124°00.63′ W. long.;
(139) 39°32.41′ N. lat., 124°00.01′ W. long.;
(140) 39°05.40′ N. lat., 124°00.52′ W. long.;
(141) 39°04.32′ N. lat., 123°59.00′ W. long.;
(142) 38°58.02′ N. lat., 123°58.18′ W. long.;
(143) 38°58.19′ N. lat., 124°01.90′ W. long.;
(144) 38°50.27′ N. lat., 123°56.26′ W. long.;
(145) 38°46.73′ N. lat., 123°51.93′ W. long.;
(146) 38°44.64′ N. lat., 123°51.77′ W. long.;
(147) 38°32.97′ N. lat., 123°41.84′ W. long.;
(148) 38°14.56′ N. lat., 123°32.18′ W. long.;
(149) 38°13.85′ N. lat., 123°29.94′ W. long.;
(150) 38°11.88′ N. lat., 123°30.57′ W. long.;
(151) 38°08.72′ N. lat., 123°29.56′ W. long.;
(152) 38°05.62′ N. lat., 123°32.38′ W. long.;
(153) 38°01.90′ N. lat., 123°32.00′ W. long.;
and
(154) 38°00.00′ N. lat., 123°30.00′ W. long.

(xiv) The 250-fm (457-m) depth contour used between the U.S. border with Canada and 38° N. lat., modified to allow fishing in petrale sole areas, is defined by straight lines connecting all of the following points in the order stated:

(1) 48°14.71′ N. lat., 125°41.95′ W. long.;
(2) 48°13.00′ N. lat., 125°39.00′ W. long.;
(3) 48°08.50′ N. lat., 125°45.00′ W. long.;
(4) 48°06.00′ N. lat., 125°46.50′ W. long.;
(5) 48°03.50′ N. lat., 125°37.00′ W. long.;
(6) 48°01.50′ N. lat., 125°40.00′ W. long.;
(7) 47°57.00′ N. lat., 125°37.00′ W. long.;
(8) 47°55.50′ N. lat., 125°28.50′ W. long.;
(9) 47°58.00′ N. lat., 125°25.00′ W. long.;
(10) 48°00.50′ N. lat., 125°24.50′ W. long.;
(11) 48°03.50′ N. lat., 125°21.00′ W. long.;
(12) 48°02.00′ N. lat., 125°19.50′ W. long.;
(13) 48°00.00′ N. lat., 125°21.00′ W. long.;
(14) 47°58.00′ N. lat., 125°20.00′ W. long.;
(15) 47°58.00′ N. lat., 125°18.00′ W. long.;
(16) 47°52.00′ N. lat., 125°16.50′ W. long.;
(17) 47°49.00′ N. lat., 125°11.00′ W. long.;
(18) 47°46.00′ N. lat., 125°06.00′ W. long.;
(19) 47°44.50′ N. lat., 125°07.50′ W. long.;
(20) 47°42.00′ N. lat., 125°06.00′ W. long.;
(21) 47°38.00′ N. lat., 125°07.00′ W. long.;
(22) 47°30.00′ N. lat., 125°00.00′ W. long.;
(23) 47°28.00′ N. lat., 124°58.50′ W. long.;
(24) 47°28.88′ N. lat., 124°54.71′ W. long.;
(25) 47°27.70′ N. lat., 124°51.87′ W. long.;
(26) 47°24.84′ N. lat., 124°48.45′ W. long.;
(27) 47°21.76′ N. lat., 124°47.42′ W. long.;
(28) 47°18.84′ N. lat., 124°46.75′ W. long.;
(29) 47°19.82′ N. lat., 124°51.43′ W. long.;
(30) 47°18.13′ N. lat., 124°54.25′ W. long.;
(31) 47°13.50′ N. lat., 124°54.69′ W. long.;
(32) 47°15.00′ N. lat., 125°00.00′ W. long.;
(33) 47°08.00′ N. lat., 124°59.82′ W. long.;
(34) 47°05.79′ N. lat., 125°01.00′ W. long.;
(35) 47°03.34′ N. lat., 124°57.49′ W. long.;
(36) 47°01.00′ N. lat., 125°00.00′ W. long.;
(37) 46°55.00′ N. lat., 125°02.00′ W. long.;
(38) 46°51.00′ N. lat., 124°57.00′ W. long.;
(39) 46°47.00′ N. lat., 124°55.00′ W. long.;
(40) 46°34.00′ N. lat., 124°38.00′ W. long.;
(41) 46°30.50′ N. lat., 124°41.00′ W. long.;
(42) 46°33.00′ N. lat., 124°32.00′ W. long.;
(43) 46°29.00′ N. lat., 124°32.00′ W. long.;
(44) 46°20.00′ N. lat., 124°39.00′ W. long.;
(45) 46°18.16′ N. lat., 124°40.00′ W. long.;
(46) 46°16.00′ N. lat., 124°27.01′ W. long.;
(47) 46°15.00′ N. lat., 124°30.96′ W. long.;
(48) 46°13.17′ N. lat., 124°38.76′ W. long.;
(49) 46°10.51′ N. lat., 124°41.99′ W. long.;
(50) 46°06.24′ N. lat., 124°41.81′ W. long.;
(51) 46°03.04′ N. lat., 124°50.26′ W. long.;
(52) 45°56.99′ N. lat., 124°45.45′ W. long.;
(53) 45°49.94′ N. lat., 124°45.75′ W. long.;
(54) 45°49.94′ N. lat., 124°42.33′ W. long.;
(55) 45°45.73′ N. lat., 124°42.18′ W. long.;
(56) 45°45.73′ N. lat., 124°43.82′ W. long.;
(57) 45°41.94′ N. lat., 124°43.61′ W. long.;
(58) 45°41.58′ N. lat., 124°39.86′ W. long.;
(59) 45°38.45′ N. lat., 124°39.94′ W. long.;
(60) 45°35.75′ N. lat., 124°42.91′ W. long.;
(61) 45°24.49′ N. lat., 124°38.20′ W. long.;
(62) 45°14.43′ N. lat., 124°39.05′ W. long.;
(63) 45°14.30′ N. lat., 124°34.19′ W. long.;
(64) 45°08.98′ N. lat., 124°34.26′ W. long.;
(65) 45°09.02′ N. lat., 124°38.81′ W. long.;
(66) 44°57.98′ N. lat., 124°36.98′ W. long.;
(67) 44°56.62′ N. lat., 124°38.32′ W. long.;
(68) 44°50.82′ N. lat., 124°35.52′ W. long.;
(69) 44°46.89′ N. lat., 124°38.32′ W. long.;
(70) 44°50.78′ N. lat., 124°44.24′ W. long.;
(71) 44°44.27′ N. lat., 124°50.78′ W. long.;
(72) 44°32.63′ N. lat., 124°54.24′ W. long.;
(73) 44°23.25′ N. lat., 124°49.78′ W. long.;
(74) 44°13.16′ N. lat., 124°58.81′ W. long.;
(75) 43°57.88′ N. lat., 124°58.25′ W. long.;
(76) 43°56.89′ N. lat., 124°57.33′ W. long.;
(77) 43°53.41′ N. lat., 124°51.95′ W. long.;

(78) 43°51.56′ N. lat., 124°47.38′ W. long.;
(79) 43°51.49′ N. lat., 124°37.77′ W. long.;
(80) 43°48.02′ N. lat., 124°43.31′ W. long.;
(81) 43°42.77′ N. lat., 124°41.39′ W. long.;
(82) 43°24.09′ N. lat., 124°42.57′ W. long.;
(83) 43°19.73′ N. lat., 124°45.09′ W. long.;
(84) 43°15.98′ N. lat., 124°47.76′ W. long.;
(85) 43°04.14′ N. lat., 124°52.55′ W. long.;
(86) 43°04.00′ N. lat., 124°53.88′ W. long.;
(87) 42°54.69′ N. lat., 124°54.54′ W. long.;
(88) 42°45.46′ N. lat., 124°49.37′ W. long.;
(89) 42°43.91′ N. lat., 124°45.90′ W. long.;
(90) 42°38.84′ N. lat., 124°43.36′ W. long.;
(91) 42°34.82′ N. lat., 124°46.56′ W. long.;
(92) 42°31.57′ N. lat., 124°46.86′ W. long.;
(93) 42°30.98′ N. lat., 124°44.27′ W. long.;
(94) 42°29.21′ N. lat., 124°46.93′ W. long.;
(95) 42°28.52′ N. lat., 124°49.40′ W. long.;
(96) 42°26.06′ N. lat., 124°46.61′ W. long.;
(97) 42°21.82′ N. lat., 124°43.76′ W. long.;
(98) 42°17.47′ N. lat., 124°38.89′ W. long.;
(99) 42°13.67′ N. lat., 124°37.51′ W. long.;
(100) 42°13.76′ N. lat., 124°40.03′ W. long.;
(101) 42°05.12′ N. lat., 124°39.06′ W. long.;
(102) 42°02.67′ N. lat., 124°38.41′ W. long.;
(103) 42°02.67′ N. lat., 124°35.95′ W. long.;
(104) 42°00.00′ N. lat., 124°35.88′ W. long.;
(105) 41°59.99′ N. lat., 124°35.92′ W. long.;
(106) 41°56.38′ N. lat., 124°34.96′ W. long.;
(107) 41°53.98′ N. lat., 124°32.50′ W. long.;
(108) 41°50.69′ N. lat., 124°30.46′ W. long.;
(109) 41°47.79′ N. lat., 124°29.52′ W. long.;
(110) 41°21.00′ N. lat., 124°29.00′ W. long.;
(111) 41°11.00′ N. lat., 124°23.00′ W. long.;
(112) 41°05.00′ N. lat., 124°23.00′ W. long.;
(113) 40°54.00′ N. lat., 124°26.00′ W. long.;
(114) 40°50.00′ N. lat., 124°26.00′ W. long.;
(115) 40°44.51′ N. lat., 124°30.83′ W. long.;
(116) 40°40.61′ N. lat., 124°32.06′ W. long.;
(117) 40°37.36′ N. lat., 124°29.41′ W. long.;
(118) 40°35.64′ N. lat., 124°30.47′ W. long.;
(119) 40°37.43′ N. lat., 124°37.10′ W. long.;
(120) 40°36.00′ N. lat., 124°40.00′ W. long.;
(121) 40°31.59′ N. lat., 124°40.72′ W. long.;
(122) 40°24.64′ N. lat., 124°35.62′ W. long.;
(123) 40°23.00′ N. lat., 124°32.00′ W. long.;
(124) 40°23.39′ N. lat., 124°28.70′ W. long.;
(125) 40°22.28′ N. lat., 124°25.25′ W. long.;
(126) 40°21.90′ N. lat., 124°25.17′ W. long.;
(127) 40°22.00′ N. lat., 124°28.00′ W. long.;
(128) 40°21.35′ N. lat., 124°29.53′ W. long.;
(129) 40°19.75′ N. lat., 124°28.98′ W. long.;
(130) 40°18.15′ N. lat., 124°27.01′ W. long.;
(131) 40°17.45′ N. lat., 124°25.49′ W. long.;
(132) 40°18.00′ N. lat., 124°24.00′ W. long.;
(133) 40°16.00′ N. lat., 124°26.00′ W. long.;
(134) 40°17.00′ N. lat., 124°35.00′ W. long.;
(135) 40°16.00′ N. lat., 124°36.00′ W. long.;
(136) 40°10.00′ N. lat., 124°22.75′ W. long.;
(137) 40°03.00′ N. lat., 124°14.75′ W. long.;
(138) 39°49.25′ N. lat., 124°06.00′ W. long.;
(139) 39°34.75′ N. lat., 123°58.50′ W. long.;
(140) 39°03.07′ N. lat., 123°57.81′ W. long.;
(141) 38°52.25′ N. lat., 123°56.25′ W. long.;
(142) 38°41.42′ N. lat., 123°46.75′ W. long.;
(143) 38°39.47′ N. lat., 123°46.59′ W. long.;
(144) 38°35.25′ N. lat., 123°42.00′ W. long.;
(145) 38°19.97′ N. lat., 123°32.95′ W. long.;
(146) 38°15.00′ N. lat., 123°26.50′ W. long.;
(147) 38°08.09′ N. lat., 123°23.39′ W. long.;
(148) 38°10.08′ N. lat., 123°26.82′ W. long.;
(149) 38°04.08′ N. lat., 123°32.12′ W. long.; and
(150) 38°00.00′ N. lat., 123°29.85′ W. long.

(xv) Farallon Islands. The Farallon Islands, off San Francisco and San Mateo Counties, include Southeast Farallon Island, Middle Farallon Island, North Farallon Island and Noon Day Rock. Under California law, commercial fishing for all groundfish and recreational fishing for certain species of groundfish is prohibited between the shoreline and the 10-fm (18-m) depth contour around the Farallon Islands. (*See* section B.(1) Table 3 (South) and Table 4 (South), section C.(1) Table 5 (South), and section D.(3))

(xvi) Cordell Banks. Cordell Banks are located offshore of California's Marin County. Recreational fishing for certain species of groundfish is prohibited within a 5 nautical mile radius around a point located at 38°02′ N. lat. and 123°25′ W. long. (*See* section D.(3))

(18) *Rockfish categories.* Rockfish (except thornyheads) are divided into categories north and south of 40°10′ N. lat., depending on the depth where they most often are caught: nearshore, shelf, or slope (scientific names appear in Table 2). Nearshore rockfish are further divided into shallow nearshore and deeper nearshore categories south of 40°10′ N. lat. Trip limits are established for "minor rockfish" species according to these categories (*see* Tables 3–5).

(a) Nearshore rockfish consists entirely of the minor nearshore rockfish species listed in Table 2, which includes California scorpionfish.

(i) Shallow nearshore rockfish consists of black-and-yellow rockfish, China rockfish, gopher rockfish, grass rockfish, and kelp rockfish.

(ii) Deeper nearshore rockfish consists of black rockfish, blue rockfish, brown rockfish, calico rockfish, copper rockfish, olive rockfish, quillback rockfish, and treefish.

(iii) California scorpionfish.

(b) Shelf rockfish consists of canary rockfish, shortbelly rockfish, widow rockfish, yelloweye rockfish, yellowtail rockfish, bocaccio, chilipepper, cowcod, and the minor shelf rockfish species listed in Table 2.

(c) Slope rockfish consists of Pacific ocean perch, splitnose rockfish, darkblotched rockfish, and the other minor slope rockfish species listed in Table 2.

(19) *Flatfish complex.* Flatfish managed under the FMP include: arrowtooth flounder, butter sole, curlfin sole, Dover sole, English sole, flathead sole, Pacific sanddab, petrale sole, rex sole, rock sole, sand sole, and starry flounder. Where Tables 3, 4, and/or 5 of sections IV.B. and IV.C. refer to landings limits for "all other flatfish," those limits apply to all flatfish cumulatively taken from the group of flatfish species listed in this section except for those flatfish species listed with species-specific limits.

(20) *Application of requirements.* Paragraphs IV.B. and IV.C. pertain to the commercial groundfish fishery, but not to Washington coastal tribal fisheries, which are described in section V. The provisions in paragraphs IV.B. and IV.C. that are not covered under the headings "limited entry" or "open access" apply to all vessels in the commercial fishery that take and retain groundfish, unless otherwise stated. Paragraph IV.D. pertains to the recreational fishery.

TABLE 2.—MINOR ROCKFISH SPECIES (EXCLUDES THORNYHEADS)

North of 40°10′ N. lat.	South of 40°10′ N. lat.
NEARSHORE	
black, Sebastes melanops	black, Sebastes melanops.
black and yellow, S. chrysolmelas	black and yellow, S. chrysolmelas.
blue, S. mystinus	blue, S. mystinus.
brown, S. auriculatus	brown, S. auriculatus.
calico, S. dalli	calico, S. dalli.
China, S. nebulosus	California scorpionfish, Scorpaena guttata.
copper, S. caurinus	China, Sebastes nebulosus.
gopher, S. carnatus	copper, S. caurinus.
grass, S. rastrelliger	gopher, S. carnatus.
kelp, S. atrovirens	grass, S. rastrelliger.
olive, S. serranoides	kelp, S. atrovirens.
quillback, S. maliger	olive, S. serranoides.
treefish, S. serriceps	quillback, S. maliger.

TABLE 2.—MINOR ROCKFISH SPECIES (EXCLUDES THORNYHEADS)—Continued

North of 40°10′ N. lat.	South of 40°10′ N. lat.
	treefish, S. serriceps.
SHELF	
bronzespotted, S. gilli	bronzespotted, S. gilli.
bocaccio, S. paucispinis	chameleon, S. phillipsi.
chameleon, S. phillipsi	dwarf-red, S. rufianus.
chilipepper, S. goodei	flag, S. rubrivinctus.
cowcod, S. levis	freckled, S. lentiginosus.
dwarf-red, S. rufianus	greenblotched, S. rosenblatti.
flag, S. rubrivinctus	greenspotted, S. chlorostictus.
freckled, S. lentiginosus	greenstriped, S. elongatus.
greenblotched, S. rosenblatti	halfbanded, S. semicinctus.
greenspotted, S. chlorostictus	honeycomb, S. umbrosus.
greenstriped, S. elongatus	Mexican, S. macdonaldi.
halfbanded, S. semicinctus	pink, S. eos.
honeycomb, S. umbrosus	pinkrose, S. simulator.
Mexican, S. macdonaldi	pygmy, S. wilsoni.
pink, S. eos	redstriped, S. proriger.
pinkrose, S. simulator	rosethorn, S. helvomaculatus.
pygmy, S. wilsoni	rosy, S. rosaceus.
redstriped, S. proriger	silvergrey, S. brevispinis.
rosethorn, S. helvomaculatus	speckled, S. ovalis.
rosy, S. rosaceus	squarespot, S. hopkinsi.
silvergrey, S. brevispinis	starry, S. constellatus.
speckled, S. ovalis	stripetail, S. saxicola.
squarespot, S. hopkinsi	swordspine, S. ensifer.
starry, S. constellatus	tiger, S. nigorcinctus.
stripetail, S. saxicola	vermilion, S. miniatus.
swordspine, S. ensifer	yelloweye, S. ruberrimus.
tiger, S. nigorcinctus	yellowtail, S. flavidus.
vermilion, S. miniatus.	
yelloweye, S. ruberrimus.	
SLOPE	
aurora, S. aurora	aurora, S. aurora.
bank, S. rufus	bank, S. rufus.
blackgill, S. melanostomus	blackgill, S. melanostomus.
darkblotched, S. crameri	darkblotched, S. crameri.
redbanded, S. babcocki	Pacific ocean perch (POP), S. alutus.
rougheye, S. aleutianus	redbanded, S. babcocki.
sharpchin, S. zacentrus	rougheye, S. aleutianus.
shortraker, S. borealis	sharpchin, S. zacentrus.
splitnose, S. diploproa	shortraker, S. borealis.
yellowmouth, S. reedi	yellowmouth, S. reedi.

B. Limited Entry Fishery

(1) *General.* Most species taken in limited entry fisheries will be managed with cumulative trip limits (*see* paragraph IV.A.(1)(d)), size limits (*see* paragraph IV.A.(6)), seasons (*see* paragraph IV.A.(7)), and areas that are closed to specific gear types. The trawl fishery has gear requirements and trip limits that differ by the type of trawl gear on board (*see* paragraph IV.A.(14)). Cowcod retention is prohibited in all fisheries and groundfish vessels operating south of Point Conception must adhere to CCA restrictions (*see* paragraph IV.A.(17)(b)). Yelloweye rockfish and canary rockfish retention is prohibited in the limited entry fixed gear fisheries. Most of the management measures for the limited entry fishery are listed above and in the following tables: Table 3 (North), Table 3 (South), Table 4 (North), and Table 4 (South).

A header in Table 3 (North), Table 3 (South), Table 4 (North) and Table 4 (South) generally describes the Rockfish Conservation Area (RCA) (*i.e.*, closed area) for vessels participating in the limited entry fishery. The RCA boundaries are defined by latitude and longitude coordinates (*see* paragraph IV.A.(17)), except that under state law fishing is prohibited by limited entry vessels from the shoreline to a 10-fm (18-m) depth contour around the Farallon Islands. For a definition of the Farallon Islands, *see* paragraph IV.A.(17)(f).

Management measures may be changed during the year by announcement in the **Federal Register** pursuant to the requirements of the APA. However, the management regimes for several fisheries (nontrawl sablefish, Pacific whiting, and black rockfish) do not neatly fit into these tables and are addressed immediately following Table 3 (North), Table 3 (South), Table 4 (North), and Table 4 (South).

Federal commercial groundfish regulations are not intended to supersede any more restrictive State commercial groundfish regulations relating to federally-managed groundfish.

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Table 3 (North). 2004 Trip Limits and Gear Requirements[1/] for Limited Entry Trawl Gear North of 40°10' N. Latitude[2/]

Other Limits and Requirements Apply -- Read Sections IV. A. and B. NMFS Actions before using this table 32004

	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area[10/] (RCA): North of 40°10' N. lat.	75 fm - modified 200 fm [11/]	60 fm - 200 fm		75 fm - 150 fm	75 fm - 200 fm	75 fm - modified 200 fm [11/]

Small footrope or midwater trawl gear is required shoreward of the RCA; all trawl gear (large footrope, midwater trawl, and small footrope gear) is permitted seaward of the RCA.

A vessel may have more than one type of limited entry bottom trawl gear on board, but the most restrictive trip limit associated with the gear on board applies for that trip and will count toward the cumulative trip limit for that gear. A vessel may not have limited entry bottom trawl gear on board if that vessel also has trawl gear on board that is permitted for use within a RCA, including limited entry midwater trawl gear, regardless of whether the vessel is intending to fish within a RCA on that fishing trip. **See IV.A.(14)(iv) for details.**

1	**Minor slope rockfish[3/]**	4,000 lb/ 2 months				
2	**Pacific ocean perch**	3,000 lb/ 2 months				
3	**DTS complex**	Providing only large footrope or midwater trawl gear is used to land any groundfish species during the entire limit period, then large footrope trawl trip limits apply. If small footrope gear[7/] is used at any time in any area (North or South of 40°10' N. lat., shoreward or seaward of RCA) during the entire limit period, then small footrope trawl limits apply.				
4	Sablefish					
5	large footrope or midwater trawl gear	9,300 lb/ 2 months		8,700 lb/ 2 months		6,200 lb/ 2 months
6	small footrope gear[7/]	2,000 lb/ 2 months		5,000 lb/ 2 months		2,000 lb/ 2 months
7	Longspine thornyhead					
8	large footrope or midwater trawl gear	15,000 lb/ 2 months		10,000 lb/ 2 months		
9	small footrope gear[7/]	1,000 lb/ 2 months				
10	Shortspine thornyhead					
11	large footrope or midwater trawl gear	3,150 lb/ 2 months		2,100 lb/ 2 months		
12	small footrope gear[7/]	1,000 lb/ 2 months				
13	Dover sole					
14	large footrope or midwater trawl gear	67,500 lb/ 2 months		21,000 lb/ 2 months (providing large footrope, small footrope, and/or midwater trawl gear is used)		45,000 lb/ 2 months
15	small footrope gear[7/]	10,000 lb/ 2 months				10,000 lb/ 2 months
16	**Flatfish**	Providing only large footrope or midwater trawl gear is used to land any groundfish species during the entire limit period, then large footrope trawl trip limits apply. If small footrope gear[7/] is used at any time in any area (North or South of 40o10' N. lat., shoreward or seaward of RCA) during the entire limit period, then small footrope trawl limits apply.				
17	All other flatfish, Petrale sole, & Rex sole					
18	large footrope or midwater trawl gear for All other flatfish[4/] & Rex sole	100,000 lb/ 2 months				
19	large footrope or midwater trawl gear for Petrale sole	Not limited		100,000 lb/ 2 months		Not limited
20	small footrope gear[7/]	30,000 lb/ 2 months, no more than 10,000 lb/ 2 months of which may be petrale sole.		60,000 lb/ 2 months, no more than 25,000 lb/ 2 months of which may be petrale sole.		30,000 lb/ 2 months, no more than 10,000 lb/ 2 months of which may be petrale sole.
21	Arrowtooth flounder					
22	large footrope or midwater trawl gear	Not limited		150,000 lb/ 2 months		Not limited
23	small footrope gear[7/]	4,000 lb/ 2 months		6,000 lb/ 2 months		4,000 lb/ 2 months

Table 3 (North). Continued

24	**Whiting**[5/]	Before the primary whiting season: 20,000 lb/trip -- During the primary season: mid-water trawl permitted in the RCA. See IV.B.(3)(b) for season and trip limit details. -- After the primary whiting season: 10,000 lb/trip			
25	**Minor shelf rockfish**[3/] **& Widow rockfish**				
26	large footrope trawl	CLOSED[6/]			
27	midwater trawl for Widow rockfish	Before the primary whiting season: CLOSED[6/] -- During primary whiting season: In trips of at least 10,000 lb of whiting, combined widow and yellowtail limit of 500 lb/ trip, cumulative widow limit of 1,500 lb/ month. Mid-water trawl permitted in the RCA. See IV.B.(3)(b) for primary whiting season and trip limit details. -- After the primary whiting season: CLOSED[6/]			12,000 lb/ 2 months
28	midwater for Minor shelf rockfish or small footrope trawl[7/] for minor shelf & widow	300 lb/ month	1,000 lb/ month, no more than 200 lb/ month of which may be yelloweye rockfish		300 lb/ month
29	**Canary rockfish**				
30	large footrope trawl	CLOSED[6/]			
31	midwater or small footrope trawl[7/]	100 lb/ month	300 lb/ month	100 lb/ month	
32	**Yellowtail**				
33	large footrope trawl	CLOSED[6/]			
34	midwater trawl	Before the primary whiting season: CLOSED[6/] -- During primary whiting season: In trips of at least 10,000 lb of whiting: combined widow and yellowtail limit of 500 lb/ trip, cumulative yellowtail limit of 2,000 lb/ month. Mid-water trawl permitted in the RCA. See IV.B.(3)(b) for primary whiting season and trip limit details. -- After the primary whiting season: CLOSED[6/]			18,000 lb/ 2 months
35	small footrope trawl[7/]	In landings without flatfish, 1,000 lb/ month. As flatfish bycatch, per trip limit is the sum of 33% (by weight) of all flatfish except arrowtooth flounder, plus 10% (by weight) of arrowtooth flounder. Total yellowtail landings not to exceed 10,000 lb/ 2 months, no more than 1,000 lb of which may be landed without flatfish.			
36	**Minor nearshore rockfish**				
37	large footrope trawl	CLOSED[6/]			
38	midwater or small footrope trawl[7/]	300 lb/ month			
39	**Lingcod**[8/]				
40	large footrope trawl	CLOSED[6/]			
41	midwater or small footrope trawl[7/]	800 lb/ 2 months	1,000 lb/ 2 months	800 lb/ 2 months	
42	**Other Fish**[9/]	Not limited			

1/ Gear requirements and prohibitions are explained above. See IV. A.(14).
2/ "North" means 40°10' N. lat. to the U.S.-Canada border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.
3/ Bocaccio and chilipepper are included in the trip limits for minor shelf rockfish and splitnose rockfish is included in the trip limits for minor slope rockfish
4/ "Other" flatfish means all flatfish at 50 CFR 660.302 except those in this Table 3 with species specific management measures, including trip limits.
5/ The whiting "per trip" limit in the Eureka area shoreward of 100 fm is 10,000 lb/ trip all year. Outside Eureka area, the 20,000 lb/ trip limit applies. See IV. B.(3)
6/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).
7/ Small footrope trawl means a bottom trawl net with a footrope no larger than 8 inches (20 cm) in diameter.
8/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
9/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.
10/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at IV. A.(17)(f), that may vary seasonally.
11/ The "modified 200 fm" line is modified to exclude certain petrale sole areas from the RCA.
To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 3 (South). 2004 Trip Limits and Gear Requirements[1/] for Limited Entry Trawl Gear South of 40°10' N. Latitude[2/]

Other Limits and Requirements Apply -- Read Sections IV. A. and B. NMFS Actions before using this table 32004

	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area[10/] (RCA):						
40°10' - 34°27' N. lat.	75 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)		100 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)		75 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)	
South of 34°27' N. lat.	75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands		100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands		75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands	

Small footrope or midwater trawl gear is required shoreward of the RCA; all trawl gear (large footrope, midwater trawl, and small footrope gear) is permitted seaward of the RCA.

A vessel may have more than one type of limited entry bottom trawl gear on board, but the most restrictive trip limit associated with the gear on board applies for that trip and will count toward the cumulative trip limit for that gear. A vessel may not have limited entry bottom trawl gear on board if that vessel also has trawl gear on board that is permitted for use within a RCA, including limited entry midwater trawl gear, regardless of whether the vessel is intending to fish within a RCA on that fishing trip. **See IV.A.(14)(iv) for details.**

1	**Minor slope rockfish[3/]**					
2	40°10' - 38° N. lat.	7,000 lb/ 2 months				
3	South of 38° N. lat.	40,000 lb/ 2 months				
4	**Splitnose**					
5	40°10' - 38° N. lat.	7,000 lb/ 2 months				
6	South of 38° N. lat.	40,000 lb/ 2 months				
7	**DTS complex**	If fishing North of 40°10' N. lat. at any time during the cumulative limit period, differential trip limits based on footrope size and crossover provisions will apply during the entire limit period. See Table 3 (North) and Section A. (12) for more details				
8	Sablefish	11,250 lb/ 2 months		7,500 lb/ 2 months		
9	Longspine thornyhead	15,000 lb / 2 months		10,000 lb / 2 months		
10	Shortspine thornyhead	3,000 lb/ 2 months		2,000 lb/ 2 months		
11	Dover sole	39,000 lb/ 2 months		26,000 lb/ 2 months		
12	**Flatfish**	If fishing North of 40°10' N. lat. at any time during the cumulative limit period, differential trip limits based on footrope size and crossover provisions will apply during the entire limit period. See Table 3 (North) and Section A. (12) for more details				
13	All other flatfish[4/] & Rex sole	100,000 lb/ 2 months	All other flatfish plus petrale & rex sole: 100,000 lb/ 2 months, no more than 20,000 lb/ 2 months of which may be petrale sole			100,000 lb/ 2 months
14	Petrale sole	No limit				No limit
15	Arrowtooth flounder	No limit	10,000 lb/ 2 months			No limit
16	**Whiting[5/]**	Before the primary whiting season: 20,000 lb/trip -- During the primary whiting season: mid-water trawl permitted in the RCA. See IV.B.(3)(b) for season and trip limit details. -- After the primary whiting season: 10,000 lb/trip				
17	**Minor shelf rockfish, Widow, and Chilipepper rockfish[3/]**	Providing only large footrope trawl gear is used to land any groundfish species during the entire limit period, then large footrope limit applies.				
18	large footrope trawl for Minor shelf rockfish	300 lb/ month				
19	large footrope trawl for Chilipepper rockfish	2,000 lb/ 2 months				
20	large footrope or midwater trawl for Widow rockfish	CLOSED[6/]				
21	midwater for Minor shelf or Chilipepper rockfish or small footrope trawl[7/] for minor shelf, widow & chilipepper	300 lb/ month				
22	**Bocaccio**	Providing only large footrope trawl gear is used to land any groundfish species during the entire limit period, then large footrope limit applies.				
23	large footrope trawl	100 lb/month				
24	midwater or small footrope trawl[7/]	CLOSED[6/]				

Table 3 (South). Continued

25	**Canary rockfish**			
26	large footrope trawl		CLOSED[6/]	
27	midwater or small footrope trawl[7/]	100 lb/ month	300 lb/ month	100 lb/ month
28	**Cowcod**		CLOSED[6/]	
29	**Minor nearshore rockfish**			
30	large footrope trawl		CLOSED[6/]	
31	midwater or small footrope trawl[7/]		300 lb/ month	
32	**Lingcod[8/]**			
33	large footrope trawl		CLOSED[6/]	
34	midwater or small footrope trawl[7/]	800 lb/ 2 months	1,000 lb/ 2 months	800 lb/ 2 months
35	**Other Fish[9/]**		Not limited	

1/ Gear requirements and prohibitions are explained above. See IV. A.(14).

2/ "South" means 40°10' N. lat. to the U.S.-Mexico border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.

3/ Yellowtail is included in the trip limits for minor shelf rockfish and POP is included in the trip limits for minor slope rockfish.

4/ "Other" flatfish means all flatfish at 50 CFR 660.302 except those in this Table 3 with species specific management measures, including trip limits.

5/ The whiting "per trip" limit in the Eureka area shoreward of 100 fm is 10,000 lb/ trip all year. Outside Eureka area, the 20,000 lb/ trip limit applies. See IV. B.(3)

6/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7)

7/ Small footrope trawl means a bottom trawl net with a footrope no larger than 8 inches (20 cm) in diameter.

8/ The minimum size limit for lingcod is 24 inches (61 cm) total length.

9/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.

10/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat./long. coordinates set out at IV. A.(17)(f), that may vary seasonally.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 4 (North). 2004 Trip Limits for Limited Entry Fixed Gear North of 40°10' N. Latitude[1/]

Other Limits and Requirements Apply -- Read Sections IV. A. and B. NMFS Actions before using this table 32004

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area[8/] (RCA):						
	North of 46°16' N. lat.	shoreline - 100 fm					
	46°16' N. lat. - 40°10' N. lat.	30 fm - 100 fm					
1	**Minor slope rockfish[4/]**	4,000 lb/ 2 months					
2	**Pacific ocean perch**	1,800 lb/ 2 months					
3	**Sablefish**	300 lb/ day, or 1 landing per week of up to 900 lb, not to exceed 3,600 lb/ 2 months					
4	**Longspine thornyhead**	10,000 lb/ 2 months					
5	**Shortspine thornyhead**	2,100 lb/ 2 months					
6	**Dover sole**	5,000 lb/ month					
7	**Arrowtooth flounder**						
8	**Petrale sole**						
9	**Rex sole**						
10	**All other flatfish[2/]**						
11	**Whiting[3/]**	10,000 lb/ trip					
12	**Minor shelf rockfish, widow, and yellowtail rockfish[4/]**	200 lb/ month					
13	**Canary rockfish**	CLOSED[5/]					
14	**Yelloweye rockfish**	CLOSED[5/]					
15	**Minor nearshore rockfish**	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish[6/]					
16	**Lingcod[7/]**	CLOSED[5/]		400 lb/ month			CLOSED[5/]
17	**Other fish[9/]**	Not limited					

1/ "North" means 40°10' N. lat. to the U.S.-Canada border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.

2/ "Other flatfish" means all flatfish at 50 CFR 660.302 except those in this Table 4 with species specific management measures, including trip limits.

3/ The whiting "per trip" limit in the Eureka area shoreward of 100 fm is 10,000 lb/ trip all year. Outside Eureka area, the 20,000 lb/ trip limit applies. See IV. B.(3).

4/ Bocaccio and chilipepper are included in the trip limits for minor shelf rockfish and splitnose rockfish is included in the trip limits for minor slope rockfish.

5/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).

6/ For black rockfish north of Cape Alava (48°09'30" N. lat.), and between Destruction Island (47°40'00" N. lat.) and Leadbetter Point (46°38'10" N. lat.), there is an additional limit of 100 lb or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.

7/ The minimum size limit for lingcod is 24 inches (61 cm) total length.

8/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat./long. coordinates set out at IV. A.(17)(f), that may vary seasonally.

9/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 4 (South). 2004 Trip Limits for Limited Entry Fixed Gear South of 40°10' N. Latitude[1/]

Other Limits and Requirements Apply -- Read Sections IV. A. and B. NMFS Actions before using this table

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		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area[7/] (RCA):						
	40°10' - 34°27' N. lat.	30 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)		20 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)		30 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)	
	South of 34°27' N. lat.	60 fm - 150 fm (also applies around islands)					
1	**Minor slope rockfish[4/]**						
2	40°10' - 38° N. lat.	7,000 lb/ 2 months					
3	South of 38° N. lat.	40,000 lb/ 2 months					
4	**Splitnose**						
5	40°10' - 38° N. lat.	7,000 lb/ 2 months					
6	South of 38° N. lat.	40,000 lb/ 2 months					
7	**Sablefish**						
8	40°10' - 36° N. lat.	300 lb/ day, or 1 landing per week of up to 900 lb, not to exceed 3,600 lb/ 2 months					
9	South of 36° N. lat.	350 lb/ day, or 1 landing per week of up to 1,050 lb					
10	**Longspine thornyhead**	10,000 lb/ 2 months					
11	**Shortspine thornyhead**	2,000 lb/ 2 months					
12	**Dover sole**	5,000 lb/ month When fishing for Pacific sanddabs, vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to 1 lb (0.45 kg) of weight per line are not subject to the RCAs.					
13	**Arrowtooth flounder**						
14	**Petrale sole**						
15	**Rex sole**						
16	**All other flatfish[2/]**						
17	**Whiting[3/]**	10,000 lb/ trip					
18	**Minor shelf rockfish, widow, and yellowtail rockfish[4/]**						
19	40°10' - 34°27' N. lat.	300 lb/ 2 months	CLOSED[5/]	200 lb/ 2 months		300 lb/ 2 months	
20	South of 34°27' N. lat.	CLOSED[5/]	2,000 lb/ 2 months				
21	**Chilipepper rockfish**	2,000 lb/ 2 months, this opportunity only available seaward of the nontrawl RCA					
22	**Canary rockfish**	CLOSED[5/]					
23	**Yelloweye rockfish**	CLOSED[5/]					
24	**Cowcod**	CLOSED[5/]					
25	**Bocaccio**						
26	40°10' - 34°27' N. lat.	200 lb/ 2 months	CLOSED[5/]	100 lb/ 2 months		200 lb/ 2 months	
27	South of 34°27' N. lat.	CLOSED[5/]	300 lb/ 2 months				
28	**Minor nearshore rockfish**						
29	Shallow nearshore						
30	40°10' - 34°27' N. lat.	300 lb/ 2 months	CLOSED[5/]	500 lb/ 2 months	600 lb/ 2 months	500 lb/ 2 months	300 lb/ 2 months
31	South of 34°27' N. lat.	CLOSED[5/]	300 lb/ 2 months				
32	Deeper nearshore						
33	40°10' - 34°27' N. lat.	500 lb/ 2 months	CLOSED[5/]	500 lb/ 2 months		400 lb/month	500 lb/ 2 months
34	South of 34°27' N. lat.	CLOSED[5/]	500 lb/ 2 months	600 lb/ 2 months			400 lb/ 2 months
35	California scorpionfish	CLOSED[5/]	300 lb/ 2 months		400 lb/ 2 months		300 lb/ 2 months

Table 4 (South). Continued

36	Lingcod[6/]	CLOSED[5/]	400 lb/ month, when nearshore open	CLOSED[5/]
37	Other fish[8/]	Not limited		

1/ "South" means 40°10' N. lat. to the U.S.-Mexico border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.
2/ "Other flatfish" means all flatfish at 50 CFR 660.302 except those in this Table 4 with species specific management measures, including trip limits.
3/ The whiting "per trip" limit in the Eureka area shoreward of 100 fm is 10,000 lb/ trip all year. Outside Eureka area, the 20,000 lb/ trip limit applies. See IV. B.(3)
4/ Chilipepper rockfish is included in the trip limits for minor shelf rockfish and POP is included in the trip limits for minor slope rockfish.
5/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).
6/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
7/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at IV. A.(17)(f) that may vary seasonally.
8/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.
To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

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(2) *Sablefish.* The limited entry sablefish allocation is further allocated 58 percent to trawl gear and 42 percent to nontrawl gear. *See* footnote e/ of Table 1a.

(a) *Trawl trip limits.* Management measures for the limited entry trawl fishery for sablefish are listed in Table 3 (North) and Table 3 (South).

(b) *Nontrawl (fixed gear) trip limits.* To take, retain, possess, or land sablefish during the primary season for the limited entry fixed gear sablefish fishery, the owner of a vessel must hold a limited entry permit for that vessel, affixed with both a gear endorsement for longline or trap (or pot) gear, and a sablefish endorsement (*see* 50 CFR 660.323(a)(2)(i).) A sablefish endorsement is not required to participate in the limited entry daily trip limit fishery.

(i) *Primary season.* The primary season begins at 12 noon l.t. on April 1, 2004, and ends at 12 noon l.t. on October 31, 2004. There are no pre-season or post-season closures. During the primary season, each vessel with at least one limited entry permit with a sablefish endorsement that is registered for use with that vessel may land up to the cumulative trip limit for each of the sablefish-endorsed limited entry permits registered for use with that vessel, for the tier(s) to which the permit(s) are assigned. For 2004, the following limits are in effect: Tier 1, 62,000 lb (28,123 kg); Tier 2, 28,000 lb (12,701 kg); Tier 3, 16,000 lb (7,257 kg). (**Note:** These tier limits are likely to change as new observer data is released in the spring of 2004. Limits will be finalized before the start of the primary season.) All limits are in round weight. If a vessel is registered for use with a sablefish-endorsed limited entry permit, all sablefish taken after April 1, 2004 count against the cumulative limits associated with the permit(s) registered for use with that vessel.

(ii) *Daily trip limit.* Daily and/or weekly sablefish trip limits listed in Table 4 (North) and Table 4 (South) apply to any limited entry fixed gear vessels not participating in the primary sablefish season described in paragraph (i) of this section. North of 36° N. lat., the daily and/or weekly trip limits apply to fixed gear vessels that are not registered for use with a sablefish-endorsed limited entry permit, and to fixed gear vessels that are registered for use with a sablefish-endorsed limited entry permit when those vessels are not fishing against their primary sablefish season cumulative limits. South of 36° N. lat., the daily and/or weekly trip limits for taking and retaining sablefish that are listed in Table 4 (South) apply throughout the year to all vessels registered for use with a limited entry fixed gear permit.

(iii) *Participating in both the primary and daily trip limit fisheries.* A vessel that is eligible to participate in the primary sablefish season may participate in the daily trip limit fishery for sablefish once that vessel's primary season sablefish limit(s) have been taken or after October 31, 2004, whichever occurs first. No vessel may land sablefish against both its primary season cumulative sablefish limits and against the daily trip limit fishery limits within the same 24 hour period of 0001 hour l.t. to 2400 hours l.t. If a vessel has taken all of its tier limit except for an amount that is smaller than the daily trip limit amount, that vessel's subsequent sablefish landings are automatically subject to daily and/or weekly trip limits.

(3) *Whiting.* Additional regulations that apply to the whiting fishery are found at 50 CFR 660.306 and at 50 CFR 660.323(a)(3) and (a)(4).

(a) *Allocations.* The non-tribal allocations, based on percentages that are applied to the commercial OY of (commercial OY to be announced before the start of the primary season) in 2004 (see 50 CFR 660.323(a)(4)), are as follows:

(i) *Catcher/processor sector*—TBA(24 percent);

(ii) *Mothership sector*—TBA (34 percent);

(iii) *Shore-based sector*—TBA (42 percent). No more than 5 percent (TBA) of the shore-based whiting allocation may be taken before the shore-based fishery begins north of 42° N. lat. on June 15, 2003.

(iv) *Tribal allocation—See* paragraph V.

(b) *Seasons.* After the start of a primary season for a sector of the whiting fishery, the season remains open for that sector until the quota is taken and the fishery season for that sector is closed by NMFS. The 2004 primary seasons for the whiting fishery start on the same dates as in 2003, as follows (*see* 50 CFR 660.323(a)(3)):

(i) *Catcher/processor sector*—May 15;

(ii) *Mothership sector*—May 15;

(iii) *Shore-based sector*—June 15 north of 42° N. lat.; April 1 between 42°–40°30′ N. lat.; April 15 south of 40°30′ N. lat.

(c) *Trip limits.*

(i) *Before and after the regular (primary) season.* The "per trip" limit for whiting before and after the regular (primary) season for the shore-based sector is announced in Table 3 (North) and Table 3 (South), as authorized at 50 CFR 660.323(a)(3) and (a)(4). This trip limit includes any whiting caught shoreward of 100 fathoms (183 m) in the Eureka, CA area. The "per trip" limit for other groundfish species before, during and after the regular (primary) season are announced in Table 3 (North) and Table 3 (South) and apply as follows:

(A) Before the primary whiting season, vessels may use either small and/or large footrope gear during a cumulative limit period, but are subject to the more restrictive trip limits for the entire cumulative period.

(B) Once the primary whiting season begins for a sector of the fishery, then the midwater trip limits apply and are additive to the trip limits for other

groundfish species for that fishing period (*i.e.*, vessels are not constrained by the lower midwater limits and can harvest up to the footrope-specific trawl limits plus the midwater trawl limits for that cumulative limit period).

(C) Following the primary whiting season, vessels can access either the small and/or large footrope limits, but any landings of other groundfish species made during the primary whiting season count against the cumulative limits for that period.

(ii) *Inside the Eureka, CA 100-fm (183-m) contour.* No more than 10,000 lb (4,536 kg) of whiting may be taken and retained, possessed, or landed by a vessel that, at any time during a fishing trip, fished in the fishery management area shoreward of the 100 fathom (183 m) contour (as shown on NOAA Charts 18580, 18600, and 18620) in the Eureka, CA area.

(4) *Black rockfish.* The regulations at 50 CFR 660.323(a)(1) state: "The trip limit for black rockfish (*Sebastes melanops*) for commercial fishing vessels using hook-and-line gear between the U.S.-Canada border and Cape Alava, WA (48°09′30″ N. lat.) and between Destruction Island, WA (47°40′00″ N. lat.) and Leadbetter Point, WA (46°38′10″ N. lat.), is 100 lb (45 kg) or 30 percent, by weight of all fish on board, whichever is greater, per vessel per fishing trip." These "per trip" limits apply to limited entry and open access fisheries, in conjunction with the cumulative trip limits and other management measures listed in Tables 4 (North) and Table 5 (North) of section IV. The crossover provisions at paragraphs IV.A.(12) do not apply to the black rockfish per-trip limits.

C. Trip Limits in the Open Access Fishery

(1) *General.* Open access gear is gear used to take and retain groundfish from a vessel that does not have a valid permit for the Pacific Coast groundfish fishery with an endorsement for the gear used to harvest the groundfish. This includes longline, trap, pot, hook-and-line (fixed or mobile), setnet and trammel net (south of 38° N. lat. only), and exempted trawl gear (trawls used to target non-groundfish species: pink shrimp or prawns, and, south of Pt. Arena, CA (38°57′30″ N. lat.), California halibut or sea cucumbers). Unless otherwise specified, a vessel operating in the open access fishery is subject to, and must not exceed any trip limit, frequency limit, and/or size limit for the open access fishery. Groundfish species taken in open access fisheries will be managed with cumulative trip limits (*see* paragraph IV.A.(1)(d)), size limits (*see* paragraph IV.A.(6)), seasons (*see* paragraph IV.A.(7)), and closed areas. Cowcod retention is prohibited in all fisheries and groundfish vessels operating south of Point Conception, CA must adhere to CCA restrictions (*see* paragraph IV.A.(17)(b)). Retention of yelloweye rockfish and canary rockfish is prohibited in all open access fisheries. The trip limits, size limits, seasons, and other management measures for open access groundfish gear, including exempted trawl gear, are listed in Table 5 (North) and Table 5 (South).

A header in Table 5 (North) and Table 5 (South) approximates the RCA (*i.e.*, closed area) for vessels participating in the open access fishery. Vessels targeting groundfish may not fish in the RCA. Vessels targeting species other than groundfish may fish in the RCA but may not retain groundfish caught within the RCA nor groundfish caught outside of the RCA boundaries on the same fishing trip. The RCA boundaries are defined by latitude and longitude coordinates (*see* paragraph IV.A.(17)), except that under State law, fishing is prohibited by open access fixed gear and exempted trawl vessels from the shoreline to a 10-fm (18–m) depth contour around the Farallon Islands. For a definition of the Farallon Islands, *see* paragraph IV.A.(17)(f).

For the exempted trawl gear fisheries, exempted trawl gear RCAs, if applicable, are detailed in the exempted trawl gear sections at the bottom of Table 5 (North) and Table 5 (South). Retention of groundfish caught by exempted trawl gear is prohibited in the designated RCAs, except that pink shrimp trawl may retain groundfish caught both inside and outside the exempted trawl RCA subject to the limits in Table 5 (North) and Table 5 (South). Retention of groundfish caught by salmon troll gear is prohibited in the designated RCAs, except that salmon trollers may retain yellowtail rockfish caught both inside and outside the non-trawl RCA subject to the limits in Table 5 (North). The trip limit at 50 CFR 660.323(a)(1) for black rockfish caught with hook-and-line gear also applies. (The black rockfish limit is repeated at paragraph IV.B.(4).)

Federal commercial groundfish regulations are not intended to supersede any more restrictive State commercial groundfish regulations relating to federally-managed groundfish.

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Table 5 (North). 2004 Trip Limits for Open Access Gears North of 40°10' N. Latitude[1/]

Other Limits and Requirements Apply -- Read Sections IV. A. and C. NMFS Actions before using this table 32004

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area[8/] (RCA):						
	North of 46°16' N. lat.	shoreline - 100 fm					
	46°16' N. lat. - 40°10' N. lat.	30 fm - 100 fm					
1	**Minor slope rockfish[2/]**	Per trip, no more than 25% of weight of the sablefish landed					
2	**Pacific ocean perch**	100 lb/ month					
3	**Sablefish**	300 lb/ day, or 1 landing per week of up to 900 lb, not to exceed 3,600 lb/ 2 months					
4	**Thornyheads**	CLOSED[5/]					
5	**Dover sole**	3,000 lb/month, no more than 300 lb of which may be species other than Pacific sanddabs.					
6	**Arrowtooth flounder**						
7	**Petrale sole**						
8	**Rex sole**						
9	**All other flatfish[3/]**						
10	**Whiting**	300 lb/ month					
11	**Minor shelf rockfish, widow and yellowtail rockfish[2/]**	200 lb/ month					
12	**Canary rockfish**	CLOSED[5/]					
13	**Yelloweye rockfish**	CLOSED[5/]					
14	**Minor nearshore rockfish**	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish[8/]					
15	**Lingcod[6/]**	CLOSED[5/]		300 lb/ month			CLOSED[5/]
16	**Other Fish[7/]**	Not limited					
17	**PINK SHRIMP EXEMPTED TRAWL** *(not subject to RCAs)*						
18	North	**Effective April 1 - October 31, 2004:** groundfish 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/month (minimum 24 inch size limit); sablefish 2,000 lb/month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed.					
19	**SALMON TROLL**						
20	North	Salmon trollers may retain and land up to 1 lb of yellowtail rockfish for every 2 lbs of salmon landed, with a cumulative limit of 200 lb/month, both within and outside of the RCA. This limit is within the 200 lb per month combined limit for minor shelf rockfish, widow rockfish and yellowtail rockfish, and not in addition to that limit. All groundfish species are subject to the open access limits, seasons and RCA restrictions listed in the table above.					

1/ "North" means 40°10' N. lat. to the U.S.-Canada border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.

2/ Bocaccio and chilipepper rockfishes are included in the trip limits for minor shelf rockfish and splitnose rockfish is included in the trip limits for minor slope rockfish.

3/ "Other flatfish" means all flatfish at 50 CFR 660.302 except those in this Table 5 with species specific management measures, including trip limits.

4/ For black rockfish north of Cape Alava (48°09'30" N. lat.), and between Destruction Island (47°40' N. lat.) and Leadbetter Point (46°38'10" N. lat.), there is an additional limit of 100 lbs or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.

5/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).

6/ The size limit for lingcod is 24 inches (61 cm) total length.

7/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline

8/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours, but specifically defined by lat./long. coordinates set out at IV. A.(17)(f), that may vary seasonally.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 5 (South). 2004 Trip Limits for Open Access Gears South of 40°10' N. Latitude[1/]

Other Limits and Requirements Apply -- Read Sections IV. A. and C. NMFS Actions before using this table 32004

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area[7/] (RCA):						
	40°10' - 34°27' N. lat.	30 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)		20 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)		30 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)	
	South of 34°27' N. lat.	60 fm - 150 fm (also applies around islands)					
1	Minor slope rockfish[2/]						
2	40°10' - 38° N. lat.	Per trip, no more than 25% of weight of the sablefish landed					
3	South of 38° N. lat.	10,000 lb/ 2 months					
4	Splitnose	200 lb/ month					
5	Sablefish						
6	40°10' - 36° N. lat.	300 lb/ day, or 1 landing per week of up to 900 lb, not to exceed 3,600 lb/ 2 months					
7	South of 36° N. lat.	350 lb/ day, or 1 landing per week of up to 1,050 lb					
8	Thornyheads						
9	40°10' - 34°27' N. lat.	CLOSED[5/]					
10	South of 34°27' N. lat.	50 lb/ day, no more than 1,000 lb/ 2 months					
11	Dover sole	3,000 lb/month, no more than 300 lb of which may be species other than Pacific sanddabs. When fishing for Pacific sanddabs, vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to 1 lb of weight per line are not subject to the RCAs.					
12	Arrowtooth flounder						
13	Petrale sole						
14	Rex sole						
15	All other flatfish[3/]						
16	Whiting	300 lb/ month					
17	Minor shelf rockfish, widow and chilipepper rockfish[2/]						
18	40°10' - 34°27' N. lat.	300 lb/ 2 months	CLOSED[5/]	200 lb/ 2 months		300 lb/ 2 months	
19	South of 34°27' N. lat.	CLOSED[5/]	500 lb/ 2 months				
20	Canary rockfish	CLOSED[5/]					
21	Yelloweye rockfish	CLOSED[5/]					
22	Cowcod	CLOSED[5/]					
23	Bocaccio						
24	40°10' - 34°27' N. lat.	200 lb/ 2 months	CLOSED[5/]	100 lb/ 2 months		200 lb/ 2 months	
25	South of 34°27' N. lat.	CLOSED[5/]	100 lb/ 2 months				
26	Minor nearshore rockfish						
27	Shallow nearshore						
28	40°10' - 34°27' N. lat.	300 lb/ 2 months	CLOSED[5/]	500 lb/ 2 months	600 lb/ 2 months	500 lb/ 2 months	300 lb/ 2 months
29	South of 34°27' N. lat.	CLOSED[5/]	300 lb/ 2 months				
30	Deeper nearshore						
31	40°10' - 34°27' N. lat.	500 lb/ 2 months	CLOSED[5/]	500 lb/ 2 months		400 lb/month	500 lb/ 2 months
32	South of 34°27' N. lat.	CLOSED[5/]	500 lb/ 2 months	600 lb/ 2 months			400 lb/ 2 months
33	California scorpionfish	CLOSED[5/]	300 lb/ 2 months		400 lb/ 2 months		300 lb/ 2 months

Table 5 (South). Continued

34	Lingcod[4/]	CLOSED[5/]	300 lb/ month, when nearshore open	CLOSED[5/]
35	Other Fish[6/]	Not limited		
36	**PINK SHRIMP EXEMPTED TRAWL GEAR** *(not subject to RCAs)*			
37	South	**Effective April 1 - October 31, 2004:** Groundfish 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/ month (minimum 24 inch size limit); sablefish 2,000 lb/ month, canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed.		
38	**PRAWN AND, SOUTH OF 38°57'30" N. LAT., CALIFORNIA HALIBUT AND SEA CUCUMBER EXEMPTED TRAWL**			
39	**EXEMPTED TRAWL Rockfish Conservation Area[7/] (RCA):**			
40	40°10' - 34°27' N. lat.	75 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)	100 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)	75 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)
41	South of 34°27' N. lat.	75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands	100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands	75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands
42		Groundfish 300 lb/trip. Trip limits in this table also apply and are counted toward the 300 lb groundfish per trip limit. The amount of groundfish landed may not exceed the amount of the target species landed, except that the amount of spiny dogfish landed may exceed the amount of target species landed. Spiny dogfish are limited by the 300 lb/trip overall groundfish limit. The daily trip limits for sablefish coastwide and thornyheads south of Pt. Conception and the overall groundfish "per trip" limit may not be multiplied by the number of days of the trip. Vessels participating in the California halibut fishery south of 38°57'30" N. lat. are allowed to (1) land up to 100 lb/day of groundfish without the ratio requirement, provided that at least one California halibut is landed and (2) land up to 3,000 lb/month of flatfish, no more than 300 lb of which may be species other than Pacific sanddabs, sand sole, starry flounder, rock sole, curlfin sole, or California scorpionfish (California scorpionfish is also subject to the trip limits and closures in line 33).		

1/ "South" means 40°10' N lat. to the U.S -Mexico border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.
2/ Yellowtail rockfish is included in the trip limits for minor shelf rockfish and POP is included in the trip limits for minor slope rockfish.
3/ "Other flatfish" means all flatfish at 50 CFR 660.302 except those in this Table 5 with species specific management measures, including trip limits.
4/ The size limit for lingcod is 24 inches (61 cm) total length.
5/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).
6/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.
7/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours, but specifically defined by lat./long. coordinates set out at IV. A.(17)(f), that may vary seasonally.
To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

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(2) *Groundfish taken with exempted trawl gear by vessels engaged in fishing for ridgeback prawns, California halibut, or sea cucumbers.* Trip limits for groundfish retained in the ridgeback prawn, California halibut, or sea cucumber fisheries are in Table 5 (South). The table also generally describes the RCAs for vessels participating in these fisheries.

(a) *Participation in the California halibut fishery.* A trawl vessel will be considered participating in the California halibut fishery if:

(i) It is not fishing under a valid limited entry permit issued under 50 CFR 660.333 for trawl gear;

(ii) All fishing on the trip takes place south of Pt. Arena, CA (38°57′30″ N. lat.); and

(iii) The landing includes California halibut of a size required by California Fish and Game Code section 8392(a), which states: "No California halibut may be taken, possessed or sold which measures less than 22 in (56 cm) in total length, unless it weighs 4 lb (1.8144 kg) or more in the round, 3 and one-half lbs (1.587 kg) or more dressed with the head on, or 3 lbs (1.3608 kg) or more dressed with the head off. Total length means the shortest distance between the tip of the jaw or snout, whichever extends farthest while the mouth is closed, and the tip of the longest lobe of the tail, measured while the halibut is lying flat in natural repose, without resort to any force other than the swinging or fanning of the tail."

(b) *Participation in the sea cucumber fishery.* A trawl vessel will be considered to be participating in the sea cucumber fishery if:

(i) It is not fishing under a valid limited entry permit issued under 50 CFR 660.333 for trawl gear;

(ii) All fishing on the trip takes place south of Pt. Arena, CA (38°57′30″ N. lat.); and

(iii) The landing includes sea cucumbers taken in accordance with California Fish and Game Code, section 8405, which requires a permit issued by the State of California.

(3) *Groundfish taken with exempted trawl gear by vessels engaged in fishing for pink shrimp.* Trip limits for groundfish retained in the pink shrimp fishery are in Table 5 (North) and Table 5 (South). Notwithstanding section IV.A.(11), a vessel that takes and retains pink shrimp and also takes and retains groundfish in either the limited entry or

another open access fishery during the same applicable cumulative limit period that it takes and retains pink shrimp (which may be 1 month or 2 months, depending on the fishery and the time of year), may retain the larger of the two limits, but only if the limit(s) for each gear or fishery are not exceeded when operating in that fishery or with that gear. The limits are not additive; the vessel may not retain a separate trip limit for each fishery.

D. Recreational Fishery

Federal recreational groundfish regulations are not intended to supersede any more restrictive State recreational groundfish regulations relating to federally-managed groundfish.

(1) *Washington.* For each person engaged in recreational fishing in the EEZ seaward of Washington, the groundfish bag limit is 15 groundfish, including rockfish and lingcod, and is open year-round (except for lingcod). The following sublimits and closed areas apply:

(a) *Closed Areas.*

(i) *Yelloweye Rockfish Conservation Area.* The Yelloweye Rockfish Conservation Area, or YRCA, is a "C-shaped" area which is closed to recreational groundfish and halibut fishing. The YRCA is defined by latitude and longitude coordinates specified at 50 CFR 660.304(d).

(ii) *Recreational Rockfish Conservation Area.* The recreational Rockfish Conservation Area, or recreational RCA, is an area which may be closed to recreational groundfish fishing inseason. If recreational fishing for all groundfish is prohibited seaward of a boundary line approximating the 30-fm (55-m) depth contour, a document will be published in the **Federal Register** inseason pursuant to the requirements of the APA. Coordinates for the boundary line approximating the 30-fm (55-m) depth contour are listed in section IV.A.(17)(f).

(b) *Rockfish.* In areas of the EEZ seaward of Washington that are open to recreational groundfish fishing, there is a 10 rockfish per day bag limit. Taking and retaining canary rockfish and yelloweye rockfish is prohibited.

(c) *Lingcod.* Recreational fishing for lingcod is closed between January 1 and March 12, and between October 17 and December 31. In areas of the EEZ seaward of Washington that are open to recreational groundfish fishing and when the recreational season for lingcod is open (*i.e.*, between March 13–October 16), there is a bag limit of 2 lingcod per day, which may be no smaller than 24 in (61 cm) total length.

(2) *Oregon.*

(a) *Seasons, closed areas.* Recreational fishing for groundfish is open from January 1 through December 31 in all areas, except that from June 1 through September 30, recreational fishing for groundfish is prohibited seaward of a recreational RCA boundary line approximating the 40-fm (73-m) depth contour, subject to the provisions in paragraph IV.D.(2)(b). Coordinates for the boundary line approximating the 40-fm (73-m) depth contour are listed in section IV.A.(17)(f). Recreational fishing for all groundfish may be prohibited inseason seaward of a boundary line approximating the 30-fm (55-m) depth contour. If a boundary line approximating the 30-fm (55-m) depth contour is implemented inseason, a document will be published in the **Federal Register** pursuant to the requirements of the APA. Coordinates for the boundary line approximating the 30-fm (55-m) depth contour are listed in section IV.A.(17)(f).

(b) *Bag limits, size limits.* The bag limits for each person engaged in recreational fishing in the EEZ seaward of Oregon are two lingcod per day, which may be no smaller than 24 in (61 cm) total length; and 10 marine fish per day, which excludes salmon, tuna, perch species, sturgeon, sanddabs, lingcod, striped bass and baitfish (herring, smelt, anchovies and sardines), but which includes rockfish, greenling, cabezon and other groundfish species. The minimum size limit for cabezon retained in the recreational fishery is 16 in (41 cm) and for greenling is 10 in (26 cm). Taking and retaining canary rockfish and yelloweye rockfish is prohibited. During the all-depth recreational fisheries for Pacific halibut, vessels with halibut on board may not take and retain, possess or land yelloweye rockfish or canary rockfish.

(3) *California.* Seaward of California (north and south of 40°10′ N. lat.), California law provides that, in times and areas when the recreational fishery is open, there is a 20-fish bag limit for all species of finfish, within which no more than 10 fish of any one species may be taken or possessed by any one person. Retention of cowcod, yelloweye rockfish and canary rockfish is prohibited in the recreational fishery seaward of California all year in all areas.

(a) *North of 40°10′ N. lat.* For each person engaged in recreational fishing in the EEZ seaward of California north of 40°10′ N. lat. to the California/Oregon border, the following seasons, bag limits, and size limits apply:

(i) *RCG Complex.* The California rockfish, cabezon, greenling complex (RCG Complex), as defined in state regulations (Section 1.91, Title 14, California Code of Regulations), includes all rockfish, kelp greenling, rock greenling, and cabezon. This category does not include California scorpionfish, also known as "sculpin."

(A) *Seasons.* North of 40°10′ N. lat., recreational fishing for the RCG Complex is open from January 1 through December 31.

(B) *Bag limits, boat limits, hook limits.* North of 40°10′ N. lat., in times and areas when the recreational season for the RCG Complex is open, there is a limit of two hooks and one line when fishing for rockfish, and the bag limit is 10 rockfish per day, of which no more than 2 may be bocaccio. The following daily bag limits also apply: no more than 10 cabezon per day and no more than 10 kelp greenling and 10 rock greenling per day. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

(C) *Size limits.* The following size limits apply: bocaccio may be no smaller than 10 in (25 cm) total length; cabezon may be no smaller than 15 in (38 cm) total length; and kelp and rock greenling may be no smaller than 12 in (30 cm) total length.

(D) *Dressing/Filleting.* Cabezon, kelp greenling, and rock greenling taken in the recreational fishery may not be filleted at sea. Rockfish skin may not be removed when filleting or otherwise dressing rockfish taken in the recreational fishery. The following rockfish fillet size limits apply: bocaccio fillets may be no smaller than 5 in (12.8 cm) and brown-skinned rockfish fillets may be no smaller than 6.5 in (16.6 cm). "Brown-skinned" rockfish include the following species: brown, calico, copper, gopher, kelp, olive, speckled, squarespot, and yellowtail.

(ii) *Lingcod.*

(A) *Seasons.* North of 40°10′ N. lat., recreational fishing for lingcod is open from January 1 through December 31.

(B) *Bag limits, boat limits, hook limits.* North of 40°10′ N. lat., in times and areas when the recreational season for lingcod is open, there is a limit of two hooks and one line when fishing for lingcod. The bag limit is two lingcod per day from January 1 through March 31 and one lingcod per day from April 1 through December 31. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

(C) *Size limits.* Lingcod may be no smaller than 24 in (61 cm) total length from January 1 through March 31 and

no smaller than 30 in (77 cm) total length from April 1 through December 31.

(D) *Dressing/Filleting.* Lingcod fillets may be no smaller than 16 in (41 cm) in length from January 1 through March 31 and no smaller than 21 in (54 cm) from April 1 through December 31 in length.

(b) *South of 40°10′ N. lat.* For each person engaged in recreational fishing in the EEZ seaward of California south of 40°10′ N. lat., the following seasons, bag limits, size limits and closed areas apply:

(i) *Closed Areas.*

(A) *Cowcod Conservation Areas.* Coordinates defining the boundaries of the Cowcod Conservation Areas (CCAs) are described in Federal regulations at 50 CFR 660.304(c). Recreational fishing for all groundfish is prohibited within the CCAs, except that fishing for sanddabs is permitted subject to the provisions in paragraph IV.D.(3)(b)(v) and that fishing for species managed under this section (not including cowcod, canary, and yelloweye rockfish) are permitted in waters shoreward of the 20-fm (37-m) depth contour within the CCAs from March 1 through December 31, subject to the bag limits in this section.

(B) *Recreational Rockfish Conservation Areas.* The recreational Rockfish Conservation Areas, or recreational RCAs, are areas that are closed to recreational fishing for groundfish.

(1) *Between 40°10′ N. lat. and 34°27′ N. lat.,* recreational fishing for all groundfish, except sanddabs, is prohibited seaward of a boundary line approximating the 30-fm (55-m) depth contour along the mainland coast and along islands and offshore seamounts during January 1 through February 29 and September 30 through December 31; is prohibited seaward of the 20-fm (37-m) depth contour during May 1 through August 31; and is closed entirely during March 1 through April 30 (*i.e.*, prohibited seaward of the shoreline). Coordinates for the boundary line approximating the 30-fm (55-m) depth contour are listed in section IV.A.(17)(f). Under state law, recreational fishing for rockfish, lingcod, and associated species limited to cabezon, greenlings of the genus *Hexagrammos,* California scorpionfish, California sheephead, and ocean whitefish are prohibited between the shoreline and the 10-fm (18-m) depth contour around the Farallon Islands. For a definition of the Farallon Islands, *see* paragraph IV.A.(17)(f). Recreational fishing for certain groundfish species is also prohibited in waters of the Cordell Banks, located at 38°02′ N. lat. and 123°25′ W. long., and within a 5 nautical mile radius around this point. This portion of the Cordell Banks is closed to fishing for rockfish, lingcod, cabezon, kelp greenlings and California scorpionfish. (**Note:** California state regulations also prohibit the retention of other greenlings of the genus *Hexagrammos,* California sheephead and ocean whitefish.) For a definition of Cordell Banks, see paragraph IV.A.(17)(f).

(2) *South of 34°27′ N. lat.,* recreational fishing for all groundfish, except sanddabs, is prohibited seaward of a boundary line approximating the 60-fm (110-m) depth contour along the mainland coast and along islands and offshore seamounts during March 1 through December 31 and is closed entirely during January 1 through February 29 (*i.e.*, prohibited seaward of the shoreline), except in the CCA where fishing is prohibited seaward of the 20-fm (37-m) depth contour in paragraph (A) of this section. Coordinates for the boundary line approximating the 60-fm (110-m) depth contour are listed in section IV.A.(17)(f).

(ii) *RCG Complex.* The California rockfish, cabezon, greenling complex (RCG Complex), as defined in State regulations (section 1.91, Title 14, California Code of Regulations), includes all rockfish, kelp greenling, rock greenling, and cabezon. This category does not include California scorpionfish, also known as "sculpin."

(A) *Seasons.* Between 40°10′ N. lat. and 34°27′ N. lat., recreational fishing for the RCG Complex is open from January 1 through February 29 and from May 1 through December 31 (*i.e.*, it's closed from March 1 through April 30). South of 34°27′ N. lat., recreational fishing for the RCG Complex is open from March 1 through December 31 (*i.e.*, it's closed from January 1 through February 29). When recreational fishing for the RCG Complex is open, it is permitted only shoreward of the recreational RCA, as described in paragraph IV.D.(3)(b)(i)(B) above.

(B) *Bag limits, boat limits, hook limits.* South of 40°10′ N. lat., in times and areas when the recreational season for the RCG Complex is open, there is a limit of two hooks and one line when fishing for rockfish, and the bag limit is 10–RCG Complex fish per day (not including canary rockfish, yelloweye rockfish and cowcod, which are prohibited), of which up to 10 may be rockfish, no more than 1 of which may be bocaccio and no more than two of which may be shallow nearshore rockfish. (**Note:** The shallow nearshore rockfish group off California are composed of kelp, grass, black-and-yellow, China, and gopher rockfishes.) Also within the 10–RCG Complex fish per day limit, no more than two fish per day may be greenling (kelp and/or other greenlings) and no more than 3 fish per day may be cabezon. Lingcod, California scorpionfish and sanddabs taken in recreational fisheries off California do not count toward the 10 RCG Complex fish per day bag limit. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

(C) *Size limits.* The following size limits apply: Bocaccio may be no smaller than 10 in (25 cm) total length, cabezon may be no smaller than 15 in (38 cm), and kelp and other greenlings may be no smaller than 12 in (30 cm).

(D) *Dressing/Filleting.* Cabezon, kelp greenling, and rock greenling taken in the recreational fishery may not be filleted at sea. Rockfish skin may not be removed when filleting or otherwise dressing rockfish taken in the recreational fishery. The following rockfish filet size limits apply: Bocaccio filets may be no smaller than 5 in (12.8 cm) and brown-skinned rockfish filets may be no smaller than 6.5 in (16.6 cm). "Brown-skinned" rockfish include the following species: brown, calico, copper, gopher, kelp, olive, speckled, squarespot, and yellowtail.

(iii) *California scorpionfish.* California scorpionfish only occur south of 40°10′ N. lat.

(A) *Seasons.* Between 40°10′ N. lat. and 34°27′ N. lat., recreational fishing for California scorpionfish is open from January 1 through February 29 and from May 1 through December 31 (*i.e.*, it's closed from March 1 through April 30). South of 34°27′ N. lat., recreational fishing for California scorpionfish is open from March 1 through April 31 and from November 1 through December 31 (*i.e.*, it's closed from January 1 through February 29 and from May 1 through October 31). When recreational fishing for California scorpionfish is open, it is permitted only shoreward of the recreational RCA, as described in paragraph IV.D.(3)(b)(i)(B) above.

(B) *Bag limits, boat limits, hook limits.* South of 40°10′ N. lat., in times and areas where the recreational season for California scorpionfish is open, and the bag limit is 5 California scorpionfish per day. California scorpionfish do not count against the 10 RCG Complex fish per day limit. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

(C) *Size limits.* California scorpionfish may be no smaller than 10 in (25 cm) total length.

(D) *Dressing/Filleting.* California scorpionfish fillets may be no smaller than 5 in (12.8 cm).

(iv) *Lingcod.*

(A) *Seasons.* Between 40°10′ N. lat. and 34°27′ N. lat., recreational fishing for lingcod is open from January 1 through February 29 and from May 1 through December 31 (*i.e.*, it's closed from March 1 through April 30). South of 34°27′ N. lat., recreational fishing for lingcod is open from March 1 through December 31 (*i.e.*, it's closed from January 1 through February 29). When recreational fishing for lingcod is open, it is permitted only shoreward of the recreational RCA, as described in paragraph IV.D.(3)(b)(i)(B) above.

(B) *Bag limits, boat limits, hook limits.* South of 40°10′ N. lat., in times and areas when the recreational season for lingcod is open, there is a limit of two hooks and one line when fishing for lingcod. The bag limit is two lingcod per day from January 1 through March 31 and one lingcod per day from April 1 through December 31. Lingcod do not count against the 10–RCG Complex fish per day limit. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

(C) *Size limits.* In times and areas when the recreational season for lingcod is open, lingcod may be no smaller than 24 in (61 cm) total length from January 1 through March 31 and no smaller than 30 in (77 cm) total length from April 1 through December 31.

(D) *Dressing/Filleting.* In times and areas when the recreational season for lingcod is open, lingcod fillets may be no smaller than 16 in (41 cm) in length from January 1 through March 31 and no smaller than 21 in (54 cm) from April 1 through December 31 in length.

(v) *Sanddabs.* South of 40°10′ N. lat., recreational fishing for sanddabs is permitted both shoreward of and within the closed areas, as described in section IV.D.(3)(b)(i) above. Recreational fishing for sanddabs is permitted within the closed areas, subject to a limit of up to 12 hooks, "Number 2" or smaller, which measure 11 mm (0.44 inches) point to shank, and up to 2 lb (0.91 kg) of weight per line. There is no bag limit, season, or size limit for sanddabs, however, it is prohibited to fillet sanddabs at sea.

V. Washington Coastal Tribal Fisheries

In 1994, the United States formally recognized that the four Washington coastal treaty Indian tribes (Makah, Quileute, Hoh, and Quinault) have treaty rights to fish for groundfish in the Pacific Ocean, and concluded that, in general terms, the quantification of those rights is 50 percent of the harvestable surplus of groundfish that pass through the tribes usual and accustomed fishing areas (described at 50 CFR 660.324). For further information, *see* the proposed rule for this action at 69 FR 1380, January 8, 2004.

The Assistant Administrator (AA) announces the following tribal allocations for 2004, including those that are the same as in 2003. Trip limits for certain species were recommended by the tribes and the Council and are specified here with the tribal allocations.

A. Sablefish

The tribal allocation is 728.5 mt, 10 percent of the total catch OY, less 3 percent estimated discard mortality.

B. Rockfish

(1) For the commercial harvest of black rockfish off Washington State, a harvest guideline of: 20,000 lb (9,072 kg) north of Cape Alava, WA (48°09′30″ N. lat.) and 10,000 lb (4,536 kg) between Destruction Island, WA (47°40′00″ N. lat.) and Leadbetter Point, WA (46°38′10″ N. lat.).

(2) Thornyheads are subject to a 300-lb (136-kg) trip limit.

(3) Canary rockfish are subject to a 300-lb (136-kg) trip limit.

(4) Yelloweye rockfish are subject to a 100-lb (45-kg) trip limit.

(5) Yellowtail rockfish taken in the tribal mid-water trawl fisheries are subject to a cumulative limit of 150,000 lb (13,608 kg) per 2-month period for the entire fleet. Landings of widow rockfish must not exceed 10 percent of the weight of yellowtail rockfish landed in any two-month period. These limits may be adjusted by an individual tribe inseason to minimize the incidental catch of canary rockfish and widow rockfish.

(6) Other rockfish, including minor nearshore, minor shelf, and minor slope rockfish groups are subject to a 300-lb (136-kg) trip limit per species or species group, or to the non-tribal limited entry trip limit for those species if those limits are less restrictive than 300 lb (136 kg) per trip.

(7) Rockfish taken during open competition tribal commercial fisheries for Pacific halibut will not be subject to trip limits.

C. Lingcod

Lingcod are subject to a 450-lb (204-kg) daily trip limit and a 1,350-lb (612-kg) weekly limit.

D. Flatfish and Other Fish

Treaty fishing vessels using bottom trawl gear will be subject to the limits applicable to the non-tribal limited entry trawl fishery for Pacific cod, English sole, rex sole, arrowtooth flounder, and other flatfish. Treaty fishing vessels are restricted to a 30,000 lb (13,608 kg) per 2-month limit for petrale sole for the entire year.

E. Pacific Whiting

Whiting allocations will be announced when the final OY is announced.

Classification

These final specifications and management measures for 2004 are issued under the authority of, and are in accordance with, the Magnuson-Stevens Act, the FMP, and 50 CFR part 660 subpart G (the regulations implementing the FMP).

The 2004 specifications and management measures are intended to protect overfished and other depressed stocks while also allowing as much harvest of more abundant groundfish stocks as possible during the course of the year. NMFS received the Council's recommendations on specifications and management measures in September 2003. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for publishing the proposed rule for the specifications and management measures, the proposed rule could not be made available for public comment prior to January 8, 2004. The timing of this final rule balances the need to publish and make effective a final rule as early as possible in the calendar year against the need to provide public comments on the proposed rule.

Except for amendments to § 660.370, a 30-day delay in effectiveness for this final rule would in fact be a 60-day delay, because most of the trip limits are 2-month limits, so most fishers could exceed the entire 2-month limit before the rules went into effect after 30 days. In addition, none of the large RCAs would be in place, thus a delay in effectiveness would allow fishing in an area this final rule closes for conservation purposes. For example, if fishing were permitted in areas that this rule designates as RCAs, overharvests of overfished species would occur. Depending on the extent of the overharvest, fishing for co-occurring abundant stocks would need to be more severely restricted, or possibly closed for the remainder of the year to protect overfished species. If overfished species

harvest levels were completely taken early in the fishing year, fishing opportunities for co-occurring abundant stocks would have to be closed for the remainder of the year to protect overfished stocks. Thus, excessive harvest could cause harm to overfished species. Delay in publishing these measures could also require unnecessarily restrictive measures, including possible fishery closures, later in the year to make up for the excessive harvest that would be caused by late implementation of these regulations. Thus, a delay in effectiveness could ultimately cause economic harm to the fishing industry and associated fishing communities. For these reasons, the AA finds good cause under 5 U.S.C. 553(d)(3) to waive the requirement to delay the effective date of this rule for 30 days, except for amendments to § 660.370, which are effective April 8, 2004.

The Council prepared an FEIS for this action; a notice of availability was published on January 16, 2004 (69 FR 2593). A copy of this FEIS is available from the Council (*see* **ADDRESSES**). On February 26, 2004, NMFS issued a ROD that documents the agency's final decisions concerning the decision by the NMFS Northwest Region to approve the Council's preferred OY alternative for 2004 groundfish ABC and OY specifications and management measures for Pacific Coast groundfish. The 2004 specifications and management measures are expected to have positive effects on the biological environment and negative effects on fishing communities and the socio-economic environment. The 2004 management regime is structured to protect overfished groundfish species and includes the depth based management regime introduced in 2003 that closes large areas of the continental shelf to groundfish fishing. Closure of important fishing areas is expected to have significant impacts on the human environment.

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

Pursuant to Executive Order 13175, this final rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, regulations implementing the FMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the FMP request new allocations or regulations specific to the tribes, in writing, before the first of the two Council meetings at which the Council considers groundfish specifications and management measures. The regulations at 50 CFR 660.324(d) further states "the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus." The tribal management measures in this final rule were developed following these procedures. The tribal representative on the Council made a motion to adopt the tribal management measures, which was passed by the Council, and those management measures, which were developed and proposed by the tribes, are included in this proposed rule.

NMFS prepared an FRFA describing the impact of this action on small entities. The IRFA was summarized in the proposed rule published on January 8, 2004 (69 FR 1380). The following is the summary of the FRFA. The need for and objectives of this final rule are contained in the **SUMMARY** and in the Background section under **SUPPLEMENTARY INFORMATION**. NMFS did not receive any comments on the IRFA or on the proposed rule regarding the economic effects of this final rule.

These final 2004 annual specifications and management measures allow West Coast commercial and recreational fisheries participants to fish the harvestable surplus of more abundant groundfish stocks, while also ensuring that those fisheries do not exceed the allowable catch levels intended to protect overfished and depleted stocks. The form of the specifications, in ABCs and OYs, follows the guidance of the Magnuson-Stevens Act, the national standard guidelines, and the FMP for protecting and conserving fish stocks. Annual management measures include trip and bag limits, size limits, time/area closures, gear restrictions, and other measures intended to allow year-round West Coast groundfish landings without compromising overfished species rebuilding measures.

Approximately 1,560 vessels participate in the West Coast groundfish fisheries. Of those, about 410 vessels are registered to limited entry permits issued for either trawl, longline, or pot gear. About 1,150 vessels land groundfish against open access limits while either directly targeting groundfish or taking groundfish incidentally in fisheries directed at non-groundfish species. All but 10–20 of those vessels are considered small businesses by the Small Business Administration. There are also about 450 groundfish buyers on the West Coast, approximately 5 percent of which are responsible for about 80 percent of West Coast groundfish purchases. In the 2001 recreational fisheries, there were 106 Washington charter vessels engaged in salt water fishing outside of Puget Sound, 232 charter vessels active on the Oregon coast and 415 charter vessels active on the California coast.

The Magnuson-Stevens Act requires that actions taken to implement FMPs be consistent with the 10 national standards. National standard 8 (section 301(a)(8)) requires that conservation and management measures, consistent with the conservation requirements of the Act, "take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities and (B), to the extent practicable, minimize adverse economic impacts on such communities." Commercial and recreational fisheries for Pacific Coast groundfish contribute to the economies and shape the cultures of numerous fishing communities in Washington, Oregon, and California. Meeting the needs of fishing communities has become increasingly difficult because the Council manages a fishery that is overcapitalized and contains stocks that are overfished. In recommending this year's specifications and management measures, the Council tried to accommodate some of the needs of those communities within the constraints of Magnuson-Stevens Act requirements to rebuild overfished stocks, prevent overfishing, and minimize bycatch. In general, the Council recommended the largest harvest of the more abundant stocks as possible, consistent with conservation needs of the fish stocks.

The Council considered five alternative specifications and management measures regimes for 2004: The no action alternative, which would have implemented the 2003 management regime for 2004; the low OY alternative, which set a series of conservative groundfish harvest levels that were either intended to achieve high probabilities of rebuilding within T_{MAX} for overfished species or modest levels of harvest for more abundant stocks; the high OY alternative, which set harvest levels that were either intended to achieve lower probabilities of rebuilding within T_{MAX} for overfished species or higher harvest levels for more abundant stocks, within Council harvest parameters described earlier in this document; the medium OY alternative, which set harvest levels intermediate to those of the low and

high alternatives; and the Council OY alternative (preferred alternative) which was the same as the medium OY alternative, but with more precautionary OY levels for bocaccio and darkblotched rockfish and more precautionary recreational fisheries management than the medium OY alternative. Each of these alternatives included both harvest levels (specifications) and management measures needed to achieve those harvest levels, with the most restrictive management measures corresponding to the lowest OYs.

Each of the alternatives analyzed by the Council was expected to have different overall effects on the economy. Among other factors, the FEIS for this action reviewed alternatives other than the no action alternative for expected declines in revenue and income from 2003 levels. The low OY alternative was expected to reduce commercial ex-vessel revenue by $11.5 million in 2004, reduce overall commercial harvest income by $6.2 million, and reduce recreational fishery income (mainly charter businesses) by $95 million. The high OY alternative was expected to increase commercial ex-vessel revenue by $3.3 million in 2004, increase overall commercial harvest income by $6.9 million, and increase recreational fishery income by $122 million. The medium OY alternative was expected to increase commercial ex-vessel revenue by $3.3 million in 2004, increase overall commercial harvest income by $4.8 million, and increase recreational fishery income by $112 million. The Council's OY alternative was expected to increase commercial ex-vessel revenue by $2.8 million in 2004, increase overall commercial harvest income by $4 million, and increase recreational fishery income by $55 million. The Council's OY alternative was chosen as the preferred alternative because it met the conservation requirements of the Magnuson-Stevens Act, while reducing to the extent possible the adverse economic impacts of these conservation measures on the fishing industries and associated communities.

For the 2003 management cycle, NMFS had introduced depth-based management, which had a greater effect on both commercial and recreational fisheries income between 2002 and 2003 than retaining depth-based management will have between 2003 and 2004. The modest increases in income expected for the various fishing communities in 2004 are expected to result from a larger bocaccio OY based on a new bocaccio stock assessment. With a larger bocaccio OY, fisheries that target more abundant stocks that co-occur with bocaccio will have greater access to those stocks in 2004.

The Small Business Regulatory Enforcement Act of 1996 requires a plain language guide to assist small entities in complying with this final rule. NMFS has produced a public notice for the 2004 fishing season that includes trip limit tables and descriptions of the 2004 management measures. Contact NMFS to request a copy of this public notice (*see* **ADDRESSES**) or *see* the NMFS Northwest Region's groundfish Web site at *http://www.nwr.noaa.gov/1sustfsh/gdfsh01.htm*.

List of Subjects in 50 CFR Part 660

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

Dated: February 27, 2004.

Rebecca Lent,

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

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

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

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

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

■ 2. In § 660.302, the definitions of "Closure," "Fishery Management Area," and "Trip limits" are revised and the definitions for "Exempted gear," "Legal fish," and "North-South management area" are added in alphabetical order to read as follows:

§ 660.302 Definitions.

* * * * *

Closure, when referring to closure of a fishery, means that taking and retaining, possessing, or landing the particular species or species group is prohibited. Unless otherwise announced in the **Federal Register**, offloading must begin before the time the fishery closes.

* * * * *

Exempted gear means all types of fishing gear except longline, trap (or pot), and groundfish trawl gear. Exempted gear includes trawl gear used to take pink shrimp, ridgeback prawns, California halibut south of Pt. Arena, CA, and sea cucumber south of Pt. Arena, CA under the authority of a State of California limited entry permit for the sea cucumber fishery.

* * * * *

Fishery management area means the EEZ off the coasts of Washington, Oregon, and California between 3 and 200 nm offshore, and bounded on the north by the Provisional International Boundary between the United States and Canada, and bounded on the south by the International Boundary between the United States and Mexico. All groundfish possessed between 0–200 nm offshore or landed in Washington, Oregon, or California are presumed to have been taken and retained from the EEZ, unless otherwise demonstrated by the person in possession of those fish.

* * * * *

Legal fish means fish legally taken and retained, possessed, or landed in accordance with the provisions of 50 CFR part 660, the Magnuson-Stevens Act, any document issued under part 660, and any other regulation promulgated or permit issued under the Magnuson-Stevens Act.

* * * * *

North-South management area means the management areas defined at § 660.304(a) or defined and bounded by one or more of the commonly used geographic coordinates at § 660.304(b) for the purposes of implementing different management measures in separate sections of the U.S. West Coast.

* * * * *

Trip limits. Trip limits are used in the commercial fishery to specify the maximum amount of a fish species or species group that may legally be taken and retained, possessed, or landed, per vessel, per fishing trip, or cumulatively per unit of time, or the number of landings that may be made from a vessel in a given period of time, as follows:

(1) A per trip limit is the total allowable amount of a groundfish species or species group, by weight, or by percentage of weight of legal fish on board, that may be taken and retained, possessed, or landed per vessel from a single fishing trip.

(2) A daily trip limit is the maximum amount of a groundfish species or species group that may be taken and retained, possessed, or landed per vessel in 24 consecutive hours, starting at 0001 hours local time (l.t.) Only one landing of groundfish may be made in that 24-hour period. Daily trip limits may not be accumulated during multiple day trips.

(3) A weekly trip limit is the maximum amount of a groundfish species or species group that may be taken and retained, possessed, or landed per vessel in 7 consecutive days, starting at 0001 hours l.t. on Sunday and ending at 2400 hours l.t. on Saturday. Weekly trip limits may not be accumulated during multiple week

trips. If a calendar week includes days within two different months, a vessel is not entitled to two separate weekly limits during that week.

(4) A cumulative trip limit is the maximum amount of a groundfish species or species group that may be taken and retained, possessed, or landed per vessel in a specified period of time without a limit on the number of landings or trips, unless otherwise specified. The cumulative trip limit periods for limited entry and open access fisheries, which start at 0001 hours l.t. and end at 2400 hours l.t., are as follows, unless otherwise specified:

(i) The 2-month or "major" cumulative limit periods are: January 1–February 28/29; March 1–April 30, May 1–June 30, July 1–August 31, September 1–October 31, and, November 1–December 31.

(ii) One month means the first day through the last day of the calendar month.

(iii) One week means 7 consecutive days, Sunday through Saturday.

* * * * *

■ 3. In § 660.303, paragraphs (d)(1) and (d)(5)(i)(D) are added to read as follows:

§ 660.303 Reporting and recordkeeping.

* * * * *

(d) * * *

(1) *Declaration reports for trawl vessels intending to fish in a conservation area.* The operator of any vessel registered to a limited entry permit with a trawl endorsement; any vessel using trawl gear, including exempted gear used to take pink shrimp, ridgeback prawns, California halibut and sea cucumber; or any tribal vessel using trawl gear must provide NMFS with a declaration report, as specified at § 660.303(d)(5) of this section to identify the intent to fish within the CCA, as defined at § 660.304, or any trawl RCA, as defined in the groundfish annual or biennial management measures that are published in the **Federal Register**.

* * * * *

(5) * * *

(i) * * *

(D) Trawl gear including exempted gear used to take pink shrimp, ridgeback prawns, California halibut south of Pt. Arena, CA, and sea cucumber.

* * * * *

4. In § 660.304, the second paragraph (c)(2) is correctly redesignated as paragraph (c)(2)(ii), paragraph (d) is redesignated as paragraph (c)(3), paragraph (e) is redesignated as paragraph (d), and paragraph (b) is added to read as follows:

§ 660.304 Management areas, including conservation areas, and commonly used geographic coordinates.

* * * * *

(b) *Commonly used geographic coordinates.*

(1) Washington/Oregon border—46°16′ N. lat.

(2) Cape Falcon, OR—45°46′ N. lat.

(3) Cape Lookout, OR—45°20′15″ N. lat.

(4) Cape Blanco, OR—42°50′ N. lat.

(5) Oregon/California border—42°00′ N. lat.

(6) Cape Mendocino, CA—40°30′ N. lat.

(7) North/South management line—40°10′ N. lat.

(8) Point Arena, CA—38°57′30″ N. lat.

(9) Point San Pedro, CA—37°35′40″ N. lat.

(10) Point Lopez, CA—36°00′ N. lat.

(11) Point Conception, CA—34°27′ N. lat.

* * * * *

■ 5. In § 660.306, paragraphs (b), (aa), (bb), and (cc) are added to read as follows:

§ 660.306 Prohibitions.

* * * * *

(b) Retain any prohibited species (defined in § 660.302 and restricted in § 660.323(c)) caught by means of fishing gear authorized under this subpart or unless authorized by part 600 of this chapter. Prohibited species must be returned to the sea as soon as practicable with a minimum of injury when caught and brought on board.

* * * * *

(aa) Fishing in conservation areas. Fish with any trawl gear, including exempted gear used to take pink shrimp, ridgeback prawns, California halibut south of Pt. Arena, CA, and sea cucumber; or with trawl gear from a tribal vessel or with any gear from a vessel registered to a groundfish limited entry permit in a conservation area unless the vessel owner or operator has a valid declaration confirmation code or receipt for fishing in a conservation area as specified at § 660.303(d)(5).

(bb) Operate any vessel registered to a limited entry permit with a trawl endorsement and trawl gear on board in a Trawl Rockfish Conservation Area or a Cowcod Conservation Area (as defined at § 660.302), except for purposes of continuous transiting, with all groundfish trawl gear stowed in accordance with § 660.322(b)(8), or except as authorized in the annual or biennial groundfish management measures published in the **Federal Register**.

(cc) Operate any vessel registered to a limited entry permit with a longline or trap (pot) endorsement and longline and/or trap gear onboard in a Nontrawl Rockfish Conservation Area or a Cowcod Conservation Area (as defined at § 660.302), except for purposes of continuous transiting, or except as authorized in the annual or biennial groundfish management measures published in the **Federal Register**.

■ 6. In § 660.323, the introductory text to paragraph (c) is added to read as follows:

§ 660.323 Catch restrictions.

* * * * *

(c) *Prohibited species.* Groundfish species or species groups under the PCGFMP for which quotas have been achieved and/or the fishery closed are prohibited species. In addition the following are prohibited species: * * *

* * * * *

■ 7. In § 660.335, paragraph (e)(3)(i) is revised to read as follows:

§ 660.335 Limited entry permits-renewal, combination, stacking, change of permit ownership or permit holdership, and transfer.

(e) * * *

(3) * * *

(i) Changes in vessel registration on permits will take effect no sooner than the first day of the next major limited entry cumulative limit period following the date that SFD receives the signed permit transfer form and the original limited entry permit. Major cumulative limit periods are defined as two-month trip limit periods in § 660.302. Unless otherwise specified in the **Federal Register**, the major cumulative limit periods begin on January 1, March 1, May 1, July 1, September 1, and November 1. No transfer is effective until the limited entry permit has been reissued as registered with the new vessel.

* * * * *

■ 8. In § 660.370, paragraphs (a) and (b) are added to read as follows:

§ 660.370 Overfished species rebuilding plans.

* * * * *

(a) *Darkblotched rockfish.* The target year for rebuilding the darkblotched rockfish stock to B_{MSY} is 2030. The harvest control rule to be used to rebuild the darkblotched rockfish stock is an annual harvest rate of F=0.032.

(b) *Pacific ocean perch (POP).* The target year for rebuilding the POP stock to B_{MSY} is 2027. The harvest control rule to be used to rebuild the POP stock is an annual harvest rate of F=0.0257.

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Federal Register

Tuesday,
March 9, 2004

Part III

Securities and Exchange Commission

17 CFR Part 200, et al.
Regulation NMS; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 230, 240, 242, and 249

[Release No. 34–49325; File No. S7–10–04]

RIN 3235–AJ18

Regulation NMS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules and amendments to joint industry plans.

SUMMARY: The Securities and Exchange Commission ("Commission") is publishing Regulation NMS for public comment. In addition to redesignating the existing national market system ("NMS") rules adopted under Section 11A of the Securities Exchange Act of 1934 ("Exchange Act"), Regulation NMS would incorporate four substantive proposals that are designed to enhance and modernize the regulatory structure of the U.S. equity markets. First, the Commission is proposing a uniform rule for all NMS market centers that, subject to certain exceptions, would require a market center to establish, maintain, and enforce policies and procedures reasonably designed to prevent "trade-throughs"—the execution of an order in its market at a price that is inferior to a price displayed in another market. Second, the Commission is proposing a market access rule that would modernize the terms of access to quotations and execution of orders in the NMS. The third proposal would prohibit market participants from accepting, ranking, or displaying orders, quotes, or indications of interest in a pricing increment finer than a penny, except for securities with a share price of below $1.00. Finally, the Commission is proposing amendments to the rules and joint industry plans for disseminating market information to the public that, among other things, would modify the formulas for allocating plan net income to reward markets for more broadly based contributions to public price discovery.

DATES: Comments must be received on or before May 24, 2004.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by hard copy or e-mail, but not by both methods. Comments sent by hard copy should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–10–04. Comments submitted by e-mail should include this file number in the subject line. Comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet web site (*http://www.sec.gov*).[1]

FOR FURTHER INFORMATION CONTACT: *Trade-Through Proposal:* Heather Seidel, Attorney Fellow, at (202) 942–0788 and Jennifer Colihan, Special Counsel, at (202) 942–0735; *Market Access Proposal:* John S. Polise, Assistant Director, at (202) 942–0068, Patrick M. Joyce, Special Counsel, at (202) 942–0779, and Ann E. Leddy, Attorney, at (202) 942–0795; *Sub-Penny Quoting Proposal:* Kevin Campion, Special Counsel, or Ronesha Butler, Attorney, at (202) 942–0744; *Market Data Proposal:* Sapna C. Patel, Special Counsel, (202) 942–0166; *Regulation NMS Proposal:* Yvonne Fraticelli, Special Counsel, at (202) 942–0197; all of whom are in the Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

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[1] Personal identifying information, such as names or e-mail addresses, will not be edited from electronic submission. Submit only information that you wish to make publicly available.

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I. Preliminary Statement

The Commission is publishing for public comment proposed Regulation NMS, which incorporates a set of four, broad substantive rule proposals on market structure, along with the procedural rule proposal to create Regulation NMS. We recognize that, if ultimately adopted, the rule proposals would effect fundamental innovations in the nation's equity markets. Today's action is intended to advance the dialogue on these vitally important market structure issues.

Giving the public an opportunity to comment on specific rule proposals is the logical next step in the deliberate and systematic review of market structure that the Commission has undertaken in recent years. The central objective of this review is to determine how the regulations governing the U.S. equity markets should be modernized. Our markets are continually evolving because of such factors as innovative trading technologies, new market entrants, and changing investment patterns. We believe that one of our most important responsibilities is to monitor these changes and to ensure that the U.S. regulatory structure remains up to date. In this way, we can help our markets retain their position as the deepest and most efficient in the world—markets that offer a fair deal to all types of investors, large and small.

By publishing the proposals, the Commission does not intend to suggest that its market structure review is complete and that final decisions have been reached on any of the rule proposals' provisions. The issues undoubtedly are complex. Reaching good decisions requires a firm grasp of the relevant facts, an understanding of the often subtle ways in which the markets work, and the balancing of policy objectives that sometimes may not point in precisely the same direction. To inform its thinking, the Commission repeatedly has sought the views of market participants and the public. Thus far, our review has included multiple public hearings and roundtables, an Advisory Committee, four concept releases, the issuance of temporary exemptions intended in part to generate useful data on policy alternatives, and a constant dialogue with industry participants and investors. The information and data generated by these steps has formed the basis for the development of the rule proposals.

The Commission believes that focusing comment on specific rule proposals is the essential next step in achieving the best possible regulatory initiatives. In this regard, in addition to seeking written comments, we will hold one or more hearings in the coming months to expand the opportunity for dialogue on the rule proposals themselves and on the issues they address. The Commission will reflect the insights gained from this open process in its final rulemaking.

II. Objectives for Rule Proposals

The Commission is publishing four substantive rule proposals that are designed to enhance and modernize the national market system, along with a procedural rule proposal to create a new Regulation NMS. The rule proposals include the following regulatory initiatives:

(1) A uniform trade-through rule for all NMS market centers that would affirm the fundamental principle of price priority, while also addressing problems posed by the inherent difference in the nature of prices displayed by automated markets, which are immediately accessible, compared to prices displayed by manual markets;

(2) A uniform market access rule with a *de minimis* fee standard that would help assure non-discriminatory access to the best prices displayed by NMS market centers, but without mandating inflexible, "hard" linkages such as the Intermarket Trading System ("ITS");

(3) A sub-penny quoting rule establishing a uniform quoting increment for NMS stocks to promote greater price transparency and consistency;

(4) Amendments to the arrangements for disseminating market information that would reward self-regulatory organizations ("SROs") for their contributions to public price discovery, as well as implement many of the recommendations of the Commission's Advisory Committee on Market Information; and

(5) Regulation NMS, which would modernize and restructure the Exchange Act rules governing the NMS to promote greater clarity and understanding of the rules.

If adopted, the proposals collectively would constitute a significant upgrade of the NMS regulatory framework and address a variety of issues that have arisen in recent years. The NMS needs to be enhanced and modernized, not because it has failed investors, but because it has been so successful in promoting growth, efficiency, innovation, and competition that many of its old rules now are outdated. Since the NMS was created nearly thirty years ago, trading volume has exploded, competition among market centers has

intensified, and investor trading costs have shrunk dramatically. Each of the major milestones in the development of the NMS—including the creation of the consolidated system for disseminating market information in the 1970s, the incorporation of The Nasdaq Stock Market, Inc. ("Nasdaq") securities into the NMS in the 1980s, and the adoption of the Order Handling Rules in the 1990s—has successively generated enormous benefits for investors.

In the 2000s, improvements to the NMS have continued to benefit investors. In particular, the rescission of New York Stock Exchange, Inc. ("NYSE") Rule 390, trading in penny increments, and public disclosure of order execution quality have set the stage for exceptionally vigorous competition among market centers, particularly to provide the best prices for orders of less than block size (10,000 shares). Since November 2001, for example (the first month for which all markets were required to disclose their execution quality), the effective spreads paid by investors seeking liquidity in the NMS have declined steadily across all markets by a cumulative total of more than 40%.[2] In November 2003 alone, these reduced spreads resulted in cumulative investor savings of more than $340 million, or more than $4.0 billion on an annualized basis.[3] Importantly, small investors seeking direct participation in the U.S. securities markets have shared fully in these savings, and indeed likely have been the biggest beneficiaries of NMS improvements.

The proposals published for public comment today are intended to help assure that the NMS continues to serve investor interests in the future. The particulars of the proposals are described in more detail below. The balance of this overview places the proposals in the context of the Commission's historical approach to market structure and summarizes the goals that the proposals are designed to achieve.

The objectives for the NMS set forth in the Exchange Act are well known—efficiency, competition, price transparency, best execution, and direct interaction of investor orders. Each of these objectives is essential, yet they sometimes conflict with one another in practice and can require delicate balancing. In particular, the objective of market center competition can be difficult to reconcile with the objective of investor order interaction. We want to encourage innovation and competition by the many individual market centers that collectively make up the NMS, while at the same time assuring that each of these parts contributes to a system that, as a whole, generates the greatest benefits for investors—not their market intermediaries.

The Commission therefore has sought to avoid the extremes of, on the one hand, isolated market centers and, on the other hand, a totally centralized system that loses the benefits of vigorous competition and innovation among market centers. To achieve the appropriate degree of integration, the Commission primarily has relied on two tools: (1) Transparency of the best prices through the consolidated display of quotes and trades from all NMS market centers; and (2) intermarket "rules of the road" that establish a basic framework within which competition among NMS market centers can flourish on terms that ultimately benefit investors. Today's proposals are intended to continue this strategy.

In particular, the proposals are designed to address a variety of problems that generally fall within three categories:

(1) The need for uniform rules that promote equal regulation of, and free competition among, all types of market centers;

(2) The need to update antiquated rules that no longer reflect current market conditions; and

(3) The need to promote greater order interaction and displayed depth, particularly for the very large orders of institutional investors.

A. Promote Equal Regulation of Market Centers

Not that many years ago, the NMS could be divided fairly clearly into groups of stocks, each with its own particular mix of market centers. The traditional auction exchanges—NYSE and the American Stock Exchange LLC ("Amex")—dominated trading in their listed stocks, with some dealer participation on the regional exchanges and in the third market. Market makers dominated trading in Nasdaq stocks.

Today, these historical divisions are disappearing. For Nasdaq stocks, automated quote-driven market centers (such as Nasdaq's SuperMontage, the Archipelago Exchange,[4] and Inet ATS, Inc. ("Inet")) have captured more than 50% of share volume. For Amex stocks (for which approximately 39% of share volume now is represented by two extremely active exchange-traded funds ("ETFs")—the QQQ and SPDR), Amex now handles approximately 27% of the volume, with the remaining balance split among Archipelago, Inet, and others. The NYSE has retained approximately 75% of the volume in its listed stocks, but other market centers are attempting to raise the level of competition and increase their share of trading. Moreover, the NYSE and Amex have sought to add automated facilities that are integrated with and complement their traditional exchange floors.

The intensified competition, or threat of competition, in the NMS in recent years has benefited investors by reducing trading costs and prompting better, more efficient services. The rules that govern the NMS, however, need to be updated to reflect the new market conditions. Many rules, for example, were developed separately for listed markets and the Nasdaq market. This disparity makes little sense today when the level of trading volume and the identity and character of participating market centers are becoming more similar for both listed and Nasdaq securities.

Section 11A(c)(1)(F) of the Exchange Act grants the Commission rulemaking authority to assure equal regulation of all markets for NMS securities. Today, in many respects, the same rules apply across all U.S. equity markets. For instance, all broker-dealers have an obligation to seek to obtain best execution for their customers' orders—specifically, to seek to obtain the most favorable terms available under the circumstances.[5]

In other respects, however, there is disparity in rules across markets, and the Commission believes the proposals set forth in Regulation NMS will help further the statutory objective of assuring equal regulation of all markets

[2] This 40% reduction in spreads since November 2001 is in addition to the reduction in spreads that occurred immediately upon the initiation of trading in penny increments in the first part of 2001. *See infra*, text accompanying notes 197–199.

[3] Using execution quality statistics publicly disclosed pursuant to Exchange Act Rule 11Ac1–5, investor savings are calculated based on the share volume of market and marketable limit orders with sizes of less than 10,000 shares that were executed at 23 NMS market centers in November 2003. The share volume for each stock is multiplied by the difference in effective half-spreads between Nov. 2001 and Nov. 2003 in each stock at each market center.

[4] The Archipelago Exchange ("Archipelago") is the equities trading facility of the Pacific Exhange ("PCX").

[5] The Commission recognizes that execution price and speed of execution are not the sole relevant factors in obtaining best execution of investor orders, and that other factors may be relevant, such as (1) the size of the order, (2) the trading characteristics of the security involved, (3) the availability of accurate information affecting choices as to the most favorable market center for execution and the availability of technological aids to process such information, and (4) the cost and difficulty associated with achieving an execution in a particular market center.

for NMS securities. For example, the market for listed securities currently has a trade-through rule affirming the principle of price priority, while the market for Nasdaq securities does not. The proposed trade-through rule would address this disparity. In addition, certain market centers currently charge substantial fees for access to their displayed quotes, while other market centers are not permitted to assess such charges. The proposed access rule would address this disparity. Finally, some market centers currently engage in sub-penny quoting, while others do not. The proposed sub-penny rule would establish a uniform quoting convention.

B. Update Antiquated Rules

The NMS was created in the 1970s. Although the fundamental policy objectives that guided its creation remain as valid as ever, some of the NMS rules and facilities no longer adequately address current market conditions. For example, some were written long before technological innovation opened the door for new types of services, such as automatic execution and order routing services.

The proposals would modernize older NMS rules that have become antiquated. The proposed market access rule, for example, could be implemented using indirect market linkages that have been enabled by improved communications technology, rather than a hard linkage like the one incorporated into the ITS. The market data proposal would update formulas for allocating income to the SROs that were adequate many years ago when a single market dominated each group of securities, but much less so now when volume is split among different market centers whose contributions to the public quote and trade streams can vary considerably.

C. Promote Greater Order Interaction and Displayed Depth

A significant strength of the current NMS is the competition among market centers that encompass a variety of trading models, from traditional exchanges to electronic communications networks ("ECNs") with automated limit order books to automated market maker systems. This competition particularly has benefited retail investors, for whom a primary component of execution quality is spread costs.

Conversely, perhaps the most serious weakness of the NMS is the relative inability of all investor buying and selling interest in a particular security to interact directly in a highly efficient manner. Little incentive is offered for the public display of customer orders—particularly the large orders of institutional investors. If orders are not displayed, it is difficult for buying and selling interest to meet efficiently. In addition, the lack of displayed depth diminishes the quality of public price discovery.

The seriousness of this weakness has been voiced frequently in recent years by institutional investors. For large institutional orders (generally greater than 10,000 shares and often substantially greater), price impact costs are a more significant component of execution quality than spread costs. For example, assume that an institution decides to sell 100,000 shares of a stock when the best bid is $20, but winds up selling the stock for an average price of $19.80 because the price declines in response to the institution's selling interest. In this case, the 20-cent per share price impact cost is likely to greatly exceed the spread costs in the stock that are associated with smaller orders. Institutional investors have indicated that they need more effective ways to interact directly with large size trading interest on the other side of the market. The limited data on institutional trading costs that is publicly available tends to support their complaints. For example, one recently published analysis of worldwide institutional trading costs found that such costs for NYSE and Nasdaq stocks rose, respectively, by 25.1% and 29.6% for the period from 1999 through the second quarter of 2003.[6]

A variety of factors other than market structure (such as the decline in average stock prices) could be significant contributors to an increase in institutional trading costs. Nevertheless, these costs appear to have risen substantially during the same time period that smaller order execution costs have dropped dramatically. Given the troubling nature of this trend, we cannot afford to be satisfied with the status quo as regards the efficiency of the NMS. A critically important goal of the proposals is to enhance opportunities for the direct interaction of investor buying and selling interest and to improve the depth of public price discovery.

For example, the trade-through proposal, by modifying the existing listed market trade-through rule to accommodate the differing nature of quotes displayed by manual and automated markets, is intended to assist those institutions that seek direct and efficient interaction with contra trading interest. Similarly, the market access proposal would help assure that all investors have non-discriminatory access to the best prices for a security, no matter where they are displayed in the NMS. The sub-penny quoting proposal would address the practice of "stepping-ahead" of displayed limit orders for trivial amounts, which disadvantages those investors who are willing to contribute to quoted depth by publicly displaying their trading interest. Finally, the central objective of the market data proposal is to reward those market centers whose quotes reflect the best prices for the largest sizes and thereby contribute the most to public price discovery.

III. Trade-Through Proposal

A. Executive Summary

Changes in the equities markets in recent years have raised the issue of whether a trade in one market should be executed when a quote at a better price is displayed in another market. Rules limiting trading at an inferior price have been in place since 1978 in the markets for NYSE and Amex securities, but no such intermarket rules exist in the markets for Nasdaq securities. Over the years, dramatic changes have occurred in each of these markets, and trading in Nasdaq, NYSE, and Amex securities has spread across an increasing variety of market centers, including "alternative" highly automated markets, many of which provide for almost instantaneous executions of matching buy and sell orders within their systems. Various markets, including the NYSE, Amex, and Nasdaq, have deployed new automation systems to make their markets more efficient. Moreover, advances in technology have led to sophisticated order routing and execution systems that can provide extremely fast routing and execution capabilities among competing multiple markets. Finally, the minimum pricing variation in equity securities is now a penny instead of an eighth, resulting in narrower spreads, at least for many actively traded stocks. At the same time there is decreased depth at the best quote, and rapid quote changes—often many times within a second.

The Commission believes that these changes require it to revisit the issue of trading at inferior prices across markets.[7] Clearly, in a fully efficient market with frictionless access and instantaneous executions, trading through a better-displayed bid or offer should not occur. Yet the Commission

[6] Justin Schack, "Trading Places," *Institutional Investor*, Nov. 2003 at 29, 32 (citing Elkins/McSherry analysis).

[7] *See* Section III.B.2.b. *infra* for a discussion of the current ITS trade-through rule.

believes that even in the current markets with linkages between markets and a range of execution speeds and fill rates, there is value in protecting a displayed price from trades occurring at inferior prices in other markets. This "price protection" encourages the display of priced orders and fosters the execution of customer orders.

The Commission therefore is proposing a rule intended to preserve the benefits of price protection across markets, while addressing the tensions in the operation of the current ITS trade-through rule. The proposed rule would require an order execution facility (as defined below), national securities exchange, and national securities association to establish, maintain, and enforce polices and procedures reasonably designed to prevent the execution of a trade-through in its market. The proposed rule would apply to all incoming orders in "NMS Stocks"—all Nasdaq, NYSE, and Amex-listed stocks—and to any order execution facility that executes orders internally within its market, whether or not that market posts its best bid and offer in the consolidated quote system.[8]

The proposed rule would have two major exceptions. One would allow customers (and broker-dealers trading for their own accounts) to "opt-out" of the protections of the rule by providing informed consent to the execution of their orders, on an order-by-order basis, in one market without regard to the possibility of obtaining a better price in another market. The other exception would take into account the differences between the speed of execution in electronic versus manual markets by providing an automated market with the ability to trade-through a non-automated market up to a certain amount away from the best bid or offer displayed by the non-automated market. The Commission believes that the proposed rule would promote competition and order interaction between markets, provide an incentive for the use of limit orders and aggressive quoting, facilitate the ability to achieve best execution and help reduce the effects of fragmentation.

B. Background and Discussion

1. Foundation of Our National Market System

Amendments to the Exchange Act made almost three decades ago formed the basis for the modern market structure in the U.S.—a national market characterized by a system of competing markets, rather than one centralized market. Section 11A of the Exchange Act, enacted as part of the Securities Act Amendments of 1975 ("1975 Amendments"), sets forth Congress' findings regarding the nation's securities markets and directs the Commission to facilitate the development of an NMS in keeping with the principles set forth by Congress.[9] Specifically, Congress found that it is in the public interest and appropriate for the protection of investors and the maintenance of a fair and orderly market to assure:

- The economically efficient execution of securities transactions;
- Fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;
- The availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities;
- The practicability of brokers executing investors' orders in the best market; and
- The opportunity, consistent with the provisions in the first and last bullets above, for investors' orders to be executed without the participation of a dealer.[10]

Congress also found that the linking of all markets for securities will "foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to best execution of such orders."[11] In short, Section 11A of the Exchange Act envisions a market structure characterized by full transparency where competing markets are linked together to provide the ability to effectively and efficiently execute customer orders in the best available market. It is these core principles that have shaped the Commission's actions to foster the development of a true NMS.

Although Congress set out broad principles to govern the development of an NMS, it did not dictate a specific form that it should take. Instead, Congress envisioned that competitive forces, to the extent feasible, would shape the structure of our markets, and granted the Commission broad authority to oversee the implementation, operation, and regulation of an NMS.[12] In keeping with Congress' mandate, the Commission believes that its central role is to facilitate the development of an NMS, not to dictate the precise form that the NMS will take.[13]

Within the framework of this philosophy, the Commission has over the years helped to guide the development of our NMS. For instance, the Commission, working with the various SROs, has taken numerous steps to implement the basic structure upon which our existing NMS is built. For example:

- In the late 1970s the Commission issued several policy statements outlining its vision of an NMS, including a belief in the importance of attaining nationwide protection for customer limit orders.[14]
- In the late 1970s the Commission adopted a rule requiring the exchanges and the National Associations of Securities Dealers ("NASD") to report quotations in certain securities, and approved an NMS plan established by the SROs relating to the reporting of quotations in exchange-listed securities (the Consolidated Quotation or "CQ" Plan).[15]

[8] "NMS Stock" is defined proposed Rule 600 of Regulation NMS to mean any NMS Security other than an option. NMS Security is defined in proposed Rule 600 of Regulation NMS to mean any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan.

[9] Section 11A(a)(2) of the Exchange Act, 15 U.S.C. 78k–1(a)(2).

[10] Section 11A(a)(1)(C) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C).

[11] Section 11A(a)(1)(D) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(D).

[12] *See* Securities Exchange Act Release No. 14416 (January 26, 1978), 43 FR 4354 (February 1, 1978) ("1978 Statement") at 12–13, 17–18. *See also* Senate Committee on Banking, Housing and Urban Affairs, Report to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Sess. (1975) ("Senate Report") at 7–9 and Comm. of Conference, Report to Accompany S. 249, H.R. Rep. No. 94–249, 94th Cong., 1st Sess. (1975) ("Conference Report") at 50–51, 92.

[13] In its status report on the state of the national market system in 1979, the Commission stated that its role in the development of a national market system is to "monitor and encourage industry progress, to act as a catalyst and, when necessary, to take regulatory action to achieve a particular goal. However, the Congress did not intend that the Commission dictate the ultimate configuration of the national market system or, through regulatory fiat, force all trading into a particular mold." Securities Exchange Act Release No. 15671 (March 22, 1979), 44 FR 20360 (April 4, 1979) ("1979 Status Report") at 3.

[14] *See, e.g.*, 1978 Statement, *supra* note 12, at 35–38 and 1979 Status Report, *supra* note 13, at 10–18.

[15] *See* Securities Exchange Act Release Nos. 14415 (January 26, 1978), 43 FR 4342 (February 1, 1978) (adopting Rule 11Ac1–1 under the Exchange Act). Rule 11Ac1–1 (proposed to be designated as Rule 602) requires each SRO to collect, process and make available to securities information vendors quotation prices and sizes for all securities as to which last sale information is included in the consolidated transaction reporting system contemplated by Rule 11Aa3–1 under the Exchange Act (proposed to be designated as Rule 601). In 1978 the Commission approved a joint proposal by the SROs to implement the requirements of Rule 11Ac1–1 under the Exchange Act (proposed to be designated as Rule 602), the CQ Plan, which became effective on July 28, 1978. *See* Securities Exchange Act Release No. 15009 (July 28, 1978), 43 FR 34851 (August 7, 1978). On February 20, 1979 quotations of third market makers were added to the consolidated quote data stream. *See* Securities

• Rule 11Aa3–1 (proposed to be designated as Rule 601), which requires SROs to implement a transaction reporting plan for the collection, processing and dissemination of last sale transaction reports in reported securities, was adopted in 1972.[16]

• In 1979 the Commission approved an exchange plan to link the various markets trading exchange-listed securities (the "ITS Plan").[17]

• Rule 11Ac1–2 (proposed to be designated as Rule 603), which was adopted in 1980, imposes minimum requirements regulating the manner in which securities information vendors display transaction and quotation information.[18]

• In response to the Commission's continuing concerns regarding intermarket price protection, in 1981 the ITS participants proposed amendments to the ITS Plan and to their own rules requiring participants to avoid the execution of a trade at a price worse than the best price displayed on another participant market.[19] In 1981 the Commission approved the amendments to the ITS Plan, including a model trade-through rule upon which the SRO trade-through rules were based.[20] In 1981 and 1982, respectively, the Commission approved the exchanges' and NASD's trade-through rules.[21]

• In 1990 the Commission approved on a pilot basis a proposal by several of the SROs governing the collection, consolidation and dissemination of quotation and transaction information for Nasdaq national market securities listed and traded on Nasdaq and traded on exchanges pursuant to unlisted trading privileges.[22] The Nasdaq UTP Plan now applies to all Nasdaq securities.[23]

• In 1996, as part of its Order Handling Rules initiative designed to enhance transparency and competition in the market place, the Commission adopted Rule 11Ac1–4 under the Exchange Act (proposed to be designated as Rule 604) (the "Limit Order Display Rule"), which requires certain exchange specialists and over-the-counter ("OTC") market makers to publicly display customer limit orders that better the specialist's or market maker's displayed price and/or size.[24]

• The Commission also amended Rule 11Ac1–1 under the Exchange Act (proposed to be designated as Rule 602) (the "Quote Rule") at the same time to require a specialist or OTC market maker to publicly display its best-priced quotations and customer limit orders for any listed security when it is responsible for more than 1% of the aggregate trading volume for that security, and to make publicly available any superior prices that the specialist or market maker privately quotes through certain ECNs.[25]

• In June 2000 the Commission issued an order that established the framework for the SROs to convert their quotation prices from fractions to decimals.[26] The order allowed the SROs to select a uniform minimum pricing variation for stock quotes of no greater than $.05 and no less than $.01.[27] In July 2000 the SROs submitted a Decimals Implementation Plan that set the minimum pricing variation for equity stock quotations at one cent, and each SRO established rules setting the minimum quoting increment for equity securities in its market at one cent.[28]

These and other actions resulted in a solid foundation for our NMS. For NYSE, Amex, and Nasdaq securities, the best bids and offers of each national securities exchange and registered OTC market maker are collected and made available to market participants. The last sale prices for NYSE, Amex, and Nasdaq securities are collected and disseminated through a central reporting facility to market participants. All national securities exchanges and registered OTC market makers that trade "ITS eligible" securities (including any ECN registered as an Intermarket Trading System/Computer Assisted Execution System ("ITS/CAES") market maker) are able to access each ITS participant's top-of-book through the ITS linkage, and are subject to existing trade-through provisions that require ITS participants' members to seek to avoid trading at a price in one market that is inferior to the price displayed in another market. Alternative markets to the traditional floor-based auction markets have developed within the existing national market system, bringing added competition to our markets.

2. Intermarket Price Protection

The Commission believes that one of the most important goals of an NMS is the encouragement of the display of limit orders and aggressive quotes, which provide the basis for all price discovery in the markets. When trades occur at prices that are inferior to displayed limit orders or quotes, it could discourage their display because market participants may be less willing to display limit orders or to quote aggressively if they believe it likely that

Exchange Act Release No. 15511 (January 24, 1979), 44 FR 6230.

[16] *See* Securities Exchange Act Release No. 9850 (November 8, 1972), 37 FR 24172 (the rule was adopted as Rule 17a-15 and was redesignated as Rule 11Aa3–1 in 1980). In the mid 1970s the Commission approved two NMS plans proposed by various SROs to implement the requirements of Rule 11Aa3–1. *See* Securities Exchange Act Release Nos. 10787 (May 10, 1974), 39 FR 17799 (approving a joint plan proposed by the NYSE, Amex, Midwest Stock Exchange (the predecessor to the Chicago Stock Exchange ("CHX"), Pacific Exchange ("PCX"), PBW Stock Exchange (the predecessor to the Philadelphia Stock Exchange ("Phlx")) and the NASD, which became the Consolidated Tape Association ("CTA") Plan) and 11255 (February 18, 1975), 40 FR 8397 (declaring effective individual plans proposed by the Boston Stock Exchange ("BSE"), Cincinnati Stock Exchange (the predecessor to the National Stock Exchange ("NSX")), Detroit Stock Exchange and Instinet for complying with Rule 11Aa3–1 subject to each becoming an "other reporting party" pursuant to the CTA Plan). The Commission notes that the current CTA Plan participants are: Amex, BSE, Chicago Board Options Exchange ("CBOE"), CHX, NSX, NASD, NYSE, PCX and Phlx. *See* Securities Exchange Act Release No. 48987 (December 23, 2003), 68 FR 75661 (December 31, 2003).

[17] *See* Securities Exchange Act Release Nos. 14661 (April 14, 1978), 43 FR 17419 (April 24, 1978) (initial temporary approval), 15058 (August 11, 1978) (extending temporary approval), 16214 (September 21, 1979), 44 FR 56069 (extending temporary approval) and 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983) (final permanent approval). All national securities exchanges and the NASD are now members of the ITS Plan except the International Securities Exchange, which trades solely securities not covered by the ITS Plan. The ITS Plan requires each Plan participant to provide electronic access to its displayed best bid or offer to other Plan participants and provides an automated mechanism for routing orders, called commitments, to reach those displayed prices.

[18] *See* Securities Exchange Act Release No. 16590 (February 13, 1980), 45 FR 12391 (February 19, 1980).

[19] *See* Securities Exchange Act Release Nos. 17703 (April 9, 1981) (adopting amendments to the ITS Plan), 17579 (February 26, 1981), 46 FR 14876 (March 2, 1981) (CHX proposal), 17612 (March 9, 1981), 46 FR 16770 (March 13, 1981) (PCX, BSE, NYSE and Phlx proposal) and 17671 (March 30, 1981), 46 FR 20345 (April 3, 1981) (NSX and Amex proposal).

[20] *See* Securities Exchange Act Release No. 17703 (April 9, 1981), *supra* note 19.

[21] *See* Securities Exchange Act Release Nos. 17704 (April 9, 1981), 46 FR 22520 (April 17, 1981) (order approving exchange rules) and 19249 (November 17, 1982), 47 FR 53552 (November 26, 1982) (order approving NASD rule).

[22] *See* Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (approval order of the Reporting Plan for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis ("Nasdaq UTP Plan")). The parties did not begin trading until July 12, 1993; thus, the pilot period began on July 12, 1993. The Nasdaq UTP Plan has been in operation since that time on an extended pilot basis. *See, e.g.*, Securities Exchange Act Release Nos. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994) and 48318 (August 12, 2003), 68 FR 49534 (August 18, 2003).

[23] *See* Securities Exchange Act Release No. 45081 (November 19, 2001), 66 FR 59273 (November 27, 2001) (extending the scope of the Plan to include all Nasdaq/NM and SmallCap securities).

[24] *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996).

[25] *Id.*

[26] *See* Securities Exchange Act Release No. 42914 (June 8, 2000), 65 FR 38010 (June 19, 2000).

[27] *Id.* at 38013.

[28] *See* Securities Exchange Act Release No. 46280 (July 29, 2002), 67 FR 50739 (August 5, 2002).

such orders and quotes will be bypassed by executions in other markets at prices that would be advantageous to them. A rule that effectively prevents one market from executing an order at a price that is inferior to a better price displayed on another market, especially in an NMS characterized by multiple competing markets, may encourage market participants to use limit orders and to quote aggressively, which in turn can improve the price discovery process and contribute to increased liquidity and depth. Moreover, such a rule, coupled with adequate access among markets, also could help reduce the effects of fragmentation and promote order interaction among competing markets by providing that trades would not execute in each individual market without reference to quotes and orders displayed in other markets.

In addition, when trades occur at prices worse than the displayed quote, it gives an impression of unfairness in our market system, especially to retail investors who see their orders executed at the inferior prices. Trade-through rules facilitate broker-dealers' ability to achieve best execution for their customers' orders. Pursuant to a trade-through rule, if a broker-dealer routes an order to a market that is not showing the best bid or offer at the time of order execution, that market should not execute the order at a price that is inferior to the price displayed on the other market, unless an exception applies.

a. History of Intermarket Price Protection

In the late 1970s, following the adoption of the 1975 Act Amendments to the Exchange Act, the Commission expressed its desire to move forward to achieve nationwide protection for customer limit orders, calling for industry efforts to be concentrated on achieving nationwide protection of public limit orders based on the principle of price priority.[29] With regard to the trading of exchange-listed securities, the Commission believed that the ITS participants should be given time to enhance ITS as a way of providing intermarket price protection for customer limit orders.[30] Although its focus was on providing protection for public limit orders, in its 1979 Status Report the Commission also stated its belief that nationwide price protection, if it was to be accomplished "in a fair manner consistent with the Act," ultimately should protect all buying and selling interest displayed by a market center as part of its current bid and offer as well as all displayed public limit orders away from the best market that were also superior to the price of the proposed trade.[31]

In 1981 the participants in the ITS Plan proposed amendments to the ITS Plan that stated that certain market participants should not execute orders at a price worse than the best price displayed by another participant market in the public quote.[32] The proposal included a model trade-through rule.[33] The Plan participants also proposed amendments to their own rules to institute trade-through rules patterned after the model ITS rule requiring their members to avoid trading through a better price displayed on another market.[34] In 1981 the Commission approved these amendments to the ITS Plan and ITS exchange participant trade-through rules.[35] Several years later, the NASD become an ITS Plan participant and instituted its own trade-through rule that applies to each of its members that is a registered market maker in exchange-listed securities (an "ITS/CAES" market maker).[36]

b. Existing Intermarket Price Protection Regime

The NYSE and Amex markets, and the Nasdaq market, have adopted different approaches to intermarket price protection. With regard to NYSE- and Amex-listed securities, the ITS trade-through rule requires members of an exchange, when purchasing or selling, either as principal or agent, a security traded through ITS on the exchange or by issuing a commitment to trade through ITS, to avoid initiating a trade-through (unless an exception applies).[37] The ITS rule defines a trade-through to occur when a member initiates a purchase (sale) on the exchange of a security traded through ITS at a price that is higher (lower) than the price at which the security is offered (bid for) at the time of the purchase (or sale) in another ITS participant market as reflected in the offer (bid) then being displayed on the exchange from the other participant market.[38] Each SRO

[29] *See* 1978 Statement, *supra* note 12, at 34–38 and 1979 Status Report, *supra* note 13, at 11–15. In its 1978 Statement, the Commission's focus included a desire for a central limit order file that would have provided price and time priority for public limit orders across markets trading the same securities. In its 1979 Status Report, however, the Commission recognized that introducing a system based upon absolute intermarket time priority for public limit orders might have a disruptive impact on the nation's markets at that time. The Commission thus expressed its intent to focus attention on achieving intermarket price priority for public limit orders.

[30] *See* 1979 Status Report, *supra* note 13, at 15–16. In 1979 the Commission proposed, as a step towards achieving intermarket price protection for public limit orders through ITS, its own rule that would have prohibited a broker-dealer from executing a transaction in a market center at a price inferior to the price of any displayed public limit order(s) unless the broker-dealer either simultaneously with or immediately after such execution satisfied any better priced public limit order. *See* Securities Exchange Act Release No. 15770 (April 26, 1979), 44 FR 26692. In 1992, citing the passage of the years and the lack of progress on developing a nationwide system for the collection and dissemination of limit orders, the Commission withdrew its proposed rule. *See* Securities Exchange Act Release No. 31344 (October 21, 1992), 57 FR 48581 (October 27, 1992) ("Withdrawal Release"). In doing so, it noted that the trade-through rules of the SROs, while not providing the same level of intermarket price protection that would have been provided by the Commission's rule, did provide price protection for public limit orders. *Id.* at 12.

[31] *See* 1979 Status Report, *supra* note 13, at 25.

[32] *See* Securities Exchange Act Release No. 17703 (April 9, 1981), *supra* note (order adopting trade-through amendments to the ITS Plan), and Section 8(d) of the ITS Plan.

[33] *See* Exhibit B of the ITS Plan.

[34] *See supra* note 19. The ITS participants also proposed to develop a "limit order information system" ("LOIS"), based on the existing ITS, that would have required specialists to aggregate and enter limit orders for display, and brokers executing a block trade outside the best bid or offer would have been required to satisfy the LOIS orders. This system was never implemented because of the participants' inability to reach consensus. *See* Withdrawal Release, *supra* note 30, at 10–11.

[35] *See* Securities Exchange Act Release No. 17703 (April 9, 1981), *supra* note (approval of trade-through amendments to ITS) and 17704 (April 9, 1981), *supra* note (approval of exchange trade-through rules).

[36] *See* Securities Exchange Act Release No. 19249, *supra* note (approval of NASD trade-through rule). The basic operation of the NASD's trade-through rule is similar to that of the exchange trade-through rules.

[37] *See* Section (b)(1) of Exhibit B of the ITS Plan. Pursuant to the ITS Plan and SRO trade-through rules, an ITS Participant can send an order, termed a "commitment to trade," to another ITS Participant to trade with a better price displayed by that other Participant market. The commitment to trade is a firm obligation to trade for a fixed period of time, either 30 seconds or one or two minutes, depending upon the time period chosen by the sending ITS Participant. If the receiving ITS Participant accepts the commitment to trade, the system reports back an execution to the sending ITS Participant. If the commitment to trade is not accepted by the receiving ITS Participant within the specified time frame, the commitment is automatically canceled. A commitment to trade also may be canceled by the receiving ITS Participant within the designated time period if it is priced away from the receiving ITS Participant's market at the time the commitment is received.

[38] The ITS rule also defines a trade-through to occur when a member of the exchange initiates the purchase (sale) of a security traded through ITS by sending a commitment to trade through ITS that results in an execution at a price that is higher (lower) than the price at which the security is being offered (bid for) at the time of the purchase (sale) in another ITS participant market as reflected by the offer (bid) then being displayed on the exchange from such other order execution facility. *See* Section (a) of Exhibit B of the ITS Plan.

Section 8(d)(i) of the ITS Plan states that members located in an ITS exchange participant market or an ITS/CAES market maker should not purchase (sell) any security that is traded through ITS at a price that is higher (lower) than the price at which the

requires its members, when purchasing or selling any ITS security, either as principal or agent, on its market or when sending a commitment through ITS, to avoid initiating a trade-through unless an exception applies.[39] The SRO trade-through rules also include extensive procedures for "satisfying" an order that is traded-through.[40]

The existing trade-through rules apply to exchange members and registered OTC market makers that trade NYSE or Amex-listed securities, but not to block positioners that operate in the OTC market without registration as OTC market makers.[41] Thus, OTC block positioners generally are not restricted by the existing trade-through rule from trading outside the best bid and offer. Nor do the trade-through rules apply to alternative trading systems ("ATSs") that trade NYSE or Amex-listed securities in the OTC market unless they are required to (or choose to) post quotes in the consolidated quotation system through an SRO.[42] When an ATS displays its best bid or offer in the consolidated quotation system through an SRO, it becomes subject to that SRO's trade-through restrictions (and thus the ITS Plan trade-through restrictions). For example, the NASD requires any ATS that intends to display its quotes in NYSE or Amex securities in the OTC market to register as an ITS/CAES market maker and thus become subject to the NASD's (and ITS Plan's) trade-through restrictions.[43]

In contrast, the Nasdaq UTP Plan as approved by the Commission does not contain any trade-through provisions, and no intermarket trade-through rules currently exist with regard to the trading of Nasdaq securities.[44]

c. Strains on Existing Intermarket Price Protection Regime

While the Commission continues to believe that a trade-through rule can encourage the use of limit orders, facilitate best execution, and reduce the effects of fragmentation, the Commission is concerned that developments in the markets over the last few years have called into question the continued viability of the existing system for achieving intermarket price protection in NYSE and Amex stocks.

The structure of the U.S. securities market is quite different now than when the ITS trade-through provisions were adopted. At the time when the existing rules were put in place, order routing and execution facilities were slower, there was less vigorous intermarket competition in NYSE, Amex, and Nasdaq securities, and the minimum trading increment was 1/8th of a dollar. By contrast, in today's market, rapid advances in technology have provided a variety of means to efficiently route orders to multiple markets. "Alternative" markets that provide almost instantaneous executions by automatically matching buy and sell orders have emerged, as has the use of "smart" order routing and execution systems by broker-dealers and other market participants. Stocks are quoted in pennies instead of 1/8ths, which has led (in many instances) to narrower spreads, less depth at the top-of-book and rapidly changing quotes. It also may reduce the cost of a trade-through to the investor.

Because competing market centers currently offer different speeds and levels of certainty of execution, the challenge of providing price protection across these diverse markets has grown. In recent years some market participants have argued that the restrictions imposed by existing trade-through rules for NYSE and Amex securities impede the efficient operation of "non-traditional" automated markets that operate by automatically, and nearly instantaneously, matching buying and selling interest resident in their systems.[45] These market participants say that if an electronic market is subject to existing trade-through rules, the market must slow down or forego an execution in its system in order to send an order to another market displaying a better price to attempt to access that better priced order, or risk having to satisfy the better-priced order if it is traded-through. Although the trade would occur at an inferior price, these

security, at the time of the purchase, is offered (bid for) by one or more of the other Participants' markets, as reflected in the offer (bid) being furnished from the other market that is available on the trading floor of, or available in the quotation service used by, such member or ITS/CAES market maker.

[39] See, e.g., NYSE Rule 15A and NASD Rule 5262. The exceptions to the existing SRO trade-through rules include the following circumstances: (1) When the size of the bid or offer traded-through is for 100 shares; (2) the member that initiated the trade-through is unable to avoid the trade-through because of a systems/equipment failure or malfunction; (3) the transaction that constituted the trade-through was not a "regular way" contract; (4) the bid or offer that was traded-through was being displayed from a market that was relieved of its obligations with respect to the bid or offer under Rule 11Ac1–1 under the Exchange Act pursuant to the "unusual market" exception of paragraph (b)(3) of that rule; (5) the trade-through occurred on an exchange during a period when the members on the exchange were relieved of their obligations under paragraph (c)(2) of Rule 11Ac1–1 pursuant to the "unusual market" exception of paragraph (b)(3) of Rule 11Ac1–1, provided, however, that unless one of the other exceptions applies, during such period members shall make every reasonable effort to avoid trading-through any bid or offer displayed on the exchange from any other ITS Participant whose members are not so relieved of their firm quote obligations under paragraph (c)(2) of Rule 11Ac1–1; (6) the bid or offer traded-through had caused a locked or crossed market in the security; (7) the transaction involves purchases and sales effected in an opening (or reopening) transaction; and (8) the transaction involves any "block trade" or "block transaction" as defined in the SRO's ITS block trade policy.

Each SRO has adopted a policy regarding the execution of block trades, based on a model block trade policy contained in Exhibit C of the ITS Plan, that allows a member (or ITS/CAES market maker, in the case of the NASD) to trade-through a better displayed price on another market in the course of executing a block trade if the member simultaneously executes the better displayed order at the block price. See, e.g., NYSE Rule 15A and NASD Rule 5264.

[40] In summary terms, the market whose order was traded-through must first send a complaint to the market that initiated the trade-through. The party that initiated the trade-through must then respond, either by claiming an exception or by taking corrective action. If corrective action is taken, the party that traded-through can either satisfy the order that was traded-through at the limit price (or, in limited circumstances, at the price that caused the trade-through) or adjust the price of the transaction that caused the trade-through to a price at which the trade-through would not have occurred. In all instances where an order that was executed was for an account other than the account of the broker-dealer involved, the order shall receive either: (i) The price that caused the trade-through; (ii) the price at which the order traded-through was satisfied; or (iii) the adjusted price, whichever is most beneficial to the order. See, e.g., NYSE Rule 15A(b)(2)(A), (B) and (C) and NASD Rule 5262(b)(1) and (2).

[41] Block positioners are exempt from the 1% mandatory quote requirement of the Quote Rule, Rule 11Ac1–1 under the Exchange Act.

[42] Specifically, pursuant to Regulation ATS, ATSs are not required to display their best bid and offer in a particular security through an SRO until they have 5% or more of the average daily trading volume in that security over a six-month period. *See* Section 301(b)(3)(i) and (ii) of Regulation ATS, 17 CFR 242.301 to 303.

[43] A market maker or ATS that intends to or is required to display quotes in NYSE or Amex securities in the consolidated quotation system and chooses to do so through the NASD through the Consolidated Quotations Service ("CQS") must register with the NASD as a CQS market maker. *See* NASD Rule 6320(a). Any CQS market maker that is registered in a reported security that is eligible for inclusion in ITS/CAES also must register as an ITS/CAES market maker and must participate in ITS/CAES. *See* NASD Rules 6320(e) and 5210(e). ITS/CAES enables market makers in ITS-eligible securities to direct orders to, and receive orders from, other ITS participant markets.

[44] In its 1985 release announcing its decision to grant unlisted trading privileges to national securities exchanges in NMS Securities, the Commission noted that it did not believe that a sophisticated intermarket linkage needed to be in place during the initial stages of trading such securities, but it encouraged the NASD and exchanges to develop computerized intermarket trading linkages and trade-through rules on their own. See Securities Exchange Act Release No. 22412 (September 16, 1985), 50 FR 38640. In subsequent releases, the Commission reiterated its belief that UTP participants should develop an intermarket trading linkage and adopt a trade-through rule. *See* Securities Exchange Act Release No. 31672 (December 30, 1992), 58 FR 3054 (January 7, 1993) and 33408 (December 30, 1993), 59 FR 1045 (January 7, 1994).

[45] These arguments have been made in various forums including congressional hearings, industry publications, and discussions with regulators.

market participants say that some customers prefer the speed and/or certainty of execution over price.

Many automated markets argue that requiring them to provide this outbound access to a non-automated market to reach the better price displayed on that other market, no matter how marginal that better price is and how long it takes the other market to execute the order (if at all), not only compromises the basic structure of their markets but also effectively grants an option to that slower market during the time period before the order is executed. This option has value, as there is a risk that the market for the stock may move before the order is executed, especially if a significant amount of time passes before the order is executed.[46] In addition, market participants argue that there is no guarantee that the order will even be executed at the price that was showing at the time that the order was sent, given the rapid quote changes that exist for some securities today.[47]

A trade-through rule like the current ITS trade-through rule effectively prevents a market center from executing an investor's order immediately at an inferior price, even if that is what the investor desires. Thus, such a rule impacts an individual investor's ability to direct the manner in which its order will be executed. In today's environment characterized by rapidly changing quotes, narrow spreads, and less depth at the inside, some investors may believe that best execution is fulfilled by instructing their broker that speed and/or certainty of execution is more important than the possibility of a small amount of price improvement.

With respect to transactions in certain high-volume, derivatively-priced ETFs—QQQs, SPDRs and Diamonds—that are widely traded by electronic markets, the Commission in August 2002 issued an order to ease the restrictions of the trade-through rules by granting, on a temporary basis, a three-cent *de minimis* exemption to the trade-through provisions of the ITS Plan.[48] The exemption allows participants to execute orders in these ETFs at prices no more than three cents away from the best bid or offer displayed in the consolidated quote at the time of execution.[49] The Commission, in issuing the exemption, stated its belief that the exemption would, on balance, provide investors with increased liquidity and increased choice of execution venues while limiting the possibility that investors would receive significantly inferior prices.[50]

In light of the Commission's three-cent *de minimis* exemption for the QQQs, SPDRs, and Diamonds, the ITS participants held many discussions regarding ways to revise the trade-through requirements in the ITS Plan. The participants were not able to reach consensus on a course of action (amendments to the ITS Plan must be unanimous under the existing plan provisions). The Commission also notes that not all market participants affected by the operation of the current trade-through rules have a direct voice in the administration of the ITS Plan, and are therefore unable themselves to directly influence or affect any changes to the trade-through provisions of the ITS Plan.

With respect to the market for the trading of Nasdaq securities, there are no intermarket trade-through rules and no mandatory intermarket linkage other than the telephonic access required among markets trading Nasdaq stocks under the Nasdaq UTP Plan and the access requirements for participants in the NASD's Alternative Display Facility ("ADF").[51] Over the past few years, however, a number of new markets have begun trading Nasdaq stocks. Nasdaq stocks are traded on Nasdaq's National Market Execution System (more commonly known as "SuperMontage"), all of the largest ECNs, the PCX (through its equity trading facility the Archipelago Exchange), the Amex, the BSE, and the NSX. In addition, Nasdaq stocks are traded among participants in the ADF. Nasdaq market makers and other registered broker-dealers also continue to trade Nasdaq securities outside of SuperMontage or the ADF. As a result, trading now extends beyond the Nasdaq's SuperMontage system where displayed prices are protected. Broker-dealers trading in the Nasdaq market rely on best execution obligations. Yet, even without a trade-through rule, the Nasdaq market does not appear to lack competitive quoting in the most actively traded securities.

C. Proposed Trade-Through Rule

The Commission believes there is value in having a rule that provides a measure of price protection for limit orders across markets, if the rule is designed to accommodate the current structure of our NMS. Like the current ITS trade-through rule, a Commission trade-through rule would encourage the use of limit orders, aggressive quoting, and order interaction and help preserve investors' expectation that their orders will be executed at the best displayed price. The Commission therefore is proposing its own trade-through rule that would apply not only to the trading of NYSE and Amex securities but also to the trading of Nasdaq securities.

The Commission's proposed trade-through rule would require markets, with regard to the trading of NMS Stocks—NYSE, Amex, and Nasdaq securities—to establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of trade-throughs in their markets. The proposed rule includes two exceptions to the basic requirement that are designed to address issues that have been raised regarding the current ITS trade-through rule. One exception would allow customers (and broker-

[46] Pursuant to the ITS Plan, an entity sending a commitment through the ITS system may designate a time period during which the commitment shall be irrevocable following acceptance by the system—either thirty seconds or one or two minutes. *See* Section 6(b)(i) of the ITS Plan and Securities Exchange Act Release No. 44903 (October 3, 2001), 66 FR 52159 (October 12, 2001). If the commitment is not accepted or rejected during the applicable time period, the commitment is automatically canceled by the system at the end of the applicable time period. *See* Section 6(b)(iv) of the ITS Plan.

[47] The Commission notes that many industry participants have expressed frustration with so-called "phantom quotes," where a market participant is unable to interact with another market's quote because the quote faded upon receipt of the order. The Commission reminds markets that the firm quote rule requirements in Rule 11Ac1–1 under the Exchange Act apply to all incoming orders, including ITS commitments, and stresses that it is the responsibility of each market participant that is posting a bid or offer to comply with the rule, and each SRO's responsibility to effectively and consistently enforce compliance by its members with the rule. *See, e.g.*, Securities Exchange Act Release No. 40260 (July 24, 1998), 63 FR 40748 (July 30, 1998) (stating the firm quote rule applies to ITS commitments and emphasizing that all ITS participants must strictly enforce the rule to ensure that investors receive best execution and that the market receives reliable quotation information).

[48] *See* Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 14, 2002).

[49] *Id.* The Commission has extended this temporary exemption until March 4, 2004. *See* Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003).

[50] *Id.* The Commission's Office of Economic Analysis conducted an analysis of trading in the QQQs in 2002, comparing trading on a day before the *de minimis* exemption was implemented; a day after the exemption was implemented before the Island ECN stopped displaying its orders to anyone, even its subscribers (going "dark"); and a day after the exemption was implemented when the Island ECN was "dark." The analysis showed that the percent of trades executed outside the NBBO did not increase, and that less than 1% of total trades were executed more than three cents away from the NBBO, after the *de minimis* exemption was implemented. A copy of the analysis is available in the File No. S7–10–04.

[51] In general, the ADF access rules provide that any market participant quoting in the ADF must provide (1) direct electronic access to all other ADF quoting market participants, and (2) direct electronic access to any other NASD member broker-dealer that is not an ADF quoting market participant, if requested, and must allow for indirect electronic access. *See* NASD Rule 3400A(a).

dealers acting for their own account) to provide informed consent to having their orders executed in one market without regard to prices in other markets. The other exception would allow an automated market to trade through a non-automated market up to a certain amount. The proposed rule is intended to respond to the current criticisms of the existing rule and accommodate different marketplace models, while still preserving important customer and market integrity protections. As discussed in more detail in Section III.C.7. below, the Commission emphasizes that the proposed rule is not intended to, and would not, in any way alter or lessen a broker-dealer's best execution obligations.

1. Markets Subject to the Proposed Rule

The proposed rule would require an order execution facility,[52] national securities exchange and national securities association to establish, maintain, and enforce policies and procedures reasonably designed to prevent the purchase or sale of an NMS Stock at a price that is inferior to a better price displayed on another market.[53] The intent of the proposed rule is to prohibit the execution of any trade-through by any order execution facility, national securities association or national securities exchange, absent one of the specified exceptions. Nevertheless, the Commission recognizes the unavoidable "false-positive" and "false-negative" trade-throughs that occur because quotes are updated and orders are executed more rapidly than information can be communicated. The Commission does not believe that an order execution facility should be held responsible for protecting a better-priced quote that it cannot see because it has not yet received the quote. Specifically, in an environment where quotes can change numerous times within a fraction of a second, an order execution facility should not be required to protect a best bid or best offer of another order execution facility disseminated within the same second during which the order execution facility executed the order but which was not the best bid or best offer that the executing market saw at the instant that it executed the order. The Commission requests comment on whether drafting the rule to require order execution facilities, national securities exchanges, and national securities associations to establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of trade-throughs in their markets is sufficient to effectively deter and prevent trade-throughs. Should the Commission instead, or in addition, explicitly prohibit trade-throughs absent an exception?

The Commission is proposing to define "order execution facility" broadly to include all national securities exchanges and national securities associations that operate a facility that executes orders, ATSs, exchange specialists and market makers, OTC market makers, block positioners and any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.[54] The Commission believes that including broker-dealers that do not post quotes or orders in the public quote but that nevertheless execute orders internally is important because otherwise those markets would have an advantage over markets that display their best quotes and orders in the public quote. Given the availability of best bid and best offer information, the access standards proposed by the Commission today,[55] and the advanced technology that currently is available for the routing of order flow, the Commission does not believe that including "non-quoting" markets within the scope of the proposed rule would impose any undue hardships on such markets. The Commission requests comments on the advisability of including "non-quoting" markets within the scope of the rule, including whether there are any practical difficulties or other costs that would not justify the benefits of requiring them to comply with the rule. The Commission also requests comment on the extent of any positive or negative impact of including these markets within the scope of the rule.

2. Types of Securities Subject to the Proposed Rule

The proposed trade-through rule would apply to the trading of all NMS Stocks, which means that it would apply to the trading of all Nasdaq, NYSE, and Amex stocks.[56] Applying a trade-through rule to the trading of Nasdaq securities would represent a change from the status quo. The Commission believes that it may no longer be possible to identify a distinction between Nasdaq stocks and other NMS Stocks for purposes of imposing trade-through protections.

The Commission requests comment on applying the protections of the proposed rule to the trading of Nasdaq securities. The Commission also requests comment on the practical impact of implementing a trade-through rule for Nasdaq securities, including specifically what system, technical, or other changes would be needed to implement the proposed rule.

3. Types of Orders Subject to the Proposed Rule

The proposed rule would apply to any purchase or sale of an NMS Stock during regular trading hours. Accordingly, the proposed rule would apply to orders for the account of a broker-dealer as well as for the account of a customer.[57] The Commission believes that excluding orders for the account of a broker-dealer would undermine the purpose of the proposed rule to provide price protection to displayed better-priced limit orders and quotes, because the broker-dealer orders would be able to trade-through the better prices. However, a broker-dealer (as well as a customer) may choose to opt-out of the rule's protections with regard to orders for its own account, pursuant to the opt-out exception proposed below. The Commission requests comment on whether broker-dealer orders should be included within the scope of the rule.

4. Bids and Offers To Be Protected

The proposed rule would require an order execution facility, national securities exchange, and national securities association to establish, maintain, and enforce policies and

[52] An order execution facility would be defined in proposed Rule 600 of Regulation NMS as any exchange market maker; OTC market maker; any other broker or dealer that executes an order internally by trading as principal or crossing orders as agent; ATS; or national securities exchange or national securities association that operates a facility that executes orders.

[53] The proposed definition of a "trade-through" would be the purchase or sale of an NMS Stock during regular trading hours, either as principal or agent, at a price that is lower than the best bid or higher than the best offer of any order execution facility that is disseminated pursuant to an effective national market system plan at the time the transaction is executed. *See* proposed Rule 600 of Regulation NMS.

[54] *See* Rule 600 of proposed Regulation NMS. The Commission notes that the proposed definition of order execution facility would include any registered broker-dealer that is a member of an SRO that executes orders internally, as an OTC market maker, exchange specialist or market maker, block positioner, or otherwise. In addition, however, the Commission is proposing that an order execution facility, national securities exchange, and national securities association may choose to accept only "opted-out" orders (as discussed below) and, therefore, would not be required to comply with the requirements of the proposed rule. *See* section (a)(2) of proposed Rule 611 of Regulation NMS.

[55] *See* Section IV *infra* for a discussion of the Commission's market access proposal.

[56] *See* note 8, *supra*.

[57] For purposes of the proposed rule, "customer" is defined to mean any person that is not a broker or dealer. *See* proposed Rule 600 of Regulation NMS.

procedures reasonably designed to prevent the execution of an order at a price that trades through the best bid or best offer of any order execution facility that is disseminated pursuant to an effective national market system plan. Currently, bids and offers that are disseminated pursuant to an effective national market system plan include, with respect to NYSE and Amex listed securities, the best bid and best offer of each national securities exchange that trades a particular NYSE or Amex listed security, as well as the best bid and best offer of each individual registered market maker and ATS (registered as an ITS/CAES market maker) that provides its best bid and best offer to the NASD for a particular NYSE or Amex listed security.[58] The current ITS trade-through rule protects the best bid and best offer of each national securities exchange and the "ITS/CAES BBO,"[59] which is one best bid price and one best offer price (with aggregate size) for all ITS/CAES market makers, but not the best bid and best offer of each individual ITS/CAES market maker.[60] With regard to the trading of Nasdaq securities, bids and offers that are disseminated pursuant to an effective national market system plan include the best bid and best offer of each national securities exchange that trades a particular Nasdaq security, the best bid and best offer of each registered Nasdaq market maker or ATS that provides its best bid and best offer in a particular Nasdaq security to Nasdaq, and the best bid and best offer of each ADF quoting market participant that provides its best bid and best offer in a particular Nasdaq security to the NASD.[61]

The Commission requests comment on the extent to which the best bid and best offer of each individual market maker and ATS that would be protected pursuant to the proposed rule is available to all order execution facilities that would be subject to the proposed rule, and the extent to which the accessibility of those bids and offers would be impacted by the proposed access standards and market data amendments proposed today.[62] The Commission also requests comment as to the scope of the bids and offers that should be protected pursuant to the proposed rule. In particular, should the best bids and best offers of each individual registered market maker and ATS be protected, as proposed? Or should the proposed rule protect only the best bid and best offer of each national securities exchange and the aggregate best bid and best offer of each non-exchange "market" (*i.e.* one best bid price and one best offer price with aggregate size for all ITS/CAES market makers with respect to the trading of NYSE and Amex securities otherwise than on an exchange, a best bid price and best offer price with aggregate size for the Nasdaq market with respect to the trading of Nasdaq securities, and a best bid price and best offer price with aggregate size for the ADF with respect to the trading of Nasdaq securities)? Further, if the proposed rule did not protect the best bid and best offer of each individual market maker and ATS, the Commission requests comment as to whether there should be just one best bid price and best offer price, with aggregate size, for the trading of Nasdaq securities other than on an exchange, or whether there should be a separate best bid and best offer for trading on Nasdaq and a separate best bid and best offer for trading on the ADF.

As noted above, the proposed rule would apply only to the best bid and best offer of any order execution facility that is disseminated pursuant to an effective national market system plan. It would not apply to other limit orders or quotes that are also priced better than the order being executed but are not disseminated pursuant to an effective national market system plan. To expand the price protection beyond the best bid and best offer for each market would entail the Commission requiring quoting market centers to make available, and provide access to, their entire depth of book to other markets. Although the Commission believes that from a policy viewpoint it would make sense to provide protection to any better-priced quote or order displayed in another quoting order execution facility, not just the top-of-book of each quoting order execution facility, the Commission questions whether protecting all displayed limit orders and quotes at this time would be feasible. The Commission, however, requests comment on whether it should expand the scope of the proposed rule to include trade-through protection beyond the best-displayed bid and offer. For example should the scope of the proposed rule include protection beyond the best displayed bid and offer in the circumstance where a market center voluntarily provides depth-of-book information through the facilities of an effective national market system plan?

Current SRO rules regarding block trades in NYSE and Amex securities, adopted pursuant to the ITS Plan (as well as the provisions of the ITS Plan itself) allow block trades to be executed at an inferior price as long as the party executing the block executes any better priced order(s) displayed on another market(s) at the block price.[63] In the proposed rule, the Commission is not proposing to treat large "block-sized" trades any differently than non-block trades. Thus, an order execution facility could not execute a block trade at a price inferior to the best bid or offer displayed on any other order execution facility unless the order execution facility sent an order to trade at the price of the better-priced order.[64] The Commission believes that an exception for block trades may not be necessary because its proposed exception to the trade-through rule to allow a customer, or broker-dealer trading for its own account, to provide informed consent to having its order executed without the protection of the rule would be available to a customer or broker-dealer that wishes to execute a block trade.[65]

The Commission requests comment on whether this is the appropriate way to handle block trades under the proposed rule. The Commission requests comment on the extent to which treating block trades in the same manner as other trades, combined with the proposed opt-out exception, would impact a broker-dealer's or customer's ability to execute a block trade, if at all. The Commission also requests comment

[56] *See* Rule 11Ac1–1 under the Exchange Act (proposed to be designated as Rule 602), 17 CFR 240.11Ac1–1, and Sections I(w) and VI(a) and (c) of the CQ Plan.

[59] The ITS/CAES BBO is defined in Section 6(a)(i)(B) of the ITS Plan as the best bid price and best offer price, together with the sum of the sizes accompanying the bids and offers at the best bid price and best offer price. The trade-through rule excepts bids and offers where the size is 100 shares.

[60] *See* Sections 6(a)(i)(A) and (B) and 8(d)(i) of the ITS Plan, and *e.g.*, NYSE Rule 15A(a)(2) and NASD Rule 5210(i).

[61] *See* Securities Exchange Act Release No. 49137 (January 28, 2004), 69 FR 5217 (February 3, 2004) (notice of filing of amendments to the Nasdaq UTP Plan).

[62] *See infra* Sections IV and VI, respectively, for a discussion of the Commission's market access proposal and the market data proposal.

[63] For purposes of the ITS participants' block trade policies, a "block trade" or "block transaction" is defined as a transaction that involves 10,000 or more shares of a common stock traded through ITS or a quantity of such stock having a market value of $200,000 or more that (i) is effected at a price outside the bid or offer displayed from another ITS participant market and (ii) involves either a cross of block size or any other transaction of block size that is not the result of an execution at the current bid or offer on the market executing the block trade. *See, e.g.*, NYSE Rule 15A and NASD Rule 5264.

[64] *See* Section III.D.3. below for a discussion of a proposed exception to the trade-through requirements in those instances where an order execution facility sends an order to execute against a better-priced order displayed on another market at the same time or prior to executing an order in its own market at an inferior price.

[65] *See* Section III.D.1. below for a discussion of the proposed opt-out exception.

on whether a block exception would be necessary if the proposed opt-out exception were not adopted.

5. Required Policies and Procedures

The proposed rule would require each order execution facility, national securities exchange, and national securities association to develop policies and procedures reasonably designed to prevent the execution of a trade-through in its market.[66] While the exact nature and extent of the policies and procedures would therefore depend upon the type, size, and nature of the order execution facility, national securities exchange, and national securities association, these procedures must be designed to forestall trade-throughs from occurring other than pursuant to an exception. Among other things, the policies and procedures of an order execution facility, national securities exchange, and national securities association should provide for the monitoring of quotations in other markets and prevent a trade from being effected in its market at a price inferior to a bid or offer that was apparent to the order execution facility in another market.

The Commission believes it is important for each order execution facility, national securities exchange, and national securities association to include a reasonable process in its required policies and procedures for specifically identifying and handling "false positive" and "false negative" trade-throughs. Given the speed with which the quotes update in certain stocks, there may well be instances of "false-positive" trade-throughs, where a market participant took all reasonable precautions and legitimately did not think it was trading through the best bid or best offer of any other market center disseminated pursuant to an effective national market system plan at the time of execution but, because of rapid-fire quote changes in the stock (or possibly inconsistent records as to the time of execution), it appears in hindsight that the order execution facility did in fact trade through another market. As discussed above, the Commission does not believe it reasonable to require a market center to protect a bid or offer that has not yet been received by it and that the market center, therefore, cannot see at the instant that an order is executed. The Commission recognizes that these issues already exist under the current trade-through rules. The Commission requests comment on specific procedures that could be implemented to prevent and identify instances of "false-positive" and "false-negative" trade-throughs.

The Commission also requests comment on the minimum standards to which an order execution facility, national securities exchange, and national securities association should adhere when establishing, maintaining, and enforcing its required policies and procedures

6. Access Standards

The Commission recognizes that it would not be reasonable to impose trade-through restrictions that prohibit an order execution facility from executing an order at a price inferior to the best bid or offer displayed in another market(s) unless the order execution facility can see and have fair and efficient access to those prices. Therefore, the Commission believes that an effective linkage between markets must be in place before implementing a trade-through rule, whether it is a "hard-wired" linkage or required minimum access standards. This is especially true for the market for Nasdaq stocks, where trading has expanded to multiple markets and where there is no existing "hard-wired" linkage or minimum access standards, other than the telephonic access required by the Nasdaq UTP Plan and the minimum access standards of the ADF.[67]

The Commission believes that the access standards it has proposed today would provide the necessary levels of access.[68] The Commission requests comment on whether existing access in the markets for Nasdaq, Amex and NYSE securities is adequate to support the proposed trade-through rule, in light of the advances in technology and the proprietary linkages already in place today. If current access is not adequate, the Commission requests comment on what access standards would be needed as a prerequisite to implementing the proposed trade-through rule.

Under the proposed access rules, an SRO would not be permitted to post quotes or orders for another market center (such as an ATS or market maker) through its facilities unless it has first made a determination that the market center has provided adequate access to its quotes and orders under the proposed access standards.[69] The Commission believes that this requirement is necessary to protect against inaccessible markets becoming part of the consolidated quote.

7. Duty of Best Execution

The Commission emphasizes that the proposed trade-through rule, including the automated market exception, in no way alters or lessens a broker-dealer's duty to achieve best execution for its customers' orders. A broker-dealer still must seek the most advantageous terms reasonably available under the circumstances for all customer orders. A broker-dealer must carry out a regular and rigorous review of the quality of market centers to evaluate its best execution policies, including the determination as to which markets it routes customer order flow. A broker-dealer cannot merely assume that because the market(s) to which it sends its customer orders is subject to the proposed rule, the broker-dealer can abdicate its responsibilities for evaluating the execution quality of that market. Moreover, broker-dealers that execute customer orders internally would continue to be evaluated against the best bid and offer (or better bid or offer, if available) for best execution purposes, regardless of whether these orders were executed automatically or manually. The proposed trade-through rule does not justify a market maker executing retail orders internally at prices inferior to the best quote, even if executed automatically.

D. Exceptions to the Proposed Rule

To provide flexibility for market centers with different market structures and to give investors more control over how their orders are executed, the proposed rule would include an exception allowing customers to "opt-out," and an exception allowing an automated market to trade through a non-automated market in limited circumstances. The Commission also is seeking comment on an alternative to these exceptions that would require market centers to provide automated access to displayed quotations.

[66] The Commission notes that any member of an SRO that executes orders would be deemed on order execution facility under the proposed rule and thus subject to the proposed rule's requirements. In addition, any member that would not be deemed an order execution facility but receives order flow from customers or other broker-dealers would potentially be subject to the proposed requirement to obtain informed consent prior to allowing the customer or broker-dealer to opt out.

[67] For many years, only Nasdaq and the CHX traded Nasdaq stocks. Recently, as discussed in Section III.B.2.c. above, other markets have begun trading Nasdaq securities. While Nasdaq and CHX have negotiated a bilateral linkage between their markets, it is not clear how the other markets would be linked, if at all. The NMS plan governing the trading of Nasdaq securities, the Nasdaq UTP Plan, only requires telephonic access between the markets trading Nasdaq stocks. *See* Section IX of the Nasdaq UTP Plan.

[68] *See* Section IV *infra* for a discussion of the Commission's market access proposal.

[69] *See* Section IV.B.2. *infra*.

1. Opt-Out Orders

Some investors may, at times, value speed and/or certainty of execution over the possibility of obtaining a slightly better price on another market, especially prices that may be as little as one cent per share better. These investors may want the ability to trade immediately in the market to which they send an order without having any delay from routing the order to another marketplace with a slightly better price, particularly a non-automated market that does not provide the same speed or certainty of execution as the market to which the investor sent its order. Such order routing decisions by an investor are facilitated by execution data now available for orders of less than 10,000 shares that can help guide investors in their investment decisions regarding where and when to execute their orders.[70] Large traders may also want the ability to execute a block immediately at a price outside the quotes, to avoid parceling the block out over time in a series of transactions that could cause the market to move to an inferior price.

A further benefit of providing investors with the flexibility to choose whether their orders should trade through a better quote is that it might create market forces that would discipline markets that provided slow executions or inadequate access to their markets. If investors were not satisfied with the level of automation or service provided by a market center, they could choose to have their orders executed without regard to that market's quote, thus putting pressure on the market to improve its services.

The Commission therefore is proposing an exception to the trade-through rule to allow an order execution facility to execute an order at a price that trades through a better-displayed bid or offer on another market if the person for whose account the order is entered (*e.g.* a broker-dealer for its own account or a customer for the customer's account) makes an informed decision to affirmatively opt out of the trade-through rule's protections with regard to that order.[71] The proposed exception strives to preserve the usual customers' expectation of having their orders executed at the best displayed price, but allows a choice for those investors whose trading strategies may benefit from an immediate execution priced outside the national best bid and offer ("NBBO"). Broker-dealers, of course, would not have to permit their customers the ability to opt out of the trade-through rule's protections. The Commission requests comment on whether the proposed opt-out exception is needed to enable informed traders to design their own trading strategies appropriate to their particular circumstances.

While the opt-out exception would provide greater execution flexibility to informed traders, the Commission recognizes that the opt-out exception is inconsistent with the principle of price protection for limit orders because it would allow investors to choose to have their orders executed without regard to better-priced orders displayed on other market centers. If limit orders frequently remain unexecuted after trades take place at inferior prices, investors may be discouraged from entering limit orders, thus reducing price discovery. In light of this concern, the Commission requests comment on the extent to which limit orders would remain unexecuted after a trade-through, and the impact on investors' use of limit orders, if the opt-out exception were to be implemented.

If used frequently, the proposed opt-out exception also might undermine investor confidence that their orders will receive the best price available in the markets, when they see trades frequently occurring at prices inferior to better prices displayed on other markets. The Commission therefore requests comment on whether the opt-out exception would undermine the principle of price priority and, if so, the anticipated impact of this exception on the principle of price priority.

a. Request for Comment on Automated Execution Alternative

To the extent that the need for trade-through flexibility is caused by the inability to trade efficiently with published quotations, this problem could be addressed more directly by requiring all market centers to provide an automated response to electronic orders at their quote. As discussed in Section IV below, the Commission historically has not dictated the means of execution provided by competing market centers. Nonetheless, if the Commission were to adopt an automatic execution requirement, such action may allay to some extent investors' concerns over their inability to quickly access manual markets and control their own executions.

In addition, to the extent that trade-through flexibility is needed to facilitate block trading, an automatic execution requirement in conjunction with the proposed trade-through rule's provision for simultaneously routing and trading may enable block trades to avoid trading through without moving the market. Because the proposed trade-through rule would allow a market participant to route orders to the displayed quotes and then trade at a price that would otherwise be a trade-through, a block trader could use automatic execution to simultaneously access the existing displayed quotes and then execute the remainder of the block at a discount, without violating the rule.

An automatic execution requirement may well deal with two of the potential serious flaws with the proposed opt-out exception. First, to the extent that the opt-out exception is inconsistent with the principle of price protection for limit orders, an automatic execution requirement at the best bid or offer for limit orders avoids this problem. Under such an alternative, investors would not be discouraged from entering limit orders, and price discovery would be enhanced.

Second, an automatic execution alternative also supports the principle of price priority. It would not allow trades to occur at inferior prices, as could happen under the proposed opt-out exception. Such an alternative could maintain investor confidence that their orders will receive the best bids and offers displayed in any market.

For these reasons, the Commission requests comment on whether there is a continued need for the opt-out exception if it were to adopt an automatic execution requirement. The Commission also requests comment if there is a continued need for the proposed automated market exception, if the Commission were to adopt an automatic execution requirement, because all market centers would be required to provide the same basic level of automatic execution functionality,

[70] Rule 11Ac1–5 under the Exchange Act (proposed to be designated as Rule 605), requires certain market centers to make publicly available on a monthly basis standardized statistics concerning their order executions, including such measures as the effective and realized spreads, speed of execution and the number of orders executed at, inside and outside of the quote. Rule 11Ac1–6 under the Exchange Act (proposed to be designated as Rule 606), requires broker-dealers to make publicly available on a quarterly basis a report on their order routing practices, including a discussion of any payment for order flow arrangements.

[71] *See* Section (b)(8) of proposed Rule 611. A broker-dealer sending orders to another broker-dealer with whom it has a relationship (*e.g.* an introducing/executing broker relationship) would either be acting for its own account or acting on behalf of the account of a customer. In either instance, the broker-dealer receiving the orders would be required to obtain consent from the sending broker-dealer with respect to each order prior to treating an order as one that has "opted out." If the sending broker-dealer were acting on behalf of a customer, it would have to obtain informed consent from its customer prior to sending an order to another broker-dealer for execution.

and thus there would be no distinction for purposes of the proposed rule between manual markets and automated markets.

In the access discussion in Section IV, the Commission requests comment on whether, if it were to require automatic execution, it would need to set performance standards governing the use of the automatic execution functionality to which all markets would be required to adhere. The Commission specifically requests comment as to whether it should set minimum execution performance standards that would require that market participants' systems respond to orders from other markets within certain time frames.[72] Would minimum performance standards be essential to any consideration to not adopt an opt-out exception? The Commission also requests comment on whether, as discussed earlier, even if the Commission were to adopt an automatic execution requirement, the Commission should retain the proposed opt-out exception in order to provide a market and competition-driven incentive for different markets to provide and maintain a high level of service.

b. Opt-Out—Order-by-Order Consent

If a broker or dealer were to provide investors the ability to opt out, the proposed rule would require the broker-dealer to obtain informed consent from each investor who chooses to opt out of the protections of the proposed rule on an order-by-order basis. The Commission is not proposing to allow consent on a global basis, either by a written agreement or otherwise, because of a concern with the potential for abuse if consent can be obtained on a basis other than for each particular order. Requiring an investor to provide informed consent on an order-by-order basis, based upon its execution preference at the time of placing the order, is intended to help protect against less sophisticated customers, such as retail customers, consenting without fully understanding to what they are consenting or the effect of such consent. Specifying whether or not the order is "opted-out" could become another facet of the order handling instructions given to the broker-dealer at the time of execution, and indeed consent could be obtained electronically for those systems where orders are sent electronically to broker-dealers.[73] Nonetheless, in view of the time involved in communicating the consent, the Commission requests comment on the anticipated impact of the requirement to obtain informed consent on an order-by-order basis on the order handling and execution processes of each broker-dealer, and whether this requirement would be expected to significantly slow down that process. The Commission also requests comment on whether it is necessary to restrict consent to a trade-by-trade basis for parties that enter into agreements authorizing opting out, and if so, how such global consent should operate. Finally, the Commission requests comment on whether the ability to opt out should be available only to institutional or sophisticated investors, who may be better qualified, or in a better position to understand, the implications of opting out then retail investors. If so, how should the Commission define an institutional or sophisticated investor?

The requirement to obtain informed consent in order to allow an opt-out would apply to any broker-dealer that receives order flow from a customer or another broker-dealer even if that broker-dealer would not be considered an order execution facility under the proposed rule.[74] Although the way in which a broker-dealer would obtain informed consent consistent with any fiduciary obligations arising from the particular relationship with an investor may differ from investor to investor, a broker-dealer at a minimum should explain in clear and concise terms to any customer from whom it accepts consent, for each order, that: (1) The customer's order would be executed in the market to which it is sent without regard to prices displayed in other markets, even if those prices are better; (2) the customer affirmatively would be agreeing to forego the possibility of obtaining a better price that may be available in another market at the time its order is executed; and (3) this could result in the customer's order receiving an execution at a price that is inferior to the best bid or offer displayed at the time his or her order is executed. Each time a customer consents, the broker-dealer must be confident that the customer fully understands this disclosure and the nature of the consent. The Commission solicits comment on whether there are any particular disclosures that a broker-dealer should be required to make prior to obtaining informed consent.

The Commission requests comment on how a broker-dealer would fulfill this obligation to obtain informed consent with respect to orders it receives from other broker-dealers, when it has no interaction or relationship with that broker-dealer's customers. The Commission also requests comment on how, if at all, broker-dealers would fulfill this obligation with respect to retail customers who lack complete information about comparative market quality, current market data from all markets, and the willingness to undertake individual market routing decisions. Further, the Commission requests comment on whether different issues are raised when an order execution facility receives order flow directly from customers for execution.

The Commission realizes that market participants that handle customer or broker-dealer orders and that choose to provide these entities the ability to opt out likely would have to make changes to their order handling and execution practices to accommodate this exception. Likewise, an order execution facility receiving the order from another order execution facility, a broker-dealer, or directly from a customer for execution would need to ensure that its systems could distinguish between opted-out and non-opted-out orders for purposes of execution. Broker-dealers receiving orders from their customers and other broker-dealers likely would need to amend their order handling procedures to accommodate those who choose to opt out, as well as their own orders for which the broker-dealer opts out. The Commission requests comment on order handling, systems and other changes broker-dealers that route orders, and order execution facilities that execute orders, would have to make before they would be able to implement the requirements of this proposed exception.

c. Opt-Out—Provision of National Best Bid or Offer

The Commission also is proposing to require a broker-dealer to disclose to its customers that have opted-out the national best bid or offer, as applicable, at the time of execution for each execution for which a customer opted

[72] *See* Section IV.A.2. *infra*.

[73] The Commission notes that if the ability to consent were automated, just as with non-automated consent, the broker-dealer should, consistent with any fiduciary responsibilities arising from the particular relationship with a customer or broker-dealer, provide each customer or broker-dealer submitting an order with sufficient clear and concise disclosure regarding the impact of such consent prior to the customer or broker-dealer making a determination whether or not to opt-out for each order to allow the customer or broker-dealer to make an informed decision. The broker-dealer also should provide a mechanism for ensuring that the customer fully understands the disclosure prior to making the determination whether to opt-out.

[74] The Commission reminds broker-dealers that they would be required to comply with the recordkeeping requirements of Rule 17a–4 under the Exchange Act, 17 CFR 240.17a–4.

out.[75] If the order were a purchase, the broker-dealer would be required to provide the national best offer at the time of execution and if the order were a sale, the broker-dealer would be required to provide the national best bid at the time of execution.[76] Such disclosure would be required to be given as soon as possible, but in no event later than one month from the date on which the order was executed. The bid or offer that would be required to be disclosed to the customer pursuant to this exception would need to be displayed in close proximity to, and no less prominently than, the execution price for the applicable transaction that is provided to the customer pursuant to the requirements of Rule 10b–10 under the Exchange Act.[77] The required disclosure could be made on the confirmation for the transaction sent to the customer pursuant to Rule 10b–10 under the Exchange Act, or the monthly account statement relating to that trade sent to the customer pursuant to applicable SRO rules. Alternatively, the broker-dealer could provide the bid or offer information on another form of disclosure document, as long as it is clear to which transaction the bid or offer information refers (*i.e.*, the bid or offer must be displayed in close proximity to, and no less prominently than, the execution price for the relevant transaction).

The Commission intends this requirement to help ensure that customers who opt out of the proposed rule's protections are informed of the consequences of opting out, and are able to compare the execution they received to the best-displayed bid or offer at the time of execution. This disclosure would provide the customer with valuable execution quality information upon which to base future determinations as to whether to opt out of the proposed rule's protections.

The Commission requests comment on the extent to which this information would be useful to investors. The Commission also seeks comment on whether this requirement should apply when the "customer" is another broker-dealer. The Commission further requests comment on whether there would be any practical difficulties in implementing this requirement. In particular, the Commission requests comment as to how this requirement would, or should, apply to transactions that are reported to the customer on an average price basis. Further, the Commission seeks specific comment as to the monetary costs of system or other modifications necessary to provide this information to customers who choose to opt out.

2. Automated Order Execution Facility Exception

The Commission is proposing to permit an automated market to execute orders within its market without regard to a better price displayed on a non-automated market, within certain price parameters. This exception is designed to reflect the comparative difficulty of accessing market quotes from non-automated markets, and to adjust the trade-through requirement to these differences. The Commission believes this would enhance the ability of individual markets with different market structures to compete more fairly with each other. The Commission is not attempting to favor either form of market.

a. Definition of "Automated Order Execution Facility"

This proposed exception contemplates two categories of order execution facilities—an "automated order execution facility" and a "non-automated order execution facility." The Commission proposes to define an "automated order execution facility" as a order execution facility that provides for an immediate automated response to all incoming orders for up to the full size of its best bid and offer disseminated pursuant to an effective national market system plan, without any restrictions on executions. A restriction would include, for example, a limit on the number of orders for the account of the same individual or beneficial owner that could be sent to the market for execution within a certain time frame, or a limit on the size for which an automated response is available, other than the full size of the best bid or offer displayed by the market. The Commission has proposed to narrowly define "automated order execution facility" to exclude market centers that turn off their automatic execution systems or otherwise limit the ability to access their quotes or orders on an automated basis (other than in accordance with federal securities laws, rules, and regulations), to ensure that market participants can readily access these prices. A "non-automated order execution facility" would include any order execution facility not qualified as an automated order execution facility.

The Commission requests comment generally on these definitions and categories, and specifically whether there are any restrictions that a market center should be allowed to impose and still be considered "automated" under the proposed definition of automated order execution facility. For example, should a market still be considered "automated" under the proposed definition if it were to provide an exception to the operation of its automated functionality when an order would otherwise be executed at a price that would cause a trade-through? How should an order execution facility's response to incoming orders with special handling instructions be treated for purposes of whether an order execution facility would be considered automated, *i.e.* are there any types of orders with special handling instructions or conditions that an order execution facility should be allowed to exclude from the operation of its automated functionality and still be considered "automated" for purposes of the proposed trade-through rule? For instance, should a market still be considered "automated" even if its automatic execution functionality does not accept orders to sell short? The Commission also requests comment on how such an automated market exception would work in practice for a market that provides an automated response to its top-of-book but otherwise operates as a manual market. Should the definition of "automated order execution facility" exclude a market that has the ability to, and does, implicitly or explicitly "turn off" its automated functionality to allow for manual executions of orders on the market?

The Commission requests comment on whether the Commission, a third party, or each individual market center should determine which market centers qualify as automated order execution facilities, and how such determination should be communicated to the order

[75] See section (c) of proposed Rule 611. The Commission is not proposing to require a broker-dealer to provide this information to another broker-dealer from which it receives order flow. Specifically, a broker-dealer would be required to provide the national best bid or offer, as applicable, to a customer with whom it has a relationship and from whom it has received an order if the customer opted out.

[76] The Commission proposes to define national best bid and national best offer to mean, with respect to quotations for an NMS Security, the best bid and best offer for such security that are calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan; *provided*, that in the event two or more market centers transmit to the plan processor pursuant to such plan identical bids or offers for an NMS Security, the best bid or best offer (as the case may be) shall be determined by ranking all such identical bids or offers (as the case may be) first by size (giving the highest ranking to the bid or offer associated with the largest size), then by time (giving the highest ranking to the bid or offer received first in time).

[77] 17 CFR 240.10b–10. For example, this means that the bid or offer should not be disclosed on a separate page from the execution price for the transaction, and should not be displayed in a smaller font size or type than the execution price.

execution facilities who must comply with the proposed rule. Further, the Commission requests comment on whether it should specify what "immediate" means in terms of providing an automated response, and if so, whether it would be appropriate to impose a minimum performance standard with respect to response times. Specifically, the Commission requests comment on whether it should require that an order execution facility's system that provides automated functionality have the capability to respond to an order from another market participant within a certain limited time period. If commenters believe that the Commission should specify a performance standard for "immediate," what should that standard be? Should the performance standard require that a certain percentage of all incoming orders receive an execution within a very short time frame, and allow a longer time period for the remaining percentage? For instance, should the performance standard require that 98% of orders receive execution in less than one second, and all orders receive an execution in three seconds? Or should the performance standard require that all orders receive an execution within the same time frame? If so, should that time frame be within one or two seconds after order receipt? Or should another similar standard be used? The Commission also solicits comment on the anticipated competitive effects of the proposed exception on automated and non-automated order execution facilities.

b. Operation of the Exception

An automated order execution facility would be able to trade through the price of a non-automated order execution facility up to the "trade-through limit amount" (as defined below). An automated order execution facility would not be allowed to trade through the prices of other automated order execution facilities. A non-automated order execution facility would not be allowed to trade through any other market, whether or not it is automated. Given the structure of non-automated markets, in particular the time it takes to manually execute an order (which is necessarily greater because of market maker and crowd participation), the Commission does not believe that there is a particular need to provide a non-automated market an exception to the proposed trade-through rule on the basis of execution speed. The Commission requests comment on the proposed operation of this exception. The Commission also requests comment as to the continued need for the proposed automated market exception if it were to adopt an automatic execution requirement.[78]

c. Allowable Trade-Through Amount

The Commission believes that the amount by which an automated order execution facility should be allowed to trade through a non-automated order execution facility should relate, to the greatest extent possible, to the value of the option that must be given to the other market when attempting to access a better price. Where price protection is the goal, order execution facilities (and their subscribers, customers or members) generally should not be compelled to access another market unless the apparent price improvement from doing so successfully is greater than the estimated cost of attempting access. In short, the allowable trade-through amount should reflect the cost (including time value) of attempting to access the other market.

The calculation of option value is based on several variables, including the volatility and price of the security. Higher volatility means more potential price movement and greater option value, while lower volatility means less potential price movement and less option value. Assuming volatility and other variables as constant, the value of an at-the-money option is proportional to stock price. In granting the three-cent *de minimis* exemption from the trade-through provisions of the ITS Plan for QQQs, SPDRs and Diamonds, the Commission estimated the option values of attempting to access a better price through ITS to be between one and two and a half cents per share.[79] This calculation took into account price and volatility and the fact that ITS commitments are irrevocable for a minimum of thirty seconds. The Commission does not believe, however, that it would be practical to calculate the estimated option value for each NMS Stock that would be subject to the proposed trade-through rule based upon the individual volatility and price of each security. The Commission therefore proposes to calculate the allowable "trade-through limit amount" by using the values of a thirty second option on stocks with a range of volatilities, and estimates such options to have values of approximately five to ten basis points.[80] Specifically, the Commission proposes the following "trade-through limit amounts": For a bid or offer up to $10, the allowable amount would be one cent; for a bid or offer between $10.01 to $30, the allowable amount would be two cents; for a bid or offer between $30.01 and $50 the allowable amount would be three cents; for a bid or offer between $50.01 and $100, the allowable amount would be four cents; and for a bid or offer above $100, the allowable amount would be five cents.

The Commission requests comment on the feasibility and usefulness of this approach, and the reasonableness of the proposed trade-through limit amounts. The Commission also requests comment on other possible alternative approaches to determining the amount(s) by which an automated market should be allowed to trade through a non-automated market. The Commission further requests comment on whether the proposed rule should provide for one trade-through limit amount, such as three cents, that would apply to all NMS Stocks, rather than tiered amounts as proposed.

3. Other Exceptions

Section (b)(7) of the proposed trade-through rule would provide an exception in those instances where an order execution facility sends an order to execute against a better-priced order displayed on another market at the same time or prior to executing an order in its own market at an inferior price.[81] Specifically, the exception is intended to apply when the market that wants to execute the inferior priced order (Market A) sends an order, at the same time or prior to executing the trade-through, to execute against any better-priced bid or offer of another market (Market B) that is disseminated pursuant to an effective national market system plan, where such order is priced equal to or better than the price of Market B's better-priced bid or offer and is for the number of shares displayed for that better-priced bid or offer.[82] If the

[78] *See* Section III.D.1. above for a more detailed discussion of this issue.

[79] Given that the price of the QQQs at the time was around $30 per share, three cents represented approximately ten basis points. *See* Securities Exchange Act Release No. 46428 (August 28, 2002), *supra* note 48.

[80] The Commission has chosen 30 seconds because it is the shortest amount of time for which a market sending an ITS commitment to another market can be irrevocable.

[81] The Commission notes that several SROs have submitted proposed rule changes to the Commission to amend their trade-through rules to include an almost identical exception. *See* File Nos. SR–NYSE–2003–36, SR–CHX–2003–37, and SR–Amex–2004–07.

[82] The Commission notes that this exception is intended to allow for the execution of an order at a price that trades through a better-priced bid or offer displayed on another order execution facility if the order execution facility executing the order has sent an order to trade with that better-priced bid

Continued

better-priced bid or offer is still available when Market A's incoming order reaches Market B, the incoming order should execute against the better-priced bid or offer. This exception therefore continues to provide protection to the better-priced bid or offer. The Commission emphasizes, however, that if the order sent by Market A to Market B is executed against Market B's better-priced bid or offer, the broker-dealer executing the inferior-priced order, or the broker-dealer on whose behalf the order is being executed, still must fulfill its duty of best execution to its customer with regard to that order, by providing the customer order the better price. Thus, this exception would not alter a broker-dealer's duty to provide best execution for its customers' orders.

The proposed rule also would incorporate other exceptions to the current trade-through prohibitions. Specifically, the proposed rule would include exceptions under the following circumstances: (1) The order execution facility displaying the better price was experiencing a failure, material delay or malfunction of its systems or equipment when the trade-through occurred; [83] (2) the order execution facility that initiated the trade-through made every reasonable effort to avoid the trade-through but was unable to do so because of a systems or equipment failure, material delay or malfunction in its own market; (3) the transaction that constituted the trade-through was not a "regular way" contract; [84] (4) the bid or offer that is traded-through was displayed by an order execution facility that was, or whose members were, relieved of their obligations under paragraph (c)(2) of Rule 11Ac1–1 under the Exchange Act (proposed to be designated as paragraph (b)(2) of Rule 602) with respect to such bid or offer pursuant to paragraph (b)(3) of Rule 11Ac1–1 under the Exchange Act (proposed to be designated as paragraph (a)(3) of Rule 602); [85] (5) the transaction that constituted the trade-through was an opening or reopening transaction by the order execution facility; and (6) the transaction that constituted the trade-through was executed at a time when there was a crossed market.[86]

The Commission believes the proposed exception for opening and re-opening transactions is appropriate because the process for executing orders at the open, and after a trading halt, involves the queuing and ultimate execution of multiple orders at a single price or several prices, making it difficult to apply the restrictions of the proposed trade-through rule to each individual order to be executed. For example, it would be very difficult for a market center that is attempting to open a security to determine which of the multiple orders it has to execute at the open would receive a better price displayed on another market. It also could be problematic for the market center opening the stock to be able to match the better price, or access the other market to obtain the better price, when that away market price may change during the time period when the market center opening the stock is making its determination as to what price at which to open the stock, and thus not be the current market displayed when the market actually determines the price at which it will open? The Commission recognizes that the opening process in the OTC market for Nasdaq stocks is different than for the listed market, and that the application of the restrictions of the proposed trade-through rule at the opening may make sense in a market that does not have a single-price opening. The Commission requests comment as to when, if at all, the execution of orders at the opening and re-opening after a trading halt should be subject to the proposed trade-through rule.

The Commission also requests comment on the appropriateness of the proposed exception for where the order execution facility that initiated the trade-through made every reasonable effort to avoid the trade-through but was unable to do so because of a systems or equipment failure, material delay or malfunction in its own market. What are the types of situations in which this proposed exception would appropriately apply? In other words, when would it be reasonable to allow a market that is not able to execute orders in compliance with the trade-through requirements because of systems problems to continue to execute orders without complying with the proposed rule?

The Commission also requests comment on whether it should continue to include an exception for when a market participant executes a trade-through at a time when the market participant executing the order, and other market participants in its market, were relieved of their firm quote obligations pursuant to the "unusual market" exception of the Quote Rule, provided that unless another exception applies, the market participant executing the order made every reasonable effort to avoid trading through the best bid or offer of any other market participant not so relieved of its firm quote obligations under the Quote Rule.[87]

Although included in the current ITS trade-through rule, the Commission proposes not to include an exception from the trade-through prohibition in cases where the bid or offer that is traded through has caused a locked market.[88] If an exception were allowed for a better-priced locking bid or offer on another market, the order that is being executed would miss the opportunity to be executed at the better price. Also, requiring a market to attempt to access a better-priced locking bid or offer may help to unlock the market more quickly than if the market could trade through the locking bid or offer. The Commission also notes that the proposed access standards discussed in Section IV below would include provisions to deter market participants

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or offer in compliance with the requirements of the exception only during the time period after the market trading through has sent the order to the away market, but before it receives a response or the quote on the away market is updated. It is not intended to allow an order execution facility to execute orders as trade-throughs in reliance on this proposed exception after it has received a response to its order from the away market or the away market has changed its quote.

[83] The Commission believes that it is appropriate to provide an exception in those instances where a market displaying a better-priced bid or offer was experiencing a failure, material delay or malfunction of its systems or equipment because of the uncertainty as to whether another market would be able to access the better-priced bid or offer in a timely manner or receive a response, or whether its displayed quotes were valid.

[84] Providing an exception for a transaction that was executed other than pursuant to standardized terms (not a "regular way" contract) is appropriate because the order likely was executed taking into account factors not related to the current market price, such as extended settlement terms or at a negotiated price away from the market.

[85] The Commission believes that this exception is appropriate because an order execution facility should not be required to attempt to match or access a better-priced bid or offer displayed on another market when that bid or offer is not firm under the Commission's Quote Rule, Rule 11Ac1–1 under the Exchange Act (proposed to be designated as Rule 602).

[86] A crossed market occurs when the best bid is higher than the best offer. The Commission believes this exception is appropriate because any transaction executed in a crossed market would constitute a trade-through under the proposed rule. Therefore, unless the proposed rule contains an exception for a crossed market, no order execution facility could execute in a crossed market without violating the trade-through rule. Such an exception may provide some incentive to market participants not to intentionally cross a market (since their bid or offer that has crossed the market could be executed against), as well as provide an opportunity for the order being executed to be executed at the better, crossed price. Nevertheless, the Commission believes that intentionally crossing the market to take advantage of this exception to the trade-through rule would violate the access rules proposed today. *See* Section IV, *infra*.

[87] *See, e.g.*, NYSE Rule 15A(b)(3)(D).

[88] *See, e.g.*, NYSE Rule 15A(b)(3)(F) and NASD Rule 5262(a)(5). A locked market occurs when the bid price equals the offer price.

from locking or crossing the market, and thereby lead to fewer instances of locked markets. Nevertheless, the Commission requests comment on whether it should include an exception for locked markets to the proposed trade-through rule. The Commission also requests comment on whether it should include an exception for locked markets in the trade-through rule if the proposed access rule were adopted without the proposed provision that would require every SRO to establish and enforce rules requiring its members to avoid locking or crossing the quotations of quoting market centers and quoting market participants?[89]

The Commission also notes that the proposed rule, unlike the current rule, does not include an exception for trading through a 100-share bid or offer. The Commission is concerned that a *de minimis* exception, such as the 100-share exception, would provide an opportunity for market participants to circumvent the requirements of the proposed rule.[90] Nevertheless, the Commission requests comment on whether it is necessary to include an exception for a *de minimis* size, such as for 100 shares. Finally, the Commission requests comment on whether there should be any other exceptions, or whether any proposed exception should not be included.[91]

E. Interaction With Existing Plans/Rules

As noted above, no intermarket trade-through rules currently exist with regard to the trading of Nasdaq securities. With respect to NYSE and Amex securities, the ITS trade-through rule provides that a member should avoid trading through a better price available in another market, subject to certain exceptions detailed in the SROs' rules. The ITS trade-through rule does not include an opt-out or automated market exception. Therefore, unless the ITS Plan and SROs' rules were amended to incorporate the flexibility of the Commission's proposed rule with regard to the proposed opt-out and automated market exceptions, they would remain more restrictive than the proposed rule with regard to those two exceptions. In addition, the proposed rule would eliminate certain of the existing exceptions to the ITS trade-through rule. If adopted, these more restrictive provisions of the Commission rule would, of course, control.

At this time, the Commission is not proposing to amend the ITS Plan or the SROs' trade-through rules on its own initiative to reflect more permissive terms of any trade-through rule that the Commission may ultimately adopt. The Commission believes that market participants should be able to agree, on a voluntary basis, to provide higher levels of protection to each other's prices. And, if the Commission's trade-through and access proposals were adopted, any participant that no longer wanted to be subject to more restrictive trade-through provisions in the ITS Plan could withdraw from the plan, as long as it could comply with the proposed access standards discussed in Section IV below. However, if the proposed trade-through rule were adopted as proposed, the ITS participants would be required to amend the ITS Plan and their trade-through rules where they conflict with more restrictive provisions in the Commission's proposed rule.

The Commission requests comment on whether it should require that the ITS Participants amend the ITS Plan and their trade-through rules to implement the proposed trade-through rule in its entirety, if it were adopted, even where the Commission rule would be more permissive than the existing rules. The Commission also requests comment on whether the Commission should amend the ITS Plan and SRO trade-through rules on its own initiative if the proposed trade-through rule were adopted.

F. General Request for Comments

The Commission seeks comments on the trade-through proposal described in this section III. In addition to the specific requests for comment above, the Commission asks commenters to address whether the proposed rule would further the NMS goals set out in Section 11A of the Exchange Act[92] and, in particular, the goal of assuring "the practicability of brokers executing investors' orders in the best market."

The Commission also requests comment on several alternative regulatory approaches to intermarket price protection as outlined below. One alternative would be to adopt the proposed trade-through rule with the automated market exception but not the opt-out exception. Another choice would be to adopt the proposed rule without the automated market exception and extend the existing three-cent *de minimis* exemption to all securities covered by the proposed rule, either with or without the proposed opt-out exception.

Another alternative would be to maintain the existing ITS trade-through rule and allow the three-cent *de minimis* exemption for certain ETFs (QQQs, SPDRs and Diamonds) to expire. This approach would not address the fundamental problems identified with the operation of the existing rule, although it likely would provide operational continuity for the ITS Plan participants. A variation on this alternative would be to maintain the existing rule, allow the *de minimis* exception to expire, and add an opt-out exception to the existing rule. Another option would be to maintain the existing rule and approve on a permanent basis the three-cent *de minimis* exemption for the QQQs, SPDRs and Diamonds. This alternative would not address the issues with the current operation of the ITS trade-through rule with respect to securities other than the QQQs, SPDRs, and Diamonds, although it would provide operational continuity while still providing relief for those three actively-traded ETFs. Two other choices would be to maintain the existing rule and extend the three-cent *de minimis* exemption either to: (1) All ETFs subject to the ITS Plan; or (2) all securities subject to the ITS Plan. A variation on this latter approach would be to extend the *de minimis* exemption to all securities subject to the ITS Plan but impose a cap on the size of quotations that could be traded-through. Each of these approaches that would include an extension of the current *de minimis* exemption would provide some degree of operational continuity.

Another approach would be to eliminate the existing ITS trade-through rule and rely solely upon the principles of best execution. The Commission invites comment on the need for price protection in NYSE, Amex, and Nasdaq securities in today's market, and whether the NMS goals and objectives could be achieved without a trade-through rule. In light of the advent of penny spreads, more efficient executions, active competition between markets trading like securities and a broker-dealer's duty of best execution,

[89] *See* Section IV.B.4. *infra* for a discussion of locked and crossed markets in the Commission's market access proposal.

[90] For example, a market (Market A) that wanted to execute an order at a price inferior to a better price showing on another market (Market B) could send a 100 share order at a better price to Market B, thus establishing a new best bid or offer for Market B. Market A could then trade through the 100 share order, subject to the existing exception for 100 share orders, as well as any other orders below that 100 share order on Market B because Market A only is required to protect the best bid or best offer in each market.

[91] Section (d) of proposed Rule 611 states that the Commission may exempt from the provisions of Rule 611, either unconditionally or on specified terms and conditions, any order execution facility, national securities exchange, national securities association, or broker or dealer, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protections of investors.

[92] 15 U.S.C. 78k–1.

in the absence of a trade-through rule, would accessible better-priced limit orders remain unexecuted if trades were occurring at inferior prices? Would the occurrence of trade-throughs weaken customer confidence in the fairness or efficiency of the market? What would be the competitive effect of removing the trade-through rule from the markets trading NYSE and Amex securities? If price protection is not required, and better-priced limit orders can be ignored, would limit orders be displayed less often?

The Commission requests specific comment on the costs and benefits, and the viability, of each alternative outlined above.

The Commission also requests comment on the feasibility of the proposed trade-through rule. In light of the active trading and frequent quote changes in the markets, would the trade-through rule as proposed impede the efficient execution of orders and raise opportunity costs? Is access between markets efficient enough today to support a trade-through rule? Would this access be adequate if the Commission's proposed access rule—discussed in Section IV—were adopted? How should the proposed trade-through rule reflect access fees charged by market centers? Would the Commission's proposed access fee cap minimize access fees sufficiently that they need not be addressed in the trade-through rule? If the Commission does not ultimately adopt a $.001 standard for access fees, should there be a trade-through rule exception applicable to quotes with access fees of more than a specific amount? If so, should this amount be $.005, $.003, or $.001, or some other amount?

The Commission requests comment as to whether, and if so, to what extent, the proposed trade-through rule would have the desired effect of preventing trade-throughs. Commenters are also asked to comment on the proposed exceptions to the general rule, and whether these exceptions would permit adequate protection of customer orders or, alternatively, undermine the intended effect of the proposed rule. Finally, the Commission requests comment on whether, if it were to adopt the proposed trade-through rule, a phase-in period would be necessary or appropriate to allow market participants time to adapt to its provisions. If so, what aspect(s) of the proposed trade-through rule should be phased-in, and what would be the appropriate phase-in period?

G. Paperwork Reduction Act

Certain provisions of the proposed rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995,[93] and the Commission has submitted them to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The Commission is proposing to create a new information collection entitled "Trade-Through Rule" which would be Rule 611 of proposed NMS under the Exchange Act. OMB has not yet assigned a control number to the new collection of information imposed by proposed Rule 611 under the Exchange Act.

1. Summary of Collection of Information

a. Establishment of Policies and Procedures

The proposed trade-through rule would require an order execution facility, national securities exchange, and national securities association to establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of a trade-through in its market. The nature and extent of the policies and procedures that an order execution facility, national securities exchange, and national securities association would be required to establish to comply with this requirement would depend upon the type, size, and nature of the order execution facility, national securities exchange, and national securities association.

b. Disclosure Necessary To Obtain Informed Consent for Opt-Out Exception

The proposed rule includes an exception that would permit investors to give informed consent to the broker-dealer to whom they route their order(s) to "opt-out" of the protection provided by the proposed rule on an order-by-order basis. If a broker-dealer chooses to provide investors the ability to opt-out, a broker-dealer would need to, consistent with any fiduciary obligations arising from its relationship with the investor, provide to an investor sufficient disclosure regarding the impact of opting out prior to the investor making a determination whether or not to opt out so that the investor can make a fully informed decision.

c. Disclosure of National Best Bid or Offer in the Event of a Customer Opt-Out

If a broker-dealer chooses to provide customers the ability to opt-out, and in the event a customer chooses to opt-out for a particular order, the broker-dealer to whom the customer routed the order would be required within one month of the date of execution of the order to disclose to the customer the national best bid or offer in the security, as applicable, at the time of execution of the order. The broker-dealer could choose how it would provide such disclosure as long as such disclosure complies with the proposed rule's requirements. For instance, the broker-dealer could include such disclosure on the confirmation sent to the customer pursuant to Section 240.10b–10,[94] on the account statement for the account sent to the customer pursuant to applicable SRO rules, or it could provide the national best bid or offer information in another form of disclosure that is in compliance with the proposed requirements.

The Commission does not believe that any other market participants would be subject to a requirement under the proposed rule to collect information in addition to what they are already required to collect under existing rules.

2. Proposed Use of Information

a. Establishment of Policies and Procedures

The proposed requirement for each order execution facility, national securities exchange, and national securities association to establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of a trade-through in its market would help ensure that the order execution facility, national securities exchange, or national securities association and its customers, subscribers, members, and employees, as applicable, generally avoid trade-throughs, as contemplated by the proposed rule's requirements.

b. Disclosure Necessary To Obtain Informed Consent for Opt-Out Exception

The need for a broker-dealer to provide an investor sufficient disclosure regarding the impact of choosing to opt out of the proposed rule's protections prior to the investor making an informed determination whether or not to opt out would be necessary to help ensure that each investor, especially a retail customer, makes a fully-informed

[93] 44 U.S.C. 3501 *et seq.*

[94] 17 CFR 240.10b–10.

decision whether to forego the protections afforded by the proposed trade-through rule. The Commission notes that this requirement would only apply to broker-dealers who choose to provide investors the ability to opt-out.

c. Disclosure of National Best Bid or Offer in the Event of a Customer Opt-Out

The proposed rule's requirement that a broker-dealer provide a customer that has opted out of the proposed rule's protection with respect to the execution of a particular order with the national best bid or offer for that security displayed at the time of the execution of the order, would help ensure that customers are informed of the consequences of opting out by enabling customers to compare the execution price they receive with the national best bid or offer for the security displayed at the time of the execution. The Commission believes that such information would be useful for customers in making future decisions as to whether to opt out of the rule's protections. The Commission notes that this requirement would only apply to broker-dealers who choose to provide investors the ability to opt-out, and whose customers do in fact opt-out.

3. Respondents

a. Establishment of Policies and Procedures

The proposed requirement for each order execution facility, national securities exchange, and national securities association to establish policies and procedures reasonably designed to prevent the execution of a trade-through in its market potentially would apply to the nine registered national securities exchanges and the NASD, and the approximately 6,768 broker-dealers registered with the Commission as of December 31, 2002, which include broker-dealers operating as equity ATSs, broker-dealers registered as market makers in NMS stocks, and any other broker-dealer that has the ability to execute orders within its systems.[95] The Commission requests comment on the accuracy of this estimated figure.

b. Disclosure Necessary To Obtain Informed Consent for Opt-Out Exception

Each of the approximately 6,768 broker-dealers that were registered with the Commission as of December 31, 2002 could potentially choose to provide investors the ability to opt-out. If a broker-dealer were to choose to provide this ability to investors, the broker-dealer would need to obtain informed consent on an order-by-order basis from an investor in order to allow the investor to opt-out. Thus, each of these entities would need to provide adequate disclosure to an investor prior to the investor making a determination whether to opt out of the proposed rule's protections. The Commission assumes that not all broker-dealers would choose to provide this choice to investors. The Commission specifically requests comment as to how many broker-dealers would choose to allow their customers to opt-out.

c. Disclosure of National Best Bid or Offer in the Event of a Customer Opt-Out

The requirement for a broker-dealer to disclose the national best bid or offer to a customer who chooses to opt out of the proposed trade-through rule's protections potentially would apply to any of the approximately 6,768 broker-dealers that were registered with the Commission as of December 31, 2002 that receive order flow from customers, if they chose to provide their customers the ability to opt-out.[96] This number includes clearing broker-dealers even if they do not have the relationship with the customer, as non-clearing broker-dealers may rely on the clearing firms that carry their customer accounts to send confirmations, account statements, or other disclosure documents related to transactions to their customers. The Commission requests comment on this estimate as to how many broker-dealers would be subject to this requirement, if they chose to offer customers the ability to opt-out.

The Commission has considered each of these respondents for the purposes of calculating the reporting burden under the proposed trade-through rule.

4. Total Annual Reporting and Recordkeeping Burden

a. Establishment of Policies and Procedures

Although the exact nature and extent of the required policies and procedures that an order execution facility, national securities exchange, and national securities association would be required to establish would vary depending upon the nature of the order execution facility (*e.g.*, SRO vs. non-SRO, large broker-dealer vs. small broker), the Commission broadly estimates that it would take an SRO approximately 250 hours of legal,[97] compliance,[98] information technology[99] and business operations personnel[100] time,[101] and a non-SRO order execution facility approximately 200 hours of legal, compliance, information technology and business operations personnel time,[102] to develop the required policies and procedures.

Included within this estimate, the Commission staff expects that SRO and non-SRO respondents may incur one-time external costs for out-sourced legal services. While the Commission staff recognizes that the amount of legal outsourcing utilized to help establish policies and procedures may vary

[95] The Commission recognizes that this number may be over-inclusive because it may include registered broker-dealers that do not execute orders and broker-dealers that may not effect transactions in equity securities.

[96] This figure likely includes broker-dealers that do business only with other broker-dealers and would not be subject to this requirement.

[97] The Commission estimates that the average hourly rate for legal service in the securities industry is between $150 per hour and $300 per hour. For purposes of this Release, the Commission will use a rate of $300 per hour to determine potential legal costs associated with the proposed rule.

[98] The Commission estimates that the average hourly rate for a compliance manager in the securities industry is approximately $83 per hour. *See* Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (Sept. 2002). For purposes of this trade-through proposal, the Commission applied a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support for average hourly rate of approximately $110 per hour for compliance personnel time.

[99] The Commission estimates that the average hourly rate for a senior computer programmer in the securities industry is approximately $49 per hour. *See* Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (Sept. 2002). For purposes of this trade-through proposal, the Commission applied a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support for average hourly rate of approximately $65 per hour for information technology personnel time.

[100] The Commission estimates that the average hourly rate for an operations manager in the securities industry is approximately $51 per hour. *See* Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (Sept. 2002). For purposes of this trade-through proposal, the Commission applied a 35% upward adjustment for overhead, reflecting the cost of supervision, space, and administrative support for average hourly rate of approximately $70 per hour for business operations personnel time.

[101] The Commission anticipates that of 250 hours it estimates would be spent to establish policies and procedures, 115 hours would be spent by legal personnel, 100 hours would be spent by compliance personnel, 15 hours would be spent by information technology personnel and 20 hours would be spent by business operations personnel of the SRO order execution facility.

[102] The Commission anticipates that of 200 hours it estimates would be spent to establish policies and procedures, 85 hours would be spent by legal personnel, 75 hours would be spent by compliance personnel, 20 hours would be spent by information technology personnel and 20 hours would be spent by business operations personnel of the non-SRO order execution facility.

widely from entity to entity, the staff estimates that on average, each order execution facility, national securities exchange, and national securities association would outsource 50 hours of legal time in order to establish policies and procedures in accordance with the proposed rule.[103]

The Commission staff estimates that there would be an initial one-time burden of 200 burden hours per SRO or 1,800 hours,[104] and 150 burden hours per non-SRO order execution facility[105] or 1,015,200 hours, for a total of 1,017,000 burden hours to establish policies and procedures designed to prevent the execution of a trade-through for an estimated one-time initial cost of $145,469,475[106] The Commission estimates a capital cost of approximately $101,655,000 for both SROs and non-SROs resulting from outsourced legal work.[107]

Once an order execution facility has established policies and procedures reasonably designed to prevent trade-throughs in its market, the Commission estimates that it would take the average SRO and non-SRO order execution facility approximately two hours per month of internal legal time and three hours of internal compliance time to ensure that its policies and procedures are up-to-date and remain in compliance with the Commission's rule. The Commission staff estimates that these ongoing costs would be 60 hours annually per respondent, for an estimated annual cost of $75,631,320.[108]

The Commission requests specific comments on these estimates, including whether and if so, how many, order execution facilities would choose to accept only opted-out orders, in which case they would not be required to establish policies and procedures. The Commission also requests comment on how costs would differ for the different types of non-SRO respondents.

b. Disclosure Necessary To Obtain Informed Consent for Opt-Out Exception

With regard to the proposed exception that would allow investors to give informed consent to have their orders executed without regard to the protections provided by the proposed rule, each broker-dealer receiving order flow from investors that determines to provide investors the ability to opt-out likely would incur one-time start-up costs associated with modifying its internal order handling procedures so as to be able to provide any necessary disclosure to investors. The nature of the needed changes likely would vary for each broker-dealer, depending upon how it receives order flow (*e.g.*, manually over the telephone or through an electronic order routing system). The Commission staff estimates that it would take approximately 140 hours for a broker-dealer to determine the content of the disclosures and how they will be provided, as well as to make any necessary modifications to its order handling systems. This includes approximately 20 hours of legal personnel time, 20 hours of compliance personnel time, 20 hours of business operations personnel time and 80 hours of information technology personnel time. The Commission believes that not all broker-dealers would provide the ability to opt-out, but for purposes of this calculation has included all registered broker-dealers in the cost estimate, which likely over-estimates the cost burden. The Commission requests comment as to how many broker-dealers would offer this ability to investors and how many would not. Further, the Commission staff has assumed for purposes of this burden estimate that all information technology services would be provided internally. The Commission requests comment on the amount of information technology work that a broker-dealer would outsource in order to make modifications to its order handling systems necessary to provide the required disclosure to investors, and how that would impact the costs of making those modifications.

Included within this estimate, the Commission staff expects that broker-dealers may incur one-time external costs for out-sourced legal services. While the Commission staff recognizes that the amount of legal outsourcing utilized to determine the content of the disclosures and how they would be provided may vary widely from entity to entity, the staff estimates that on average, each broker-dealer would outsource 8 hours of legal time in order to make this determination.[109]

Therefore, the Commission staff estimates that there would be a one-time burden of 893,376 hours[110] for broker-dealers to make changes to their systems necessary to provide disclosure to investors regarding the impact of opting out of the protections offered by the proposed rule for a total one-time cost of approximately $83,923,200,[111] plus a one-time capital cost of approximately $16,243,200 resulting from outsourced legal work.[112]

The Commission staff estimates that costs to comply with this requirement on an ongoing basis would be minimal. Specifically, the Commission staff estimates that it would take one hours of legal time, two hours of compliance time, two hours of business operations time and one hour of information technology time per month to monitor that disclosures are being made appropriately. The Commission staff estimates that these ongoing costs would be 72 hours annually per respondent, for an estimated annual cost of $58,881,600.[113]

The Commission requests specific comments on these estimates.

c. Disclosure of National Best Bid or Offer in the Event of a Customer Opt-Out

If a broker-dealer chooses to provide investors with the ability to opt-out, the

[103] The Commission staff does not anticipate that any compliance services would be outsourced.

[104] There are eight national securities exchanges (Amex, BSE, CBOE, CHX, NSX, NYSE, Phlx and PCX) and one national securities association (NASD) that trade NMS stocks and thus would be subject to the proposed rule. The ISE does not trade NMS Stocks and thus would not be subject to the proposed rule. The estimated 1,800 burden hours necessary for SRO order execution facilities to establish policies and procedures are calculated by multiplying nine times 200 hours (9 × 200 hours = 1,800 hours).

[105] The Commission estimates that there are 6,768 potential non-SRO order execution facilities. The estimated 1,015,200 burden hours necessary for non-SRO order execution facilities to establish policies and procedures are calculated by multiplying 6,768 times 150 hours (6,768 × 150 hours = 1,015,200 hours).

[106] This figure was calculated as follows: (65 legal hours × $300) + (100 compliance hours × $110) + (15 information technology hours × $65) + (20 business operation hours × $70) = $ 32,875 per SRO × 9 SROs = $295,875 total cost for SROs; (35 legal hours × $300) + (75 compliance hours × $110) + (20 information technology hours × $65) + (20 business operation hours × $70) = $ 21,450 per broker-dealer × 6,768 broker-dealers = $145,173,600 total cost for broker-dealers; $295,875 + $145,173,600 = $145,469,475.

[107] This figure was calculated as follows: (50 legal hours × $300 × 9 SROs) + (50 legal hours × $300 × 6,768 broker-dealers) = $101,655,000.

[108] This figure was calculated as follows: (2 legal hours × 12 months × $300 × (9 + 6,768) + (3 compliance hours × 12 months × $110 × (9 + 6,768)) = $75,631,320.

[109] The Commission staff does not anticipate that any compliance services would be outsourced.

[110] The estimated 893,376 burden hours was calculated by adding 12 hours of estimated internal legal personnel time, 20 hours of estimated compliance personnel time, 20 hours of business operations personnel time and 80 hours of estimated internal information technology time and multiplying that by the number of registered broker-dealers, 6,768. ((12 + 20 + 20 + 80) × 6,768 = 893,376)).

[111] This figure was calculated as follows: (12 legal hours × $300) + (20 compliance hours × $110) + (20 business operations hours × $70) + (80 information technology hour × $65) × 6,768 = $83,923,200.

[112] This figure was calculated as follows: (8 legal hours × $300 × 6,768) = $16,243,200.

[113] This figure was calculated as follows: (1 legal hour × 12 months × $300) + (2 compliance hours × 12 months × $110) + (2 business operations hours × 12 months × $70) + (1 information technology hour × 12 months × $65) × 6,768 = $58,881,600.

proposed rule would require a broker-dealer to provide its customers (but not other broker-dealers from whom it receives order flow) with the national best bid or offer for the security, as applicable, available at the time each customer order was executed, if the customer chooses to opt-out of the protections provided by the proposed rule. These broker-dealers would likely incur one-time start-up costs associated with modifying their procedures and systems to comply with this requirement to provide the national best bid or best offer information to customers for each order for which a customer opts-out of the rule's protections, either on their confirmations, account statements or other disclosure document.

The Commission estimates that it would take approximately 350 hours for a broker-dealer to modify its procedures and systems to be able to provide the national best bid or offer to customers who choose to opt-out for a particular order. This includes approximately 20 hours of internal legal, 20 hours of compliance personnel time, 50 hours of business operations personnel time and approximately 260 hours of internal information technology personnel time. Therefore, the Commission staff estimates that there would be a one-time burden of 2,368,800 hours for broker-dealers to make any changes to their systems necessary to provide customers with the national best bid or offer in the event a customer opts out of the proposed rule's protections,[114] for an estimated initial one-time total cost of approximately $193,564,800.[115]

The Commission staff has assumed for purposes of this burden estimate that all information technology services would be provided internally. The Commission requests comment on the amount of information technology work that a broker-dealer would outsource in order to make modifications to its systems necessary to provide a customer with the national best bid or offer in the event a customer opts out of the proposed rule's protections, and how that would impact the costs of making those modifications.

Once a broker-dealer's procedures are modified so as to comply with the requirement to provide the national best bid or offer if a customer has opted-out, the Commission believes that the burden of complying with the requirement on an on-going basis should be minimal. The Commission estimates that it would take the average broker-dealer two hours of legal time, five hours of compliance personnel time, five hours of business operations personnel time and five hours of information technology personnel time per month to monitor whether or not its systems are operating correctly so as to provide the required bid and offer information, and to conduct any other necessary systems maintenance. This ongoing cost could be included within the broker-dealer's existing monitoring and surveillance processes. The Commission staff estimates that these ongoing costs would be approximately 204 hours annually per respondent, for an estimated annual cost of $148,219,200.[116]

The Commission specifically requests comment on the frequency with which commenters believe this exception to the proposed rule would be utilized by customers presented with the ability to opt-out of the protections of the proposed trade-through rule, and how this would impact the information collection costs.

5. General Information About Collection of Information

a. Establishment of Policies and Procedures

This collection of information would be mandatory. The Commission expects that the policies and procedures generated pursuant to the proposed rule would be communicated to the members and employees of all entities covered by the proposed rule. Any records generated in connection with the proposed rule's requirement to establish policies and procedures would be required to be preserved in accordance with, and for the periods specified in, Exchange Act Rules 17a–1[117] and 17a–4(e)(7).[118]

b. Disclosure Necessary To Obtain Informed Consent for Opt-Out Exception

To the extent that a broker-dealer determines to provide investors the ability to opt-out, this collection of information would be considered mandatory but the nature and extent of the disclosure to be provided by the broker-dealer necessary to obtain informed consent would vary from investor to investor. To the extent such disclosures are in written form, broker-dealers would be required to preserve records of any such disclosures in accordance with, and for the period specified in, Exchange Act Rule 17a–4.[119]

c. Disclosure of National Best Bid or Offer in the Event of a Customer Opt-Out

To the extent that a broker-dealer determines to provide investors the ability to opt-out, and to the extent customers choose to opt-out, this collection of information would be mandatory and would be provided by broker-dealers to customers, and would also be maintained by broker-dealers. Broker-dealers would be required to preserve a record of any disclosure of the national best bid or offer to a customer in the event a customer opts out of the proposed rule's protection in accordance with, and for the period specified in, Exchange Act Rule 17a–4.[120]

6. General Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–10–04. Requests for materials submitted to

[114] The estimated 2,368,800 burden hours was calculated by adding 20 hours of estimated internal legal time, 20 hours of estimated compliance time, 50 hours of estimated business operations time and 260 hours of estimated internal information technology time and multiplying that by the number of registered broker-dealers, 6,768. ((20 + 20 + 50 + 260) × 6,768 = 2,368,800)).

[115] This figure was calculated as follows: (20 legal hours × $300) + (20 compliance hours × $110) + (50 business operations hours × $70) + (260 information technology hours × $65) × 6,768 = $193, 564,800.

[116] This figure was calculated as follows: (2 legal hours × 12 months × $300) + (5 compliance hours × 12 months × $110) + (5 business operations hours × 12 months × $70) + (5 information technology hours × 12 months × $65) × 6,768 = $148,219,200.

[117] 17 CFR 240.17a–1.

[118] 17 CFR 240.17a–4(e)(7).

[119] 17 CFR 240.17a–4.

[120] 17 CFR 240.17a–4.

OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–10–04, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549–0609. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publications.

H. Consideration of Costs and Benefits

As discussed above, changes in the structure of the equity markets in recent years have called into question the continued viability of the existing system for achieving intermarket price protection. In light of these concerns, the Commission believes that these changes require it to revisit the issue of trading at prices inferior to the best available bids and offers. The Commission therefore is proposing a new rule that would require an order execution facility, national securities exchange, and national securities association to establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of an order in its market at a price that is inferior to a better price displayed on another market.

One exception to the proposed rule would allow an order execution facility to execute an order without regard to the protections of the proposed rule if the person or entity for whose account the order is entered affirmatively makes an informed decision to opt out of the rule's protection. Another exception would provide that order execution facilities that offer immediate automated responses to incoming orders up to the size of their best bid and offer, without restriction, would be permitted to trade at a price inferior to the best bid or offer of a non-automated market up to limited amount. The proposed rule also would provide for several other exceptions.

As a result of this undertaking, the Commission believes that there will be identifiable cost and benefits. These are discussed below. The Commission requests comment on all aspects of this proposed cost-benefit analysis, including identification of any additional costs or benefits of the proposed rule. The Commission encourages commenters to identify or supply any relevant data concerning the costs or benefits of the proposed rule.

1. Benefits

When an investor receives an execution in one market at a price that is inferior to a better price displayed in another market, that "trade-through" has a cost to the investor receiving the inferior execution. In addition, when trades occur at prices worse than the displayed best bid or offer, it gives an impression of unfairness in the market, particularly to those investors who witness their orders being executed at inferior prices. A trade-through also imposes a cost on the broker-dealer or customer responsible for the best displayed order or quote that is traded through. When trades occur at prices that are inferior to displayed limit orders or quotes, market participants may be less willing to display limit orders or to quote aggressively if they believe it likely that such orders and quotes will be bypassed by executions in other markets at prices that would be advantageous to them. If limit orders frequently remain unexecuted after trades take place at inferior prices, investors may discouraged from entering limit orders, thus reducing price discovery.

By requiring order execution facilities, national securities exchanges, and national securities associations to establish policies and procedures reasonably designed to prevent trade-throughs, the proposed rule should help ensure that investors consistently receive executions at the best displayed bid or offer (or better), whether through price matching or by orders being routed to markets with better prices, unless an investor chooses to opt out of the proposed rule's protections or another exception applies. This would be true no matter where the order was being executed (*e.g.* on an exchange, on SuperMontage, or internally by a broker-dealer). The proposed rule also should facilitate the ability of a broker-dealer to achieve best execution for its customer orders because if a broker-dealer routes an order to a market not showing the best bid or offer, that market should not execute the order at a price that is inferior to the bid or offer displayed on the other market unless an exception applies. These results in turn may help bolster investor confidence in the integrity of the market, which may encourage investors to be more willing to invest in the market, thus adding depth and liquidity to the markets.

The Commission also believes that the proposed rule may encourage the use of limit orders and more competitive quoting because investors who use limit orders, and order execution facilities that quote aggressively, would be more likely to receive an execution because trades would not occur on another market at a price inferior to their orders, except in circumstances where an exception applies. An increase in the use of limit orders and aggressive quoting should likewise enhance price discovery and liquidity in the markets.

Further, because the proposed rule would provide that trades would not execute in one market without regard to the best bids and offers in other markets, the proposed rule should help increase efficiency and encourage competition and order interaction between multiple markets by providing a greater opportunity for orders to interact with one another, particularly on an automated basis. The proposed rule also would permit an automated market to execute orders without regard to a better bid or offer displayed on a non-automated market, within certain price parameters. This exception is designed to reflect the comparative difficulty of accessing market quotes from non-automated markets, and to adjust the trade-through requirement to these differences. This should enhance the ability of individual markets with different market structures to compete fairly with each other.

In addition, the availability of the proposed opt-out exception, which would provide investors with choice as to whether their orders should trade through a better price, may create market forces that would serve to discipline markets that provided slow executions or inadequate access to their markets. If investors were not satisfied with the level of automation or service provided by a market center, they could choose to opt out of the proposed rule's provisions, thus putting pressure on markets to improve their services. Similarly, because the proposed automated market exception would allow an automated market to trade through better prices displayed on a non-automated market up to a certain amount, an automated market could execute orders in its market without reference to any non-automated market's better-priced orders. Market participants may be less likely to send their order flow to a market center whose orders can be ignored by other markets. To the extent that such a dynamic impacts the ability of a non-automated market to compete and attract order flow, the proposed exception may provide an incentive for a non-automated market to automate, at least for its displayed best bid and offer, which would generally increase the efficiency of the markets and improve the accessibility of better bids and offers for all investors. Markets that would be

considered automated pursuant to the proposed automated market exception also may benefit because other markets would not be able to trade through their best displayed bids and offers unless an investor chose to opt out (or another exception applied). Furthermore, the ability of automated markets to trade through non-automated markets may encourage automated markets that do not currently quote in the public consolidated quote system to do so, which would serve to enhance competition and transparency in the market for NYSE or Amex securities (where the current trade-through rules apply).

The Commission seeks comment on any additional benefits of the proposed trade-through rule, including relevant data to help quantify the expected benefits. The Commission specifically seeks comment on the expected increase in efficiency and decrease in execution costs from allowing investors to opt out and from allowing automated markets to trade-through manual markets up to a certain amount.

2. Costs

Order execution facilities, national securities exchanges, and national securities associations would incur costs associated with establishing, maintaining, and enforcing policies and procedures reasonably designed to prevent trade-throughs. It is difficult to estimate the extent of what these costs would be because the exact nature and extent of the policies and procedures would depend on the type, size and nature of each entity's business.

An order execution facility, national securities exchange, and national securities association would incur costs associated with developing these policies and procedures. As discussed above in Section III.G., the Commission broadly estimates that each SRO that would be subject to this requirement would incur a one-time initial cost for establishing such policies and procedures of approximately $47,875, and each non-SRO order execution facility that would be subject to this requirement would incur a one-time initial cost for establishing policies and procedures of approximately $36,450. Once it has established policies and procedures, each order execution facility, national securities exchange, and national securities association also would likely incur costs associated with maintaining and updating its policies and procedures to ensure they continue to be reasonably designed to prevent trade-throughs. The Commission broadly estimates that the annual costs for updating the policies and procedures would be approximately $11,160 per order execution facility, national securities exchange, or national securities association. The Commission requests comment on these estimates.

An order execution facility, national securities exchange, and national securities association also would incur initial one-time costs associated with taking action necessary to effectuate the policies and procedures it has developed. For example, an order execution facility, national securities exchange, and national securities association would have to ensure that its members (if applicable) and its personnel responsible for trading in its market are on notice that the order execution facility, national securities exchange, or national securities association is subject to the restrictions of the proposed trade-through rule and that the members and personnel are subject to the order execution facility's, national securities exchange's or national securities association's policies and procedures established pursuant to the proposed rule.[121] Further, all order execution facilities, national securities exchanges, and national securities associations would have to educate and train their employees as to the scope and impact of, and how to comply with, the proposed rule and the policies and procedures implemented by the order execution facility, national securities exchange or national securities association. Moreover, an order execution facility (whether or not it is an SRO or non-SRO), national securities exchange, and national securities association would have to build into its trading or trade reporting system inhibitors to prevent trading at an inferior price to a published quote. Each order execution facility, national securities exchange, and national securities association would incur costs associated with modifying its systems and procedures to implement these actions.

In addition, each order execution facility, national securities exchange, and national securities association also must, commensurate with its business, incur ongoing costs associated with monitoring for and enforcing compliance with the proposed rule and its own policies and procedures developed pursuant to the proposed rule. The order execution facility, national securities exchange, and national securities association could include provisions for such monitoring and enforcement within its existing policies and procedures for monitoring and enforcing compliance with the federal securities laws, rules, and regulations.[122] Each SRO order execution facility, national securities exchange, and national securities association also would have to include this proposed rule, and its own trade-through policies and procedures, within the scope of its existing procedures for bringing disciplinary actions against its members for violations of the federal securities laws, rules, and regulations and its own rules. Order execution facilities, national securities exchanges, and national securities associations likely would incur costs associated with updating existing enforcement procedures and, for SROs, with updating disciplinary procedures. For example, order execution facilities may incur costs associated with additional personnel time needed to monitor for and investigate instances of trade-throughs, as well as costs associated with modifications to existing monitoring or surveillance systems. The costs of these monitoring and compliance tools may be greater for markets that trade Nasdaq securities, which are not currently subject to a trade-through rule and may not have any existing infrastructure in place.

If a broker-dealer were to choose to provide investors the ability to opt out of the protections of the proposed rule, it would need to, consistent with any fiduciary obligations arising from its relationship with the investor, provide sufficient disclosure to each investor prior to that investor making a determination whether or not to opt out with respect to that order so that the investor can make an informed decision. The Commission preliminarily believes that not all broker-dealers would offer investors the ability to opt out, but has preliminarily included all registered broker-dealers in its cost analysis. Therefore, the Commission estimates that each broker-dealer would incur an initial one-time cost of approximately $14,800 to modify its order handling procedures and systems to be able to comply with this requirement, and approximately $8,700 annually per broker-dealer to monitor for and

[121] The Commission notes that any member of an SRO that executes orders would be deemed on order execution facility under the proposed rule and thus subject to the proposed rule's requirements. In addition, any member that is not an order execution facility but who receives order flow from customers or other broker-dealers would potentially be subject to the proposed opt-out requirement to obtain informed consent.

[122] For instance, an order execution facility, national securities exchange, or national securities association should develop real-time monitoring or surveillance procedures and reports that would record any instance where an order is executed on its market at a price that trades through a better price displayed on another market.

maintain compliance with this requirement. The Commission requests specific comment on how many broker-dealers would choose to offer investors the ability to opt out.

A broker-dealer that provided investors the ability to opt out also likely would need to modify its order handling procedures to record for each order whether or not an investor has chosen to opt out of the proposed rule's protections for purposes of order handling. In addition, each order execution facility that executes orders likely would need to modify its order handling and execution procedures to identify incoming orders that are opted-out, for purposes of determining how to execute them, unless the order execution facility chooses to accept only opted-out orders. Broker-dealers and order execution facilities would incur costs associated with making these changes. Furthermore, the proposed rule would require that a broker-dealer that provides customers the ability to opt out and whose customer has chosen to opt out must provide that customer with the national best bid or offer, as applicable, at the time of the execution of the customer's order. Again, while the Commission preliminarily believes that not all broker-dealers would offer investors the ability to opt out, it has preliminarily included all registered broker-dealers in its cost analysis. Therefore, the Commission broadly estimates that each broker-dealer would incur a one-time initial cost of approximately $28,600 to modify its procedures and systems to provide the national best bid and offer information to customers in compliance with the proposed rule, as well as approximately $21,900 annually per broker-dealer to monitor for continued compliance with this proposed requirement. The Commission requests comment on these estimates.

Order execution facilities also may incur costs to modify their order handling and execution procedures and systems to comply with the proposed automated market exception, as they likely would need to modify their systems to recognize the proposed trade-through limit amounts, as well as which order execution facilities are deemed to be non-automated order execution facilities. The Commission asks commenters to quantify, to the extent possible, the dollar costs of making each of these, and any other, order handling, execution system and other changes necessary to comply with the proposed rule.

Another possible cost would be the potential impact of the proposed rule on the time it would take to execute orders subject to the proposed rule, especially in markets not currently subject to trade-through rules. The process of observing the prices on other markets and determining whether it is necessary to route orders to another market or match a better price on another market could result in slower execution times. The Commission requests comment on the extent to which the imposition of the proposed rule may affect execution times and the impact, if any, this would have on the quality and cost of order executions. The Commission also requests comment on the extent to which the necessity for a broker-dealer to provide disclosure to an investor prior to obtaining informed consent to opt out would impact the speed with which the order would be executed. The ability to execute orders pursuant to the proposed opt-out and automated market exceptions also may impact the execution price of such orders, in that orders executed pursuant to those exceptions would forego the opportunity to be executed at a better price displayed on another market. The Commission requests comment as to the best way to quantify this potential cost.

The proposed rule also may adversely impact the ability of order execution facilities that would not qualify as "automated" under the proposed rule to compete with other market centers and attract order flow because in certain circumstances automated order execution facilities would be able to execute orders within their markets without reference to better-priced orders displayed in a non-automated market, and investors may be less likely to send order flow to a market center whose order can be bypassed by executions in other markets.

The proposal would apply to broker-dealers that internalize order flow even if they do not post quotes in the consolidated quote. The Commission requests comment on the extent to which the trade-through proposal would impact the profitability of such broker-dealers because they would need to match the price of, or route to, a better priced bid or offer displayed on another order execution facility when executing their customer orders (unless an exception applies).

Finally, the Commission generally requests comment as to whether the operation of the proposed rule would result in the potential costs discussed above, and how to quantify these potential costs. The Commission also seeks comment on any additional anticipated costs of the proposed trade-through rule, including specifics of the dollar amount of such cost impact.

I. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act [123] requires the Commission, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. Section 23(a) of the Exchange Act [124] requires the Commission to consider the anticompetitive effects of any rules that we adopt under the Exchange Act. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The proposed trade-through rule is intended to be a response to changes that have occurred in the marketplace that have impacted the operation of rules relating to intermarket price protection. The proposed rule would require that an order execution facility, national securities exchange, and national securities association establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of an order in its market at a price that is inferior to the best bid or offer displayed in an order execution facility, unless an exception applies.

The Commission preliminarily believes that the proposed trade-through rule will bolster investor confidence in the markets by helping to ensure that the customer orders are executed at the best price available and providing protection against limit orders being by-passed by inferior priced executions. The price protection provided by the proposed rule should encourage the use of limit orders and aggressive quoting, which should help improve the price discovery process, and in turn, contribute to increased liquidity and depth in the markets. The deeper and more liquid markets are, the more willing the public may be to invest its capital, thus promoting capital formation.

The Commission also preliminarily believes that the operation of the proposed trade-through rule should help promote efficiency in the markets. In general, a rule that provides price protection across markets should help increase efficiency and reduce the effects of fragmentation because it will

[123] 15 U.S.C. 78c(f).

[124] 15 U.S.C. 78w(a).

help link together competing markets so orders should have a greater opportunity to interact.

Further, by permitting investors to opt out of the proposed rule's protections on an order-by-order basis, the proposed rule would allow investors to have more control over the execution of their orders. By allowing automated order execution facilities to trade through non-automated order execution facilities up to a certain amount, the proposed rule should help promote greater efficiency by enhancing the ability of all markets, regardless of market structure, to operate without undue constraint, consistent with investor protection. By allowing automated order execution facilities to trade through non-automated order execution facilities, the proposed rule also should promote efficiency by facilitating the ability of investor orders to interact more directly on an automated basis.

The proposed rule should promote competition and order interaction among markets by providing that orders would not be able to execute in one market without regard to the best quotes and orders in another market. This should encourage the use of limit orders and aggressive quoting. The proposed rule also should promote competition among markets and provide choice for investors and other market participants by enhancing the ability of different markets with different market structures to efficiently and effectively operate within a single national market system.

The Commission solicits comments on these matters with respect to the proposed rule. Would the proposed rule have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act? Would the proposed rule, if adopted, promote efficiency, competition, and capital formation? Commenters are requested to provide empirical data and other factual support for their views if possible.

J. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [125] the Commission must advise OMB as to whether the proposed regulation constitutes a "major" rule. Under SBRFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requests comment on the potential impact of the proposed regulation on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

K. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA"), in accordance with the provisions of the Regulatory Flexibility Act ("RFA"),[126] regarding the proposed trade-through rule.

The proposed trade-through rule would require any order execution facility,[127] national securities exchange, and national securities association to establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of an order in its market at a price that is inferior to a better bid or offer displayed on another market, otherwise known as a trade-through. The proposed rule would include several exceptions to the trade-through restrictions, including an opt-out option and an exception for automated markets. Specifically, an order execution facility would be permitted to execute an order at a price that trades through a better-displayed price on another market if the person for whose account the order is entered, whether a customer or broker-dealer, affirmatively makes an informed decision to opt out of the rule's protection. In addition, an order execution facility that offers immediate automated responses to incoming orders for up to the full size of its best bid and offer, without any restriction on execution, would be permitted to trade through the price of a non-automated order execution facility up to a specified amount. The proposed trade-through rule also would provide for several other exceptions.

1. Reasons for the Proposed Action

Over the last twenty years, there have been significant changes in the way the markets operate and compete with each other. There have been technological advances that have resulted in automated quoting and handling of orders and new market participants have emerged with new business models. Some market centers operate entirely electronically, while others continue to conduct floor-based trading. Also, with the advent of trading in decimals, the minimum pricing variation in equity securities has narrowed and there is often less depth at the top-of-book. Issues have been raised as to the continued efficient operation of the current ITS trade-through rule due to these changes in the structure of the markets. This trade-through proposal is intended to address these issues and to respond to the criticisms of the existing rule while still preserving important market integrity and investor protections.

2. Objectives and Legal Basis

The proposed trade-through rule is designed to achieve several objectives. The proposed trade-through rule should help promote the use of limit orders and aggressive quoting by providing a measure of price protection across unlinked, competing markets, while still allowing these markets to operate under their current business models. The proposed trade-through rule also should help facilitate the ability of a broker-dealer to comply with its best execution obligations, and should help to ensure that customer orders receive an execution at the best bid or offer available across multiple markets.

The Commission is proposing the trade-through rule under the authority set forth in Exchange Act Sections 3(b), 5, 6, 11A, 15, 15A, 17(a) and (b), 19, and 23(a).

3. Small Entities Subject to the Rules

The requirement of the proposed trade-through rule that an order execution facility, national securities exchange, and national securities association must establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of a trade-through in its market would apply to any market that executes orders in NMS Stocks—specifically, any exchange market maker, OTC market maker, any other broker-dealer that executes orders internally by trading as principal or by crossing orders as agent, any alternative trading system, and any national securities exchange or national securities association. Each of these entities that would qualify as "automated" under the proposed rule also may take advantage of the

[125] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[126] 5 U.S.C. 603.

[127] The proposed definition of order execution facility in proposed Rule 600 of Regulation NMS includes any exchange market maker; OTC market maker; other broker-dealer that executes an order within its own market or system; alternative trading system; or any national securities exchange or national securities association that operates a facility that executes orders.

exception that would allow an automated market to trade through a non-automated market up to a certain amount.

In addition, all broker-dealers who receive orders from customers or other broker-dealers potentially would be subject to the rule's requirements relating to the opt-out exception, regardless of whether or not the broker-dealer executes orders, and thus may not be deemed an order execution facility under the proposed rule. Specifically, if a broker-dealer were to chose to provide investors the ability to opt-out, the broker-dealer would need to provide its customers and broker-dealers from whom it receives order flow with adequate prior disclosure regarding the consequences of opting out of the proposed rule's protections (*e.g.*, potential execution at a price inferior to the best bid or offer) to ensure that the customer or broker-dealer makes an informed decision. If an investor decides to opt out of the trade-through rule's protections, the broker-dealer then likely would need to mark the order as opted-out. The broker-dealer also would be required pursuant to the proposed rule to disclose to a customer that chose to opt-out, within one month of the date the transaction was executed, the best displayed bid or offer for that security available at the time the customer order was executed. Accordingly, the proposed rule would impact a wide variety of market participants. Each is discussed below.

a. National Securities Exchanges and National Securities Associations

None of the existing national securities exchanges is a small entity as defined by Commission rules. Paragraph (e) of Exchange Act Rule 0–10[128] states that the term "small business," when referring to an exchange, means any exchange that has been exempted from the reporting requirements of Exchange Act Rule 11Aa3–1. None of these exchanges is exempt from the requirements. There is one national securities association, which the Commission has determined is not a small entity.

b. Broker-Dealers, Alternative Trading Systems, and Exchange and OTC Market Makers

The proposed rule's requirement to establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of a trade-through, absent an exception, would apply to any order execution facility as outlined above.[129] All of these entities (except the SROs) are registered broker-dealers. The requirements associated with the operation of the proposed opt-out exception to the proposed rule would apply to any broker-dealer that receives order flow from its own customers or other broker-dealers, if the broker-dealer chooses to provide such entities the ability to opt-out. The proposed exception to allow an order execution facility to trade through a non-automated market could be utilized by any order execution facility that qualified as automated under the proposed rule. The other proposed exceptions could apply to any order execution facility subject to the proposed rule's requirements.

Commission rules generally define a broker-dealer as a small entity for purposes of the Exchange Act and the Regulatory Flexibility Act if the broker-dealer had a total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and it is not affiliated with any person (other than a natural person) that is not a small entity.[130]

The Commission estimates that as of December 31, 2002, there were approximately 880 Commission-registered broker-dealers that would be considered small entities for purposes of the statute. Each of these broker-dealers potentially would be required to comply with the requirement of the proposed rule to establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of a trade-through in its market. Each of these small entities also would be able to utilize the exception for non-automated markets if it were to qualify as automated under the terms of the proposed rule.

In addition, each of these 880 broker-dealers that are considered small entities could potentially handle orders on behalf of customers or other broker-dealers. If these broker-dealers wanted to offer their customers and broker-dealers from whom they receive order flow the opportunity to opt out, they would be required to obtain informed consent on an order-by-order basis. This would necessitate the broker-dealer providing prior disclosure to investors consistent with any fiduciary obligations arising from its relationship with the investors and recording whether the investor made a decision to opt out. The broker-dealer also would be required to provide the national best bid or offer to a customer who has chosen to opt out.

4. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed trade-through rule would require each order execution facility, national securities exchange, and national securities association to establish, maintain, and enforce policies and procedures reasonably designed to prevent trade-throughs in its market. These policies and procedures must include the ability to monitor for and detect instances of non-compliance with the proposed rule as well as provide for enforcement of the proposed rule.

With regard to the proposed opt-out exception, a broker-dealer that chose to provide investors the ability to opt-out would need to provide adequate disclosure to each investor to ensure that the investor's decision is an informed one, consistent with any fiduciary obligations arising from its relationship with the investor. Broker-dealers would be required to keep a record of any disclosure provided to the investor prior to the investor providing the consent in compliance with Commission or SRO books and records rules.[131] The Commission also anticipates that broker-dealers likely would document a customer's decision to provide informed consent. In addition, for customers that chose to opt out of the proposed rule's protection, broker-dealers would be required to disclose to the customer the national best bid or offer for that security, as applicable, available at the time the customer order was executed.

5. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any federal rules that duplicate, overlap, or conflict with the proposed rules.

6. Significant Alternatives

Pursuant to Section 3(a) of the RFA, the Commission must consider the following types of alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) clarification, consolidation, or simplification of compliance and reporting requirements under the Rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from

[128] 17 CFR 240.0–10.

[129] This means that it would apply to alternative trading systems, registered exchange specialists and market makers, registered OTC market makers, block positioners, and any other broker or dealer that executes orders internally.

[130] 17 CFR 240.0–10(c).

[131] *See, e.g.*, 17 CFR 240.17a–4.

coverage of the rule, or any part thereof, for small entities.

The Commission does not believe that it is necessary to establish differing compliance or reporting requirements or timetables to take into account the resources available to small entities, nor does the Commission believe that any clarification, consolidation or simplification of compliance and reporting requirements under the proposed rule for small entities is necessary. The Commission notes that the proposed rule was drafted to allow each entity subject to the rule's requirements to develop internal policies and procedures that are appropriate given that entity's type, size and nature. Therefore, the Commission preliminarily believes that the proposed rule already contains flexibility necessary for small entities. Further, the Commission has attempted to draft the proposed rule to be as straightforward as possible to achieve its objective. Any simplification, consolidation or clarification of the rule should occur for all entities, not just small entities. The Commission also does not believe that it is necessary to consider whether small entities should be permitted to use performance rather than design standards to comply with the proposed rule as the rule already proposes performance standards and does not dictate for entities of any size any particular design standards (*e.g.*, technology) that must be employed to achieve the objectives of the proposed rule.

Finally, the Commission believes that an exemption from coverage of the proposed rule for small entities would interfere with achieving the primary goals of protecting limit orders and quotes, reducing the effects of fragmentation and helping to ensure customers receive executions at the best bid or offer available. If small entities were not required to comply with the proposed rule, they would be permitted to trade through existing limit orders and quotes on other markets, thus reducing the price protection provided to those displayed limit orders and quotes. In addition, investors whose orders were sent for execution to small entity broker-dealers that were not required to comply with the rule may not benefit fully from the price protections provided by the proposed rule.

7. Solicitation of Comments

The Commission encourages the submission of comments with respect to any aspect of this IRFA. In particular, the Commission requests comments regarding: (1) The number of small entities that may be affected by the proposed rules; (2) the existence or nature of the potential impact of the proposed rule on small entities discussed in the analysis; and (3) how to quantify the impact of the proposed rules. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule were adopted, and will be placed in the same public file as comments on the proposed rule.

IV. Market Access Proposal

A. Access to Equity Markets in the NMS

In the market for equity securities today, multiple trading venues seek to attract order flow by competing over liquidity, price, speed of execution, and other significant terms. Currently, however, there are few regulatory standards governing the manner of access among competing market centers.[132] Guided by little more than the fiduciary duty of best execution, a broker must seek the most favorable terms for a customer's transaction reasonably available under the circumstances.[133] And yet if a customer's order cannot be routed to the market with the best price, a broker may not be able to fulfill the duty of best execution that it owes to its customer. In practice, therefore, the absence of a uniform standard governing the terms of access may have created difficulties for brokers as they seek to obtain the best available prices for their customer orders.

Under Section 11A of the Exchange Act, the Commission is charged with responsibility to facilitate the development of the NMS.[134] The Commission has routinely sought the views of the public as it carries out its responsibilities with respect to the NMS. In 2002, the Commission convened a series of public hearings concerning the structure of the U.S. equity markets. An impressive assembly of investors, investment professionals, academics, and others participated in a series of open hearings on market structure issues, discussing the challenges with respect to market structure and offering widely divergent views as to how the Commission should confront those challenges.

The participants expressed general agreement that the Commission should further the interests of investors by promoting a market structure that encourages the robust interaction of buying and selling interest; that investors, both large and small, are best served by a system that ensures prices are established through fair and vigorous competition among competing market centers; and that investors need to be able to execute transactions in the best market efficiently. These views are fully consistent with general principles that Congress chose in guiding the Commission under Section 11A of the Exchange Act.[135] One important way in which the Commission can further those principles is by providing for fair and effective intermarket access within the NMS.

Ensuring access to diverse marketplaces within a unified national market would foster efficiency, enhance competition, and contribute to the "best execution" of orders for securities.[136] Accordingly, the Commission today is proposing new standards governing access to quotations and the execution of orders for equity securities throughout the NMS. The proposed new access standards, proposed to be designated as Rule 610 of Regulation NMS, would require market centers to permit all market participants access to their limit order books, at least indirectly, on a non-discriminatory basis. In addition, the proposed rule would limit any fees charged by market centers and broker-dealers for access to their quotations to a *de minimis* amount. Finally, the proposal would require SROs to establish rules to reduce the incidence of inter-market locked and crossed quotations.

1. Current Access Framework

Broker-dealers have a duty to seek the most favorable terms reasonably available in executing transactions on behalf of their customers.[137] The price at which an order can be executed is of paramount importance for most investors, but in seeking the best price some investors may weigh other factors, such as the speed and certainty of execution at a specified price, even more than the possibility of execution at a better price. In today's market for

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[132] *See, e.g.*, Rule 11Ac1–1 under the Exchange Act; Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (the "Order Handling Rules Release").

[133] *Order Execution Obligations*, Securities Exchange Act Release No. 37619A at 50 (September 6, 1996), 61 FR 48290 (September 12, 1996); *see also In the Matter of the Application of Robert Bruce Orkin*, Securities Exchange Act Release No. 32035 at fn. 22 (March 23, 1993).

[134] *See* Section 11A of the Exchange Act, 15 U.S.C. 78k–1.

[135] *See* Section 11A(a)(1)(C) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C).

[136] *Id* at Section 11A(a)(1)(D), 15 U.S.C 78k–1(a)(1)(D).

[137] *See, e.g., Charles Hughes & Co.* v. *SEC*, 139 F.2d 434 (2nd Cir. 1943).

equity securities, multiple marketplaces compete over price, speed, and other terms. To fulfill the duty of best execution, therefore, a broker-dealer must be able to identify the best available terms among multiple competing marketplaces, and gain fair and efficient access to those marketplaces. Any weakness or inefficiencies in the system of reaching quotations and executing orders among market centers could compromise a broker-dealer's ability to satisfy its duty of best execution.

Today's NMS features competing pools of liquidity in stocks listed on the NYSE, the Amex, and Nasdaq, though the nature of the competition differs in each of those categories. For NYSE-listed stocks, the NYSE currently dominates trading with approximately 75% of the volume. NYSE stocks are also traded on regional exchanges, and in the OTC market by block positioners and market makers through Nasdaq's intermarket system. To a lesser extent, NYSE stocks are traded on ECNs. The competition is similar for Amex-listed stocks. Although the Amex currently has a significant part of the volume in Amex-listed stocks, ECNs and the Archipelago Exchange, the equities trading facility of the PCX, have the predominant share of the volume of ETFs. In stocks registered on Nasdaq, market makers and some ECNs trade on SuperMontage, Nasdaq's order collection, display, and execution facility. A few ECNs post orders on the ADF, the NASD's quotation display and trade reporting facility. Still other ECNs post their quotes and print trades at the NSX. Finally, the Archipelago Exchange maintains a system for electronically executing trades and routing orders outside of SuperMontage.

With respect to exchange-listed equity securities, members of exchanges and the NASD currently can access each other's quotes through the ITS. Physical access is provided by ITS connectivity, and the terms of access are governed by the ITS Plan. Participants in the ITS Plan have agreed not to charge for access to their markets through the ITS. The ITS Plan provides grievance procedures for violations of the ITS trade-through rule and sets forth procedures to follow in the event of a locked or crossed market.

The basic terms of intermarket access in Nasdaq securities are set forth in the Nasdaq UTP Plan. Unlike the ITS Plan, the Nasdaq UTP Plan does not establish a physical linkage for Nasdaq stocks or provide limitations on trade-throughs or locked and crossed markets. Instead, the Nasdaq UTP Plan requires only that each participant in the Nasdaq UTP Plan provide direct telephone access to each market maker or specialist in its market, and forbids participants from imposing access or execution fees with respect to transactions in Nasdaq securities that are communicated by telephone.[138] Currently, the NASD, Amex, NSX, CHX, BSE, and PCX trade Nasdaq securities under the Nasdaq UTP Plan.

The registered national exchanges, market makers, ECNs, and other broker-dealers may access Nasdaq's SuperMontage through a Nasdaq member to reach quotations displayed in SuperMontage, but they need not use SuperMontage in order to trade Nasdaq securities. The NASD operates the ADF as an alternative to SuperMontage. The ADF does not operate a linkage or execution system like SuperMontage; rather, market participants must obtain their own access to ADF participants under the ADF's rules governing access.[139] These rules provide that ADF participants must make electronic access to their quotations available in the ADF.

Under the Commission's Quote Rule,[140] if a market maker enters an order into an ECN that betters its own quote, the market maker generally must reflect that order in its quote unless the ECN has reflected the order in the quote it provides to an exchange, the ADF, or Nasdaq, and the ECN enables brokers-dealers to reach the market maker's order displayed through the ECN as easily as they could reach that order directly through an SRO. In short, the ECN must allow any broker-dealer to effect a transaction against the order on the same terms as if the broker-dealer had carried out the transaction directly with the market maker whose order is represented in the ECN.

The Commission's Regulation ATS has integrated ECNs and ATSs more fully into the NMS.[141] Under Regulation ATS, an ATS with at least five percent of the trading volume in any particular security must publicly display its best-priced orders in that security to an exchange, the ADF, or Nasdaq, and must allow market participants to access those publicly displayed orders.[142] Furthermore, an ATS with 20 percent or more of the trading volume in any particular security must provide "fair access" to its system; that is, it must not unreasonably prohibit or inhibit any person from obtaining access to the services that it offers.[143] Such an ATS may, however, establish fair and objective criteria, such as creditworthiness, to differentiate among potential participants. Currently, six ATSs operate as ECNs, and display quotes through SuperMontage, the ADF, the BSE, or the NSX.

In a system with so many competing market centers and pools of liquidity, market participants not only need to know what the best prices are and in which market they are available, but they also must be able to access that market routinely and efficiently. Historically, however, markets have attempted to maintain effective control over the terms of inbound order access by seeking to erect barriers in the form of fees, execution priorities, membership requirements, direct bans, and other restrictions.[144] The proposed access standards are designed to substantially reduce these barriers to intermarket access.

2. Nonlinked Markets

Historically, the NYSE and the regional exchanges have primarily functioned as agency markets, while the OTC market has primarily functioned as a dealer market. In recent years, these distinctions have blurred. In block trades, which occur both on and off exchanges, major broker-dealers take one side as principal. Moreover, dealers act as OTC market makers in a number of NYSE stocks.[145] By contrast, the market for Nasdaq securities, which has historically been dominated by OTC market makers, has been marked in recent years by an explosive growth in ECNs that function exclusively on an agency basis.

Heightened competition among market centers has led to market fragmentation—the trading of orders in multiple locations—and this has reduced interaction among orders dispersed across the competing markets. The intermarket linkage systems currently in place in the NMS provide

[138] *See* Nasdaq UTP Plan, Section IX (a) and (b).

[139] *See* Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002) (SR–NASD–2002–97); Securities Exchange Act Release No. 47663 (April 10, 2003), 68 FR 19043 (April 17, 2003) (SR–NASD–2003–67) (extending pilot program).

[140] *See* Rule 11Ac1–1 under the Exchange Act, 17 CFR 240.11Ac1–1.

[141] *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) ("Regulation ATS Release").

[142] *See* Rule 301(b)(3) under the Exchange Act, 17 CFR 240.301(b)(3).

[143] *See* Rule 301(b)(5) under the Exchange Act, 17 CFR 240.301(b)(5).

[144] *See, e.g.*, Regulation ATS Release, 63 FR 70844.

[145] The rescission of NYSE Rule 390 in 2000 allowed NYSE members to serve as OTC market makers or dealers in all NYSE-listed securities. *See* Securities Exchange Act Release No. 42450 (February 23, 2000), 65 FR 10570 (February 29, 2000) (notice of proposed rescission); Securities Exchange Act Release No. 42758, 65 FR 30175 (May 10, 2000) (order approving rescission).

a means of access to the best displayed prices, but they are not comprehensive and have been criticized for their inefficiencies.

In the OTC market, the development of SuperMontage, the creation of the ADF, and the growth of ECNs have created multiple venues for the trading of Nasdaq stocks. SuperMontage does not route orders away from its system. Instead, market participants rely on private routing systems to trade across markets in order to obtain the best prices for customer and proprietary orders in Nasdaq stocks.

Before the launch of SuperMontage, nearly all of the ECNs participated in Nasdaq. Recently, however, several ECNs have chosen to operate independently of Nasdaq. Following SuperMontage's launch in 2002, several ECNs chose to remain outside of SuperMontage and to post their quotes in the ADF. The ADF is a pure display and trade reporting facility that offers neither order executions nor the automatic routing of orders. In accordance with the ADF's rules, ADF participants are linked to each other pursuant to privately negotiated linkage agreements.

With respect to NYSE and Amex securities, the market centers that trade those securities are currently linked through the ITS. The ITS provides the ability to route commitments individually from one market center to another for execution. In recent years critics have charged that the ITS is inefficient, and that the ITS Plan does not easily accommodate new business models.[146] In particular, the provision of the ITS Plan governing trade-throughs and locked and crossed markets requires ITS Participants to wait up to 30 seconds for a response from other markets to avoid trading at a price worse than their published quote. Some ECNs have asserted that the ITS Plan is incompatible with their trading systems, which allow trades to be executed electronically within a fraction of a second.[147] Moreover, because any amendment to the ITS Plan requires the unanimous agreement of the ITS Participants, any single Participant may effectively wield veto authority over any proposed change to the ITS.[148] For this reason, among others, critics have charged that the ITS Plan has been slow to embrace new technology and, more important, new competition.[149]

One consequence of fragmentation has been a rise in the incidence of locked markets.[150] A locked market occurs, for instance, when an offer to sell at a certain price is displayed on one market at the same price as an offer to buy on another market, but the orders cannot meet because the two markets are not linked. For example, a market that posts an order on SuperMontage to buy a security at $10.01 may have its quote locked when an ECN posts an order on the ADF to sell the security at $10.01. Because the bid and ask quotes are identical and yet they do not execute across markets, some market centers' automatic execution systems may perceive the quotes to be stale or incorrect, and shut down.

There is anecdotal evidence that the incidence of locked markets has gained pace in recent months.[151] As discussed more fully below, some critics have charged that the dramatic increase in the frequency of locked markets can be traced to access fee and liquidity rebate strategies that have created economic incentives for some market participants to lock the market.

Another issue raised by trading across competing market centers is the speed and/or certainty of access among these markets. Trading in penny increments has resulting in narrower spreads, less depth at the top-of-book, and rapid movements between price points. At the same time, advances in technology, including the use of "smart" order-routing and automatic execution systems, have provided a variety of means of routing and executing orders in multiple markets more quickly and efficiently. The speed at which trading occurs in some markets has increased as market participants strive to make greater use of technology to execute orders at the prices they see before the prices change. Therefore, as markets have become more automated, the speed at which markets can access each other has taken on greater importance.

Competing market centers, however, currently offer different types of access and different speeds of execution. For instance, in the market for trading Nasdaq securities, which is highly automated, market participants have objected to the extension of trading pursuant to the Nasdaq UTP Plan to exchanges that do not offer automatic execution.[152] With regard to exchange-listed securities, market participants also have voiced concerns with the operation of existing trade-through rules and the impact of those rules on the efficient operation of automated markets. Various market participants have argued that all competing markets should offer automatic execution.[153]

The Commission has been reluctant to mandate automatic execution, in part because of a concern that doing so might be incompatible with the business models of individual market centers and interfere with the ability of individual market centers to compete.[154] Given the changes that have occurred in the markets in recent years, however, and particularly the widespread use of electronic execution in some markets, the Commission requests comment on whether its proposed access standards should require a "quoting market center" or a "quoting market participant," as defined in the rule, to execute orders at its quote automatically. The Commission also requests comment on the scope of any such automatic execution requirement. For example, should each quoting market center and quoting market participant be required to offer automatic execution with respect to its entire trading book? Or should an automatic execution requirement be limited only to the best bids and offers of quoting market centers and quoting market participants?

The concept of automatic execution entails the immediate electronic execution of orders against quotes or orders present in the market. Yet, different automated markets can have

[146] *See, e.g.*, Beatrice Boehmer, *Trading Your Neighbor's ETFs: Competition Or Fragmentation*, J. Banking & Finance, September 2003; Ivy Schmerken, *Will The NYSE Specialist Probe Open The Listed Markets To ECNs?*, Wall Street & Technology, July 1, 2003; J. Alex Tarquino, *Electronic Communication Networks Look Toward The Big Board*, N.Y. Times, December 29, 2002.

[147] *See, e.g.*, Kouwe, Zachery, *As The Campaign For ETF Trading Volume Presses On, Island Goes Dark, Arca Gains Market Share, And The Major Exchanges Fight To Hold Their Own*, Alternative Investment News, August 1, 2003; Koh, Peter, *Nasdaq Faces An Identify Crisis*, EuroMoney, July 1, 2003; Sales, Robert, *ADF Looks To Bypass ITS For Listed Equities*, Wall Street & Technology, December 1, 2002.

[148] Intermarket Trading System Plan, Section 4.C; *see* Securities Exchange Act Release No. 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983). *See also* Securities Exchange Act Release No. 40260 (July 24, 1998), 63 FR 40748 (July 30, 1998) (proposing amendment to provision requiring unanimous approval of participants).

[149] *See, e.g.*, Chapman, Peter, *National Markets Under Fire*, Trader's Magazine, November 1, 2002.

[150] See, *e.g.*, Schmerken, Ivy, *Nasdaq's Battle Over Locked Crossed Markets*, Wall Street & Technology, May 1, 2003.

[151] *Id.*

[152] *See, e.g.*, letter to Jonathan G. Katz, Secretary, Commission, from John J. D. McFerrin-Clancy, Schlam Stone & Dolan, dated August 15, 2002 (petition for review of Securities Exchange Act Release No. 46205 by Knight Trading Group, Inc.).

[153] *See, e.g.*, letter to Jonathan G. Katz, Secretary, Commission, from Mark B. Sutton, Chairman, SIA Market Structure Committee, Securities Industry Association, dated May 5, 2000, commenting on Securities Exchange Act Release No. 42450.

[154] *See, e.g.*, Securities Exchange Act Release Nos. 43084 (July 28, 2000), 65 FR 48406 (August 8, 2000) (proposing Rules 11Ac1–5 and 11Ac1–6 under the Exchange Act), and 46305 (August 2, 2002), 67 FR 51609 (August 8, 2002) (order approving Amex rule proposal relating to the trading of Nasdaq securities).

significantly different execution speeds depending on their internal processes and the technology employed. Therefore, if the Commission determines to require automatic execution, the Commission requests comment as to whether it should promulgate performance standards to ensure that the quotes of all market participants are available for automatic execution.[155] Such performance standards would be designed to ensure that all automatic execution systems satisfy minimum standards that would assure that market participant orders are executed in substantially equivalent timeframes across markets.

Accordingly, the Commission requests comment as to whether it would be appropriate to impose a minimum performance standard with respect to response times for automatic execution. Specifically, the Commission requests comment on whether it should impose a requirement on market participants, mandating that their automatic execution systems provide the capability to respond to an order from another market participant within certain timeframes. For example, a general standard could be imposed that would require markets to provide automatic executions of all orders within a specified timeframe after receipt (*e.g.*, one or two seconds). A more refined alternative standard could require markets to provide automatic execution of (1) all orders within a longer timeframe after receipt (*e.g.*, three seconds) and (2) a specified percentage of orders (*e.g.*, 98%) within a shorter timeframe after receipt (*e.g.*, one second). The Commission requests comment on the nature of any minimum performance standard, with respect to response times for automatic execution, that should be imposed on market participants.

The Commission also believes that, if quoting market centers and quoting market participants were required to offer automatic execution, it would be critical that the automatic execution functions of quoting market centers and quoting market participants not unfairly discriminate by offering their members faster automatic execution than they offer to non-members. In the Commission's view, such discrimination would be inconsistent with the standard of equivalent access and would thwart the goals of Section 11A of the Exchange Act.

[155] The Commission notes that the ADF currently imposes minimum performance standards for participants in its order quotation and display facility. *See* NASD Rule 4300A(e).

3. Access Fees

ECNs that display their quotes in the public quotation system typically charge per share "access fees" to non-subscriber market participants that trade with the orders that the ECNs display. These fees are generally similar to the fees that subscribers pay to trade with ECN orders.[156] In its rules requiring ECNs and ATSs to display their quotes, the Commission permitted ECNs to charge a fee "similar to the communications and systems charges imposed by various markets, if not structured to discourage access by non-subscriber broker-dealers."[157] ECNs may not charge fees that have the effect of creating barriers to access for non-subscribers, however.[158] Currently, pursuant to a series of no-action letters from the Division of Market Regulation, ECNs charge fees to non-subscribers in amounts equal to those that they charge a "substantial proportion" of their active broker-dealer subscribers, but no more than $.009 per share.[159] The fees that ECNs charge vary in size depending on the ECN.

Although ECNs charge other market participants per-share fees for access to their quotes, other market participants, most notably market makers, must trade at their displayed quotes without imposing access fees.[160] Therefore, depending on the identity of the market participant that has posted a quotation, a displayed price may be the true price that a customer will pay, or it may be the base price to which an access fee is subsequently appended. In addition, the exchanges and Nasdaq typically charge a variety of transaction fees. Accordingly, published quotes today do not reliably indicate the true prices that are actually available to investors.

As ECNs have become more active in the equities markets, the absence of a uniform quoting convention has made it difficult for market participants to compare quotations readily across all marketplaces. Indeed, because the ECNs' displayed quotes do not reflect the per-share access fees that they impose, the NBBO can be viewed as artificially narrow. Market makers and other broker-dealers that owe a duty of best execution to customers nevertheless are held to the benchmark that the NBBO reflects. Accordingly, some market participants believe that, under the circumstances, a non-subscriber should not be forced to pay a fee to an ECN in order to obtain the execution of a customer order at the NBBO.

Furthermore, there is a view that the dramatic rise in locked and crossed markets in recent years can be traced to the proliferation of access fees, charges, and liquidity rebates offered by ECNs and Nasdaq.[161] These practices—paying so-called "liquidity rebates" to customers that post limit orders, while imposing access fees on orders that execute against those resting orders—arguably have encouraged locked and crossed markets.[162]

Indeed, several of the largest ECNs currently pay $.002 per share to order providers upon the execution of their limit orders, and simultaneously charge $.003 to the "liquidity takers" whose orders execute against resting limit orders in the ECN. If, for example, a market maker posts the best bid on SuperMontage in a particular security at $20.00, a customer could enter a market order to sell that executes against the bid, and sell the stock at the $20.00 bid price (plus a $.003 per-share SuperMontage fee).[163] By submitting a sell limit order to an ECN that is not linked to SuperMontage and that does not have a $20 bid at that time, the customer could lock the market at $20.00 bid, $20.00 asked. Rather than paying an access fee to execute against the displayed order, the customer could simply wait for some other market participant to unlock the market by executing an order against the customer's quote, and thus receive a liquidity rebate from the ECN in the process. In this scenario, the $.005 per share difference between paying an

[156] Regulation ATS Release, 63 FR 70844.

[157] Order Handling Rules Release, 61 FR at 48314 n.272; *see* Regulation ATS Release, 63 FR 70844.

[158] *Id.*

[159] The no-action letters are posted to the Commission's web site at *http://www.sec.gov/divisions/marketreg/mr-noaction.htm#ecns*. *See also* Regulation ATS Release, 63 FR 70844 ("The Commission believes that fees charged by an alternative trading system would be inconsistent with equivalent access if they have the effect of creating barriers to access for non-subscribers").

[160] *See* Rule 11Ac1–1(c)(2) under the Exchange Act, 17 CFR 240.11Ac1–1(c)(2); *see also* Letter from Robert L.D. Colby, Deputy Director, Division of Market Regulation, Commission, to Louis B. Todd, Jr., Head of Equity Trading, J.C. Bradford & Co., dated August 6, 1998.

[161] *See, e.g.*, Schmerken, Ivy, *Nasdaq's Battle Over Locked Crossed Markets*, Wall Street & Technology, May 1, 2003.

[162] *Id.*

[163] SuperMontage subscribers pay a fee of $.003 per share, up to a certain per-order maximum limit, to execute against orders in the book. ECNs currently charge non-subscribers that access their markets through SuperMontage an additional access fee of up to $.003 per share or more. The Commission has approved an NASD rule change that, in part, establishes the maximum fees that ECNs may charge when their orders are accessed through SuperMontage. *See* Securities Exchange Act Release Nos. 48501 (September 17, 2003), 68 FR 56358 (September 30, 2003) (proposal) and 49220 (February 11, 2004) (approval) (SR–NASD–2003–128).

access fee and receiving a liquidity rebate gives an economic incentive to encourage the repeated locking of markets in some securities.[164]

B. Proposed Access Standards Under Regulation NMS

The Commission today is proposing to adopt new regulations governing intermarket access to quotes and orders in the equity markets of the NMS. The new provisions would be designated as Rule 610 of Regulation NMS.[165]

1. New Terms

For purposes of the new provisions governing access, the Commission proposes to include in a new rule that would be designated as Rule 600 of Regulation NMS two new defined terms to identify the parties to which the access provisions apply.[166] The Commission intends these terms broadly to include all market participants that either are required, or otherwise choose, to display quotations in the NMS. A "quoting market center" would be defined to mean an order execution facility of any exchange or association that is required to make available to a quotation vendor its best bid or best offer in a security pursuant to the Quote Rule.[167] A "quoting market participant" would be defined to mean any broker-dealer that provides its best bid or best offer in a security to an exchange or association pursuant to the Quote Rule or Regulation ATS, and whose best bid or best offer is not otherwise available through a quoting market center. Accordingly, a market center such as an exchange that offers execution functionality would be considered a quoting market center, while a market participant that enters quotations on a quotation facility that does not offer order execution functionality, such as the ADF, would be considered a quoting market participant.

2. Access to Published Bids and Offers

Under the proposed rule, quoting market centers and quoting market participants would not be permitted to impose unfairly discriminatory terms that inhibit non-members, non-subscribers, or non-customers from obtaining access to quotations and the execution of orders through their members, subscribers, or customers. Moreover, a quoting market participant would be required to make its quotations accessible to all quoting market centers and all other quoting market participants on terms as favorable as those it grants to its most preferred member, customer, or subscriber.[168]

The proposed rule seeks to ensure access not through government-imposed linkages, but rather through linkages established by the marketplace. At the core of the proposed new rule is a provision that would prohibit quoting market centers and quoting market participants from imposing unfairly discriminatory terms that prevent or inhibit any person from accessing their quotations indirectly through a member, customer, or subscriber. This standard is intended to ensure that a member, customer, or subscriber of a quoting market center or quoting market participant can sponsor access to quotes and order execution without receiving disparate treatment in the handling of that order with respect to fees, speed, or other terms. Under this rule, the quoting market center or quoting market participant would not be permitted to treat orders from non-members, non-customers, or non-subscribers that are communicated indirectly through a member, customer, or subscriber any differently from the way it treats the orders of that member, customer, or subscriber. Consequently, securities market participants would not need to establish direct relationships with every quoting market center or quoting market participant in order to access the quotes of all markets; rather, these participants need only have relationships with a member, customer, or subscriber of a quoting market participant or a member, customer, or subscriber of a quoting market center to obtain effective access to those quotes.

The new rule also would require each quoting market participant to make its quotations available, for the purpose of order execution, to all quoting market centers and all other quoting market participants on terms as favorable as those it grants to its most preferred member, customer, or subscriber. Currently, although ADF participants have established linkages among themselves pursuant to private agreements, a non-ADF participant potentially could have no means by which to access the quotes of an ADF participant, particularly if no ADF participant is willing to offer ready access to non-ADF participants. Therefore, in very limited circumstances, the proposed access rule effectively would impose "direct access" obligations on an ADF participant or other quoting market participant that has not yet established linkages between itself and quoting market centers.

3. Access Fees

i. How Access Fees Cause Distortion in the Markets

Under Regulation ATS, ECNs that display market maker quotes or are responsible for at least 5% of the trading volume in a stock must furnish their quotes to the public quotation system, where the quotes are displayed along with the quotes of traditional exchanges and market makers. The Order Handling Rules Release stated that an ECN "may impose charges for access to its system, similar to the communications and systems charges imposed by various markets, if not structured to discourage access by non-subscriber broker-dealers."[169]

Although access fees have decreased steadily in recent years, the fees nonetheless are currently causing various distortions in the trading of securities. Most ECNs and Nasdaq pay a per-share rebate for limit orders that become executed against incoming orders. This rebate rewards market participants for submitting "resting" limit orders that give depth to the trading book. The ECNs and Nasdaq also impose a per-share access fee on the incoming marketable orders that execute against the resting limit orders and thereby "remove liquidity" from the book. In this way, the ECNs and Nasdaq effectively use access fee rebates as payment to attract liquidity to their limit order books. Because non-subscribers cannot place limit orders on an ECN's book and therefore cannot receive the rebates, the fees that they pay act as a subsidy to the subscribers that place standing limit orders on the ECN's book. Therefore, the more an ECN can charge in access fees, the more it can rebate to its subscribers. In practice, some ECNs charge considerably more than others. In the current decimal trading environment, where penny spreads are commonplace, these differences can add significant non-transparent costs to securities transactions. This may undermine the

[164] Of course, this problem would be exacerbated if the ECN charges an even higher access fee, such as $.009 per share.

[165] In addition, proposed Rule 610(d) would provide the Commission with exemptive authority pursuant to Section 36 of the Exchange Act, 15 U.S.C. 78mm.

[166] *See* the rule proposed to be designated as Rule 600 of Regulation NMS.

[167] Rule 11Ac1–1 under the Exchange Act, 17 CFR 240.11Ac1–1. Under proposed Regulation NMS, the Quote Rule is proposed to be redesignated as Rule 604.

[168] For example, non-subscribers or non-customers of a quoting market participant would be entitled to the very best level of service, and at the very best rates, that it offers to any of its subscribers or customers.

[169] Order Handling Rules Release, 61 FR at 48314, n.272.

"fair access" standards established in the Order Handling Rules and Regulation ATS.

Furthermore, Rule 11Ac1–1(c)(2) under the Exchange Act prohibits non-ECN broker-dealers from charging an access fee in addition to their posted quotation.[170] Although Nasdaq's current pricing and rebate structure indirectly provides limited rebates of Nasdaq's access fees to market participants, many believe that prohibiting non-ECN broker-dealers from charging access fees, but not their ECN competitors, puts the non-ECN broker-dealers at an unwarranted competitive disadvantage.

Finally, many believe that ECN access fees exacerbate locked markets. In addition to the concerns raised in Section IV.A.3. above, some allege that certain ECNs have programmed their systems to lock the quote of other market participants automatically. These critics believe that some ECNs routinely lock quotations instead of routing orders to the other quote, simply so that they can force a contra-party to be a "liquidity taker" and thereby collect the associated access fee rebate for themselves.[171] They assert that these ECNs are able to induce others to execute against the quotation that is locking the market, in order to clear the locked quotation and allow their automatic execution systems to work.[172] In the Commission's view, impediments to access may lead to locked markets, create difficulty for market participants seeking best execution for customer orders, and call into question the efficiency of the marketplace.

ii. Regulatory Alternatives With Respect to Access Fees

The Commission has considered various regulatory responses to the growing problems that access fees cause. Among these, four alternatives merit discussion here: Reflecting the access fees in the displayed quote; rounding access fees to full-penny trading increments in the displayed quote; banning access fees outright; and establishing a *de minimis* fee standard.

First, the Commission has considered a requirement that access fees be accurately reflected in the displayed quotes of market participants. Because access fees are currently imposed in amounts of less than one cent, requiring access fees to be reflected in the quote necessarily would lead to subpenny pricing. In the Commission's view, the main benefit of displaying quotations in subpenny increments is that displayed quotations would accurately reflect the prices that investors would actually pay, and quote comparability would be achieved. As more fully discussed with respect to the rule proposed to be designated as Rule 612 of Regulation NMS, however, the Commission believes that more widespread use of subpenny quotations would further reduce the depth of liquidity available to investors at any particular subpenny price.[173] In addition, widespread subpenny pricing could very likely exacerbate "stepping ahead" practices, where market participants submit orders that better the displayed quotes by economically insignificant amounts, thereby devaluing price priority and reducing the incentive for aggressive quoting. Furthermore, subpenny pricing could lead to an increase in "flickering quotes," where quotations change so frequently and so rapidly as to engender confusion among investors and complicate the efforts of broker-dealers to comply with their regulatory obligations, including the duty of best execution. Accordingly, the Commission does not believe that the potential benefits of displaying subpenny access fees in quotations would justify the costs.

Second, the Commission has considered a "quote normalization" approach that would apply a universal rounding convention to all access fees. Under one such rounding convention, a fee at or smaller than a prescribed amount would be rounded down to zero, and therefore not reflected in the displayed quote, but a fee greater than the prescribed amount would be included in the quote, which would then be rounded away to the next full-penny trading increment. For example, if the fee threshold were set at $.0025 per share, a fee of $.0025 would not be incorporated into the displayed quote of an order to buy at $50.00, but a fee of $.003 would be reflected in the displayed quote and rounded to $49.99. This would reflect the existence of a fee in excess of the threshold in the quoted price. The benefit of this approach is that it could provide an economic incentive for markets to keep access fees below the prescribed level. On the other hand, the Commission believes that this approach could impair price transparency and distort the accuracy of market information, because it would lead to orders being displayed at prices better or worse than the actual price, and perhaps materially so. As noted above, for example, an order to buy at $50.00, posted in an ECN with an access fee at $.003 per share, would be displayed at $49.99, or $.007 lower than the actual net price. On balance, the Commission believes that the benefits of adopting this quote normalization approach would not justify the costs.

Third, the Commission has considered banning access fees. The main benefits of banning access fees are that quotes would be fully comparable throughout the NMS, and would accurately reflect the price. This is consistent with the guiding principles set forth in Section 11A of the Exchange Act.[174] Currently, however, the business models of many ECNs depend on access fees. In addition, exchanges charge various transaction fees for accessing the liquidity in their markets. The Commission believes that the complete elimination of these fees could impair the operation of these markets, thereby reducing competition among market centers within the NMS. Accordingly, the Commission does not believe, on balance, that the benefits of an absolute ban on access fees would justify the potential economic costs to the markets.

Finally, the Commission considered, and is today proposing, the establishment of a *de minimis* fee standard. This alternative is discussed in full detail below.

iii. Proposed Solution: A *de minimis* Fee Standard

Under the rule proposed to be designated as Rule 610 of Regulation NMS, all quoting market centers, quoting market participants, and broker-dealers that display attributable quotes through SROs would be permitted to impose fees for the execution of orders.[175] Under the proposed rule, access fees would be limited to a *de minimis* amount: Access fees charged by any individual market participant

[170] 17 CFR 240.11Ac1–1(c)(2); *see* letter from Robert L.D. Colby, Deputy Director, Division of Market Regulation, Commission, to Louis B. Todd, Jr., Head of Equity Trading, J.C. Bradford & Co., dated August 6, 1998.

[171] *See, e.g.*, Clary, Isabelle, *Trading Under New Rules*, Securities Industry News, January 12, 2004.

[172] Because some market makers' automatic execution systems are programmed not to process trades while a quotation is locking or crossing the market, market makers regularly execute against locking or crossing quotations—and pay the ECN access fee—to clear such quotations out of their automatic execution systems. Under NASD Rule 4613, market participants are prohibited from locking or crossing the market in a security within Nasdaq systems, but there is no inter-market rule prohibiting locking and crossing of the market for Nasdaq securities. Therefore, market participants today are permitted to lock or cross the market in the public quotation stream when they are quoting Nasdaq securities on a non-Nasdaq system, such as the ADF.

[173] The Commission's subpenny quoting proposal is discussed in Section V.

[174] *See* Section 11A(a)(1) of the Exchange Act, 15 U.S.C. 78k–1(a)(1).

[175] An attributable quote would disclose the identity of the quoting market center, quoting market participant, or broker-dealer that publishes the quote. *See, e.g.*, NASD Rule 4701(c).

would be capped at $0.001 per share, and the accumulation of these fees would be limited to no more than $.002 per share in any transaction.[176] This proposed access fee standard is designed to promote a common quoting convention that would harmonize quotations and facilitate the ready comparison of quotes across the NMS. As discussed more fully in Section V, quoting market centers, quoting market participants, and broker-dealers would not be permitted to reflect these subpenny access fees in their quotations.

The proposed rule would allow an SRO's order interaction facility to charge a maximum fee of $0.001 per share for access to its market. Market makers, specialists, ATSs, and other broker-dealers that display attributable quotes through SROs would also be permitted to charge a maximum fee of $0.001 per share for access to their quotes, and would be permitted to charge this access fee in addition to any access fee that the SRO also imposes on the transaction.

Under the proposed rule, a customer might incur more than one charge on a single transaction because an SRO would be permitted to impose a fee for access to its order interaction facility and a broker-dealer would be permitted to impose a fee for access to its quotes. The proposed rule would limit the accumulation of these charges in any single transaction to no more than $.002 per share. In the Commission's view, limiting access fees to a *de minimis* amount—would promote intermarket access, the standardization of quotations, and the Commission's goals for the NMS.

The proposed rule also would prohibit a quoting market center or quoting market participant from charging a non-member, non-subscriber, or non-customer a fee for indirect access to the quoting market center or quoting market participant through a member, subscriber, or customer, although the member, subscriber, or customer could be charged the standard access fee. The proposed rule would not address the price or other contractual terms that a member, subscriber, or customer of a particular quoting market center or quoting market participant may establish with third parties seeking access. Further, the rule would not restrict SROs or broker-dealers from rebating all or a portion of the permissible access fees to their members, subscribers, or customers.

[176] For securities priced at less than $1.00, a fee standard of .1% of the share price would apply, with fees aggregating to no more than .2% of the share price.

4. Locked and Crossed Markets

The Commission also believes that repeated or continual locking or crossing of a market may raise concerns about the orderliness and efficiency of the markets. Quotes represent prices at which market participants stand ready to trade. When the bid and offer quotes are displayed at the same price, this indicates either that one or the other's quote is not valid, that brokers are not diligently representing their clients, or that inefficiencies exist that deter trading with the quoting market. As a result, locked quotes can cause confusion regarding reliability of the displayed quote, and create difficulty for market participants seeking best execution for customer orders.

As trading in Nasdaq stocks becomes more dispersed, the resulting reduction in interaction between orders displayed in competing market centers has increased the opportunity for locked and crossed markets. If trading in NYSE and Amex securities becomes more fragmented without being subject to ITS or other locked and crossed provisions, locked or crossed markets could increase in those securities. Accordingly, the proposed rule would require every SRO to establish and enforce rules requiring its members to avoid locking or crossing the quotations of quoting market centers and quoting market participants. For example, these SRO rules may include so-called "ship and post" procedures that would require a market participant to attempt to execute against a displayed order before posting a quote that may lock or cross the market. Under the proposal, the SRO rules also would be required to prohibit members from engaging in a pattern or practice of locking or crossing the quotations in any security.

The Commission recognizes that locked and crossed markets between competing market centers can occur accidentally. For instance, quotes may inadvertently lock or cross when two markets are changing their quotes simultaneously. Accordingly, the proposed rule would require each SRO to promulgate rules that would discourage market participants from engaging in locking and crossing, but nonetheless would tolerate some minimal incidents of locked and crossed markets.

Accidental locks often are resolved quickly. Quotes also may lock, however, because one or both quotes have an access fee attached, which increases the net price of trading with that quote, and creates an undisclosed spread. Quotes also may lock due to the different speeds of market centers. Automated markets change their quotes frequently as quotes are executed and new orders are displayed. Other markets that rely heavily on human traders to quote and trade may not adjust their quotations as quickly, and these quotes may become stale. At times, automated markets may lock the quotes of manual markets instead of attempting to trade with those quotes.

The Commission requests comment on the extent of the concerns arising from locked markets in particular. Some market participants say that locked quotes convey useful price information, and the ability to lock quotes enables markets to efficiently communicate their trading interest. In addition, the problem of apparent locked markets resulting from quotes with access fees attached may be reduced by the adoption of the other access provisions of proposed Regulation NMS. For example, if quoting market centers and quoting market participants have fair access to each others' quotations, and access fees are limited to *de minimis* levels, the economic incentives that currently encourage locked markets may diminish. Similarly, as automated executions become more prevalent, there may be less reason to lock a displayed quote. Therefore, the Commission requests comment on the necessity of adopting restrictions on locked markets in the light of the proposed provisions governing intermarket access and access fees.

The Commission also recognizes that for fully-electronic markets the ability to display a quote at a price is a prerequisite to trading at that price. Accordingly, as an alternative to the locked-and-crossed markets rule as currently proposed, the Commission requests comment as to whether there should be an exception from the locking provisions of proposed Regulation NMS for quotes of automated markets that lock quotes of manual markets. More broadly, the Commission also requests comment on whether the scope of the anti-locking and anti-crossing provisions of proposed Regulation NMS should be limited to situations in which trade-throughs would be prohibited. For instance, should locked markets be permitted generally, and should market participants be allowed to enter crossing quotations in situations where the proposed trade-through rule would allow a quote to be traded through?

C. Proposed Amendments to Fair Access Standard Under Regulation ATS

Under Regulation ATS, an ATS with at least 5% of the trading volume in a

security is required to provide its best bids and offers to a national securities exchange or a national securities association.[177] The Commission believes that access to these quotations is no less important than access to other quotations available in the NMS. Currently, Regulation ATS requires that ATSs with at least 20% of the trading volume in a security maintain standards ensuring that they will not unfairly discriminate or unreasonably deny access to their systems.[178] In conjunction with the proposed new standards governing intermarket access, the Commission is proposing to lower this "fair access" threshold in Regulation ATS from 20% to 5% in order to ensure that the quotes of all significant market participants are accessible throughout the NMS. The Commission also believes that establishing a single 5% threshold for both the transparency and access standards of Regulation ATS will encourage fair competition between ATSs with significant internal trading volume. The Commission requests comment on whether the fair access standard should be expanded to apply to all ATSs that voluntarily provide their quotes to a national securities exchange or registered securities association for inclusion in the public quotation stream, irrespective of an ATS's percentage of trading volume.

D. General Request for Comment

The Commission seeks comments on the access proposal described above. The Commission asks commenters to address whether the proposed new rules relating to access to published bids and offers would further the NMS goals set out in Section 11A of the Exchange Act.[179]

Furthermore, the Commission requests that interested persons respond to the following specific questions:

- Are the proposed rules an appropriate response to the need for access between markets and the concerns raised by access fees and locked and crossed quotes?
- Is reliance upon private, negotiated agreements between members and nonmembers adequate to ensure intermarket access to competing pools of equity liquidity throughout the NMS?
- Would the proposed limitation on disparate treatment of indirect access provide sufficient access to all quoting market centers through broker-dealers and routing systems? How would the proposal affect ECN-subscriber relationships?
- Should the Commission mandate automatic execution—requiring that quotes be fully and immediately accessible at their full size—as part of its proposed access standards ? If so, why? If not, why not?
- Should any such automatic execution requirement be limited to the best bid and offer?
- Do the proposed rules adequately address the concerns that have arisen with respect to access fees? If not, what rules would do so?
- Would the establishment of a *de minimis* standard on access fees be a desirable means of ensuring the comparability of quotes for stocks trading at prices of $1.00 or more per share and, if so, is the $.001 ($.002 in the aggregate) threshold appropriate? If not, what means would be desirable?
- Is the establishment of a *de minimis* standard on access fees a desirable means of ensuring the comparability of quotes for stocks trading at prices of less than $1.00 per share, and, if so, is the fee standard of .1% (.2% in the aggregate) appropriate?
- Would the proposed *de minimis* standards interfere unnecessarily with the business models of ECNs, national securities associations, and national securities exchanges? Are there other, less intrusive ways of dealing with the concerns that have arisen with respect to access fees? If so, what are they?
- Would the proposed new access provisions, quotation standardization, and new SRO responsibilities with respect to locked and crossed markets appropriately and effectively address the current problems with respect to locked and crossed markets? If not, why not and what would accomplish this goal instead?
- Would the establishment of a lower 5% "fair access" threshold under Regulation ATS be necessary and appropriate to accomplish the Commission's stated goals? If not, why not? Would a threshold higher or lower than 5% be appropriate? If so, why?
- Finally, the Commission requests comment on whether, if it were to adopt the proposed new access provisions, a phase-in period would be necessary or appropriate to allow market participants time to adapt to them. If so, what aspect or aspects of the proposed provisions should be phased in, and what would be the appropriate phase-in period?

The Commission recognizes that intermarket access presents a number of complex problems to which there may be many possible solutions. Interested persons may wish to propose and discuss specific, alternative approaches to intermarket access that the Commission should consider as it seeks to accomplish its goal of strengthening the NMS. Commenters may also wish to discuss whether there are any reasons why the Commission should consider an alternative approach.

E. Paperwork Reduction Act

The Commission does not believe that the proposed new access rule contains any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended, but the Commission encourages comments on this point. The Commission notes that the requirement under the rule proposed to be designated as Rule 610(c) that each exchange and association must establish and enforce rules that would require members reasonably to avoid locking or crossing the quotations of quoting market centers and quoting market participants would necessitate that each exchange and association keep records of locked and crossed quotations for surveillance purposes. However, as each market already has established rules and procedures for avoiding intra-market locking and crossing, and national securities exchanges, national securities associations, and broker-dealers participating through Nasdaq in the ITS Plan all have rules prohibiting inter-market locks and crosses for listed securities, the Commission believes that these requirements are minimal. This information would be derived from information that Section 17(a) of the Exchange Act and Rule 17a–1 thereunder already require be kept and preserved. The Commission is cognizant, however, that the new rule proposed to be designated as Rule 610(c) would require each exchange and association to use such information in a different manner, as by the creation of an additional report concerning locked and crossed quotations. Accordingly, the Commission solicits comment on this point.

The Commission also does not believe that the proposed amendment to Regulation ATS contains any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended, but the Commission encourages comments on this point. The proposed amendment to Regulation ATS would extend the fair access requirements of Regulation ATS to all ATSs with at least 5% of the trading volume in a particular security. The Commission believes that this amendment will affect fewer than ten ATSs. Accordingly, the Commission believes that the amendment imposes

[177] *See* Rule 301(b)(3) of Regulation ATS, 17 CFR 242.301(b)(3).

[178] *See* Rule 301(b)(5)(i) of Regulation ATS, 17 CFR 242.301(b)(5)(i).

[179] 15 U.S.C. 78k–1.

no new collection of information requirements. The Commission encourages comments on this point.

F. Consideration of Costs and Benefits

As discussed above, the Commission is proposing a new rule that would require SROs and other quoting market centers and quoting market participants to permit all market participants access to their trading books. In addition, in order to standardize quotations, the proposed new rule would enable quoting market centers, quoting market participants, and broker-dealers to charge *de minimis* fees for access to their quotations, establish common quoting conventions for bids and offers, and create a mechanism for reducing the incidence of locked and crossed markets.

The Commission has preliminarily determined that quote standardization would reduce the disparity that currently exists between the publicly displayed quotation and the actual price (including access fees) that is charged. The Commission believes that both investors and professional traders would benefit from this improved transparency. Also, by eliminating the disparity between the posted quotation and the execution price, the Commission believes that the execution cost associated with a transaction may be reduced for the ultimate benefit of individual investors. This would also be the case with the anti-locking and anti-crossing provisions, which would allow for more transparent pricing and better information that would inure to the benefit of individual investors.

The proposal may adversely affect the limited number of ATSs that currently charge high access fees. Such ATSs would most likely be required to re-evaluate their business plans in light of the proposed quote standardization regime. Market makers would also be allowed to charge access fees directly. The Commission believes that this would further add to market transparency and allow market makers to compete with ATSs on more equal terms. High-volume ATSs, national securities exchanges, and Nasdaq would have to make minor to modest adjustments but would not, in the Commission's view, be significantly affected by the proposal.

The Commission has identified below certain additional costs and benefits to the proposed new access rule. The Commission requests comment on all aspects of this proposed cost-benefit analysis, including identification of additional costs or benefits of the proposed changes. The Commission encourages commenters to identify or supply any relevant data concerning the costs or benefits of the proposed rule.

1. Benefits

In carrying out its oversight of the NMS, the Commission seeks to serve the interests of investors by proposing rules designed to ensure that securities transactions can be executed efficiently, at prices established by vigorous and fair competition among market centers. The Commission believes that such access to diverse marketplaces within a unified national market would foster efficiency, enhance competition and contribute to the "best execution" of orders for qualified securities.

The proposed new rule would establish common quoting conventions and entitle market participants to full access to the limit order books of quoting market centers and quoting market participants on a non-discriminatory basis. The Commission believes that the new access standards would increase transparency and enhance confidence in the markets. The Commission also believes that the proposed rule would promote interaction among markets, reduce the effects of fragmentation, and lower the costs to investors.

The Commission believes that, by establishing a uniform standard governing the terms of access among or between competing market centers, the proposed rule would assist broker-dealers in complying with their best execution obligations by enabling them to route customers' orders to the market with the best price. The Commission also believes that the proposed rule would alleviate the growing problem of locked and crossed quotations in the NMS. Finally, the Commission believes that the lowering of the fair access threshold under Regulation ATS to 5% of trading volume in a particular security should help to assure that all significant market participants meaningfully participate in the NMS.

The Commission seeks comment on these benefits, as well as any additional benefits of the proposed new access standards.

2. Costs

The Commission recognizes that the proposed rule would impose costs on quoting market centers and quoting market participants, including national securities exchanges and national securities associations. SROs and other market centers would incur costs associated with any systems changes necessary to comply with the requirement that they permit all market participants access to their trading books. Likewise, all broker-dealers that currently do not make their quotations available to all other market participants on a non-discriminatory basis would incur costs associated with systems changes to comply with this requirement of the proposed rule. In addition, in both cases, the quotation standardization provision of the proposed rule could result in a reduction in the fees currently charged by quoting market centers.

In addition, every exchange and association would be required to establish and enforce rules requiring their members to avoid locking and crossing quotations. To the extent that an SRO may require rule changes to comply with the proposed rule, there would be regulatory costs. However, as each market already has established rules and procedures for avoiding intra-market locking and crossing, and national securities exchanges, national securities associations, and broker-dealers participating through Nasdaq in the ITS Plan all have rules prohibiting inter-market locks and crosses for listed securities, the Commission believes that these requirements are minimal. Moreover, market centers would need to develop and maintain surveillance programs to detect when a locked or crossed quotation has occurred, as well as disciplinary procedures addressed to those who engage in a pattern or practice of locking or crossing quotations. Finally, the proposed amendment to Regulation ATS would extend Regulation ATS's requirements to all ATSs with at least 5% of the trading volume in a particular security. The Commission expects that most ATSs will not have sufficient volume to trigger this threshold and will therefore not have to comply with this provision. Those ATSs that do trigger this threshold would likely incur costs associated with systems changes and regulatory costs to comply with Regulation ATS.

The Commission seeks comment on any additional costs of the proposed new access standards.

F. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act [180] requires the Commission, whenever it engages in rulemaking and must consider or determine if an action is necessary or appropriate in the public interest, also to consider whether the action would promote efficiency, competition, and capital formation. Section 23(a) of the Exchange Act

[180] 15 U.S.C. 78c(f).

likewise requires the Commission to consider the impact such rules would have on competition.[181] Specifically, Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed access rule is intended to address the absence of a uniform standard governing access to quotations and the execution of orders for equity securities throughout the NMS. The proposed rule would require SROs and other quoting market centers and quoting market participants to permit all market participants access to their limit order books, establish common quoting conventions for bids and offers, enable quoting market centers and quoting market participants, including broker-dealers, to charge *de minimis* fees for access to their quotations, and create a mechanism for reducing the incidence of locked and crossed markets.

The Commission believes that the proposed new access standards would bolster investor confidence in the markets by helping to ensure investors that their orders are executed at the best prices and are subject to no hidden fees, regardless of the market on which the execution takes place. The Commission further believes that the proposed rule would establish common quoting conventions that would increase transparency in the market, thereby enhancing investor confidence, and thus capital formation. Moreover, the Commission believes that the proposed rule would encourage interaction between the markets and reduce fragmentation by removing impediments to the execution of orders between and among marketplaces thereby increasing efficiency and competition.

The Commission also believes that the proposed rule would assist broker-dealers in evaluating and complying with their best execution obligations. Finally, the proposed rule would cause markets to strive to reduce locking and crossing of quotations on their markets. The Commission believes that this should increase the efficiency of the markets.

The Commission requests comment on whether the proposed rules are expected to promote efficiency, competition, and capital formation.

[181] 15 U.S.C. 78w(a).

G. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act,[182] the Commission must advise OMB as to whether the proposed regulation constitutes a "major" rule. A rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review.

The Commission requests comment on the potential impact of the proposed regulation on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

H. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") in accordance with the provisions of the Regulatory Flexibility Act ("RFA")[183] with respect to the proposed new access standards.

The proposed new access standards would require SROs and other market centers to permit all market participants access to their limit order books. In addition, the proposed rule would enable market centers and broker dealers to charge *de minimis* fees for access to their quotations, establish common quoting conventions for bids and offers, and create a mechanism for reducing the incidence of locked and crossed markets.

1. Reasons for the Proposed Action

In recent years, there have been significant changes in the way the markets operate and compete with each other. New technological advances have resulted in automated quoting and handling of orders, and new market participants have emerged with new business models. Some market centers operate entirely electronically, while others continue to conduct floor-based trading. With the advent of trading in decimals, the minimum pricing variation in equity securities has narrowed and there is often less depth at the top-of-book.

[182] Pub. L. 104–121, title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C., and as a note to 5 U.S.C. 601).

[183] 5 U.S.C. 603.

Currently, although multiple trading venues seek to attract order flow by competing over price, speed of execution, and other significant factors, there are few regulatory standards governing the routing and execution of orders among or between competing market centers. The Commission believes that it is time to establish standards governing access to quotations and the execution of orders for equity securities throughout the NMS. The Commission believes that ensuring access to diverse marketplaces within a unified national market would foster efficiency, enhance competition, and contribute to the "best execution" of orders for NMS securities.

2. Objectives and Legal Basis

The proposed new access standards are designed to achieve several objectives. The Commission believes that the proposed new access standards would give market participants access to the prices and liquidity found on competing market centers. The Commission also believes that the proposed new access standards would assist broker-dealers in evaluating and complying with their best execution obligations. Finally, the Commission believes that the proposed rule would alleviate the growing problem of locked and crossed markets in the NMS.

The Commission is proposing the new access standards under the authority set forth in Sections 3(b), 5, 6, 11A, 15, 15A, 17(a) and (b), 19, 23(a) and 36 of the Exchange Act.

3. Small Entities Subject to the Rules

The proposed new access standards are designed to apply to any national securities exchange or national securities association that provides an order execution facility, or any alternative trading system or other broker-dealer that displays its quotes other than on a national securities exchange or national securities association order execution facility. These entities would be required to adopt rules and procedures that would comply with the requirement that they permit all market participants with access to their trading books or quotations, as appropriate, on a non-discriminatory basis. In addition, these entities may be required to revise their fees to comply with the quotation standardization provision of the proposed rule.

In addition, every exchange and association would be required to establish and enforce rules requiring their members to avoid locking and crossing quotations. The market centers would need to develop and maintain

surveillance programs to detect when a locked or crossed quotation has occurred, as well as penalties to discipline those who engage in a pattern or practice of locking or crossing quotations. The proposed rule would also extend Regulation ATS's requirements to all ATSs with at least 5% of the trading volume in a particular security. Those ATSs would likely need to adopt procedures to comply with Regulation ATS.

The proposed rule is intended to reach a wide variety of market participants. Each is discussed below.

a. National Securities Exchanges and National Securities Association

None of the national securities exchanges is considered a small entity as defined by Commission rules. Rule 0–10(e) under the Exchange Act [184] states that the term "small business," when referring to an exchange, means any exchange that has been exempted from the reporting requirements of Rule 11Aa3–1 under the Exchange Act. There is one national securities association, which is not a small entity as defined by 13 CFR 121.201.

b. Alternative Trading Systems

There are 12 ATSs that are considered small entities.

c. Broker-Dealers and Exchange and OTC Market Makers

Commission rules generally define a broker-dealer as a small entity for purposes of the Exchange Act and the RFA if the broker-dealer had a total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and the broker-dealer is not affiliated with any person (other than a natural person) that is not a small entity.[185] The Commission estimates that as of December 31, 2002, there were approximately 880 Commission-registered broker-dealers that would be considered small entities for purposes of the statute that would be required to comply with the proposed rule's provisions regarding access to quotations and quotation standardization.

4. Reporting, Recordkeeping, and other Compliance Requirements

The proposed new access standards would require every exchange and association to establish and enforce rules requiring their members to avoid locking and crossing quotations. The market centers would need to develop and maintain surveillance programs to detect when locked or crossed quotations have occurred, as well as disciplinary measures to apply as necessary or appropriate. In addition, Regulation ATS would require that all ATSs with at least 5% of the trading volume in a particular security maintain records with respect to grants, denials and limitations of access.

5. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any rules that duplicate, overlap, or conflict with the proposed rules.

6. Significant Alternatives

Pursuant to Section 3(a) of the RFA, the Commission must consider the following types of alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the proposed rule, or any part thereof, for small entities.

The Commission believes that different compliance or reporting requirements or timetables for small entities would interfere with achieving the primary goal of establishing standards governing access to quotations and the execution of orders for equity securities throughout the NMS. If all market participants, regardless of size, are not obligated to comply with the proposed new access standards, investors that are customers of small broker-dealers, and market participants seeking to access the quotations and liquidity of such small broker-dealers, would not benefit fully from the rule, potentially reducing the benefits of the rule. The Commission also does not believe that it is necessary to consider whether small entities should be permitted to use performance rather than design standards to comply with the proposed rule as the rule already proposes performance standards and does not dictate for entities of any size any particular design standards (*e.g.*, technology) that must be employed to achieve the objectives of the proposed rule.

7. Solicitation of Comments

The Commission encourages the submission of comments with respect to any aspect of this IRFA. In particular, the Commission requests comments regarding: (1) The number of small entities that may be affected by the proposed rules; (2) the existence or nature of the potential impact of the proposed small entities discussed in the analysis; and (3) how to quantify the impact of the proposed rules. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule is adopted, and will be placed in the same public file as comments on the proposed rule.

V. Sub-Penny Quoting Proposal

A. Introduction

In April 2001, the U.S. equity markets completed the conversion from pricing in fractions to pricing in decimals. This conversion has reduced trading costs through narrower spreads, made equity pricing easier to understand, and aligned the pricing of securities on U.S. markets with major markets abroad, which were the Commission's primary goals in directing the markets to make the conversion.[186]

As part of the conversion to decimals, each of the major markets established a minimum quoting increment of at least $0.01, which the Commission approved.[187] More recently, however, there has been a growing trend in the industry, particularly among ECNs, to display quotations in their proprietary systems in "sub-pennies" (*i.e.*, increments finer than a penny). These sub-penny quotes may be superior to the best quotes displayed on Nasdaq and the exchanges, but such quotes are currently rounded to the nearest penny by the markets and securities information processors, and therefore are not included in the quotation data that is disseminated to the public.[188]

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[184] 17 CFR 240.0–10.

[185] 17 CFR 240.0–10(c)

[186] *See, infra* Part V.B.2 for a further discussion of the impact of the decimals conversion.

[187] Securities Exchange Act Release No. 46280 (July 29, 2002), 67 FR 50739 (August 5, 2002) (order approving proposed rule changes and amendments related to decimal pricing). In this Order, the Commission approved the proposals of Amex, BSE, CBOE, CHX, the exchange then known as Cincinnati Stock Exchange, Inc., subsequently renamed the "National Securities Exchange" ("CSE"), ISE, NASD, NYSE, PCX, and Phlx (collectively, "Participants") to establish a minimum price variation (MPV) of $0.01 for equity issues, $0.05 for option issues quoted under $3.00 a contract, and $0.10 for option issues quoted at $3.00 a contract or greater ("July 2002 Order").

[188] The Commission staff had provided a no-action letter in 1997 to Nasdaq for ECNs and market makers to handle orders priced in increments smaller than 1/16 in Nasdaq securities without having consolidated quotations reflect that bids or offers had been rounded. *See* Letter to Robert Aber, Vice President and General Counsel, Nasdaq, from

Continued

Therefore, this information often may not be accessible to the average investor. Nevertheless, many broker-dealers access these sub-penny quotes either to fulfill their best execution obligation to their customers or simply to obtain better prices than they could through the exchanges or Nasdaq. This access is often facilitated by order management tools that allow market participants automatically to route orders based on the best price available in the market, even if that price is merely a fraction of a cent better than the best publicly displayed price in the market. As a result, the exclusion of sub-penny pricing from the disseminated quotation data effectively is creating "hidden markets" where securities trade in prices not transparent to the general public.

In addition, recent economic research conducted by Commission staff and by Nasdaq suggests that market participants may use sub-penny quoting more as a means to "step ahead" of competing limit orders for an economically insignificant amount to gain execution priority, than as an extrinsic expression of trading interest.[189] If so, sub-penny pricing could discourage market participants from using limit orders, which could deprive the markets of an important source of liquidity.

Sub-penny trading has increased since the implementation of decimals, and Nasdaq recently filed a proposal with the Commission that would allow securities that trade through Nasdaq systems to be quoted in $0.001 increments. This proposal, if approved, could lead to widespread sub-penny quoting. Simultaneous with this proposal, Nasdaq also filed a petition for Commission action with the Commission, upon which the Commission seeks comment below, in which Nasdaq requests that the Commission adopt a uniform rule requiring market participants to quote *and* trade Nasdaq securities in a "consistent monetary increment," with certain exceptions.[190]

The Commission is concerned that the status quo, where superior sub-penny quotes on alternative markets are not transparent to and may not be readily accessible to average investors, may be harmful to those investors and to the markets as a whole. At the same time, the Commission believes that including those sub-penny quotes in the best publicly disseminated prices could harm investors and the markets. Among other things, and as described in more detail below, sub-penny quoting is likely to decrease further market depth (*i.e.*, the number of shares of a security that is available at any given price), increase the incidence of market participants stepping ahead of standing limit orders for an economically insignificant amount, and make it more difficult for broker-dealers to meet certain of their regulatory obligations by increasing the incidence of so-called "flickering" quotes. Moreover, the Commission is concerned that the potential benefits of marginally better prices that sub-penny quotes might offer in securities priced above $1.00 per share are not likely to justify the costs that would result from such a change. Therefore, the Commission is proposing to prohibit market participants from accepting, ranking, or displaying orders, quotes, or indications of interest in a pricing increment finer than a penny in any NMS stock, other than those with a share price below $1.00.

B. Decimals Conversion

1. Background

In June 2000, the Commission issued an order (the "June 2000 Order") that established the framework for the exchanges and NASD (collectively, the "Participants") to convert their quotation prices in equity securities and options from fractions to decimals.[191] The June 2000 Order permitted the Participants to select a uniform minimum price variation ("MPV") for stock quotations of no greater than $0.05 and no less than $0.01.[192] In July 2000, the NYSE, on behalf of the Participants, submitted to the Commission a "Decimals Implementation Plan" that set the MPV for equity securities quotations at a penny.[193]

The June 2000 Order established two other requirements. First, it required the Participants to submit to the Commission studies analyzing how the decimals conversion had affected systems capacity, liquidity, and trading behavior, including an analysis of whether there should be a uniform price increment for all securities. Results of the studies submitted by Nasdaq and by NYSE are discussed below.[194] Second, the order required the Participants to submit rule filings to the Commission that would individually establish an MPV for each market quoting equity securities and options. In these filing, the Participants established minimum quoting increments of $0.01 for equity securities.[195]

2. Impact of the Decimals Conversion

The markets completed the decimals conversion by April 9, 2001, and the Commission believes that the goals of decimalization—to simplify pricing for investors, make U.S. markets more competitive internationally, and potentially reduce trading costs (in terms of spreads)—appear to have largely been met. In addition to making securities pricing easier to understand and consistent with the pricing

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Richard R. Lindsey, Director, Division of Market Regulation (July 31, 1997). While the orders were rounded for quotation purposes, the trades were reported and printed in the actual price increments. *See also* Letter to Paul O'Kelley, Chief Operations Officer, CHX, from Annette L. Nazareth, Director, Division of Market Regulation, Commission (April 6, 2001) (providing similar relief for CHX specialists and market makers); Letter to Jeffrey T. Brown, Senior Vice President and General Counsel, CSE, from Robert L.D. Colby, Deputy Director, Division of Market Regulation, Commission (July 26, 2002) (providing similar relief to CSE members).

[189] *See, infra* Part V.D.2.c. for a further discussion of Nasdaq's economic study; *see also, infra* Part V.E. for a further discussion of an economic study prepared by SEC staff. These studies may both be accessed in the Commission's Public Reference Room.

[190] *See* Letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission (August 4, 2003) ("Nasdaq Petition") File No. S7–11–03. Although Nasdaq in its petition does not explicitly request that the Commission impose a penny pricing increment, it asserts that implementation of a penny increment for quoting and trading Nasdaq securities would be "prudent." *Id.* The Nasdaq Petition also may be accessed in the Commission's Public Reference Room.

[191] *See* Securities Exchange Act Release No. 42914 (June 8, 2000), 65 FR 38010 (June 19, 2000) ("June 2000 Order"). On January 28, 2000, the Commission had ordered the Participants to facilitate an orderly transition to decimal pricing in the securities markets. Securities Exchange Act Release No. 42360 (Jan. 28, 2000), 65 FR 5004, 5005 (Feb. 2, 2000). In that order, the Commission set a timetable for the Participants to begin trading some equity securities, and options on those securities, in decimals by July 3, 2000, and all equities and options by January 3, 2001. Subsequently, on April 13, 2000, the Commission issued another order staying the original deadlines for decimalization. Securities Exchange Act Release No. 42685 (April 13, 2000), 65 FR 21046 (April 19, 2000).

[192] Securities Exchange Act Release No. 42914, 65 FR at 38013. The Order noted: "There was little agreement among the commenters regarding a minimum quoting increment during the phase-in period; suggestions ranged from a dime to a penny. As a result, the phase-in plan may fix the minimum quoting increment during the phase-in periods, provided that the minimum increment is not greater than five cents and no less than one cent for any equity security, and that at least some equity securities are quoted in one cent minimum increments."

[193] *See* letter from Dennis L. Covelli, Vice President, NYSE, to Annette Nazareth, Director, Division of Market Regulation, Commission (July 25, 2000). Due to capacity limitations in quoting and trading options, however, the Decimals Implementation Plan selected uniform MPVs for quoting options of $0.05 for options quoted under $3.00 and $0.10 for options at $3.00 or greater.

[194] Overall, there were nine such studies prepared by the Participants. In addition, CHX commissioned a study.

[195] *See* July 2002 Order, *supra* n. 187. The Order also established a $0.05 MPV for option issues quoted under $3.00 a contract and a $0.10 MPV for option issues quoted at $3.00 a contract or greater.

increments on major markets abroad, decimals (and specifically the move to a penny MPV for equity securities) have reduced spreads, thus resulting in reduced trading costs for investors entering orders—particularly smaller orders—that are executed at or within the quotes.[196]

For example, Nasdaq conducted a study on the impact of the decimal conversion on Nasdaq-listed securities and found that quoted and effective spreads fell by an average of about 50% from the period before the decimal conversion to the period after decimal pricing was implemented.[197] Nasdaq also found that small retail orders benefited the most from reduced spreads due to the decimal conversion.[198] Nasdaq also witnessed no increase in intraday volatility.

NYSE conducted a similar study for NYSE-listed securities and reported similar results, noting that quoted spreads fell to less than half their pre-decimal average size, and effective spreads were, on average, 43% lower.[199] NYSE found that net price improvement rose 29%.

Despite these benefits, this fundamental change did not come without costs. For example, Nasdaq found that the quoted size posted at the inside price (the "depth") fell by about two-thirds (although cumulative displayed depth fell by a smaller amount).[200] It also found that the number of quote updates for the securities studied increased by 12% or more after controlling for the day-to-day fluctuation in trading activity, which indicates a negative impact on systems capacity.[201]

Moreover, NYSE also found that the quoted size posted at the inside or best price for NYSE-listed securities fell by about two-thirds.[202] In addition, the number of orders received on NYSE systems more than doubled, and the number of trades rose 76%. NYSE found that the typical transaction size fell, with the average size of limit orders declining 21%. Finally, NYSE found that many more limit orders were cancelled following decimalization, namely 42.4% compared to 34.2% pre-decimals, which could be the result of faster-moving quotes.[203]

C. Sub-Penny Concept Release

On balance, the Commission believes that the benefits of decimals to investors and to the markets have justified the costs. Nevertheless, as the pricing increment for equity securities decreases beyond a certain level, the potential costs to investors and the markets may increase and could, at some point, surpass any potential benefit of permitting securities to be quoted in finer increments.

In July 2001, to assist the Commission in determining the optimal minimum price increment at which securities should be quoted and traded, the Commission issued a Concept Release seeking public comment on the potential impact of sub-penny pricing.[204] In particular, the Concept Release requested comment on a number of issues, including the potential impact sub-penny pricing might have on (1) market depth (*i.e.*, the number of shares available at a given price), (2) price clarity (*e.g.*, the potential to cause ephemeral or "flickering" quotes), (3) marketplace execution priority rules, and (4) automated systems.

The Commission received 33 comment letters in response to the Concept Release.[205] Commenters included NYSE and three regional exchanges, several broker-dealers and industry groups (including the Securities Industry Association ("SIA") and the Investment Company Institute ("ICI"), a large ECN, and a number of individuals. The majority opposed sub-penny pricing. Some of those opposing sub-pennies believed that the negative impacts that accompanied trading in decimals would be exacerbated by reducing the MPV even further, without meaningfully reducing spreads or securing other countervailing benefits for the markets or investors. These commenters thus recommended that all quoting and trading of securities have a minimum increment of at least a penny.[206] Some commenters that opposed sub-penny quoting thought trading in sub-pennies should be allowed.[207]

Some commenters believed that the forces of competition, rather than regulation by the Commission or Congress, should determine the

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[196] *Id.*

[197] The Nasdaq Stock Market, Inc., *The Impact of Decimalization on the Nasdaq Stock Market; Final Report to the SEC Prepared By Nasdaq Economic Research* (June 11, 2001) at 4 ("Nasdaq Decimals Report"). The quoted spread is the difference between the national best ask price and the national best bid price. The effective spread is twice the absolute difference between the midpoint of the bid-ask spread and the price paid (or received) by investors, and accounts for trading that occurs at prices other than the quoted prices.

[198] Nasdaq found that effective spreads for small trades fell by about 46%, whereas those for larger trades (*i.e.*, those over 2000 shares) fell by 27%. Nasdaq Decimals Report, *supra* note 197 at 16.

[199] *Decimalization of Trading on the New York Stock Exchange: A Report to the Securities and Exchange Commission*, (Sept. 7, 2001) ("NYSE Decimals Report"). The July 2002 Order cited prior OEA studies indicating that some of the anticipated benefits of decimalization, such as the significant narrowing of quoted spreads, were evident almost immediately. For example, OEA estimated that, from December 2000 to March 2001, quoted spreads for NYSE-listed securities narrowed an average of 37%. An even more dramatic reduction in quoted spreads was observed in Nasdaq-listed securities, with spreads narrowing an average of 50% following decimalization. These results were consistent with those found in other studies. *See, e.g.*, Bessembinder, 2003, *Trade Execution Costs and Market Quality After Decimalization*, Journal of Financial and Quantitative Analysis, 38(4) (finding narrower average quoted, effective, and realized bid-ask spreads, and lower volatility post-decimalization).

[200] Nasdaq Decimals Report, *supra* note 197 at 2, 33–37. Quoted depth refers to displayed depth at the NBBO whereas cumulative depth measures aggregated depth at various price levels relative to the quote midpoint. Nasdaq noted that the fall in quoted size could be explained, at least in part, by a decline in the use of limit orders after decimals.

[201] Nasdaq noted, however, that the move to decimals did not cause unmanageable increases in message traffic. *Id.*

[202] NYSE Decimals Report, *supra* note 199 at 2, 9.

[203] Other studies examined the effects of decimalization on the NYSE. *See* Bacidore, Battalio, and Jennings, 2003, *Order Submission Strategies, Liquidity Supply and Trading in Pennies on the New York Stock Exchange*, Journal of Financial Markets, 6(3), 337–362 (finding that the average size of non-marketable limit orders fell in the post-decimals period, limit order cancellation rates rose significantly in the post-decimal sample period, and quoted depth fell dramatically). *See also* Chakravarty, Wood, and Van Ness, *Decimals and Liquidity: A Study of the NYSE*, Journal of Financial Research, forthcoming (finding that quoted depth as well as quoted and effective bid-ask spreads declined significantly following decimalization and that the number of trades and trading volume declined significantly).

[204] Securities Exchange Act Release No. 44568 (July 18, 2001), 66 FR 38390 (July 24, 2001).

[205] *See* Letters from Security Traders Association (STA) (1), Wynncroft, Inc. (Wynncroft) (2), Frank Yang (Yang) (3), Dalton Strategic Investment Services (Dalton) (4), Quaker Securities (Quaker) (5), Investor Resources Group (Investor Resources) (6), Sean McGowan (McGowan) (7), Momentum Securities for Electronic Traders Association (ETA) (8), Diamant Investment (Diamant) (9), CHX (10), Advanced Clearing, Inc. (Advanced Clearing) (11), Midwood Securities (12), NYSE (13), Security Traders Association/ECN Subcommittee (STA/ECN) (14), The Rock Island Company (Rock Island) (15), Carl Giannone (Giannone) (16), T. Rowe Price (17), CooperNeff Advisors (CooperNeff) (18), Specialist Association (19), Investment Company Institute (ICI) (20), Securities Industry Association (SIA) (21), Phlx (22), Investment Technology Group, Inc. (ITG) (23), BSE (24), Richard Tsuhara (Tsuhara) (25), Josh Levine (Levine) (26), Knight Trading Group (Knight) (27), J.R. Leming (Leming) (28), Island ECN (Island) (29), The Security Traders Association of New York, Inc. (STANY) (30), ABN Amro Inc. (AAI) (31), Carnes Investment Group (32), and Ameritrade (33). Copies of these letters, as well as a summary of all comments received, may be accessed in the Commission's public reference room under File No. S7–14–01.

[206] *See* Letters from STA (1), Yang (3), Dalton (4), Investor Resources (6), McGowan (7), Midwood Securities (12), NYSE (13), Rock Island (15), Specialist Association (19), and Phlx (22).

[207] *See* Letters from ETA (8), T. Rowe Price (17), ICI (20), SIA (21), ITG (23), Knight (27), and Ameritrade (33).

minimum increment.[208] These commenters suggested that finer increments could improve market efficiency and provide investors with valuable price improvement. They argued that the problems accompanying decimals could be resolved through technology enhancements, rather than through a market structure overhaul.

Commenters' views on the specific questions solicited in the Concept Release are discussed below.

1. Market Depth

Many commenters noted that the narrower quoted and effective spreads that resulted from decimals came at the expense of a material loss of depth at the best displayed bids and offers.[209] They contended that the increase in the number of price points to 100, and the spreading of buy and sell interest across these prices, made it more difficult for market participants to ascertain the price of a particular security and assess their chances of being able to obtain an execution at a particular price. Market professionals complained that they were finding it increasingly difficult to gauge market depth at or near the NBBO and to determine how long it would take to complete an order, thus rendering the NBBO less effective in reflecting true trading interest.[210] These commenters believed that the increase in potential price points that would result from sub-penny pricing would exacerbate the problems with diminished depth and liquidity (*i.e.*, the ability to find a buyer or seller at any given price), undermine the orderliness of the markets, and cast further doubt on the accuracy of price discovery.

One commenter countered these arguments, opining that sub-penny opponents may be motivated more by concerns over broker-dealer profitability (which would be expected to fall as spreads decline) rather than broader policy implications of sub-penny pricing.[211]

Two commenters contended that problems with respect to determining depth and liquidity are caused by limitations in the way quotation data is currently disseminated and that these problems have been magnified with decimals.[212] One of these commenters believed that one way to address concerns over diminished depth and liquidity would be for markets to display more depth of book information.[213] A commenter suggested that the marketplace would adopt new technologies to deliver market data in a format that accurately represents buy and sell interest, and that what this commenter viewed as the inadequacy of the current NBBO-style quote is not a justification for limiting the size of the MPV.[214]

2. Price Clarity and Flickering Quotes

A number of the commenters believed that the conversion to decimals clarified pricing for investors by allowing them to compare prices to buy and sell stocks in dollars and cents, as opposed to dealing with fractions. They contended, however, that sub-pennies would lead to confusing prices by causing quotes to change rapidly or "flicker."[215] They argued that flickering quotes could interfere with investors' understanding of securities prices, impair broker-dealers' efforts to obtain best execution for customers' orders, make it harder to compare execution quality among market centers, and increase the incidence of locked and crossed markets and trade-throughs.[216]

Two commenters that favored sub-penny pricing disputed the arguments of those opposing it.[217] They disagreed with the view that quote flickering is necessarily a negative result, arguing that quickly changing, accurate, timely prices are desirable features of an efficient market. Moreover, these commenters believed that rapidly changing price information can be presented in a comprehensible manner, such as through graphical displays.

3. Execution Priority Rules

The Concept Release also sought comment on the impact, if any, sub-penny pricing would have on the markets' execution priority rules.[218] The majority of commenters believed that "stepping ahead" or "pennying" (*i.e.*, attempting to gain execution priority by improving the best bid by a penny) had increased with the advent of decimals and that this problem would be exacerbated with sub-pennies.[219]

One commenter believed that sub-penny pricing would erode price priority in the markets by encouraging institutions and professional traders to "jump the queue" to achieve priority over pending orders for a marginally better price without taking a meaningful economic risk.[220] Another commenter stated that such activity deters market participants from displaying large orders.[221] Many commenters believed that, to obtain priority, market participants should be required to improve on a quoted price by at least a penny.[222] Another commenter noted that it had performed an analysis on the manner in which sub-penny quoting and trading was used and found that sub-penny quoting and trading was used primarily to step ahead of resting limit orders and undermine the NASD's Manning Interpretation.[223] As a result, in April 2003 that commenter discontinued all clients' ability to enter orders in Nasdaq securities beyond two decimal places, reasoning that virtually no benefit is derived from the quotations and executions on a sub-penny basis.

Another commenter, however, argued that finer increments would make priority jumping more transparent and more efficient.[224] An additional

[208] *See* Letters from CHX (10), STA/ECN (14), Giannone (16), BSE (24), Tsuhara (25), Levine (26), and Island (29).

[209] *See* Letters from STA (1), Wynncroft (2), ETA (8), Advanced Clearing (11), Midwood Securities (12), NYSE (13), Rock Island (15), T. Rowe Price (17), CooperNeff (18), Specialist Association (19), ICI (20), SIA (21), Phlx (22), and Knight (27).

[210] The ICI contended that it was especially difficult to fill entirely at the best displayed prices large orders of mutual funds, pension funds, and other institutional firms, thus resulting in increased transaction costs. The ICI cited, among other studies, Nasdaq's decimal study noting that many market makers indicated that working large institutional orders requires more trades.

[211] See Letter from Island (29).

[212] *See* Letters from Levine (26) and Island (29).

[213] *See* Letter from Island (29). Island noted that it showed its 15 best orders on its system. ICI (20) noted that, if securities were quoted in sub-penny increments, being able to view the top of the book or even the entire book would be insufficient to provide investors with enough information about the trading interest in a particular security because investors could be using fewer limit orders.

[214] *See* Letter from Levine (26).

[215] *See* Letters from STA (1), Dalton (4), Investor Resources (6), Diamant (9), STA/ECN (14), Rock Island (15), Giannone (16), SIA (21), and BSE (24).

[216] *See* Letters from NYSE (13), T. Rowe Price (17), Specialist Association (19), ICI (20), SIA (21), Phlx (22), and BSE (24).

[217] *See* Letters from Levine (26) and Island (29).

[218] Commission and SRO rules provide customer limit orders with priority over specialist and market maker orders at the same price on the exchanges and on Nasdaq. *See*, e.g., 17 CFR 240.11a1–1(T); NYSE Rule 92(b), and NASD's Manning Interpretation (NASD IM–2110–2).

[219] *See* Letters from STA (1), Yang (3), Quaker (5), Diamant (9), Advanced Clearing (11), Midwood (12), NYSE (13), STA/ECN (14), Rock Island (15), Giannone (16), Specialist Association (19), ICI (20), SIA (21), Phlx (22), BSE (24), and Leming (28).

[220] *See* Letter from Specialist Association (19).

[221] See Letter from ICI (20). The ICI noted that there has already been a reduction in the use of limit orders by institutional investors on the exchanges and Nasdaq under decimalization, citing the SRO decimal studies in support. ICI stated that permitting the entry of orders and the quoting of securities in sub-pennies would allow a trader to gain priority over another trader by bidding as little as $.001 more for the same security with almost no risk of loss.

[222] *See* Letters from NYSE (13), Phlx (22), Rock Island (15), Specialist Association (19), ICI (20), and SIA (21).

[223] *See* Letter from Ameritrade (33). *See* Section V.D.2.d. *infra* for a discussion of the Manning Interpretation.

[224] *See* Letter from Levine (26). The commenter noted that when constrained by artificially large increments, market participants tend to enter into private priority jumping arrangements where the

commenter disputed the theory that sub-penny increments would reduce transparency (*i.e.*, the ability to gauge trading interest at a particular price) by discouraging the use of limit orders, as some commenters contended, noting that its volume and the number of limit orders it receives substantially increased after the introduction of decimal pricing, despite the fact that it allows orders to be entered up to three decimal places.[225]

4. Short Sale Regulation

The Concept Release also solicited comment on how a reduction in the minimum pricing increment might impact other price-dependent rules, such as those regulating short sales—the "tick test" of Rule 10a–1 under the Exchange Act[226] and the "bid test" of NASD Rule 3350.[227] The majority of commenters who addressed short sale regulation believed that the rapid trades and flickering quotes that could result if sub-penny pricing were permitted could make compliance with the bid and tick tests more difficult.[228] They noted that, even using automated compliance systems, it would be difficult for traders to effect short sales in volatile markets, and that this would be nearly impossible for human traders in some instances.

5. Quote Rounding

The Concept Release also sought comment on possible scenarios for incorporating sub-penny quotes into the publicly disseminated quote stream. In particular, the Commission sought comment on whether sub-penny quotes should be accepted and rounded to the nearest penny prior to display, or whether the sub-penny quotes should be reflected in publicly disseminated quotes.[229]

Some commenters argued that quoting in sub-pennies should not be allowed, either directly or through a rounding scenario because quoting in sub-pennies would unnecessarily complicate administration of the Order Handling Rules.[230]

In addition, NYSE believed that rounding sub-penny prices to the nearest penny would distort market information. Phlx believed that rounding quotes would increase trade-throughs and locked markets and create uncertainty among investors as to the quality of their executions. It also thought that a rounding indicator attached to the quote would not alleviate these problems.

One commenter argued that, while the Commission should not permit the display of sub-penny increments, mandatory rounding should provide for greater depth at the inside, thus leading to higher transparency, which in turn would have a positive impact on overall execution quality.[231] This commenter believed that, without specific guidelines, each system would round differently, thus making comparison more difficult.[232]

6. Automated Systems

Finally, the Concept Release requested comment on the potential effects that quoting, trading, and reporting securities in increments less than a penny would have on systems capacity. Although a few commenters cautioned that introducing sub-penny trading could have adverse technological impacts on the markets and market participants,[233] many acknowledged that some of the changes needed to facilitate sub-penny trading had already been accomplished with the switch to decimals. Notably, participants in an SIA survey indicated that, during the decimals conversion, most market participants had made adjustments to their automated systems and capacity that could accommodate sub-pennies.[234]

The general consensus of the firms that responded to the SIA survey was that, while redesigning systems and adding capacity to accommodate sub-pennies is technologically feasible, it would require considerable funds and staff time without providing any real benefit to investors or contributing to market efficiency.

Vendors that responded to the SIA survey reported that their display capabilities varied, with four decimal places being a common constraint, although some were limited to two or three decimal places. Capacity was also viewed as an important concern.

Some SROs that responded to the SIA survey indicated that they would need to expand capacity to accommodate sub-penny trading. Others stated that they were not yet ready to handle multiple decimal places, and that moving beyond two decimal places would require major systems redesign.

An ECN countered arguments that moving to sub-pennies would have a detrimental effect on automated systems, stating it had not experienced any capacity problems, even though 40% of its displayed orders were in sub-pennies. That ECN believed that the continual increases in processing power and bandwidth would alleviate any capacity concerns and that any decision on sub-pennies should not be based on

incentive payments are typically not included in the price of the executed orders and thus are hidden from the marketplace. The commenter believed that in efficient markets, competitive forces quickly find an equilibrium that thwarts "parasitic pricing," because "parasites" must compete with one another and ultimately must add information to the marketplace to survive.

[225] *See* Letter from Island (29). Island further argued that it was not even necessary to outbid another market participant to take priority. For example, a market participant could post the highest bid on the NYSE, yet see numerous transactions occur on regional exchanges without receiving an execution, suggesting that trading ahead can currently occur at the same price as a limit order. Island argued that if trading ahead can occur at the same price, the minimum increment becomes irrelevant in terms of discouraging limit orders.

[226] 17 CFR 240.10a–1. The current tick test of Rule 10a–1 under the Exchange Act provides that, subject to certain exceptions, an exchange-listed security may be sold short only: (1) At a price above the immediately preceding reported price (plus tick), or (2) at the last sale price if it is higher than the last different reported price (zero-plus tick).

[227] The "bid test" of NASD Rule 3350 prohibits NASD members from effecting short sales in Nasdaq NMS securities at or below the best bid when the best bid displayed is below the preceding best bid in a security. If there is an "upbid" in a security, *i.e.*, the best bid displayed is above the preceding best bid, there is no restriction on the price that an NASD member can sell an NMS security short. In November 2003, the Commission proposed a new short sale regulation (Regulation SHO) that would, among other things, provide a uniform short sale price test for exchange-listed and Nasdaq securities, wherever traded. The regulation would restrict all short sales to a price at least a penny above the consolidated best bid. Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972 (Nov. 6, 2003) at Part IV. In the release proposing Regulation SHO, the Commission noted that the proposed bid test should offer more short selling opportunities than the current tick test.

[228] *See* Letters from Momentum/ETA (8), Advanced Clearing (11), NYSE (13), Giannone (16), SIA (21), Phlx (22), BSE (24), and Knight (27).

[229] In seeking comment on these scenarios, the Commission stated its desire to reexamine no-action relief the staff had granted that permitted market participants to round quotes in increments below the minimum quoting increment without including an indicator identifying these quotes as having been rounded. *See supra* note 188.

[230] *See* Letters from: NYSE (13), ICI (20), Phlx (22), and Knight (27). On August 28, 1997, the Commission adopted Rule 11Ac1–4 and amendments to Rule 11Ac1–1 under the Exchange Act. *See* Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) (collectively referred to as the Order Handling Rules).

[231] *See* Letter from Advanced Clearing (11). The commenter noted its belief that most orders submitted in sub-penny increments are not rounded by market destinations, and thus transparency in the market is reduced by the non-display of these orders. Furthermore, some ECNs display out to three decimal places and will not accept orders to four decimal places.

[232] *Id.*

[233] *See* Letters from STA/ECN (14), SIA (21), BSE (24), and Knight (27).

[234] *See* Letter from SIA (21). To address the Commission's questions relating to automated systems, the SIA conducted an informal survey of member firms, SROs, clearing organizations, and vendors to determine the industry's readiness to trade and quote securities in sub-pennies.

the system limitations of some industry participants.[235]

D. Nasdaq's Rule Proposal and Petition for Commission Action

1. Proposed Rule Change

On August 5, 2003, Nasdaq filed a proposed rule change that would permit it to adopt a minimum quotation increment of $0.001 for Nasdaq-listed securities.[236] The current minimum quotation increment for those securities is $0.01.[237] In the proposal, Nasdaq states that the existing environment, in which market participants use quote increments ranging from pennies to hundredths of pennies, harms investors by creating a two-tiered market, one for ordinary investors (who may not have access to sub-penny quotes) and another for professionals (who do have access). Nasdaq argues that, unless and until a uniform quote increment is established, it must implement a minimum quote increment of $0.001 to remain competitive with ECNs that permit their subscribers to quote in sub-pennies.

2. Petition for Commission Action

Simultaneous with the proposed rule change, Nasdaq filed a petition for Commission action requesting that the Commission adopt a uniform rule requiring market participants to quote *and* trade Nasdaq-listed securities in a "consistent monetary increment," with the exception of average-priced trades.[238] According to Nasdaq, sub-penny trades represented about 5% of all trades and shares executed on or reported to Nasdaq between 1999 and 2001, but had increased to 16% in the prior year. Nasdaq believes this increase was caused by sophisticated order routing systems that are calibrated to sub-penny increments. Nasdaq states that these systems gather quotes from SROs and ECNs, rank those quotes in increments as small as 1/100th of a cent, and route orders to the best available quotations based upon those rankings. Nasdaq contends that these systems are a principal reason why market makers, ECNs, and other market participants have begun accepting limit orders and displaying quotations in sub-pennies.

a. Two-Tiered Market

In Nasdaq's view, sub-penny quotes disadvantage ordinary investors because such quotes are not reflected in the NBBO data that is disseminated to the public. Moreover, according to Nasdaq, most traditional and electronic brokerage firms that serve retail investors limit their clients to placing orders in whole penny increments.[239] As a result, Nasdaq asserts that smaller investors generally can neither see nor access sub-penny quotes, thereby creating a two-tiered market, one for professional traders and one for average investors.

b. Disparate Quoting and Trading Conventions

Nasdaq further contends that there is a great disparity in quoting and trading conventions among market participants and that these differences, which are not widely known, can disadvantage investors who generally would not be aware of the many differences in the practices for receiving and disseminating quote and trade information. Nasdaq states the following:

- Ordinary investors often are limited to submitting orders in penny increments largely because many prominent online brokerages only accept orders in pennies.
- ECNs and Nasdaq market makers accept and execute orders in sub-penny increments.
- Some ECNs display and execute orders out to three decimal places, and some do so only for stocks priced below $10 per share. Other ECNs accept and execute orders out to four decimal places.
- Market makers generally quote only in penny increments but often offer price improvement to customer orders in sub-penny increments.
- Nasdaq, as a market center, accepts quotes in penny increments and orders in sub-penny increments up to four decimal places, but Nasdaq states that it truncates (or cuts off) the prices of those orders to two decimal places and does not rank or display orders based on sub-pennies. While SuperMontage does not execute or display quotes and orders in sub-pennies, firms that accept orders delivered in penny increments (as opposed to those that accept automatic executions) can respond to those orders by offering sub-penny price improvement. Nasdaq's Automated Confirmation Transaction ("ACT") service accepts trade reports from Nasdaq market participants out to six decimal places.
- Archipelago Exchange (a facility of the Pacific Exchange) truncates orders it receives in sub-pennies and executes in pennies. Other exchanges (which Nasdaq does not name) that trade Nasdaq-listed securities display quotes in penny increments but allow trade reporting in sub-penny increments.
- The exclusive securities information processors (SIPS—Nasdaq for Nasdaq securities and SIAC for exchange-listed securities) disseminate quotes in penny increments, which means that no sub-penny quotes are displayed to the public.
- All major market data vendors, including Reuters, Bloomberg, and ILX, provide quotation data in penny increments.
- Order matching systems such as ITG's POSIT, use sub-penny increments to match customer orders at the midpoint of the bid and ask quotation in stocks with a penny spread and report average-priced trades.[240]
- Order management systems, such as LAVA and Sungard's PowerNet, rank and display quotes and orders in increments up to four decimal places.

c. Stepping Ahead of Limit Orders

Nasdaq also contends that some market participants use sub-pennies to "step-ahead" of displayed quotes and limit orders for an economically insignificant amount, thereby devaluing price priority and reducing the incentive for aggressive quoting. Nasdaq provides an example where the national best bid in Microsoft is 25.12. A trader enters an order to buy 100 shares at 25.121 (Order A) and a second trader then enters an order for 100 shares at 25.1211 (Order B). An order routing system that ranks orders in sub-pennies would give execution priority to Order B. Even though the total value of the trade was $2512.11, Order B would gain execution priority over the best bid for 11 cents and over Order A for only one cent.

Nasdaq states that its internal research on sub-penny pricing supports the conclusion that market participants are deliberately using sub-pennies to gain priority over orders rather than to contribute to legitimate price discovery. Nasdaq states that in March 2003 it analyzed sub-penny pricing behavior

[235] *See* letter from Island (29).

[236] File No. SR–NASD–2003–121.

[237] NASD Rule 4613(a)(1)(B).

[238] *See* Letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission (August 4, 2003) ("Nasdaq Petition").

[239] According to Nasdaq, online brokerages like Ameritrade, TD Waterhouse, Schwab, and E*Trade accept customer orders only in penny increments, whereas direct access firms that cater to day traders and hedge funds typically accept orders in sub-penny increments. *Id.* at p. 4. According to Ameritrade, beginning with the start of decimalization in April 2001, Ameritrade allowed its clients to place orders up to four decimal places on Nasdaq-listed securities but discontinued this practice in April 2003 after determining that its clients were "primarily utilizing sub-penny quoting and trading to step ahead of resting limit orders and undermine the [NASD's] Manning provision." *See* Letter from Ameritrade (33).

[240] *See* ITG's web site for a further description of POSIT (*http://www.itginc.com/products/posit/*).

and determined that 37% of sub-penny prices at the third decimal place (*i.e.*, $0.001) occur at the $0.001 or $0.009 price points and that 43% of sub-penny prices at the fourth decimal place occur at the $0.0001 or $0.0009 price points. Nasdaq concludes that these numbers are statistically significant indicators that market participants use sub-penny prices to gain priority over other orders for the smallest amount possible.

d. Potential Impact on Regulatory Requirements

Nasdaq also contends that sub-penny pricing can complicate compliance with various regulatory requirements, including marketplace customer protection rules, such as the NASD's Manning Interpretation, broker-dealer best execution obligations, and short sale restrictions.

According to Nasdaq, NASD IM–2110–2, the so-called Manning Interpretation, is designed to ensure that broker-dealers protect their customer limit orders by requiring NASD member firms to provide a minimum level of price improvement to incoming orders in Nasdaq-listed securities if the firm chooses to trade as principal with those incoming orders at prices superior to customer limit orders they currently hold. If the firm fails to provide the minimum level of price improvement to the incoming order, it must execute its customer limit orders or it is in violation of Manning. Nasdaq is currently operating a pilot relative to its Manning Interpretation that could be impacted in a sub-penny environment.[241] The Manning pilot requires that before a Nasdaq market maker may interact as principal with (*i.e.*, internalize) an incoming order, it must provide price improvement to the incoming order of at least $0.01 above any customer limit orders that the market maker is holding if any of those limit orders are priced at, or better than, the best market displayed in Nasdaq. If the customer limit orders are priced outside the best market displayed in Nasdaq, the Nasdaq market maker must price improve an incoming order by the next superior minimum quotation increment permitted by Nasdaq. Therefore, if Nasdaq were to change its minimum quoting increment to $0.001 as it has proposed, market makers would be permitted to step ahead of certain limit orders for $0.001. Nasdaq contends that a sub-penny price improvement standard with respect to Manning would not adequately protect investors.

Nasdaq also believes that sub-penny pricing makes it more difficult for broker-dealers to comply with their best execution obligation.[242] Nasdaq contends that in the absence of uniform quoting and trading increments, it is difficult for broker-dealers to conduct the necessary "regular and rigorous" assessment to determine whether they are meeting their best execution obligations. Moreover, Nasdaq believes that decimalization generally and sub-penny pricing in particular likely increases the frequency of price changes (so-called "flickering quotes"), thereby making it more difficult for a broker-dealer to determine whether a particular price is "reasonably available," a key component in the best execution assessment.

Nasdaq further contends that flickering quotes could complicate the administration of NASD Rule 3350, which restricts short selling.[243] Nasdaq states that this rule relies on the most recent bid change to assess whether a particular short sale is legal. Nasdaq contends that sub-penny quoting will render NASD's rule "unmanageable."

Finally, Nasdaq contends that a move to sub-penny pricing will further reduce market liquidity and depth without any economically meaningful offsetting reduction in quoted and effective spreads and will increase market participants' costs.

E. SEC Staff Research on Sub-Pennies

The Commission's Office of Economic Analysis (OEA) conducted research on sub-penny trading and found clustering activity similar to that which Nasdaq discusses in its petition for Commission action.[244] OEA conducted a study of sub-penny trading for the week of April 21–25, 2003, and found:

- Sub-penny trades accounted for 12.9% of trades in Nasdaq-listed issues, 9.8% of trades in Amex-listed issues, and 1.0% of trades in NYSE-listed issues in the sample week.[245] Trades in ETFs that were reported as CSE or Nasdaq executions accounted for the majority of Amex sub-penny trades. Over 40% of all trades in Nasdaq issues reported to CSE (where Island ECN is the dominant player) were in sub-pennies. Most sub-penny trades in NYSE-listed issues were also reported as Nasdaq trades.[246]
- Sub-penny trades cluster at $0.001 (1/10th cent) and $0.009 (9/10th cent) price points. In Nasdaq issues, 25.1% of sub-penny trades executed at a $0.001 price point and 24.3% of sub-penny trades executed at a $0.009 price point, for a combined total of 49.4%. Trades on other tenth-cent sub-penny price points (*e.g.*, those on a price point of $0.004) each accounted for only 5%–7% of sub-penny trades. In contrast, the expected price pattern is uniform increment usage, or clustering on mid-point prices (*i.e.*, $0.005) and larger increments. This uniform increment usage pattern is found in penny usage where clustering occurs on dime and nickel multiples. The sub-penny pattern of clustering on the $0.001 and $0.009 price points is consistent with the use of sub-penny pricing to gain priority over existing quotes or limit orders.[247]
- Another 12% of sub-penny trades occurred at a price increment of $0.0001 (1/100th cent), and about one-half of these trades occurred at the most extreme price points of $0.0001 or $0.0009.
- Overall frequency of sub-penny trades and the level of sub-penny clustering is approximately the same at all price levels. For example, 10.5% of trades in securities priced below $1.00 were executed in sub-penny increments compared to 11.5% of trades in securities priced greater than $60. The fraction of sub-penny trades executed at the $0.001 and $0.009 price points was close to 50% for all price levels. These results suggest that sub-penny prices are generated by proprietary trading algorithms.
- Sub-penny trades occur more frequently for actively traded stocks. In the 20 most active Nasdaq stocks

[241] *See* Securities Exchange Act Release No. 48876 (Dec. 4, 2003), 68 FR 69103 (Dec. 11, 2003) (notice of filing and immediate effectiveness of SR–NASD–2003–180). Unless extended or approved permanently, the Manning pilot would expire on June 30, 2004. If the pilot were to expire, the terms of the Manning Interpretation that were in effect prior to the pilot would apply. Under such terms, market makers would, in certain limited circumstances (*i.e.*, where the spread is one cent), be permitted to price improve by one-half cent without triggering Manning obligations. *See* NASD Notice to Members 97–57. In addition to Manning, a broker-dealer has a best execution obligation with respect to its handling of customer orders.

[242] Generally, that duty requires broker-dealers to seek the most favorable terms reasonably available under the circumstances for a customer's transaction.

[243] *See supra* note 227 for a further description of the operation of NASD Rule 3350.

[244] This study can be accessed in the Commission's public reference room.

[245] The average size of sub-penny trades was 553 shares for Nasdaq-listed securities (compared to 607 shares for trades in pennies), 1,898 shares in NYSE-listed securities (compared to 1,117 shares for trades in pennies), and 1,314 shares in Amex-listed securities (compared to 1,970 shares for trades in pennies).

[246] Because sub-penny trading occurs on ECNs, the resulting executions appear as trade reports on CSE (now NSX), Nasdaq, and NASD's ADF where ECNs report trades.

[247] For example, if the spread in a stock were $10.00 (bid)—$10.01 (offer), a market participant would step ahead of the best bid by bidding $10.001, and step ahead of the best offer by offering $10.009.

(measured by share volume), 22.1% of trades were executed in sub-pennies and sub-penny trades occur less frequently as trading activity declines. Sub-penny clustering on 1s and 9s occur at each trade activity level.

OEA observed that earlier studies suggest that traders tend to use minor price points more often for lower priced securities.[248] OEA concluded that the absence of this relation in the current study suggests that the use of sub-penny pricing for most stocks is more likely related to traders' attempts to gain precedence over competing orders than to legitimate price discovery.

F. Discussion of Proposed Rule

Generally, the Commission believes that competitive forces in the marketplace should determine the prices that market participants may bid or offer for securities. As such, the Commission acknowledges the arguments of the commenters discussed above in response to the Concept Release that, in the absence of a compelling public policy interest, market forces rather than the government should determine the manner in which securities are priced. At the same time, however, in Section 11A of the Exchange Act Congress directed the Commission to facilitate the development of a national market system for securities. In January 2000, the Commission determined that the markets' conversion to decimal pricing was consistent with its obligations under Section 11A because the Commission believed that decimal pricing could benefit investors by "enhancing investor comprehension, facilitating globalization of our markets, and potentially reducing transactions costs, depending on the minimum price variant used." [249] For the most part, that minimum price variant has meant penny pricing.

As discussed above, the implementation of decimals has met the goals the Commission had in ordering it. Decimal pricing is now an accepted component of the U.S. securities markets. Spreads in equity securities are far lower than they were under the outmoded, fraction-based pricing system, thus resulting in reduced trading costs for investors entering orders that are executed at or within the quotes.

In the Commission's view, however, the marginal benefits of a further reduction in the minimum pricing increment are not likely to justify the costs to be incurred by such a move. Indeed, the Commission believes that the markets' experience with sub-penny quoting indicates that the practice, if allowed to persist, could actually harm investors and the markets.

The Commission believes that OEA's research discussed above strongly suggests that much of the trading that currently takes place in sub-pennies is the result of market participants attempting to step ahead of penny-priced limit orders for the smallest economic increment possible. In the Commission's view, it is unlikely that the high rate of sub-penny clustering around $0.001 and $0.009 price points would have occurred in the absence of stepping ahead behavior. Furthermore, as OEA's research suggests, some sub-penny pricing as well as clustering around the 1 and 9 price points also occurred in increments finer than $0.001, which suggests that sub-penny pricing and the resulting stepping ahead activity could be taken to an absurd extreme.[250] When market participants can gain execution priority for an infinitesimally small amount, important customer protection rules such as exchange priority rules and the NASD's Manning Interpretation as currently formulated could be rendered meaningless. Without those protections, professional traders would have more opportunities to take advantage of non-professionals, which could result in the non-professionals either losing executions or receiving executions at inferior prices. If investors' limit orders lose execution priority for a nominal amount, over time, investors may cease to use them, which would deprive the markets of a vital source of liquidity. Therefore, the use of sub-penny pricing could harm investors and the markets.

Moreover, the Commission believes that the increase in flickering quotes that could result from widespread sub-penny pricing could make it more difficult for broker-dealers to satisfy their best execution obligations and other regulatory responsibilities. The best execution obligation requires broker-dealers to seek for their customers' transactions the most favorable terms reasonably available under the circumstances.[251] This standard is premised on the practical ability of a broker-dealer to determine whether a displayed price is or is not reasonably obtainable given the technology available to that broker-dealer. The Commission is concerned that a trend toward widespread sub-penny quoting could make it a practical impossibility for brokers to determine with reasonable certainty whether displayed prices are likely to be available.

The same rationale would also apply with respect to compliance with short selling restrictions. Under a bid test as the Commission has proposed in Regulation SHO and which is the prevailing standard for Nasdaq-listed securities, market participants must be able to determine what was the last prevailing bid to determine whether they may effect a short sale. The more rapidly the quote changes, the more difficult it becomes to make that determination.

Furthermore, the Commission believes that widespread sub-penny quoting could exacerbate a number of the disadvantageous aspects of decimal pricing. For example, sub-penny pricing could decrease depth (*i.e.*, the number of shares) available at the best displayed prices. OEA's research indicates that some market participants already are quoting in pricing increments as narrow as $0.0001. Experience with decimal pricing generally would seem to suggest that further decreases in the quoting increment could lead to further declines in the number of shares available at a given price.[252] Finer slices of liquidity at any given price could lead to higher transaction costs, particularly for institutional investors (such as pension funds and mutual funds) which are more likely to place large orders. These higher transaction costs would likely be passed on to retail investors and others that have assets in funds managed by the institutions. Decreasing depth at the inside could also cause such institutions to rely more on execution alternatives away from the exchanges and Nasdaq, which are designed to help larger investors find matches for large blocks of securities. Such a trend could further fragment the securities markets.

Although sub-penny pricing currently appears, for the most part, to be limited to trading in Nasdaq-listed securities through ECNs and ATSs, Nasdaq's rule proposal, discussed above, effectively would extend sub-penny trading to all securities that are traded through Nasdaq systems, which would include all Nasdaq securities and presumably exchange-listed securities that are traded by Nasdaq market participants

[248] *See, e.g.*, Harris, Larry, "Stock Price Clustering and Discreteness," Review of Financial Studies (1991).

[249] Securities Exchange Act Release No. 42360, 65 FR at 5005.

[250] As noted above, the average sizes for sub-penny trades and penny trades are comparable. *See supra* note 245.

[251] *See* Securities Exchange Act Release No. 37619A, 61 FR at 48322.

[252] As discussed above, both Nasdaq and NYSE found that depth at the inside price declined substantially with the implementation of decimals. *See supra* notes200–202—and accompanying text.

pursuant to unlisted trading privileges.[253]

As Nasdaq states in its petition for Commission action, there currently is no industry standard for trading and quoting increments. Although Nasdaq and the exchanges currently permit quoting in single penny increments, these markets allow trades to be printed in increments below a penny. Although certain online brokers only accept orders priced in one-cent increments,[254] ECNs and Nasdaq market makers accept orders and execute trades in sub-penny increments.[255] While market makers quote through Nasdaq only in penny increments, they may display orders in ECNs in sub-pennies. This lack of uniformity in pricing is not only confusing but it also increases the likelihood that more sophisticated market participants will use the discrepancy in pricing increments as an arbitrage opportunity that is unlikely to be available to less informed investors.[256]

To address the concerns discussed above, the Commission is proposing a rule that would prohibit every national securities exchange, national securities association, ATS (including ECNs), vendor, broker or dealer from ranking, displaying, or accepting from any person a bid or offer, an order, or an indication of interest in any NMS stock in an increment less than $0.01.[257]

The proposed rule would exclude NMS stocks with a share price below $1.00. The Commission excluded low-priced securities from the proposed rule because a sub-penny increment represents a greater percentage of the value of a given share of such securities than it does for higher-priced securities.[258] Below, the Commission seeks comment on whether such an exclusion is desirable, and if so, whether $1.00 per share is the correct measure for low-priced securities.

The proposed rule is intended to prohibit the acceptance, display, or ranking of trading interest in an NMS stock (other than a low-priced security) in an increment below one cent. For example, the rule would prohibit a market maker or specialist from accepting a customer limit order priced in an increment below one cent. It would also prevent the market maker or specialist from displaying its proprietary quote in an increment below a penny whether through any exchange, Nasdaq, ADF, or through an ECN or a vendor.

In addition, the proposed rule would prohibit market participants from ranking orders, quotes, or indications of interest in an NMS stock (other than a low-priced security) that are priced in an increment less than a penny. In other words, the rule is intended to ensure that a market participant can only receive execution priority over standing limit orders or quotes by improving the best displayed price by more than a nominal amount (*i.e.*, by at least a penny per share).[259]

The proposed rule is intended to address the concern that the non-uniform display of sub-penny quotes is creating hidden markets whereby more sophisticated traders can view and access better prices than those available to the general public. The proposal also could mitigate a disincentive to using limit orders (*i.e.*, the prospect that a market participant can gain execution priority by bettering the limit price by an economically insignificant amount).

The proposed rule would not prohibit an exchange or association from reporting or "printing" a trade in a sub-penny increment, as most markets currently permit. Therefore, a broker-dealer could, consistent with the proposed rule, provide price improvement to a customer order in an amount that resulted in an execution in an increment below a penny so long as the broker-dealer did not accept orders that already were priced in increments below a penny.[260]

In addition, the proposed rule would not *per se* prohibit an exchange or association from printing a trade that was the result of a mid-point or volume-weighted pricing algorithm, as long as the exchange or association or its members did not otherwise violate the proposed rule with respect to the trading interest that resulted in the execution. For example, a system that accepted unpriced orders that were then matched at the midpoint of the NBBO would not violate the proposed rule even though resulting executions could occur in share prices of less than one cent. If such a system were operated by an association, exchange, ATS, or broker-dealer, however, and the system accepted orders priced in sub-penny increments and those orders matched against one another in the system, the system operator would have violated the proposed rule by accepting and (possibly) ranking orders in prices below a penny.

The Commission is not proposing to prohibit trading in sub-pennies because it does not believe at this time that trading in sub-penny increments raises the same concerns that sub-penny quoting does. The Commission seeks comments, however, on this and other issues below.

G. General Request for Comment

Question 1. What are the costs and benefits of a prohibition against quoting in increments finer than a penny? Do the benefits of a prohibition justify the costs?

Question 2. Nasdaq in its petition for Commission action and commenters in their responses to the Commission's sub-penny Concept Release identified a number of concerns with sub-penny pricing (*e.g.*, creation of hidden markets, loss of depth and liquidity, and increases in flickering quotes). Have Nasdaq and the commenters that opposed sub-penny pricing accurately stated the likely impact of sub-penny pricing? Are there other concerns with sub-penny pricing that were not mentioned by Nasdaq or the commenters to the Concept Release? If these concerns are warranted, do they justify the prohibition of sub-penny quoting that the Commission has proposed?

In its petition for Commission action, Nasdaq asks the Commission to adopt a rule requiring market participants to

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[253] OEA found that Nasdaq market participants currently report trades in NYSE-listed securities in sub-penny increments. If sub-penny quotes were permitted through SuperMontage, Nasdaq's primary trading system, trading in those securities in sub-pennies could ramp up quickly.

[254] *See, e.g.*, Letter from Ameritrade (33).

[255] *See* Nasdaq Petition, *supra* note 238.

[256] For example, sophisticated market participants with access to those trading venues that permit sub-penny pricing may buy or sell securities at prices that are a fraction of a cent better than would be available through Nasdaq or an exchange that only permits penny pricing. They could then unwind those transactions through Nasdaq or an exchange and make a risk-free profit.

[257] An indication of interest is a non-firm expression of interest to trade at a given price. Although the proposed rule would not apply to options, in the solicitation of comment section below, the Commission seeks comment on whether the proposal should be expanded to apply to options.

[258] The Commission also believes that the $1.00 threshold is an attractive cut-off point for the sub-penny pricing proposal because it is also the level at which SROs begin delisting procedures against issuers, which can coincide with a reduction in trading volume, thereby reducing the economic incentives to quote in sub-pennies. *See, e.g.*, NASD Rule 4310(c)(4) (delisting standards for SmallCap securities) and NASD Rule 4450(a)(5) and (b)(4) (delisting standards for Nasdaq NMS securities). The proposed rule provides that the Commission can grant exemptions from the sub-penny quoting prohibition consistent with Section 36 of the Act. 15 U.S.C. 78mm.

[259] The proposed rule would supplement other protections in place to protect customer limit orders, such as NASD's Manning Interpretation and broker-dealers' best execution obligation.

[260] Such price improvement would also need to be done in a manner that was consistent with the broker-dealer's obligations under other Commission and SRO rules (*e.g.*, best execution and Manning).

quote and trade Nasdaq securities in a consistent monetary increment or MPV. In one respect, the rule that the Commission is proposing would be broader than that requested by Nasdaq in that it would apply to Nasdaq-listed as well as exchange-listed securities. In another respect, however, the Commission's proposal is narrower than Nasdaq's request, in that it would prohibit sub-penny quoting but not trading.

Question 3. What are the advantages and disadvantages of the Commission's proposal versus the rulemaking that Nasdaq proposes? For example, which proposal would be the most likely to address the concerns raised by sub-penny pricing in the most efficient manner? For commenters who believe that sub-pennies raise concerns that should be addressed with regulatory action, are those concerns limited to Nasdaq-listed securities or do they apply to exchange-listed securities also?

Question 4. The Commission's proposal would apply to Nasdaq-listed and exchange-listed securities alike. Are there differences in those types of securities that might warrant different treatment with respect to sub-penny pricing? If so, what are they?

Question 5. Would the rule that the Commission has proposed address the primary concerns that have been raised about sub-penny pricing? If not, are there other steps the Commission should take in addition to (or instead of) the proposed rule to address those concerns?

Question 6. The rule that the Commission has proposed would not prohibit, under certain circumstances, trades to be executed in sub-penny increments (*i.e.*, those resulting from sub-penny price improvement or from mid-point or volume-weighted pricing systems). Should the scope of the rule be expanded to prohibit this type of sub-penny pricing also? If the current rule is approved as proposed, what means would the Commission and responsible SROs need to have in place to discern which sub-penny trades are the result of permissible trading activity and which are not? Are these means currently in place or would new procedures and systems need to be implemented?

Question 7. The rule that the Commission has proposed excludes securities priced below $1.00 per share. Does sub-penny pricing in low-priced securities raise the same concerns that have been raised about such pricing generally? If so, are there other reasons why low-priced securities should nevertheless be excluded from the proposed rule? If commenters believe that low-priced securities should be excluded from the proposed rule, is $1.00 per share an appropriate price level for such an exclusion? Would $2.00 per share be more appropriate? If not, what is an appropriate price level—higher or lower than $1.00? If low-priced securities are properly excluded from the proposed rule, should the exclusion apply as soon as a security drops below $1.00 per share or should the proposed rule require that the securities trade below that level for a certain period of time (*e.g.*, for 10 trading days)? How would investors and other market participants know whether or not a security had met the required test?

Question 8. The proposal currently does not apply to options. Should the Commission extend the proposal to options? Are there differences between options and NMS stocks (to which the proposal currently applies) that would make a prohibition such as the one the Commission is proposing undesirable or infeasible for options? If so, what are these differences?

Question 9. Are there other types of securities that should be excluded from the proposed rule? For example, do ETFs, which are derivatively priced, raise the same concerns that have been expressed with respect to sub-penny pricing generally? If not, should ETFs be excluded from the proposed rule?

Finally, the Commission seeks general comment on the proposal described in this Release as well as Nasdaq's petition for Commission action. In addition to the specific requests for comment included above, the Commission asks commenters to address whether the proposed rule and petition for Commission action would further the national market system goals set out in Section 11A of the Exchange Act. The Commission also requests comment on whether, if it were to adopt the proposed Commission rule, a phase-in period would be necessary or appropriate to allow market participants time to adapt to it. If so, what would be an appropriate phase-in period? The Commission also invites commenters to provide views and data as to the costs and benefits associated with the proposed rule and petition for Commission action. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[261] the Commission also is requesting information regarding the potential impact of the proposed rule on the economy on an annual basis. If possible, commenters should provide empirical data to support their views.

[261] Pub. L. 104–121, 110 Stat. 857.

H. Paperwork Reduction Act

The Commission does not believe that proposed Rule 612 under the Exchange Act contains any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended, but the Commission encourages comments on this point.[262]

I. Consideration of Costs and Benefits

Under proposed Rule 612 market participants would be prohibited from accepting, ranking, or displaying orders, quotes, or indications of interest in a pricing increment finer than a penny in NMS stocks, other than those with a share price below $1.00. The Commission has identified the benefits and costs as described below and encourages commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs or benefits. Specifically, the Commission requests data to quantify each of the costs and the value of each of the benefits identified. The Commission also seeks estimates and views regarding each of the identified costs and benefits of the proposal for particular types of market participants and any other costs or benefits that may result from the adoption of the proposed rule.

1. Benefits

In carrying out its oversight of the national market system, the Commission seeks to serve the interest of investors by adopting rules designed to ensure that securities transactions can be executed efficiently, at prices established by vigorous and fair competition among market centers. The Commission believes that the markets' conversion to decimal pricing has benefited investors by, among other things, clarifying and simplifying pricing for investors, making our markets more competitive internationally, and reducing trading costs by narrowing spreads. The Commission is concerned, however, that if the MPV decreases beyond a certain point, some of the benefits of decimals could be sacrificed. At the same time, some of the negative impacts associated with the decimal conversion could be exacerbated. The proposed rule restricting the use of sub-pennies could bring numerous benefits, as discussed below. The Commission requests comments on the benefits identified below and any benefits of the proposal we may not have identified.

a. Preserve Price Clarity

The conversion to decimals clarified pricing for investors by allowing them

[262] 44 U.S.C. 3501 *et seq.*

to compare securities in dollars and cents rather than fractions. Quotations in sub-pennies, however, have the potential to undercut price clarity by forcing market participants to choose quickly between slightly different and rapidly changing prices that could be located in different markets. Prohibiting sub-penny quoting could reduce the incidence of such flickering quotes which can impair broker-dealers' efforts to fulfill their best execution obligations by making it harder to determine whether particular prices are reasonably available.

b. Enhance Market Transparency

Market transparency, the dissemination of meaningful quote and trade information, assists investors in making informed order entry decisions and enhances broker-dealers' ability to meet their best execution duties. The Commission has been particularly concerned about the development of so-called "hidden markets," in which more sophisticated traders can view and access quotations in sub-pennies at prices superior to the quotation information available to the general public. The Commission's proposal could enhance transparency by mandating that NMS stocks trade in prices displayed and readily accessible to the general public. In doing so, the proposed rule could help to eliminate the current two-tiered structure, one for professional traders and one for average investors.

c. Enhance Market Depth

For investors and other market participants to make use of the price information provided by the consolidated quotation systems, there needs to be meaningful information available concerning depth, the amount of buy and sell interest available at any given price. As the MPV is reduced, the depth available for any given security may become disseminated over more price points. In addition, smaller increments may increase the risk for investors placing limit orders, particularly large limit orders, by allowing one market participant to gain priority over the limit order without making an economically significant contribution to the price of the security. This could in turn have a negative impact on depth, as traders become reluctant to post limit orders. A resultant impact could be increased transaction costs associated with executing orders, particularly large orders. The Commission's proposal could benefit investors by helping, in conjunction with other rules designed to protect customer limit orders, to ensure that a market participant can only receive execution priority over standing limit orders or quotes by improving the best displayed price by something more than a nominal amount. The proposed rule also could help to mitigate a disincentive to using limit orders (*i.e.*, the prospect that a market participant can gain execution priority by bettering the limit price by an economically insignificant amount) and therefore could benefit the markets by increasing liquidity, depth, and transparency.

2. Costs

The Commission recognizes that there may be costs involved with the proposal. A prohibition against displaying orders, quotes, or indications of interest in sub-pennies by market participants could lead to a removal of better pricing of securities from the market. The restriction on the use of sub-penny quoting could decrease the potential for narrower spreads in markets that might have chosen to permit sub-penny pricing because there would be fewer potential price points. Market participants, particularly subscribers of ECNs that permit sub-penny quoting, could be adversely affected by the proposed rule because the proposal would diminish their ability to gain execution priority over standing limit orders based on smaller quote changes. In other words, under the proposal, an ECN subscriber would be required to improve the best prevailing quote by at least a penny to gain execution priority. The Commission requests comment on each of the potential costs of the proposed rule identified below and any costs not described here. The Commission encourages commenters to provide data to quantify these costs.

a. Pricing

The Commission recognizes that the proposed rule would impose some costs, namely on investors and broker-dealers executing orders either for customers or their proprietary accounts. In particular, restricting the ability of market participants to display, rank, or accept orders in sub-pennies could prevent investors, or broker-dealers executing orders on behalf of investors, from executing their orders at better prices. We believe that currently sub-penny use is limited primarily to professional traders. Going forward, market participants that currently use sub-penny price increments and those that might use them if they were permitted could incur opportunity costs by being precluded from quoting in sub-pennies.

b. Spreads

The bid-ask spread, the difference between what the buyer is willing to pay for the security and the seller's asking price, might not be as narrow as it otherwise could be in those markets that might have decided to permit sub-penny quoting.

c. Business Models

As indicated in the OEA Study, sub-penny quoting currently is most prevalent in Nasdaq-listed securities and in trading of ETFs where ECNs play a more dominant role. As a result, some market participants, specifically ECNs, who have been able to utilize business models that achieve execution priority by improving prevailing prices by a sub-penny increment might be adversely affected by the proposed rule.

d. Automated Systems

The restriction on the use of sub-pennies could have an adverse technological impact on market participants. The Commission recognizes that the proposed rule could require quoting market participants, national securities exchanges, and national securities associations that currently are capable of accepting and displaying orders in sub-pennies to incur costs by reprogramming their systems to stop these orders from entering.

J. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.[263] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when adopting rules under the Act, to consider the impact such rules would have on competition.[264] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission has considered the proposed rule in light of these standards and preliminarily believes that the proposed rule will not impose a burden on competition not necessary or appropriate in furtherance of the

[263] 15 U.S.C. 78c(f).

[264] 15 U.S.C. 78w(a)(2).

purposes of the Exchange Act. To the contrary, by preserving the benefits of decimalization, guarding against the less desirable effects of further reducing the MPV, and addressing the growing number of sub-penny quotes that are neither displayed nor readily accessible to the general public, proposed Rule 612 may promote fair and vigorous competition. Although we acknowledge that the proposed rule would, in some circumstances, prevent market participants from offering marginally better prices, the Commission is concerned that sub-penny quoting may be used more as a means for market participants to step ahead of competing limit orders for an economically insignificant amount to gain execution priority than as an extrinsic expression of trading interest.

The Commission believes that the proposed rule would assist broker-dealers in evaluating and complying with their best execution obligations, as well as other rules that operate off a minimum increment. The Commission also believes that the proposed rule would enhance depth and transparency by preventing trading interest from being spread across an increasing number of price points. It also would prevent market participants from gaining priority over a standing limit order without making an economically significant contribution to the price of a security. In these respects, the proposed rule would encourage market participants to use limit orders, an important source of liquidity. Accordingly, the proposed rule may promote market efficiency, competition, and capital formation. In addition, the proposed rule would also bolster investor confidence by ensuring that their orders, especially large orders, can be executed without incurring large transaction costs. This increase in investor confidence should also promote market efficiency, competition, and capital formation.

The Commission believes that the proposed rule would establish common quoting conventions that would increase transparency in the markets. Moreover, the Commission believes that the proposed rule would encourage interaction between the markets and reduce fragmentation by removing impediments to the execution of orders between and among markets. The increased transparency in the markets and reduction of fragmentation between the markets may bolster investor confidence, thereby promoting capital formation.

The Commission requests comment on whether the proposed rule would promote efficiency, competition, and capital formation.

K. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [265] we must advise the Office of Management and Budget as to whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- A significant adverse effect on competition, investment, or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed regulation on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

L. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA), in accordance with the provisions of the Regulatory Flexibility Act (RFA),[266] regarding the proposed Rule 612 under the Exchange Act.

1. Reasons for the Proposed Action

The Commission believes that while the conversion from fractions to decimals benefited investors by clarifying and simplifying pricing for investors, making our markets more competitive internationally, and reducing trading costs by narrowing spreads, these benefits could be sacrificed by decreasing the MPV from a penny to pricing increments finer than a penny. The Commission is particularly concerned that the growing trend in the industry, particularly among ECNs, to display quotations in their proprietary systems in sub-pennies is creating so-called "hidden markets," in which more sophisticated traders can view and access quotations in sub-pennies at prices superior to the quotation information available to the general public. In addition, Nasdaq has recently filed a proposed rule change to permit it to adopt a minimum quotation increment of $0.001 for Nasdaq-listed securities, while simultaneously also filing a petition for Commission action in which it asks the Commission to establish a uniform quoting and trading increment for securities.

The Commission thus believes that this would be an opportune time to address these issues by proposing a uniform standard of quoting in NMS stocks. The Commission is thus proposing to prohibit any vendor, exchange, association, broker-dealer, or ATS (including ECNs) from accepting, ranking, or displaying quotes, orders or indications of interest in NMS stocks in sub-penny increments.

2. Objectives

The proposed rule is designed to fulfill several objectives. Proposed Rule 612 seeks to promote transparency by eliminating what may be resulting in a two-tiered system whereby broker-dealers are able to view quotations in sub-pennies that are not displayed or readily available to the general public. The proposed rule is also designed to prevent widespread quoting in sub-pennies, which could harm the markets and investors, by undermining a number of the benefits of decimalization. In particular, sub-penny quotes could impair broker-dealers' efforts to meet their best execution obligations, and interfere with investors' understanding of securities prices. In addition, the proposed rule is designed to enhance depth by preventing quotations from being spread across an increasing number of price points, while also encouraging the use of limit orders, an important source of liquidity, by preventing competing market participants from stepping ahead of limit orders for an economically insignificant amount.

3. Legal Basis

Pursuant to the Exchange Act and, particularly, Sections 3(b), 5, 6, 11A, 15, 15A, 17(a) and (b), 19, 23(a), and 36 thereof, 15 U.S.C. 78c(b), 78e, 78f, 78k–1, 78o, 78mm, 78q(a) and (b), and 78w(a), the Commission proposes to adopt new Rule 612.

4. Small Entities Subject to the Rule

The proposed rule would apply to any national securities exchange, national securities association, ATS, vender, or broker or dealer. ATSs that are not registered as exchanges are required to register as broker-dealers. Accordingly, ATSs would be considered small entities if they fall within the standard for small entities that would apply to broker-dealers.

The proposed rule would prohibit these entities from accepting, ranking or

[265] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 USC, 15 U.S.C. and as a note to 5 U.S.C. 601).

[266] 5 U.S.C. 603.

displaying orders, quotes, or indications of interest in a pricing increment finer than a penny in NMS stocks, other than those with a share price below $1.00. The proposed rule would apply to a wide variety of market participants. Each is discussed below.

a. National Securities Exchanges and National Securities Association

None of the national securities exchanges is a small entity as defined by Commission rules. Paragraph (e) of Exchange Act Rule 0–10 [267] states that the term "small business," when referring to an exchange, means any exchange that has been exempted from the reporting requirements of Exchange Act Rule 11Aa3–1. There is one national securities association, which is not a small entity as defined by 13 CFR 121.201.

b. Broker-Dealers

Commission rules generally define a broker-dealer as a small entity for purposes of the Exchange Act and the RFA if the broker-dealer had a total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and the broker-dealer is not affiliated with any person (other than a natural person) that is not a small entity.[268] The Commission estimates that as of 2002, there were approximately 880 Commission-registered broker-dealers that would be considered small entities for purposes of the statute that would be required to comply with the proposed rule's provisions regarding access to quotations and quotation standardization.

c. Vendors

A vendor is defined in Exchange Act Rule 11Aa3–1(a)(11) as any securities information processor engaged in the business of disseminating transaction reports or last sale data with respect to transactions in reported securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an ECN, moving ticker or interrogation device. Paragraph (g) of Exchange Act Rule 0–10 states that the term "small business," when referring to a securities information processor, means any securities information processor that: (1) Had gross revenues of less than $10 million during the preceding fiscal year (or in the time it has been in business, if shorter); (2) Provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) Is not affiliated with any person (other than a natural person) that is not a small business or small organization under this section. The Commission estimates that there are approximately 80 vendors but only 20% of these or 16 are considered small entities. The Commission seeks comment on whether these estimates are accurate.

5. Reporting, Recordkeeping, and Other Compliance Requirements

Proposed Rule 612 would not impose any new reporting, recordkeeping or other compliance requirements on market participants that are small entities.

6. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap or conflict with the proposed rule.

7. Significant Alternatives

Pursuant to Section 3(a) of the RFA,[269] the Commission must consider the following types of alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the proposed rule, or any part thereof, for small entities.

The primary goal of the proposed rule is to provide a uniform pricing increment for NMS stocks. As such, we believe that imposing different compliance or reporting requirements, and possibly a different timetable for implementing compliance or reporting requirements, for small entities could undermine the goal of uniformity. In addition, we have concluded similarly that it would not be consistent with the primary goal of the proposal to further clarify, consolidate or simplify the proposed rule for small entities. The Commission also does not believe that it is necessary to consider whether small entities should be permitted to use performance rather than design standards to comply with the proposed rule because the rule already proposes performance standards and does not dictate for entities of any size any particular design standards (*e.g.*, technology) that must be employed to achieve the objectives of the proposed rule. The Commission also preliminarily believes that it would be inconsistent with the purposes of the Exchange Act to specify different requirements for small entities or to exempt broker-dealers from the proposed rule.

8. Request for Comments

The Commission encourages written comments on matters discussed in the IRFA. In particular, the Commission requests comments on (i) the number of small entities that would be affected by the proposed rule; (ii) the nature of any impact the proposed rule would have on small entities and empirical data supporting the extent of the impact; and (iii) how to quantify the number of small entities that would be affected by and/or how to quantify the impact of the proposed rule. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule is adopted, and will be placed in the same public file as comments on the proposed rule itself. Persons wishing to submit written comments should send three copies to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–10–04. Comments submitted by e-mail should include this file number in the subject line. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted letters also will be posted on the Commission's Internet web site (*http://www.sec.gov*).

VI. Market Data Proposal

A. Introduction

The Commission is proposing to amend the rules and joint industry plans for disseminating market information to the public. Pursuant to these arrangements, participants in the U.S. markets have real-time access to the best quotes for and trades in the thousands of stocks that are listed on a national securities exchange or Nasdaq. For each security, this information is disseminated on a consolidated basis. Quotes and trades are continuously collected from the many different market centers (*i.e.*, exchanges, market makers, and ATSs) that simultaneously trade a security and then disseminated to the public in a single stream of

[267] 17 CFR 240.0–10.

[268] 17 CFR 240.0–10(c).

[269] 5 U.S.C. 603(c).

information. Consolidated market information has been an essential element in the success of the U.S. securities markets. It is the principal tool for assuring the transparency of buying and selling interest in a security, for addressing the fragmentation of trading among many different market centers, and for facilitating the best execution of investor orders by their brokers.

The arrangements for disseminating market information were developed in the 1970's when Congress enacted Section 11A of the Exchange Act, mandating the creation of the NMS. To assure the public availability of market information, the Commission adopted Rules 11Aa3–1, 11Ac1–1, and 11Ac1–2 under the Exchange Act. The SROs comply with these rules by participating in three joint industry plans ("Plans").[270] Pursuant to the Plans, three separate networks disseminate consolidated market information for NMS Stocks: (1) Network A for securities listed on the NYSE, (2) Network B for securities listed on the Amex and other national securities exchanges, and (3) Network C for securities traded on Nasdaq.[271] For each security, the data includes (1) an NBBO with prices, sizes, and market center identifications,[272] (2) a montage of the best bids and offers from each SRO that includes prices, sizes, and market center identifications, and (3) a consolidated set of trade reports in the security. The Networks establish fees for this data, which must be filed for Commission approval. In 2003, the Networks collected $424 million in revenues derived from market data fees and, after deduction of Network expenses, distributed $386 million to their individual SRO participants.[273]

As the equity markets evolved in recent years, strains began to develop in these market data arrangements, particularly with respect to setting fees for the data and allocating revenues to SROs. In December 1999, the Commission published a concept release on market information fees and revenues.[274] It requested public comment on a wide range of issues, including (1) a potential cost-based approach for evaluating the reasonableness of fees, (2) new criteria for distributing Network net income to SROs, (3) increased Plan and SRO disclosure, and (4) improved Plan governance, administration, and oversight. In response, the Commission received many comments that addressed market data arrangements in great depth, but also reflected serious divisions in the securities industry over how best to regulate market information.

To help resolve these divisions, the Commission established an Advisory Committee on Market Information ("Advisory Committee") in the summer of 2000. The Advisory Committee, chaired by Professor Joel Seligman, was given a broad mandate to explore both fundamental matters, such as the benefits of price transparency and consolidated information, and practical issues, such as the best model for collecting and disseminating market information. The Advisory Committee issued its report in September 2001.[275] It made a variety of recommendations, including (1) retaining price transparency and consolidated market information as core elements of the U.S. securities markets, (2) permitting market centers to distribute additional information, such as depth of limit order book, free from mandatory consolidation requirements, (3) adopting a "competing consolidators" model of data dissemination, (4) broadening governance of the Plans through a non-voting advisory committee, and (5) rejecting a cost-based approach for reviewing fees.

Today, the Commission is proposing amendments that would implement most of the Advisory Committee recommendations. In particular, the amendments are intended to retain the core benefits of the current rules—price transparency and consolidated information—while enhancing their fairness and efficiency. To this end, the amendments would authorize the independent distribution of additional data by individual market centers, as well as establish uniform standards for the terms on which such is data is distributed. Rule 11Ac1–2 (proposed to be redesignated as Rule 603 of Regulation NMS), which requires the consolidated display of information, would be revised to streamline its requirements and to ease its burden of compliance. The amendments also would broaden participation in Plan governance to help assure that interested parties other than SROs have an opportunity to be heard. For the reasons discussed in Section VI.B.2 below, however, the Commission has decided not to propose the adoption of a competing consolidators model for market data dissemination.

Finally, today's proposal is intended to address the serious economic and regulatory distortions caused by the current Plan formulas for allocating Network net income to the SROs. The formulas currently are based solely on the number of trades or share volume reported by an SRO. They therefore do not directly reward those market centers that generate the highest quality quotes—*i.e.*, those quotes that have the best prices and the largest sizes that contribute the most to price discovery. Moreover, the exclusive focus on trade reporting has distorted SRO competition and created incentives for "print facilities," "wash" trades and "shredded" trades solely to maximize market data revenues.[276] The proposed new formula would adopt a broad-based measure of an SRO's contribution to a Network's data stream. The new allocation formula, along with the other amendments proposed today, is intended to address those elements of the current market data arrangements that are most in need of reform, while retaining for investors the vitally important benefits of price transparency and consolidated information.

B. Consideration of Alternative Models

Since receiving the Advisory Committee Report, the Commission has undertaken an extended review of alternative models for disseminating market information to the public. The current model offers many benefits to investors and other information users, particularly with respect to the quality

[270] The three joint-industry plans are (1) the CTA Plan, which is operated by the Consolidated Tape Association and disseminates transaction information for exchange-listed securities, (2) the CQ Plan, which disseminates consolidated quotation information for exchange-listed securities, and (3) the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for Nasdaq-listed securities. The last restatements of the CTA Plan and the CQ Plan were approved in 1996. *See* Securities Exchange Act Release No. 37191 (May 9, 1996), 61 FR 24842 (File No. SR–CTA/CQ–96–1). The amended versions of the CTA Plan and the CQ Plan were filed as attachments to File No. SR–CTA/CQ–96–1, which are available in the Commission's Public Reference Room. The Nasdaq UTP Plan was last published in its entirety in 2001. *See* Securities Exchange Act Release No. 44822 (September 20, 2001), 66 FR 50226 (File No. S7–24–89). There have been several subsequent amendments to the Plans; the Plans have not been republished in this connection.

[271] Proposed Rule 600 under Regulation NMS defines the term "NMS Stock" to mean securities that are covered by the Plans.

[272] Proposed Rule 600 under Regulation NMS defines the term "national best bid and national best offer."

[273] *See infra*, section VI.C.1 (table setting forth revenues, expenses, and allocations of net income for Networks A, B, and C).

[274] Securities Exchange Act Release No. 42208 (Dec. 9, 1999), 64 FR 70613 ("Concept Release").

[275] Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (September 14, 2001) (available at *http://www.sec.gov*) ("Advisory Committee Report"). The Advisory Committee Report includes a comprehensive description of the arrangements for disseminating market data to the public, including the terms, fees, and revenues of the Plans.

[276] *See infra* section VI.C.1.

of information disseminated by the three Networks. These Networks have established a solid record over the years for disseminating information that is accurate and reliable. Moreover, the Networks assure that the best prices offered by all significant market centers trading a particular security are readily available from a single source. The most significant weakness of the current model, however, is that it affords little opportunity for market forces to determine a Network's fees, or the allocation of those fees to a Network's SRO participants. The Networks are the exclusive processors of consolidated information for NMS Stocks, and the consolidated display requirement necessarily means that all users of market information must purchase the Networks' data at the Networks' fees.

The Commission's review has focused on three alternatives to the current model: (1) A deconsolidation model recommended by a minority of the Advisory Committee; (2) a competing consolidators model recommended by the majority of the Advisory Committee; and (3) a hybrid model that would have retained a consolidated NBBO, but deconsolidated trades and all quotes other than the NBBO. The primary goal of each alternative is to introduce greater competition and flexibility into the dissemination of market data. Each, however, appears to have significant drawbacks. The Commission is discussing its analysis of these models to inform the public of the basis of its decision not to propose one of the alternative models and to offer the public an opportunity to comment on the issue.

At the outset, it is important to recognize the difficulties involved in attempting to choose the best available model. No matter which of the three alternatives is considered, serious trade-offs of benefits and drawbacks must be accepted. In particular, there is an inherent tension between the objectives of assuring price transparency and the public availability of market information, which is are fundamental objectives of the Exchange Act,[277] and the objective of expanding the operation of market forces with respect to data fees and revenue allocation. The Commission's primary goals in resolving these competing objectives can be divided into three broad categories: (1) Maintaining the quality of information that is disseminated to the public; (2) assuring the reasonableness of fees that would preserve the wide public availability of market information; and (3) improving the distribution of fee revenues to reward those SROs that contribute the most to public price discovery. The following discussion reflects these goals.

1. Deconsolidation Model

A minority of the Advisory Committee recommended a deconsolidation model,[278] which would eliminate the requirement that vendors and broker-dealers provide consolidated data to their customers. As a result, the Plans and Networks would no longer be necessary. Each market center would be required to distribute its own information directly to multiple vendors and brokers, and would establish its own fees for the information. Investors and other users (including other market centers) could refrain from purchasing a market center's data if they did not believe its value was worth the fee. The strength of this model is the maximum flexibility it allows for competitive forces to determine data products, fees, and SRO revenues.

The deconsolidation model's most significant drawback, however, is the risk of confusion and harm to retail investors. Currently, retail investors are able, when making a trading or order-routing decision, to assess prices and evaluate the best execution of their orders by reviewing data from a single source. Because of the consolidated display requirement, they are assured that the data they receive reflects the best quotes and most recent trade price for a security, no matter where such quotes and trade are displayed in the NMS. If the consolidated display requirement were eliminated, retail investors would need to monitor the quality of the data disseminated by brokers and vendors. These brokers and vendors simultaneously could be displaying a variety of "best" quotes and "last" trade prices for a single security. Although some retail investors might have the time, inclination, and knowledge to sort through these issues, many likely would not.

Retail investors should not be required to become experts on market structure to participate directly in the equity markets with confidence that they will receive a fair deal. The Commission believes that assuring retail investors ready access to consolidated prices is a vital benefit of the current model of data dissemination. In addition, the consolidated stream of best quotes and trades for a security is the single most important tool for unifying the many different market centers that simultaneously trade NMS Stocks into something that truly can be called a national market system. A substantial majority of the Advisory Committee affirmed its support for the consolidated display requirement.[279]

A second serious drawback to the deconsolidation model is the problem of market power. The quote and trade information from a dominant securities market may be so necessary that it can charge monopoly-like fees for its information. High fees could curtail access to this market information, harming some users of the information. In turn, these fees could prompt calls for active rate regulation. In light of the potential investor confusion and market power drawbacks, the Commission has decided not to propose an alternative model that would eliminate the consolidated display requirement and compromise the benefits it provides.

2. Competing Consolidators Model

A majority of the Advisory Committee recommended the adoption of a model with competing consolidators.[280] This model would retain the consolidated display requirement, but the Plans and Networks with their central processors would no longer be required. Instead, each SRO would be allowed to separately establish its own fees that are not unreasonably discriminatory, to separately enter into and administer its own market data contracts, and to provide its own data distribution facility. Any number of data vendors or broker-dealers ("competing consolidators") could purchase data from the individual SROs, consolidate the data, and distribute it to investors and other data users.

The Advisory Committee identified four primary benefits that might result from implementation of this model. First, it believed that market participants would have a greater ability to innovate. Dissolution of the Plans' joint governance structure might allow for modifications to occur more quickly in response to new technologies and market opportunities. Second, it believed that dismantling the Plans would lead to ancillary gains. Rather than acting in concert on market data matters, SROs would no longer have the burdens associated with joint administration, along with potential antitrust exposure. Third, explicit information sharing arrangements imposed by the Plans on their participants would be eliminated. The Committee believed that the elimination

[277] Exchange Act Section 11A(a)(1)(C)(iii).

[278] Advisory Committee Report, *supra* note 275, section VII.B.1.

[279] Advisory Committee Report, *supra* note 275, section VII.B.1.

[280] Advisory Committee Report, *supra* note 275, section VII.C.2.

of this artificial cooperation among competitors could enhance the forces of competition. Fourth, the arrangements under which market data revenues are allocated among Plan participants would be eliminated. Because each market separately would establish and collect its own fees, intermarket competition could be enhanced.

The Commission has considered carefully the merits of the competing consolidators model. It has decided not to propose the model for adoption, however, because it does not believe that the potential benefits of the model are sufficient to justify the model's serious drawbacks. First, the use of multiple consolidators necessarily entails a risk of loss of uniformity in the data that is distributed to the public. The Advisory Committee was fully aware of this risk and specifically discussed four types of quality problems. These related to sequencing of information, validation tolerances, capacity, and data protocols and formats. The Advisory Committee believed, however, that such problems could be overcome. The Commission agrees that the potential severity of these problems could be limited, but remains concerned about the risk that data quality could be compromised. In addition, switching to a competing consolidators model could lead to an increase in processing costs caused by having many consolidators perform tasks that currently are performed by a single processor per Network. Such costs ultimately would be borne by investors and other data users.

Another significant drawback of the competing consolidators model is that it would not introduce any additional market forces into the setting of data fees and the receipt of revenues by SROs. To comply with the consolidated display requirement, all vendors and broker-dealers acting as competing consolidators would have no choice but to obtain data from each of the SROs that trade a security. The fees set by the SROs for their data would be filed for Commission approval. Over the years, the Commission primarily has relied on the ability of the Networks to forge a broad industry consensus supporting their fees before they are filed for Commission approval.[281] If the competing consolidators model were adopted, this consensus underlying a single fee for a Network's stream of data would be lost. In reviewing the fees of individual SROs, the Commission could be called upon to resolve a host of difficult issues raised by commenters on the fees, particularly if the new fees set by all of the SROs collectively added up to a substantial increase over the total fees currently charged by the Networks. The Advisory Committee did not support the primary criterion that the Commission discussed in its Concept Release—that an SRO's data fees should be reasonably related to the SRO's costs to generate and disseminate the data. The Committee believed that a cost-based standard would be unwise and ultimately prove unworkable. It did not, however, offer an alternative objective criterion, nor is the Commission aware of such a criterion, that could be used to resolve fee disputes in an even-handed fashion.

In summary, the most significant potential benefits of the competing consolidators model would inure most directly to the SROs, which no longer would be required to act jointly through the Plans. Investors and other data users, however, would bear the most significant potential risks of switching to a new model—higher fees for lower quality information. The Commission therefore has decided not to propose the competing consolidators model for adoption.

3. Hybrid Model

Finally, the Commission considered a "hybrid" approach that would have retained the key elements of the current model (*e.g.*, the consolidated display requirement, Plans, and Networks) for quotes representing the NBBO, but deconsolidated all trade reporting and all quotes other than the NBBO. Given that the range of data disseminated by the Networks would be cut back significantly, the fees for Network data also would be cut back, by as much as 75% for example. The remaining net income of a Network could be distributed to SROs pursuant to a revised allocation formula analogous to the one proposed in Section VI.C.2 below. All other data currently disseminated by the Networks—all trades and the best bids and offers from individual SROs that do not represent the NBBO—would be deconsolidated. Each SRO would distribute its data separately, as was discussed above with respect to the deconsolidation model. A variant of this hybrid approach would provide a slimmed-down NBBO, with only the best prices and little other information, which would be distributed by the Network for the cost of collecting, processing, and disseminating this reduced NBBO.

The most significant strength of the hybrid model is that it potentially would preserve a baseline level of consolidated data most needed by retail investors—the NBBO—while at the same time affording a much greater opportunity for market forces to determine the fees for trades and non-NBBO quotes of the individual SROs. All investors would continue to have access to the NBBO for purposes of making trading decisions and evaluating the best execution of their orders. For other data, the SROs would be free to establish their own fees, subject to Commission approval. In the absence of a consolidated display requirement, investors and data users would be free to not purchase an SRO's data if they believed its value did not justify the fee.

The hybrid model, however, suffers from many of the significant drawbacks of the other alternatives. First, as discussed above, issues relating to the quality of data would need to be addressed, such as the problem of preserving uniformity when data is disseminated by many different processors. Perhaps most important, however, is the issue of whether market forces could be relied upon to assure reasonable fees for market data that would preserve its wide availability. As discussed previously, an SRO with a significant share of trading in NMS Stocks potentially could exercise market power in setting fees for its data. Few investors could afford to do without the best quotes and trades of an SRO that is dominant in a significant number of stocks. Therefore, instead of introducing greater competitive forces into the fee-setting process, the hybrid model could embroil the Commission in highly contentious disputes when a dominant SRO's fees were filed for approval. Moreover, as noted above in the context of the competing consolidators model, there does not appear to be any widely-accepted, objective, and workable standard for resolving such disputes in an evenhanded fashion.

The Commission therefore has decided not to propose the hybrid model for adoption. At its heart, this decision is based on the Commission's belief that investors and other data users are the most significant beneficiaries of the current model. They receive high-quality data at affordable fees, and must only deal with one administrator and processor per Network to obtain a complete set of the best quotes and trades from all SROs. In contrast, the significant drawbacks of the current model are experienced most directly by the SROs and other industry participants. Rather than switch to a new model and risk compromising the benefits currently enjoyed by investors, the Commission has chosen to propose specific solutions to the most pressing

[281] *See* Concept Release, *supra* note 274, section III.C.

and serious problems with the current model.

The Commission requests comment from the public on its evaluation of the relative strengths and weaknesses of the current model and of the various alternatives. In particular, are investors and other information users relatively satisfied with the current products and fees offered by the Networks? If not, would investors and users fare better under one of the alternative models considered by the Commission, or under another type of model? How serious are the data quality issues that might arise when multiple processors individually and simultaneously collect and disseminate data for the same security from many different market centers? If the Commission adopted a partly or fully deconsolidated model, would market forces alone be sufficient to establish fees that would assure the wide availability of data, or would the Commission need to play an active role in reviewing fees? What standards would be available to guide the Commission in reviewing the fairness and reasonableness of fees?[282] Are such standards objective and workable, or would they require the exercise of considerable discretion by the Commission?

C. Allocation of Network Net Income

The Commission is proposing an amendment to the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan that would change the current formulas for allocating the Plans' net income to their SRO participants. The new formula is intended to establish a more broad-based measure of an SRO's contribution to a Network's data stream than is provided by the current formulas.[283]

1. Current Plan Formulas

The current allocation formulas for the Networks' distributable net income are based on the number or share volume of an SRO's reported trades in Network securities. Network A and Network B allocate net income based solely on the number of trades reported by an SRO.[284] Network C allocates net income based on an average of a participant's number of trades and its share volume.[285] These formulas are used to distribute very substantial amounts of Network net income. The following table sets forth the Networks' revenues, expenses, and net income in 2003, along with the allocation of net income to the various SROs:

2003 Financial Information for Networks A, B, and C[286]

	Network A	Network B	Network C	Total
Revenues	$171,462,000	$99,179,000	$153,686,000	$424,327,000
Expenses	9,322,000	3,508,000	25,470,000	38,300,000
Net Income	162,140,000	95,671,000	128,216,000	386,027,000
Allocations:				
NYSE	145,610,000	2,826,000	0	148,436,000
NASD/Nasdaq	8,907,000	18,895,000	87,716,000	115,518,000
PCX	1,056,000	18,662,000	19,058,000	38,776,000
Amex	0	36,189,000	32,000	36,221,000
NSX	795,000	10,828,000	20,661,000	32,284,000
CHX	3,208,000	4,450,000	706,000	8,364,000
BSE	2,234,000	2,516,000	43,000	4,793,000
Phlx	330,000	1,276,000	0	1,606,000
CBOE	0	29,000	0	29,000

By focusing exclusively on the number of trades, no matter how small the trade, and the share volume of trading to compensate SROs for their contribution to a Network's data stream, these formulas have caused a variety of economic and regulatory distortions. First, although quotes are disseminated by the Networks, the formulas do not reward those market centers that generate the highest quality quotes—*i.e.*, those quotes that have the best prices and the largest sizes. Such quotes are a critically important source of public price discovery, yet currently are irrelevant to an SRO's share of Network net income. Conversely, reports of very small trades often have less value for purposes of price discovery, yet the report of a 100-share trade is given equal weight with the report of a 5000-share trade under the current Network A and B formulas.

Second, the trade-based formulas create an incentive for SROs to operate "print facilities" that report a large number of trades. These SROs attempt to attract business by awarding percentage rebates (*e.g.*, 50% and higher) of their data revenues to ATSs and market makers that agree to report their trades through the SRO. The ATS or market maker may otherwise have little connection with the SRO. To compete with print facilities, other SROs are forced to offer rebates as well. As a result, the purely commercial consideration of maximizing market data revenues, rather than the quality of an SRO's regulatory expertise or trading services, may determine which SRO is responsible for reporting (and regulating) a trade. In addition, some ATSs and market makers have chosen to display quotes through one SRO and report trades to another—potentially causing confusion about where liquidity is to be found.

[282] *See* Exchange Act Section 11A(c)(1)(C).

[283] In the Concept Release, *supra* note 274, the Commission requested comment on whether the Plan allocation formulas should be revised to reflect more directly the value that each SRO's information contributed to the stream of consolidated market data. The commenters were almost evenly split on this issue. Five preferred maintaining the current system. They particularly noted the difficulty in designing a formula that would accurately accord different values to quotations, in a manner that would provide a meaningful incentive to improve markets. Four commenters believed that the current formulas should be revised to reflect high-quality market data, although each proposed different formulas to achieve this result.

[284] Paragraph XII(a)(iii) of the CTA Plan provides that a CTA Network's net income shall be allocated among its SRO participants according to their respective "Annual Shares." Annual Share is defined in paragraph XII(a)(i) as a fraction of which (1) the numerator is the number of trades in Network securities reported by a particular SRO, and (2) the denominator of which is the total number of trades in Network securities reported by all SROs. Paragraph IX(a)(i) of the CQ Plan incorporates by reference the CTA Plan's definition of Annual Share.

[285] Exhibit 1(1) to the Nasdaq UTP Plan provides that net income shall be allocated in accordance with an SRO's "percentage of total volume." Percentage of total volume is defined in Exhibit 1(2) as the average of an SRO's percentage of total trades in Network securities and its percentage of total share volume in Network securities.

[286] The Network financial information for 2003 is preliminary and unaudited.

Finally, the exclusively trade-based formulas create an incentive for fraudulent or distortive practices, particularly by reporting a large number of very small trades. As a result, market participants have engaged in illegal wash trades solely to generate market data revenues.[287] Some market participants also "shred" their total trading volume into the smallest possible trade sizes to maximize the amount of data revenues such trading can generate. Such practices detract from the accuracy and usefulness of the Network data streams.

2. Proposed New Formula

The Commission believes that the existing allocation formulas are greatly in need of reform. In particular, the formulas should incorporate a more broad based measure of the contribution of an SRO's quotes and trades to the consolidated data stream. By expanding the scope of the existing formulas, many of the regulatory and economic distortions discussed above could be alleviated.[288]

The Commission is proposing an amendment to each of the Plans ("Formula Amendment") that is intended to achieve this objective.[289] The new formula reflects a two-step process. First, a Network's distributable net income (*e.g.*, $150 million) would be allocated among the many individual securities (*e.g.*, 3000) included in the Network's data stream. Second, the net income that is allocated to an individual security (*e.g.*, $200,000) then would be allocated among the SROs based on measures of the utility of their trades and quotes in the security. The Formula Amendment provides that, notwithstanding any other provision of a Plan, its SRO participants are entitled to receive an annual payment for each calendar year that is equal to the sum of the SRO's Trading Shares, Quoting Shares, and NBBO Improvement Shares in each Network security for the year. These three types of Shares are dollar amounts that are calculated based on SRO trading and quoting activity in each Network security. The Trading, Quoting, and NBBO Improvement Shares then are added together to determine an SRO's total allocation of net income for the year.

Although the Formula Amendment appears complicated at first sight, it is important to keep in mind that only SROs and other industry participants will need to deal with the formula directly, and that the formula will control the allocation of hundreds of millions of dollars. No matter what formula ultimately is adopted, those parties most affected by it will soon know its details intimately. Accordingly, the Commission's primary objective is to adopt a formula that is as serviceable and useful as possible, even at the cost of somewhat increased complexity.

a. Security Income Allocation

The first step of the proposed new formula is to allocate a Network's total distributable net income among the many different securities that are included in a Network (the "Security Income Allocation"). Paragraph (b) of the Formula Amendment bases this allocation on the square root of dollar volume of trading in each security. Other potential alternatives would be to allocate net income equally among Network securities, or to allocate net income based directly on the trading volume in Network securities. The Commission has proposed to use the square root of dollar volume, for the following reasons.

Allocating a Network's net income equally among all of its securities would fail to recognize the differing value of quotes and trades for securities that are heavily traded versus those that are rarely traded. Consequently, the initial allocation of a Network's net income among individual securities should reflect the level of trading in each security. On the other hand, the allocation formula also should adjust for the highly disproportionate level of trading in the very top tier of Network securities. A small number of securities (*e.g.*, the top 5%) are much more heavily traded than the other thousands of Network securities. Consequently, an allocation among individual securities that simply was directly proportional to trading volume would fail to reflect adequately the importance of price discovery for the vast majority of Network securities.

Under the Formula Amendment, the distribution of net income among all Network securities would be in proportion to the square root of the total dollar volume in the security. The dollar volume represents the importance of trading activity in each security. Since the marginal value of a quote diminishes as the number of quotes increases, the net income allocated to a security should not increase in a linear fashion with the activity in the security. Information-theoretic arguments from market microstructure theory suggest that the information in volumes increases only with the square root of volume.[290]

The Commission preliminarily believes that it is appropriate to reward those SROs whose quoting and trading activity extends broadly throughout the thousands of stocks included in a Network. Comment is requested on this issue and whether the use of the square root function adequately achieves this objective. Comment also is requested on whether other criteria would be more suitable for allocating net income among individual securities. For example, would using the square root of trades, rather than dollar volume, better reflect the tiered nature of trading volume, while also minimizing the potential for anomalous results for very inactively traded securities?

b. Measures of Trading and Quoting

After a specific amount of Network net income has been allocated to an individual security (*i.e.*, the Security Income Allocation), this amount must be allocated further among the various SROs that transmit trades and quotes in the security to the Network processor. Paragraphs (c) through (e) of the Formula Amendment provide for this

[287] NASD News Release, "NASD Settles Charges Against Swift Trade Securities for Deceptive Trading and Non-Bona Fide 'Wash' Transactions in QQQ," (Oct. 16, 2002) ("fictitious wash transactions were part of an effort to obtain market data revenue generated from such transactions").

[288] In 2002, the Commission abrogated several of the more extreme SRO proposals for rebating data revenues to market participants. Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775. The purpose of the abrogation was to allow more time for the Commission to consider market data issues. Given that the existing Plan allocation formulas would be changed to reward more beneficial quoting and trading behavior, the Commission anticipates that rebates would be permitted in the future, assuming their terms meet applicable Exchange Act standards and SROs are able to meet their regulatory responsibilities.

[289] Given the close connection between fees for access to quotes and allocating net income to SROs based on their quoting activity, the terms of the proposed allocation formula are closely related to adoption of the restrictions on access fees in the market access proposal. The Commission requests comment on whether quotes displayed by market centers that charge an access fee should be entitled to earn an allocation of market data net income pursuant to the measures of quoting activity discussed below.

[290] Some basic probability theory underlies the motivation for using the square root specification: The variance of a sum of innovations to a random walk is proportional to the number of terms in that sum. The standard deviation of the sum, which is the square root of its variance, is proportional to the average size of the sum. The standard deviation thus is proportional to the square root of the number of terms in the sum.

Substantial theoretical and empirical research in finance suggests that prices generally follow a random walk and that prices change in response to trades with large trades having greater impact than small trades, on average. Since it is reasonable to associate the flow of information in price changes with the average size of price changes, the price change standard deviation is a sensible measure of the flow of information in prices. Combining these facts suggests that the information in prices on average should be roughly proportional to the square root of volume.

allocation according to three measures of an SRO's contribution to a Network's data stream: (1) The SRO's proportion of trading in each Network security ("Trading Share"); (2) the SRO's proportion of quotes with prices that equal the NBBO in each Network security ("Quoting Share"); and (3) the SRO's proportion of quotes that improve the price of the NBBO in each Network security ("NBBO Improvement Share").

i. Trading Share

Under paragraph (c) of the Formula Amendment, an SRO's Trading Share in a particular Network security would be a dollar amount that is determined by multiplying (i) an amount equal to the lesser of (A) 50% of the Security Income Allocation for the Eligible Security or (B) an amount equal to $2.00 multiplied by the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year, by (2) the SRO's Trade Rating in the security. A Trade Rating would be a number that represents the SRO's proportion of dollar volume and qualified trades in the security, as compared to the dollar volume and qualified trades of all SROs. The Trade Ratings of all SROs would add up to a total of one. Thus, for example, multiplying 50% of the Security Income Allocation for a Network security (*e.g.*, $200,000) by an SRO's Trade Rating in that security (*e.g.*, 0.2555) would produce a dollar amount (*e.g.*, 50% × $200,000 × 0.2555 = $25,550) that is the SRO's Trading Share for the security for the year.

Applying 50% of the Security Income Allocation to the Trading Share reflects a judgment that generally trades and quotes are of approximately equal importance for price discovery purposes. For securities with lower trading volume, however, this percentage can disproportionately reward a small number of trades during the year, at the expense of those markets that aggressively quote a security throughout the year. For example, the Security Income Allocation for a security with 10 qualified trades during the year might be $300. Rather than allocate the full $300 to those SROs that reported a small number of trades (for an average per trade allocation of $30), the proposed formula includes a cap of $2 per qualified transaction report, so that a total of only $20 would be allocated pursuant to the Trading Share. The difference of $280 ($300 minus $20) is shifted to the Quoting Share to reward those markets that consistently displayed valuable quotes in the security throughout the more than 250 trading days during the year. The amount of the cap of $2 per qualified transaction report exceeds the highest amount per transaction report currently allocated for any of the three Networks.

An SRO's Trade Rating would be calculated by taking the average of (1) the SRO's percentage of total dollar volume reported in the Network security during the year, and (2) the SRO's percentage of total qualified trades reported in the Network security for the year. To be qualified, a trade must have a dollar volume of $5000 or higher. This dollar volume would reflect, for example, a 200-share trade at a price of $25 per share. Analysis of Network A data indicates that this threshold would include approximately 50% of total trades and approximately 90% of total dollar volume. The purpose of this minimum size requirement is, first, to eliminate those very small trades that often have the least price discovery value and, second, to reduce the potential for significant numbers of "shredded" trades.

The use of a standard that allocates 50% of Network net income based solely on dollar volume and qualified trades in Network securities is intended to reward an SRO for its contribution to the consolidated stream of trade reports disseminated by a Network, without regard to the value of the SRO's quotes. Comment is requested on whether 50% of a Security Income Allocation generally reflects an appropriate weighting for trading activity. In addition, is the cap on the average per trade allocation appropriate and, if so, is $2 per qualified trade an appropriate limit? Comment also is requested on whether dollar volume and qualified trades are appropriate measures of an SRO's contribution to the consolidated trade stream. Is a minimum size requirement appropriate for the number of trades criterion and, if so, should the amount be higher or lower than $5000? How would a minimum size requirement affect the handling or routing of investor orders? Alternatively, should trades with a size of less than $5000 receive some credit, but credit that is proportional to their smaller size (*e.g.*, a $1000 trade would receive one-fifth the credit of a trade of $5000 or greater). Finally, should a cap be placed on the size of individual trades (*e.g.*, $500,000 dollar volume) to prevent the allocation for exceptionally large trades from swamping the allocation for smaller trades?

ii. Quoting Share

Under paragraph (d) of the Formula Amendment, an SRO's Quoting Share in a particular Network Security would be a dollar amount that is determined by multiplying (i) an amount equal to 35% of the Security Income Allocation for the security, plus the difference, if greater than zero, between 50% of the Security Income Allocation for the Eligible Security and an amount equal to $2.00 multiplied by the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year, by (ii) the SRO's Quote Rating in the security. A Quote Rating would be a number that represents the SRO's proportion of quotes that equaled the price of the NBBO during the year ("Quote Credits"), as compared to the Quote Credits of all SRO's during the year. The Quote Ratings of all SROs would add up to a total of one. Multiplying 35% of the Security Income Allocation for a Network security (plus any shifted allocation from the Trading Share) by an SRO's Quote Rating in that security would produce a dollar amount that is the SRO's Quoting Share for the security for the year.

An SRO would earn one Quote Credit for each second of time and dollar value of size that the SRO's quote during regular trading hours equals the price of the NBBO.[291] Thus, for example, a bid with a dollar value of $4000 (*e.g.*, a bid of $20 with a size of 200 shares) that equals the national best bid for three seconds would be entitled to 12,000 Quote Credits. If an SRO quotes simultaneously at both the national best bid and the national best offer, it would earn Quote Credits for each quote.

With respect to SRO quotes that are not fully accessible through automatic execution,[292] however, the Formula Amendment would establish an automatic cut-off of Quote Credits when such quotes are left alone at the NBBO as a result of quote changes by other SROs. For example, if two SROs have transmitted bids with a price of $10 per share that represents the national best bid in a security, and one of those SROs subsequently lowers its bid to $9.98 per share, the second SRO will be left alone at the national best bid. If the second SRO's quote is fully accessible through automatic execution, its bid of $10 per share would continue to earn Quote Credits. If the second SRO's quote is not

[291] Regular trading hours are defined in proposed Rule 600 of Regulation NMS as between 9:30 a.m. and 4 p.m. Eastern Time, unless otherwise specified pursuant to the procedures established in Rule 605(a)(2).

[292] The Commission preliminarily believes that an SRO's quotes would not be "fully accessible" unless all of such quotes are generated by market centers that qualify as an "automated order execution facility" under the proposed trade-through rule. *See supra*, section III.D.2. Comment is requested on whether this is an appropriate standard.

fully accessible through automatic execution, its bid of $10 per share would cease earning Quote Credits when the first SRO lowered its bid. The second SRO could recommence earning credits by retransmitting its bid to the Network processor to confirm a current willingness to trade at a bid price of $10.

The purpose of the automatic cut-off of Quote Credits for SRO quotes that are not fully accessible through automatic execution is to help assure that stale quotes are not highly rewarded. If an SRO's quote is left alone at the NBBO, it would be the only SRO earning Quote Credits throughout the time the quote remains alone at the NBBO. Given that other SROs have moved their prices away, the quote submitted by an SRO with manual trading may be in the process of being updated to reflect a new price. This quote may be the last to be updated because it is the least desirable, and it cannot be automatically executed. The SRO should not earn Quote Credits during this time. If, on the other hand, the SRO with manual trading remains willing to trade immediately at the old price, it has the opportunity to retransmit the quote and thereby recommence earning Quote Credits.

The use of time and size at the NBBO as a measure for allocating 35% of Network net income is intended to reward those SROs that contribute valuable quotes to a Network's data stream. Comment is requested on whether this measure achieves its purpose and is serviceable. For example, does rewarding SROs for the length of time of their quotes create such a powerful incentive for slowness in updating quotes that the accuracy and integrity of the consolidated quote stream itself would be seriously compromised? Does the automatic cut-off for quotes that are not fully accessible through automatic execution help ameliorate this problem? The Commission also requests comment on whether 35% is an acceptable weighting to place on this measure of quoting activity. As noted above with respect to the Trading Share, the total Security Income Allocation for a security generally will be split evenly between trading activity and quoting activity. For quoting activity, the proposed formula allocates a higher amount to the Quoting Share than to the NBBO Improvement Share (35% compared to 15%). This allocation is based on a judgment that consistent quoting in size at the NBBO adds substantial depth to the market, and that the Quoting Share reflects a broader measure of quoting activity than the NBBO Improvement Share. In addition, any quote that qualifies for an NBBO Improvement Share necessarily would also qualify for a Quoting Share.

iii. NBBO Improvement Share

Under paragraph (e) of the Formula Amendment, an SRO's NBBO Improvement Share in a particular Network security would be a dollar amount that is determined by multiplying (i) 15% of the Security Income Allocation for such security by (ii) the SRO's NBBO Improvement Rating in the security. An NBBO Improvement Rating would be a number that reflects the proportion of an SRO's quotes that improve the price of the NBBO in a security ("NBBO Improvement Credits"), as compared to the NBBO Improvement Credits of all SROs in the security. The NBBO Improvement Ratings of all SROs would add up to a total of one. Multiplying 15% of the Security Income Allocation for a Network security by an SRO's NBBO Improvement Rating in that security would produce a dollar amount that is the SRO's NBBO Improvement Share for the security for the year.

An SRO would earn NBBO Improvement Credits in two ways. First, it would earn one NBBO Improvement Credit for each five seconds of time and dollar value of size that a quote transmitted by the SRO during regular trading hours improves the price of the existing NBBO in a security ("Qualified Quote") and continues to remain equal to the price of the NBBO on a going-forward basis. Second, an SRO would earn NBBO Improvement Credits for a Qualified Quote equal to the total dollar volume of the SRO's transaction reports in the security that meet the following four conditions: (1) The transaction report must be transmitted to the Network processor subsequent to the Qualified Quote; (2) the transaction report must be transmitted while the price of the Qualified Quote remains equal to the NBBO or no later than five seconds after it no longer equals the NBBO; (3) the price of the transaction report must be the same as the price of the Qualified Quote; and (4) the total NBBO Improvement Credits earned for transaction reports connected with a single Qualified Quote cannot exceed the sum of the dollar value of size of such Qualified Quote plus the total NBBO Improvement Credits earned for the time and size of such Qualified Quote.

The following example is provided to illustrate the rules for calculating NBBO Improvement Credits. Assume that SRO #1 transmits a bid at 9:45:37 a.m. with a price of $10.00 and a size of 4000 shares, thereby improving the existing national best bid of $9.98. SRO #1's bid is a Qualified Quote and entitled to earn NBBO Improvement Credits. At 9:45:39 a.m., SRO #2 transmits a bid with a price of $10.00 and a size of 5000 shares. SRO #2's bid, even though it equals the price of SRO #1's bid and has greater size, does not affect the right of SRO #1 to earn NBBO Improvement Credits. At 9:45:40 a.m., SRO #1 transmits a transaction report with a price of $10.00 and a size of 1000 shares, and also lowers the size of its bid to 3000 shares. At 9:45:44 a.m., SRO #1 lowers its bid to $9.99. At 9:45:47, SRO #1 transmits a transaction report with a price of $10.00 and a size of 4000 shares.

In the foregoing example, SRO #1 would have earned a total of 80,000 NBBO Improvement Credits (30,000 credits for quoting plus 50,000 credits for trading). For the time and size of its bid, it earned 30,000 credits for maintaining the bid price at $10.00 (equal to the national best bid) for a full five-second increment with a size of 3000 shares. It is not entitled to credits for the full 4000-share size of the initial bid because the size was not maintained for 5 seconds. For its trading, SRO #1 earned 10,000 credits for its first transaction report (which was transmitted while its bid price remained equal to the national best bid), and 40,000 credits for its second transaction report (which was transmitted within five seconds after SRO #1's bid no longer equaled the national best bid). Finally, the total of 50,000 credits for transaction reports does not exceed the maximum amount that could be earned for transaction reports (the maximum amount was 70,000 credits—40,000 for the initial dollar value of size of the Qualified Quote, plus 30,000 for the total NBBO Improvement Credits earned for the time and size of the Qualified Quote).

The purpose of the NBBO Improvement Share is to reward SROs with quotes that frequently improve the prices of the NBBO, even if such quotes are soon matched by the quotes of other SROs. The five-second minimum for time and size of a price-improving quote is intended to assure the credits are not earned for ephemeral quotes that are posted and quickly withdrawn without trading. Credits are earned for trading connected to a price-improving quote to assure that (1) an SRO is rewarded for displaying a price-improving quote even if the quote is quickly taken out by an arriving order, and (2) an SRO is rewarded for continuing to trade when its quote is left displayed for more than five seconds. The cap on credits for trading is intended to maintain a

reasonable relation between a price-improving quote and the total number of credits that can be earned for the quote (for example, if a price-improving quote with a size of 100 shares is followed by a transaction report with a size of 10,000 shares).

The Commission requests comment on the formula for calculating an NBBO Improvement Share. Does it achieve its objective of rewarding valuable quotes? Is a five-second time period the appropriate length to achieve its objective to preclude giving credit to ephemeral quotes? Should an SRO also be allowed to earn credits for quotes that are left alone at the NBBO as a result of quote changes by other SROs, rather than just for quotes that improve the price of the NBBO? If a price-improving quote results in a locked or crossed market, should the quote be entitled to earn NBBO Improvement Credits? Should the weighting of 15% of a Security Income Allocation be higher or lower?

In addition, the Commission requests comment on whether the NBBO Improvement Share creates an unacceptable risk of "gaming" behavior by market participants that would harm the integrity of a Network's data stream. For example, unscrupulous market centers, seeking to qualify trades for NBBO Improvement Credits, potentially could engage in the practice of "flashing" quotes at an improved NBBO immediately prior to reporting a trade. These quotes would be transmitted to the Plan processor, even though the market center had no valid, prospective trading interest at the price (*i.e.*, other than the trade that was already in hand and that the market center was attempting to qualify for NBBO Improvement Credits). The Commission notes that such quotes would be fraudulent and would violate a variety of Exchange Act provisions and rules. Comment is requested on whether the threat of enforcement action and sanctions would be sufficient to deter such behavior. Comment also is requested on whether other alternative approaches would more usefully measure the contribution of an SRO's quotes to a Network's data stream.

The Commission generally requests comment on the Formula Amendment as a whole, including whether it is workable and its potential effect on SROs, other industry participants, and investors. Are all of the elements of the formula necessary and appropriate to achieve the goal of rewarding markets for their contributions to the consolidated data stream? Adoption of the new formula could result in substantial shifts in the allocation of Network net income among the various SROs. Given that changes in the allocation formula may lead SROs and market participants to alter their conduct, how probative are historical trading and quoting patterns in determining the future effect of a new formula? Comment is requested on the likelihood of major changes in existing levels of net income allocation and the potential effect on SROs that receive lesser amounts of income. For example, would potential shifts in the allocation of Network net income promote or detract from effective self-regulation of the markets? In this regard, comment is requested on the likely effect of the proposed formula on the current practice of some SROs to grant substantial rebates of Network net income to market participants.

Finally, comment is requested on the extent to which the net income allocation formula should be modified if some market centers continue to charge fees for access to their quotes. Under the market access proposal discussed in Section IV, such fees would be capped at a *de minimis* amount of $0.001 per share, and the accumulation of this fee would be limited to no more than $0.002 per share. If this limitation is not ultimately adopted, should the quotes and trades transmitted by market centers that charge fees higher than a *de minimis* amount also be entitled to receive an allocation of Network net income? Potentially, all quotes and all trades transmitted by such market centers could be excluded from the calculation of Trading Shares, Quoting Shares, and NBBO Improvement Shares, thereby eliminating any allocation of Network net income for such quotes and trades. Alternatively, only the quotes could be excluded from the calculation, with the trades continuing to qualify for an allocation of a Trading Share. Comment is requested on whether either of these alternatives would be appropriate, and also on any other alternatives that would more appropriately reflect the charging of access fees.

D. Plan Governance

The Commission is proposing an amendment to the Plans that would broaden participation in their governance ("Governance Amendment"). Currently, operating committees, composed of one representative from each SRO participant, govern the Plans.[293] In addition, the Networks have an administrator and a processor. For Network A, the administrator is the NYSE, and the processor is SIAC. For Network B, the administrator is Amex, and the processor is SIAC. For Network C, the current administrator and processor is Nasdaq.[294]

The Advisory Committee on Market Information recommended a number of changes to the governance of the Plans and operation of the Networks, including the creation of non-voting advisory committees to the Plans that would broaden participation in their governance.[295] The Commission agrees that advisory committees potentially would improve Plan governance. In particular, the committees would help assure that the views of interested parties other than SROs have an opportunity to be heard on Plan matters, and that their views are heard prior to any decision on a matter by the Plan's operating committee. Earlier and more broadly based participation could contribute to the ability of the Plans to achieve a consensus on disputed issues.

Paragraph (b) of the Governance Amendment sets forth requirements for composition of the advisory committees. Members would be selected for two-year

[293] *See generally* Advisory Committee Report, *supra* note 275, section III, which includes a full description of the Plans' terms and governance, as well as the operation of the Networks.

[294] *See* Securities Exchange Act Release No. 43863 (Jan. 19, 2001), 66 FR 8020 (extension of Nasdaq UTP Plan was conditioned on, among other things, bona fide competitive bidding for Nasdaq UTP Plan processor).

[295] Advisory Committee Report, *supra* note 275, section VII.3.B. The Advisory Committee also recommended (1) enhanced industry efforts to streamline Plan administration, particularly the administration of vendor and subscriber contracts, and (2) mandatory competitive bidding for Network processors. The Commission agrees that efforts to enhance the efficiency of Plan administration should be encouraged, and believes that the proposal to broaden Plan governance could help assure that the Plans continue their cooperative efforts with the industry to streamline administration. The Commission does not believe, however, that the potential benefits currently would justify the costs of mandating periodic competitive bidding for Network processors. The Plans already provide for periodic evaluation of the processor and for replacement if its performance is unsatisfactory. Moreover, the Commission itself has authority, if necessary, to require a change of processor by initiating a Plan amendment.

The Advisory Committee considered, but did not recommend, changing the unanimous vote requirements currently included in the Plans. Although they vary somewhat in their particulars, the Plans generally require that significant matters, such as amendments to a Plan and reductions in fees, be approved by all of the Plan's SRO participants. On disputed matters, this requirement sometimes can result in gridlock. Eliminating the unanimous vote requirement would facilitate more flexible Plan decision-making, but also potentially would allow SROs that collectively represent only a minority of trading in Plan securities to dictate policy affecting all of the SROs. The Commission has decided not to propose an amendment to the Plans' unanimous vote requirements at this time, but requests comment on whether they should be modified in any respect.

terms to allow sufficient time for them to gain familiarity with Plan business. The operating committee of a Plan would select, by majority vote, at least one representative from each of the following five categories: (1) A broker-dealer with a substantial retail investor customer base, (2) a broker-dealer with a substantial institutional investor customer base, (3) an ATS, (4) a data vendor, and (5) an investor. In addition, each SRO participant would have the right to select one committee member that is not employed by or affiliated with any participant.

Paragraphs (c) and (d) of the Governance Amendment set forth the function of an advisory committee and the requirements for its participation in Plan affairs. The function of an advisory committee is to assure that its members have an opportunity to submit their views to the operating committee on Plan matters, prior to any decision by the operating committee. Such Plan matters would include, but not be limited to, new or modified products, fees, procedures for fee administration, and pilot programs. To enable the advisory committee members to perform their function properly, members would have the right to attend regular meetings of the operating committee and to receive any information relating to Plan business that was provided to members of the operating committee. The operating committee would retain the power, however, to meet in executive session if, by majority vote, it determined that an item of business required confidential treatment.

The Commission requests comment on whether the proposed advisory committees would achieve the goal of broadening participation in Plan matters in a useful way. Should the enumerated five categories of parties interested in Plan matters be expanded to include others? Does a two-year term afford members a sufficient time to gain familiarity with Plan business, without being so long that it deters individuals from participating? Comment also is requested on whether the types of Plan matters on which an advisory committee is entitled to submit views should be more specifically enumerated. Finally, is it useful and appropriate to allow advisory committee members to attend meetings of the operating committee and receive operating committee information (subject to the confidential treatment exception)? If the operating committee meets in executive session, should the Plan specify what the advisory committee must be informed about the business conducted at such session?

E. Proposed Amendments to Rules 11Aa3–1 and 11Ac1–2

The Advisory Committee on Market Information recommended that the Exchange Act rules governing distribution and display of market information be modified in two respects. First, it believed that individual market centers (including SROs, ATSs, and market makers) should have the freedom to distribute their own market data independently.[296] Such data could include "core information"—the trades and best quotes of a market center—which would continue to be transmitted to the Networks, but also additional information such as depth of order book. This additional information has become increasingly important as decimal trading has spread displayed depth across a greater number of price points. Second, the Advisory Committee recommended that the Commission should consider making the consolidated display requirement more flexible, again in order to promote wider distribution of data by individual market centers.[297] The Commission agrees and is proposing amendments to Exchange Act Rule 11Aa3–1 (proposed to be redesignated as Rule 601 of Regulation NMS) and Exchange Act Rule 11Ac1–2 (proposed to be redesignated as Rule 603 of Regulation NMS) to implement these recommendations. In addition, the Commission is adding a consolidation requirement to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) to make explicit in an Exchange Act rule what is currently the case in fact—all SROs must act jointly through NMS plans to disseminate consolidated market information in NMS Stocks to the public.

1. Independent Distribution of Information

Currently, paragraphs (c)(2) and (c)(3) of Rule 11Aa3–1 (proposed to be redesignated as Rule 601) prohibit SROs and their members from disseminating their trade reports independently.[298] Under the proposed amendment to the Rule, these paragraphs would be rescinded. Members of an SRO would continue to be required to transmit their trades to the SRO (and SROs would continue to transmit trades to the Networks pursuant to the Plans), but such members also would be free to distribute their own data independently, with or without fees.

Although current rules do not prohibit the independent distribution of quotes, they do not establish standards for such distribution. Paragraph (a) of the proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) establishes uniform standards for distribution of both quotes and trades that would create an equivalent regulatory regime for all types of market centers. First, paragraph (a)(1) of the proposed amendment requires that any market information[299] distributed by an exclusive processor, or by a broker or dealer (including ATSs and market makers) that is the exclusive source of the information, be made available to securities information processors on terms that are fair and reasonable. Paragraph (a)(2) of the proposed amendment requires that any SRO, broker, or dealer that distributes market information must do so on terms that are not unreasonably discriminatory. These requirements would prohibit, for example, a market center from distributing its data independently on a more timely basis than it makes available the "core data" that is required to be disseminated through a Network processor. With respect to non-core data, however, the Commission preliminarily believes that market centers should have considerable leeway in determining whether, or on what terms, they provide non-core data to a Network processor. Such an entity may be in a unique competitive position. As Network processor, it acts on behalf of all markets in disseminating consolidated information, yet it also may be closely associated with the competitor of a market center. Comment is requested on this issue.[300]

[296] Advisory Committee Report, *supra* note 275, section VII.B.2.

[297] Advisory Committee Report, *supra* note 275, section VII.B.1.

[298] Regulation NMS would remove the definitions in current paragraph (a) of Rule 11Aa3–1 and place them in Rule 600. Current subparagraphs (c)(2) and (c)(3) of Rule 11Aa3–1 are proposed to be rescinded. As a result, current subparagraph (c)(4) of current Rule 11Aa3–1 would be redesignated as subparagraph (b)(2) of Rule 601.

[299] The information covered by the proposed amendment tracks the language of Section 11A(c) of the Exchange Act, which applies to "information with respect to quotations for or transactions in" securities. This statutory language encompasses a broad range of information, including information relating to limit orders held by a market center. *See, e.g.*, S. Report No. 94–75, 94th Cong., 1st Sess. 9 (1975) ("In the securities markets, as in most other active markets, it is critical for those who trade to have access to accurate, up-to-the-second information as to the prices at which transactions in particular securities are taking place (*i.e.*, last sale reports) and the prices at which other traders have expressed their willingness to buy or sell (*i.e.*, quotations)."); H.R. Report No. 94–229, 94th Cong., 1st Sess. 93 (1975) (Section 11A grants Commission "pervasive rulemaking power to regulate securities communications systems").

[300] Comment also is requested on the issue of whether and, if so, on what terms Network processors should be required to disseminate non-

The "fair and reasonable" and "not unreasonably discriminatory" requirements are derived from the language of Section 11A(c) of the Exchange Act. Under Section 11A(c)(1)(C), the more stringent "fair and reasonable" requirement is applicable to an "exclusive processor," which is defined in Section 3(a)(22)(B) as an SRO or other entity that distributes the market information of an SRO on an exclusive basis. The proposed amendment would extend this requirement to non-SRO market centers when they act in functionally the same manner as exclusive processors and are the exclusive source of their own data. Applying this requirement to non-SROs is consistent with Section 11A(c)(1)(F), which grants the Commission rulemaking authority to "assure equal regulation of all markets" for NMS Securities.[301]

The Commission requests comment on the proposed authorization of independent distribution of information by market centers, and on the standards applicable to such distribution. In particular, would the authorization successfully lead to the public dissemination of more market information? If more, would the standards help to assure that the information is made available on terms that further the objectives of the NMS? Alternatively, would the standards potentially reduce the information that is disseminated?

2. Consolidation of Information

All of the SROs currently participate in Plans that provide for the dissemination of consolidated information for the NMS Stocks that they trade.[302] The Plans were adopted in order to enable the SROs to comply with Exchange Act rules regarding the reporting of trades and distribution of quotes. With respect to trades, current paragraph (b) of Rule 11Aa3–1 (proposed to be redesignated as Rule 601) requires each SRO to file transaction reporting plans that specify, among other things, how its transactions are to be consolidated with the transactions of other SROs. With respect to quotes, current paragraph (b)(1) of Rule 11Ac1–1 (proposed to be redesignated as Rule 602) requires an SRO to establish procedures for making its best quotes available to vendors.

To confirm by Exchange Act rule that both existing and any new SROs will be required to continue to participate in such joint-SRO plans, paragraph (b) of the proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) would require SROs to act jointly pursuant to one or more NMS plans to disseminate consolidated information for NMS Stocks. Such consolidated information must include an NBBO that is calculated in accordance with the definition set forth in proposed Rule 600.[303] In addition, the NMS plans must provide for the dissemination of all consolidated information for an individual NMS Stock through a single processor. Thus, different processors are permitted to disseminate information for different NMS Stocks (*e.g.*, SIAC for Network A stocks, and Nasdaq for Network C stocks), but all quotes and trades in a stock must be disseminated through a single processor. As a result, information users, particularly retail investors, can obtain data from a single source that reflects the best quotes and most recent trade price for a security, no matter where such quotes and trade are displayed in the NMS. Comment is requested on these consolidation requirements.

3. Display of Consolidated Information

Paragraph (c) of the proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) would substantially revise the consolidated display requirement. In general, the Rule currently requires that vendors and broker-dealers, if they provide any display of market information for an NMS Stock, also must provide a consolidated display that encompasses information from all the market centers that trade the stock. The proposed amendment would retain this core requirement, but would (1) reduce the information that must be included in a consolidated display, (2) narrow the range of contexts that trigger the consolidated display requirement, and (3) generally streamline the Rule's language.

Rule 11Ac1–2 (proposed to be redesignated as Rule 603) often can require the display of a complete montage of quotes from all reporting market centers trading a security, even though the prices of some of these quotes may be far away from the current NBBO. The new definition of "consolidated display" (set forth in Rule 600 of proposed Regulation NMS) would eliminate this montage requirement and simply require a consolidated display that is limited to the prices, sizes, and market center identifications of the NBBO, along with the most recent last sale information. Beyond disclosure of this basic information, market forces, rather than regulatory requirements, would be allowed to determine what, if any, additional data from other market centers is displayed. In particular, investors and other information users ultimately could decide whether they needed additional information in their displays.

Also, Rule 11Ac1–2 (proposed to be redesignated as Rule 603) currently requires a consolidated display in a broad range of contexts. Vendors must provide a consolidated display whenever they provide any market information to broker-dealers, and broker-dealers are prohibited from operating or maintaining a display that a vendor would not be permitted to provide. Under paragraph (c)(1) of the proposed amendment to the Rule, a consolidated display would be required only when it is most needed—a context in which a trading or order-routing decision could be implemented. For example, the consolidated display requirement would continue to cover broker-dealers who provide on-line data to their customers in software programs from which trading decisions can be implemented. Similarly, the requirement would continue to apply to vendors who provide displays that facilitate order routing by broker-dealers. It would not apply, however, when market data are provided on a purely informational website that does not offer any trading or order-routing capability.[304]

Finally, Rule 11Ac1–2 (proposed to be redesignated as Rule 603) currently imposes specific "keystroke retrieval" requirements for accessing consolidated information. The proposed amendment simply would require that consolidated data be made available in an equivalent

core data on behalf of market centers. The Nasdaq UTP Plan, for example, indicates that the Network C operating committee has determined that the entity succeeding Nasdaq as processor should have the ability to disseminate the depth of book information that a participant voluntarily provides, subject to the costs of such dissemination being borne exclusively by the participant.

[301] *See also* Section 11A(a)(1)(C) of the Exchange Act (two of the five principal objectives for the NMS are (1) the availability to broker, dealers, and investors of market information, and (2) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets.

[302] *See generally* Advisory Committee Report, *supra* note 275, section III.B (description of current market data arrangements).

[303] Rule 600 of proposed Regulation NMS defines "national best bid and national best offer."

[304] The proposed amendment would retain the exemptions currently set forth in current Rule 11Ac1–2(f) (proposed to be redesignated as Rule 603(c)(2)) for exchange and market linkage displays. The current exemption for displays used by SROs for monitoring or surveillance purposes would no longer be necessary because of the limitation of the proposed amendment to trading and order-routing contexts.

manner as other data. In addition, the Rule contains a variety of other provisions that appear to be no longer necessary. These include requirements relating to moving tickers, categories of market information, and representative bids and offers (current paragraphs (b)(2)(iv) and (v) and paragraphs (c)(2)(iv) and (vi)). Such requirements are deleted in the proposed amendment.

The Commission requests comment on the revision of the consolidated display requirement set forth in the proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603). Would the proposal achieve its goal of giving investors, particularly retail investors, the information they need to make informed trading decisions and to evaluate whether brokers attain best execution of their orders? Comment also is requested on whether the proposed amendment adequately identifies those contexts in which the consolidated display should apply.

F. General Request for Comment

The Commission is soliciting comment on the proposed amendments to the Plans and to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) relating to the dissemination of market data, as discussed above. Interested persons are invited to submit written presentations of views, data, and arguments concerning the proposed amendments, including the feasibility and practicality of implementing the proposed changes. Commenters are also invited to provide comments on whether the Commission should adopt an alternative model for disseminating market data to the public. Finally, the Commission requests comment on whether, if it were to adopt the proposed amendments, a phase-in period would be necessary or appropriate to allow market participants time to adapt to their provisions. If so, what aspect(s) of the proposed amendments should be phased-in, and what would be the appropriate phase-in period?

G. Paperwork Reduction Act

The proposed amendments to the Plans and to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) do not impose recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Accordingly, the Paperwork Reduction Act does not apply.

H. Consideration of Costs and Benefits

1. Introduction

The Commission proposes to amend rules relating to the dissemination of market data to the public. In particular, the Commission proposes to amend three joint-industry plans—the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan—to modify current formulas for the allocation of Plan net income to the SROs. In addition, the Commission proposes to broaden Plan governance by amending the Plans to require the establishment of a non-voting advisory committee comprised of interested parties other than SROs. The Commission also proposes to rescind the current prohibition in Rule 11Aa3–1 under the Exchange Act (proposed to be redesignated as Rule 601 of Regulation NMS)[305] on SROs and their members from independently disseminating their own trade reports. Furthermore, the Commission proposes to amend Rule 11Ac1–2 under the Exchange Act (proposed to be redesignated as Rule 603 of Regulation NMS)[306] to incorporate uniform standards pursuant to which market centers, including ATSs and market makers, that contribute to consolidated information may also independently distribute their own trade reports and quotes. The Commission further proposes to amend Rule 11Ac1–2 (proposed to be redesignated as Rule 603) to make explicit that all SROs must act jointly through the Plans and through a single processor per security to disseminate consolidated market information in NMS Stocks to the public. Finally, the Commission proposes to streamline and simplify the requirements in Rule 11Ac1–2 (proposed to be redesignated as Rule 603), including the data required to be displayed under the Rule, as well as limiting the range of the Rule to the display of market data in trading and order-routing contexts.

The Commission has identified below certain costs and benefits relating to proposed amendments to the Plans and to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603). The Commission requests comments on all aspects of this cost-benefit analysis, including identification of any additional costs and/or benefits of the proposed amendments. The Commission encourages commenters to identify and supply any relevant data, analysis, and estimates concerning the costs and/or benefits of the proposed amendments.

[305] 17 CFR 240.11Aa3–1.

[306] 17 CFR 240.11Ac1–2.

2. Proposed New Net Income Allocation Formula

a. Benefits

The Commission preliminarily believes that modifying the current formulas for allocating distributable net income under the Plans would be beneficial to the marketplace because the new allocation formula would reward markets for the value of their quotes and would reduce the economic and regulatory distortions caused by the current formulas. Under the current formulas, the allocation of Plan net income is based on the number or share volume of an SRO's reported trades. Although quotes are disseminated by the Networks, these current trade-based formulas do not reward those market centers that generate quotes with the best prices and the largest sizes that are an important source of public price discovery. These current formulas also have encouraged certain SROs to operate as "print facilities" that award percentage rebates to ATSs and market makers that agree to report their trades through the SRO in order to obtain a larger share of market data revenues. The current formulas have resulted in some market participants distorting trade reporting to obtain more market data revenues by engaging in wash sales or by "shredding" their total trade volume into the smallest trade sizes. The Commission preliminarily believes the proposed new allocation formula would address these problems raised by the current formulas, thereby benefiting the NMS as a whole.

The proposed new allocation formula would be a two-step process. The Security Income Allocation would be the initial step of the process, when a Network's distributable net income would be allocated among the individual securities included in the Network's data stream based on the square root of the dollar volume of trading in each security. The benefit of allocating the net income in this manner is that the initial allocation would take into account the level of trading activity in each security, while adjusting for the disproportionate level of trading in the very top tier of NMS Securities.

Following the initial distribution of net income, the next step in the process would be to allocate the net income of an individual security among the SROs that trade the security based on three criteria that account for each SRO's trading and quoting activity. Specifically, fifty percent of the net income allocated to a particular security (subject to a cap of $2 per qualified transaction report) would be allocated to SROs based on their dollar volume of

trading and number of qualified transactions—*i.e.*, those transactions that have a dollar volume of $5,000 or greater. This "Trading Share" criterion is intended to reward those SROs that actively trade in the security, thereby providing liquidity and price discovery, while setting a minimum qualifying trade size to reduce the potential for shredding of trade volume. In addition, thirty-five percent of the net income allocated to a particular security would be allocated to SROs based on credits earned for the time and size of their quotes (during regular trading hours) at the NBBO. This "Quoting Share" criterion is intended to reward markets whose quotes frequently equal the best prices and for the largest sizes. Finally, fifteen percent of the net income allocated to a particular security would be allocated to SROs based on credits earned for their qualifying quotes (during regular trading hours) that improve the price of the NBBO. An SRO would earn credit for the dollar volume of its qualifying quote if the price of the quote were displayed for five seconds and for the dollar volume of any trades reported at the price of the qualifying quote while it is displayed at the NBBO or up to five seconds after it is no longer equal to the NBBO. This "NBBO Improvement Share" criterion is intended to reward aggressive quoting that improves the NBBO price. The benefit of these broad-based measures for the allocation of net income to the SROs is that they would reward an SRO for its overall contribution of both quotes and trades, while potentially reducing the incentive for distortive trade reporting practices. In addition, investors would benefit because these broad-based measures should enhance price discovery. The Commission therefore preliminary believes that the proposed new allocation formula would be beneficial to those SROs that provide the highest quality information—that contributes to price discovery—by rewarding them with a larger portion of Plan net income.

b. Costs

The Commission recognizes that there could be potential costs associated with modifying the current formulas for allocating Plan net income. These formulas have been used since the creation of the Networks in the 1970s. The SROs and the Network processors—SIAC and Nasdaq—have become familiar with the formulas for purposes of allocating net income and structuring their businesses. The Network processors would need to learn the details of a new allocation formula and to consider SRO quotes, in addition to reported trades, as a measure for allocating net income.

The proposed new allocation formula is also more complex than the current formulas in the Plans. Network processors, or some other entity retained by the Networks, would be required to develop a program that would calculate the Trading Shares, Quoting Shares, and NBBO Improvement Shares of Network participants.

Finally, some SROs are likely to be allocated a smaller portion of Plan net income under the proposed new allocation formula than they would have received under the current formulas, while other SROs would receive a larger portion of net income. This would be the result if certain SROs are currently reporting a large number of trades or share volume of trades, but are not necessarily providing the best quotes or trades with larger sizes. In addition, SROs that receive a smaller portion of the net income may need to generate additional funds with which to operate and regulate their markets.

3. Plan Governance

a. Benefits

The Commission preliminarily believes that the proposed amendments to the Plans requiring the Plan participants to establish an advisory committee would enhance the NMS. Currently, a representative of each SRO participating in a Plan is a member of the operating committee that governs that Plan. The proposed amendments to the Plans would require the establishment of a non-voting advisory committee comprised solely of persons not employed by or affiliated with a Plan participant. The proposed amendments would broaden, and accordingly should improve, participation in the governance of the Plans.

The proposed amendments would require the Plan participants to select the members of the advisory committee comprised, at a minimum, of one or more representatives associated with (1) a broker-dealer with a substantial retail investor base, (2) a broker-dealer with a substantial institutional investor customer base, (3) an ATS, (4) a data vendor, and (5) an investor. In addition, each Plan participant would be entitled to select an additional committee member. The Commission preliminarily believes that the composition of the advisory committee should give interested parties other than the SROs a voice in matters that affect them. These members of the advisory committee would have the right to submit their views to the operating committee on Plan business (other than matters determined to be confidential by a majority of Plan participants), prior to any decision made by the operating committee, and would have the right to attend operating committee meetings. Broader participation in the Plans through the establishment of an advisory committee would be beneficial to the administration of the Plans because it could promote the formation of industry consensus on disputed issues.

b. Costs

The proposed amendments to the Plans could potentially result in costs to the Plan participants. Participants would be required to engage in a selection process for purposes of establishing an advisory committee. A Plan's operating committee as a whole would be required to select a minimum of five committee members. Each Plan participant would then have the right to select one committee member. This selection process could potentially result in added costs and administrative burden and expense to the Plan participants.

Another potential cost of the proposed Plan amendment requiring the establishment of an advisory committee could be disruption of the current governance of the Plans by their participants. Since the creation of the Plans, representatives from the SROs have been the sole participants in the Plans and have been responsible for their administration. The additional participation of non-SRO parties could increase the difficulty of reaching consensus on Plan business.

4. Proposed Amendments to Rules 11Aa3–1 and 11Ac1–2

a. Independent Distribution of Information

i. Benefits

The Commission proposes to amend Rule 11Aa1–3 (proposed to be redesignated as Rule 601) to rescind the prohibition on SROs and their members from distributing their own transaction reports and last sale data outside of the Plans.[307] Rescission of this prohibition would allow market centers, including ATSs and market makers, that contribute to consolidated information to also distribute their market data independently of the Networks. In addition to the data that market centers are required to provide to the Networks, the rescission would allow market

[307] Although current rules do not also prohibit the independent distribution of quotation information, the rules do not provide standards for such distribution.

centers to independently distribute other market data, such as depth of the limit order book. Such information could be beneficial to investors and other information users because it has become increasingly important as decimal trading has spread displayed depth across a greater number of price points. Market centers may also benefit from additional revenues if they chose to charge a fee for the independent distribution of their market data information.

The Commission also proposes to add new provisions to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) to establish uniform standards for the distribution of market data. Uniform standards would be beneficial to the marketplace because they would create an equivalent regulatory regime for all types of market centers. The proposed standards would require an exclusive processor, or a broker or dealer with respect to information for which it is the exclusive source, that distributes quote and transaction information in an NMS Stock to a securities information processor ("SIP") to do so on terms that are fair and reasonable. In addition, those SROs, brokers, or dealers that distribute such information to a SIP, broker, dealer, or other persons would be required to do so on terms that are not unreasonably discriminatory. Furthermore, these proposed uniform standards are based, in part, on similar requirements found in Sections 3 and 11A of the Exchange Act [308] for SROs and entities that distribute SRO information on an exclusive basis. The Commission preliminarily believes that extending these requirements to non-SRO market centers, including ATSs and market makers, would help assure equal regulation of all markets that trade NMS Stocks.

ii. Costs

The Commission recognizes that the proposed rescission of the prohibition on independent distribution of trade reports under Rule 11Aa3–1 (proposed to be redesignated as Rule 601) could potentially lead to market centers incurring costs associated with the independent distribution of their market data if they choose to distribute such data without charging a fee. In addition, investors may have to pay for additional data if market centers choose to charge a fee for the additional data. Furthermore, if market centers choose to distribute their own quotation information, this could potentially result in one market center's data becoming more or less valuable than another market center's data, and thereby increase or reduce that market center's overall income.

b. Consolidation of Information

i. Benefits

The Commission proposes to amend Rule 11Ac1–2 (proposed to be redesignated as Rule 603) to make explicit that all SROs must act jointly through the Plans to disseminate consolidated market information, including an NBBO, in NMS Stocks to the public. All SROs currently participate in Plans that provide for the dissemination of consolidated transaction and quotation information for the NMS Stocks that they trade. The proposed amendment to the Rule would provide the benefit of clarifying that all SROs—whether existing or new—would be required to participate jointly in one or more Plans to disseminate consolidated information in NMS Stocks. The proposed amendment would also require that all quote and trade information for an individual NMS Stock be disseminated through a single processor (currently, SIAC or Nasdaq). The Commission preliminarily believes that requiring a single processor for a particular security should help to ensure that investors continue to receive the benefits of obtaining consolidated information from a single source.

ii. Costs

The Commission does not foresee any costs associated with this particular proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603), and, specifically, requests comment on whether amending the Rule to require explicitly what is current practice among the SROs regarding the consolidated dissemination of information through the Plans and through a single processor would result in any costs or burdens on the SROs or on any other entities.

c. Display of Consolidated Information

i. Benefits

The Commission proposes to amend Rule 11Ac1–2 (proposed to be redesignated as Rule 603) in order to streamline the current requirements and to ease the burden of compliance. Currently, the Rule requires data vendors and broker-dealers that provide any display of market data in a particular security to provide a consolidated display of data from all of the market centers that trade the security. The Commission proposes to retain this core requirement, but proposes to streamline the data required to be displayed, reduce the range of the contexts in which the Rule would apply, and amend the Rule's language to clarify certain provisions and to rescind unnecessary provisions.

In particular, the Commission proposes to limit the scope of the consolidated display requirement. The proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) would eliminate the burden on vendors and broker-dealers to display a complete montage of quotes from all market centers trading a particular security, which would include the price of quotes that may be far away from the current NBBO. Vendors and broker-dealers would therefore benefit from this reduced consolidated display requirement. Furthermore, they, as well as other persons (including investors and other information users), would have the ability to decide what, if any, additional data from other market centers beyond this basic disclosure to display.

The Commission also proposes to amend the Rule to limit the consolidated display requirement to market data provided in a context in which a trading or order-routing decision could be implemented. Currently, the Rule applies broadly to any displays of market data provided by a vendor to a broker-dealer and to any displays of market data provided by a broker-dealer. This proposed amendment to the Rule would allow vendors and broker-dealers to display market data without having to comply with the consolidated display requirement so long as they are not displaying it in a trading or order routing context. For example, under the proposed amendment, if market data is provided on a purely informational website and does not offer any trading or order-routing capabilities, then the vendor displaying such data would not be required to comply with the consolidated display requirement for purposes of displaying that data. Vendors and broker-dealers would benefit from a reduction in their consolidated display obligations under this proposed amendment, while still providing investors with useful information.

The Commission also proposes to amend Rule 11Ac1–2 (proposed to be redesignated as Rule 603) to simply the rule language to require that consolidated data be made available in an equivalent manner as other data and to rescind unnecessary provisions in order to update the Rule.[309] Together,

[308] 15 U.S.C. 78c and 15 U.S.C. 78k–1.

[309] The provisions to be rescinded would include requirements relating to moving tickers, categories

these proposed amendments should benefit broker-dealers and vendors by making compliance with the Rule easier and more efficient.

ii. Costs

A potential cost attributable to the proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) could be that there may be individuals who use the displayed montage of quotes from all market centers trading a particular security. If the proposed amendment were adopted, and vendors and broker-dealers determined not to display this additional information, these investors would be required to obtain the additional data at additional cost.

The proposed amendment to the Rule could also potentially result in an administrative cost or burden for vendors and broker-dealers that would be required to assess in what circumstances they are displaying market data information for trading and order-routing purposes and in what circumstances they are displaying such information for other purposes. The Commission preliminarily believes that such a cost would be minimal.

I. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act [310] requires the Commission, whenever it engages in rulemaking, and is required to consider or determine if an action is necessary or appropriate in the public interest, also to consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act [311] requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any such rule would have on competition. Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The proposed amendments to the Plans to implement a new net income allocation formula should help to promote efficiency in the marketplace by eliminating incentives for market participants to distort trade reporting under the current formulas by engaging in wash trades and by eliminating incentives for market participants to "shred" their total trade volume in order to obtain market data revenues. In addition, the proposed amendments to the Plans to establish an advisory committee should promote efficiency in the administration of the Plans by allowing interested parties other than SROs to have a voice in the governance of such Plans, which could contribute to the resolution of potential disputes that the Plan participants would otherwise bring before the Commission. Furthermore, the proposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) should promote efficiency and competition among market centers by helping to assure that independently reported trade and quote information is distributed on terms that are fair and reasonable and not unreasonably discriminatory. The proposed amendment to amend Rule 11Ac1–2 (proposed to be redesignated as Rule 603) should also promote efficiency in the dissemination of consolidated market information by requiring that all SROs act jointly through the Plans to disseminate such information to the public.

The proposed amendments to the Plans to modify the current net income allocation formulas and to establish an advisory committee should assist capital formation through a more appropriate allocation of the Networks' net income to those who contribute most to public price discovery, and by potentially minimizing costs that may arise from having to resolve disputes relating to the administration of the Plans through broader representation. The proposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) would also eliminate the requirement to display a complete montage of quotes from all market centers and should therefore promote capital formation by reducing the costs to vendors and broker-dealers that are currently required to display quotes that may be far away from the NBBO.

The Commission preliminarily believes that the proposed amendments to the Plans and to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) would not impose any competitive burden that is not necessary and appropriate in furtherance of the purposes of the Exchange Act. In fact, the proposed new allocation formula should provide for a more useful distribution of net income by rewarding market centers for the quality of their quotes in addition to their reported trades. The proposed amendments to the Plans to establish an advisory committee should also enhance and promote competition by broadening governance of the Plans to include other non-SRO parties. Furthermore, the proposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) should lessen the burden on vendors and broker-dealers from having to comply with certain consolidated display requirements, and should engender competition among market centers that contribute to consolidated information that also choose to independently distribute their own market data. In addition, the proposed amendment providing that all SROs consolidate information in each NMS Stock and disseminate such information through a single processor per security should clarify that SROs are on an equal competitive footing with each other. Thus, the Commission preliminarily believes that the proposed amendments should enhance rather than burden competition by creating a more equal competitive environment for market centers and others.

The Commission requests comment on the proposed amendments' effects on the economy as a whole, and more specifically, how the proposed amendments to the Plans and to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) are expected to affect efficiency, competition, and capital formation. The Commission requests that, if possible, commenters provide empirical data as well as factual support for their views.

J. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [312] the Commission must advise the Office of Management and Budget as to whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requests comment on the potential impact of the proposed amendments on the economy on an annual basis. Commenters are requested

of market information, and representative bids and offers.

[310] 15 U.S.C. 78c(f).

[311] 15 U.S.C. 78w(a)(2).

[312] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

to provide empirical data and other factual support for their view to the extent possible.

K. Regulatory Flexibility Act Certification and Initial Regulatory Flexibility Analysis

1. Regulatory Flexibility Act Certification for the Proposed Amendments to the Plans

The Commission hereby certifies, pursuant to 5 U.S.C. 603(b), that the proposed amendments to the Plans, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed amendments to the Plans imposing a new net income allocation formula would only impact the SROs,[313] SIAC (the processor for the CTA Plans and the CQ Plan), and Nasdaq (the processor for the Nasdaq UTP Plan). The proposed amendments to the Plans requiring the establishment of an advisory committee would apply only to Plan participants. SIAC and Nasdaq would not be considered "small entities" for purposes of the Regulatory Flexibility Act.[314] The Plan participants are either national securities exchanges or a national securities association and, as such, are not small entities.[315] Accordingly, the Commission does not believe that the proposed amendments to the Plans would have a significant economic impact on a substantial number of small entities.

The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

2. Initial Regulatory Flexibility Analysis for Proposed Amendments to Rules 11Aa3–1 and 11Ac1–2

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to the proposed amendment to Rules 11Aa3–1 and 11Ac1–2 under the Exchange Act (proposed to be redesignated as Rules 601 and 603 of Regulation NMS).[316]

a. Reasons for the Proposed Action

The Commission believes that an overall modernization of the rules for disseminating market data to the public is necessary to address problems posed by the current market data rules. The Commission proposes to retain the core elements of the current rules—price discovery and mandatory consolidation—which provide important benefits to investors and to others who use market information, while amending other parts of the current rules that have resulted in serious economic and regulatory distortions. More specifically, the Commission proposes to amend the Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) to lift certain restrictions in order to reduce the burden on and to provide simplification and uniformity for those market centers, broker-dealers, and data vendors that have to comply with requirements under the Rules.

b. Objectives

The proposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) are designed to fulfill several objectives. First, the proposed amendment to Rule 11Aa3–1 (proposed to be redesignated as Rule 601) is intended to provide market centers, including ATSs and market makers, with flexibility to independently distribute their own trade reports, aside from their obligation to provide their trade reports to an SRO or to the Networks (depending on the type of market center). Second, a prime objective of the proposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) is to provide uniform standards for all market centers, including non-SRO market centers and entities that are exclusive processors of SRO market data, for the independent distribution of market data. Third, the objective of the proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) providing that all SROs act jointly through the Plans and disseminate their consolidated information through a single processor is to clarify the current practice among the SROs and to require continued participation in the Plans and dissemination through one processor per security. Fourth, an additional objective of the proposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) is to reduce consolidated display requirements on broker-dealers and vendors and to limit their consolidated display obligations to the disclosure of the NBBO and consolidated last sale information, and to the display of market information in a trading or order-routing context. Finally, the proposed amendments to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) are intended to ease the burden of compliance by simplifying the current consolidated display requirements under the Rule and by rescinding old provisions in the Rule that are outdated and no longer necessary.

c. Legal Basis

The Commission proposes amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) pursuant to its authority set forth in Sections 2, 3(b), 5, 6, 11A, 15, 15A, 17(a), 19, 23(a), and 36 of the Exchange Act, and Rules 11Aa3–2(b)(2) and 11Aa3–2(c)(1) thereunder.[317]

d. Small Entities Subject to the Rule

The proposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) would affect ATSs, market makers, broker-dealers, and SIPs that could potentially be small entities. Paragraph (c) of Rule 0–10 under the Exchange Act[318] defines the term "small business" or "small organization," when referring to a broker-dealer, to mean a broker or dealer that had total capital of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, or if not required to file such statements, it had total capital of less than $500,000 on the last business day of the preceding fiscal year; and is not affiliated with any person (other than a natural person) that is not a small business or small organization. ATSs and market makers would be considered broker-dealers for purposes of this definition. Paragraph (g) of Rule 0–10[319] defines the term "small business" or "small organization," when referring to a SIP, to mean a SIP that had gross revenues of less than $10 million during the preceding fiscal year and provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year; and is not affiliated with any person (other than a natural person) that is not a small business or small organization.

[313] Paragraph (e) of Exchange Act Rule 0–10 provides that the term "small entity," when referring to an exchange, means any exchange that has been exempted from the reporting requirements of 17 CFR 240.11Aa3–1 and is not affiliated with any person that is not a small entity. Under this standard, none of the exchanges affected by the proposed rule is a small entity. Similarly, the national securities association affected by the proposed rule is not small entity as defined by 13 CFR 121.201.

[314] *See* 17 CFR 240.0–10(g).

[315] *See* 17 CFR 240.0–10(e).

[316] 17 CFR 240.11Aa3–1 and 17 CFR 240.11Ac1–2.

[317] 15 U.S.C. 78b, 78c(b), 78e, 78f, 78k–1, 78*o*, 78*o*–3, 78q(a), 78s; 78w(a), and 78mm; 17 CFR 240.11Aa3–2(b)(2) and 17 CFR 240.11Aa3–2(c)(1).

[318] 17 CFR 240.0–10(c).

[319] 17 CFR 240.0–10(g).

As of December 31, 2002, the Commission estimates that there are approximately 880 registered broker-dealers, including ATSs and market makers, and approximately 16 SIPs that would be considered small entities. The Commission's proposed amendment to Rule 11Aa3–1 (proposed to be redesignated as Rule 601) would enable small market centers, including ATSs and market makers, that contribute to consolidated information, if they so choose, to also independently distribute their own trade reports. The Commission's proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603) would reduce the compliance burden on small broker-dealers and SIPs by limiting the data required to be consolidated and displayed under the Rule.[320]

The Commission requests comment on the number of small entities that would be impacted by the proposed amendments, including any available empirical data.

e. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) would not impose any new reporting, recordkeeping or other compliance requirements on ATSs, market makers, broker-dealers, and SIPs that are small entities. SROs that would be subject to these proposed amendments would not be considered small entities.

f. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap or conflict with the proposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603).

g. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, the Commission has considered the following alternative models for disseminating market data to the public: (1) A competing consolidators model under which each SRO would be allowed to sell its market data separately to any number of consolidators; (2) a rescission of the consolidated display requirement and allowing all SROs and other market centers to distribute their market data individually; and (3) a hybrid model that would retain the consolidated display requirement and existing Networks solely for the dissemination of the NBBO, but allow the SROs to distribute their own quotes and trades independently and without a consolidated display requirement. These alternative models were all intended to introduce more competition in the marketplace and greater flexibility in market data dissemination.

The primary goal of the proposed amendments to Rules 11Aa3–1 and 11Ac1–2 (proposed to be redesignated as Rules 601 and 603) is to retain the benefits of the consolidated display requirement, which provides a uniform, consolidated stream of data and is the single most important tool for unifying all of the market centers trading NMS Stocks, while providing market centers that contribute to consolidated information with the ability to independently distribute their own market data and reducing the consolidated display requirements on broker-dealers and SIPs. The Commission preliminarily believes that these potential alternative models pose an unacceptable risk of losing important benefits that investors and other information users receive under the current system—an affordable and highly reliable stream of quotes and trades that is consolidated from all significant market centers trading an NMS Stock. The Commission also does not believe that it is necessary to consider whether small entities should be permitted to use performance rather than design standards to comply with the proposed amendments as the amendments already propose performance standards and do not dictate for entities of any size any particular design standards (*e.g.*, technology) that must be employed to achieve the objectives of the proposed amendments.

h. Solicitation of Comments

The Commission encourages comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, the Commission requests comments regarding: (1) The number of small entities that may be affected by the proposed amendments; (2) the existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and (3) how to quantify the impact of the proposed amendments. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VII. Regulation NMS Proposal

A. Introduction

The Commission proposes to simplify the structure of the rules adopted under Section 11A of the Exchange Act ("NMS rules") by designating them as proposed Regulation NMS and renumbering them. In addition, the Commission proposes to include in proposed Regulation NMS proposed Rule 600 ("NMS Security Designation and Definitions"). This proposed new rule would replace Exchange Act Rule 11Aa2–1, which designates "reported securities" as NMS securities. Proposed Rule 600 also would include, in alphabetical order, all of the defined terms used in proposed Regulation NMS. The proposed new rule series is Rule 600 through Rule 612 (17 CFR 242.600—612).

Proposed Rule 600 would provide a single set of definitions that would be used throughout proposed Regulation NMS. To create a single set of definitions, the Commission proposes to update or delete from proposed Regulation NMS some terms that have become obsolete and to eliminate the use of multiple, inconsistent definitions for identical terms. In addition, the Commission is proposing to adopt two new terms, "NMS security" and "NMS stock," which would replace some terms that would be eliminated. These terms are necessary to maintain distinctions between current NMS rules that apply to equity securities and ETFs only (*e.g.*, Exchange Act Rules 11Ac1–4 and 11Ac1–5) and those that apply to equity securities, ETFs, and options (*e.g.*, Exchange Act Rules 11Ac1–1 and 11Ac1–6). Proposed Rule 600 would retain, unchanged, most definitions used in the current NMS rules and would include new definitions used in the new rules proposed in this release. The proposed definitional changes would not affect the substantive requirements of the existing NMS rules.

B. Discussion of Proposed Regulation NMS

1. Rule Numbering

In proposed Regulation NMS, the Commission would renumber and, in some cases, rename the current NMS rules, and incorporate proposed Rule

[320] The proposed amendment to Rule 11Ac1–2 (proposed to be redesignated as Rule 603), providing that all SROs act jointly through the Plans and disseminate their consolidated information through a single processor would only apply to the SROs, which are not "small entities" for purposes of the Regulatory Flexibility Act.

600 and the proposed new rules. Where applicable, current NMS rules would be amended to remove the definitions which would be consolidated in proposed Rule 600. The proposed titles and numbering of the rules in proposed Regulation NMS, including the proposed new rules, appear below:

- Rule 600: NMS Security Designation and Definitions (replaces Exchange Act Rule 11Aa2–1, which the Commission is proposing to rescind, and incorporates definitions from the current NMS rules and the proposed new rules);
- Rule 601: Dissemination of Transaction Reports and Last Sale Data with Respect to Transactions in NMS Stocks (renumbers and renames Exchange Act Rule 11Aa3–1, the substance of which would be modified);[321]
- Rule 602: Dissemination of Quotations in NMS Securities (renumbers and renames Exchange Act Rule 11Ac1–1 ("Quote Rule"), the substance of which would remain largely intact);
- Rule 603: Distribution, Consolidation, and Display of Information with Respect to Quotations for and Transactions in NMS Stocks (renumbers and renames Exchange Act Rule 11Ac1–2 ("Vendor Display Rule"), the substance of which would be modified substantially);[322]
- Rule 604: Display of Customer Limit Orders (renumbers Exchange Act Rule 11Ac1–4 ("Limit Order Display Rule"), the substance of which would remain largely intact);
- Rule 605: Disclosure of Order Execution Information (renumbers Exchange Act Rule 11Ac1–5, the substance of which would remain largely intact);
- Rule 606: Disclosure of Order Routing Information (renumbers Exchange Act Rule 11Ac1–6, the substance of which would remain largely intact);
- Rule 607: Customer Account Statements (renumbers Exchange Act Rule 11Ac1–3, the substance of which would remain largely intact);
- Rule 608: Filing and Amendment of National Market System Plans (renumbers Exchange Act Rule 11Aa3–2, the substance of which would remain largely intact);
- Rule 609: Registration of Securities Information Processors: Form of Application and Amendments (renumbers Exchange Act Rule 11Ab2–1, the substance of which would remain largely intact);
- Rule 610: Access to Published Bids and Offers (proposed new rule);
- Rule 611: Trade-Through Rule (proposed new rule); and
- Rule 612: Minimum Pricing Increment (proposed new rule).

2. Rule 600—NMS Security Designation and Definitions

a. Transaction Reporting Requirements for Equities and Listed Options

Section 11A(a)(2) of the Exchange Act directs the Commission to "designate the securities or classes of securities qualified for trading in the national market system."[323] The 1975 Amendments and the legislative history to the 1975 Amendments were silent as to the particular standards the Commission should employ in designating NMS securities.[324] Instead, Congress provided the Commission with the flexibility and discretion to base NMS designation standards on the Commission's experience in facilitating the development of an NMS.[325]

To satisfy the requirement that it designate the securities qualified for trading in the NMS, the Commission adopted Exchange Act Rule 11Aa2–1 in 1981.[326] Exchange Act Rule 11Aa2–1 currently defines the term "national market system security" to mean "any reported security as defined in Rule 11Aa3–1." Exchange Act Rule 11Aa3–1 defines a "reported security" as "any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan."[327] Exchange Act Rule 11Aa3–1(a)(3) defines the term "effective transaction reporting plan" to mean "any transaction reporting plan approved by the Commission pursuant to this section." Exchange Act Rule 11Aa3–1(a)(2) defines the term "transaction reporting plan" to mean "any plan for collecting, processing, making available or disseminating transaction reports with respect to transactions in reported securities filed with the Commission pursuant to, and meeting the requirements of, this section." The effective transaction reporting plans are the CTA Plan and the Nasdaq UTP Plan.

In addition to identifying those securities deemed to be NMS securities, when adopted, the Exchange Act Rule 11Aa2–1 designation also tacitly identified those securities that did not meet that designation (*i.e.*, securities other than those that are so designated as NMS securities). Historically, securities excluded from this designation included standardized options and small capitalization equity securities (a subset of which has been identified as Nasdaq SmallCap securities). Trading in options and Nasdaq SmallCap securities has increased over the past three decades and gradually many of the rules that govern NMS securities have been applied to these securities. Over time, much of the terminology that has been used to distinguish NMS securities from options and Nasdaq SmallCap securities has become obsolete or contorted.

For example, the Nasdaq UTP Plan provides for the collection from Plan participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in "eligible securities." Prior to 2001, the Nasdaq UTP Plan defined an "eligible security" as any Nasdaq National Market security as to which unlisted trading privileges have been granted to a national securities exchange pursuant to Section 12(f) of the Exchange Act or that is listed on a national securities exchange. In 2001, the Nasdaq UTP Plan was amended to include Nasdaq SmallCap securities.[328] As a result, Nasdaq SmallCap securities became eligible securities because they are now reported through an effective transaction reporting plan (*i.e.*, the Nasdaq UTP Plan), bringing them within the purview of the NMS security designation. Several definitions in the current NMS rules, however, do not reflect the inclusion of Nasdaq SmallCap securities in the Nasdaq UTP Plan and therefore must be updated. Regulation NMS proposes to do so.

In addition, transactions in exchange-listed options are reported through the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan").[329] Unlike the CTA Plan and the Nasdaq UTP Plan—transaction reporting plans that the Commission approved pursuant to Exchange Act Rules 11Aa3–1 and 11Aa3–2—the OPRA Plan was

[321] In the market data proposal, discussed in Section VI., the Commission is proposing to amend substantively Exchange Act Rule 11Aa3–1.

[322] In the market data proposal, discussed in Section VI., the Commission is proposing to amend substantively Exchange Act Rule 11Ac1–2.

[323] 15 U.S.C. 78k–1(a)(2).

[324] *See* Securities Exchange Act Release No. 23817 (November 17, 1986), 51 FR 42856 (November 26, 1986) (proposing amendments to Exchange Act Rules 11Aa2–1 and 11Aa3–1) ("1986 Proposing Release").

[325] *See id.*

[326] *See* Securities Exchange Act Release No. 17549 (February 17, 1981), 46 FR 13992 (February 25, 1981) (adopting Exchange Act Rule 11Aa2–1).

[327] *See* Exchange Act Rule 11Aa3–1(a)(4).

[328] *See* Securities Exchange Act Release No. 45081 (November 19, 2001), 66 FR 59273 (November 27, 2001).

[329] The exchanges that are participants to the OPRA Plan are Amex, BSE, CBOE, ISE, PCX, and Phlx.

approved by the Commission only pursuant to Exchange Act Rule 11Aa3–2.[330] As such, the OPRA Plan is an "effective national market system plan" but not an "effective transaction reporting plan." While at their core the CTA Plan, the Nasdaq UTP Plan, and the OPRA Plan perform essentially the same function (*i.e.*, they govern the consolidated reporting of securities transactions by Plan participants), because the OPRA Plan is not an effective transaction reporting plan, listed options covered by the OPRA Plan are technically not "securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan." Therefore, options were not considered NMS securities as defined by Exchange Act Rule 11Aa2–1. While the impact of this distinction may not be readily apparent, the differences in the way the Plans are designated dictates the securities laws and regulations that apply to securities reported pursuant to those Plans.

Further, as discussed below, some terms in the NMS rules have become superfluous or outdated. In addition, in the current NMS rules, certain terms are defined in different ways in different rules. Because proposed Regulation NMS proposes a consolidated set of definitions that would apply to all rules within the proposed Regulation, these inconsistencies would need to be eliminated. The definitional changes proposed in this Release, however, are not intended to change materially the scope of the current NMS rules.

b. "NMS Security" and "NMS Stock"

Some NMS rules, including the Quote Rule and Exchange Act Rule 11Ac1–6, currently apply to both (1) equities, ETFs and related securities for which transaction reports are made available pursuant to an effective transaction reporting plan, and (2) listed options for which market information is made available pursuant to an effective national market system plan. To provide a single term that would be used in any provision of proposed Regulation NMS that applies to both categories of securities, the Commission is proposing to adopt a new term, "NMS security."[331]

Because many rules in proposed Regulation NMS, including Rule 604 (currently Exchange Act Rule 11Ac1–4) and Rule 605 (currently Exchange Act Rule 11Ac1–5), would continue to be inapplicable to listed options, the Commission proposes to adopt a new term, "NMS stock" that would be used in those provisions. The Commission proposes to define the term "NMS stock" as "any NMS security other than an option."

c. Changes to Current Definitions in the NMS Rules

Proposed Rule 600 would provide a single set of definitions that would be used throughout proposed Regulation NMS. To create a single set of definitions, the Commission proposes to eliminate multiple, inconsistent definitions of identical terms. In addition, the Commission proposes to amend some definitions in the NMS rules to reflect changed conditions in the marketplace or to modernize references. For example, as discussed above, several definitions in the NMS rules have become obsolete by the extension of the Nasdaq UTP Plan to Nasdaq SmallCap securities.[332] Because the Nasdaq UTP Plan includes Nasdaq SmallCap securities, those securities now are "securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan" (*i.e.*, they are "reported" securities).[333] For this reason, it is no longer necessary to distinguish, as several NMS rules do currently, between "reported" securities and equity securities for which market information is made available through Nasdaq.[334] Accordingly, the Commission proposes to eliminate or revise the defined terms in the NMS rules that make this distinction.

i. "Covered security"

Different definitions of the term "covered security" appear in the Quote Rule, the Limit Order Display Rule, and in Exchange Act Rule 11Ac1–6.[335] In addition, as discussed below, the term has become obsolete. Therefore, the Commission is proposing to eliminate the term "covered security" from proposed Regulation NMS and to replace it with the term "NMS security" or "NMS stock," as applicable, depending upon the scope of the particular rule.

ii. "Reported security"

Several NMS rules use the term "reported security." Although the Limit Order Display Rule, the Vendor Display

[330] *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). Exchange Act Rule 11Aa3–2 codifies the procedures that SROs must follow to seek approval for or amendment of a national market system plan.

[331] Specifically, the Commission proposes to define an "NMS security" as "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." This definition currently is used to define a "reported security" in the Quote Rule. *See* Exchange Act Rule 11Ac1–1(a)(20). For the reasons described below, the Commission is proposing to eliminate the term "reported security" from the Quote Rule and not include it in proposed Regulation NMS.

[332] *See* NASD Rule 4200 for the definition of a Nasdaq SmallCap security. The Nasdaq UTP Plan provides for the collection from Plan participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in "eligible securities." "Eligible securities" initially included Nasdaq NMS securities listed on an exchange or traded on an exchange pursuant to a grant of unlisted trading privileges. *See* Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (order approving the Nasdaq UTP Plan on a pilot basis). In 2001, the Nasdaq UTP Plan was amended to, among other things, revise the definition of "eligible securities" to include Nasdaq SmallCap securities. *See* Securities Exchange Act Release No. 45081 (November 19, 2001), 66 FR 49273 (November 27, 2001) (order approving Amendment No. 12 to the Nasdaq UTP Plan).

[333] Exchange Act Rules 11Aa3–1 and 11Ac1–2 define the term "reported security" to mean "any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan." As discussed more fully below, the Quote Rule provides a different definition of "reported security."

[334] *See e.g.*, Exchange Act Rule 11Ac1–2(a)(4) (defining "subject security" to mean "(i) any reported security; and (ii) any other equity security as to which transaction reports, last sale data or quotation information is disseminated through NASDAQ"); and Exchange Act Rule 11Ac1–1(a)(6) (defining "covered security" to mean "any reported security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as described in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii))").

[335] Although the Quote Rule and the Limit Order Display Rule each define the term "covered security" as "any reported security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as described in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii))," the scope of the definitions is not identical because each rule defines the term "reported security" differently. The Quote Rule defines a "reported security" to mean "any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." See Exchange Act Rule 11Ac1–1(a)(20). The Limit Order Display Rule defines a "reported security" to mean "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan." *See* Exchange Act Rule 11Ac1–4(a)(10).

Exchange Act Rule 11Ac1–6 defines the term "covered security" to mean: "(i) any national market system security and any other security for which a transaction report, last sale data or quotation information is disseminated through an automated quotation system as defined in Section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii)); and (ii) any option contract traded on a national securities exchange for which last sale reports and quotation information are made available pursuant to an effective national market system plan. *See* Exchange Act Rule 11Ac1–6(a)(1)."

Rule, and Exchange Act Rule 11Aa3–1 contain identical definitions of "reported security," the Quote Rule provides a different definition.[336] Because the term "reported security" is defined inconsistently in the NMS rules and in light of proposed changes to related terms, the Commission proposes to eliminate the term "reported security" from proposed Regulation NMS and replace it with the term "NMS security" or "NMS stock," depending on the scope of the particular rule.

The Limit Order Display Rule uses the term "reported security" solely for the purpose of defining the term "covered security."[337] Because the Commission proposes to eliminate the term "covered security," the term "reported security" also would not need to be used in the redesignated Limit Order Display Rule (proposed Rule 604). Therefore, as noted above, the term "NMS stock" would replace the term "covered security" in proposed Rule 604.

Similarly, the Quote Rule uses the term "reported security" primarily to define the term "covered security."[338] Because the Commission proposes to eliminate the term "covered security," the term "reported security" also would not be used in the redesignated Quote Rule (proposed Rule 602).[339]

iii. "Subject security"

The Quote Rule and the Vendor Display Rule use the term "subject security," although the rules define the term differently. To eliminate this inconsistency, the Commission proposes not to use the term "subject security" in the proposed successor to the Vendor Display Rule (proposed Rule 603), and to retain for the Quote Rule provision of proposed Regulation NMS (proposed Rule 602) a slightly modified version of the definition of "subject security" that is currently in the Quote Rule.

The Vendor Display Rule defines the term "subject security" to mean "(i) any reported security; and (ii) any other equity security as to which transaction reports, last sale data or quotation information is disseminated through NASDAQ."[340] As discussed above, the extension of the Nasdaq UTP Plan to include Nasdaq SmallCap securities renders obsolete the distinction between a "reported security" and a security for which market information is disseminated through Nasdaq. Accordingly, the Commission proposes to use the term "NMS stock" rather than "subject security" in the proposed Vendor Display Rule successor.

The Quote Rule currently defines the term "subject security" to mean:

(i) With respect to an exchange: (A) Any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported in the consolidated system; and (B) Any other covered security for which such exchange has in effect an election, pursuant to paragraph (b)(5)(i) of this section, to collect, process, and make available to quotation vendors bids, offers, quotation sizes, and aggregate quotation sizes communicated on such exchange; and

(ii) With respect to a member of an association: (A) Any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported in the consolidated system; and (B) Any other covered security for which such member acts in the capacity of an OTC market maker and has in effect an election, pursuant to paragraph (b)(5)(ii) of this section, to communicate to its association bids, offers and quotation sizes for the purpose of making such bids, offers and quotation sizes available to quotation vendors.[341]

Because the Quote Rule applies to both listed options and equities covered by an effective transaction reporting plan, the Commission proposes to revise the Quote Rule's definition of "subject security" by replacing references to a "covered security" with references to an "NMS security." In addition, for the reasons discussed below, the Commission proposes to replace the phrase "reported in the consolidated system" with the phrase "reported pursuant to an effective transaction reporting plan or effective national market system plan."

iv. "Consolidated system"

Paragraph (a)(25) of the Quote Rule currently defines the term "subject security" to include, among other things: (1) With respect to an exchange, any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported in the consolidated system; and (2) with respect to a member of an association, any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported in the consolidated system. Paragraph (a)(5) of the Quote Rule defines the term "consolidated system" to mean "the consolidated transaction reporting system, including a transaction reporting system operating pursuant to an effective national market system plan."

The Commission proposes to clarify the definition of "subject security" by eliminating the phrase "reported in the consolidated system" from proposed Regulation NMS and replacing it with the phrase "reported pursuant to an effective transaction reporting plan or an effective national market system plan." Thus, proposed Regulation NMS would define a "subject security" to include, among other things: (1) With respect to a national securities exchange, any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and (2) with respect to a member of a national securities association, any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective

[336] The Limit Order Display Rule, the Vendor Display Rule, and Exchange Act Rule 11Aa3–1 define a "reported security" to mean "any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan." *See* Exchange Act Rules 11Ac1–4(a)(10), 11Ac1–2(a)(20), and 11Aa3–1(a)(4). The Quote Rule defines the term "reported security" to mean "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." *See* Exchange Act Rule 11Ac1–1(a)(20). As discussed above, the Commission is proposing substantial modifications to the current Vendor Display Rule.

[337] *See* Exchange Act Rule 11Ac1–4(a)(5). The Limit Order Display Rule defines a "covered security" to include both reported securities and other securities for which market information is disseminated through Nasdaq.

[338] *See* Exchange Act Rule 11Aa1–1(a)(6). The Quote Rule defines a "covered security" to include both reported securities and other securities for which market information is disseminated through Nasdaq.

[339] In paragraph (b)(1)(ii) of the Quote Rule, which requires a registered national securities association to disseminate quotations at all times when last sale information is available with respect to "reported securities," the reference to "reported security" would be replaced by a reference to "NMS security."

[340] *See* Exchange Act Rule 11Ac1–2(a)(4).

[341] *See* Exchange Act Rule 11Ac1–1(a)(25) (emphasis added).

transaction reporting plan or effective national market system plan.

This change is designed to provide a clearer, more descriptive, and less circular definition of "subject security" by indicating that the trading volume referred to in the definition is the trading volume in a security that is reported pursuant to an effective transaction reporting plan or an effective national market system plan. Although replacing the phrase "reported in the consolidated system" with the phrase "reported pursuant to an effective transaction reporting plan or an effective national market system plan" would produce a clearer definition of "subject security," it would not alter the scope or the substance of the definition.[342]

v. "National Securities Exchange"

Section 3(a)(1) of the Exchange Act defines the term "exchange" to mean "any organization, association, or group of persons * * * which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood * * *"[343] Exchange Act Rule 3b–16,[344] adopted in 1998, interprets the statutory definition of "exchange" broadly to include any organization, association, or group of persons that: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade. Exchange Act Rule 3b–16 was designed to provide "a more comprehensive and meaningful interpretation of what an exchange is in light of today's markets."[345]

The Quote Rule's definition of an "exchange market maker" defines the term "national securities exchange" as an "exchange."[346] To avoid confusion between a "national securities exchange" and the broader interpretation of "exchange" set forth in Exchange Act Rule 3b–16, the Commission proposes to use the term "national securities exchange" rather than "exchange" throughout proposed Regulation NMS. The national securities exchange definition is intended to capture only those entities that operate as national securities exchanges and that are registered as such with the Commission. It is not intended to capture those entities that meet the "exchange" definition under Regulation ATS but that operate as something other than a national securities exchange. The use of this term is consistent with the use of the term "exchange" in the current NMS rules.

vi. "OTC Market Maker"

The Quote Rule and Exchange Act Rule 11Ac1–5 define the term "OTC market maker" differently.[347] Unlike the Quote Rule, Exchange Act Rule 11Ac1–5 defines the term "OTC market maker" to include an explicit reference to a securities dealer that holds itself out as being willing to buy from and sell to customers or others in the United States. In proposed Regulation NMS, the Commission proposes to retain the reference to transactions with "customers or others in the United States" to indicate clearly that a foreign dealer could be an "OTC market maker" if it acts as a securities dealer with respect to customers or others in the United States.

Accordingly, the Commission proposes to define "OTC market maker" for proposed Regulation NMS as "any dealer that holds itself out as being willing to buy from and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange."[348]

vii. "Vendor"

The term "vendor" or "quotation vendor" is defined differently in three NMS rules: The Quote Rule and Exchange Act Rules 11Aa3–1 and 11Ac1–2.[349] Although the definitions are similar, the definition of "vendor" in Exchange Act Rule 11Ac1–2 is the most comprehensive because it encompasses any SIP that disseminates transaction reports, last sale data, or quotation information, whereas the other definitions are less complete in identifying the types of information that vendors typically make available. To provide a uniform and comprehensive definition of the term "vendor," the Commission proposes to use in Regulation NMS the definition of "vendor" as it is currently defined in Exchange Act Rule 11Ac1–2(a)(2).

viii. "Best Bid," "Best Offer," and "National Best Bid and National Best Offer"

The Quote Rule and Rule 11Ac1–2 define the terms "best bid" and "best offer" differently.[350] In addition, the

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[342] This proposed amendment would also impact certain non-NMS rules that define the term consolidated system. *See, e.g.*, Exchange Act Rule 10b–18(a)(7) ("consolidated system means the consolidated transaction reporting system contemplated by Rule 11Aa3–1"). As discussed below, the Commission is also proposing to change certain non-NMS rules that are impacted by the definitional changes proposed in this Release.

[343] 15 U.S.C. 78c(a)(1).

[344] 17 CFR 240.3b–16.

[345] *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1999) (adopting Regulation ATS).

[346] Specifically, the Quote Rule states that the term "exchange market maker" shall mean "any member of a national securities exchange ('exchange') who is registered as a specialist or market maker pursuant to the rules of such exchange." *See* Exchange Act Rule 11Ac1–1(a)(9). The statutory requirements applicable to a national securities exchange are set forth in Section 6 of the Exchange Act, 15 U.S.C. 78f.

[347] *Compare* Exchange Act Rules 11Ac1–1(a)(13) and 11Ac1–5(a)(18).

[348] The proposed definition of "OTC market maker" uses the term "NMS stock" because there is no OTC market in standardized options.

[349] The Quote Rule defines the term "quotation vendor" to mean "any securities information processor engaged in the business of disseminating to brokers, dealers or investors on a real-time basis, bids and offers made available pursuant to this section, whether distributed through an electronic communications network or displayed on a terminal or other display device." *See* Exchange Act Rule 11Ac1–1(a)(19). Exchange Act Rule 11Aa3–1(a)(11) defines the term "vendor" to mean "any securities information processor engaged in the business of disseminating transaction reports or last sale data with respect to transactions in reported securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker or interrogation device." Exchange Act Rule 11Ac1–2(a)(2) defines the term "vendor" to mean "any securities information processor engaged in the business of disseminating transaction reports, last sale data or quotation information with respect to subject securities to brokers, dealers or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker or interrogation device."

[350] The Quote Rule states that "[t]he terms *best bid* and *best offer* shall mean the highest priced bid and the lowest priced offer." *See* Exchange Act Rule 11Ac1–1(a)(3). Exchange Act Rule 11Ac1–2(a)(15) defines the terms "best bid" and "best offer" as follows:

(i) With respect to quotations for a reported security, the highest bid or lowest offer for that security made available by any reporting market center pursuant to § 240.11Ac1–1 (Rule 11Ac1–1 under the Act) (excluding any bid or offer made available by an exchange during any period such exchange is relieved of its obligations under paragraphs (b)(1) and (2) of § 240.11Ac1–1 by virtue of paragraph (b)(3)(i) thereof)); Provided, however, That in the event two or more reporting market centers make available identical bids or offers for a reported security, the best bid or best offer (as the case may be) shall be computed by ranking all such identical bids or offers (as the case may be) first by size (giving the highest ranking to the bid or offer associated with the largest size), then by time (giving the highest ranking to the bid or offer received first in time); and

(ii) With respect to quotations for a subject security other than a reported security, the highest bid or lowest offer (as the case may be) for such security disseminated by an over-the-counter market maker in Level 2 or 3 of NASDAQ.

term "consolidated best bid and offer" is defined in Exchange Act Rule 11Ac1–5(a)(7) to mean "the highest firm bid and the lowest firm offer for a security that is calculated and disseminated on a current and continuous basis pursuant to an effective national market system plan." The Commission proposes to retain the definitions of "best bid" and "best offer" as used in the Quote Rule. A new term called "national best bid and national best offer" would: (1) Replace the term "best bid and best offer" as that term is currently used in Exchange Act Rule 11Ac1–2 and (2) replace the term "consolidated best bid and offer" as that term is currently used in Exchange Act Rule 11Ac1–5. This new term would refer to the best quotes that are calculated and disseminated by a plan processor pursuant to an effective NMS plan.[351] The proposed definition of "national best bid and national best offer" also would address those instances where multiple market centers transmit identical bids and offers to the plan processor pursuant to an NMS plan by establishing the way in which these bids and offers are to be prioritized.

ix. "Bid" or "Offer," "Customer," "Nasdaq Security," and "Responsible Broker or Dealer"

The Commission also proposes to update or clarify the following terms in the NMS rules: "bid" or "offer;" "customer;" "Nasdaq security;" and "responsible broker or dealer."

The Quote Rule currently defines the terms "bid and offer" to mean "the bid price and the offer price communicated by an exchange member or OTC market maker to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of a covered security, as either principal or agent, but shall not include indications of interest." [352] The Commission proposes to update this definition by replacing the term "OTC market maker" with the phrase "member of a national securities association" and to call the term "bid or offer" rather than "bid and offer" to reflect the fact that the terms are not always used in the conjunctive. Modifying the definition to apply to any member of a national securities association would clarify that bids and offers include quotes communicated not only by OTC market makers but also by ATSs, ECNs, and order entry firms that are members of the NASD but that are not market makers.

Expanding the bid and offer terms could have the unintended consequence of also expanding the scope of the Quote Rule where those terms are used to apply to members of a national securities association that are not OTC market makers (*e.g.*, ECNs, and ATSs). To avoid this unintended expansion of the scope of the Quote Rule, the Commission is proposing to amend the definition of "responsible broker or dealer." In particular, the Commission is proposing to amend the portion of that definition currently in Rule 11Ac1–1(a)(21)(ii) to limit its scope to bids and offers communicated by an OTC market maker.

The Commission is also proposing to amend the definition of the term "customer." The Quote Rule currently defines that term to mean "any person that is not a registered broker-dealer." [353] To indicate that the scope of the definition includes broker-dealers that are exempt from registration as well as registered broker-dealers, the Commission proposes to revise the definition by deleting the term "registered." Thus, proposed Rule 600 would define the term "customer" to mean "any person that is not a broker-dealer."

Exchange Act Rule 11Aa3–1 currently defines the term "NASDAQ security" to mean "any registered equity security for which quotation information is disseminated in the National Association of Securities Dealers Automated Quotation system ("NASDAQ")." [354] This acronym is now out-dated. Therefore, to modernize this definition and to ensure that any type of registered security that Nasdaq lists is covered by this definition, the Commission proposes to define the term "Nasdaq security" to mean "any registered security listed on the Nasdaq Stock Market, Inc."

d. Definitions in the Proposed New Rules

The Commission also is proposing to include within proposed new Rule 600 a number of new definitions that would be used in proposed new Rules 610 through 612 of proposed Regulation NMS. These new terms are discussed in detail in Sections III, IV, and V above. Specifically, for the reasons discussed above, the Commission proposes to adopt the following terms:

- The term *Automated order execution facility* shall mean an order execution facility that provides for an immediate automated response to all incoming subject orders for up to the full size of its best bid and offer disseminated pursuant to an effective national market system plan without any restriction on execution.
- The term *Consolidated display* shall mean (i) the prices, sizes, and market identifications of the national best bid and national best offer for a security, and (ii) consolidated last sale information for a security.
- The term *Consolidated last sale information* shall mean the price, volume, and market identification of the most recent transaction report for a security that is disseminated pursuant to an effective national market system plan.
- The term *Non-automated order execution facility* shall mean an order execution facility that is not an automated order execution facility.
- The term *Order execution facility* shall mean any exchange market maker; OTC market maker; any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent; alternative trading system; or national securities exchange or national securities association that operates a facility that executes orders.
- The term *Quoting market center* shall mean an order execution facility of any national securities exchange or national securities association that is required to make available to a vendor its best bid or best offer in a security pursuant to § 242.602).
- The term *Quoting market participant* shall mean any broker or dealer that provides its best bid or best offer in a security to a national securities exchange or national securities association pursuant to § 242.602) or Regulation ATS (§§ 242.300 through 242.303), and the best bid or best offer of which is not otherwise available through a quoting market center.
- The term *Subject order* shall mean any order to buy or sell an NMS stock received by an order execution facility from itself, any member, customer, subscriber, or any other order execution facility that is executed during regular trading hours.
- The term *Trade-through* shall mean the purchase or sale of an NMS stock

[351] The definition of "reporting market center" currently in Rule 11Ac1–2(a)(14) and incorporated into that Rule's definitions of "best bid" and "best offer" would no longer be necessary and therefore would be deleted.

[352] *See* Exchange Act Rule 11Ac1–1(a)(4). Exchange Act Rule 11Ac1–2(a)(6) uses the Quote Rule's definition of "bid" and "offer" for reported securities, but it defines "bid" and "offer" for Nasdaq SmallCap securities as "the most recent bid or offer price of an over-the-counter market maker disseminated through Level 2 or 3 of NASDAQ." Because Nasdaq SmallCap securities now are reported securities, it is unnecessary to maintain the distinction between reported securities and Nasdaq SmallCap securities. Accordingly, to update and provide a single definition of the terms "bid" and "offer," the Commission proposes to eliminate the definitions of "bid" and "offer" in Exchange Act Rule 11Ac1–2 and retain modified versions of the terms as they are defined in the Quote Rule.

[353] *See* Exchange Act Rule 11Ac1–1(a)(26).

[354] *See* Exchange Act Rule 11Aa3–1(a)(6).

during regular trading hours, either as principal or agent, at a price that is lower than the best bid or higher than the best offer of any order execution facility that is disseminated pursuant to an effective national market system plan at the time the transaction was executed.

The Commission requests comment on the proposed definitions that would be used in proposed new Rules 610 through 612.

3. Proposed Changes to Other Rules

In addition to the changes described above, the Commission is proposing to amend a number of rules that cross-reference current NMS rules or that use terms that proposed Regulation NMS would amend or eliminate.[355] These amendments are intended to be non-substantive. Specifically, the Commission proposes to make conforming changes to the following rules: § 200.30–3;[356] Rule 144[357] under the Securities Act of 1933;[358] Exchange Act Rule 31–1;[359] § 249.1001;[360] Exchange Act Rule 3a51–1;[361] Exchange Act Rule 3b–16;[362] Exchange Act Rule 10b–10;[363] Exchange Act Rule 10b–18;[364] Exchange Act Rule 15b9–1;[365] Exchange Act Rule 12a–7;[366] Exchange Act Rule 12f–1;[367] Exchange Act Rule 12f–2;[368] Exchange Act Rule 15c2–11;[369] Exchange Act Rule 19c–3;[370] Exchange Act Rule 19c–4;[371] Rule 100 of Regulation M under the Exchange Act;[372] Rule 300 of Regulation ATS under the Exchange Act;[373] and Rule 301 of Regulation ATS under the Exchange Act.[374]

4. Exemptive Authority

Proposed Rules 610, 611, and 612 each provide that the Commission may exempt persons from the provisions of those rules, either conditionally or unconditionally, if it determines such exemption is consistent with the public interest and the protection of investors. In addition, the Commission is proposing to amend 17 CFR 200.30–3 to grant the Director of the Division of Market Regulation delegated authority to grant exemptions from the provisions of proposed Regulation NMS.

C. General Request for Comment

The Commission seeks comment on proposed Rule 600 and the designation of the NMS rules as proposed Regulation NMS, as described above. The Commission asks commenters to address whether the proposal would further the NMS goals set out in Section 11A of the Exchange Act, and whether the definitions contained in proposed Rule 600 are appropriate and accurate. The Commission also seeks comment on whether the technical changes proposed to the NMS rules successfully preserve the scope of the current rules. In addition, the Commission seeks specific comment on whether additional, non-substantive modifications could be made to the NMS rules to enhance clarity or remove outdated references. The Commission also invites commenters to provide views and data concerning the costs and benefits associated with the proposal.

D. Paperwork Reduction Act

Neither proposed Rule 600 nor any of the conforming amendments to the NMS rules proposed in Section VII impose recordkeeping or information collection requirements, or other collections of information that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Accordingly, the Paperwork Reduction Act does not apply.

E. Consideration of Costs and Benefits

The Commission proposes to designate the NMS rules as proposed Regulation NMS and to adopt and include in proposed new Regulation NMS a separate definitional rule, proposed Rule 600, that would contain all of the defined terms used in proposed Regulation NMS and make certain conforming amendments to the NMS rules. Currently, each NMS rule includes its own set of definitions and some identical terms, such as "covered security," "reported security," and "subject security" are defined inconsistently. Although proposed Rule 600 would retain, unchanged, most of the definitions used in the NMS rules, it would delete or revise obsolete definitions and eliminate the use of inconsistent definitions for identical terms. Proposed Rule 600 would not alter the requirements or operation of the existing NMS rules. By creating a single set of defined terms for Regulation NMS, proposed Rule 600 should make the NMS rules clearer and easier to understand.

The Commission has identified below certain costs and benefits relating to the proposal. The Commission requests comments on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of the proposal. The Commission encourages commenters to identify and supply any relevant data, analysis, and estimates concerning the costs or benefits of the proposal.

1. Benefits

The Commission preliminarily believes that proposed Rule 600 and the related proposed amendments would benefit all entities that are subject to the requirements of proposed Regulation NMS including broker-dealers, national securities exchanges, the NASD, ECNs, SIPs, and vendors. By eliminating or revising obsolete and inconsistent definitions and adopting a single set of definitions that would be used throughout proposed Regulation NMS, proposed Rule 600 should make proposed Regulation NMS easier to understand, thereby facilitating compliance with its requirements and potentially easing the compliance burden on entities subject to proposed Regulation NMS. Increased compliance with proposed Regulation NMS would, in turn, benefit investors and the public interest.

2. Costs

Proposed Rule 600 would update and clarify the definitions used in the NMS rules. Neither proposed Rule 600 nor the related proposed amendments would alter the existing requirements of the NMS rules. Accordingly, the Commission believes that the proposed changes would likely impose few additional costs on entities subject to

[355] Certain other rules that would be impacted by proposed Regulation NMS that are also the subject of other proposed Commission rulemakings that are currently pending, such as Exchange Act Rule 10a–1 (17 CFR 240.10a–1), are not included in this proposal. *See* Securities Exchange Act Release No. 48709 (October 28, 2003), 68 FR 62972 (November 6, 2003) (proposing new Regulation SHO regarding short sales, which would, among other things, repeal Rule 10a–1).

[356] 17 CFR 300.30–3. In addition to the conforming changes, as discussed below, the Commission is proposing to amend this rule to grant the Director of the Division of Market Regulation the authority to grant exemptions to proposed new Rules 610 through 612.

[357] 17 CFR 230.144.

[358] 15 U.S.C. 77a *et seq.*

[359] 17 CFR 240.31–1.

[360] 17 CFR 249.1001.

[361] 17 CFR 3a51–1.

[362] 17 CFR 240.3b–16.

[363] 17 CFR 240.10b–10. Proposed amendments to Exchange Act Rules 3a51–1 and Rule 10b–10 are currently under consideration and have been published for comment. *See* Securities Exchange Act Release Nos. 49148 (January 29, 2004) and 49037 (January 8, 2004). If the amendments to one or both of these rules are adopted before the amendments proposed in this release, then the new definitions would also have to be revised.

[364] 17 CFR 240.10b–18.

[365] 17 CFR 240.15b9–1.

[366] 17 CFR 240.12a–7.

[367] 17 CFR 240.12f–1.

[368] 17 CFR 240.12f–2.

[369] 17 CFR 240.15c2–11.

[370] 17 CFR 240.19c–3.

[371] 17 CFR 240.19c–4.

[372] 17 CFR 242.100.

[373] 17 CFR 242.300.

[374] 17 CFR 242.301.

proposed Regulation NMS. Although some additional personnel costs may be incurred in reviewing the proposed changes, the Commission believes that these costs would be minimal.

F. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act [375] requires the Commission, whenever it engages in rulemaking or in the review of a rule of an SRO, and it is 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. Section 23(a)(2) of the Exchange Act [376] requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any such rule would have on competition. Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Proposed Rule 600 and the related proposed amendments should help to promote efficiency and capital formation by making the NMS rules easier to understand, thereby helping to reduce compliance costs for entities subject to the rules. Enhanced clarity in the definitions used in proposed Regulation NMS also should benefit investors and the public interest by facilitating compliance with the requirements of proposed Regulation NMS. Because proposed Rule 600 would merely clarify the definitions used in proposed Regulation NMS without imposing new requirements, and because the related proposed amendments would create no new requirements, this proposal should not impose a burden on competition or alter the competitive standing of entities subject to proposed Regulation NMS.

The Commission requests comment on whether the proposed changes are expected to affect efficiency, competition, and capital formation.

G. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [377] the Commission must advise the Office of Management and Budget as to whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment, or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requests comment on the potential impact of the proposal on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

H. Regulatory Flexibility Act Certification

The Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that proposed Rule 600 and the related proposed amendments, if adopted, would not have a significant economic impact on a substantial number of small entities. Proposed Rule 600 would revise and clarify the definitions used in proposed Regulation NMS, thereby facilitating compliance with proposed Regulation NMS and potentially easing the compliance burden on entities seeking to comply with the regulation. Neither proposed Rule 600 nor the related proposed amendments of the NMS rules would alter the existing requirements of the NMS rules. Accordingly, the Commission does not believe that proposed Rule 600 and the re-designation of the NMS rules as proposed Regulation NMS would have a significant impact on a substantial number of small entities.

The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

VIII. Statutory Authority

Pursuant to the Exchange Act and particularly, Sections 2, 3(b), 5, 6, 11A, 15, 15A, 17(a) and (b), 19, 23(a), and 36 thereof, 15 U.S.C. 78b, 78c(b), 78e, 78f, 78k–1, 78o, 78o–3, 78q(a) and (b), 78s; 78w(a), and 78mm, and Rules 11Aa3–2(b)(2) and 11Aa3–2(c)(1) thereunder, 17 CFR 240.11Aa3–2(b)(2) and 17 CFR 240.11Aa3–2(c)(1), the Commission proposes to: (1) Redesignate the NMS rules under Section 11A of the Exchange Act as Regulation NMS rules; (2) adopt Rules 600, 610, 611, and 612 of Regulation NMS; (3) amend current Rules 11Aa3–1 and 11Ac1–2 under the Exchange Act and redesignate them as Rules 601 and 603 of Regulation NMS; (4) amend the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan; and (5) amend various other rules to reflect the adoption of Regulation NMS, as set forth below.

IX. Text of the Proposed Amendments to the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan

The Commission hereby proposes to amend the CTA Plan, the CQ Plan, and the Nasdaq UTP Plan to incorporate the new net income allocation formula into each Plan, which would supercede the existing allocation formulas in those Plans, and to incorporate the new Plan governance language into each Plan.

Set forth below is the text of (1) the proposed new allocation formula to be incorporated into each of the Plans, and (2) the proposed new Plan governance language to be incorporated into each of the Plans.

Proposed Formula Amendment

(#) *Allocation of Net Income.*

(a) *Annual Payment.* Notwithstanding any other provision of this Plan, each Participant eligible to receive distributable net income under the Plan shall receive an annual payment for each calendar year that is equal to the sum of the Participant's Trading Shares, Quoting Shares, and NBBO Improvement Shares, as defined below, in each Eligible Security for the calendar year.

(b) *Security Income Allocation.* The Security Income Allocation for an Eligible Security shall be determined by multiplying (i) the distributable net income of the Plan for the calendar year by (ii) the Volume Percentage for such Eligible Security. The Volume Percentage for an Eligible Security shall be determined by dividing (i) the square root of the dollar volume of transaction reports disseminated by the Processor in such Eligible Security during the calendar year by (ii) the sum of the square roots of the dollar volume of transaction reports disseminated by the Processor in each Eligible Security during the calendar year.

(c) *Trading Share.* The Trading Share of a Participant in an Eligible Security shall be determined by multiplying (i) an amount equal to the lesser of (A) fifty percent of the Security Income Allocation for the Eligible Security or (B) an amount equal to $2.00 multiplied by the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during

[375] 15 U.S.C. 78c(f).

[376] 15 U.S.C. 78w(a)(2).

[377] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

the calendar year, by (ii) the Participant's Trade Rating in the Eligible Security. A Participant's Trade Rating in an Eligible Security shall be determined by taking the average of (i) the Participant's percentage of the total dollar volume of transaction reports disseminated by the Processor in the Eligible Security during the calendar year, and (ii) the Participant's percentage of the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year. A qualified transaction report shall have a dollar volume of $5,000 or greater.

(d) *Quoting Share.* The Quoting Share of a Participant in an Eligible Security shall be determined by multiplying (i) an amount equal to thirty-five percent of the Security Income Allocation for the Eligible Security, plus the difference, if greater than zero, between fifty percent of the Security Income Allocation for the Eligible Security and an amount equal to $2.00 multiplied by the total number of qualified transaction reports disseminated by the Processor in the Eligible Security during the calendar year, by (ii) the Participant's Quote Rating in the Eligible Security. A Participant's Quote Rating in an Eligible Security shall be determined by dividing (i) the sum of the Quote Credits earned by the Participant in such Eligible Security during the calendar year by (ii) the sum of the Quote Credits earned by all Participants in such Eligible Security during the calendar year. A Participant shall earn one Quote Credit for each second of time multiplied by dollar value of size that a firm bid (offer) transmitted by the Participant to the Processor during regular trading hours is equal to the price of the national best bid (offer) in the Eligible Security; provided, however, with respect to quotes transmitted by a Participant that are not fully accessible through automatic execution, that such quotes will cease earning credits when they are left alone at the national best bid (offer) as a result of quote changes transmitted by other Participants. A Participant may recommence earning credits for a quote that is left alone at the national best bid (offer) by retransmitting the quote to confirm a current willingness to trade at the price of such quote. The dollar value of size of a quote shall be determined by multiplying the price of a quote by its size.

(e) *NBBO Improvement Share.* The NBBO Improvement Share of a Participant in an Eligible Security shall be determined by multiplying (i) an amount equal to fifteen percent of the Security Income Allocation for the Eligible Security by (ii) the Participant's NBBO Improvement Rating in the Eligible Security. A Participant's NBBO Improvement Rating in an Eligible Security shall be determined by dividing (i) the sum of the NBBO Improvement Credits earned by the Participant in such Eligible Security during the calendar year by (ii) the sum of the NBBO Improvement Credits earned by all Participants in such Eligible Security during the calendar year. A Participant shall earn one NBBO Improvement Credit for each five seconds of time multiplied by the dollar value of size that a firm bid (offer) transmitted by the Participant to the Processor during regular trading hours increases (lowers) the price of the existing national best bid (offer) in the Eligible Security ("Qualified Quote") and continues to remain equal to the price of the national best bid (offer) in such Eligible Security. In addition, a Participant shall earn NBBO Improvement Credits for a Qualified Quote equal to the total amount of dollar volume of the Participant's transaction reports in the Eligible Security (i) that are transmitted after the Qualified Quote and up to five seconds after the price of the Qualified Quote no longer continues to equal the price of the national best bid (offer) in such Eligible Security, and (ii) that have prices equal to the price of the Qualified Quote; provided, however, that the total NBBO Improvement Credits for a Qualified Quote earned from transaction reports shall not exceed an amount equal to the initial dollar value of size of such Qualified Quote plus the total number of NBBO Improvement Credits earned for the time and size of such Qualified Quote.

Proposed Governance Amendment

(#) *Advisory Committee.*

(a) *Formation.* Notwithstanding any other provision of this Plan, an Advisory Committee to the Plan shall be formed and shall function in accordance with the provisions set forth in this section.

(b) *Composition.* Members of the Advisory Committee shall be selected for two-year terms as follows:

(1) *Operating Committee Selections.* By affirmative vote of a majority of the Participants entitled to vote, the Operating Committee shall select at least one representative from each of the following categories to be members of the Advisory Committee: (i) A broker-dealer with a substantial retail investor customer base, (ii) a broker-dealer with a substantial institutional investor customer base, (iii) an alternative trading system, (iv) a data vendor, and (v) an investor.

(2) *Participant Selections.* Each Participant shall have the right to select one member of the Advisory Committee. A Participant shall not select any person employed by or affiliated with any Participant.

(c) *Function.* Members of the Advisory Committee shall have the right to submit their views to the Operating Committee on Plan matters, prior to a decision by the Operating Committee on such matters. Such matters shall include, but not be limited to, any new or modified product, fee, contract, or pilot program that is offered or used pursuant to the Plan.

(d) *Meetings and Information.* Members of the Advisory Committee shall have the right to attend all meetings of the Operating Committee and to receive any information concerning plan matters that is distributed to the Operating Committee; provided, however, that the Operating Committee may meet in executive session if, by affirmative vote of a majority of the Participants entitled to vote, the Operating Committee determines that an item of Plan business requires confidential treatment.

X. Text of Proposed Rules

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 240, 242, and 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Proposed Rules

For the reasons set out in the preamble, Title 17, Chapter II of the Code of the Federal Regulations is proposed to be amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The authority citation for part 200 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. Section 200.30–3 is amended by:

(a) Removing paragraphs (a)(62) and (a)(71);

(b) Redesignating paragraphs (a)(63) through (a)(78) as paragraphs (a)(62) through (a)(76);

(c) Revising paragraphs (a)(27), (a)(28), (a)(36), (a)(37), (a)(42), (a)(49), (a)(61), and newly redesignated paragraphs (a)(68), and (a)(69); and

(d) Adding new paragraphs (a)(77), (a)(78), and (a)(79).

The revisions and additions read as follows:

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(27) To approve amendments to the joint industry plan governing consolidated transaction reporting declared effective by the Commission pursuant to Rule 601 (17 CFR 242.601) or its predecessors, Rule 11Aa3–1 and Rule 17a–15, and to grant exemptions from Rule 601 pursuant to Rule 601(f) (17 CFR 242.601(f)) to exchanges trading listed securities that are designated as national market system securities until such times as a Joint Reporting Plan for such securities is filed and approved by the Commission.

(28) To grant exemptions from Rule 602 (17 CFR 242.602), pursuant to Rule 602(d) (17 CFR 242.602(d)).

* * * * *

(36) To grant exemptions from Rule 603 (17 CFR 242.603), pursuant to Rule 603(c) (17 CFR 242.603(c)).

(37) Pursuant to Rule 600 (17 CFR 242.600), to publish notice of the filing of a designation plan with respect to national market system securities, or any proposed amendment thereto, and to approve such plan or amendment.

* * * * *

(42) Under 17 CFR 242.608(e), to grant or deny exemptions from 17 CFR 242.608.

* * * * *

(49) Pursuant to section 11A(b) of the Act (15 U.S.C. 78k–1(b)) and Rule 609 thereunder (17 CFR 242.609), to publish notice of and, by order, grant under section 11A(b) of the Act and Rule 609 thereunder: Applications for registration as a securities information processor; and exemptions from that section and any rules or regulations promulgated thereunder, either conditionally or unconditionally.

* * * * *

(61) To grant exemptions from Rule 604 (17 CFR 242.604), pursuant to Rule 604(c) (17 CFR 242.604(c)).

* * * * *

(68) Pursuant to Rule 605(b) (17 CFR 242.605(b)), to grant or deny exemptions, conditionally or unconditionally, from any provision or provisions of Rule 605 (17 CFR 242.605).

(69) Pursuant to Rule 606(c) (17 CFR 242.606(c)), to grant or deny exemptions, conditionally or unconditionally, from any provision or provisions of Rule 606 (17 CFR 242.606).

* * * * *

(77) To grant or deny exemptions from Rule 610 (17 CFR 242.610), pursuant to Rule 610(d) (17 CFR 242.610(d)).

(78) To grant or deny exemptions from Rule 611 (17 CFR 242.611), pursuant to Rule 611(d) (17 CFR 242.611(d)).

(79) To grant or deny exemptions from Rule 612 (17 CFR 242.612), pursuant to Rule 612(b) (17 CFR 242.612(b)).

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

3. The general authority citation for part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 77sss, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

4. Section 230.144 is amended by:

(a) Removing the authority citation following § 230.144; and

(b) Revising paragraph (e)(1)(iii).

The revision reads as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(e) * * *

(1) * * *

(iii) The average weekly volume of trading in such securities reported pursuant to an *effective transaction reporting plan* or an *effective national market system plan* as those terms are defined in § 242.600 of this chapter during the four-week period specified in paragraph (e)(1)(ii) of this section.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

5. The general authority citation for part 240 is revised to read follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 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, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 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.

* * * * *

6. Section 240.3a51–1 is amended by revising the introductory text of the section and the introductory text of paragraph (a) to read as follows:

§ 240.3a51–1 Definition of "penny stock."

For purposes of section 3(a)(51) of the Act (15 U.S.C. 78c(a)(51)), the term *penny stock* shall mean any equity security other than a security:

(a) That is an NMS stock, as defined in § 242.600 of this chapter, provided that:

* * * * *

7. Section 240.3b–16 is amended by revising paragraph (d) to read as follows:

§ 240.3b–16 Definitions of terms used in Section 3(a)(1) of the Act.

* * * * *

(d) For the purposes of this section, the terms *bid and offer* shall have the same meaning as under § 242.600 of this chapter.

* * * * *

8. Section 240.10b–10 is amended by:

a. Revising paragraphs (a)(2)(i)(C) and (a)(2)(ii)(B);

b. Removing paragraph (d)(8); and

c. Redesignating paragraphs (d)(9) and (d)(10) as paragraphs (d)(8) and (d)(9).

The revisions read as follows:

§ 240.10b–10 Confirmation of transactions.

* * * * *

(a) * * *

(1) * * *

(i) * * *

(C) For a transaction in any NMS stock as defined in § 242.600 of this chapter or any other equity security as to which transaction reports, last sale data or quotation information is disseminated through an automated quotation system sponsored by a registered national securities association or a national securities exchange or a security authorized for quotation on an automated interdealer quotation system that has the characteristics set forth in section 17B of the Act (15 U.S.C. 78q–2), a statement whether payment for order flow is received by the broker or dealer for transactions in such securities and the fact that the source and nature of the compensation received in connection with the particular transaction will be furnished upon written request of the customer; *provided, however,* that brokers or dealers that do not receive payment for order flow in connection with any transaction have no disclosure obligations under this paragraph; and

* * * * *

(i) * * *

(B) In the case of any other transaction in an NMS security as defined by § 242.600 of this chapter, or an equity security that is quoted on an automated quotation system sponsored by a registered national securities association or traded on a national securities exchange and that is subject to last sale reporting, the reported trade price, the price to the customer in the transaction, and the difference, if any, between the reported trade price and the price to the customer.

* * * * *

9. Section 240.10b–18 is amended by revising paragraph (a)(6) to read as follows:

§ 240.10b–18 Purchases of certain equity securities by the issuer and others.

* * * * *

(a) * * *

(6) *Consolidated system* means a consolidated transaction or quotation reporting system that collects and publicly disseminates on a current and continuous basis transaction or quotation information in common equity securities pursuant to an effective transaction reporting plan or an effective national market system plan (as those terms are defined in § 242.600 of this chapter).

* * * * *

§§ 240.11Aa2–1 through 240.11Ac1–6 [Removed]

10. The undesignated center heading preceding § 240.11Aa2–1 and §§ 240.11Aa2–1 through 240.11Ac1–6 are removed.

11. Section 240.12a–7 is amended by revising the introductory text of paragraph (a)(2) to read as follows:

§ 240.12a–7 Exemption of stock contained in standardized market baskets from section 12(a) of the Act.

(a) * * *

(2) The stock is an NMS stock as defined in § 242.600 of this chapter and is either:

* * * * *

12. Section 240.12f–1 is amended by:

a. Removing the authority citation following the section;

b. Removing "and" at the end of paragraph (a)(3); and

c. Revising paragraph (a)(4).

The revision reads as follows:

§ 240.12f–1 Applications for permission to reinstate unlisted trading privileges.

(a) * * *

(4) Whether transaction information concerning such security is reported pursuant to an effective transaction reporting plan contemplated by § 242.601 of this chapter;

* * * * *

13. Section 240.12f–2 is amended by revising paragraph (a) to read as follows:

§ 240.12f–2 Extending unlisted trading privileges to a security that is the subject of an initial public offering.

(a) *General provision.* A national securities exchange may extend unlisted trading privileges to a subject security when at least one transaction in the subject security has been effected on the national securities exchange upon which the security is listed and the transaction has been reported pursuant to an effective transaction reporting plan, as defined in § 242.600 of this chapter.

* * * * *

14. Section 240.15b9–1 is amended by:

a. Removing the authority citation following the section; and

b. Revising paragraph (c).

The revision reads as follows:

§ 240.15b9–1 Exemption for certain exchange members.

* * * * *

(c) For purposes of this section, the term Intermarket Trading System shall mean the intermarket communications linkage operated jointly by certain self-regulatory organizations pursuant to a plan filed with, and approved by, the Commission pursuant to § 242.608 of this chapter.

15. Section 240.15c2–11 is amended by revising paragraph (f)(5) to read as follows:

§ 240.15c2–11 Initiation or resumption of quotations without specified information.

* * * * *

(f) * * *

(5) The publication or submission of a quotation respecting a security that is authorized for quotation in the Nasdaq system (as defined in § 242.600 of this chapter), and such authorization is not suspended, terminated, or prohibited.

* * * * *

16. Section 240.19c–3 is amended by revising paragraph (b)(6) to read as follows:

§ 240.19c–3 Governing off-board trading by members of national securities exchanges.

* * * * *

(b) * * *

(6) The term *effective transaction reporting plan* shall mean any plan approved by the Commission pursuant to § 242.601 of this chapter for collecting, processing, and making available transaction reports with respect to transactions in an equity security or class of equity securities.

17. Section 240.19c–4 is amended by revising paragraph (e)(6) to read as follows:

§ 240.19c–4 Governing certain listing or authorization determinations by national securities exchanges and associations.

* * * * *

(e) * * *

(6) The term *exchange* shall mean a national securities exchange, registered as such with the Securities and Exchange Commission pursuant to section 6 of the Act (15 U.S.C. 78f), which makes transaction reports available pursuant to § 242.601 of this chapter; and

* * * * *

18. Section 240.31–1 is amended by revising paragraph (e) to read as follows:

§ 240.31–1 Securities transactions exempt from transaction fees.

* * * * *

(e) Transactions which are executed outside the United States and are not reported, or required to be reported, to a transaction reporting association as defined in § 242.600 of this chapter and any approved plan filed under § 242.601 of this chapter;

* * * * *

PART 242—REGULATIONS M, ATS, AC, AND NMS AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

19. The authority citation for part 242 is revised to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

20. The part heading for part 242 is revised as set forth above.

21. Section 242.100 is amended by revising the definition for "electronic communications network" and "Nasdaq" found in paragraph (b) to read as follows:

§ 242.100 Preliminary note; definitions.

* * * * *

(b) * * *

Electronic communications network has the meaning provided in § 242.600.

* * * * *

Nasdaq means the electronic dealer quotation system owned and operated by The Nasdaq Stock Market, Inc.

* * * * *

22. Section 242.300 is amended by:

a. Revising paragraphs (g) and (h);

b. Removing paragraphs (i) and (j); and

c. Redesignating paragraphs (k), (l), and (m) as paragraphs (i), (j), and (k).

The revisions read as follows:

§ 242.300 Definitions.

* * * * *

(g) *NMS stock* shall have the meaning provided in § 242.600; *provided, however,* that a debt or convertible security shall not be deemed an NMS stock for purposes of this Regulation ATS.

(h) *Effective transaction reporting plan* shall have the meaning provided in § 242.600.

* * * * *

23. Section 242.301 is amended by revising paragraphs (b)(3), (b)(5), and (b)(6) to read as follows:

§ 242.301 Requirements for alternative trading systems.

* * * * *

(b) * * *

(3) *Order display and execution access.* (i) An alternative trading system shall comply with the requirements set forth in paragraph (b)(3)(ii) of this section, with respect to any NMS stock in which the alternative trading system:

(A) Displays subscriber orders to any person (other than alternative trading system employees); and

(B) During at least 4 of the preceding 6 calendar months, had an average daily trading volume of 5 percent or more of the aggregate average daily share volume for such NMS stock as reported by an effective transaction reporting plan.

(ii) Such alternative trading system shall provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price for such NMS stock, displayed to more than one person in the alternative trading system, for inclusion in the quotation data made available by the national securities exchange or national securities association to vendors pursuant to § 242.602.

(iii) With respect to any order displayed pursuant to paragraph (b)(3)(ii) of this section, an alternative trading system shall provide to any broker-dealer that has access to the national securities exchange or national securities association to which the alternative trading system provides the prices and sizes of displayed orders pursuant to paragraph (b)(3)(ii)(A) of this section, the ability to effect a transaction with such orders that is:

(A) Equivalent to the ability of such broker-dealer to effect a transaction with other orders displayed on the exchange or by the association; and

(B) At the price of the highest priced buy order or lowest priced sell order displayed for the lesser of the cumulative size of such priced orders entered therein at such price, or the size of the execution sought by such broker-dealer.

* * * * *

(5) *Fair access.* (i) An alternative trading system shall comply with the requirements in paragraph (b)(5)(ii) of this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

(A) With respect to any NMS stock, 5 percent or more of the average daily volume in that security reported by an effective transaction reporting plan;

(B) With respect to an equity security that is not an NMS stock and for which transactions are reported to a self-regulatory organization, 5 percent or more of the average daily trading volume in that security as calculated by the self-regulatory organization to which such transactions are reported;

(C) With respect to municipal securities, 5 percent or more of the average daily volume traded in the United States;

(D) With respect to investment grade corporate debt, 5 percent or more of the average daily volume traded in the United States; or

(E) With respect to non-investment grade corporate debt, 5 percent or more of the average daily volume traded in the United States.

(ii) An alternative trading system shall:

(A) Establish written standards for granting access to trading on its system;

(B) Not unreasonably prohibit or limit any person in respect to access to services offered by such alternative trading system by applying the standards established under paragraph (b)(5)(ii)(A) of this section in an unfair or discriminatory manner;

(C) Make and keep records of:

(1) All grants of access including, for all subscribers, the reasons for granting such access; and

(2) All denials or limitations of access and reasons, for each applicant, for denying or limiting access; and

(D) Report the information required on Form ATS–R (§ 249.638 of this chapter) regarding grants, denials, and limitations of access.

(iii) Notwithstanding paragraph (b)(5)(i) of this section, an alternative trading system shall not be required to comply with the requirements in paragraph (b)(5)(ii) of this section, if such alternative trading system:

(A) Matches customer orders for a security with other customer orders;

(B) Such customers' orders are not displayed to any person, other than employees of the alternative trading system; and

(C) Such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

(6) *Capacity, integrity, and security of automated systems.*

(i) The alternative trading system shall comply with the requirements in paragraph (b)(6)(ii) of this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

(A) With respect to any NMS stock, 20 percent or more of the average daily volume reported by an effective transaction reporting plan;

(B) With respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, 20 percent or more of the average daily volume as calculated by the self-regulatory organization to which such transactions are reported;

(C) With respect to municipal securities, 20 percent or more of the average daily volume traded in the United States;

(D) With respect to investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States; or

(E) With respect to non-investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States.

(ii) With respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, the alternative trading system shall:

(A) Establish reasonable current and future capacity estimates;

(B) Conduct periodic capacity stress tests of critical systems to determine such system's ability to process transactions in an accurate, timely, and efficient manner;

(C) Develop and implement reasonable procedures to review and keep current its system development and testing methodology;

(D) Review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters;

(E) Establish adequate contingency and disaster recovery plans;

(F) On an annual basis, perform an independent review, in accordance with established audit procedures and standards, of such alternative trading system's controls for ensuring that paragraphs (b)(6)(ii)(A) through (E) of

this section are met, and conduct a review by senior management of a report containing the recommendations and conclusions of the independent review; and

(G) Promptly notify the Commission staff of material systems outages and significant systems changes.

(iii) Notwithstanding paragraph (b)(6)(i) of this section, an alternative trading system shall not be required to comply with the requirements in paragraph (b)(6)(ii) of this section, if such alternative trading system:

(A) Matches customer orders for a security with other customer orders;

(B) Such customers' orders are not displayed to any person, other than employees of the alternative trading system; and

(C) Such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

* * * * *

24. Part 242 is amended by adding Regulation NMS, §§ 242.600 through 242.612 to read as follows:

Sec.

Regulation NMS—Regulation of the National Market System

242.600 NMS security designation and definitions.
242.601 Dissemination of transaction reports and last sale data with respect to transactions in NMS stocks.
242.602 Dissemination of quotations in NMS securities.
242.603 Distribution, consolidation, and display of information with respect to quotations for and transactions in NMS stocks.
242.604 Display of customer limit orders.
242.605 Disclosure of order execution information.
242.606 Disclosure of order routing information.
242.607 Customer account statements.
242.608 Filing and amendment of national market system plans.
242.609 Registration of securities information processors: form of application and amendments.
242.610 Access to published bids and offers.
242.611 Trade-through rule.
242.612 Minimum pricing increment.

Regulation NMS—Regulation of the National Market System

§ 242.600 NMS security designation and definitions.

(a) The term *national market system security* as used in section 11A(a)(2) of the Act (15 U.S.C. 78k–1(a)(2)) shall mean any NMS security as defined in paragraph (b) of this section.

(b) For purposes of Regulation NMS (§§ 242.600 through 242.612), the following definitions shall apply:

(1) *Aggregate quotation size* means the sum of the quotation sizes of all responsible brokers or dealers who have communicated on any national securities exchange bids or offers for an NMS security at the same price.

(2) *Alternative trading system* has the meaning provided in § 242.300(a).

(3) *Automated order execution facility* means an order execution facility that provides for an immediate automated response to all incoming subject orders for up to the full size of its best bid and best offer disseminated pursuant to an effective national market system plan without any restriction on execution.

(4) *Average effective spread* means the share-weighted average of effective spreads for order executions calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the national best bid and national best offer at the time of order receipt and, for sell orders, as double the amount of difference between the midpoint of the national best bid and national best offer at the time of order receipt and the execution price.

(5) *Average realized spread* means the share-weighted average of realized spreads for order executions calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the national best bid and national best offer five minutes after the time of order execution and, for sell orders, as double the amount of difference between the midpoint of the national best bid and national best offer five minutes after the time of order execution and the execution price; *provided, however*, that the midpoint of the final national best bid and national best offer disseminated for regular trading hours shall be used to calculate a realized spread if it is disseminated less than five minutes after the time of order execution.

(6) *Best bid and best offer* mean the highest priced bid and the lowest priced offer.

(7) *Bid* or *offer* means the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as either principal or agent, but shall not include indications of interest.

(8) *Block size with respect to* an order means it is:

(i) Of at least 10,000 shares; or

(ii) For a quantity of stock having a market value of at least $200,000.

(9) *Categorized by order size* means dividing orders into separate categories for sizes from 100 to 499 shares, from 500 to 1999 shares, from 2000 to 4999 shares, and 5000 or greater shares.

(10) *Categorized by order type* means dividing orders into separate categories for market orders, marketable limit orders, inside-the-quote limit orders, at-the-quote limit orders, and near-the-quote limit orders.

(11) *Categorized by security* means dividing orders into separate categories for each NMS stock that is included in a report.

(12) *Consolidated display* means:

(i) The prices, sizes, and market identifications of the national best bid and national best offer for a security; and

(ii) Consolidated last sale information for a security.

(13) *Consolidated last sale information* means the price, volume, and market identification of the most recent transaction report for a security that is disseminated pursuant to an effective national market system plan.

(14) *Covered order* means any market order or any limit order (including immediate-or-cancel orders) received by a market center during regular trading hours at a time when a national best bid and national best offer is being disseminated, and, if executed, is executed during regular trading hours, but shall exclude any order for which the customer requests special handling for execution, including, but not limited to, orders to be executed at a market opening price or a market closing price, orders submitted with stop prices, orders to be executed only at their full size, orders to be executed on a particular type of tick or bid, orders submitted on a "not held" basis, orders for other than regular settlement, and orders to be executed at prices unrelated to the market price of the security at the time of execution.

(15) *Customer* means any person that is not a broker or dealer.

(16) *Customer limit order* means an order to buy or sell an NMS stock at a specified price that is not for the account of either a broker or dealer; *provided, however*, that the term *customer limit order* shall include an order transmitted by a broker or dealer on behalf of a customer.

(17) *Customer order* means an order to buy or sell an NMS security that is not for the account of a broker or dealer, but shall not include any order for a quantity of a security having a market value of at least $50,000 for an NMS security that is an option contract and a market value of at least $200,000 for any other NMS security.

(18) *Directed order* means a customer order that the customer specifically

instructed the broker or dealer to route to a particular venue for execution.

(19) *Dynamic market monitoring device* means any service provided by a vendor on an interrogation device or other display that:

(i) Permits real-time monitoring, on a dynamic basis, of transaction reports, last sale data, or quotation information with respect to a particular security; and

(ii) Displays the most recent transaction report, last sale data, or quotation information with respect to that security until such report, data, or information has been superseded or supplemented by the display of a new transaction report, last sale data, or quotation information reflecting the next reported transaction or quotation in that security.

(20) *Effective national market system plan* means any national market system plan approved by the Commission (either temporarily or on a permanent basis) pursuant to § 242.608.

(21) *Effective transaction reporting plan* means any transaction reporting plan approved by the Commission pursuant to § 242.601.

(22) *Electronic communications network* means any electronic system that widely disseminates to third parties orders entered therein by an exchange market maker or OTC market maker, and permits such orders to be executed against in whole or in part; except that the term *electronic communications network* shall not include:

(i) Any system that crosses multiple orders at one or more specified times at a single price set by the system (by algorithm or by any derivative pricing mechanism) and does not allow orders to be crossed or executed against directly by participants outside of such times; or

(ii) Any system operated by, or on behalf of, an OTC market maker or exchange market maker that executes customer orders primarily against the account of such market maker as principal, other than riskless principal.

(23) *Exchange market maker* means any member of a national securities exchange that is registered as a specialist or market maker pursuant to the rules of such exchange.

(24) *Exchange-traded security* means any NMS security or class of NMS securities listed and registered, or admitted to unlisted trading privileges, on a national securities exchange; *provided, however,* that securities not listed on any national securities exchange that are traded pursuant to unlisted trading privileges are excluded.

(25) *Executed at the quote* means, for buy orders, execution at a price equal to the national best offer at the time of order receipt and, for sell orders, execution at a price equal to the national best bid at the time of order receipt.

(26) *Executed outside the quote* means, for buy orders, execution at a price higher than the national best offer at the time of order receipt and, for sell orders, execution at a price lower than the national best bid at the time of order receipt.

(27) *Executed with price improvement* means, for buy orders, execution at a price lower than the national best offer at the time of order receipt and, for sell orders, execution at a price higher than the national best bid at the time of order receipt.

(28) *Inside-the-quote limit order, at-the-quote limit order,* and *near-the-quote limit order* mean non-marketable buy orders with limit prices that are, respectively, higher than, equal to, and lower by $0.10 or less than the national best bid at the time of order receipt, and non-marketable sell orders with limit prices that are, respectively, lower than, equal to, and higher by $0.10 or less than the national best offer at the time of order receipt.

(29) *Interrogation device* means any securities information retrieval system capable of displaying transaction reports, last sale data, or quotation information upon inquiry, on a current basis on a terminal or other device.

(30) *Joint self-regulatory organization plan* means a plan as to which two or more self-regulatory organizations, acting jointly, are sponsors.

(31) *Last sale data* means any price or volume data associated with a transaction.

(32) *Listed equity security* means any equity security listed and registered, or admitted to unlisted trading privileges, on a national securities exchange.

(33) *Listed option* means any option traded on a registered national securities exchange or automated facility of a national securities association.

(34) *Make publicly available* means posting on an Internet Web site that is free and readily accessible to the public, furnishing a written copy to customers on request without charge, and notifying customers at least annually in writing that a written copy will be furnished on request.

(35) *Market center* means any exchange market maker, OTC market maker, alternative trading system, national securities exchange, or national securities association.

(36) *Marketable limit order* means any buy order with a limit price equal to or greater than the national best offer at the time of order receipt, or any sell order with a limit price equal to or less than the national best bid at the time of order receipt.

(37) *Moving ticker* means any continuous real-time moving display of transaction reports or last sale data (other than a dynamic market monitoring device) provided on an interrogation or other display device.

(38) *Nasdaq security* means any registered security listed on The Nasdaq Stock Market, Inc.

(39) *National market system plan* means any joint self-regulatory organization plan in connection with:

(i) The planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or

(ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and their members with any section of this Regulation NMS and part 240, subpart A of this chapter promulgated pursuant to section 11A of the Act (15 U.S.C. 78k–1).

(40) *National securities association* means any association of brokers and dealers registered pursuant to section 15A of the Act (15 U.S.C. 78o–3).

(41) *National securities exchange* means any exchange registered pursuant to section 6 of the Act (15 U.S.C. 78f).

(42) *National best bid and national best offer* means, with respect to quotations for an NMS security, the best bid and best offer for such security that are calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan; *provided,* that in the event two or more market centers transmit to the plan processor pursuant to such plan identical bids or offers for an NMS security, the best bid or best offer (as the case may be) shall be determined by ranking all such identical bids or offers (as the case may be) first by size (giving the highest ranking to the bid or offer associated with the largest size), and then by time (giving the highest ranking to the bid or offer received first in time).

(43) *NMS security* means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.

(44) *NMS stock* means any NMS security other than an option.

(45) *Non-automated order execution facility* means an order execution facility that is not an automated order execution facility.

(46) *Non-directed order* means any customer order other than a directed order.

(47) *Odd-lot* means an order for the purchase or sale of an NMS stock in an amount less than a round lot.

(48) *Options class* means all of the put option or call option series overlying a security, as defined in section 3(a)(10) of the Act (15 U.S.C. 78c(a)(10)).

(49) *Options series* means the contracts in an options class that have the same unit of trade, expiration date, and exercise price, and other terms or conditions.

(50) *Order execution facility* means any exchange market maker; OTC market maker; any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent; alternative trading system; or national securities exchange or national securities association that operates a facility that executes orders.

(51) *OTC market maker* means any dealer that holds itself out as being willing to buy from and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size.

(52) *Participants,* when used in connection with a national market system plan, means any self-regulatory organization which has agreed to act in accordance with the terms of the plan but which is not a signatory of such plan.

(53) *Payment for order flow* has the meaning provided in § 240.10b–10 of this chapter.

(54) *Plan processor* means any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan.

(55) *Profit-sharing relationship* means any ownership or other type of affiliation under which the broker or dealer, directly or indirectly, may share in any profits that may be derived from the execution of non-directed orders.

(56) *Published aggregate quotation size* means the aggregate quotation size calculated by a national securities exchange and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to a responsible broker or dealer.

(57) *Published bid and published offer* means the bid or offer of a responsible broker or dealer for an NMS security communicated by it to its national securities exchange or association pursuant to § 242.602 and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to such responsible broker or dealer.

(58) *Published quotation size* means the quotation size of a responsible broker or dealer communicated by it to its national securities exchange or association pursuant to § 242.602 and displayed by a vendor on a terminal or other display device at the time an order is presented for execution to such responsible broker or dealer.

(59) *Quotation size,* when used with respect to a responsible broker's or dealer's bid or offer for an NMS security, means:

(i) The number of shares (or units of trading) of that security which such responsible broker or dealer has specified, for purposes of dissemination to vendors, that it is willing to buy at the bid price or sell at the offer price comprising its bid or offer, as either principal or agent; or

(ii) In the event such responsible broker or dealer has not so specified, a normal unit of trading for that NMS security.

(60) *Quotations* and *quotation information* mean bids, offers and, where applicable, quotation sizes and aggregate quotation sizes.

(61) *Quoting market center* means an order execution facility of any national securities exchange or national securities association that is required to make available to a vendor its best bid or best offer in a security pursuant to § 242.602.

(62) *Quoting market participant* means any broker or dealer that provides its best bid or best offer in a security to a national securities exchange or national securities association pursuant to § 242.602 or Regulation ATS (§§ 242.300 through 242.303), and the best bid or best offer of which is not otherwise available through a quoting market center.

(63) *Regular trading hours* means the time between 9:30 a.m. and 4:00 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to § 242.605(a)(2).

(64) *Responsible broker or dealer* means:

(i) When used with respect to bids or offers communicated on a national securities exchange, any member of such national securities exchange who communicates to another member on such national securities exchange, at the location (or locations) or through the facility or facilities designated by such national securities exchange for trading in an NMS security a bid or offer for such NMS security, as either principal or agent; *provided, however,* that, in the event two or more members of a national securities exchange have communicated on or through such national securities exchange bids or offers for an NMS security at the same price, each such member shall be considered a *responsible broker or dealer* for that bid or offer, subject to the rules of priority and precedence then in effect on that national securities exchange; and further *provided,* that for a bid or offer which is transmitted from one member of a national securities exchange to another member who undertakes to represent such bid or offer on such national securities exchange as agent, only the last member who undertakes to represent such bid or offer as agent shall be considered the *responsible broker or dealer* for that bid or offer; and

(ii) When used with respect to bids and offers communicated by an OTC market maker to a broker or dealer or a customer, the OTC market maker communicating the bid or offer (regardless of whether such bid or offer is for its own account or on behalf of another person).

(65) *Revised bid or offer* means a market maker's bid or offer which supersedes its published bid or published offer.

(66) *Revised quotation size* means a market maker's quotation size which supersedes its published quotation size.

(67) *Self-regulatory organization* means any national securities exchange or national securities association.

(68) *Specified persons,* when used in connection with any notification required to be provided pursuant to § 242.602(a)(3) and any election (or withdrawal thereof) permitted under § 242.602(a)(5), means:

(i) Each vendor;

(ii) Each plan processor; and

(iii) The processor for the Options Price Reporting Authority (in the case of a notification for a subject security which is a class of securities underlying options admitted to trading on any national securities exchange).

(69) *Sponsor,* when used in connection with a national market system plan, means any self-regulatory organization which is a signatory to such plan and has agreed to act in accordance with the terms of the plan.

(70) *Subject order* means any order to buy or sell an NMS stock received by an order execution facility from itself, any member, customer, subscriber or any other order execution facility that is executed during regular trading hours.

(71) *Subject security* means:

(i) With respect to a national securities exchange:

(A) Any exchange-traded security other than a security for which the executed volume of such exchange, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and

(B) Any other NMS security for which such exchange has in effect an election, pursuant to § 242.602(a)(5)(i), to collect, process, and make available to a vendor bids, offers, quotation sizes, and aggregate quotation sizes communicated on such exchange: and

(ii) With respect to a member of a national securities association:

(A) Any exchange-traded security for which such member acts in the capacity of an OTC market maker unless the executed volume of such member, during the most recent calendar quarter, comprised one percent or less of the aggregate trading volume for such security as reported pursuant to an effective transaction reporting plan or effective national market system plan; and

(B) Any other NMS security for which such member acts in the capacity of an OTC market maker and has in effect an election, pursuant to § 242.602(a)(5)(ii), to communicate to its association bids, offers, and quotation sizes for the purpose of making such bids, offers, and quotation sizes available to a vendor.

(72) *Time of order execution* means the time (to the second) that an order was executed at any venue.

(73) *Time of order receipt* means the time (to the second) that an order was received by a market center for execution.

(74) *Time of the transaction* has the meaning provided in § 240.10b–10 of this chapter.

(75) *Trade-through* means the purchase or sale of an NMS stock during regular trading hours, either as principal or agent, at a price that is lower than the best bid or higher than the best offer of any order execution facility that is disseminated pursuant to an effective national market system plan at the time the transaction was executed.

(76) *Trading rotation* means, with respect to an options class, the time period on a national securities exchange during which:

(i) Opening, re-opening, or closing transactions in options series in such options class are not yet completed; and

(ii) Continuous trading has not yet commenced or has not yet ended for the day in options series in such options class.

(77) *Transaction report* means a report containing the price and volume associated with a transaction involving the purchase or sale of one or more round lots of a security.

(78) *Transaction reporting association* means any person authorized to implement or administer any transaction reporting plan on behalf of persons acting jointly under § 242.601(a).

(79) *Transaction reporting plan* means any plan for collecting, processing, making available or disseminating transaction reports with respect to transactions in NMS stocks filed with the Commission pursuant to, and meeting the requirements of, § 242.601.

(80) *Vendor* means any securities information processor engaged in the business of disseminating transaction reports, last sale data, or quotation information with respect to NMS securities to brokers, dealers, or investors on a real-time or other current and continuing basis, whether through an electronic communications network, moving ticker, or interrogation device.

§ 242.601 Dissemination of transaction reports and last sale data with respect to transactions in NMS stocks.

(a)(1) Every national securities exchange shall file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed through its facilities, and every national securities association shall file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed by its members otherwise than on a national securities exchange.

(2) Any transaction reporting plan, or any amendment thereto, filed pursuant to this section shall be filed with the Commission, and considered for approval, in accordance with the procedures set forth in § 242.608(a) and (b). Any such plan, or amendment thereto, shall specify, at a minimum:

(i) The listed equity and Nasdaq securities or classes of such securities for which transaction reports shall be required by the plan;

(ii) Reporting requirements with respect to transactions in listed equity securities and Nasdaq securities, for any broker or dealer subject to the plan;

(iii) The manner of collecting, processing, sequencing, making available and disseminating transaction reports and last sale data reported pursuant to such plan;

(iv) The manner in which such transaction reports reported pursuant to such plan are to be consolidated with transaction reports from national securities exchanges and national securities associations reported pursuant to any other effective transaction reporting plan;

(v) The applicable standards and methods which will be utilized to ensure promptness of reporting, and accuracy and completeness of transaction reports;

(vi) Any rules or procedures which may be adopted to ensure that transaction reports or last sale data will not be disseminated in a fraudulent or manipulative manner;

(vii) Specific terms of access to transaction reports made available or disseminated pursuant to the plan; and

(viii) That transaction reports or last sale data made available to any vendor for display on an interrogation device identify the marketplace where each transaction was executed.

(3) No transaction reporting plan filed pursuant to this section, or any amendment to an effective transaction reporting plan, shall become effective unless approved by the Commission or otherwise permitted in accordance with the procedures set forth in § 242.608.

(b) *Prohibitions and reporting requirements.*

(1) No broker or dealer may execute any transaction in, or induce or attempt to induce the purchase or sale of, any NMS stock:

(i) On or through the facilities of a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed on or through such exchange facilities; or

(ii) Otherwise than on a national securities exchange unless there is an effective transaction reporting plan with respect to transactions in such security executed otherwise than on a national securities exchange by such broker or dealer.

(2) Every broker or dealer who is a member of a national securities exchange or national securities association shall promptly transmit to the exchange or association of which it is a member all information required by any effective transaction reporting plan filed by such exchange or association (either individually or jointly with other exchanges and/or associations).

(c) *Retransmission of transaction reports or last sale data.* Notwithstanding any provision of any effective transaction reporting plan, no national securities exchange or national securities association may, either individually or jointly, by rule, stated policy or practice, transaction reporting plan or otherwise, prohibit, condition or otherwise limit, directly or indirectly, the ability of any vendor to retransmit,

for display in moving tickers, transaction reports or last sale data made available pursuant to any effective transaction reporting plan; *provided, however*, that a national securities exchange or national securities association may, by means of an effective transaction reporting plan, condition such retransmission upon appropriate undertakings to ensure that any charges for the distribution of transaction reports or last sale data in moving tickers permitted by paragraph (d) of this section are collected.

(d) *Charges.* Nothing in this section shall preclude any national securities exchange or national securities association, separately or jointly, pursuant to the terms of an effective transaction reporting plan, from imposing reasonable, uniform charges (irrespective of geographic location) for distribution of transaction reports or last sale data.

(e) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective transaction reporting plan in accordance with the provisions of § 242.608(d).

(f) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any national securities exchange, national securities association, broker, dealer, or specified security if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to, and perfection of the mechanisms of, a national market system.

§ 242.602 Dissemination of quotations in NMS securities.

(a) *Dissemination requirements for national securities exchanges and national securities associations.*

(1) Every national securities exchange and national securities association shall establish and maintain procedures and mechanisms for collecting bids, offers, quotation sizes, and aggregate quotation sizes from responsible brokers or dealers who are members of such exchange or association, processing such bids, offers, and sizes, and making such bids, offers, and sizes available to vendors, as follows:

(i) Each national securities exchange shall at all times such exchange is open for trading, collect, process, and make available to vendors the best bid, the best offer, and aggregate quotation sizes for each subject security listed or admitted to unlisted trading privileges which is communicated on any national securities exchange by any responsible broker or dealer, but shall not include:

(A) Any bid or offer executed immediately after communication and any bid or offer communicated by a responsible broker or dealer other than an exchange market maker which is cancelled or withdrawn if not executed immediately after communication; and

(B) Any bid or offer communicated during a period when trading in that security has been suspended or halted, or prior to the commencement of trading in that security on any trading day, on that exchange.

(ii) Each national securities association shall, at all times that last sale information with respect to NMS securities is reported pursuant to an effective transaction reporting plan, collect, process, and make available to vendors the best bid, best offer, and quotation sizes communicated otherwise than on an exchange by each member of such association acting in the capacity of an OTC market maker for each subject security and the identity of that member (excluding any bid or offer executed immediately after communication), except during any period when over-the-counter trading in that security has been suspended.

(2) Each national securities exchange shall, with respect to each published bid and published offer representing a bid or offer of a member for a subject security, establish and maintain procedures for ascertaining and disclosing to other members of that exchange, upon presentation of orders sought to be executed by them in reliance upon paragraph (b)(2) of this section, the identity of the responsible broker or dealer who made such bid or offer and the quotation size associated with it.

(3)(i) If, at any time a national securities exchange is open for trading, such exchange determines, pursuant to rules approved by the Commission pursuant to section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)), that the level of trading activities or the existence of unusual market conditions is such that the exchange is incapable of collecting, processing, and making available to vendors the data for a subject security required to be made available pursuant to paragraph (a)(1) of this section in a manner that accurately reflects the current state of the market on such exchange, such exchange shall immediately notify all specified persons of that determination. Upon such notification, responsible brokers or dealers that are members of that exchange shall be relieved of their obligation under paragraphs (b)(2) and (c)(3) of this section and such exchange shall be relieved of its obligations under paragraphs (a)(1) and (2) of this section for that security; *provided, however*, that such exchange will continue, to the maximum extent practicable under the circumstances, to collect, process, and make available to vendors data for that security in accordance with paragraph (a)(1) of this section.

(ii) During any period a national securities exchange, or any responsible broker or dealer that is a member of that exchange, is relieved of any obligation imposed by this section for any subject security by virtue of a notification made pursuant to paragraph (a)(3)(i) of this section, such exchange shall monitor the activity or conditions which formed the basis for such notification and shall immediately renotify all specified persons when that exchange is once again capable of collecting, processing, and making available to vendors the data for that security required to be made available pursuant to paragraph (a)(1) of this section in a manner that accurately reflects the current state of the market on such exchange. Upon such renotification, any exchange or responsible broker or dealer which had been relieved of any obligation imposed by this section as a consequence of the prior notification shall again be subject to such obligation.

(4) Nothing in this section shall preclude any national securities exchange or national securities association from making available to vendors indications of interest or bids and offers for a subject security at any time such exchange or association is not required to do so pursuant to paragraph (a)(1) of this section.

(5)(i) Any national securities exchange may make an election for purposes of the definition of *subject security* in § 242.600(b)(71)(i)(B) for any NMS security, by collecting, processing, and making available bids, offers, quotation sizes, and aggregate quotation sizes in that security; except that for any NMS security previously listed or admitted to unlisted trading privileges on only one exchange and not traded by any OTC market maker, such election shall be made by notifying all specified persons, and shall be effective at the opening of trading on the business day following notification.

(ii) Any member of a national securities association acting in the capacity of an OTC market maker may make an election for purposes of the definition of *subject security* in § 242.600(b)(71)(ii)(B) for any NMS security, by communicating to its association bids, offers, and quotation sizes in that security; except that for any other NMS security listed or admitted to

unlisted trading privileges on only one exchange and not traded by any other OTC market maker, such election shall be made by notifying its association and all specified persons, and shall be effective at the opening of trading on the business day following notification.

(iii) The election of a national securities exchange or member of a national securities association for any NMS security pursuant to this paragraph (a)(5) shall cease to be in effect if such exchange or member ceases to make available or communicate bids, offers, and quotation sizes in such security.

(b) *Obligations of responsible brokers and dealers.*

(1) Each responsible broker or dealer shall promptly communicate to its national securities exchange or national securities association, pursuant to the procedures established by that exchange or association, its best bids, best offers, and quotation sizes for any subject security.

(2) Subject to the provisions of paragraph (b)(3) of this section, each responsible broker or dealer shall be obligated to execute any order to buy or sell a subject security, other than an odd-lot order, presented to it by another broker or dealer, or any other person belonging to a category of persons with whom such responsible broker or dealer customarily deals, at a price at least as favorable to such buyer or seller as the responsible broker's or dealer's published bid or published offer (exclusive of any commission, commission equivalent or differential customarily charged by such responsible broker or dealer in connection with execution of any such order) in any amount up to its published quotation size.

(3)(i) No responsible broker or dealer shall be obligated to execute a transaction for any subject security as provided in paragraph (b)(2) of this section to purchase or sell that subject security in an amount greater than such revised quotation if:

(A) Prior to the presentation of an order for the purchase or sale of a subject security, a responsible broker or dealer has communicated to its exchange or association, pursuant to paragraph (b)(1) of this section, a revised quotation size; or

(B) At the time an order for the purchase or sale of a subject security is presented, a responsible broker or dealer is in the process of effecting a transaction in such subject security, and immediately after the completion of such transaction, it communicates to its exchange or association a revised quotation size, such responsible broker or dealer shall not be obligated by paragraph (b)(2) of this section to purchase or sell that subject security in an amount greater than such revised quotation size.

(ii) No responsible broker or dealer shall be obligated to execute a transaction for any subject security as provided in paragraph (b)(2) of this section if:

(A) Before the order sought to be executed is presented, such responsible broker or dealer has communicated to its exchange or association pursuant to paragraph (b)(1) of this section, a revised bid or offer; or

(B) At the time the order sought to be executed is presented, such responsible broker or dealer is in the process of effecting a transaction in such subject security, and, immediately after the completion of such transaction, such responsible broker or dealer communicates to its exchange or association pursuant to paragraph (b)(1) of this section, a revised bid or offer; *provided, however,* that such responsible broker or dealer shall nonetheless be obligated to execute any such order in such subject security as provided in paragraph (b)(2) of this section at its revised bid or offer in any amount up to its published quotation size or revised quotation size.

(4) Subject to the provisions of paragraph (a)(4) of this section:

(i) No national securities exchange or OTC market maker may make available, disseminate or otherwise communicate to any vendor, directly or indirectly, for display on a terminal or other display device any bid, offer, quotation size, or aggregate quotation size for any NMS security which is not a subject security with respect to such exchange or OTC market maker; and

(ii) No vendor may disseminate or display on a terminal or other display device any bid, offer, quotation size, or aggregate quotation size from any national securities exchange or OTC market maker for any NMS security which is not a subject security with respect to such exchange or OTC market maker.

(5)(i) Entry of any priced order for an NMS security by an exchange market maker or OTC market maker in that security into an electronic communications network that widely disseminates such order shall be deemed to be:

(A) A bid or offer under this section, to be communicated to the market maker's exchange or association pursuant to this paragraph (b) for at least the minimum quotation size that is required by the rules of the market maker's exchange or association if the priced order is for the account of a market maker, or the actual size of the order up to the minimum quotation size required if the priced order is for the account of a customer; and

(B) A communication of a bid or offer to a vendor for display on a display device for purposes of paragraph (b)(4) of this section.

(ii) An exchange market maker or OTC market maker that has entered a priced order for an NMS security into an electronic communications network that widely disseminates such order shall be deemed to be in compliance with paragraph (b)(5)(i)(A) of this section if the electronic communications network:

(A)(*1*) Provides to a national securities exchange or national securities association (or an exclusive processor acting on behalf of one or more exchanges or associations) the prices and sizes of the orders at the highest buy price and the lowest sell price for such security entered in, and widely disseminated by, the electronic communications network by exchange market makers and OTC market makers for the NMS security, and such prices and sizes are included in the quotation data made available by such exchange, association, or exclusive processor to vendors pursuant to this section; and

(*2*) Provides, to any broker or dealer, the ability to effect a transaction with a priced order widely disseminated by the electronic communications network entered therein by an exchange market maker or OTC market maker that is:

(*i*) Equivalent to the ability of any broker or dealer to effect a transaction with an exchange market maker or OTC market maker pursuant to the rules of the national securities exchange or national securities association to which the electronic communications network supplies such bids and offers; and

(*ii*) At the price of the highest priced buy order or lowest priced sell order, or better, for the lesser of the cumulative size of such priced orders entered therein by exchange market makers or OTC market makers at such price, or the size of the execution sought by the broker or dealer, for such security; or

(B) Is an alternative trading system that:

(*1*) Displays orders and provides the ability to effect transactions with such orders under § 242.301(b)(3); and

(*2*) Otherwise is in compliance with Regulation ATS (§ 242.300 through § 242.303).

(c) *Transactions in listed options.*

(1) A national securities exchange or national securities association:

(i) Shall not be required, under paragraph (a) of this section, to collect from responsible brokers or dealers who

are members of such exchange or association, or to make available to vendors, the quotation sizes and aggregate quotation sizes for listed options, if such exchange or association establishes by rule and periodically publishes the quotation size for which such responsible brokers or dealers are obligated to execute an order to buy or sell an options series that is a subject security at its published bid or offer under paragraph (b)(2) of this section;

(ii) May establish by rule and periodically publish a quotation size, which shall not be for less than one contract, for which responsible brokers or dealers who are members of such exchange or association are obligated under paragraph (b)(2) of this section to execute an order to buy or sell a listed option for the account of a broker or dealer that is in an amount different from the quotation size for which it is obligated to execute an order for the account of a customer; and

(iii) May establish and maintain procedures and mechanisms for collecting from responsible brokers and dealers who are members of such exchange or association, and making available to vendors, the quotation sizes and aggregate quotation sizes in listed options for which such responsible broker or dealer will be obligated under paragraph (b)(2) of this section to execute an order from a customer to buy or sell a listed option and establish by rule and periodically publish the size, which shall not be less than one contract, for which such responsible brokers or dealers are obligated to execute an order for the account of a broker or dealer.

(2) If, pursuant to paragraph (c)(1) of this section, the rules of a national securities exchange or national securities association do not require its members to communicate to it their quotation sizes for listed options, a responsible broker or dealer that is a member of such exchange or association shall:

(i) Be relieved of its obligations under paragraph (b)(1) of this section to communicate to such exchange or association its quotation sizes for any listed option; and

(ii) Comply with its obligations under paragraph (b)(2) of this section by executing any order to buy or sell a listed option, in an amount up to the size established by such exchange's or association's rules under paragraph (c)(1) of this section.

(3) *Thirty second response.* Each responsible broker or dealer, within thirty seconds of receiving an order to buy or sell a listed option in an amount greater than the quotation size established by a national securities exchange's or national securities association's rules pursuant to paragraph (c)(1) of this section, or its published quotation size must:

(i) Execute the entire order; or

(ii)(A) Execute that portion of the order equal to at least:

(*1*) The quotation size established by a national securities exchange's or national securities association's rules, pursuant to paragraph (c)(1) of this section, to the extent that such exchange or association does not collect and make available to vendors quotation size and aggregate quotation size under paragraph (a) of this section; or

(*2*) Its published quotation size; and

(B) Revise its bid or offer.

(4) Notwithstanding paragraph (c)(3) of this section, no responsible broker or dealer shall be obligated to execute a transaction for any listed option as provided in paragraph (b)(2) of this section if:

(i) Any of the circumstances in paragraph (b)(3) of this section exist; or

(ii) The order for the purchase or sale of a listed option is presented during a trading rotation in that listed option.

(d) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any responsible broker or dealer, electronic communications network, national securities exchange, or national securities association if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.

§ 242.603 Distribution, consolidation, and display of information with respect to quotations for and transactions in NMS stocks.

(a) *Distribution of information.*

(1) Any exclusive processor, or any broker or dealer with respect to information for which it is the exclusive source, that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor shall do so on terms that are fair and reasonable.

(2) Any national securities exchange, national securities association, broker, or dealer that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor, broker, dealer, or other persons shall do so on terms that are not unreasonably discriminatory.

(b) *Consolidation of information.* Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.

(c) *Display of information.*

(1) No securities information processor, broker, or dealer shall provide, in a context in which a trading or order-routing decision can be implemented, a display of any information with respect to quotations for or transactions in an NMS stock without also providing, in an equivalent manner, a consolidated display for such stock.

(2) The provisions of paragraph (c)(1) of this section shall not apply to a display of information on the trading floor or through the facilities of a national securities exchange or to a display in connection with the operation of a market linkage system implemented in accordance with an effective national market system plan.

(d) *Exemptions.* The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, or item of information, or any class or classes of persons, securities, or items of information, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.604 Display of customer limit orders.

(a) *Specialists and OTC market makers.* For all NMS stocks:

(1) Each member of a national securities exchange that is registered by that exchange as a specialist, or is authorized by that exchange to perform functions substantially similar to that of a specialist, shall publish immediately a bid or offer that reflects:

(i) The price and the full size of each customer limit order held by the specialist that is at a price that would improve the bid or offer of such specialist in such security; and

(ii) The full size of each customer limit order held by the specialist that:

(A) Is priced equal to the bid or offer of such specialist for such security;

(B) Is priced equal to the national best bid or national best offer; and

(C) Represents more than a *de minimis* change in relation to the size associated with the specialist's bid or offer.

(2) Each registered broker or dealer that acts as an OTC market maker shall publish immediately a bid or offer that reflects:

(i) The price and the full size of each customer limit order held by the OTC market maker that is at a price that would improve the bid or offer of such OTC market maker in such security; and

(ii) The full size of each customer limit order held by the OTC market maker that:

(A) Is priced equal to the bid or offer of such OTC market maker for such security;

(B) Is priced equal to the national best bid or national best offer; and

(C) Represents more than a *de minimis* change in relation to the size associated with the OTC market maker's bid or offer.

(b) *Exceptions.* The requirements in paragraph (a) of this section shall not apply to any customer limit order:

(1) That is executed upon receipt of the order.

(2) That is placed by a customer who expressly requests, either at the time that the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders, that the order not be displayed.

(3) That is an odd-lot order.

(4) That is a block size order, unless a customer placing such order requests that the order be displayed.

(5) That is delivered immediately upon receipt to a national securities exchange or national securities association-sponsored system, or an electronic communications network that complies with the requirements of § 242.602(b)(5)(ii) with respect to that order.

(6) That is delivered immediately upon receipt to another exchange member or OTC market maker that complies with the requirements of this section with respect to that order.

(7) That is an "all or none" order.

(c) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any responsible broker or dealer, electronic communications network, national securities exchange, or national securities association if the Commission determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system.

§ 242.605 Disclosure of order execution information.

Preliminary Note: Section 242.605 requires market centers to make available standardized, monthly reports of statistical information concerning their order executions. This information is presented in accordance with uniform standards that are based on broad assumptions about order execution and routing practices. The information will provide a starting point to promote visibility and competition on the part of market centers and broker-dealers, particularly on the factors of execution price and speed. The disclosures required by this section do not encompass all of the factors that may be important to investors in evaluating the order routing services of a broker-dealer. In addition, any particular market center's statistics will encompass varying types of orders routed by different broker-dealers on behalf of customers with a wide range of objectives. Accordingly, the statistical information required by this section alone does not create a reliable basis to address whether any particular broker-dealer failed to obtain the most favorable terms reasonably available under the circumstances for customer orders.

(a) *Monthly electronic reports by market centers.*

(1) Every market center shall make available for each calendar month, in accordance with the procedures established pursuant to paragraph (a)(2) of this section, a report on the covered orders in NMS stocks that it received for execution from any person. Such report shall be in electronic form; shall be categorized by security, order type, and order size; and shall include the following columns of information:

(i) For market orders, marketable limit orders, inside-the-quote limit orders, at-the-quote limit orders, and near-the-quote limit orders:

(A) The number of covered orders;

(B) The cumulative number of shares of covered orders;

(C) The cumulative number of shares of covered orders cancelled prior to execution;

(D) The cumulative number of shares of covered orders executed at the receiving market center;

(E) The cumulative number of shares of covered orders executed at any other venue;

(F) The cumulative number of shares of covered orders executed from 0 to 9 seconds after the time of order receipt;

(G) The cumulative number of shares of covered orders executed from 10 to 29 seconds after the time of order receipt;

(H) The cumulative number of shares of covered orders executed from 30 seconds to 59 seconds after the time of order receipt;

(I) The cumulative number of shares of covered orders executed from 60 seconds to 299 seconds after the time of order receipt;

(J) The cumulative number of shares of covered orders executed from 5 minutes to 30 minutes after the time of order receipt; and

(K) The average realized spread for executions of covered orders; and

(ii) For market orders and marketable limit orders:

(A) The average effective spread for executions of covered orders;

(B) The cumulative number of shares of covered orders executed with price improvement;

(C) For shares executed with price improvement, the share-weighted average amount per share that prices were improved;

(D) For shares executed with price improvement, the share-weighted average period from the time of order receipt to the time of order execution;

(E) The cumulative number of shares of covered orders executed at the quote;

(F) For shares executed at the quote, the share-weighted average period from the time of order receipt to the time of order execution;

(G) The cumulative number of shares of covered orders executed outside the quote;

(H) For shares executed outside the quote, the share-weighted average amount per share that prices were outside the quote; and

(I) For shares executed outside the quote, the share-weighted average period from the time of order receipt to the time of order execution.

(2) Every national securities exchange on which NMS stocks are traded and each national securities association shall act jointly in establishing procedures for market centers to follow in making available to the public the reports required by paragraph (a)(1) of this section in a uniform, readily accessible, and usable electronic form. In the event there is no effective national market system plan establishing such procedures, market centers shall prepare their reports in a consistent, usable, and machine-readable electronic format, and make such reports available for downloading from an Internet website that is free and readily accessible to the public.

(3) A market center shall make available the report required by paragraph (a)(1) of this section within one month after the end of the month addressed in the report.

(b) *Exemptions.* The Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or

transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.606 Disclosure of order routing information.

(a) *Quarterly report on order routing.*

(1) Every broker or dealer shall make publicly available for each calendar quarter a report on its routing of non-directed orders in NMS securities during that quarter. For NMS stocks, such report shall be divided into three separate sections for securities that are listed on the New York Stock Exchange, Inc., securities that are qualified for inclusion in The Nasdaq Stock Market, Inc., and securities that are listed on the American Stock Exchange LLC or any other national securities exchange. Such report also shall include a separate section for NMS securities that are option contracts. Each of the four sections in a report shall include the following information:

(i) The percentage of total customer orders for the section that were non-directed orders, and the percentages of total non-directed orders for the section that were market orders, limit orders, and other orders;

(ii) The identity of the ten venues to which the largest number of total non-directed orders for the section were routed for execution and of any venue to which five percent or more of non-directed orders were routed for execution, the percentage of total non-directed orders for the section routed to the venue, and the percentages of total non-directed market orders, total non-directed limit orders, and total non-directed other orders for the section that were routed to the venue; and

(iii) A discussion of the material aspects of the broker's or dealer's relationship with each venue identified pursuant to paragraph (a)(1)(ii) of this section, including a description of any arrangement for payment for order flow and any profit-sharing relationship.

(2) A broker or dealer shall make the report required by paragraph (a)(1) of this section publicly available within one month after the end of the quarter addressed in the report.

(b) *Customer requests for information on order routing.*

(1) Every broker or dealer shall, on request of a customer, disclose to its customer the identity of the venue to which the customer's orders were routed for execution in the six months prior to the request, whether the orders were directed orders or non-directed orders, and the time of the transactions, if any, that resulted from such orders.

(2) A broker or dealer shall notify customers in writing at least annually of the availability on request of the information specified in paragraph (b)(1) of this section.

(c) *Exemptions.* The Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

§ 242.607 Customer account statements.

(a) No broker or dealer acting as agent for a customer may effect any transaction in, induce or attempt to induce the purchase or sale of, or direct orders for purchase or sale of, any NMS stock or a security authorized for quotation on an automated inter-dealer quotation system that has the characteristics set forth in section 17B of the Act (15 U.S.C. 78q–2), unless such broker or dealer informs such customer, in writing, upon opening a new account and on an annual basis thereafter, of the following:

(1) The broker's or dealer's policies regarding receipt of payment for order flow from any broker or dealer, national securities exchange, national securities association, or exchange member to which it routes customers' orders for execution, including a statement as to whether any payment for order flow is received for routing customer orders and a detailed description of the nature of the compensation received; and

(2) The broker's or dealer's policies for determining where to route customer orders that are the subject of payment for order flow absent specific instructions from customers, including a description of the extent to which orders can be executed at prices superior to the national best bid and national best offer.

(b) *Exemptions.* The Commission, upon request or upon its own motion, may exempt by rule or by order, any broker or dealer or any class of brokers or dealers, security or class of securities from the requirements of paragraph (a) of this section with respect to any transaction or class of transactions, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the pubic interest and the protection of investors.

§ 242.608 Filing and amendment of national market system plans.

(a) *Filing of national market system plans and amendments thereto.*

(1) Any two or more self-regulatory organizations, acting jointly, may file a national market system plan or may propose an amendment to an effective national market system plan ("proposed amendment") by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (a)(4) and (5) of this section.

(2) The Commission may propose amendments to any effective national market system plan by publishing the text thereof, together with a statement of the purpose of such amendment, in accordance with the provisions of paragraph (b) of this section.

(3) Self-regulatory organizations are authorized to act jointly in:

(i) Planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan;

(ii) Preparing and filing a national market system plan or any amendment thereto; or

(iii) Implementing or administering an effective national market system plan.

(4) Every national market system plan filed pursuant to this section, or any amendment thereto, shall be accompanied by:

(i) Copies of all governing or constituent documents relating to any person (other than a self-regulatory organization) authorized to implement or administer such plan on behalf of its sponsors; and

(ii) To the extent applicable:

(A) A detailed description of the manner in which the plan or amendment, and any facility or procedure contemplated by the plan or amendment, will be implemented;

(B) A listing of all significant phases of development and implementation (including any pilot phase) contemplated by the plan or amendment, together with the projected date of completion of each phase;

(C) An analysis of the impact on competition of implementation of the plan or amendment or of any facility contemplated by the plan or amendment;

(D) A description of any written understandings or agreements between or among plan sponsors or participants relating to interpretations of the plan or conditions for becoming a sponsor or participant in the plan; and

(E) In the case of a proposed amendment, a statement that such amendment has been approved by the sponsors in accordance with the terms of the plan.

(5) Every national market system plan, or any amendment thereto, filed pursuant to this section shall include a description of the manner in which any facility contemplated by the plan or amendment will be operated. Such description shall include, to the extent applicable:

(i) The terms and conditions under which brokers, dealers, and/or self-regulatory organizations will be granted or denied access (including specific procedures and standards governing the granting or denial of access);

(ii) The method by which any fees or charges collected on behalf of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment will be determined and imposed (including any provision for distribution of any net proceeds from such fees or charges to the sponsors and/or participants) and the amount of such fees or charges;

(iii) The method by which, and the frequency with which, the performance of any person acting as plan processor with respect to the implementation and/or operation of the plan will be evaluated; and

(iv) The method by which disputes arising in connection with the operation of the plan will be resolved.

(6) In connection with the selection of any person to act as plan processor with respect to any facility contemplated by a national market system plan (including renewal of any contract for any person to so act), the sponsors shall file with the Commission a statement identifying the person selected, describing the material terms under which such person is to serve as plan processor, and indicating the solicitation efforts, if any, for alternative plan processors, the alternatives considered and the reasons for selection of such person.

(7) Any national market system plan (or any amendment thereto) which is intended by the sponsors to satisfy a plan filing requirement contained in any other section of this Regulation NMS and part 240, subpart A of this chapter shall, in addition to compliance with this section, also comply with the requirements of such other section.

(b) *Effectiveness of national market system plans.*

(1) The Commission shall publish notice of the filing of any national market system plan, or any proposed amendment to any effective national market system plan (including any amendment initiated by the Commission), together with the terms of substance of the filing or a description of the subjects and issues involved, and shall provide interested persons an opportunity to submit written comments. No national market system plan, or any amendment thereto, shall become effective unless approved by the Commission or otherwise permitted in accordance with paragraph (b)(3) of this section.

(2) Within 120 days of the date of publication of notice of filing of a national market system plan or an amendment to an effective national market system plan, or within such longer period as the Commission may designate up to 180 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the sponsors consent, the Commission shall approve such plan or amendment, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act. Approval of a national market system plan, or an amendment to an effective national market system plan (other than an amendment initiated by the Commission), shall be by order. Promulgation of an amendment to an effective national market system plan initiated by the Commission shall be by rule.

(3) A proposed amendment may be put into effect upon filing with the Commission if designated by the sponsors as:

(i) Establishing or changing a fee or other charge collected on behalf of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment (including changes in any provision with respect to distribution of any net proceeds from such fees or other charges to the sponsors and/or participants);

(ii) Concerned solely with the administration of the plan, or involving the governing or constituent documents relating to any person (other than a self-regulatory organization) authorized to implement or administer such plan on behalf of its sponsors; or

(iii) Involving solely technical or ministerial matters. At any time within 60 days of the filing of any such amendment, the Commission may summarily abrogate the amendment and require that such amendment be refiled in accordance with paragraph (a)(1) of this section and reviewed in accordance with paragraph (b)(2) of this section, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

(4) Notwithstanding the provisions of paragraph (b)(1) of this section, a proposed amendment may be put into effect summarily upon publication of notice of such amendment, on a temporary basis not to exceed 120 days, if the Commission finds that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

(5) Any plan (or amendment thereto) in connection with:

(i) The planning, development, operation, or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or

(ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and/or their members of any section of this Regulation NMS and part 240, subpart A of this chapter promulgated pursuant to section 11A of the Act (15 U.S.C. 78k–1), approved by the Commission pursuant to section 11A of the Act (or pursuant to any rule or regulation thereunder) prior to the effective date of this section (either temporarily or permanently) shall be deemed to have been filed and approved pursuant to this section and no additional filing need be made by the sponsors with respect to such plan or amendment; *provided, however,* that all terms and conditions associated with any such approval (including time limitations) shall continue to be applicable; *provided, further,* that any amendment to such plan filed with or approved by the Commission on or after the effective date of this section shall be subject to the provisions of, and considered in accordance with the procedures specified in, this section.

(c) *Compliance with terms of national market system plans.* Each self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant. Each self-

regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members.

(d) *Appeals.* The Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective national market system plan as follows:

(1) Any action taken or failure to act by any person in connection with an effective national market system plan (other than a prohibition or limitation of access reviewable by the Commission pursuant to section 11A(b)(5) or section 19(d) of the Act (15 U.S.C. 78k–1(b)(5) or 78s(d))) shall be subject to review by the Commission, on its own motion or upon application by any person aggrieved thereby (including, but not limited to, self-regulatory organizations, brokers, dealers, issuers, and vendors), filed not later than 30 days after notice of such action or failure to act or within such longer period as the Commission may determine.

(2) Application to the Commission for review, or the institution of review by the Commission on its own motion, shall not operate as a stay of any such action unless the Commission determines otherwise, after notice and opportunity for hearing on the question of a stay (which hearing may consist only of affidavits or oral arguments).

(3) In any proceedings for review, if the Commission, after appropriate notice and opportunity for hearing (which hearing may consist solely of consideration of the record of any proceedings conducted in connection with such action or failure to act and an opportunity for the presentation of reasons supporting or opposing such action or failure to act) and upon consideration of such other data, views, and arguments as it deems relevant, finds that the action or failure to act is in accordance with the applicable provisions of such plan and that the applicable provisions are, and were, applied in a manner consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets, and the removal of impediments to, and the perfection of the mechanisms of a national market system, the Commission, by order, shall dismiss the proceeding. If the Commission does not make any such finding, or if it finds that such action or failure to act imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, the Commission, by order, shall set aside such action and/or require such action with respect to the matter reviewed as the Commission deems necessary or appropriate in the public interest, for the protection of investors, and the maintenance of fair and orderly markets, or to remove impediments to, and perfect the mechanisms of, a national market system.

(e) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

§ 242.609 Registration of securities information processors: form of application and amendments.

(a) An application for the registration of a securities information processor shall be filed on Form SIP (§ 249.1001) in accordance with the instructions contained therein.

(b) If any information reported in items 1–13 or item 21 of Form SIP or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the securities information processor shall promptly file an amendment on Form SIP correcting such information.

(c) The Commission, upon its own motion or upon application by any securities information processor, may conditionally or unconditionally exempt any securities information processor from any provision of the rules or regulations adopted under section 11A(b) of the Act (15 U.S.C. 78k–1(b)).

(d) Every amendment filed pursuant to this section shall constitute a "report" within the meaning of sections 17(a), 18(a) and 32(a) of the Act (15 U.S.C. 78q(a), 78r(a), and 78ff(a)).

§ 242.610 Access to published bids and offers.

(a) *Requirements.*

(1) A quoting market center shall not impose unfairly discriminatory terms that prevent or inhibit a non-member, non-customer, or non-subscriber of the quoting market center from obtaining access to quotations and the execution of orders through a member, customer, or subscriber of the quoting market center.

(2) A quoting market participant:

(i) Shall make its quotations available, for the purpose of order execution, to all other quoting market participants and all quoting market centers on terms as favorable as those it grants to its most preferred member, customer, or subscriber; and

(ii) Shall not impose unfairly discriminatory terms that prevent or inhibit a non-member, non-customer, or non-subscriber of the quoting market participant from obtaining access to quotations and the execution of orders through a member, customer, or subscriber of the quoting market participant.

(b) *Quotation standardization.*

(1) A quoting market center may impose a fee for an order execution against its displayed price in an amount no greater than:

(i) $.001 per share; or

(ii) .1% of price per share in the case of a security with a share price of less than $1.00.

(2) A quoting market participant may impose a fee for an order execution against its displayed price in an amount no greater than:

(i) $.001 per share; or

(ii) .1% of price per share in the case of a security with a share price of less than $1.00.

(3) A broker-dealer that displays an attributable quote through a quoting market center may impose a fee for the execution of an order against such displayed attributable quote in an amount no greater than:

(i) $.001 per share; or

(ii) .1% of price per share in the case of a security with a share price of less than $1.00.

(4) Accumulated access fees of quoting market centers, quoting market participants, and broker-dealers shall not exceed $.002 per share in any transaction; for securities priced at less than $1.00, such fees shall not exceed .2% of the share price.

(c) *Locked or crossed quotations.* Each national securities exchange and national securities association must establish and enforce rules:

(1) That require its members reasonably to avoid locking or crossing the quotations of quoting market centers and quoting market participants;

(2) That are reasonably designed to enable a market participant to reconcile locked or crossed quotations in a security before effecting a trade in that security; and

(3) That prohibit its members from engaging in a pattern or practice of locking or crossing quotations in any security.

(d) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any national securities exchange, national

securities association, quoting market center, or quoting market participant if the Commission determines that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.

§ 242.611 Trade-through rule.

(a) *Price protection.*

(1) An order execution facility, national securities exchange, and national securities association must establish, maintain, and enforce policies and procedures reasonably designed to prevent the execution of a trade-through in its market, unless one or more of the provisions of paragraph (b) of this section is applicable.

(2) An order execution facility, national securities exchange, and national securities association that is not able to or chooses not to comply with the requirements of paragraph (a)(1) of this section may only accept orders that are opted-out pursuant to paragraph (b)(8) of this section.

(b) *Exceptions.* The policies and procedures required by paragraph (a) of this section do not have to be designed to prevent the execution of a trade-through in the following circumstances:

(1) The order execution facility displaying the better price was experiencing a failure, material delay, or malfunction of its systems or equipment when the trade-through occurred.

(2) The order execution facility that initiated the trade-through made every reasonable effort to avoid the trade-through but was unable to do so because of a systems or equipment failure, material delay, or malfunction in its own market.

(3) The transaction that constituted the trade-through was not a "regular way" contract.

(4) The bid or offer that is traded-through was displayed by an order execution facility that was, or whose members were, relieved of their obligations under § 242.602(b)(2) with respect to such bid or offer pursuant to § 242.602(a)(3).

(5) The transaction that constituted the trade-through was an opening or reopening transaction by the order execution facility.

(6) The transaction that constituted the trade-through was executed at a time when there was a crossed market.

(7)(i) At the same time or prior to executing a transaction that constituted a trade-through, the order execution facility sent an order or orders to trade with each bid or offer of another order execution facility that was disseminated pursuant to an effective national market system plan and that was priced better than the price at which such transaction was executed ("better-priced bid or offer").

(ii) Each order sent by an order execution facility under paragraph (b)(7)(i) of this section must be priced equal to or better than the better-priced bid or offer and be for the number of shares displayed for that better-priced bid or offer.

(8) *Opt-out orders.* When a broker or dealer or a customer expressly provides, at the time an order is placed for its account, informed consent to the execution of such order without regard to a better price of another order execution facility that is disseminated pursuant to an effective national market system plan.

(9) *Automated order execution facilities.*

(i) An automated order execution facility can trade through the best bid or best offer of a non-automated order execution facility that is disseminated pursuant to an effective national market system plan up to the *trade-through limit amount.*

(ii) For a buy order in an NMS stock where the national best offer is under $10 at the time of execution, or a sell order in an NMS stock where the national best bid is under $10 at the time of execution, the *trade-through limit amount* is equal to one cent.

(iii) For a buy order in an NMS stock where the national best offer is from $10.01 to $30 at the time of execution, or a sell order in an NMS stock where the national best bid is from $10.01 to $30 at the time of execution, the *trade-through limit amount* is equal to two cents.

(iv) For a buy order in an NMS stock where the national best offer is from $30.01 to $50 at the time of execution, or a sell order in an NMS stock where the national best bid is from $30.01 to $50 at the time of execution, the *trade-through limit amount* is equal to three cents.

(v) For a buy order in an NMS stock where the national best offer is from $50.01 to $100 at the time of execution, or a sell order in an NMS stock where the national best bid is from $50.01 to $100 at the time of execution, the *trade-through limit amount* is equal to four cents.

(vi) For a buy order in an NMS stock where the national best offer is greater than $100 at the time of execution, or a sell order in an NMS stock where the national best bid is greater than $100 at the time of execution, the *trade-through limit amount* is equal to five cents.

(c) *Disclosure requirement to customers that opt-out.*

(1) For each buy order for the account of a customer executed pursuant to paragraph (b)(8) of this section, the broker or dealer must disclose to the customer the national best offer for the NMS stock at the time of execution of the order. For each sell order for the account of a customer executed pursuant to paragraph (b)(8) of this section, the broker or dealer must disclose to the customer the national best bid for the NMS stock at the time of execution of the order.

(2) The bid or offer required to be disclosed pursuant to paragraph (c)(1) of this section must be disclosed as soon as possible, but in no event later than one month from the date on which the order was executed.

(3) The bid or offer required to be disclosed pursuant to paragraph (c)(1) of this section must be displayed in close proximity to, and no less prominently than, the execution price as reported to the customer for the order pursuant to the requirements of § 240.10b–10 of this chapter.

(d) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any order execution facility, national securities exchange, national securities association, or broker or dealer if the Commission determines that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.

§ 242.612 Minimum pricing increment.

(a) No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment less than $0.01, except for those NMS stocks the share price of which is below $1.00.

(b) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any organization, association, or group of persons if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets, or the removal of impediments to and the perfection of the mechanism of a national market system.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

25. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

26. Section 249.1001 is revised to read as follows:

§ 249.1001 Form SIP, for application for registration as a securities information processor or to amend such an application or registration.

This form shall be used for application for registration as a securities information processor, pursuant to section 11A(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1(b)) and § 242.609 of this chapter, or to amend such an application or registration.

27. Form SIP (referenced in § 249.1001) is amended by revising Instruction 6 of General Instructions for Preparing and Filing Form SIP to read as follows:

Form SIP

* * * * *

General Instructions for Preparing and Filing Form SIP

* * * * *

6. Rule 609(b) of Regulation NMS requires that if any information contained in items 1 through 13 or item 21 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment must be filed promptly on Form SIP correcting such information.

* * * * *

Dated: February 26, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–4712 Filed 3–8–04; 8:45 am]

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Tuesday,
March 9, 2004

Part IV

Department of Transportation

Federal Transit Administration

49 CFR Part 659
Rail Fixed Guideway Systems; State Safety Oversight; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 659

[Docket No. FTA–2004–17196]

RIN 2132–AA76

Rail Fixed Guideway Systems; State Safety Oversight

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FTA proposes to revise its regulation for State oversight of rail transit safety and security programs. FTA believes that these changes will clarify and improve the performance of existing requirements; respond to recommendations identified by oversight agencies and rail transit agencies; and address new concerns for security and emergency preparedness. Also, the new rule will include guidance that FTA has issued in the past several years as part of its audit program and technical assistance. Proposed changes are the result of FTA's on-going evaluation of State and rail transit programs performed since 1997 and outreach conducted over the last year.

DATES: Comments on this proposed rule must be submitted by June 7, 2004.

ADDRESSES: Written comments must refer to the docket number appearing above and must be submitted to the United States Department of Transportation (U.S. DOT), Central Docket Office, PL–401, 400 Seventh Street SW., Washington, DC 20590. All comments received will be available for inspection at the above address from 10 a.m. to 5 p.m., Monday through Friday, except Federal holidays. Those desiring the agency to acknowledge receipt of their comments should include a self-addressed stamped postcard with their comments. Commenters may also submit their comments electronically. Instructions for electronic submission may be found at the following web address: *http://dms.dot.gov/submit/*. The public may also review docketed comments electronically. The following web address provides instructions and access to the DOT electronic docket: *http://dms.dot.gov/search/*. The Dockets Management System (DMS) is available 24 hours each day, 365 days each year. Please follow the online instructions for more information and help.

Electronic Access: Electronic access to this rule and a side-by-side table of the current rule and the proposed rule, along with other safety rules, may be obtained through the FTA Office of Safety and Security home page at *http://transit-safety.volpe.dot.gov*. An electronic copy of this document may be downloaded, using a modem and suitable communications software, from the Government Printing Office's (GPO) Electronic Bulletin Board Service at (202) 512–1661. Internet users may download this document from the **Federal Register**'s homepage at *http://www.nara.gov/fedreg* and from the GPO database at *http://www.access.gpo.gov/nara*.

FOR FURTHER INFORMATION CONTACT: Jerry Fisher or Roy Field, Office of Safety and Security, Federal Transit Administration, (202) 366–2896 (telephone) or (202) 366–3765 (fax).

SUPPLEMENTARY INFORMATION:

Outline of Preamble

I. Background and Purpose
II. Summary of Existing Requirements
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V. Section by Section Analysis
VI. Regulatory Process Matters
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  b. Departmental Significance
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  d. Unfunded Mandates Reform Act of 1995
  e. Executive Order 13132 (Federalism Assessment)
  f. Paperwork Reduction Act

I. Background and Purpose

In response to congressional concern regarding the potential for catastrophic accidents and security incidents on rail fixed guideway systems, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) added section 28 to the Federal Transit Act (codified at 49 U.S.C. 5330). This section mandated that FTA issue a rule creating a State-managed oversight program for rail transit safety and security:

On June 25, 1992, FTA issued an Advance Notice of Proposed Rulemaking (ANPRM) soliciting public comment on a range of issues to be addressed in the Notice of Proposed Rulemaking (NPRM). 57 FR 28572. On December 9, 1993, FTA published that NPRM at 58 FR 64855. The final rule, 49 CFR part 659, "Rail Fixed Guideway Systems; State Safety Oversight," was issued on December 27, 1995, at 60 FR 67034; it is also referred to as the state safety oversight rule or Part 659. The safety requirements for Part 659 went into effect on January 1, 1997 and the security requirements went into effect one year later.

When FTA issued its final rule, only five (5) States maintained provisions for safety oversight of rail fixed guideway systems. Today, 22 States and the District of Columbia have developed and implemented state safety oversight programs affecting 36 rail transit agencies. It is projected that over the next decade, an additional seven (7) States and as many as 16 new start rail transit agencies may be affected by Part 659.

Since Part 659 created a community of oversight agencies where previously few existed, the initial goal of the rulemaking was to ensure that States were provided with sufficient authority to establish programs that met the legislation's minimum requirements. FTA recognized that it would take some time to determine if Part 659 requirements met this goal.

Now, after more than six years of experience in implementing Part 659 and evaluating its performance, FTA believes that significant changes have been identified and are warranted to improve the program. The proposed rule, presented here, conveys FTA's recommendations to clarify State authorities and rail transit agency responsibilities under the statute.

II. Summary of Existing Requirements

Section 5330 of Title 49, U.S.C. applies "only to States that have rail fixed guideway mass transportation systems not subject to regulation by the Federal Railroad Administration." In its implementing regulations, FTA defined a rail fixed guideway system as,

> any light, heavy or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that is included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas and is not regulated by the Federal Railroad Administration (FRA). 49 CFR 659.5.

Each State with a rail fixed guideway system operating within its borders is required to designate an oversight agency with sufficient legal authority and technical capacity to implement Part 659 requirements. The designated oversight agency is required to develop a program standard that defines the relationship between the oversight agency and the rail fixed guideway system. The program standard must, at a minimum, comply with the American Public Transportation Association's (APTA) Manual for the Development of Rail Transit System Safety Program Plans (APTA Manual) and must include specific provisions addressing the personal security of passengers and employees.

The oversight agency must review and approve, in writing, the rail fixed guideway system's system safety program plan and system security plan. After these initial approvals, the

oversight agency must review and approve, as necessary, updates to the rail fixed guideway system's plans.

The oversight agency must require each rail fixed guideway system to report the occurrence of accidents and unacceptable hazardous conditions within a specified period of time and must investigate such events in accordance with established procedures. The oversight agency may conduct its own investigation, use a contractor to conduct an investigation, or review and approve the investigation conducted by the rail fixed guideway system or the National Transportation Safety Board (NTSB), or use a combination of these methods.

The oversight agency must require the rail fixed guideway system to implement corrective action plans, as appropriate, to minimize, control within a specified period, correct, or eliminate hazardous conditions identified during investigations. The oversight agency must monitor implementation of these plans.

The oversight agency must conduct an on-site safety review of the rail fixed guideway system's implementation of its system safety program plan and system security plan at least every three years. Once this review is complete, the oversight agency must issue a report containing its findings and recommendations, an analysis of the rail fixed guideway system's safety and security program, and a determination of whether it should be updated.

The oversight agency must require the rail fixed guideway system to conduct an internal safety audit process that complies with Checklist Number 9 of the APTA Manual. In addition, the rail fixed guideway system must submit an annual report to the oversight agency documenting the results of internal safety audit process.

Lastly, the oversight agency must submit three types of reports to FTA: an Initial Submission; an Annual Submission, and a Periodic Submission.

If a State has not met these requirements or has not made adequate efforts to comply with them, the Secretary of the U.S. Department of Transportation may withhold up to five percent of a fiscal year's apportionment under FTA's formula program for urbanized areas (formerly section 9) attributable to the State or an affected urbanized area in the State.

A side-by-side table of the current rule and the proposed rule is available on the FTA Office of Safety and Security home page at *http://transit-safety.volpe.dot.gov.*

III. Need for Rule Revision

Since the rule's requirements went into effect, FTA has monitored oversight agency compliance. During this time, FTA has worked with representatives from oversight agencies, rail transit agencies, FRA, NTSB, and APTA to identify areas in which the program, or the rule itself, can be strengthened to ensure effective safety and security oversight at our nation's rail transit properties, affected by Part 659.

In this activity, FTA utilized five distinct methods from which to evaluate State compliance with Part 659 requirements and to identify areas in which the rule could be improved. Each of these methods, and its specific findings for the rule revision, is described below:

(1) FTA's audit program for Part 659;

(2) FTA's State Safety Oversight Program Annual Meetings;

(3) Quarterly State Safety Oversight Program Teleconferences;

(4) Working Groups for oversight agencies and rail transit agencies to discuss the performance of the program and make recommendations to FTA for improvements; and

(5) Coordination with the NTSB.

Audit Program. In 1998, FTA initiated its audit program for state safety oversight agencies. Since that time, FTA has conducted 17 audits that have assisted FTA in determining State compliance with the rule as well as providing meaningful recommendations for strengthening the state safety oversight program. Audit findings indicate that: (1) Oversight agencies have difficulty determining their role and authority in the management of hazards at the rail transit agencies within their jurisdiction; (2) the APTA Manual does not currently provide a clear listing of specific authorities required to manage oversight program provisions; (3) States have difficulty requiring and enforcing the performance of internal safety audits at rail transit agencies; and (4) States and rail transit agencies have difficulty ensuring that program plans remain up-to-date.

Annual Meetings. FTA initiated its annual meetings in 1997 to discuss elements of the rule in detail; provide training for oversight personnel in key areas, such as hazard identification and resolution and the conduct of three-year safety reviews; promote coordination with other federal programs; support working sessions to identify key concerns in rule implementation; and present and discuss findings from its audit program. During the last three annual meetings, States have provided FTA with a listing of their recommendations regarding FTA activity in the upcoming year. Typical State needs include training, funding, and increased coordination with FRA, NTSB, and FTA's Project Management Oversight Program.

Quarterly Teleconferences. In 2001, FTA began a quarterly teleconference series with oversight agencies to update oversight agencies on FTA activities, to discuss emerging safety and security issues, and plan for the year's annual meeting.

Working Groups. In 2002, FTA initiated a series of monthly teleconference working sessions with representatives from oversight agencies and rail transit agencies. These teleconferences provide a forum for key stakeholders to present their program recommendations to FTA. The oversight agencies selected seven members to represent the State perspective. APTA worked with the rail transit community to identify five members for its group. Findings from the teleconference calls include: (1) Both oversight agency and rail transit agency representatives requested that FTA address the need for a process-based requirement for the hazard management process; (2) both oversight agency and rail transit agency representatives requested greater consistency with other federal agencies and programs in accident notification and investigation thresholds; (3) oversight agency representatives requested that FTA remove the APTA Manual incorporation by reference and provide a listing of specific authorities required for the management of state safety oversight programs; and (4) some oversight agency representatives suggested greater oversight for safety prior to passenger operations.

National Transportation Safety Board. In September 2002, the NTSB issued recommendations to FTA's Administrator (R–02–18 and –19), stating that the APTA Manual, published on August 20, 1991, does "not contain the necessary specific guidance for assessing the effectiveness of rules compliance programs; as a result, the guidelines are not effective tools for regulatory authorities or transit agencies." The NTSB recommended that rail transit agencies should adopt, in their system safety program plans, specific standards covering rules compliance and efficiency test programs. NTSB also made recommendations to APTA to update the APTA Manual to address this concern, and to FTA to adopt the updated APTA Manual.

Over the last six years, FTA has also developed technical assistance material to address concerns identified by FTA,

the States, and the rail transit agencies. FTA has published technical advisories, safety and security newsletters, and guidelines to address implementation of rule requirements and successful practices. While the guidance has benefited oversight agency and rail transit agency program implementation, FTA recognizes that a number of the identified issues must be resolved by regulation. It is based on the above findings that FTA proposes revisions to the existing state safety oversight rule.

The purpose of this revision is to improve the performance of the state safety oversight program and effect the following outcomes: (1) Enhanced program efficiency and authority; (2) increased responsiveness to recommendations and emerging safety and security issues; (3) improved consistency in the collection and analysis of accident causal factors through increased coordination with other Federal reporting and investigation programs; and (4) improved performance of the hazard management process. In addition, the proposed rule will clarify FTA's position with regard to oversight management objectives and streamline current reporting requirements including a move from paper reporting to electronic reporting. Finally, the proposed rule would address heightened concerns for rail transit security and emergency preparedness.

IV. Overview of the Proposed Rule

At the time when Part 659 was published, FTA believed strongly that in order to establish a nation-wide baseline standard for safety, it was necessary to incorporate the APTA Manual by reference. FTA has learned in the last six years, however, that while the APTA Manual still provides a valuable tool for rail transit agencies in their development of system safety program plans, it does not assist in State compliance with rule requirements. To address this situation, the proposed rule provides minimum requirements that should support the development of an oversight program and guide its oversight activities. These requirements are located in § 659.13 of the proposed rule.

Removing reference to the APTA Manual also requires that FTA identify minimum requirements to be addressed by the rail transit agency in its system safety program plan. In preparing these requirements, FTA used the APTA Manual and materials developed by oversight agencies. These requirements are located in § 659.15 of the proposed rule.

In the proposed rule, the oversight agency would require the rail transit agency to develop its system safety program plan and system security plan as separate documents. All oversight agency reviews of the system security plan would occur on-site at the rail transit agency, or according to another procedure developed by the rail transit agency in its system security plan. These requirements are located in § 659.17 of the proposed rule.

The proposed rule would require the oversight agency to oversee an annual review by rail transit agency of its system safety program plan and system security plan and modify or update as necessary. The proposed regulation would require the oversight agency to review and approve any modification or update. These changes are located § 659.19 of the proposed rule.

The proposed rule would stipulate that the rail transit agency conduct on-going internal safety and security reviews of its safety and security programs and notify the oversight agency at least 30 days prior to its conduct. The proposed regulation would require the State to review and approve an annual report on rail transit agency internal safety and security reviews and require the rail transit agency executive director or general manager to submit a letter certifying rail transit agency compliance with its own system safety program plan and system security plan. These requirements are located in § 659.21 of the proposed rule.

The proposed rule would clarify the State's role in the oversight of hazard management activities performed by the rail transit agency. The current rule specifies use of a hazard resolution matrix to categorize hazards. Those hazards categorized as unacceptable are to be investigated and culminate in the development to corrective action plans to mitigate the unacceptable hazardous condition. The proposed rule would clarify that hazards are managed using a hazard identification and resolution process, similar to that prescribed in the APTA Manual. The proposed rule would outline the process to be developed by the rail transit agency that guides its hazard identification and resolution activities, as well as coordination with the oversight agency. These requirements are located in § 659.25 of the proposed rule.

The proposed rule also addresses inconsistencies in accident notification and investigation thresholds between the state safety oversight program and FTA's National Transit Database (NTD) reporting thresholds, and the NTSB's notification and investigation thresholds. The proposed rule would allow FTA to standardize accident causal information obtained through the state safety oversight program by ridership and accident data reported by rail transit agencies to the NTD. The increased consistency would create a direct relationship between reported accidents, identified causal factors, and corrective actions and support consistent analysis of industry performance and needs. Moreover, the proposed rule would support consistency between those accidents requiring investigation under the state safety oversight program and those investigated by the NTSB. These requirements are located in § 659.27, § 659.29, and § 659.31 of the proposed rule.

V. Section-by-Section Analysis

In this section, FTA discusses the differences between the existing rule and the proposed rule. In addition to seeking comments on the proposed rule overall, FTA also requests comments on the specific issues indicated below.

Definitions (§ 659.5)

In the existing rule, FTA identifies thresholds for accident notification and investigation in the rule's definitions. In the proposed rule, FTA has opted to incorporate these thresholds directly in their applicable sections (§ 659.27—Notification and § 659.29—Investigations). FTA requests that comments made on these thresholds be directed at the appropriate sections of the proposed rule.

To clarify where events requiring notification and investigation may occur, FTA has added definitions for "rail transit vehicle" and "rail-transit controlled property." Likewise, to identify who may be affected by these events, FTA has added a definition of "individual."

FTA has replaced the definition of hazardous condition with the term "hazard" and proposes a definition that is more widely used in the state safety oversight program and industry. FTA proposes to strike the definition of "unacceptable hazardous condition" in the current rule and replace this categorization threshold with a proposed hazard management process, specified in section § 659.25.

FTA has added a definition of "corrective action plan" and "system security plan" to clarify existing requirements, and has revised its definition of "system safety program standard" and "system safety program plan" to reflect changes to the proposed rule regarding the removal of the incorporation by reference of the APTA Manual.

To address on-going questions resulting from the existing rule's use of the term "revenue operations," FTA proposes the addition of the term "passenger operations." This definition would clarify the point in time when approved oversight agency and rail transit agency programs must be in effect.

The proposed rule would modify the definition of rail fixed guideway system by clarifying that the rule applies to systems that are included in FTA's calculation of fixed guideway route miles to receive funding under the formula program for urbanized areas (49 U.S.C. 5336). FTA also added a caveat to address a system's intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336). With this change, States with a rail transit project that is funded without federal monies but expects to receive operating funds would be covered by the program at the initiation of passenger operations. Finally, in the revised rule, FTA proposes to use the term "rail transit agency" to refer to an entity that operates a rail fixed guideway system.

Designation of Oversight Agency (§ 659.9)

FTA's proposed rule contains several changes that would affect the existing requirement for a State to designate an oversight agency for each rail transit agency affected by Part 659 within its jurisdiction. FTA is basing these proposed changes on lessons learned as the state oversight community has grown. This proposed section would only apply to States with rail fixed guideway systems in their jurisdiction that have not designated an oversight agency by the date of the publication of the final rule.

Part 659 currently stipulates that States designate an agency "to serve as the oversight agency and to implement the requirements of [Part 659]." During the rulemaking effort for the current rule, FTA interpreted this requirement as meaning that the State was not required to designate an oversight agency during the planning, design, and construction of a new start rail system. As explained in the preamble to the current rule, FTA believes that the language of section 5330 "covers only operating systems or systems about to commence operations."

Since 1998, FTA has worked with Utah, Wisconsin, and Puerto Rico to ensure both the designation of oversight agencies for new start rail projects and compliance with rule requirements at the time of passenger operations. From this experience, FTA has learned the importance of clarifying the designation time frame for States with new start systems "about to commence operations." Without specific authority to require and approve a designation submission that includes a schedule for ensuring all program requirements are met by the time of operations, it is difficult for FTA to ensure that sufficient time is provided to address and resolve program concerns prior to passenger operations.

The proposed rule, therefore, would require that the State's designation, at a minimum, coincides with the execution of any grant between FTA and the rail transit agency for the new start project. FTA anticipates that, in most cases, this requirement will correspond to execution of a Full Funding Grant Agreement for a new start rail project.

Designation means that the Governor for the affected State would identify an agency, and a point of contact from that agency, that will likely assume oversight responsibility for the rail transit agency. Designation, for purposes of the proposed rule, may occur prior to the passage of enabling legislation or other activities that may be necessary for the oversight agency to assume its responsibilities for implementing Part 659 requirements.

Upon designation, the State would have 60 days to provide FTA with a designation submission. The designation submission would include (1) identification of the agency most likely to provide oversight; (2) a description of its current authorities relative to rail transit safety and security oversight; (3) identification of any potential conflicts of interest between the designated agency and the rail transit agency based on financial or shared management responsibilities; (4) a point of contact within the designated agency to coordinate with FTA regarding the development of the program, and (5) a proposed schedule detailing major milestones to ensure implementation of the State's oversight program with revenue operations of the rail transit agency.

This proposal would formalize a practice that is already in place and described in FTA's Compliance Guidelines for States with New Starts Projects. Currently, FTA asks that the Governor of each State affected by Part 659 to request designation of the oversight agency, as well as a point of contact within the State-designated agency with whom FTA may work to establish a line of communication as the agency develops its oversight program. It is in working with the State point of contact that FTA is able to provide technical assistance and outreach to support the development of the State's oversight program. Timely designation of the oversight agency also provides FTA with the opportunity to formally invite State representatives to participate in new start system meetings, held under FTA's Project Management Oversight Program, to assess quarterly the progress of capital projects subject to Part 659.

These changes to the rule's designation provisions also enhance consistency with two other FTA programs. FRA and FTA published Shared Use of the Tracks of the General Railroad System by Conventional Railroads and Light Rail Transit Systems. 65 Fed. Reg. 42525 (July 10, 2000). This joint statement addresses safety issues related to light rail transit operations that plan to take place on the tracks of the general railroad system, and the role of the state safety oversight program in supporting the rail transit agency's waiver process with FRA.

Also, in a recent revision to FTA's Full Funding Grant Agreement Guidance (FTA Circular 5100.1A, issued on December 5, 2002), FTA now requires greater coordination between FTA's Project Management Oversight Program and the state safety oversight program. New start projects receiving a $25 million or greater share of federal funds must include a Safety and Security Management Plan as part of the Project Management Plan used to evaluate project progress and authorize the release of funds. A component of this plan includes implementation schedules for meeting State Safety Oversight requirements and waiver applications to FRA for transit operations sharing corridors with the general railroad system. These submissions must be coordinated with the State and the designated oversight agency to ensure the continued receipt of FTA funds.

To support early state safety oversight program development, FTA makes funds available to support the designation of an oversight agency and the development of the oversight program under FTA's interpretation of Section 5309 of title 49, U.S.C. (FTA Guidance on Eligibility of Start-up Costs, September 5, 1997). State oversight agencies are able to receive funding from the rail transit agency, so long as the oversight agency state safety oversight expenses are incurred during the pre-revenue service phase of the capital project, are reasonable, and directly support activation and pre-revenue operations of the new service implemented under a capital grant.

The proposed rule would also address those new start projects that are not funded by FTA grants, but intend to eventually receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336). For these projects, when an entity declares its intent to FTA to receive formula funding (typically conveyed through the State transportation planning process), an oversight agency must be designated. Again, 60 days is provided for the State to make its designation submission to FTA.

For rail transit agencies that operate, or will operate, in more than one State, the affected States may each designate an agency of the State to implement state safety oversight requirements, or may agree to designate one agency of one State, or an agency representative of both States. Whatever designation determination is made by the affected States, a single program standard, adopted by each State, would be developed to implement state safety oversight program requirements. In this manner, the rail transit agency would not be unduly burdened with requirements from two or more States, but would be able to develop a seamless program that is equally applicable in all affected States.

For commenters addressing this section, FTA specifically requests information regarding (1) the amount of time required to prepare the designation submission described in this section; and (2) any additional requirements that may be appropriate to support coordination with FTA's Project Management Oversight Program and FRA's Joint Policy on Shared Use Track Systems.

System Safety Program Standard (§ 659.13)

The current rule requires oversight agencies to develop and adopt a program standard that, at a minimum: (1) Complies with the APTA Manual, and (2) requires the rail transit agency to address the personal security of its passengers and employees.

The proposed rule would remove the reference to the APTA Manual from the requirements for a state safety oversight system safety program standard. FTA believes that this change is necessary for several reasons.

First, to provide guidance for a dynamic and growing program, FTA, working through the established public comment process, needs the ability to change, modify, or revise the minimum requirements of the program standard. Reliance on the 1991 version, or subsequent versions, of the APTA Manual does not provide this capability because FTA does not manage this document.

Second, the APTA Manual provides guidance for developing a rail transit agency system safety program plan but does not provide guidelines for how a State agency should oversee a rail transit agency safety and security program or meet state safety oversight requirements. While this situation was also the case when FTA issued the current rule in December 1995, the state safety oversight community had yet to be created (only five of the existing 22 oversight agencies had been designated). At that time, based on public comment, it was appropriate to reference a known industry standard rather than to attempt to create a new one for State organizations that had not yet been established.

Six years later, however, a more mature and experienced oversight community has expressed concerns with using the APTA Manual as the basis the program standard. In outreach sessions, oversight agencies have requested that, instead of the APTA Manual, FTA provide a specific list of minimum requirements for the program standard which can be referenced in State enabling legislation, administrative code, executive directives, and other means through which responsibility and authority is conveyed to the oversight agency. To this end, in the proposed rule, FTA has prepared a list of ten (10) elements that would be included in a program standard, including minimum requirements that would address oversight agency authority and specific interfaces with the rail transit agency. The ten sections identified in the proposed rule correspond closely to the organization and content already used by many States in their standards—offering a tailored list of authorities and activities required for oversight programs. FTA believes that this modified approach will strengthen and clarify the enforceability of the program and provide minimum requirements that focus on the management of the State's oversight program.

It is important to note that in removing the program's incorporation by reference of the APTA Manual, FTA is not intending to lessen the importance of this document to the rail transit industry. To the contrary, FTA believes the APTA Manual provides a valuable resource for rail transit agencies and supports their compliance with the Part 659 requirement for system safety program plan development. Further, FTA plans to collaborate with APTA to ensure that future implementation guidelines are a product of a partnership between FTA, APTA, oversight agencies, and rail transit agencies. FTA urges APTA to consider this proposed rule in its subsequent revisions to the APTA Manual.

System Safety Program Plan (§ 659.15)

The current rule stipulates that the oversight agency must require the rail transit agency to develop and implement a written system safety program plan that complies with the oversight agency's program standard. The proposed rule would maintain this requirement, though instead of the APTA Manual, the proposed rule would identify 21 elements that must be included in the rail transit agency's system safety program plan.

These 21 elements are derived from the industry's experience with both the APTA Manual and the state safety oversight program. A rail transit agency relying on the current APTA Manual to develop its system safety program plan will have successfully addressed the 21 minimum elements identified by FTA in the proposed rule, provided the rail transit agency makes modifications to address specific changes proposed in the revised rule. These changes follow.

(1) Develop a hazard management process in compliance with hazard management process (§ 659.25) of the proposed rule—modifying the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 7 to include coordination with the oversight agency.

(2) Provide additional detail on the processes used by the rail transit agency to address safety in system modifications and safety certification for major projects—modifying the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 15.

(3) Describe accident notification, investigation and corrective action management processes in keeping with the proposed rule requirements (§ 659.27 and § 659.29)—modifying the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 8 and the current rule.

(4) Describe the process by which the rail transit agency will evaluate its emergency management program, such as an annual field exercise. FTA strongly believes that in order to address heightened concerns from recent events, an annual field exercise would support a rail transit agency's evaluation of its level of preparedness for an emergency event. In the last two years, FTA has provided funding to support the conduct of emergency preparedness

drills at the majority of the rail transit agencies around the nation. Lessons learned from this activity indicate its value in assuring preparedness and promoting integration of local responders into rail transit agency emergency preparedness programs. This represents a modification to the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 14.

(5) Document an internal safety and security review process which addresses greater coordination with the oversight agency regarding notification of reviews, oversight agency review of checklists and procedures, and submission of an annual report to the oversight documenting findings and status of recommendations, as specified in § 659.21 of the proposed rule—modifying the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 9;

(6) Provide additional detail on the employee safety program (to include employee/contractor right-of-way safety)—modifying the rail transit agency's description of these processes prepared in response to APTA Manual's Checklist Numbers 19 and 22.

(7) Identify the specific requirements to address rail transit agency procedures for rules compliance and performance testing to assess employee knowledge of/compliance with operating rules—modifying the rail transit agency's description prepared in response to APTA Manual's Checklist Number 12.

FTA proposes this last change to address recommendations issued to FTA's Administrator on September 26, 2002 by the NTSB (R–02–18 and –19). In these recommendations, the NTSB concluded that the APTA Manual, published on August 20, 1991, does "not contain the necessary specific guidance for assessing the effectiveness of rules compliance programs; as a result, the guidelines are not effective tools for regulatory authorities or transit agencies." The NTSB recommended that rail transit agencies should adopt, in their system safety program plans, specific standards covering rules compliance and efficiency test programs. NTSB also made recommendations to APTA to update the APTA Manual to address this concern, and to FTA to adopt the updated APTA Manual. Since FTA's revised rule proposes not to reference the APTA Manual in its program, FTA believes that it is important to address the NTSB recommendation regarding performance testing in the minimum requirements for the system safety program plan.

System Security Plan (§ 659.17)

To address the need to protect security information from public disclosure, FTA believes that it is important to make certain that the system safety program plan and the system security plan are separate documents with different protocols for review and management. The current rule allows the two plans to be combined into a single system safety and security program plan, and relies on the submission of these documents directly to the oversight agency via hard or electronic copy.

FTA is proposing a change to this practice which, first, would call for a separate system security plan, and, second, ensure that this plan and its supporting procedures would only be reviewed on-site at the rail transit agency, or according to some other procedure specified by the rail transit agency in its system security plan. FTA believes that recent events resulting from the September 11, 2001, attacks and potential changes in security policy that may be promulgated by the Transportation Security Administration warrant these modifications.

FTA considered the requirement for the designation of "transit security sensitive information" and the creation of procedures for the management and storage of this type of information at the oversight agency. However, FTA decided that the inconvenience of requiring on-site review of a rail transit agency's system security plan and supporting procedures was a less complex regulatory matter than attempting to create new policies for classifying and managing specific types of information at state agencies.

Therefore, FTA's proposed rule would identify minimum requirements for the system security plan, and specify that the State must require the rail transit agency to make available to the oversight agency, for review and approval, its system security plan and accompanying procedures. The oversight agency would then conduct its review of the system security plan and supporting procedures on-site at the rail transit agency, or following some other procedure specified by the rail transit agency in its system security plan and approved by the oversight agency. Throughout this process, the transit system and the oversight agency must comply with all regulations related to the non-disclosure of sensitive information, including the Transportation Security Administration's regulations at 49 CFR Part 1520.

Rail Transit Agency Annual Review of Its System Safety Program Plan and System Security Plan (§ 659.19)

FTA concluded from its audit program that the current rule does not provide sufficient guidance with regard to a recommended schedule for rail transit agency review and revision of its system safety program plan and system security plan. FTA found that rail transit agency reviews varied between one and three years and created situations where a rail transit agency may be implementing procedures or practices that are not reflected in its system safety program plan or system security plan. To address this potential for out-of-date plans, the proposed regulation would specify that the oversight agency must require the rail transit agency to conduct an annual review of its system safety program plan and system security plan. This review may simply result in the determination that no update is necessary in either plan, or it may address specific issues, such as the need for revised organization charts or roles and responsibilities matrices, or it may result in more substantive changes to one or both plans.

In the event that the system safety program plan is modified, the rail transit agency would be required to submit the modified plan and any subsequently modified procedures to the oversight agency for review and approval. Upon approval of the plan, the oversight agency would be required to issue a formal letter of approval to the rail transit agency.

In the event the rail transit agency's system security plan is modified, the rail transit agency would be required to make available to the oversight agency for on-site review at the rail transit agency, the modified plan and accompanying procedures. Upon approval of the plan, the oversight agency would be required to issue a formal letter of approval to the rail transit agency.

Rail Transit Agency Internal Safety and Security Reviews (§ 659.21)

Results from FTA's audit program and outreach with both oversight agencies and rail transit agencies indicate that the internal safety audit process requirement specified in the APTA Manual (Checklist Number Nine), and referenced in the current rule, has been perhaps the most challenging element of the program. Rail transit agencies have struggled with obtaining sufficient resources and management support to ensure that all elements identified in the APTA Manual are reviewed consistently

over a three-year timeframe. State oversight agencies have expressed the difficulty of obtaining schedules, checklists and procedures by which the rail transit agency plans to conduct these reviews. State oversight agencies have also indicated that the indirect authority provided by the current rule, which requires only an annual report documenting the rail transit agency's performance of the internal safety audit process, makes it difficult for them to address this issue more actively with the rail transit agencies.

FTA always intended that oversight agencies would play an important role in ensuring that the internal safety audit process identified by the rail transit agencies in their system safety program plans and system security plans is carried out. However, FTA agrees that in practice, the current rule does not sufficiently support oversight agency authority to monitor implementation of this program in an on-going manner.

To address these concerns, FTA proposes revising the existing rule to provide specific requirements that must be carried out by the oversight agency with regard to this process. To this end, FTA proposes that oversight agencies would require the rail transit agencies within their jurisdiction to develop a process for the performance of on-going internal safety and security reviews. This process would be included in the system safety program plan (for safety-related items) and the system security plan (for security-related items), and be reviewed and approved by the oversight agencies.

Further, the proposed rule would require that this process must: (1) Describe the method used by the rail transit agency to determine if all identified elements of its system safety program plan and system security plan are performing as intended; and (2) ensure that all elements of the system safety program plan and system security plan are reviewed in an on-going manner and completed over a three-year cycle.

This process must also ensure that the rail transit agency would notify the oversight agency at least thirty (30) days prior to the conduct of scheduled internal safety and security reviews, and that the rail transit agency would submit to the oversight agency, at the time of notification, any checklists or procedures it will use during the review. Any checklists or procedures the rail transit agency would use for the security portion of its review must be made available to the oversight agency for on-site review. At the request of the rail transit agency, the oversight agency may participate in these reviews, though the proposed rule would not require their participation.

In the proposed rule, the oversight agency must require the rail transit agency to submit an annual report documenting internal safety and security review activities and the status of subsequent findings and recommendations. The security portion of this report would only be made available for on-site review at the rail transit agency. The annual report would be accompanied by a formal letter of certification signed by the rail transit agency's executive director or general manager indicating that the rail transit agency is in compliance with its system safety program plan and system security plan. The oversight agency would be required to formally review and approve this report.

FTA believes that this amended process will greatly improve the coordination between the rail transit agencies and the oversight agencies regarding this element of the program.

Oversight Agency Safety and Security Reviews (§ 659.23)

The current rule requires that, at least every three years, the oversight agency must conduct an on-site review of the rail transit agency's implementation of its system safety program plan and system security plan. It also requires that the oversight agency prepare and issue a report containing findings and recommendations resulting from that review, which, at a minimum, must include an analysis of the efficacy of the system safety program plan and a determination of whether it should be updated. Based on the results of this on-site review, the oversight agency would require the rail transit agency to develop corrective action plans to address review findings.

Both oversight agencies and rail transit agencies have expressed general satisfaction with these reviews. However, those States that conduct these reviews in an on-going manner over the three-year period (rather than as a single review) requested that FTA clarify their authority to conduct the reviews in this manner. Therefore, this section has been amended to specify that the rail transit agency's system safety program plan may be reviewed in an on-going manner, over the three-year timeframe, or in a comprehensive on-site review at the rail transit agency, occurring once every three years.

Hazard Management Process (§ 659.25)

In the revised rule, FTA is proposing that the oversight agency require the rail transit agency to develop a process to identify and resolve hazardous conditions during operation, system extensions, modifications, or changes. This process would replace the current requirements for the notification and investigation of "unacceptable hazardous conditions," and ensure that the oversight agency has an on-going role in the rail transit agency's hazard identification and resolution process. FTA believes that such a role would enhance the program's capability to monitor the identification and resolution of hazards at the rail transit agency.

As proposed in the revised rule, the oversight agency must require the rail transit agency to develop, as part of the system safety program plan, a hazard management process to be reviewed and approved by the oversight agency. This process must, at a minimum: (1) Define the rail transit agency's approach to hazard management and the implementation of an integrated system-wide hazard resolution process; (2) specify the sources of, and the mechanisms to support, the on-going identification of hazards; (3) define the process by which identified hazards will be evaluated and prioritized for elimination or control; (4) identify the mechanism used to track to resolution the identified hazard(s); (5) define minimum thresholds for the notification and reporting to oversight agencies of hazardous conditions; and (6) specify the process by which the rail transit agency will provide on-going reporting of hazard resolution activities to the oversight agency.

The proposed regulation would not require industry-wide conformance to a single hazard management methodology. Rail transit agencies may propose methods that are specified in the APTA Manual or in military or other system safety references, or they may wish to limit application of matrix-based assessments in favor of trend analysis or other tools. Whatever approach is ultimately selected by the rail transit agency, it must be accurately identified and documented in the hazard management process, submitted as part of the system safety program plan, and reviewed and approved by the oversight agency.

Likewise, specific mechanisms for the on-going communication of the results of the hazard management process with the oversight agencies would be left open, to be determined by the specific rail transit agency and oversight agency. Some rail transit agencies may wish to invite their oversight agencies to monthly or quarterly meetings of Hazard Resolution Committees and to document hazard management activity in meeting minutes or notes from these

sessions. Other agencies may propose delivering a specific report on a monthly, quarterly or semi-annual basis to the oversight agency. Still other rail transit agencies may provide oversight agencies with access to existing hazard management databases and reports, or may conduct monthly teleconferences. FTA encourages the rail transit agencies and the oversight agencies, whenever possible, to take advantage of existing hazard management tools and processes to document and share information.

This process would ensure a continuous dialogue regarding hazard management between the oversight agency and the rail transit agency. Further, the hazard management process would define the sources from which rail transit agencies will identify and evaluate potential hazards as well as the notification, investigation and corrective action requirements implemented by the rail transit agency and reviewed and approved by the oversight agency.

FTA believes that this approach will provide oversight agencies with an improved understanding of this process, as applied in the rail transit industry, and a greater context from which to assess rail transit agency hazard evaluation processes and corrective action plans.

Notification (§ 659.27)

The current rule stipulates that the oversight agency must require the rail transit agency to report accidents and unacceptable hazardous conditions within a specified period of time determined by the oversight agency. Upon notification of these events, oversight agencies must investigate and require, review and approve corrective action plans, as appropriate, to address investigation findings. In the current rule, "accidents" include any events, if as a result: an individual dies; an individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or a collision, derailment, or fire causes property damage in excess of $100,000.

"Unacceptable hazardous conditions" include those hazardous conditions determined to be unacceptable using the APTA Manual, Hazard Resolution Matrix (Checklist Number 7). As explained in the section above, the proposed rule replaces the requirements for "unacceptable hazardous conditions" notification and investigation with a hazard management process (§ 659.25).

For accident notification and investigation, results from FTA's audit program and outreach with both oversight agencies and rail transit agencies indicate that the current rule's thresholds for accident notification are not consistent with other notification and investigation thresholds. For example, the current rule's definition of accident does not correspond with thresholds established by the NTSB, FTA's Drug and Alcohol Program, the NTD, the FRA for shared track systems, or State or local occupational safety and environmental protection programs.

In working sessions with oversight agencies and rail transit agencies, FTA identified a range of thresholds, currently used for major incident reporting in the NTD, that FTA believes are significant to the state safety oversight program. Using these thresholds, the proposed rule would require oversight agency notification within two (2) hours for any of the following events: (1) A fatality, where an individual is confirmed dead within 30 days of a transit-related incident, excluding suicides and deaths from illness; (2) injuries requiring immediate medical attention away from the scene for two or more individuals; (3) property damage to rail transit vehicles, non-rail transit vehicles, other rail transit property or facilities that equals or exceeds $25,000; (4) an evacuation due to life safety reasons; or (5) a main-line derailment. These events could take place on a rail transit vehicle or on rail transit-controlled property, and could involve rail transit passengers, employees, contractors, rail transit facility occupants, other workers, or trespassers.

By using consistent thresholds in the revised rule, oversight agencies would be able to track rail transit agency reports to the NTD using a module to be developed by FTA for this purpose. The ability to access information within the NTD would enable oversight agencies to consistently monitor rail transit agency performance of investigations, identify causal factors, and assign corrective actions using an existing federal resource. Consistent definitions allow FTA to remove elements of oversight agency annual reporting requirements, namely accident data and causal factors. FTA would get this information directly from the NTD to support its analysis of causal factors and drive safety and security initiatives and activities.

For rail transit agencies that share track with the general railroad system and are subject to FRA notification requirements, FTA's revised rule proposes that the oversight agency would also be notified within two (2) hours of an incident for which the rail transit agency must notify the FRA. FTA believes this is necessary to address the role of the state safety oversight program in FRA's waiver process.

FTA's proposed rule would also require that the oversight agency identify in its program standard the information to be given by the rail transit agency during notification. The oversight agency would be notified using any means, system, or format specified by the oversight agency in its program standard.

Investigations (§ 659.29)

In the current rule, the oversight agency must (1) establish procedures to investigate accidents and unacceptable hazardous conditions and (2) unless the NTSB has investigated or will investigate an accident, the oversight agency must investigate accidents and unacceptable hazardous conditions occurring at a transit agency under its jurisdiction. In the current rule, investigation "may involve no more than a review and approval of the transit agency's determination of the probable cause of an accident or unacceptable hazardous condition."

FTA is now proposing that the oversight agency must, at a minimum investigate, or cause to be investigated, accidents meeting one of three thresholds for which it receives notification: (1) A fatality; (2) injuries requiring immediate medical attention away from the scene for two or more persons; (3) property damage equal to or exceeding $25,000. This definition would correspond closely to the thresholds required by the NTSB for rail transit agency notification of events that may be subsequently investigated by the NTSB.

In meeting this requirement, the oversight agency would be required to ensure that the investigation is conducted according to procedures reviewed and approved by the oversight agency and submitted to FTA. In the event the oversight agency designates the rail transit agency to conduct the investigation on its behalf, it would do so formally and would require the rail transit agency to use investigation procedures that have been formally approved by the oversight agency and submitted to FTA to fulfill the oversight agency's Initial or Annual Submission requirements.

FTA's proposed rule specifies that each investigation must be documented in a final report that includes a description of investigation activities, identified causal factors, and a corrective action plan. The revised rule would provide the oversight agency with the flexibility to determine, in its program standard, when the final investigation report must be submitted to the oversight agency; the format of the final report; and whether status

updates or preliminary findings should also be submitted according to a timeframe specified by the oversight agency. FTA encourages oversight agencies and rail transit agencies to take advantage of existing reports and templates, to eliminate the need for additional rail transit agency reporting requirements. FTA's proposed rule also specifies that the oversight agency must review and formally approve each final investigation report.

Corrective Action Plans (§ 659.31)

Based on the results of FTA's audit program and working sessions with oversight agencies and rail transit agencies, FTA's proposed rule would consolidate all requirements for corrective action plans into a single section. In this section, FTA proposes that the oversight agency would, at a minimum, require the rail transit agency to develop a corrective action plan for the following occurrences: (1) Results from investigations in which identified causal factors are determined by the rail transit agency or oversight agency as requiring corrective actions; and (2) findings from safety and security reviews performed by the oversight agency. Requirements for corrective action plan development for identified hazardous conditions would be specified by the rail transit agency in the hazard management process.

The proposed rule specifies that each corrective action plan must identify the action to be taken by the rail transit agency and the schedule for its implementation. The corrective action plan would be reviewed and formally approved by the oversight agency. The oversight agency would be required to monitor the implementation of each approved corrective action plan.

FTA is aware of current program challenges, described by both oversight agencies and rail transit agencies, regarding the means available to assess whether the corrective action has been implemented and whether it is successfully meeting its intended objective. To address these concerns, FTA's proposed rule specifies that the oversight agency must require the rail transit agency to provide (1) verification that the corrective action(s) has been implemented as detailed in the corrective action plan or a proposed alternate action(s) subject to oversight agency review and approval; and (2) periodic reports as requested by the oversight agency detailing the status of each corrective action(s) not completely implemented as detailed in the corrective action plan.

FTA believes that this approach would provide the rail transit agency with sufficient flexibility to address the implementation of corrective action plans, while, at the same time, ensure the implementation of a process which can be effectively monitored by the oversight agency.

Oversight Agency Report to the Federal Transit Administration (§ 659.33)

Based on its experience with monitoring and evaluating implementation of the state safety oversight program, FTA is proposing minor modifications to the current oversight agency submissions to FTA, namely its initial submissions, annual submissions, and periodic submissions. The proposed regulation would require that all submissions to FTA are made electronically using an electronic reporting system. At the current time, FTA anticipates that this reporting would occur in an internet-based format, as a secure page on FTA's existing safety and security website. State oversight agencies will be assigned a secure login where they may upload their annual reports and electronic copies of supporting documents and procedures. FTA believes that automating this process would simplify the reporting function and data warehousing requirements associated with the rule.

For initial submissions, the proposed rule would specify that the each designated oversight agency must submit to FTA: (1) Oversight agency program standard and supporting procedures; and (2) a certification that the system safety program plan and the system security plan have been developed, reviewed, and approved. In States with rail fixed guideway systems in passenger operations as of the publication date of this rule, the designated oversight agency must make its initial submissions to FTA no later one year after the publication of the final rule. In States with rail fixed guideway systems entering passenger operations after the publication date of this rule, the designated oversight agency must make its initial submission within a time frame proposed by the State in its designation submission and approved by FTA.

For commenters addressing this section, FTA requests their opinions regarding the specified time frames for the initiation submissions. Is one year from the publication date of the final rule sufficient?

FTA's revised rule proposes that annual submissions from oversight agencies be made prior to March 15 of each year, and comply with the annual report template developed by FTA and submitted to the oversight agencies prior to March 15 of each year. The annual submission would require the following: (1) A publicly available annual report summarizing its oversight activities for the preceding twelve months; (2) a report documenting findings from three-year safety review activities, if a three-year safety review has been completed since the last annual report was submitted; and (3) program standard and supporting procedures that have been changed during the preceding year.

Finally, in its revised rule, FTA would have the authority to request periodic submissions from oversight agencies, which may include status reports for accident investigations, hazards, and corrective action plans.

Use of Contractors (§ 659.35)

FTA's revised rule would remove the list of activities for which state safety oversight agencies may allow the use contractors to address state safety oversight requirements. Instead, this revised section would simply require the oversight agency to prohibit an individual or entity from providing state safety oversight services when there may exist a conflict of interest. FTA would leave this determination to the oversight agency.

Certification of Compliance (§ 659.37)

As in the existing rule, FTA's revised rule would require that each oversight agency certify annually to the FTA that it has complied with the requirements of the state safety oversight program. FTA is proposing that each certification would be made electronically to FTA using an electronic reporting system specified by FTA. The oversight agency would be required to maintain a signed copy of each annual certification to FTA, subject to audit by FTA.

VI. Regulatory Process Matters

a. Executive Order 12866

FTA has determined that this proposed action is a significant regulatory action within the meaning of Executive Order 12866. While it is anticipated that the economic impact of this rulemaking will be minimal because the changes here are incremental in nature and any incremental costs are negligible, FTA recognizes that the proposed rule affects State governments and may be of congressional interest. After consultation between DOT and the Office of Management and Budget (OMB) concerning this NPRM, it has been determined that further OMB review of the NPRM is not needed.

In 1995, FTA evaluated the industry-wide costs and benefits of the current

rule. The economic analysis is available from FTA. In its analysis, FTA estimated the total costs for the first ten years to be approximately $9.1 million. However, when factoring in projections for program growth and new starts, the estimated annual burden between years five (5) and ten (10) increased approximately 15 percent. The present annual cost of 49 CFR Part 659 is $1,337,688. FTA estimates the annual cost of the proposed rule (*i.e.*, the annual cost of the entire rule as amended, as distinct from incremental costs of the proposed changes) to be approximately $2.1 million. The $800,000 difference between the current cost of implementing the rule and the annual cost of implementing the rule over the next 10 years is caused by mostly continued program growth (*i.e.*, addition of seven (7) rail transit agencies and new states by the year 2013). Further, in its estimate for this proposed rule, FTA increased the assumed hourly rate for personnel responsible for implementing rule requirements from $25 per hour to $35 per hour. This increase reflects FTA experience with the implementation of the current rule's requirements and outreach with state and rail transit agency representatives. FTA believes that while the estimate for annual cost burden has increased, the proposed changes will not cause the regulated parties to drastically change their behavior or substantially increase the number of resources needed to meet the proposed requirements.

b. Departmental Significance

This proposed rule is a significant regulation under the Department's Regulatory Policies and Procedures, because it makes changes to an important Departmental policy. Changes include the replacement of a referenced industry manual as the guideline for program compliance with proposed minimum requirements, a change in the definition of accident notification and investigation thresholds, clarification of critical processes such as the management of hazardous conditions and the performance of threat and vulnerability assessments, and many definitional additions.

c. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FTA has evaluated the effects of this proposed action on small entities and has determined that this proposed rule will not have a significant impact on a substantial number of small entities because these proposed changes will effect only larger transit agencies and oversight agencies (such as State departments of transportation and public utility commissions). Further, the original analysis done for the 1995 final rule, currently being implemented, led to the determination that there would be no significant impact on small entities. This rule merely proposes modest administrative changes to the original rule. For these reasons, FTA certifies that this action will not have a significant economic impact on a substantial number of small entities.

d. Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (2 U.S.C. 1532). As noted above, the estimated $2.1 million annual cost of implementing the rule is well below this threshold.

e. Executive Order 13132 (Federalism Assessment)

Prior to the publication of the original State Safety Oversight rule, FTA conducted a Federalism Assessment according to requirements of Executive Order 12612, which has since been revoked and replaced by the above-referenced order. That analysis can be found at 60 Fed. Reg. 67041 (Dec. 27, 1995). Because the State Safety Oversight requirements are already in place, and this proposed rule only provides more detailed requirements for greater clarification and performance-based evaluation to the existing rule, FTA has determined that Federalism impacts are minimal.

FTA has also determined that this action does not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. As was noted in the original analysis, there may be instances in which a State or local agency faces a conflict between compliance with this rule and State and local requirements. Because compliance with this rule is a condition of Federal financial assistance, State and local governments have the option of not seeking the Federal funds if they choose not to comply with this rule.

f. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Budget and Management (OMB) for each collection of information they conduct, sponsor, or require through regulations. This proposed rule includes information collection requirements subject to PRA. OMB approved FTA's collection requirements in the original rule and reviewed and approved an updated submission in September 1999. That approval can be found under OMB #2132–0558.

Since this action contains a proposal to institute additional or altered paperwork collection burdens, FTA is required to submit this collection of information to OMB for review and approval. Accordingly, FTA seeks public comments on this proposed information collection requirement. Interested parties are invited to send comments regarding any aspect of this information collection, including but not limited to: (1) The necessity and utility of the information collection for the proper performance of the functions of FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this NPRM will be summarized and/or included in the request for OMB approval of this information collection.

The estimated burden for information collection requirements is an annualized amount of 26,502 hours and $927,600 for oversight agencies and 33,244 hours and $1,163,540 for rail transit agencies. These numbers concern the burdens of the entire as amended, as distinct from incremental burdens of the proposed changes.

List of Subjects in 49 CFR Part 659

Grant Programs—Transportation, Mass transportation, Reporting and record keeping requirements, Safety, Security, and Transportation.

For the reasons described in the preamble, FTA proposes to amend title 49, Code of Federal Regulations, Part 659, as set forth below:

PART 659—STATE SAFETY OVERSIGHT

1. The authority citation for 49 CFR part 659 continues to read as follows:

Authority: 49 U.S.C. 5330.

2. Revise part 659 to read as follows:

PART 659—RAIL FIXED GUIDEWAY SYSTEMS; STATE SAFETY OVERSIGHT

Sec.

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659.3 Scope.
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659.21 Rail transit agency internal safety and security reviews.
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§ 659.1 Purpose.

This part implements 49 U.S.C. 5330 by requiring a State to oversee the safety and security of rail fixed guideway systems through a designated oversight agency.

§ 659.3 Scope.

This part applies to a State that has within its boundaries a rail fixed guideway system as defined in this part.

§ 659.5 Definitions.

Contractor means an entity that performs tasks required by this part on behalf of the oversight or rail transit agency. The rail transit agency may not be a contractor for the oversight agency.

Corrective action plan means a plan developed by the rail transit agency that sets forth the actions the rail transit agency will take to minimize, control, correct, or eliminate hazardous conditions and the schedule for implementation for those actions.

FTA means the Federal Transit Administration, an agency within the U.S. Department of Transportation.

Hazard means any real or potential condition (as defined in the rail transit agency's hazard management process) that can cause injury, illness, or death; damage to or loss of a system, equipment or property; or damage to the environment.

Individual means a passenger; employee; contractor; rail transit facility occupant; other transit facility worker; or trespasser.

Investigation means the process used to determine the causal factors of an accident or hazard such that actions can be identified to prevent recurrence.

Oversight agency means the entity, other than the rail transit agency, designated by the State or several States to implement this part.

Passenger means a person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel.

Passenger operations means the period of time commencing when any aspect of rail transit agency operation is initiated with the intent to carry passengers.

Program standard means a written document developed and adopted by the oversight agency that describes the policies, objectives, responsibilities, and procedures used to provide rail transit agency safety and security oversight.

Rail fixed guideway system means, as determined by FTA, any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that:

(1) Is not regulated by the Federal Railroad Administration; and

(2) Is included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336); or

(3) Has submitted documentation to FTA indicating its intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336).

Rail transit agency means an entity that operates a rail fixed guideway system.

Rail transit-controlled property means property that is utilized by the rail transit agency and may be owned, leased, or maintained by the rail transit agency.

Rail transit vehicle means the rail transit agency's rolling stock.

Safety means freedom from harm resulting from unintentional acts or circumstances.

Security means freedom from harm resulting from intentional acts or circumstances.

System safety program plan means a document developed and adopted by the rail transit agency detailing its safety policies, objectives, responsibilities, and procedures.

System security plan means a document developed and adopted by the rail transit agency detailing its security policies, objectives, responsibilities, and procedures.

§ 659.7 Withholding of funds for noncompliance.

The Administrator of the FTA may withhold up to five percent of the amount required to be apportioned for use in any State or affected urbanized area in such State under FTA's formula program for urbanized areas if the State in the previous fiscal year has not met the requirements of this part and the Administrator determines that the State is not making adequate efforts to comply with this part.

§ 659.9 Designation of oversight agency.

(a) States with oversight agencies designated for rail fixed guideway systems in passenger operations prior to the publication of this rule are not required to re-designate to FTA.

(b) For a rail fixed guideway system that will operate in only one State, the State must designate an agency of the State, other than the rail transit agency, as the oversight agency to implement the requirements in this part.

(c) For a rail fixed guideway system that will operate in more than one State, each affected State must designate an agency of the State, other than the rail transit agency, as the oversight agency to implement the requirements in this part. To fulfill this requirement, the affected States:

(1) May agree to designate one agency of one State, or an agency representative of all States, to implement the requirements in this part.

(2) In the event multiple States share oversight responsibility for a rail fixed guideway system, the States must ensure that the rail fixed guideway system is subject to a single program standard, adopted by all affected States.

(d) The State designation of the oversight agency must:

(1) Coincide with the execution of any grant agreement between FTA and the rail fixed guideway system within the State's jurisdiction; or

(2) Occur prior to the application for funding under FTA's formula program for urbanized areas (49 U.S.C. 5336) by an entity determined by FTA as meeting the definition of rail fixed guideway system.

(e) Within (60) days of designation of the oversight agency, the State must submit the following to FTA:

(1) The name of the oversight agency designated to implement requirements in this part;

(2) Documentation of the oversight agency's authority to provide State oversight;

(3) Contact information for the representative identified by the designated oversight agency as having responsibility for oversight activities;

(4) A description of the organizational and financial relationship between the designated oversight agency and the rail transit agency;

(5) A schedule for the designated agency's development of its State safety oversight program including the projected date of its initial submission, as required in § 659.31(a); and

(f) The State's designation of its oversight agency and submission of

required information is subject to review and approval by FTA.

§ 659.11 Confidentiality of investigation reports.

The State may prohibit an investigation report that may be prepared by the oversight agency from being admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

§ 659.13 System safety program standard.

(a) The oversight agency must develop a written program standard that meets the requirements as specified in this part and includes, at a minimum, the following sections:

(1) *Oversight agency program management*—In this section, the oversight agency must explain its authority, policies, and roles and responsibilities for the provision of safety and security oversight of the rail transit agencies within its jurisdiction. This section must provide an overview of planned activities to ensure on-going communication with each affected rail transit agency regarding safety and security information, as well as policies for communication with FTA, including initial, annual and periodic submissions.

(2) *Oversight agency program standard development*—In this section, the oversight agency must describe its process for the development and review and adoption of the program standard, the modification and/or update of the program standard, and the process through which the program standard and any subsequent revisions are distributed to each affected rail transit agency.

(3) *Requirements for rail transit agency system safety program plan*—In this section, the oversight agency must specify the minimum requirements to be addressed in the system safety program plan developed by each affected rail transit agency within its jurisdiction. This section must also describe the process and timeframe through which the oversight agency must receive, review, and approve the rail transit agency system safety program plan.

(4) *Requirements for rail transit agency system security plan*—In this section, the oversight agency must identify the minimum requirements to be addressed in the system security plan developed by each affected rail transit agency within its jurisdiction. This section must also describe the process through which the oversight agency will review and approve the rail transit agency system security program plan.

(5) *Rail transit agency internal safety and security reviews*—In this section, the oversight agency must describe its role in overseeing the rail transit agency internal safety or security review process. This includes a description of the process used by the oversight agency to receive rail transit agency checklists and procedures and approve the rail transit agency's annual report on findings.

(6) *Oversight agency safety and security review*—In this section, the oversight agency must specify its process and criteria to be used every three years for conducting a complete review of each affected rail transit agency's implementation of its system safety program plan and system security plan. This section must also include the process to be used by the affected rail transit agency and the oversight agency to manage findings and recommendations from this review.

(7) *Hazard management process*—In this section, the oversight agency must specify information to be contained in the affected rail transit agency's system safety program plan regarding the hazard management process, including requirements for on-going communication and coordination regarding the identification; categorization; resolution; and reporting of hazardous conditions to the oversight agency.

(8) *Notification*—In this section, the oversight agency must identify the specific requirements for the notification of accidents by the rail transit agency to the oversight agency. This section must include required timeframes, means for notification, and the information to be submitted upon notification.

(9) *Investigations*—In this section, the oversight agency must identify the thresholds for events which require an oversight agency investigation. The roles and responsibilities for conducting investigations must include: coordination with the rail transit agency investigation process; the role of the oversight agency in supporting investigations conducted by the National Transportation Safety Board; and review and approval of investigation reports, including formats and sign-offs.

(10) *Corrective actions*—In this section, the oversight agency must specify its criteria for the development of a corrective action plan by the rail transit agency; its process for the review and approval of a corrective action plan; and its policies for the verification and tracking of corrective action plan implementation.

(b) The program standard and any referenced program procedures must be submitted to FTA as part of the initial submission. Subsequent revisions and updates must be submitted to FTA as part of the oversight agency's annual submission.

§ 659.15 System safety program plan.

(a) The oversight agency must require the rail transit agency to develop and implement a written system safety program plan that complies with requirements in this part and the oversight agency's program standard.

(b) The system safety program plan must include, at a minimum:

(1) A policy statement signed by top management which endorses the safety program and provides a description of the authority that establishes the system safety program plan.

(2) A clear definition of the goals and objectives for the safety program and stated management responsibilities to ensure that they are achieved.

(3) An overview of the management structure of the rail transit agency, including:

(i) An organization chart;

(ii) A description of how the safety function is integrated into the rest of the rail transit organization; and

(iii) Clear identification of the lines of authority used by the rail transit agency to manage safety issues.

(4) The process used to control changes to the system safety program plan, including:

(i) Specification of an annual assessment regarding whether the system safety program plan should be updated; and

(ii) Required coordination with the oversight agency, including timeframes for submission, revision and approval.

(5) A description of the specific activities required to implement the system safety program, including:

(i) Tasks to be performed by the rail transit safety function, specified by position and management accountability, in matrices and/or narrative format; and

(ii) Safety-related tasks to be performed by other rail transit departments, specified by position and management accountability, in matrices and/or narrative format.

(6) A description of the process used by the rail transit agency to implement its hazard management program, including activities for:

(i) Hazard identification;

(ii) Hazard investigation, evaluation and analysis;

(iii) Hazard control and elimination;

(iv) Hazard tracking; and

(v) Requirements for on-going reporting to the oversight agency regarding hazard management activities and status.

(7) A description of the process used by the rail transit agency to ensure that safety concerns are addressed in modifications to existing systems, vehicles, and equipment which do not require formal safety certification but which may have safety impacts.

(8) A description of the safety certification process required by the rail transit agency to initiate passenger operations and for subsequent major projects undertaken to extend, rehabilitate, or modify the existing system or to replace vehicles and equipment.

(9) A description of the process used to collect, maintain, analyze, and distribute safety data to ensure that the safety function within the rail transit organization receives the information necessary to support implementation of the system safety program.

(10) A description of the process used by the rail transit agency to perform accident notification, investigation and reporting, including:

(i) Notification thresholds for internal and external organizations;

(ii) Accident investigation process and references to procedures;

(iii) The process used to develop, implement and track corrective actions that address investigation findings;

(iv) Reporting to internal and external organizations; and

(v) Coordination with the oversight agency.

(11) A description of the process used by the rail transit agency to develop an approved, coordinated schedule for all emergency management program activities, which include:

(i) Meetings with external agencies;

(ii) Emergency planning responsibilities and requirements;

(iii) Process used to evaluate emergency preparedness, such as annual emergency field exercises;

(iv) After action reports and implementation of findings;

(v) Revision and distribution of emergency response procedures;

(vi) Familiarization training for public safety organizations; and

(vii) Employee training.

(12) A description of the process used by the rail transit agency to ensure that planned and scheduled internal safety reviews are performed to evaluate compliance with the system safety program plan, including:

(i) Identification of departments and functions subject to review;

(ii) Responsibility for scheduling reviews;

(iii) Process for conducting reviews, including the development of checklists and procedures and the issuing of findings;

(iv) Review reporting requirements;

(v) Tracking the status of implemented recommendations; and

(vi) Coordination with the oversight agency.

(13) A description of the process used by the trail transit agency to develop, maintain, and ensure compliance with rules and procedures, identified as having a safety impact, including:

(i) Identification of operating and maintenance rules and procedures subject to review;

(ii) Techniques used to assess the implementation of operating and maintenance rules and procedures by employees, such as performance testing;

(iii) Techniques used to assess the effectiveness of supervision provided regarding the implementation of operating and maintenance rules; and

(iv) Process for documenting results and incorporating them into the hazard management program.

(14) A description of the process used for facilities and equipment safety inspections, including:

(i) Identification of the facilities and equipment subject to regular safety related-inspection and testing;

(ii) Techniques used to conduct inspections and testing;

(iii) Inspection schedules and procedures; and

(iv) Description of how results are entered into the hazard management process.

(15) A description of the maintenance audits and inspections program including identification of the affected facilities and equipment, maintenance cycles, documentation required, and the process for integrating identified problems into the hazard management process.

(16) A description of the training and certification program for employees and contractors, including:

(i) Categories of safety-related work requiring training and certification;

(ii) A description of the training and certification program for employees and contractors in safety-related positions;

(iii) Process used to maintain and access employee and contractor training records; and

(iv) Process utilized to assess compliance with training and certification requirements.

(17) A description of the configuration management control process, including:

(i) The authority to make configuration changes;

(ii) Process for making changes; and

(iii) Assurances necessary for all involved departments to be formally notified.

(18) A description of the safety program for employees and contractors that incorporates the applicable local, state, and federal requirements, including:

(i) Safety requirements that employees and contractors must follow when working on, or in close proximity to, rail transit agency property; and

(ii) Processes for ensuring the employees and contractors know the requirements and follow them.

(19) A description of the hazardous materials program including the process used to ensure knowledge of and compliance with program requirements.

(20) A description of the drug and alcohol program and the process used to ensure knowledge of and compliance with program requirements.

(21) A description of the measures, controls, and assurances in place to ensure that safety is involved in the rail transit agency's procurement process.

(c) The oversight agency must review and approve the rail transit agency system safety program plan.

(d) Upon approval of the system safety program plan, the oversight agency must issue a formal letter of approval to the rail transit agency.

§ 659.17 System security plan.

(a) The oversight agency must require the rail transit agency to implement a system security plan that complies with requirements in this part and the oversight agency's program standard. The system security plan must be developed and maintained as a separate document and may not be part of the rail transit agency's system safety program plan.

(b) The system security plan must, at a minimum:

(1) Identify the policies, goals, and objectives for the security program endorsed by top management;

(2) Document the rail transit agency's process for managing threats and vulnerabilities during operations and for major projects, extensions, new vehicles and equipment;

(3) Identify controls in place that address the personal security of passengers and employees;

(4) Document the rail transit agency's process for conducting internal security reviews to evaluate compliance and measure the effectiveness of the system security plan; and

(5) Document the rail transit agency's process for making available its system security plan and accompanying procedures to the oversight agency for review and approval.

(c) The oversight agency may prohibit a rail transit agency from publicly disclosing the system security plan.

(d) Upon approval of the system security plan, the oversight agency must

issue a formal letter of approval to the rail transit agency.

§ 659.19 Rail transit agency annual review of its system safety program plan and system security plan.

The oversight agency must require the rail transit agency to conduct an annual review of its system safety program plan and system security plan.

(a) In the event the rail transit agency's system safety program plan is modified, the rail transit agency must submit the modified plan and any subsequently modified procedures to the oversight agency for review and approval. Upon approval of the plan the oversight agency must issue a formal letter of approval to the rail transit agency.

(b) In the event the rail transit agency's system security plan is modified, the rail transit agency must make the modified system security plan and accompanying procedures available to the oversight agency for review, subject to requirements specified in § 659.17(b)(5). Upon approval of the plan the oversight agency must issue a formal letter of approval to the rail transit agency.

§ 659.21 Rail transit agency internal safety and security reviews.

(a) The oversight agency must require the rail transit agency to develop and document in its system safety program plan, a process for the performance of on-going internal safety and security reviews.

(b) The internal safety and security review process must, at a minimum:

(1) Describe the process used by the rail transit agency to determine if all identified elements of its system safety program plan and system security plan are performing as intended.

(2) Ensure that all elements of the system safety program plan and system security plan are reviewed in an on-going manner and completed over a 3-year cycle. The 3-year cycle commences [EFFECTIVE DATE OF FINAL RULE].

(c) The rail transit agency must notify the oversight agency at least (30) days prior to the conduct of scheduled internal safety and security reviews.

(1) The rail transit agency must submit to the oversight agency any checklists or procedures it will use during the safety portion of its review.

(2) Any checklists or procedures the rail transit agency will use for the security portion of its review must be made available to the oversight agency subject to § 659.17(b)(5).

(d) The oversight agency must require the rail transit agency to submit, annually, a report documenting internal safety and security review activities and the status of subsequent findings and recommendations. The security portion of this report must be made available for oversight agency review subject to § 659.17(b)(5).

(e) The annual report must be accompanied by a formal letter of certification signed by the rail transit agency's executive director or general manager indicating that the rail transit agency is in compliance with its system safety program plan and system security plan.

(f) The oversight agency must formally review and approve the annual report.

§ 659.23 Oversight agency safety and security reviews.

Every 3 years, or in an on-going manner, commencing with the initiation of rail transit agency passenger operations, the oversight agency must conduct an on-site review of the rail transit agency's implementation of its system safety program plan and system security plan.

§ 659.25 Hazard management process.

(a) The oversight agency must require the rail transit agency to develop and document in its system safety program plan a process to identify and resolve existing hazards conditions during its operation, as well as any hazards arising due to subsequent system extensions or modifications, operational changes, or other changes within the rail transit environment.

(b) The hazard management process must, at a minimum:

(1) Define the rail transit agency's approach to hazard management and the implementation of an integrated system-wide hazard resolution process;

(2) Specify the sources of, and the mechanisms to support, the on-going identification of hazards;

(3) Define the process by which identified hazards will be evaluated and prioritized for elimination or control;

(4) Identify the mechanism used to track to resolution the identified hazard(s);

(5) Define minimum thresholds for the notification and reporting to state oversight agencies of hazardous conditions; and

(6) Specify the process by which the rail transit agency will provide on-going reporting of hazard resolution activities to the oversight agency.

§ 659.27 Notification.

(a) The oversight agency must require the rail transit agency to notify the oversight agency within two (2) hours of any event involving a rail transit vehicle or taking place on rail transit-controlled property where one or more of the following occurs:

(1) A fatality, where an individual is confirmed dead within 30 days of a transit-related incident, excluding suicides and deaths from illness;

(2) Injuries requiring immediate medical attention away from the scene for two or more individuals;

(3) Property damage to rail transit vehicles, non-rail transit vehicles, other rail transit property or facilities that equals or exceeds $25,000;

(4) An evacuation due to life safety reasons; or

(5) A main-line derailment.

(b) The oversight agency must require rail transit agencies that share track with the general railroad system and are subject to the Federal Railroad Administration notification requirements to notify the oversight agency within two (2) hours of an incident for which the rail transit agency must notify the Federal Railroad Administration.

(c) The oversight agency must identify in its program standard the method of notification and the information to be given by the rail transit agency.

§ 659.29 Investigations.

(a) The oversight agency must investigate, or cause to be investigated, at a minimum, any event involving a rail transit vehicle or taking place on rail transit-controlled property meeting the fatality, injury, or property damage thresholds identified in § 659.27(a).

(b) The oversight agency must use approved investigation procedures that have been submitted to FTA as required in the initial submission or annual submission.

(c) In the event the oversight agency designates the rail transit agency to conduct investigations on its behalf, it must do so formally and require the rail transit agency to use investigation procedures that have been formally approved by the oversight agency.

(d) Each investigation must be documented in a final report that includes a description of investigation activities, identified causal factors, and a corrective action plan.

(1) The final investigation report must be submitted to the oversight agency in a format and timeframe specified by the oversight agency.

(2) The oversight agency must review and formally approve each final investigation report.

(3) The oversight agency shall have the authority to require periodic status reports that document investigation activities and findings in a time frame determined by the oversight agency.

§ 659.31 Corrective action plans.

(a) The oversight agency must, at a minimum, require the development of a corrective action plan for the following:

(1) Results from investigations in which identified causal factors are determined by the rail transit agency or oversight agency as requiring corrective actions; and

(2) Findings from safety and security reviews performed by the oversight agency.

(b) Each corrective action plan should identify the action to be taken by the rail transit agency and the schedule for its implementation.

(c) The corrective action plan must be reviewed and formally approved by the oversight agency.

(d) The rail transit agency must provide the oversight agency:

(1) Verification that the corrective action(s) has been implemented as detailed in the corrective action plan or that a proposed alternate action(s) has been implemented subject to oversight agency review and approval; and

(2) Periodic reports as requested by the oversight agency detailing the status of each corrective action(s) not completely implemented as detailed in the corrective action plan.

(e) The oversight agency must monitor and track the implementation of each approved corrective action plan.

§ 659.33 Oversight agency reporting to the Federal Transit Administration.

(a) Initial submission: in States with rail fixed guideway systems in passenger operations as of the publication date of this rule, the designated oversight agency must make its initial submission to FTA by [EFFECTIVE DATE OF FINAL RULE]. In States with rail fixed guideway systems initiating passenger operations after the publication date of this rule, the designated oversight agency must make its initial submission within the time frame specified by the State in its designation submission.

(b) The initial submission must include the following:

(1) Oversight agency program standard and referenced procedures; and

(2) Certification that the system safety program plan and the system security plan have been developed, reviewed, and approved.

(c) Annual Submission: before March 15 of each year, the oversight agency must submit the following to FTA:

(1) A publicly available annual report summarizing its oversight activities for the preceding 12 months, including a description of the causal factors of investigated accidents and status of corrective actions, updates and modifications to rail transit agency program documentation;

(2) A report documenting findings from 3-year safety review activities, if a 3-year safety review has been completed since the last annual report was submitted; and

(3) Program standard and supporting procedures that have been changed during the preceding year.

(d) Periodic submission—FTA retains the authority to periodically request program information.

(e) Electronic reporting—All submissions to FTA required in this part must be made electronically using an electronic reporting system specified by FTA.

§ 659.35 Conflict of interest.

The oversight agency must prohibit a party or entity from providing services to both the oversight agency and rail transit agency when there exists a conflict of interest.

§ 659.37 Certification of compliance.

(a) Annually, the oversight agency must certify to the FTA that it has complied with the requirements of this part.

(b) Each certification shall be made electronically to FTA using an electronic reporting system specified by FTA.

(c) The oversight agency must maintain a signed copy of each annual certification to FTA, subject to audit by FTA.

Issued on: February 24, 2004.

Jennifer L. Dorn,

Administrator.

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Federal Register

Tuesday,
March 9, 2004

Part V

Department of Labor

Employment and Training Administration

20 CFR Parts 667 and 670

29 CFR Parts 2 and 37

Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries; Proposed Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 667

20 CFR Part 670

Office of the Secretary

29 CFR Part 2

29 CFR Part 37

RIN 1290–AA21

Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries

AGENCY: Employment and Training Administration and the Office of the Secretary, Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The United States Department of Labor (DOL or the Department) is proposing to revise its general regulations. This proposed rule would clarify, within the framework of constitutional guidelines, that faith-based and community organizations are able to participate in DOL social service programs without regard to their religious character or affiliation, and are able to apply for and compete on an equal footing with other eligible organizations to receive DOL support. In addition, in order to consolidate in one place the Department's regulations on religious activities, this proposed rule would revise both the Employment and Training Administration (ETA) regulation on religious services at Job Corps centers and the Workforce Investment Act of 1998 (WIA) regulations relating to the use of WIA Title I financial assistance to support employment and training in religious activities. DOL supports the participation of faith-based and community organizations in its programs.

DATES: Comments must be submitted by May 10, 2004.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1290–AA21, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: Comments may be submitted by e-mail to *GRNDR@dol.gov*. Include RIN 1290–AA21 in the subject line of the message.
- Fax: As a convenience to commenters, comments of five pages or less may be submitted by facsimile ("FAX") machine to (202) 693–6146, which is not a toll-free number.
- Mail: Brent Orrell, Director, Center for Faith-Based and Community Initiatives (CFBCI), U.S. Department of Labor, Frances Perkins Building, 200 Constitution Ave., NW., Room S–2235, Washington, DC 20210.

Instructions: All submissions received must include the Regulatory Information Number (RIN) 1290–AA21 for this rulemaking. Receipt of submissions, whether by U.S. mail, FAX transmittal, or e-mail, will not be acknowledged. Because DOL continues to experience delays in receiving postal mail in the Washington, DC area, commenters are encouraged to submit any comments by mail early, or to transmit them electronically through the Agency Web site or by FAX or e-mail.

Comments will be available for public inspection during normal business hours at the CFBCI office, at the address listed above for mailed comments. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this proposed rule will be made available in the following formats: large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain the Proposed Rule in an alternate format, contact CBFCI at (202) 693–6450.

FOR FURTHER INFORMATION CONTACT: On the proposed revisions to the Office of the Secretary's general regulations, 29 CFR part 2, contact: Rhett Butler, Associate Director for Policy Development, CFBCI, (202) 693–6450. On the proposed revisions to 20 CFR part 667, contact Maria K. Flynn, Acting Administrator, Office of Policy Development, Evaluation and Research, Employment and Training Administration, (202) 693–3700. On the proposed revisions to 20 CFR 670.555, contact: Richard Trigg, Administrator of the National Office of Job Corps, (202) 693–3000. On the proposed revisions to 29 CFR 37.6, contact Annabelle T. Lockhart, Director, Civil Rights Center (CRC), (202) 693–6500. Please note these are not toll-free numbers. Individuals with hearing or speech impairments may access these telephone numbers via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

Faith-based (or "religious") and community organizations are an important part of the social services network of the United States, offering a multitude of social services to those in need. Faith-based and community groups everywhere, either acting alone or as partners with other service providers and government programs, serve the poor, and help to strengthen families and rebuild communities. All too often, however, Federal policies and programs have not recognized faith-based and community organizations as resources for providing social assistance. Federal, State and local governments have often imposed barriers to the participation of faith-based and community organizations in social service programs, including unwarranted regulatory barriers. President Bush has directed Federal agencies, including DOL, to take steps to ensure that Federal policies and programs are fully open to faith-based and community organizations in a manner that is consistent with the Constitution. The Administration believes that religiously affiliated or faith-based groups possess an under-appreciated ability to meet the needs of disadvantaged Americans and to help them enter, succeed, and thrive in the workforce. The Administration believes that there should be an equal opportunity for *all* organizations—both faith-based and otherwise—to participate in Federal programs.

As part of these efforts, President Bush issued Executive Order 13198 on January 29, 2001. The Order, which was published in the **Federal Register** on January 31, 2001 (66 FR 8497), created Centers for Faith-Based and Community Initiatives in five cabinet departments—Labor, Education, Health and Human Services, Housing and Urban Development, and Justice. Executive Order 13198 charged the Centers to identify and eliminate regulatory, contracting, and other programmatic obstacles to the equal participation of faith-based and community organizations in the provision of social services by their Departments. On December 12, 2002, President Bush issued Executive Order 13280. That Order, published in the **Federal Register** on December 16, 2002 (67 FR 77145), created Centers in two additional agencies—the United States Agency for International Development and the Department of Agriculture—and charged those Centers with duties similar to those set forth in Executive Order 13198. On December 12, 2002, President Bush also issued Executive

Order 13279, published in the **Federal Register** on December 16, 2002 (67 FR 77141). Executive Order 13279 charges executive branch agencies to give equal treatment to faith-based and community organizations that apply to the Government for Federal financial assistance to meet social needs in America's communities. President Bush called for an end to discrimination against faith-based and community organizations and, consistent with the First Amendment to the United States Constitution, ordered implementation of these policies throughout the executive branch, including, among other things, allowing organizations to retain their religious autonomy over their internal governance and composition of boards, and over their display of religious art, icons, scriptures, or other religious symbols, when participating in programs supported with Federal financial assistance. President Bush directed each executive agency, including DOL, to implement these policies. This proposed rule is part of DOL's efforts to fulfill its responsibilities under both Executive Orders 13198 and 13279.

II. Proposed Rule

A. Purpose of the Proposed Rule

Consistent with the President's initiative, this proposed rule would revise DOL's general regulations to make clear that faith-based and community organizations may participate in DOL social service programs, including as recipients of Federal financial assistance. The objective of this proposed rule is to ensure that DOL-supported social service programs are open to all qualified organizations, regardless of their religious character. This rule also aims to set forth the conditions for seeking or receiving DOL support related to these programs and the permissible uses to which such support may be put. In addition, this proposed rule is designed to ensure that DOL's social service programs are implemented in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment.

B. Proposed Amendments to DOL General Regulations

DOL proposes to amend its General Regulations at 29 CFR part 2 by incorporating a new Subpart D—Equal Treatment in DOL Programs for Faith-Based and Community Organizations; Protection of Religious Liberty of DOL Social Service Providers and Beneficiaries—to address the areas identified below.

1. Participation by Faith-Based and Community Organizations in DOL Social Service Programs

The proposed rule clarifies in § 2.32 that organizations are eligible to participate in DOL social service programs without regard to the religious character or affiliation of such organizations, and that eligible organizations may not be excluded from the competition for DOL support related to DOL social service programs simply because such organizations are faith-based. Specifically, faith-based organizations are eligible to compete for such support on the same basis, and under the same eligibility requirements, as all other non-governmental organizations. DOL, DOL social service intermediary providers, and State and local governments administering DOL support are prohibited from discriminating for or against organizations on the basis of the organizations' religious character or affiliation. This rule does not, however, preclude DOL programs from accommodating religious organizations in a manner consistent with the Establishment Clause. Of course, all DOL programs must be implemented in a manner consistent with the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment to the Constitution, as well as with other applicable constitutional provisions.

2. Inherently Religious Activities

The proposed rule describes in § 2.33 the requirements related to inherently religious activities in DOL-supported social service programs. Specifically, as described in § 2.33(b), an organization may not use direct DOL support [1] for inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, the activities must be offered separately, in time or location, from the social service programs receiving direct DOL support, and participation in any such inherently religious activities must be voluntary for the beneficiaries of such programs. This requirement ensures that DOL support provided directly to a faith-based organization is not used for inherently religious activities. Thus, direct DOL support may not be used, for example, to conduct prayer meetings, worship services, or any other activity that is inherently religious.

This restriction does not mean that a DOL social service provider cannot engage in inherently religious activities. Such activities are permissible, but DOL social service providers that receive DOL support directly must take steps to separate, in time or location, their inherently religious activities from services that they offer with direct DOL support.

These restrictions on inherently religious activities do not apply, as explained in § 2.33(c), where DOL support is provided indirectly to organizations. Indirect DOL support refers to DOL support that is indirect within the meaning of the Establishment Clause of the First Amendment to the Constitution. An organization may receive such indirect DOL support if, for example, a program beneficiary redeems a voucher, coupon, certificate, or similar mechanism that was provided to that individual using DOL financial assistance under a program that is designed to give that individual a genuine and independent private choice among providers or program options. *See Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). Vouchers might be provided, for example, as part of an Individual Training Account (ITA) under the Workforce Investment Act (WIA). Accordingly, if a WIA program beneficiary chose to redeem an ITA voucher at a seminary that had qualified as an eligible training provider, this proposed rule would not prohibit the seminary from using such indirect financial assistance to offer a program that integrated faith into its training program.

Correctional institutions are heavily regulated, and the degree of government control over correctional environments means that prison officials must sometimes take affirmative steps, in the form of chaplaincies and similar programs, to introduce religion into the environment. Without such efforts to make religious accommodations, religious freedom would not exist for Federal prisoners. *See Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972) (explaining that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty"); *Abington School District* v. *Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (observing that "hostility, not neutrality,

[1] As used in this proposed rule, the term "direct DOL support" refers to DOL support provided directly to a religious or other non-governmental organization within the meaning of the Establishment Clause of the First Amendment. For example, direct DOL support may occur where the Federal Government, a State or local government administering DOL support, or a DOL social service intermediary provider selects an organization and obtains the needed services straight from the organization (*e.g.*, via a grant or cooperative agreement).

would characterize the refusal to provide chaplains and places of worship to prisoners * * * cut off by the State from all civilian opportunities for public communion"). Accordingly, the proposed rule at § 2.33(b)(3) recognizes that the legal restrictions applied to religious activities in DOL social service programs that may be implemented in correctional facilities may sometimes be different from the legal restrictions that are applied to other DOL-supported social service programs.

In addition, as addressed in § 2.33(b)(3), the legal restrictions that apply to religious activities within some DOL-supported social service programs, *e.g.* isolated residential Job Corps facilities, may sometimes be different from legal restrictions that are applied to other DOL programs. This is because where there is extensive government control over the environment of a DOL-supported social service program, program officials may sometimes need to take affirmative steps, in the form of access to ministers and similar programs, to provide an opportunity for beneficiaries in such DOL programs to exercise their religion. *Cf. Katcoff* v. *Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) (finding it "readily apparent" that the Government is obligated by the First Amendment to make religion available to members of the Army who otherwise would not have access to their religion because they are often in isolated areas without access to religious opportunities). Without such efforts, religious freedom might not exist for these DOL program beneficiaries. Of course, religious activities must be voluntary for all beneficiaries of DOL programs.

Finally, as referenced in § 2.33(b)(2), nothing in this regulation is intended to restrict the exercise of rights or duties guaranteed by the Constitution. For example, program officials must not impermissibly restrict program beneficiaries' ability to freely express their views and to exercise their right to religious freedom. Additionally, subject to reasonable time, place and manner restrictions, residential facilities receiving DOL support must permit residents opportunities to engage in voluntary religious activities, including holding religious services, at these facilities.

3. Independence of Faith-Based and Community Organizations

The proposed rule clarifies in § 2.32(b) that a faith-based or community organization that is a DOL social service provider or participates in DOL social service programs retains its independence and may continue to carry out its mission, including the definition, development, practice, and expressions of its religious beliefs. Such an organization, however, must not use direct DOL support for any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based or community organization that is a DOL social service provider or participates in DOL social service programs may use space in its facilities to provide social services, without removing religious art, icons, scriptures, or other religious symbols. In addition, such a faith-based or community organization may retain religious terms in the organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. Nondiscrimination in DOL-Supported Social Service Programs

The proposed rule clarifies in § 2.33(a) that DOL, DOL social service intermediary providers, DOL social service providers in their use of direct DOL support, and State and local governments, must not, in providing social services (including outreach for such services), discriminate for or against a current or prospective program beneficiary on the basis of religion or religious belief.

The proposed rule would not prohibit organizations receiving DOL support indirectly (for example, organizations receiving DOL support as the result of the genuine and independent private choice of a beneficiary of a program offering choice among providers or program options) from offering assistance that integrates faith and social services and requiring participation in all aspects of the organizations' programs and activities, including the religious aspects. In such programs, voluntariness is ensured by the provision of genuine choice by the beneficiary, consistent with constitutional requirements. However, as noted in Section II.B.8 of this preamble, the proposed rule would have no effect on existing statutes. Thus, to the extent that such statutes restrict the activities of organizations receiving indirect DOL support, such restrictions remain in effect. Accordingly, the statute that applies to each program should be reviewed for the scope of its applicability, along with any regulations that implement specific provisions of the statute.

5. Assurance Requirements

This rule proposes in § 2.32(c) to direct the removal and prohibit the institution of any provision in agreements, covenants, memoranda of understanding, policies, or regulations used by DOL, or by a DOL social service intermediary provider or a State or local government administering DOL support, that requires only faith-based organizations receiving DOL support to provide assurances that they will not use such support for inherently religious activities. It is unfair to require faith-based organizations alone to provide additional assurances that other organizations are not required to provide. All DOL social service providers, as well as State and local governments administering DOL support, must carry out DOL-supported activities in accordance with all program requirements and other applicable requirements governing the conduct of DOL-supported activities, including those requirements prohibiting the use of direct DOL support for inherently religious activities. In addition, to the extent that provisions in agreements, covenants, memoranda of understanding, policies, or regulations used by DOL, or by a DOL social service intermediary provider or a State or local government administering DOL support, disqualify faith-based and community organizations from participating in DOL's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of the organizations' religious character or affiliation, the proposed rule would remove such restrictions, which are inconsistent with governing law.

6. Definitions

The proposed definitions included in § 2.31 of subpart D for "Federal financial assistance" and "social service program" were based on the definitions of the same terms in Executive Order 13279. The definitions of the terms "DOL-supported social service program," "DOL social service program," "DOL program," "DOL social service provider," "DOL social service intermediary provider" and "DOL support" were developed to make the rule more reader-friendly.

7. Application to State and Local Funds

The proposed rule clarifies in § 2.34 that if a State or local government contributes its own funds (voluntarily or in accordance with a matching funds program) to supplement Federal funds received to support DOL social service programs, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, the proposed

rule would apply to both the Federal and the State or local funds.

8. Effect on Title VII Employment Nondiscrimination Requirements and on Other Existing Statutes

The proposed rule clarifies in § 2.35 that the receipt of DOL support does not cause a religious organization to forfeit its exemption from Title VII of the Civil Rights Act of 1964's prohibitions on employment discrimination on the basis of religion. In addition, the proposed rule does not alter the effect of other statutes, including those that include requirements that recipients of certain types of DOL support refrain from discriminating on the basis of religion. *See, e.g.*, section 188(a)(2) of the Workforce Investment Act of 1998, 29 U.S.C. 2938(a)(2).

9. Status of Nonprofit Organizations

The proposed rule also establishes in § 2.36 certain alternative mechanisms by which organizations can prove they are nonprofit, which is sometimes an eligibility requirement for receiving DOL support. The availability of these alternative mechanisms will reduce the administrative burden required to prove nonprofit status and make it easier to prove eligibility when seeking DOL support, thereby allowing more organizations with limited resources to qualify for DOL support where nonprofit status is a requirement. Because many faith-based and community organizations have limited resources, the addition of these alternate mechanisms is consistent with the President's policy of enlarging eligibility for social services provision to include a broader spectrum of providers, including faith-based and community organizations. However, such alternative mechanisms would not apply where a statute requires a specific method for establishing nonprofit status.

C. Proposed Amendments to Job Corps and WIA Regulations

Consistent with the Administration's policy regarding the participation of faith-based organizations in the Government's social service programs as reflected in Executive Orders 13198 and 13279, and in order to consolidate the Department's regulations regarding religious activities and the participation of faith-based organizations and equal treatment of such organizations, this proposed rule includes changes to the Job Corps regulation on religious services found at 20 CFR 670.555 and to the WIA regulations on religious activities found at 29 CFR 37.6, and at 20 CFR 667.266 and 667.275, relating to the use of WIA Title I financial assistance to support employment or training in otherwise eligible religious activities.

1. Job Corps

With regard to the Job Corps regulation, the Department proposes to delete paragraphs (b) and (c) of 20 CFR 670.555. Currently paragraph (b) states that religious services may not be held on the premises of a Job Corps center unless the center is so isolated that transportation to and from community religious facilities is impracticable. Paragraph (c) provides that if religious services are held on center, no Federal funds may be paid to those who conduct such services, services may not be confined to one denomination, and centers may not require students to attend services. The standards for conducting religious activities at Job Corps centers would now instead be addressed by 29 CFR part 2, subpart D as set forth in this NPRM. Accordingly, the Department proposes to delete paragraphs (b) and (c), redesignate existing paragraph (d) as paragraph (b), and insert a new paragraph (c) that would cross reference 29 CFR part 2, subpart D.

2. WIA

With regard to the WIA regulations, the Department proposes to delete paragraph (1) of 29 CFR 37.6(f). Currently, paragraph (1) bars recipients of WIA Title I financial assistance from permitting "participants" "to be employed or trained in sectarian activities." (WIA "participants" are defined at 29 CFR 37.4 to be individuals who have been determined to be eligible to participate in, and who are receiving aid, benefits, services or training under, a program or activity funded in whole or in part under Title I of WIA.) This broad prohibition is inconsistent with current law, which permits the use of Federal financial assistance to provide religious training if the assistance is provided indirectly within the meaning of the Establishment Clause of the First Amendment to the Constitution and the providers of training otherwise satisfy the requirements of the program (as discussed in Section II.B.2 of this preamble). The conditions under which WIA Title I financial assistance may be used for religious employment and training would now instead be addressed by 29 CFR part 2, subpart D, as set forth in this NPRM. Accordingly, the Department proposes to revise paragraph (1) by deleting the existing language and inserting new language that would cross reference 29 CFR part 2, subpart D, as set forth in this NPRM.

For the same reasons, the Department also proposes to revise paragraph (b)(1) of 20 CFR part 667.266. Currently, this paragraph refers to and summarizes the restrictions set forth in paragraph (1) of 29 CFR 37.6(f). The Department proposes to revise paragraph (b)(1) by deleting the existing language and inserting new language that would cross reference 29 CFR part 2, subpart D, as set forth in this NPRM.

The Department also proposes to revise paragraph (b) of 20 CFR part 667.275. Like 20 CFR 667.266(b)(1), this paragraph currently refers to and summarizes the restrictions on employment and training in otherwise eligible religious activities that are set forth in 29 CFR 37.6(f)(1). Therefore, the first sentence of the proposed revision of this paragraph would parallel the proposed language for 20 CFR 667.266(b)(1), discussed above.

In addition, the existing language of 20 CFR 667.275(b) summarizes the restrictions set forth in 29 CFR 37.6(f)(2) regarding the employment of WIA participants to carry out the construction, operation, or maintenance of religious facilities. To be consistent with the revisions to 20 CFR part 667 described in the preceding paragraphs of this preamble, the second sentence of the proposed revisions to 20 CFR part 667 would simply cross-reference 29 CFR 37.6(f)(2), and the existing language of 20 CFR 667.275(b) would be deleted.

Finally, the Department proposes to amend 20 CFR 667.266(b)(2). In discussing the limitations imposed by section 188(a)(3) regarding the employment of WIA participants to carry out the construction, operation, or maintenance of religious facilities, the current language of the paragraph refers incorrectly to 29 CFR 37.6(f)(1). The correct reference is to 29 CFR 37.6(f)(2), as described above. For consistency, the proposed revision of this paragraph is identical to the language in the proposed revision of 20 CFR 667.275(b) regarding the same issue.

III. Regulatory Procedures

Executive Order 12866

OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review*.

Regulatory Flexibility Act

The Department has notified the Chief Counsel for Advocacy, Small Business

Administration, and made the certification pursuant to the Regulatory Flexibility Act (RFA) at 5 U.S.C. 605(b), that this proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed rule would not impose any new costs, or modify existing costs, applicable to recipients of DOL support. Rather, the purpose of the proposed rule is to clarify that DOL's social service programs are open to all qualified organizations, regardless of their religious character, and to establish clearly the permissible uses to which DOL support may be put. Notwithstanding the Secretary's determination that this rule will not have a significant economic effect on a substantial number of small entities, DOL specifically invites comments regarding any less burdensome alternatives to this rule that will meet DOL's objectives as described in this preamble.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This proposed rule does not impose any Federal mandates on any State, local, or tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this rule does not contain any information collection requirements that require the approval of the Office of Management and Budget.

Executive Order 13132, Federalism

Executive Order 13132, *Federalism*, prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Consistent with Executive Order 13132, DOL specifically solicits comments from State and local government officials on this proposed rule.

List of Subjects

20 CFR Part 667

Employment; Grant programs—labor; Reporting and recordkeeping requirements.

20 CFR Part 670

Employment; Grant programs—labor; Job Corps; Religious discrimination.

29 CFR Part 2

Administrative practice and procedure; Claims; Courts; Government employees; Religious discrimination.

29 CFR Part 37

Administrative practice and procedure; Aged; Aliens; Civil rights; Discrimination; Equal educational opportunity; Equal employment opportunity; Grant programs-labor; Individuals with disabilities; Investigations; Manpower training programs; Political affiliation discrimination; Religious discrimination; Reporting and recordkeeping requirements; Sex discrimination.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 20 CFR part 667; 20 CFR part 670; 29 CFR part 2; and 29 CFR part 37 as set forth below.

Signed at Washington, DC, this 3rd day of March 2004.

Elaine L. Chao,

Secretary of Labor.

Emily S. DeRocco,

Assistant Secretary for Employment and Training.

Title 20—Employees' Benefits

Chapter V—Employment and Training Administration, Department of Labor

PART 667—ADMINISTRATIVE PROVISIONS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

1. The authority citation for part 667 is revised to read as follows:

Authority: Subtitle C of Title I, Sec. 506(c), Pub. L. 105–220, 112 Stat. 936 (20 U.S.C. 9276(c)); Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750; Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258.

2. In § 667.266, paragraph (b) is revised to read as follows:

§ 667.266 What are the limitations related to religious activities?

* * * * *

(b)(1) The circumstances under which DOL support, including WIA Title I financial assistance, may be used to employ or train participants in religious activities are described in 29 CFR part 2, subpart D, which also contains requirements related to equal treatment in Department of Labor programs for religious organizations, and to protecting the religious liberty of Department of Labor social service providers and beneficiaries.

(2) Limitations on the use of WIA Title I financial assistance for the maintenance of facilities used for religious instruction or worship are described in the WIA nondiscrimination regulations at 29 CFR 37.6(f)(2).

3. In § 667.275, paragraph (b) is revised to read as follows:

§ 667.275 What are a recipient's obligations to ensure nondiscrimination and equal opportunity, and what are a recipient's obligations with respect to religious activities?

* * * * *

(b) The circumstances under which recipients may use DOL support, including WIA Title I financial assistance, to employ or train participants in religious activities are described in 29 CFR part 2, subpart D, which also contains requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty of Department of Labor social service providers and beneficiaries. Limitations on the use of WIA Title I financial assistance for the maintenance of facilities used for religious instruction or worship are described in the WIA nondiscrimination regulations at 29 CFR 37.6(f)(2). *See* section 188(a)(3) of the Workforce Investment Act of 1998, 29 U.S.C. 2938(a)(3).

PART 670—THE JOB CORPS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

4. The authority citation for part 670 is revised to read as follows:

Authority: Subtitle C of Title I, Sec. 506(c), Pub. L. 105–220, 112 Stat. 936 (20 U.S.C. 2881 *et seq.* and 9276(c)); 5 U.S.C. 301; Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750); Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258.

5. Section 670.555 is amended by removing paragraph (b), redesignating paragraph (d) as paragraph (b), and revising paragraph (c) to read as follows:

§ 670.555 What are the center's responsibilities in ensuring that students' religious rights are respected?

* * * * *

(c) Requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty of Department of Labor social service providers and beneficiaries, are found at subpart D of 29 CFR part 2. *See also* §§ 667.266 and 667.275 of 20 CFR; 29 CFR part 37.

Title 29—Labor

Chapter I—Office of the Secretary of Labor

PART 2—GENERAL REGULATIONS

7. The authority citation for part 2 is revised to read as follows:

Authority: 5 U.S.C. 301; Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750; Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258.

8. Part 2 is amended by adding a new subpart D to read as follows:

PART 2—GENERAL REGULATIONS

* * * * *

Subpart D—Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries

2.30 Purpose.
2.31 Definitions.
2.32 Equal participation of religious organizations.
2.33 Responsibilities of DOL, DOL social service providers and State and local governments administering DOL support.
2.34 Application to State and local funds.
2.35 Effect of DOL support on Title VII employment nondiscrimination requirements and on other existing statutes.
2.36 Status of nonprofit organizations.

§ 2.30 Purpose.

The purpose of the regulations in this subpart is to ensure that DOL-supported social service programs are open to all qualified organizations, regardless of the organizations' religious character, and to establish clearly the permissible uses to which DOL support for social service programs may be put, and the conditions for receipt of such support. In addition, this proposed rule is designed to ensure that the Department's social service programs are implemented in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment.

§ 2.31 Definitions.

As used in the regulations in this subpart:

(a) The term *Federal financial assistance* means assistance that non-Federal entities (including State and local governments) receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, direct appropriations, or other direct or indirect assistance, but does not include a tax credit, deduction or exemption.

(b) The term *social service program* means a program that is administered or supported by the Federal Government, or by a State or local government using Federal financial assistance, and that provides services directed at reducing poverty, improving opportunities for low-income children, revitalizing low-income communities, empowering low-income families and low-income individuals to become self-sufficient, or otherwise helping people in need. Such programs include, but are not limited to, the following:

(1) Child care services and services to meet the special needs of children, older individuals, and individuals with disabilities (including physical, mental, or emotional disabilities);

(2) Job training and related services, and employment services;

(3) Information, referral, and counseling services;

(4) Literacy and mentoring programs; and

(5) Services for the prevention and treatment of juvenile delinquency and substance abuse, services for the prevention of crime and the provision of assistance to the victims and the families of criminal offenders, and services related to intervention in, and prevention of domestic violence.

(c) The term *DOL* means the U.S. Department of Labor.

(d) The term *DOL-supported social service program*, *DOL social service program*, or *DOL program* means a social service program, as defined in paragraph (b) of this section, that is administered by or for DOL with DOL support. Such programs include, but are not limited to, the One Stop Career Center System, the Job Corps, and other programs supported through the Workforce Investment Act.

(e) The term *DOL social service provider* means any non-Federal organization, other than a State or local government, that seeks or receives DOL support as defined in paragraph (g) of this section, or participates in DOL programs other than as the ultimate beneficiary of such programs.

(f) The term "DOL social service intermediary provider" means any DOL social service provider that, as part of its duties, selects subgrantees to receive DOL support or subcontractors to provide DOL-supported services, or has the same duties under this part as a governmental entity.

(g) The term *DOL support* means Federal financial assistance, as well as procurement funding provided to a non-Federal organization, including a State or local government, to support the organization's administration of or participation in a DOL social service program as defined in paragraph (d) of this section.

§ 2.32 Equal participation of religious organizations.

(a) Religious organizations must be eligible, on the same basis as any other organization, to seek DOL support or participate in DOL programs for which they are otherwise eligible. DOL, DOL social service intermediary providers, as well as State and local governments administering DOL support, must not discriminate for or against an organization on the basis of the organization's religious character or affiliation, although this requirement does not preclude DOL, DOL social service providers, or State and local governments administering DOL support from accommodating religion in a manner consistent with the Establishment Clause. In addition, DOL, DOL social service intermediary providers, and State and local governments administering DOL support must continue to comply with otherwise applicable constitutional principles, including, among others, those articulated in the Establishment, Free Speech, and Free Exercise Clauses of the First Amendment to the Constitution.

(b) A religious organization that is a DOL social service provider retains its independence from Federal, State, and local governments and must be permitted to continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, subject to the provisions of § 2.33 of this subpart. Among other things, such a religious organization must be permitted to:

(1) Use its facilities to provide DOL-supported social services without removing or altering religious art, icons, scriptures, or other religious symbols from those facilities; and

(2) Retain its authority over its internal governance, including retaining religious terms in its name, selecting its board members on a religious basis, and including religious references in its mission statements and other governing documents.

(c) A grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government administering DOL support, or a DOL social service intermediary provider must not require only religious organizations to provide assurances that they will not use direct DOL support for inherently religious activities. Any such requirements must apply equally to both religious and other organizations. All organizations, including religious ones,

that are DOL social service providers must carry out DOL-supported activities in accordance with all applicable legal and programmatic requirements, including those prohibiting the use of direct DOL support for inherently religious activities. A grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by DOL, a State or local government, or a DOL social service intermediary provider in administering a DOL social service program must not disqualify religious organizations from receiving DOL support or participating in DOL programs on the grounds that such organizations are motivated or influenced by religious faith to provide social services, or on the grounds that such organizations have a religious character or affiliation.

§ 2.33 Responsibilities of DOL, DOL social service providers and State and local governments administering DOL support.

(a) DOL, DOL social service intermediary providers, DOL social service providers in their use of direct DOL support, and State and local governments administering DOL support must not, when providing social services, discriminate for or against a current or prospective program beneficiary on the basis of religion or religious belief. This requirement does not preclude DOL, DOL social service intermediary providers, or State or local governments administering DOL support from accommodating religion in a manner consistent with the Establishment Clause of the First Amendment to the Constitution.

(b)(1) DOL, DOL social service providers, and State and local governments administering DOL support must ensure that they do not use direct DOL support for inherently religious activities such as worship, religious instruction, or proselytization. DOL social service providers must be permitted to offer inherently religious activities so long as they offer those activities separately in time or location from social services receiving direct DOL support, and participation in the inherently religious activities is voluntary for the beneficiaries of social service programs receiving direct DOL support. For example, participation in an inherently religious activity must not be a condition for participating in a directly-supported social service program.

(2) This regulation is not intended to and does not restrict the exercise of rights or duties guaranteed by the Constitution. For example, program officials must not impermissibly restrict the ability of program beneficiaries or DOL social service providers to freely express their views and to exercise their right to religious freedom. Additionally, subject to reasonable and permissible time, place and manner restrictions, residential facilities that receive DOL support must permit residents to engage in voluntary religious activities, including holding religious services, at these facilities.

(3) Notwithstanding the requirements of paragraph (b)(1), and to the extent otherwise permitted by Federal law (including constitutional requirements), direct DOL support may be used to support inherently religious activities, and such activities need not be provided separately in time or location from other DOL-supported activities, under the following circumstances:

(i) Where DOL support is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs;

(ii) Where DOL support is provided to social service programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties; or

(iii) Where DOL-supported social service programs involve such a degree of government control over the program environment that religious exercise would be significantly burdened absent affirmative steps by DOL or its social service providers.

(c) To the extent otherwise permitted by Federal law, the restrictions set forth in this section regarding the use of direct DOL support do not apply to social service programs where DOL support is provided to a religious or other non-governmental organization indirectly within the meaning of the Establishment Clause of the First Amendment to the Constitution. Religious or other non-governmental organizations will be considered to have received support indirectly, for example, if as a result of a program beneficiary's genuine and independent choice the beneficiary redeems a voucher, coupon, or certificate that allows the beneficiary to choose the service provider, or some other mechanism is provided to ensure that beneficiaries have a genuine and independent choice among providers or program options. All organizations must, however, satisfy all applicable legal and programmatic requirements.

§ 2.34 Application to State and local funds.

If a State or local government contributes its own funds (voluntarily or in accordance with a matching funds program) to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, then the provisions of this subpart apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal assistance.

§ 2.35 Effect of DOL support on Title VII employment nondiscrimination requirements and on other existing statutes.

A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in § 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives direct or indirect DOL support. Some DOL programs, however, were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating on the basis of religion. Accordingly, to determine the scope of any applicable requirements, recipients and potential recipients should consult with the appropriate DOL program official or with the Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N4123, Washington, DC 20210, (202) 693–6500. Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

§ 2.36 Status of nonprofit organizations.

(a) In general, DOL does not require that an organization, including a religious organization, obtain tax-exempt status under section 501(c)(3) of the Internal Revenue Code in order to be eligible for Federal financial assistance under DOL social service programs. Many such programs, however, do require an organization to be a "nonprofit organization" in order to be eligible for such support. Individual solicitations that require organizations to have nonprofit status must specifically so indicate in the eligibility section of the solicitation. In addition, any solicitation for a program that requires an organization to maintain tax-exempt status must expressly state the statutory authority for requiring such status. For assistance with questions about a particular solicitation, applicants should contact the DOL program office that issued the solicitation.

(b) Unless otherwise provided by statute, in DOL programs in which an

applicant must show that it is a nonprofit organization, the applicant must be permitted to do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as tax exempt under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State Secretary of State certifying that:

(i) the organization is a nonprofit organization operating within the State; and

(ii) no part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (b)(3) of this section, if that item applies to a State or national parent organization, together with a statement by the State or national parent organization that the applicant is a local nonprofit affiliate of the organization.

PART 37—IMPLEMENTATION OF THE NONDISCRIMINATION AND EQUAL OPPORTUNITY PROVISIONS OF THE WORKFORCE INVESTMENT ACT OF 1998 (WIA)

9. The authority citation for part 37 is revised to read as follows:

Authority: Sections 134(b), 136(d)(2)(F), 136(e), 172(a), 183(c), 185(d)(1)(E), 186, 187 and 188 of the Workforce Investment Act of 1998, 29 U.S.C. 2801, *et seq.*; Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, *et seq.*; section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794; the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101; Title IX of the Education Amendments of 1972, as amended, 29 U.S.C. 1681; Executive Order 13198, 66 FR 8497, 3 CFR 2001 Comp., p. 750; and Executive Order 13279, 67 FR 77141, 3 CFR 2002 Comp., p. 258.

10. In § 37.6, paragraph (f)(1) is revised to read as follows:

§ 37.6 What specific discriminatory actions, based on prohibited grounds other than disability, are prohibited by this part?

* * * * *

(f)(1) The circumstances under which recipients may use DOL support, including WIA Title I financial assistance, to employ or train participants in religious activities are described in 29 CFR part 2, subpart D, which also contains requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty for Department of Labor social service providers and beneficiaries. *See also* §§ 667.266 and 667.275 of 20 CFR.

* * * * *

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Part VI

Securities and Exchange Commission

17 CFR Parts 210, 239, et al.
Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 239, 249, 270, and 274

[Release Nos. 33–8393; 34–49333; IC–26372; File No. S7–51–02]

RIN 3235–AG64

Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting rule and form amendments under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 to improve the periodic disclosure provided by registered management investment companies about their costs, portfolio investments, and past performance. The amendments will require a registered open-end management investment company to include in its shareholder reports disclosure of fund expenses borne by shareholders during the reporting period. The amendments also will permit a registered management investment company to include a summary portfolio schedule of investments in its reports to shareholders, provided that the complete schedule is filed with the Commission and is provided to shareholders upon request, free of charge. In addition, the amendments will require a registered management investment company to include a tabular or graphic presentation of its portfolio holdings in its reports to shareholders. The amendments also will require a registered management investment company to disclose its complete portfolio schedule on a quarterly basis in filings with the Commission that will be certified by the company's principal executive and financial officers and available on the Commission's Electronic Data Gathering, Analysis, and Retrieval System. Finally, the amendments will require a registered open-end management investment company to include Management's Discussion of Fund Performance in its annual report to shareholders.

DATES: *Effective Date:* May 10, 2004.

Compliance Date: See Section II.D. of this release for information on compliance dates.

FOR FURTHER INFORMATION CONTACT: John M. Faust, Attorney, Christopher P. Kaiser, Special Counsel, or Paul G. Cellupica, Assistant Director, Office of Disclosure Regulation, Division of Investment Management, (202) 942–0721, at the Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (the "Commission") is adopting new rule 30b1–5 [1] and amendments to rules 30a–2,[2] 30a–3,[3] and 30d–1 [4] under the Investment Company Act of 1940 [5] ("Investment Company Act"); amendments to Forms N–1A,[6] N–2,[7] and N–3 [8] under the Investment Company Act and the Securities Act of 1933 [9] ("Securities Act"); new Form N–Q [10] and amendments to Form N–CSR [11] under the Investment Company Act and the Securities Exchange Act of 1934 [12] ("Exchange Act"); and amendments to Article 6 [13] and Article 12 [14] of Regulation S–X.[15]

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[1] 17 CFR 270.30b1–5.
[2] 17 CFR 270.30a–2.
[3] 17 CFR 270.30a–3.
[4] 17 CFR 270.30d–1.
[5] 15 U.S.C. 80a–1 *et seq.*
[6] 17 CFR 239.15A; 17 CFR 274.11A.
[7] 17 CFR 239.14; 17 CFR 274.11a–1.
[8] 17 CFR 239.17; 17 CFR 274.11b.
[9] 15 U.S.C. 77a *et seq.*
[10] 17 CFR 249.332; 17 CFR 274.130.
[11] 17 CFR 249.331; 17 CFR 274.128.
[12] 15 U.S.C. 78a *et seq.*
[13] 17 CFR 210.6.
[14] 17 CFR 210.12.
[15] 17 CFR 210.

Text of Rule and Form Amendments

Executive Summary

We are adopting rule and form amendments [16] that:

- Require open-end management investment companies ("mutual funds") to disclose fund expenses borne by shareholders during the reporting period in reports to shareholders;[17]
- Permit a management investment company registered under the Investment Company Act ("fund") to include a summary portfolio schedule in its reports to shareholders, provided that the complete portfolio schedule is filed with the Commission on Form N–CSR semi-annually and is provided to shareholders upon request, free of charge;
- Exempt money market funds from including a portfolio schedule in reports to shareholders, provided that this information is filed with the Commission on Form N–CSR and is provided to shareholders upon request, free of charge;
- Require reports to shareholders by funds to include a tabular or graphic presentation of a fund's portfolio holdings by identifiable categories;
- Require a fund to file its complete portfolio schedule as of the end of its first and third fiscal quarters with the Commission on new Form N–Q, which will be filed under the Investment Company Act and the Exchange Act and certified by the fund's principal executive and financial officers; and
- Require a mutual fund to include Management's Discussion of Fund Performance in its annual report to shareholders.[18]

These amendments are intended to provide better information to investors

[16] The Commission proposed these amendments in December 2002. Investment Company Act Release No. 25870 (Dec. 18, 2002) [68 FR 160 (Jan. 2, 2003)] ("Proposing Release").

[17] A management investment company is an investment company other than a unit investment trust or face-amount certificate company. *See* section 4 of the Investment Company Act [15 U.S.C. 80a–4]. Management investment companies typically issue shares representing an undivided proportionate interest in a changing pool of securities, and include open-end and closed-end companies. *See* T. Lemke, G. Lins, A. Smith III, Regulation of Investment Companies, Vol. I, ch. 4, § 4.04, at 4–5 (2002). An open-end company is a management company that is offering for sale or has outstanding any redeemable securities of which it is the issuer. A closed-end company is any management company other than an open-end company. *See* section 5 of the Investment Company Act [15 U.S.C. 80a–5]. Open-end companies ("mutual funds") generally offer and sell new shares to the public on a continuous basis, while closed-end companies generally engage in traditional underwritten offerings of a fixed number of shares and in most cases do not offer their shares to the public on a continuous basis.

[18] Item 5 of Form N–1A.

about fund costs, investments, and performance.

I. Background

The Investment Company Act and rules thereunder require each fund to transmit a report to its shareholders semi-annually, within 60 days of the end of the period for which the shareholder report is made, and to file the report with the Commission no later than 10 days after it is transmitted to shareholders.[19] Shareholder reports are one of the principal means by which funds provide periodic information to their investors. Fund shareholder reports historically have served primarily as a vehicle to provide financial statements and other financial information to shareholders.[20] We believe that today's amendments and new rules will make these reports more effective vehicles for communicating information to investors. Today's amendments principally address disclosure of fund expenses and portfolio holdings, two significant areas for improvement that have been the subject of public discussion and concern.

A. Disclosure of Fund Expenses

Potential mutual fund investors receive significant disclosure about fund fees and expenses. Since 1988, the Commission has required the mutual fund prospectus to include a fee table that shows all fees and charges associated with a mutual fund investment as a percentage of net assets.[21] Recent rulemaking initiatives have also sought to improve disclosure to investors of mutual fund fees and charges. For example, the Commission recently adopted amendments requiring investment company advertisements to highlight the availability and importance of information on fees and charges found in the prospectus[22] and has proposed amendments to the mutual fund prospectus that would require enhanced disclosure regarding breakpoint discounts on front-end sales loads.[23] In addition, the Commission published a concept release seeking views regarding improving disclosure of transaction costs.[24] Finally, the Commission recently proposed new rules that would require broker-dealers to provide their customers with information, at the point of sale and in transaction confirmations, regarding the costs and conflicts of interest that arise from the distribution of mutual fund shares.[25]

In addition, the Commission has undertaken efforts to increase investor awareness and understanding of the significance of the costs that they pay in connection with mutual fund investments. For example, we recently added educational information to our Web site addressing breakpoints on front-end sales loads and prospectus fee tables.[26] Since 1999, the Commission has made available on its Web site the Mutual Fund Cost Calculator, an Internet-based tool that enables investors to compare the costs of owning different funds.[27]

Despite these ongoing efforts, the degree to which investors understand mutual fund fees and expenses remains a source of concern. Mutual fund fees are of two types, transactional (*e.g.*, sales loads, redemption fees) and ongoing (*e.g.*, asset-based charges such as management fees and 12b–1 fees).[28] While transactional fees are relatively transparent, ongoing fees are less evident because they are deducted from fund assets and are reflected in reduced account balances rather than being separately stated. Significant concerns have been raised regarding the degree to which investors understand the nature and effect of these ongoing fees.[29] These ongoing fees can have a dramatic effect on an investor's return. A 1% annual fee, for example, will reduce an ending account balance by 18% on an investment held for 20 years. In December 2002, we proposed amendments intended to address these concerns, that would require a registered open-end management investment company to include in its shareholder reports disclosure of fund expenses borne by shareholders during the reporting period.[30]

B. Disclosure of Fund Portfolio Holdings

Currently, funds are required to include their complete portfolio holdings in the reports that are delivered to all shareholders twice a year.[31] Investor groups, members of the

[19] *See* section 30(e) of the Investment Company Act [15 U.S.C. 80a–29(e)]; Rule 30e–1 under the Investment Company Act (17 CFR 270.30e–1) (transmission of report to shareholders); section 30(b)(2) of the Investment Company Act [15 U.S.C. 80a–30(b)(2)]; Rule 30b2–1 under the Investment Company Act (17 CFR 270.30b2–1) (filing of shareholder report with the Commission); Form N–CSR (form used by registered management investment companies to file shareholder reports).

[20] Section 30(e) of the Investment Company Act [15 U.S.C. 80a–29(e)] (requiring a fund to transmit to its stockholders, at least semi-annually, reports containing financial statements and other financial information as the Commission may prescribe by rules and regulations); National Securities Markets Improvement Act of 1996, Pub. L. 104–290, section 207, 110 Stat. 3416, 3430 (Oct. 11, 1996) (adding section 30(f) to the Investment Company Act, which allows the Commission to require that semi-annual reports "include such other information as the Commission deems necessary or appropriate in the public interest or for the protection of investors").

[21] Item 3 of Form N–1A; Investment Company Act Release No. 16244 (Feb. 1, 1988) [53 FR 3192 (Feb. 4, 1988)] (release adopting mutual fund fee table); Investment Company Act Release No. 15932 (Aug. 18, 1987) [52 FR 32018 (Aug. 25, 1987)] (release proposing mutual fund fee table).

[22] *See* Investment Company Act Release No. 26195 (Sept. 29, 2003) [68 FR 57760 (Oct. 6, 2003)].

[23] *See* Investment Company Act Release No. 26298 (Dec. 17, 2003) [68 FR 74732 (Dec. 24, 2003)].

[24] *See* Investment Company Act Release No. 26313 (Dec. 18, 2003) [68 FR 74820 (Dec. 24, 2003)].

[25] *See* Investment Company Act Release No. 26341 (Jan. 29, 2004) (69 FR 6438 (Feb. 10, 2004)).

[26] *See Breakpoints* (last modified Jan. 17, 2003), *http://www.sec.gov/answers/breakpt.htm; Tips for Reading a Prospectus* (last modified Feb. 5, 2003), *http://www.sec.gov/answers/mfprospectustips.htm.*

[27] *Mutual Fund Cost Calculator* (last modified July 24, 2000), *http://www.sec.gov/investor/tools/mfcc/mfcc-int.htm. See also Invest Wisely: An Introduction to Mutual Funds* (last modified June 2, 2003), *http://www.sec.gov/investor/pubs/inwsmf.htm* (investor brochure describing types of mutual fund fees and expenses); *Mutual Fund Fees and Expenses* (last modified Oct. 19, 2000), *http://www.sec.gov/answers/mffees.htm.*

[28] A 12b–1 fee is a fee charged by some mutual funds against fund assets to pay for marketing and distribution activities. *See* section 12(b) of the Investment Company Act [80 U.S.C. 80a–12(b)]; Rule 12b–1 under the Investment Company Act (17 CFR 270.12b–1).

[29] *See, e.g.*, Mara Der Hatanesian, *et al.*, *How to Fix the Mutual Funds Mess*, Business Week, Sept. 22, 2003, at 106 (discussing the impact of fees on returns and arguing that it is difficult for investors to determine what they personally pay based on a fund's expense ratio); Chuck Jaffe, *In "Plain English," Disclosure is a Joke*, The Boston Globe, August 31, 2003, at E4 (arguing for more understandable fee disclosure in fund prospectuses); Theo Francis, *Getting the Most From Fund Costs*, Wall Street Journal, Dec. 2, 2002, at R1 (discussing the importance of considering fees and expenses when investing in mutual funds, and explaining how to use the SEC's cost calculator); James Glassman, *A Failing Grade for Mutual Funds*, Washington Post, Dec. 1, 2002, at H1 (discussing importance of differences in expenses to fund returns, and using examples from SEC's cost calculator); Neil Weinberg, *Fund Manager Knows Best; As Corporations are Fessing Up to Investors, Mutual Funds Still Gloss Over Costs*, Forbes Magazine, Oct. 14, 2002 (84% of investors believe higher expenses result in higher performance); *Investors Need to Bone Up on Bonds and Costs, According to Vanguard/Money Investor Literacy Test*, Press Release, Business Wire, Sept. 25, 2002 (75% of survey respondents could not accurately define fund expense ratio and 64% did not understand the impact of expenses on fund returns).

[30] *See* Proposing Release, *supra* note 16. *Cf.* Mutual Funds Integrity and Fee Transparency Act of 2003, H.R. 2420, 108th Cong. § 101 (2003); Mutual Fund Investor Confidence Restoration Act of 2003, S. 1971, 108th Cong. § 101 (2003); Mutual Fund Investor Protection Act of 2003, S. 1958, 108th Cong. § 101 (2003) (requiring enhanced disclosure of mutual fund operating expenses).

[31] Rule 6–10(c)(1) of Regulation S–X [17 CFR 210.6–10(c)(1)] requires that schedules of investments be filed in support of the balance sheet entries for these investments. The forms of these schedules are specified in Rules 12–12 to 12–14 of Regulation S–X (17 CFR 210.12–12—12–14). The schedules of investments are also required to be included with the financial statements in the Statement of Additional Information ("SAI") of a fund, which is part of the registration statement

Continued

fund industry, and others have suggested ways to improve this disclosure regime, both by increasing the frequency with which funds disclose their portfolio holdings, and by streamlining the portfolio schedules that are delivered to investors to make them more useful and understandable.

First, some have argued that investors would benefit if funds were required to disclose their complete portfolio schedules more frequently than semi-annually. The Commission has received six rulemaking petitions in the past several years that advocate more frequent disclosure of funds' portfolio holdings.[32] The petitioners argue that increasing the frequency of portfolio disclosure by funds will allow investors to better monitor the extent to which their funds' portfolios overlap, and hence will enable investors to make more informed asset allocation decisions. In addition, the petitioners argue that more frequent disclosure would expose "style drift" (when the actual portfolio holdings of a fund deviate from its stated investment objective) and provide investors with greater information about how a fund is complying with its stated investment objective. The petitioners also argue that more frequent disclosure would help to shed light on and prevent several potential forms of portfolio manipulation, such as "window dressing" (buying or selling portfolio securities shortly before the date as of which a fund's holdings are publicly disclosed, in order to convey an impression that the manager has been investing in companies that have had exceptional performance during the reporting period) and "portfolio pumping" (buying shares of stock the fund already owns on the last day of the reporting period, in order to drive up the price of the stocks and inflate the fund's performance results).

Second, others have argued that permitting funds to include a summary portfolio schedule in lieu of a complete portfolio schedule in their shareholder reports would enable investors to focus on a fund's principal holdings and thereby better evaluate the fund's risk profile and investment strategy.[33] At the same time, the fund's full portfolio schedule would remain available, upon request, to those investors who find this information useful. In addition, these advocates have argued that the use of a summary schedule would reduce the burden on the funds and their shareholders of providing unnecessarily lengthy schedules of portfolio investments, which at present may require as many as 35 or 40 pages to list. For many funds, such as index funds, providing a lengthy portfolio schedule may not contribute significantly to investor understanding regarding the fund's primary investment focus. It may, however, result in significant printing and mailing costs, which are ultimately borne by investors.

The amendments that we proposed in December 2002 were intended to address both of these suggestions for improvement. First, the proposed amendments would require a fund to file its complete portfolio schedule as of the end of its first and third fiscal quarters with the Commission on proposed Form N–Q. Second, the proposed amendments would permit a fund to include a summary portfolio schedule of investments in its reports to shareholders, provided that the complete schedule is filed with the Commission and is provided to shareholders upon request, free of charge.

C. The Commission's Proposal

The Commission received 65 comment letters on the proposed amendments regarding shareholder reports and quarterly portfolio disclosure from individual investors, professional and trade associations, investor advocacy groups, members of the fund industry, bar associations, accounting firms, consultants, and academics. These commenters generally supported the Commission's proposals to improve the periodic disclosure provided to investors, although some expressed concerns regarding portions of the proposals or suggested changes. Today, the Commission is adopting these proposed amendments, with certain modifications as described below to address the suggestions of commenters.

II. Discussion

A. Disclosure of Fund Expenses

We are adopting, substantially as proposed, the requirement that mutual funds disclose in their reports to shareholders fund expenses borne by shareholders during the reporting period. Mutual fund shareholder reports will be required to include: (1) The cost in dollars associated with an investment of $1,000, based on the fund's actual expenses and return for the period; and (2) the cost in dollars associated with an investment of $1,000, based on the fund's actual expenses for the period and an assumed return of 5 percent per year.[34] The first figure is intended to permit investors to estimate the actual costs, in dollars, that they bore over the reporting period. The second figure is intended to provide investors with a basis for comparing the level of current period expenses of different funds. Together, the two expense figures are designed to increase investor understanding of the fees that they pay on an ongoing basis for investing in a fund.

Location of Disclosure

We continue to believe that disclosure of current period expenses in the shareholder reports strikes an appropriate balance between investors' need for this information and the costs and burdens that would be associated with providing this information on an individualized basis. Commenters, including individual investors and fund groups, generally supported the proposed expense disclosure on the grounds that it would enhance investor understanding of fund expenses. However, two commenters encouraged the Commission to consider an alternative approach that would require expense disclosure in quarterly account statements, consisting of either the amount of expenses paid by the individual investor, or expenses associated with a standardized investment amount.

We are not persuaded that expense disclosure in quarterly account statements would be preferable to the proposed shareholder reports disclosure. Disclosure of expenses in a fund's shareholder reports will enable investors to evaluate this information

filed with the Commission under both the Securities Act and the Investment Company Act. *See* current Item 22 of Form N–1A; Item 23 of Form N–2; Item 27(a) of Form N–3.

[32] *See* Rulemaking Petition by the International Brotherhood of Teamsters (Jan. 18, 2001); Rulemaking Petition by the American Federation of Labor and the Congress of Industrial Organizations (Dec. 20, 2000); Rulemaking Petition by the National Association of Investors Corporation (Oct. 9, 2000); Rulemaking Petition by the Consumer Federation of America, *et al.* (Aug. 8, 2000); Rulemaking Petition by the Financial Planning Association (June 28, 2000); Rulemaking Petition by Fund Democracy, LLC (June 28, 2000). The petitions are available for inspection and copying in File No. S7–51–02 in the Commission's public reference room.

[33] *See* Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Barry P. Barbash, Director, Division of Investment Management, Securities and Exchange Commission ("SEC") (Aug. 11, 1998); Letter from Heidi Stam, Principal, Securities Regulation, The Vanguard Group, to Cynthia Fornelli, Deputy Director, Division of Investment Management, SEC (Oct. 13, 1999); Letter from Robert C. Pozen, General Counsel and Managing Director, Fidelity Investments, to The Honorable Steven Wallman, Commissioner, SEC (May 5, 1995). The letters are available for inspection and copying in File No. S7–51–02 in the Commission's public reference room.

[34] Item 21(d)(1) of Form N–1A.

alongside other key information about the fund's operating results, including management's discussion of the fund's performance. In effect, shareholders will be able to evaluate the costs they pay against the services they receive. By contrast, expense disclosure in quarterly account statements would provide a less effective context for investors to assess the expenses shown.

In addition, disclosure of the cost in dollars associated with an investment of $1,000, based on the fund's actual expenses for the period and an assumed return of 5 percent per year, will provide investors with expense information in a standardized manner that will facilitate comparison of ongoing costs among funds. By contrast, personalized expense disclosure in quarterly account statements would not assist investors in making comparisons among funds because it would be based on different investment amounts and different rates of return.

We acknowledge that individualized expense disclosure in quarterly account statements would have the benefit of providing cost disclosure tailored to each investor. Our approach, however, effectively permits an investor to estimate this personalized information readily (by dividing the investor's account value by $1,000 and multiplying the result by the cost shown for a $1,000 investment).

The Commission's approach also avoids certain costs and logistical complexity that individualized disclosure in quarterly statements might entail. Mutual fund expenses are charged against fund assets and are not accounted for on an individual account basis. Therefore, implementation of individualized expense disclosure would require systems changes to provide for expense accounting on an individual account basis. Moreover, in many cases, fund shares are held by broker-dealers, financial advisers, and other third-party intermediaries, who must prepare accurate and timely customer account statements by integrating data supplied by many unrelated fund groups. In addition to the systems changes necessary for the fund itself, these financial intermediaries would need to implement new systems in order to calculate and report personalized expense information for each fund held in an account each quarter. Estimates of the costs of these changes are substantial. One commenter estimated, based on a survey of various industry participants conducted in 2000, that the aggregate costs to survey respondents associated with calculating and disclosing individualized fund expenses would be $200.4 million in initial implementation costs and $65 million in annual, ongoing costs.[35] By contrast, we estimate that the costs for standardized cost disclosure in shareholder reports, including printing and mailing costs, and the costs of preparing the new disclosure, would total approximately $16 million annually.[36]

Format and Methodology

Our amendments will require both an expense example based on the fund's actual expenses and actual return, and an expense example based on actual expenses and a 5% assumed return, as proposed. We note that several commenters objected to the second example. These commenters raised concerns that this example would make the fee disclosure unnecessarily cumbersome, particularly for multiple class funds. They also argued that it might confuse investors because the example in the shareholder report would be similar, but not identical, to the example in the fee table of the fund prospectus. For example, one commenter noted that the fee table example reflects sales charges, whereas the shareholder report example would not. We continue to believe, however, that this second example will enhance the utility to investors of the expense disclosure by facilitating comparison of ongoing expenses among funds. While the first example, based on the actual return of the fund, will enable investors to estimate readily the actual dollar cost that they paid over the reporting period, it cannot effectively serve as a vehicle for comparison of fund expenses, because the fund's return will necessarily affect the expenses incurred. The second example facilitates comparison by standardizing assumed return.

The methodology for calculation of the expense disclosure that we are adopting is similar to that required for the expense example in the fee table of the mutual fund prospectus and, with one exception, is unchanged from our proposal.[37] We are modifying the proposal to base the expense figures on costs associated with an investment of $1,000, as opposed to $10,000. We believe that it may be easier for shareholders to estimate their actual expenses using an example based on a $1,000 amount because it will simplify the multiplication involved, *e.g.*, for shareholders holding less than $10,000 in a fund.

We are also modifying the format of the expense example to include the account values for an initial investment of $1,000 as of the end of the period alongside the expense figures, and to show the fund's expense ratio expressed as a percentage. In the proposing release, we requested comment on better approaches to providing disclosure to investors about actual costs paid over the current period, and on possible modifications to the proposed computation methodology to help achieve the objective of permitting investors to estimate the actual costs, in dollars, that they bore over the reporting period. Several commenters addressed ways to improve the expense examples, and one commenter suggested addressing the impact of brokerage and related soft dollar expenses.

The Commission has given additional consideration to the questions raised in its request for comment and the comments received and has determined to modify the expense example to include figures for ending account value, as well as the fund's expense ratio as a percentage.[38] We believe that this revised format will help investors better understand the impact of fund expenses and the relationship between expenses and return, as well as the effect of brokerage and soft dollar expenses. These changes are designed to help investors understand ongoing fund costs and make better cost comparisons among funds.

Under the amendments we are adopting, the figures for beginning and ending account value and expenses paid will be required to be shown in a tabular format.[39] The instructions to the table clarify that the expense calculations are to be based on the fund's most recent fiscal half-year (the fund's second fiscal half-year in the case of an annual report). A fund will be required to state, in a footnote to the table, that expenses are equal to the fund's annualized expense ratio, multiplied by the average account value over the period, multiplied by the number of days in the fund's most recent fiscal half-year divided by 365 or 366 (to reflect the one-half year period shown). The expense ratio shown in the footnote to the table will be expressed on an annualized basis and calculated in the

[35] Investment Company Institute Survey on GAO Report on Mutual Fund Fees (Jan. 31, 2001) (available for inspection and copying in File No. S7–51–02 in the Commission's Public Reference Room).

[36] *See* Section IV., "Cost/Benefit Analysis," *infra*.

[37] *See* Section II.B. of the Proposing Release, *supra* note 16, 68 FR at 168–169 (describing methodology to be used).

[38] *See* Section IV.B., "Cost/Benefit Analysis: Costs," *infra*, for a discussion of the costs to funds of including the additional information.

[39] Item 21(d)(1) of Form N–1A.

manner required in the financial highlights table using the expenses for the fund's most recent fiscal half-year.[40]

The numerical expense disclosure will be accompanied by a prescribed narrative explanation, including an explanation of the types of costs charged by mutual funds and the assumptions used in the example.[41] We are revising the proposed narrative disclosure requirements to reflect that expenses will be shown in a table alongside the ending account values for a $1,000 initial investment. In addition, we are adding headings and revising the narrative disclosure to separate more clearly the explanations of the two expense examples. We are also adding material to the required narrative disclosure, explaining how the investor can use the information in the first expense example, together with the investor's account value, to estimate the expenses that the investor paid. A fund that charges any account fees or other recurring fees that are not included in the expenses shown in the table will be required to disclose the amounts of these fees; describe the accounts that are charged these fees; and explain how an investor would use this information to estimate the total ongoing expenses paid over the period, the impact of these fees on ending account value, and how an investor would use this information to compare the ongoing costs of investing in different funds. Finally, a fund may modify the narrative explanations if the explanation contains comparable information to that shown, and will be required to make any modifications necessary to reflect accurately the fund's circumstances.[42]

B. Disclosure of Portfolio Holdings

The Commission is adopting, with several modifications to address commenters' concerns, rule and form amendments that will: (1) Permit a fund to include a summary portfolio schedule in its reports to shareholders, provided that the complete portfolio schedule is filed with the Commission semi-annually on Form N–CSR and is provided to shareholders upon request, free of charge; (2) exempt money market funds from including a portfolio schedule in reports to shareholders, provided that this information is filed with the Commission on Form N–CSR and is provided to shareholders upon request, free of charge; (3) require reports to shareholders to include a tabular or graphic presentation of a fund's portfolio holdings by identifiable category; and (4) require a fund to file its complete portfolio schedule as of the end of its first and third fiscal quarters with the Commission on new Form N–Q, which will be certified by the fund's principal executive and financial officers. Together, these amendments will replace a one-size-fits-all approach to portfolio holdings disclosure, where all funds deliver their full portfolio schedules to all their shareholders twice a year, with a layered approach that will make more information available while permitting funds to tailor their shareholder reports to their particular circumstances and investors to tailor the amount of information they receive to meet their particular needs. This approach is intended to result in the availability of enhanced portfolio information at a reduced cost.

1. Summary Portfolio Schedule

We are adopting, with modifications to address commenters' concerns, amendments that will permit a fund to include in its reports to shareholders a summary portfolio schedule, in lieu of a complete portfolio schedule. The complete portfolio schedule will, however, continue to be available, free of charge, to those investors who are interested in this more detailed information. These amendments are designed to streamline shareholder reports and help investors to focus on a fund's principal holdings, and thereby better evaluate the fund's risk profile and investment strategy. Commenters generally supported these proposed amendments, agreeing that they would encourage investors to focus on a fund's most significant investments.

Our amendments to Regulation S–X will permit a fund to include in its reports to shareholders a summary portfolio schedule, *Schedule VI—Summary schedule of investments in securities of unaffiliated issuers*, in lieu of the full schedule contained in *Schedule I—Investments in securities of unaffiliated issuers*.[43] The summary portfolio schedule will include each of the fund's 50 largest holdings in unaffiliated issuers and each investment in unaffiliated issuers that exceeds one percent of the fund's net asset value.[44] Commenters generally supported these thresholds.

We are requiring, as proposed, that with respect to each issue required to be listed, the schedule would show (1) the name of the issuer and title of issue; (2) the balance held at the close of the period (*i.e.*, the number of shares or the principal amount of bonds and notes); (3) the value of the issue at the close of the period; and (4) the percentage value of the issue compared to net assets.[45] The summary schedule would also show the total value of all investments in securities of unaffiliated issuers.[46]

Funds will continue to be required to include in their reports to shareholders the other schedules currently required by Regulation S–X.[47] Some commenters argued that funds should also be permitted to include the investments described by these schedules, and in particular investments in securities of affiliated issuers and investments other than securities, in a summary portfolio schedule. These commenters reasoned that inclusion of these investments in a summary schedule would serve to focus investors' attention on the fund's most significant investments in these areas. Other commenters, however, reasoned that providing a complete presentation of these investments is important to investors and gives them a better understanding of the nature of the fund's investments, its hedging strategies, its use of leverage, and any potential conflicts of interest in the management of the fund. We agree with these latter commenters. Requiring a complete presentation of investments other than securities of unaffiliated issuers in shareholder reports is important in order to provide investors with an understanding of the risks and potential conflicts of interest associated with the fund's portfolio.

Format of the Summary Schedule

As adopted, our amendments to Regulation S–X will require the securities in the summary schedule to be identified by category.[48] Specifically, the summary schedule must be categorized by (i) the type of investment (such as common stocks, preferred stocks, convertible securities; fixed

[40] Instruction 1(c) to Item 21(d)(1) of Form N–1A.

[41] Item 21(d)(1) and Instruction 1(b) to Item 21(d)(1) of Form N–1A.

[42] Instruction 1(b) to Item 21(d)(1) of Form N–1A.

[43] Schedule I of Regulation S–X [17 CFR 210.12–12]; Schedule VI of Regulation S–X [17 CFR 210.12–12C]; Article 6–10(c)(2) of Regulation S–X [17 CFR 210.6–10(c)(2)]; Instruction 1 to Item 21(b)(1) and Instruction to Item 21(c)(1) of Form N–1A; Instructions 4.a., 5.a., and 7 to Item 23 of Form N–2; Instructions 4.(i), 5.(i), and 7 to Item 27(a) of Form N–3.

[44] Note 3 to Schedule VI.

[45] Columns A, B, C, and D of Schedule VI.

[46] Note 7 to Schedule VI.

[47] In addition to *Schedule I—Instruments in securities of unaffiliated issuers*, Article 6–10(c) of Regulation S–X [17 CFR 210.6–10(c)] requires the following schedules to be filed: *Schedule II—Investments—other than securities* [17 CFR 210.12–13]; *Schedule III—Investments in and advances to affiliates* [17 CFR 210.12–14]; *Schedule IV—Investments—securities sold short* [17 CFR 210.12–12A]; and *Schedule V—Open option contracts written* [17 CFR 210.12–12B].

[48] Note 1 to Schedule VI.

income securities, government securities, options purchased, warrants, loan participations and assignments, commercial paper, bankers' acceptances, certificates of deposit, short-term securities, repurchase agreements, other investment companies, and so forth); and (ii) the related industry, country, or geographic region of the investment.[49] We are also adopting a conforming amendment to clarify that these categories are required to be used in the complete portfolio schedule, in lieu of the current required categories.[50]

Our proposal would have required the securities in the summary schedule to be listed in order of descending value. However, we are persuaded by a number of commenters who asked that we require, or at least permit, funds to list securities according to identifiable categories. These commenters argued that this presentation would enhance investors' understanding of the different kinds of investments in the fund, for example, by illustrating whether a fund is significantly concentrated in one particular industry or geographic region. While we considered giving funds the flexibility to list the securities in the summary portfolio either in order of descending value or by categories, we determined that requiring a consistent approach would benefit investors who seek to compare the summary portfolio schedules of different funds, or the summary portfolio schedule and the complete portfolio schedule.

We had proposed to require that all securities not separately listed in the summary schedule be listed in a category labeled "Other securities."[51] Because we are requiring issues in the summary schedule to be categorized, however, we are modifying the proposal to require a fund, within each category identified, to group all issues that are not separately listed in a sub-category labeled "Other securities."[52] The summary schedule will be required to show the subtotals for each category of investments, subdivided by industry, country, or geographic region, together with their percentage value compared to net assets.[53]

As in the current complete portfolio schedule, the summary schedule will require funds to identify by an appropriate symbol each issue of securities that is non-income producing, each issue of securities held in connection with open put or call option contracts or loans for short sales, and each issue of restricted securities.[54] Also, as in the current complete schedule, a fund will be required to state in a footnote to the summary schedule the following amounts based on cost for Federal income tax purposes: (i) Aggregate gross unrealized appreciation for all securities in which there is an excess of value over tax cost; (ii) aggregate gross unrealized depreciation for all securities in which there is an excess of tax cost over value; (iii) net unrealized appreciation and depreciation; and (iv) the aggregate cost of securities for Federal income tax purposes.[55]

Aggregation of Issues in the Summary Schedule

Our amendments include aggregation rules applicable to the summary portfolio schedule. First, we are adopting our proposed requirement that a fund aggregate and treat as a single issue short-term debt instruments of the same issuer (with disclosure indicating the range of interest rates and maturity dates).[56] In response to a commenter's suggestion, we are also clarifying that short-term debt instruments are debt instruments whose maturities or expiration dates at the time of acquisition are one year or less, and we are adding a similar clarification to the full portfolio schedule.[57]

Second, we are adopting our proposed requirement that a fund aggregate and treat as a single issue fully collateralized repurchase agreements (with footnote disclosure indicating the range of dates of the repurchase agreements, the total purchase price of the securities, the total amount to be received upon purchase, the range of purchase dates, and a description of the securities subject to the repurchase agreements).[58] This aggregation would apply to all fully collateralized repurchase agreements without regard to their percentage of net asset value or their issuer.

Third, we are clarifying the treatment of restricted and unrestricted securities of the same issue. Restricted and unrestricted securities of the same issue should be aggregated for purposes of determining whether the issue is among the 50 largest issues, but should not be combined in the schedule.[59] The proposal, which tracked the current complete portfolio schedule, stated that the summary schedule could not combine restricted securities with unrestricted securities of the same issue, but did not address whether these securities should be aggregated for purposes of determining whether an issue is among the 50 largest issues.

Fourth, we are adopting our proposal that, for purposes of determining whether the value of an issue exceeds one percent of net asset value, a fund will be required to aggregate and treat as a single issue all securities of any one issuer.[60] If multiple securities of an issuer aggregate to greater than one percent of net asset value, each issue will be required to be listed separately in the schedule, with the exceptions described in the following paragraph.[61] We are clarifying that the U.S. Treasury and each agency, instrumentality, or corporation, including each government-sponsored entity, that issues U.S. government securities is a separate issuer. For example, Fannie Mae, Sallie Mae, and Freddie Mac each will be considered a separate issuer.

Fifth, if multiple securities of an issuer aggregate to greater than one percent of net asset value, a fund may aggregate and list as a single issue: (a) Fixed-income securities of the same issuer which are not among the 50 largest issues and whose value does not exceed one percent of net asset value of the registrant as of the close of the period (indicating the range of interest rates and maturity dates); and (b) U.S. government securities of a single agency, instrumentality, or corporation, which are not among the 50 largest issues and whose value does not exceed one percent of net asset value of the registrant as of the close of the period (indicating the range of interest rates and maturity dates).[62] Under our proposal, all securities of each such issuer would have been aggregated to determine whether the value of the securities exceeded the 1% of net asset value threshold, but, if this threshold was exceeded, each such security would

[49] Note 1 to Schedule VI.

[50] Note 2 to Schedule I. Currently, the complete portfolio schedule requires a fund to list separately (a) common shares, (b) preferred shares, (c) bonds and notes, (d) time deposits, and (e) put and call options purchased. Within each of these subdivisions, a fund must classify investments in an appropriate manner according to type of business, *e.g.*, aerospace, banking, chemicals, machinery and machine tools, petroleum, utilities, etc.; or according to type of instrument, *e.g.*, commercial paper, bankers' acceptances, certificates of deposit.

[51] Proposed Note 2 to Schedule VI.

[52] Note 4 to Schedule VI.

[53] Note 2 to Schedule VI.

[54] Notes 8, 9, and 10 to Schedule VI; Notes 5, 6, and 7 to Schedule I.

[55] Note 11 to Schedule VI; Note 8 to Schedule I.

[56] Note 3 to Schedule VI.

[57] Note 3 to Schedule VI; Note 2 to Schedule I.

[58] Note 3 to Schedule VI.

[59] Notes 3 and 4 to Schedule VI.

[60] Note 3 to Schedule VI. As described above, however, all fully collateralized repurchase agreements are required to be aggregated and treated as a single issue.

[61] Note 4 to Schedule VI. Restricted and unrestricted securities of the same issue will be listed separately.

[62] Note 4 to Schedule VI.

then be listed separately (unless the securities were otherwise subject to aggregation as short-term debt instruments). One commenter pointed out that this requirement would nullify the benefits of the summary schedule for U.S. government and corporate fixed income funds that invest in numerous issues of a single issuer. In essence, the commenter argued that, for such government securities and fixed-income funds, the proposed rules would have required the listing of nearly every issue, regardless of size, and that this result would be inconsistent with the purpose of the summary schedule. We agree.

For example, assume that a fund that invests exclusively in U.S. Treasury securities holds the following: the fund's 50 largest holdings, 20 issues which each exceed 1% of net asset value but are not among the 50 largest holdings, and 930 issues each of which does not exceed 1% of net asset value (and is not among the 50 largest holdings). Also assume that none of the 1,000 issues qualifies as short-term debt. The rules we are adopting require that all securities of any one issuer be aggregated and treated as a single issue for purposes of determining whether the value of a security exceeds 1% of net asset value, so all 1,000 issues, considered in the aggregate, would exceed the threshold. As proposed, the summary schedule would have required that each of the 1,000 issues be listed separately. As adopted, however, the summary schedule would require a separate listing only for each of the 50 largest holdings and each of the 20 other issues that considered separately exceed the 1% of net asset value threshold. The remaining 930 issues would be aggregated and listed as a single issue.

Sixth, we are modifying the proposed requirements for the summary portfolio schedule to permit certain securities to be identified as "Miscellaneous securities," as is currently permitted in the complete portfolio schedule.[63] Currently, a fund's portfolio schedule may list an amount not exceeding five percent of the total value of the portfolio holdings in one amount as "Miscellaneous securities," provided that securities so listed are not restricted, have been held for not more than one year prior to the date of the related balance sheet, and have not previously been reported by name to the shareholders, or set forth in any registration statement, application, or annual report or otherwise made available to the public.[64] Commenters noted that funds rely on this exclusion in the complete portfolio schedule to guard against the premature release of certain positions in securities of unaffiliated issuers that could lead to front-running and other predatory trading practices.

We agree with these commenters that funds should not be forced to choose between using the summary schedule and relying on this exclusion. Thus, the final rules permit any issues that would otherwise be required to be listed separately or included in a group of securities that is listed in the aggregate as a single issue to be listed in one amount as "Miscellaneous securities" in the summary schedule, provided that the securities so listed are eligible to be, and are, categorized as "Miscellaneous securities" in the fund's complete schedule.[65] The rules make clear, however, that if any security that is included in "Miscellaneous securities" would otherwise be required to be included in a group of securities that is listed in the aggregate as a single issue, the remaining securities of that group must nonetheless be listed as required even if the remaining securities alone would not otherwise be required to be listed in this manner.[66] For example, assume that a fund holds three securities of Corporation X as follows: common stock valued at 0.7% of net asset value, preferred stock valued at 0.4% of net asset value, and bonds valued at 0.3% of net asset value, none of which is among the fund's largest 50 issues. If the fund lists the common stock as "Miscellaneous securities," it must still separately list the preferred stock and bonds because the aggregate value of all three issues exceeds one percent of net asset value.

We note that the terms "Miscellaneous securities" and "Other securities" [67] may be unclear to many investors. To avoid confusion, we are therefore requiring that, if any securities are listed as "Miscellaneous securities" or "Other securities," a fund briefly explain in a footnote what those terms represent.[68] We are adopting a conforming requirement with respect to the term "Miscellaneous securities" in the complete portfolio schedule.[69]

Filing and Availability of Complete Portfolio Schedule

To ensure that shareholders have continued access to a complete schedule of the fund's portfolio holdings, any fund that uses a summary portfolio schedule will be required to file its complete portfolio schedule with the Commission on Form N–CSR, which will be available on the Commission's Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR").[70] In addition, any fund that uses a summary portfolio schedule will be required to send its complete schedule of investments in securities of unaffiliated issuers to shareholders upon request within three business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery, and to disclose in its reports to shareholders that this complete portfolio schedule is available (i) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (ii) on the fund's Web site, if applicable; and (iii) on the Commission's Web site.[71]

[63] Note 5 to Schedule VI.

[64] Note 1 to Schedule I.

[65] Note 5 to Schedule VI.

[66] Note 5 to Schedule VI.

[67] See discussion of "Other securities" in Section II.B.1, "Summary Portfolio Schedule: Format of the Summary Schedule," *supra*.

[68] Note 6 to Schedule VI.

[69] Note 1 to Schedule I.

[70] Item 6 of Form N–CSR. Funds that include the complete portfolio schedule in their shareholder reports will also file this schedule on Form N–CSR, as part of the shareholder report. This schedule must be audited, except in the case of a report on Form N–CSR as of the end of a fiscal half-year. Instruction to Item 6 of Form N–CSR.

[71] Instruction 1 to Item 21(b)(1) and Instruction to Item 21(c)(1) of Form N–1A; Instruction 7 to Item 23 of Form N–2; Instruction 7 to Item 27(a) of Form N–3.

A fund may incorporate its financial statements by reference into its registration statement. A fund that includes a summary portfolio schedule in its reports to shareholders, and that chooses to incorporate its financial statements in its Statement of Additional Information ("SAI") by reference, would be expected to incorporate by reference its full portfolio schedule from Form N–CSR, along with the other financial statements and supporting schedules in its annual report to shareholders. *See* General Instruction D.1.(c) to Form N–1A (permitting incorporation by reference into the SAI generally); General Instruction F to Form N–2 (permitting incorporation by reference of information from Form N–CSR in response to Item 23 ("Financial Statements")); General Instruction G to Form N–3 (permitting incorporation by reference of information from Form N–CSR in response to Item 27 ("Financial Statements")). Such a fund would be required to deliver the full portfolio schedule from Form N–CSR, as well as the shareholder report, upon a shareholder request for the SAI. *See* Instruction to Item 10(a)(2)(iii) of Form N–1A (requiring any information incorporated by reference into the SAI to be delivered with the SAI unless the information has been previously delivered in a shareholder report and the fund states that the shareholder report is available, without charge, upon request); General Instruction F to Form N–2 (requiring any information incorporated by reference into the SAI to be delivered with the SAI unless the person to whom the SAI is sent or given holds securities of the fund and otherwise has received copies of the material, and fund states that the material is available, without charge, upon request); General Instruction G to Form N–3 (same).

2. Exemption of Money Market Funds From Portfolio Schedule Requirements in Shareholder Reports

We are adopting, as proposed, the amendment permitting money market funds to omit Schedule I, the schedule of investments in securities of unaffiliated issuers, from their reports to shareholders, provided that they make this schedule available to shareholders upon request and free of charge, and disclose the availability of the schedule in their reports to shareholders.[72] Currently, money market funds, like other funds, are required to include their portfolio schedules in the shareholder reports that are delivered to all investors.

While commenters generally supported the proposed exemption for money market funds from a requirement to include portfolio holdings in their reports to shareholders, some commenters objected. These commenters argued that information regarding a money market fund's significant investments is helpful to understanding a money market fund's financial statements, and that exclusion of such disclosure from shareholder reports implies that money market fund shareholders need not inform themselves about their fund's credit quality, maturity, and diversification characteristics. We continue to believe, however, that portfolio holdings disclosure of money market funds in reports to shareholders is not necessary because the investments of money market funds are circumscribed by the credit quality, maturity, and portfolio diversification requirements of rule 2a–7 under the Investment Company Act.[73] Portfolio holdings schedules of money market funds typically contain a list of short-term government and corporate debt securities that may not assist the average investor in evaluating the money market fund, or in distinguishing one money market fund from another.

Our amendments will require money market funds to file their complete portfolio holdings schedules semi-annually with the Commission on Form N–CSR, however, so that complete information about their portfolios will remain available to interested investors.[74] In addition, we are requiring any money market fund that does not include its complete portfolio schedule in its reports to shareholders to disclose in its shareholder reports that its complete schedule of investments in unaffiliated issuers is available (i) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (ii) on the fund's Web site, if applicable; and (iii) on the Commission's Web site at *http://www.sec.gov*.[75] Finally, the amendments will require a money market fund to send its complete schedule of investments in securities of unaffiliated issuers within three business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.[76]

As adopted, the exemption for money market funds from portfolio holdings disclosure in shareholder reports would not apply to disclosure of investments other than investments in securities of unaffiliated issuers. One commenter had suggested that the exemption be extended to other investments, particularly investments in securities of affiliated issuers. We disagree. We believe that, as with other funds, requiring a complete presentation of investments other than securities of unaffiliated issuers in money market fund shareholder reports is important in order to provide investors with an understanding of the risks and potential conflicts of interest associated with the money market fund's portfolio.

3. Tabular or Graphic Presentation of Portfolio Holdings

We are also adopting, with modifications, the requirement that a fund include in its annual and semi-annual reports to shareholders a presentation using tables, charts, or graphs that depicts the fund's portfolio holdings by reasonably identifiable categories (*e.g.*, industry sector, geographic region, credit quality, or maturity).[77] We believe that such a presentation could illustrate, in a concise and user-friendly format, the allocation of a fund's investments across asset classes. We believe that this presentation, coupled with a summary portfolio schedule, has the potential to effectively convey to investors key information about a fund's investments. Particularly in the case of a fund with a large number of holdings, the combination of a summary portfolio schedule and a tabular or graphic asset allocation presentation could be significantly more useful to many investors than the fund's complete portfolio schedule standing alone.

A fund will have the flexibility to determine both the categories to be used (*e.g.*, industry sector, geographic region, credit quality, maturity, *etc.*) and the format (*e.g.*, tables, charts, graphs, *etc.*). The categories in this presentation will be required to be selected, and the presentation formatted, in a manner reasonably designed to depict clearly the types of investments made by the fund, given its investment objectives. We had proposed to require that the fund select categories and design the format of the tabular or graphic presentation to provide the "most useful information" to investors about the types of investments. However, one commenter objected to this standard, arguing that the determination of what constituted the "most useful information" about a fund would require a subjective judgment open to second-guessing, and that instead a requirement that a fund provide "useful information" to investors would be sufficient. Another commenter, by contrast, suggested that the Commission prescribe the categories to be used in the tabular or graphic presentation, arguing that some degree of consistency in format is necessary to make the information in the presentation accessible and understandable to investors.

We believe that it is not advisable at the present time to require a standardized format for the tabular or graphic presentation. Permitting a fund to determine the means of presenting this portfolio information will allow each fund to tailor this presentation in a manner that is appropriate to its holdings. For example, a domestic equity fund could choose to categorize its investments by attributes such as industry sector, market capitalization, or price-earnings ratio. A bond fund could choose to categorize its investments by attributes such as credit quality or maturity or government versus non-government securities.[78] Prescribing specific categories to be used, by contrast, might result in presentations that are not particularly relevant for investors in a given fund. For example, categories such as market capitalization and industry sector might be less relevant for investors in an international

[72] 17 CFR 210.12–12. *See* Instruction 2 to Item 21(b)(1) and Instruction to Item 21(c)(1) of Form N–1A; Instruction 7(ii) to Item 27(a) of Form N–3.

[73] 17 CFR 270.2a–7.

[74] Item 6 of Form N–CSR.

[75] Instruction 2 to Item 21(b)(1) and Instruction to Item 21(c)(1) of Form N–1A; Instruction 7(ii) to Item 27(a) of Form N–3.

[76] *Id.*

[77] Item 21(d)(2) of Form N–1A; Instruction 6.a to Item 23 of Form N–2; Instruction 6(i) to Item 27(a) of Form N–3.

[78] Credit quality would be required to be the ratings grade assigned by a nationally recognized statistical rating organization ("NRSRO"), as that term is used in paragraphs (c)(2)(vi)(E), (F), and (H) of Rule 15c3–1 under the Exchange Act [17 CFR 240.15c3–1(c)(2)(vi)(E), (F), and (H)]. The fund could use ratings of only one NRSRO Item 21(d)(2) of Form N–1A; Instruction 6.a to Item 23 of Form N–2; Instruction 6(i) to Item 27(a) of Form N–3.

or global equity fund than categories showing the distribution of the fund's holdings across regions or countries. In addition, a prescribed category, such as market capitalization or industry sector, might convey little useful information about a fund that has a principal investment strategy of investing primarily in securities in only one component of that category (*e.g.*, a small capitalization fund).

However, we also believe that a standard requiring that a fund's tabular or graphic presentation be designed merely to provide "useful information" may result in presentations that do not effectively convey to investors the allocation of a fund's investments across relevant asset classes. As a result, we are adopting a standard that should allow funds sufficient flexibility, while encouraging development of tabular or graphic presentations that clearly depict the types of investments made by a fund. Over time, this flexible approach may enable both funds and the Commission to determine whether certain types of presentations are more effective for different types of funds.

Further, as adopted, the amendments will permit a fund the flexibility to base the tabular or graphic presentation on either net asset value or total investments, rather than solely net asset value, as proposed. However, as with the selection of the categories and the formatting of the presentation to be used, funds must select the basis of presentation (*e.g.*, net asset value or total investments) in a manner reasonably designed to depict clearly the types of investments made by the fund, given its investment objectives. We are providing funds this flexibility because there may be instances where net asset value differs from total investments and a presentation based on total investments might be clearer to shareholders. A presentation based on total investments might be preferable when, for example, a fund has borrowed money for investment purposes. In this case, the fund's investments would total more than 100 percent of net asset value, making the fund's investments difficult to present graphically on a net asset value basis. Regardless of which method is chosen, funds should clearly identify the basis of the presentation and provide any additional explanatory information that would be useful in understanding the presentation.

Finally, we have modified the amendments to require that the tables, charts, or graphs depict the "portfolio holdings," rather than the "securities holdings" of the fund. We are adopting this modification to clarify that the tabular or graphic presentation must reflect all of the investment activities of the fund, and not just investments in securities of unaffiliated issuers or investments in securities generally.

4. Quarterly Filing of Complete Portfolio Schedule

We are adopting the requirement that a fund file its complete portfolio holdings schedule with the Commission on a quarterly basis, with one modification. A fund will be required to file its complete portfolio schedules for the second and fourth fiscal quarters on Form N–CSR,[79] and will be required to file its complete portfolio schedules for the first and third fiscal quarters on new Form N–Q, within 60 days of the end of the quarter.[80] Form N-Q will require funds to file the same schedules of investments that are currently required in annual and semi-annual reports to shareholders. These schedules may be unaudited.[81] As proposed, Form N–Q would have been filed under the Investment Company Act only. We are adopting Form N–Q as a combined Exchange Act and Investment Company Act form.

We are adopting, as proposed, the requirement that Form N–Q be filed with the Commission on EDGAR. Form N–Q will not be required to be delivered to shareholders. However, a fund will be required to include in its annual and semi-annual reports to shareholders a statement that: (i) The fund files its complete schedule of portfolio holdings with the Commission for the first and third quarters of each fiscal year on Form N–Q; (ii) the fund's Forms N–Q are available on the Commission's Web site at *http://www.sec.gov;* (iii) the fund's Forms N–Q may be reviewed and copied at the Commission's Public Reference Room, and how information on the operation of the Public Reference Room may be obtained; and (iv) if the fund makes the information on Form N–Q available to shareholders on its Web site or upon request, a description of how the information may be obtained from the fund.[82] This approach is designed to strike an appropriate balance between investors' interest in more frequent portfolio information and the costs associated with disclosing and making that information available to investors, which are ultimately borne by investors.

Commenters, including investors and many fund groups, generally supported the proposal for quarterly portfolio disclosure on Form N–Q. Commenters argued that quarterly disclosure with a 60-day delay would help investors to better monitor whether, and how, a fund is complying with its stated investment objective, and noted that quarterly disclosure would make it easier to track whether funds are engaging in forms of portfolio manipulation such as "window dressing." However, some commenters, including individual investors and investor advocacy groups, suggested that portfolio disclosure be required even more frequently, such as monthly, or that the proposed delay for filing the quarterly disclosure be shortened to 30 days, to provide investors with even more certainty that a fund is investing consistent with its investment objective. By contrast, other commenters, including some fund groups, raised concerns that the proposed quarterly disclosure may expand the opportunities for professional traders to exploit portfolio information by engaging in predatory trading practices. The commenters suggested modifications to the proposals to address these concerns, including allowing funds to request confidential treatment of certain holdings otherwise required to be reported on Form N–Q, and decreasing the frequency of required reports on Form 13F or increasing the 45 day delay for these reports.[83]

We have determined to adopt the proposed requirement for quarterly disclosure of portfolio holdings with a 60-day delay. We are not requiring more frequent portfolio disclosure, or a shorter delay, because we take seriously concerns that more frequent portfolio holdings disclosure and/or a shorter delay for release of this information may expand the opportunities for predatory trading practices that harm fund

[79] Item 6 of Form N–CSR. *See* note and accompanying text, *supra.*

[80] Form N–Q; 17 CFR 249.332; 17 CFR 274.130; rule 30b1–5 under the Investment Company Act. Small business investment companies ("SBICs") registered with the Commission on Form N–5 will not be required to file Form N–Q. General Instruction A to Form N–Q. Although they are management investment companies, SBICs are not currently required to deliver reports to shareholders containing financial statements, and hence are not required to deliver schedules of investments to their shareholders.

[81] *See* Item 1 of Form N–Q; *Schedule I—Investments in securities of unaffiliated issuers* [17 CFR 210.12–12]; *Schedule II—Investments-other than securities* [17 CFR 210.12–13]; *Schedule III—Investments in and advances to affiliates* [17 CFR 210.12–14]; *Schedule IV—Investments-securities sold short* [17 CFR 210.12–12A]; and *Schedule V—Open option contracts written* [17 CFR 210.12–12B].

[82] Item 21(d)(3) of Form N–1A; Instruction 6.b. to Item 23 of Form N–2; Instruction 6.(ii) to Item 27(a) of Form N–3.

[83] *See* section 13(f) of the Exchange Act [15 U.S.C. 78m(f)]; rule 13f-1 under the Exchange Act [17 CFR 240.13f-1]. Fund managers and other institutional investment managers exercising investment discretion over $100 million or more in certain equity securities must disclose information about portfolios that they manage on Form 13F within 45 days of the end of each quarter.

shareholders. However, we also do not believe that it is appropriate to modify our proposal by adopting a confidential treatment mechanism. We believe that such a mechanism is unnecessary because the 60-day delay in the quarterly disclosure will adequately protect funds from predatory trading practices. In addition, we believe that requiring quarterly portfolio disclosure, as proposed, may help to address the concerns raised by recent allegations that some mutual fund managers have selectively disclosed their portfolio holdings in order to reward large investors.[84]

We have also determined not to modify the reporting requirements of Form 13F at this time. Fund portfolio holdings have been required to be disclosed on Form 13F, aggregated by investment manager, since 1979.[85] By contrast, concerns about predatory trading practices arising from Form 13F have surfaced recently in the context of the current proposal. Commenters have not presented concrete evidence that quarterly disclosure of aggregate holdings by institutional investment managers on Form 13F has resulted in such trading practices.

As proposed, Form N–Q would have been filed under the Investment Company Act only. We are adopting Form N–Q as a reporting form under sections 13 and 15(d) of the Exchange Act, in addition to the Investment Company Act. We are also requiring that Form N–Q be signed and certified by its principal executive and financial officers, consistent with section 302 of the Sarbanes-Oxley Act of 2002.[86] In addition, we are amending rule 30a-3 under the Investment Company Act to broaden the definition of disclosure controls and procedures to include controls and procedures designed to ensure that information required to be disclosed on Form N–Q is recorded, processed, summarized, and reported within the time periods specified in the Commission's rules and forms.[87] As is currently the case with Form N–CSR, a fund's management would be required to evaluate, with the participation of its principal executive and financial officers, the effectiveness of the fund's disclosure controls and procedures within the 90-day period prior to the filing of a report on Form N–Q.[88]

We are designating Form N–Q as a filing required under the Exchange Act, because the fund's portfolio schedule constitutes financial information of great significance to investors. We believe that requiring certification of this financial information is consistent with the intent of the certification requirement of section 302 of the Sarbanes-Oxley Act, which is to improve the quality of the disclosure that a company provides about its financial condition in its periodic reports to investors. We also note that the complete financial statements required in the shareholder reports included in Form N–CSR are required to be certified, and that funds are required to maintain the disclosure controls and procedures, and internal control over financial reporting, referenced in the certification on Form N–CSR. The Commission believes that any marginal increase in costs associated with certifying the portfolio holdings information contained in filings on Form N–Q will be justified by the benefits to investors.

The certification required for Form N–Q will be similar to that required for Form N–CSR. However, because Form N–Q will only contain a fund's schedules of investments and not complete financial statements, the certification on Form N–Q will require a certifying officer to state, based on the officer's knowledge, that the schedules of investments included in the report fairly present in all material respects the investments of the registrant as of the end of the fiscal quarter for which the report is filed.[89] By contrast, the certification in Form N–CSR requires a certifying officer to state, based on the officer's knowledge, that the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition, results of operations, changes in net assets, and cash flows (if the financial statements are required to include a statement of cash flows) of the registrant as of, and for, the periods presented in the report.[90]

In addition, because funds will now be filing periodic reports under the Exchange Act on a quarterly basis, the form of certification for Form N–Q will require a certifying officer to state that he or she has disclosed in the report any change in the registrant's internal control over financial reporting that occurred during the most recent fiscal quarter, rather than the registrant's most recent fiscal half-year, as Form N–CSR currently requires.[91] We are adding an Item to Form N–Q for funds to disclose any such change in internal control over financial reporting.[92] We are also adopting conforming changes to the comparable disclosure item and the certification of Form N–CSR.[93] Because the certification of Form N–Q, like the current certification of Form N–CSR, will require the certifying officers to state that they have conducted an evaluation of the fund's disclosure controls and procedures and have presented in the report their conclusions about the effectiveness of the disclosure controls and procedures as of a date within 90 days prior to the filing date of the report, Form N–Q will

[84] *See SEC* v. *Gary L. Pilgrim, Harold J. Baxter, and Pilgrim Baxter & Associates, Ltd*, (United States District Court, E.D. Pa., Civil Action No. 03-CV-6341) (alleged disclosure of nonpublic fund portfolio information by adviser's principal permitted certain investors to exploit mispricing of the fund's net asset value); *In the Matter of Alliance Capital Management, L.P.*, Investment Advisers Act Release No. 2205 (Dec. 18, 2003) (disclosure of material nonpublic information about certain mutual fund portfolio holdings permitted favored client to profit from market timing). *See also* Investment Company Act Release No. 26337 (Jan. 20, 2004) [69 FR 40410 (Jan. 27, 2004)] (proposing requirements for investment adviser codes of ethics, including provisions reasonably designed to prevent misuse of material nonpublic information about client securities, holdings, and transactions); Investment Company Act Release No. 26299 Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (stating that a fund's compliance policies and procedures should address misuses of nonpublic information, including the disclosure to third parties of material information about the fund's portfolio, its trading strategies, or pending transactions); Investment Company Act Release No. 26287 (Dec. 11, 2003) [68 FR 70402 (Dec. 17, 2003)] (proposing rules requiring disclosure by mutual funds of their policies and procedures with respect to the disclosure of their portfolio securities).

[85] Institutional investment managers may request confidential treatment of information in filings on Form 13F pursuant to section 13(f)(3) of the Exchange Act [15 U.S.C. 78m(f)(3)] on the basis, among others, that the information would reveal an investment manager's ongoing program of acquisition or disposition. *See* Report of Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 87 (1975). An application for confidential treatment on this basis must, among other requirements: (a) Describe the investment strategy being followed with respect to the relevant securities holdings; (b) explain why public disclosure of the securities would, in fact, be likely to reveal the investment strategy; (c) demonstrate that such revelation of an investment strategy would be premature, and indicate whether the manager was engaged in a program of acquisition or disposition of the security both at the end of the quarter and at the time of the filing; and (d) demonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the manager's competitive position. Instructions for Confidential Treatment Requests, Form 13F [17 CFR 249.325].

[86] Rule 30d-1 under the Investment Company Act [17 CFR 270.30d-1]; General Instruction F.2.(a) to Form N–Q; section 302 of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745 (2002).

[87] 17 CFR 270.30a-3(c).

[88] 17 CFR 270.30a-3(b).

[89] Paragraph 3 of certification exhibit of Item 3 of Form N–Q.

[90] Paragraph 3 of certification exhibit of Item 11(a)(2) of Form N–CSR.

[91] Paragraph 4(d) of certification exhibit of Item 3 of Form N–Q.

[92] Item 2(b) of Form N–Q.

[93] Item 10(b) of Form N–CSR; paragraph 4(d) of certification exhibit of Item 11(a)(2) of Form N–CSR.

include an Item requiring disclosure of the conclusions of this evaluation.[94]

C. Management's Discussion of Fund Performance ("MDFP")

We are adopting, as proposed, a requirement that a mutual fund, other than a money market fund, include MDFP in its annual reports to shareholders.[95] Currently, a mutual fund is required to include MDFP in its prospectus unless the fund includes the information in its latest annual report to shareholders.[96] We note that mutual funds typically include MDFP in their annual reports. We believe that requiring MDFP to be included in the annual report will aid investors in assessing a fund's performance over the prior year and will complement other "backward looking" information required in the annual report, such as financial statements. In addition, requiring MDFP to be included in annual reports to shareholders will mean that this information will be required to be certified by a fund's principal executive and financial officers pursuant to section 302 of the Sarbanes-Oxley Act and rule 30a-2 under the Investment Company Act.

Most commenters supported the proposed requirement that MDFP be included in mutual fund annual reports. However, one commenter argued that requiring MDFP to be certified by a fund's principal executive and financial officers would have a negative impact on the quality of MDFP, as funds may be reluctant to include subjective, albeit useful, information that does not readily lend itself to meaningful certification. We disagree with this commenter's conclusion that MDFP should not be certified. Investors rely upon MDFP to explain the investment operations and performance of a mutual fund, which is as significant for investors in a fund as management's discussion and analysis of financial condition and results of operations is for investors in an operating company. We believe that a requirement that MDFP be included in shareholder reports and certified by a mutual fund's principal executive and financial officers will encourage funds to include a more complete and accurate discussion of the factors that affected fund performance in their MDFP. We have asked our staff in their review of fund shareholder reports to continue to focus on the sufficiency of MDFP disclosures and identify instances where funds have failed to provide sufficient substantive discussion of the factors that affected the fund's performance during the reporting period.[97]

D. Compliance Date

The effective date for these amendments will be May 10, 2004. We are requiring all fund reports to shareholders for periods ending on or after July 9, 2004 to comply with the amendments. In addition, we are requiring funds to file quarterly reports on Form N–Q with respect to any fiscal quarter ending on or after July 9, 2004. This timeframe is consistent with the transition period requested by most commenters, and is appropriate in light of the systems changes and other tasks that many funds may have to undertake.

Funds will be required to comply with the amendments to Items 10(b) and 11 of Form N–CSR upon the effective date. However, we are adding transition provisions in Form N–CSR that will require funds to comply with some of the current requirements of these Items, which require disclosure of changes in internal control over financial reporting with respect to the entire semi-annual period covered by the report, until the earlier of June 30, 2005, or the date that a fund has filed its first report on Form N–Q.[98] We would expect that by June 30, 2005, all funds will have begun to file reports on Form N–Q that would include disclosure regarding changes in internal control over financial reporting that occurred during the most recent fiscal quarter. This transition rule is intended to prevent any gap in the disclosure that funds provide regarding changes in internal control over financial reporting.

Funds will not be required to comply with the portion of the introductory language in paragraph 4 of the certification in Item 3 of the Form N–Q that refers to the certifying officers' responsibility for establishing and maintaining internal control over financial reporting, or with paragraph 4(b) of the certification, until the first report on Form N–Q following a report on Form N–CSR that is required to contain these portions of the certification. This compliance date is consistent with the transition period we provided in adopting these portions of the certification for Form N–CSR, in which we stated that funds must comply with these portions of the certification beginning with the first annual report on Form N–CSR for a fiscal year ending on or after June 15, 2004.[99]

III. Paperwork Reduction Act

As explained in the Proposing Release, certain provisions of the amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq*). The titles for the collections of information are: (1) "Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Open-End Management Investment Companies;" (2) "Form N–2—Registration Statement of Closed-End Management Investment Companies;" (3) "Form N–3—Registration Statement of Separate Accounts Organized as Management Investment Companies;" (4) "Form N–CSR—Certified Shareholder Report of Registered Management Investment Companies;" (5) "Rule 30e–1 under the Investment Company Act of 1940, Reports to Stockholders of Management Companies;" (6) "Form N–Q—Quarterly Schedule of Portfolio Holdings of Registered Management Investment Company;" and (7) "Rule 30b1–5 under the Investment Company Act of 1940, 'Quarterly Report.'" An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Form N–1A (OMB Control No. 3235–0307), Form N–2 (OMB Control No. 3235–0026), and Form N–3 (OMB Control No. 3235–0316) were adopted pursuant to section 8(a) of the Investment Company Act (15 U.S.C. 80a–8) and section 5 of the Securities Act (15 U.S.C. 77e). Form N–CSR (OMB Control No. 3235–0570) was adopted pursuant to section 30 of the Investment

[94] Item 2(a) of Form N–Q.

[95] Item 21(b)(7) of Form N–1A.

[96] Current Item 5 of Form N–1A. Currently, a fund that includes MDFP in its annual report must disclose in its prospectus that its annual report contains a discussion of the market conditions and investment strategies that significantly affected the fund's performance during its last fiscal year and that this discussion will be made available upon request and without charge. Current Item 1(b)(1) of Form N–1A. Because we are now requiring MDFP in a mutual fund's annual report, we are amending Instruction 5 to Item 1(b)(1) to require all funds, other than many market funds (which are not required to provide MDFP), to include this prospectus disclosure.

[97] *See In the Matter of Davis Selected Advisers "NY, Inc.*, Investment Advisers Act Release No. 2055 (Sept. 4, 2002) (fund violated section 34(b) of the Investment Company Act [15 U.S.C. 80a-34(b)] by failing to disclose the material impact that investments in initial public offerings had on its performance during its previous fiscal year in its MDFP). *See also* Investment Company Act Release No. 25870, *supra* note 16, 68 FR at 170 (noting that the staff has identified instances where MDFP has provided insufficient substantive discussion of the factors that affected the fund's performance, and asking the staff to continue to focus on deficiencies in MDFP disclosure).

[98] Instruction to Item 10(b) of Form N–CSR; Instruction to Item 11(a)(2) of Form N–CSR.

[99] Investment Company Act Release No. 26068 (June 5, 2003) [68 FR 36636, 36650 (June 18, 2003)] (amending Form N–CSR certification).

Company Act (15 U.S.C. 80a–29) and sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)). Rule 30e–1 (OMB Control No. 3235–0025) was adopted pursuant to section 30(e) of the Investment Company Act (15 U.S.C. 80a–29(e)). Form N–Q (OMB Control No. 3235–0578) is being adopted pursuant to section 30 of the Investment Company Act (15 U.S.C. 80a–29) and sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)). Rule 30b1–5 under the Investment Company Act is being adopted pursuant to section 30(b)(1) of the Investment Company Act (15 U.S.C. 80a–29(b)(1)).

We published notice soliciting comments on the collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.[100] OMB approved these collection requirements. We received no comments on the collection of information requirements.

The amendments adopted in this release will:

- Require a mutual fund to disclose fund expenses borne by shareholders during the reporting period in reports to shareholders;
- Permit a fund to include a summary portfolio schedule in its reports to shareholders, and exempt a money market fund from the requirement to include a portfolio schedule of investments in securities of unaffiliated issuers in its reports to shareholders, provided that the complete portfolio schedule is filed with the Commission on Form N–CSR semi-annually and is provided to shareholders upon request, free of charge;
- Require reports to shareholders by funds to include a tabular or graphic presentation of a fund's portfolio holdings by identifiable categories;
- Require a fund to file its complete portfolio schedule as of the end of its first and third fiscal quarters with the Commission on new Form N–Q, which will be filed under the Investment Company Act and the Exchange Act and certified by the fund's principal executive and financial officers; and
- Require a mutual fund to include Management's Discussion of Fund Performance in its annual report to shareholders.

These amendments are intended to provide better information to investors about fund costs, investments, and performance.

[100] *See* Proposing Release, *supra* note 16, 68 FR at 170–73.

Forms N–1A, N–2, and N–3

The purposes of Forms N–1A, N–2, and N–3 are to meet the registration and disclosure requirements of the Securities Act and the Investment Company Act and to provide investors with information necessary to evaluate an investment in a fund. Forms N–1A, N–2, and N–3 contain collection of information requirements. The likely respondents to the information collection in Form N–1A are open-end funds registering with the Commission. The likely respondents to the information collection in Form N–2 are closed-end funds registering with the Commission. The likely respondents to the information collection in Form N–3 are separate accounts, organized as management investment companies and offering variable annuities, registering with the Commission. Compliance with the disclosure requirements of Forms N–1A, N–2, and N–3 is mandatory. Responses to the disclosure requirements are not confidential.

We estimate that the amendments to Forms N–1A, N–2, and N–3 will have no impact on the hour burden for filing registration statements on these forms. The amendments to Forms N–1A, N–2, and N–3 relate solely to the contents of shareholder reports for funds registered on these forms, and the additional burden hours imposed by these amendments are reflected in the collection of information requirements for shareholder reports required by rule 30e–1 under the Investment Company Act.

Form N–CSR

Form N–CSR, including the amendments, contains collection of information requirements. The respondents to this information collection are funds subject to rule 30e–1 under the Investment Company Act of 1940 registering with the Commission on Form N–1A, N–2, or N–3. Compliance with the disclosure requirements of Form N–CSR is mandatory. Responses to the disclosure requirements are not confidential.

The amendments will require a fund that has used a summary portfolio schedule in its reports to shareholders, in lieu of including a complete schedule of investments in securities of unaffiliated issuers, or a money market fund that has omitted its schedule of investments in securities of unaffiliated issuers from its reports to shareholders, to file its complete schedule of investments in securities of unaffiliated issuers pursuant to Item 6 of Form N–CSR. As described in the Proposing Release, we continue to estimate that the hour burden associated with the requirements of Item 6 of Form N–CSR will increase the burden of filing Form N–CSR by 5 hours per portfolio per filing. Since the Proposing Release, however, our estimate of the number of portfolios that will file Form N–CSR has changed. We now estimate that 3,800 funds file reports on Form N–CSR, representing 9,706 portfolios, including 1,000 money market portfolios.[101] Of these, we estimate that 7,094 portfolios will file complete schedules of investments in securities of unaffiliated issuers pursuant to Item 6 of Form N–CSR.[102]

Based on these estimates, the total estimated increase in burden hours associated with the change to Form N–CSR is 70,940 hours (7,094 portfolios × 5 hours per portfolio × 2 filings per year). This represents an estimate that is 1,010 hours lower that the 71,950 hours estimate in the Proposing Release. The current total hour burden associated with Form N–CSR before these amendments is 142,619 hours and the per filing burden is 19.27 hours.[103] Thus, we now estimate that the total hour burden for filing Form N–CSR, as amended, would be 141,609 hours (142,619 hours—1,010 hours reduction) and that the weighted average burden per filing on Form N–CSR would be approximately 18.63 hours (141,609 hours / (3,800 filers × 2 filings per year)).

Shareholder Reports

Rule 30e–1, which requires funds to include in the shareholder reports the information that is required by the fund's registration statement form, contains collection of information

[101] The total number of portfolios is comprised of 8,938 portfolios of mutual funds registered on Form N–1A, 733 portfolios of closed-end funds registered on Form N–2, and 35 sub-accounts of managed separate accounts registered on Form N–3. The estimates of the total number of funds, the number of mutual fund portfolios registered on Form N–1A, the number of money market portfolios, and the number of closed-end funds registered on Form N–2 are based on the Commission staff's analysis of reports filed on Form N–SAR in 2003. The estimate of the number of sub-accounts of managed separate accounts registered on Form N–3 is based on the staff's analysis of reports filed on Form N–SAR in 2003.

[102] We calculate this number assuming that all 1,000 money market portfolios will omit portfolio schedules from their shareholder reports and that 70% of the remaining 8,706 portfolios will include a summary schedule in lieu of the complete schedule. As a result 1,000 money market portfolios and 6,094 (8,706 portfolios × .70) other portfolios would be required to complete Item 6 of Form N–CSR, for a total of 7,094.

[103] The current OMB approved burden associated with Form N–CSR is 142,498 hours. The Commission has submitted a request to increase the approved burden to 142,619 hours. This request is still pending.

requirements.[104] The respondents to this collection of information requirement are funds registered on Forms N–1A, N–2, and N–3. Compliance with the disclosure requirements of rule 30e–1 is mandatory. Responses to the disclosure requirements will not be kept confidential.

We estimate that approximately 3,800 funds are subject to rule 30e–1.[105] The current hour burden for preparing and filing semi-annual or annual shareholder reports in compliance with rule 30e–1 is 125.18 hours per report per fund, for a total of 926,350 hours (125.18 × 2 × 3,800 funds). As a result of an increase in the number of registered investment companies required to prepare and file these reports, the burden has increased to 951,368 annual burden hours (125.18 hours per report × 2 reports × 3,800 funds). We estimate that the 3,800 funds filing annual and semi-annual shareholder reports pursuant to rule 30e–1 include 9,706 portfolios, including 8,938 portfolios of mutual funds registered on Form N–1A, 733 closed-end funds registered on Form N–2, and 35 sub-accounts of managed separate accounts registered on Form N–3.[106]

We estimate, as we did in the Proposing Release, that there are 1,000 money market fund portfolios that will take advantage of the provision permitting a money market fund to omit its schedule of investments in securities of unaffiliated issuers from its shareholder reports. This will decrease the hour burden of complying with rule 30e–1 for these funds by 5 hours per portfolio per filing, or 10,000 hours (1,000 portfolios × 5 hours × 2 filings per year). We estimate that, of the remaining 8,706 portfolios of funds filing shareholder reports, 70%, or 6,094 portfolios, will choose to take advantage of the provisions permitting use of a summary portfolio schedule.[107] However, as we discussed in the Proposing Release, we continue to estimate that use of the summary portfolio schedule provisions will have no net effect on the burden hours of complying with rule 30e–1. The estimated time necessary to prepare a summary portfolio schedule is equivalent to the time currently required to prepare a complete portfolio schedule, because a fund will still need to evaluate the size of each of its investments in securities of unaffiliated issuers in order to prepare the summary portfolio schedule. Further, we continue to estimate that the requirement to include a tabular or graphic presentation in shareholder reports, which will apply to all funds, will increase the estimated burden hours for complying with rule 30e–1 by 3 hours per portfolio per filing. Due to the change in the number of portfolios, we now estimate that the annual burden associated with this requirement is 58,236 hours (9,706 portfolios × 3 hours × 2 filings per year). We estimate that the requirement to disclose in shareholder reports the dollar cost of investing in the fund over the reporting period, which would apply only to mutual funds, will increase the estimated burden hours for complying with rule 30e–1 by 5 hours per portfolio per filing. We estimate that the modifications that we are adopting that will require the expense example to include the ending account values for an initial investment of $1,000, and the fund's expense ratio expressed as a percentage, will not increase this burden, because the annualized expense ratio will be based on information required elsewhere in the shareholder report as part of the financial highlights table, and funds will be calculating ending account value for an initial investment of $1,000 in order to calculate expenses paid on that investment. Due to the change in the number of portfolios, we now estimate that the associated annual burden associated with this requirement is 89,380 hours (8,938 mutual fund portfolios × 5 hours × 2 filings per year). Finally, we continue to estimate that the requirement for mutual funds to include MDFP in annual reports to shareholders would have a negligible effect on the estimated burden hours for complying with rule 30e–1, because, in the staff's experience, over 90% of mutual funds already include MDFP in annual reports to shareholders.

Thus, taking into account the change in the number of portfolios, we estimate that the amendments will have a net increase on the burden hours of complying with rule 30e–1 of 137,616 hours (−10,000 hours + 58,236 hours + 89,380 hours), for a new total burden of 1,088,984 hours (951,368 total hours + 137,616 hours increase).

Rule 30b1–5

The purpose of Rule 30b1–5 is to improve transparency of information about funds' portfolio holdings. Rule 30b1–5 will require funds to file a quarterly report via the Commission's EDGAR system on Form N–Q, not more than sixty calendar days after the close of each first and third fiscal quarter, containing their complete portfolio holdings. The likely respondents to Rule 30b1–5 will be registered management investment companies, other than small business investment companies registered with the Commission on Form N–5.

We estimate that Rule 30b1–5 will affect approximately 3,800 portfolios, each of which will be required to file a complete portfolio holdings schedule via EDGAR on Form N–Q. However, for purposes of this Paperwork Reduction Act analysis, the burden associated with the requirements of Rule 30b1–5 has been included in the collection of information requirements of Form N–Q, rather than the new rule.

Compliance with rule 30b1–5 is mandatory for every registered fund. Responses to the disclosure requirements will not be kept confidential.

Form N–Q

The purpose of Form N–Q is to meet the disclosure requirement of the Investment Company Act and the Exchange Act and to provide investors with information necessary to evaluate an investment in the fund. Form N–Q contains collection of information requirements. The respondents to this information collection will be management investment companies subject to rule 30e–1 under the Investment Company Act registering with the Commission on Forms N–1A, N–2, or N–3. Compliance with the disclosure requirements of Form N–Q will be mandatory. Responses to the disclosure requirements will not be kept confidential.

Every registered management investment company, other than a small business investment company registered on Form N–5, will be required to file a quarterly report on Form N–Q disclosing the information required therein, not more than sixty calendar days after the close of the first and third quarters of each fiscal year. In the Proposing Release, we estimated that for each of those funds the disclosure of their portfolio holdings schedules in filings on Form N–Q as of the end of each first and third fiscal quarter would require, on average, 10 hours per

[104] The amendments being adopted are to the shareholder reports requirements in Forms N–1A, N–2, and N–3. Rule 30e–1(a) under the Investment Company Act of 1940 [17 CFR 270.30e–1(a)] requires funds to include in the shareholder reports the information that is required by the fund's registration statement form.

[105] *See supra* note .

[106] *Id.*

[107] This is based on the Commission staff's estimate that more than 70% of funds had more than 50 securities in their portfolios, according to the staff's analysis of data from the *Morningstar Principia Pro* database.

portfolio per filing.[108] We have, however, modified Form N–Q since the proposal to require that the form be certified by the fund's principal executive and financial officers, similar to the present requirement in Form N–CSR. We estimate that the increase in hour burden associated with the new requirement for certification of Form N–Q will be 1 hour per registered investment company plus 0.25 hours for every additional portfolio in the company beyond the first portfolio.[109] We currently estimate that Form N–Q will affect approximately 3,800 funds, which include 9,706 portfolios. Taking into account the change in the number of portfolios, the annual hours associated with filing Form N–Q, absent the certification requirement, would be 194,120 hours (9,706 portfolios × 2 reports per year × 10 hours per portfolio). We estimate that the annual hour burden increase attributable to the requirement to certify Form N–Q will equal 10,554 hours (((3,800 funds × 1 hour per fund) + (5,906 additional portfolios × .25 hour per additional portfolio)) × 2 filings per year). The total hour burden estimate associated with Form N–Q, including compliance with the certification requirement, is 204,674 hours (194,120 hours + 10,554 hours attributable to certification).

IV. Cost/Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. Our amendments are intended to improve the periodic disclosure provided by funds about their costs, portfolio investments, and past performance. The amendments:

- Require mutual funds to disclose fund expenses borne by shareholders during the reporting period in reports to shareholders;
- Permit a fund to include a summary portfolio schedule in its reports to shareholders, and exempt a money market fund from the requirement to include a portfolio schedule of investments in securities of unaffiliated issuers in its reports to shareholders, provided that the complete portfolio schedule is filed with the Commission on Form N–CSR semi-annually and is provided to shareholders upon request, free of charge;
- Require reports to shareholders by funds to include a tabular or graphic presentation of a fund's portfolio holdings by identifiable categories;
- Require a fund to file and certify its complete portfolio schedule as of the end of its first and third fiscal quarters with the Commission on new Form N–Q under the Investment Company Act and the Exchange Act; and
- Require a mutual fund to include Management's Discussion of Fund Performance in its annual report to shareholders.

These amendments are intended to significantly improve the periodic disclosure that fund investors receive, particularly with respect to portfolio holdings and expenses, while reducing the costs of printing and delivering funds' annual and semi-annual reports to shareholders.

In the Proposing Release, we provided an analysis of the costs and benefits of the proposed amendments, and we requested comments.[110] Seven commenters commented directly on this cost/benefit analysis, while others raised cost and benefit issues with regard to specific substantive provisions without specifically mentioning the cost/benefit analysis. These comments are discussed in further detail below.

A. Benefits

Disclosure of Fund Expenses in Shareholder Reports. The requirement for mutual funds to disclose in their reports to shareholders fund expenses borne by shareholders during the reporting period should benefit investors by increasing their awareness and understanding of the fees that they pay on an ongoing basis for investing in a mutual fund. The benefits of the improved transparency of funds' ongoing fees and expenses are difficult to quantify, however.

Use of Summary Portfolio Schedule and Exemption of Money Market Funds from Portfolio Schedule Requirements in Shareholder Reports. The Commission estimates that more than 70% of all non-money market funds may realize at least some cost savings, through reduced printing and mailing expenses, by use of a summary portfolio holdings schedule in their shareholder reports.[111] Similar benefits would be available to all money market funds, which will be exempt from the requirement to include the schedule of investments in securities of unaffiliated issuers in their reports to shareholders. For funds with large numbers of holdings, such as index funds, the cost savings in printing and mailing could be substantial.

As of year-end 2002, there were approximately 257 million shareholder accounts invested in funds affected by the amendments.[112] For each account, funds are required to provide an annual and semi-annual shareholder report, although our rules allow the delivery of a single shareholder report to investors who share an address ("householding") under certain conditions.[113] Assuming that the use of householding would reduce the number of shareholder reports by at least 10%, we estimate that, as a result, funds currently print and deliver approximately 462.4 million (257 million accounts × 2 reports × .9 (using 10% savings estimate)) shareholder reports per year.[114] Estimating that 70% of these reports will include summary schedules in lieu of complete ones, 323.82 million (462.4 million shareholder reports × .7) shareholder reports may be streamlined, reducing the associated printing and mailing costs.[115] If funds reduce their printing and distribution expenses by only one page per shareholder report, at an estimated cost of 2¢ per page, funds could save approximately $6.48 million per year (323.82 million shareholder reports × $.02 per page).[116] The Commission believes, however, that some funds may be able to reduce the length of their shareholder reports by more than a single printed page, and we therefore expect that the cost savings to funds may exceed these estimates. These potential savings may be passed on to fund shareholders.[117]

[108] This estimate was based on a review of the estimated hour burdens associated with other rules and forms under the Investment Company Act that impose similar disclosure requirements.

[109] Our estimate of the burden hours associated with the Form N–Q certification requirement is based on the staff's experience reviewing financial statements, including portfolio schedules, and the staff's previous estimate of the hour burden associated with certification under Form N–CSR. Investment Company Release No. 25914 (Jan. 27, 2003) [68 FR 5348, 5357–58 (Feb. 3, 2003)] (estimating the hour burden for certification of Form N–CSR to be 5 hours per registrant plus 0.5 hours per additional portfolio.)

[110] *See* Section V, "Cost/Benefit Analysis," of the Proposing Release, *supra* note 16, 68 FR at 173–176.

[111] *See supra* note 107.

[112] The estimate is based on the staff's review of N–SAR filings and information from the Investment Company Institute. Investment Company Institute, Mutual Fund Fact Book 65 (43rd ed. 2003).

[113] *See* Investment Company Act Release No. 24123 (Nov. 4, 1999) [64 FR 62540, 62543 (Nov. 16, 1999)] (estimating that householding rules would produce a decline in the number of shareholder reports required to be delivered of between 10 and 30 percent) ("Householding Release").

[114] *Id.*

[115] These calculations are based on the estimate that 70% of funds that will use a summary portfolio schedule and hence may benefit from reduced printing costs. *See* text accompanying note, supra.

[116] This cost per page is based on an estimate that the typical shareholder report is approximately 25 pages long and costs $.52 to print and deliver. *See* Householding Release, *supra*. note, 64 FR at 62543.

[117] The provision permitting use of a summary portfolio schedule in shareholder reports, and the exemption for money market funds from the requirement to include in shareholder reports a complete schedule of investments in securities of unaffiliated issuers, are not expected to result in any reduction in internal costs for funds, because

Continued

Apart from savings in printing and distribution costs, use of a summary portfolio schedule may benefit investors by helping them focus on a fund's principal holdings, and thereby better evaluate a fund's risk profile and investment strategy. These benefits to investors are difficult to quantify, however.[118]

The estimated cost savings is derived from the estimated reduction in burden hours, and an estimated hourly wage rate for professional and non-professional staff of $78.48. This estimated wage rate is a blended rate, based on published hourly wage rates for compliance attorneys ($74.22) and programmers ($42.05) in New York City, and the estimate that professional and non-professional staff will divide time equally on compliance with the disclosure requirements, yielding a weighted wage rate of $58.135 (($74.22 × .50) + ($42.05 × .50)) = $58.135). *See* Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2001* (Oct. 2001) (for most current rate for compliance attorneys in New York City); Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (Sep. 2002) (for most current rate for programmers in New York City). This weighted wage rate was then adjusted upward by 35% for overhead, reflecting the costs of supervision, space, and administrative support, to obtain the total per hour internal cost of $78.48 ($58.135 × 1.35 = $78.48).

A number of commenters addressed the benefits of allowing the use of the summary portfolio schedule. These commenters supported the conclusion that summary schedules should reduce costs associated with printing and mailing shareholder reports and provide more meaningful information to shareholders, although they did not specifically mention the cost-benefit analysis or provide any quantitative analysis.

Tabular or Graphic Presentation of Portfolio Holdings. The requirements for funds to provide a tabular or graphic presentation of their portfolio holdings in their annual and semi-annual reports to shareholders should benefit fund investors by illustrating, in a concise and user-friendly format, the allocation of a fund's investments across asset classes. This presentation, coupled with a summary portfolio schedule, could be significantly more useful to many investors than the fund's complete portfolio schedule standing alone, particularly in the case of funds with large numbers of holdings. These benefits to investors resulting from the use of a tabular or graphic presentation are difficult to quantify, however.

Quarterly Filing of Complete Portfolio Schedule. The requirement for a fund to file its complete portfolio schedule on new Form N–Q via EDGAR, within 60 days after the end of the first and third fiscal quarters, should benefit investors by providing them with greater information about whether, and how, a fund is complying with its stated investment objective. These requirements will allow investors, and their advisers or other investment professionals, to better monitor the extent to which the portfolios of the funds that investors hold overlap, and hence should promote more informed asset allocation decisions. In addition, quarterly disclosure of a fund's portfolio holdings may expose instances of "style drift," when the actual portfolio holdings of a fund deviate from its stated investment objective.

The increased transparency resulting from quarterly disclosure may also deter several forms of portfolio manipulation by portfolio managers, including "window dressing" (buying or selling portfolio securities shortly before the date as of which a fund's holdings are publicly disclosed, in order to convey an impression that the manager has been investing in companies that have had exceptional performance during the reporting period) and "portfolio pumping" (buying shares of stocks the fund already owns on the last day of the reporting period, in order to drive up the price of the stocks and inflate the fund's performance results). Any of these forms of portfolio manipulation enhance the appearance of the portfolio at the expense of portfolio returns. By increasing the frequency of reporting, engaging in these activities becomes more expensive in terms of returns. Therefore, we expect fewer funds to engage in these activities. To the extent that portfolio managers currently engage in these activities, shareholders will be better off as a result of the amendments. More broadly, the increased frequency of disclosure will permit investors to better link the composition of a fund portfolio to fund performance.

In addition, the requirement that reports on Form N–Q be signed and certified by a fund's principal executive and financial officers, consistent with section 302 of the Sarbanes-Oxley Act, will benefit investors. A fund's portfolio schedule constitutes financial information of great significance to investors. Requiring certification of this financial information should help to enhance investor confidence in this disclosure, and is consistent with the intent of the certification requirement of section 302.

Inclusion of MDFP in Annual Reports to Shareholders by Mutual Funds. The requirement that funds include MDFP in their annual reports to shareholders should assist investors in assessing the fund's performance over the prior year. Requiring MDFP in the annual report, as opposed to the fund's prospectus, may benefit shareholders by enabling them to assess information provided in the MDFP together with other "backward looking" information contained in the annual report. We note, however, that to the extent that, based on the staff's experience, over 90% of mutual funds already include this information in their annual reports to shareholders, these benefits are already being realized.

B. Costs

The amendments may lead to some additional costs for funds, which could be passed on to fund shareholders. In the case of the additional disclosure requirements being adopted, these costs will include both internal costs (for attorneys and other non-legal staff of a fund, such as computer programmers, to prepare and review the required disclosure) and external costs (for printing and typesetting of the disclosure).

Disclosure of Fund Expenses in Shareholder Reports. We estimate that in order for mutual funds to comply with the requirement to include in annual and semi-annual reports disclosure of the dollar cost associated with investing a standardized amount in a fund, a typical mutual fund will need to add one additional page to each of its annual and semi-annual reports, at a cost of $0.02 per page.[119] We estimate that there are approximately 251 million shareholder accounts associated with mutual fund companies, which will send out 451.8 million reports to shareholders annually.[120] Therefore,

funds that utilize these provisions will still be required to file their complete portfolio schedules on Item 6 of Form N–CSR.

[118] We note that, for purposes of the Paperwork Reduction Act, we have estimated that the exemption for money market funds from the requirement to include complete portfolio schedules in their reports to shareholders will reduce the internal burden hours for compliance with shareholder reports requirements by 10,000 hours, translating into a cost savings of $689,400 annually. However, this cost savings is offset by an equal increase in the burden associated with the requirement for money market funds to file a complete portfolio schedule in Item 6 of Form N–CSR.

[119] *See supra* note 116.

[120] Investment Company Institute, Mutual Fund Fact Book, at 63 (43rd ed. 2003) (estimating approximately 251 million shareholder accounts

this additional disclosure in shareholder reports will cost approximately $9,036,000 ((451.8 million shareholder reports × $0.02 per page) in external costs per mutual fund annually.

In addition, we estimate for purposes of the Paperwork Reduction Act that these disclosure requirements will add 89,730 burden hours for mutual funds required to transmit shareholder reports, equal to internal costs of $7,042,010 for the industry annually.[121] Thus, we estimate that the total cost of this requirement would be approximately $16 million annually. We estimate that the modifications that we are adopting that will require the expense example to include the ending account values for an initial investment of $1,000, and the fund's expense ratio expressed as a percentage, will not increase this cost estimate, because the annualized expense ratio will be based on information required elsewhere in the shareholder report as part of the financial highlights table, and funds will be calculating ending account value for an initial investment of $1,000 in order to calculate expenses paid on that investment.

As the Commission considered how to best disclose to investors the fees and expenses that they incur with investment in a fund, it considered the costs and benefits of various alternatives, including providing fund shareholders with individualized cost information (in dollars) as to the fees and expenses that they paid in quarterly account statements. We estimate that the cost of providing this individualized cost disclosure would greatly exceed the cost of our amendments. According to a report of the U.S. General Accounting Office which recommended requiring individualized cost disclosure in account statements, one broker-dealer with approximately 6.5 million customer accounts estimated that for it to develop the systems necessary to produce such statements might cost as much as $4 million, with additional annual costs of $5 million.[122] Given that as of year-end 2002, there were approximately 251 million shareholder accounts invested in mutual funds, estimated industry-wide costs could easily exceed $100 million annually.[123]

Several commenters addressed the cost of including individualized expense information in quarterly account statements, and agreed with the cost/benefit analysis provided in the Proposing Release that such a requirement would involve significant costs and logistical challenges. One commenter who supported requiring individualized cost disclosure acknowledged that the alternative might impose large costs on funds, but recommended that the Commission consider whether the additional costs truly would outweigh the potential benefits that improved fee disclosure and the attendant increase in price competition would provide.

Use of Summary Portfolio Schedule and Exemption of Money Market Funds From Portfolio Schedule Requirements in Shareholder Reports. Our amendments that will allow funds to include summary portfolio schedules in reports to shareholders may result in some costs to funds.[124] For purposes of the Paperwork Reduction Act, we estimate that these amendments will not increase the hour burden for completing a shareholder report in compliance with rule 30e–1 under the Investment Company Act. However, we estimate that use of either the provision permitting use of a summary portfolio schedule or the provision permitting a money market fund to omit its schedule of investments in securities of unaffiliated issuers will increase the hour burden for filing Form N–CSR by 5 hours per portfolio per filing, or 70,940 hours (7,094 portfolios × 5 hours per portfolio × 2 filings per year), resulting in an additional cost of filing Form N–CSR of $5,567,371.[125]

Further, to the extent that investors want to see a complete portfolio schedule, investors will incur search costs to gather this information (*i.e.*, requesting the information from the fund). However, since funds will be required to deliver the complete portfolio schedule within three days and free of charge to all investors who request it, we expect these costs to be minimal.

Tabular or Graphic Presentation of Portfolio Holdings. The amendments will require funds to provide one or more tables, charts, or graphs depicting the securities holdings of the fund by reasonably identifiable categories (*e.g.*, type of security, industry sector, geographic region, credit quality, or maturity) showing the percentage of net asset value or total investments attributable to each. We estimate that these costs will be limited, however, because a fund will have the flexibility to select categories and format the presentation in a manner reasonably designed to depict clearly the types of investments made by the fund, given its investment objectives, and because a majority of funds, according to the staff's estimate, already provide some type of tabular or graphic depiction of their holdings in shareholder reports. For purposes of the Paperwork Reduction Act, we have estimated that the disclosure requirements will add 3 hours per portfolio to the burden of completing each annual and semi-annual report to shareholders, or 58,236 hours total (3 hours per portfolio × 2 reports per year × 9,706 portfolios of funds required to provide reports to shareholders). We estimate that this additional burden will equal total internal costs of $4,570,361 annually.[126] Further, because most funds already include a similar type of presentation voluntarily in shareholder reports, we estimate that this new disclosure requirement will not increase printing and mailing costs of shareholder reports for most funds, and hence the external costs to funds of this requirement will be minimal.

Quarterly Filing of Complete Portfolio Schedule. Our requirement for funds to certify and file with the Commission for the first and third fiscal quarters of each fiscal year their complete portfolio holdings schedule on Form N–Q, and to disclose the availability of the filing on the Commission's Web site, will impose certain costs on funds. We estimate that, for purposes of the Paperwork Reduction Act, these disclosure requirements will impose 10 burden hours per portfolio per filing on Form N–Q, plus an additional 1 hour per fund and 0.25 hours for every additional portfolio in a fund beyond the first. We estimate that the total burden will

associated with mutual funds). We estimated the number of shareholder reports by multiplying the number of accounts by 2 to reflect the requirement that each fund must deliver an annual and a semi-annual report to each account-holder, and then reducing that number by 10% to reflect an estimated 10% savings in the number of reports that must be delivered to shareholders due to householding rules, arriving at 451.8 million shareholder reports annually (251 million shareholder accounts × 2 reports per year × .9 reduction due to householding). *See supra* note 113.

[121] This figure is based on an estimated hourly wage rate of $78.48. *See supra* note 118.

[122] U.S. General Accounting Office, *Mutual Fund Fees: Additional Disclosure Could Encourage Price Competition* 79 (June 7, 2000).

[123] *See* Investment Company Institute, Mutual Fund Fact Book, *supra* note 112, at 63 (estimating number of shareholder accounts in mutual funds).

[124] The amendments would have no net impact on the hour burden of compliance for money market funds, for purposes of the Paperwork Reduction Act, because the increase in burden hours associated with filing the complete portfolio schedule pursuant to Item 6 of Form N–CSR would be offset by a decrease in the burden associated with the exemption allowing money market funds to omit this schedule from their shareholder reports. *See supra* note 118.

[125] These figures are based on an estimated hourly wage rate of $78.48. *See supra* note 118 (explaining calculation of wage rate).

[126] These figures are based on an estimated hourly wage rate of $78.48. *See supra* note 118 (explaining calculation of wage rate).

therefore be 204,674 hours, or $16,062,816 in total internal costs annually, based on an estimate of 3,800 funds filing reports on Form N–Q for 9,706 fund portfolios.[127] Because this quarterly disclosure will only be required to be filed on EDGAR, and not actually delivered to shareholders, we estimate that the external costs per fund, for typesetting, printing, and mailing, of this additional disclosure will be negligible.

Mandating quarterly portfolio disclosure may impose other costs on funds and their shareholders. We received several comments on this issue. In the Proposing Release, we addressed the possibility that more frequent disclosure of portfolio holdings may expand the opportunities for professional traders to exploit this information by engaging in predatory trading practices, such as trading ahead of funds, often called "front-running," and thereby increasing funds" costs which ultimately are borne by shareholders. However, we noted that, in order for "front-running" to significantly decrease investment returns under the quarterly reporting requirements, it appears that several conditions may have to be present, and we indicated that these conditions may rarely be met, and hence the resulting costs of front-running may be minimal.[128]

The Commission's cost-benefit analysis in the Proposing Release also addressed the possibility that more frequent portfolio disclosure may facilitate the ability of outside investors to "free ride" on a mutual fund's investment strategies, by obtaining for free the benefits of fund research and investment strategies that are paid for by fund shareholders. The Commission's analysis noted that the extent to which the quarterly disclosure requirement, with a 60-day lag, will result in these types of costs is difficult to quantify, and may depend on a number of assumptions and conditions. The Commission's analysis concluded that these conditions may not often simultaneously hold, although when they do, funds may be adversely impacted. The Commission's analysis also noted, however, that once the fund adviser has completed its trading strategy, it may hope that other traders will follow it because the price impacts of their trading will make the fund's trades profitable. The net effect of "free riding" therefore is not necessarily negative.[129]

One commenter supported the Commission's analysis, arguing that it thoroughly rebutted any arguments that front-running and other predatory trading practices would occur with more frequent portfolio disclosure. Other commenters disagreed with aspects of the Commission's analysis. One such commenter argued that more frequent disclosure of fund portfolio holdings would add to the mix of information that is currently available about the individual portfolio securities of funds (including information from reports filed by institutional investment managers on Form 13F) and thus could be expected to compound the risk of front-running of fund trades that already exists. The commenter also argued that evidence indicates that free-riding based on fund portfolio holdings disclosure can be achieved, and will be facilitated by more frequent portfolio disclosure.

Inclusion of MDFP in Annual Reports to Shareholders by Mutual Funds. We estimate that the requirement that mutual funds include MDFP in their annual reports to shareholders will not impose any costs on funds or shareholders. The staff estimates that over 90 percent of mutual funds already include MDFP in their annual reports to shareholders. Further, a fund that does not include MDFP in its annual reports must include MDFP in its prospectus. Thus, this amendment will not impose any new disclosure requirement on funds, but rather will only mandate a change in the location of the required disclosure for the minority of funds that do not already include MDFP in their annual reports. To the extent, however, that a fund does not already include MDFP in its annual report to shareholders, the fund may incur additional printing and mailing costs.

V. Consideration of Burden on Competition; Promotion of Efficiency, Competition, and Capital Formation

Section 23(a)(2) of the Exchange Act requires the Commission, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[130] In addition, section 2(c) of the Investment Company Act, section 2(b) of the Securities Act, and section 3(f) of the Exchange Act require the Commission, when engaging in rulemaking that requires it 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.[131] In the Proposing Release, we requested comments on whether the proposed amendments would promote efficiency, competition, and capital formation. We received no comments on this section of the proposals.

The amendments are intended to provide greater transparency for fund shareholders regarding their investments in funds. These amendments may improve efficiency. The enhanced disclosure requirements will provide shareholders with more frequent access to portfolio holdings of the funds in which they invest, which may promote more efficient allocation of investments by investors and more efficient allocation of assets among competing funds. We believe that the rule amendments may also improve competition, as enhanced disclosure will lead to better-informed investors and will prompt funds to seek to provide better-informed investors with improved products and services. In addition, permitting funds to deliver summary portfolio schedules in shareholder reports may provide a significant reduction in printing and delivery costs ultimately borne by shareholders. Finally, the effects of the rule amendments on capital formation are unclear. Although, as noted above, we believe that the rule amendments will benefit investors, the magnitude of the effect of the rule amendments on efficiency, competition, and capital formation is difficult to quantify, particularly given that many funds do not currently provide the type of disclosure contemplated by the rule amendments.

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("Analysis") has been prepared in accordance with 5 U.S.C. 604, and relates to the Commission's rule and form amendments under the Securities Act, the Exchange Act, and the Investment Company Act to improve the quality of periodic disclosure provided by funds about their costs, portfolio investments, and past performance. These rule amendments are intended to enable funds to provide

[127] This estimate is based on data from the Commission's EDGAR system of the number of registered management investment companies, and an estimated hourly wage rate of $78.48. *See supra* note 118.

[128] *See* Proposing Release, *supra* note 16, 68 FR at 175–176.

[129] Proposing Release, *supra* note 16, 68 FR at 176.

[130] 15 U.S.C. 78w(a)(2).

[131] 15 U.S.C. 77(b), 78c(f), and 80a–2(c).

more meaningful information to shareholders while reducing the costs of producing and delivering annual and semi-annual reports to shareholders. An Initial Regulatory Flexibility Analysis ("IRFA"), which was prepared in accordance with 5 U.S.C. 603, was published in the release proposing these amendments.

A. Need for, and Objectives of, Amendments

Shareholder reports are one of the principal means by which funds provide periodic information to their investors. Fund shareholder reports historically have served primarily as a vehicle to provide financial statements and other financial information to shareholders. The Commission believes that, with some modifications, fund shareholder reports could become a more effective vehicle for communicating information to investors. The amendments adopted by the Commission principally address disclosure of fund portfolio holdings and expenses, two significant areas for improvement that have been identified by investor groups, members of the fund industry, and others.

B. Significant Issues Raised by Public Comment

In the IRFA for the proposed amendments, we requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposed amendments, the likely impact of the proposal on small entities, the nature of any impact, and providing any empirical data supporting the extent of the impact. We received no comment letters on this section.

C. Small Entities Subject to the Rule

The amendments adopted by the Commission will affect registered investment companies that are small entities. For purposes of the Regulatory Flexibility Act, 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.[132] Approximately 205 out of 3700 investment companies that will be affected by these amendments meet this definition.[133]

D. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments will:

- Require mutual funds to disclose fund expenses borne by shareholders during the reporting period in reports to shareholders;
- Permit a fund to include a summary portfolio schedule in its reports to shareholders, and exempt a money market fund from the requirement to include a portfolio schedule of investments in unaffiliated issuers in its reports to shareholders, provided that the complete portfolio schedule is filed with the Commission on Form N–CSR semi-annually and is provided to shareholders upon request, free of charge;
- Require reports to shareholders by funds to include a tabular or graphic presentation of a fund's portfolio holdings by identifiable categories;
- Require a fund to file its complete portfolio schedule as of the end of its first and third fiscal quarters with the Commission on new Form N-Q which will be filed under the Investment Company Act and the Exchange Act and certified by the fund's principal executive and financial officers; and
- Require a mutual fund to include Management's Discussion of Fund Performance in its annual report to shareholders.

The amendments will apply equally to funds that are small entities and to other funds. The Commission estimates that the amendments will result in some one-time formatting and ongoing costs and burdens that would be imposed on all funds, but which may have a relatively greater impact on smaller firms. These include the costs related to disclosing the dollar cost associated with investing a standardized amount in a fund and the requirement that funds file their complete portfolio schedules with the Commission on a quarterly basis, in filings that would be certified by a fund's principal executive and financial officers. These costs also could include expenses for computer time, legal and accounting fees, information technology staff, and additional computer and telephone equipment. However, we believe that the benefits that will result to shareholders through better information about their funds' costs, portfolio investments, and past performance justify these potential costs.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small issuers. In connection with the rule amendments, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed amendments for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, will not be appropriate or consistent with investor protection. The disclosure amendments will provide shareholders with greater transparency regarding a fund's investments, costs, and performance. Different disclosure requirements for small entities may create the risk that shareholders of those small entities will not have access to sufficient information to make informed evaluations. For example, requiring less frequent filing of portfolio holdings reports by small entities will make it more difficult for the shareholders of small entities to determine whether the fund is complying with its stated investment objective. Likewise, reducing the disclosure requirements in the shareholder reports of small entities would, for example, leave the shareholders of small funds less able to assess the amount of fees and charges that they pay. We believe it is important that the disclosure that will be required by the rule amendments be provided to shareholders by all funds, not just funds that are not considered small entities.

We have endeavored throughout these rule amendments to minimize the regulatory burden on all funds, including small entities, while meeting our regulatory objectives. For example, we have modified our proposal to extend the compliance date an additional 60 days. We also note that some of the amendments contained in this release, such as the exemption for money market funds from the requirement to include a complete schedule in their shareholder reports,

[132] 17 CFR 270.0–10.

[133] This estimate is based on figures compiled by Division of Investment Management staff regarding investment companies registered on Form N–1A, Form N–2, and Form N–3. In determining whether an insurance company separate account is a small entity for purposes of the Regulatory Flexibility Act, the assets of insurance company separate accounts are aggregated with the assets of their sponsoring insurance companies. Investment Company Act rule 0–10(b) [17 CFR 270.0–10(b)].

work to lessen the regulatory burden on all funds. Small entities should benefit from the Commission's reasoned approach to the rule amendments to the same degree as other investment companies. Further clarification, consolidation, or simplification of the proposals for funds that are small entities would be inconsistent with the Commission's concern for investor protection. Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context.

VII. Statutory Authority

The Commission is adopting amendments to Regulation S–X pursuant to authority set forth in sections 5, 6, 7, 8, and 19(a) of the Securities Act (15 U.S.C. 77e, 77f, 77g, 77h, and 77s(a)); sections 12, 13, 15(d), and 23(a) of the Exchange Act (15 U.S.C. 78*l*, 78m, 78o(d), and 78w(a)); and sections 8, 24(a), 30, 31, and 38 of the Investment Company Act (15 U.S.C. 80a–8, 80a–24(a), 80a–29, 80a–30, and 80a–37). The Commission is adopting new rule 30b1–5 and new Form N–Q pursuant to authority set forth in sections 10(b), 13, 15(d), and 23(a) of the Exchange Act (15 U.S.C. 78j(b), 78m, 78o(d), 78w(a), and 78mm) and sections 8, 30, 31, and 38 of the Investment Company Act (15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37). The Commission is adopting amendments to Forms N–1A, N–2, and N–3 pursuant to authority set forth in sections 5, 6, 7, 10, 19(a), and 28 of the Securities Act (15 U.S.C. 77e, 77f, 77g, 77j, 77s(a), and 77z–3) and sections 6(c), 8, 24(a), 30, and 38 of the Investment Company Act (15 U.S.C. 80a–6(c), 80a–8, 80a–24(a), 80a–29, and 80a–37). The Commission is adopting amendments to Form N–CSR pursuant to authority set forth in sections 10(b), 13, 15(d), 23(a), and 36 of the Exchange Act (15 U.S.C. 78j(b), 78m, 78o(d), 78w(a), and 78mm) and sections 6(c), 8, 24(a), 30, and 38 of the Investment Company Act (15 U.S.C. 80a–6(c), 80a–8, 80a–24(a), 80a–29, and 80a–37).

List of Subjects

17 CFR Parts 210, 270, and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 239 and 249

Reporting and recordkeeping requirements, Securities.

Text of Rule and Form Amendments

■ For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 78c, 78j–1, 78*l*, 78m, 78n, 78o(d), 78q, 78u–5, 78w(a), 78*ll*, 78mm, 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, unless otherwise noted.

■ 2. Paragraph (c) of § 210.6–10 is revised to read as follows:

§ 210.6–10 What schedules are to be filed.

* * * * *

(c) *Management investment companies.*

(1) Except as otherwise provided in the applicable form, the schedules specified in this paragraph shall be filed for management investment companies as of the dates of the most recent audited balance sheet and any subsequent unaudited statement being filed for each person or group.

Schedule I—Investments in securities of unaffiliated issuers. The schedule prescribed by § 210.12–12 shall be filed in support of caption 1 of each balance sheet.

Schedule II—Investments—other than securities. The schedule prescribed by § 210.12–13 shall be filed in support of caption 3 of each balance sheet. This schedule may be omitted if the investments, other than securities, at both the beginning and end of the period amount to less than one percent of the value of total investments (§ 210.6–04.4).

Schedule III—Investments in and advances to affiliates. The schedule prescribed by § 210.12–14 shall be filed in support of caption 2 of each balance sheet.

Schedule IV—Investments—securities sold short. The schedule prescribed by § 210.12–12A shall be filed in support of caption 10(a) of each balance sheet.

Schedule V—Open option contracts written. The schedule prescribed by § 210.12–12B shall be filed in support of caption 10(b) of each balance sheet.

(2) When permitted by the applicable form, the schedule specified in this paragraph may be filed for management investment companies as of the dates of the most recent audited balance sheet and any subsequent unaudited statement being filed for each person or group.

Schedule VI—Summary schedule of investments in securities of unaffiliated issuers. The schedule prescribed by § 210.12–12C may be filed in support of caption 1 of each balance sheet.

* * * * *

■ 3. Section 210.12–12 is amended by:

■ a. Adding a sentence to the end of footnote 1 to the table; and

■ b. Revising the first three sentences of footnote 2 to the table.

The addition and revision would read as follows:

§ 210.12–12 Investments in securities of unaffiliated issuers.

[1] * * * If any securities are listed as "Miscellaneous securities," briefly explain in a footnote what the term represents.

[2] Categorize the schedule by (i) the type of investment (such as common stocks, preferred stocks, convertible securities, fixed income securities, government securities, options purchased, warrants, loan participations and assignments, commercial paper, bankers' acceptances, certificates of deposit, short-term securities, repurchase agreements, other investment companies, and so forth); and (ii) the related industry, country, or geographic region of the investment. Short-term debt instruments (*i.e.*, debt instruments whose maturities or expiration dates at the time of acquisition are one year or less) of the same issuer may be aggregated, in which case the range of interest rates and maturity dates shall be indicated. * * *

* * * * *

■ 4. Section 210.12–12C is added to read as follows:

§ 210.12–12C Summary schedule of investments in securities of unaffiliated issuers.

Column A	Column B	Column C	Column D
Name of issuer and title of issue[1 3 4 5 6].	Balance held at close of period. Number of shares—principal amount of bonds and notes[8].	Value of each item at close of period[2 7 9 10 11].	Percentage value compared to net assets.

[1] Categorize the schedule by (a) the type of investment (such as common stocks, preferred stocks, convertible securities, fixed income securities, government securities, options purchased, warrants, loan participations and assignments, commercial paper, bankers' acceptances, certificates of deposit, short-term securities, repurchase agreements, other investment companies, and so forth); and (b) the related industry, country, or geographic region of the investment.

[2] The subtotals for each category of investments, subdivided by industry, country, or geographic region, shall be shown together with their percentage value compared to net assets.

[3] Except as provided in note 5, list separately the 50 largest issues and any other issue the value of which exceeded one percent of net asset value of the registrant as of the close of the period. For purposes of the list (including, in the case of short-term debt instruments, the first sentence of note 4), aggregate and treat as a single issue, respectively, (a) short-term debt instruments (*i.e.*, debt instruments whose maturities or expiration dates at the time of acquisition are one year or less) of the same issuer (indicating the range of interest rates and maturity dates); and (b) fully collateralized repurchase agreements (indicate in a footnote the range of dates of the repurchase agreements, the total purchase price of the securities, the total amount to be received upon repurchase, the range of repurchase dates, and description of securities subject to the repurchase agreements). Restricted and unrestricted securities of the same issue should be aggregated for purposes of determining whether the issue is among the 50 largest issues, but should not be combined in the schedule. For purposes of determining whether the value of an issue exceeds one percent of net asset value, aggregate and treat as a single issue all securities of any one issuer, except that all fully collateralized repurchase agreements shall be aggregated and treated as a single issue. The U.S. Treasury and each agency, instrumentality, or corporation, including each government-sponsored entity, that issues U.S. government securities is a separate issuer.

[4] If multiple securities of an issuer aggregate to greater than one percent of net asset value, list each issue of the issuer separately (including separate listing of restricted and unrestricted securities of the same issue) except that the following may be aggregated and listed as a single issue: (a) Fixed-income securities of the same issuer which are not among the 50 largest issues and whose value does not exceed one percent of net asset value of the registrant as of the close of the period (indicating the range of interest rates and maturity dates); and (b) U.S. government securities of a single agency, instrumentality, or corporation, which are not among the 50 largest issues and whose value does not exceed one percent of net asset value of the registrant as of the close of the period (indicating the range of interest rates and maturity dates). For each category identified pursuant to note 1, group all issues that are neither separately listed nor included in a group of securities that is listed in the aggregate as a single issue in a sub-category labeled "Other securities," and provide the information for Columns C and D.

[5] Any securities that would be required to be listed separately or included in a group of securities that is listed in the aggregate as a single issue may be listed in one amount as "Miscellaneous securities," provided the securities so listed are eligible to be, and are, categorized as "Miscellaneous securities" in the registrant's Schedule of Investments in Securities of Unaffiliated Issuers required under § 210.12–12. However, if any security that is included in "Miscellaneous securities" would otherwise be required to be included in a group of securities that is listed in the aggregate as a single issue, the remaining securities of that group must nonetheless be listed as required by notes 3 and 4 even if the remaining securities alone would not otherwise be required to be listed in this manner (*e.g.*, because the combined value of the security listed in "Miscellaneous securities" and the remaining securities of the same issuer exceeds one percent of net asset value, but the value of the remaining securities alone does not exceed one percent of net asset value).

[6] If any securities are listed as "Miscellaneous securities" pursuant to note 5 or "Other securities" pursuant to note 4, briefly explain in a footnote what those terms represent.

[7] Total Column C. The total of column C should equal the total shown on the related balance sheet for investments in securities of unaffiliated issuers.

[8] Indicate by an appropriate symbol each issue of securities which is non-income producing. Evidences of indebtedness and preferred shares may be deemed to be income producing if, on the respective last interest payment date or date for the declaration of dividends prior to the date of the related balance sheet, there was only a partial payment of interest or a declaration of only a partial amount of the dividends payable; in such case, however, each such issue shall be indicated by an appropriate symbol referring to a note to the effect that, on the last interest or dividend date, only partial interest was paid or partial dividends declared. If, on such respective last interest or dividend date, no interest was paid or no cash or in kind dividends declared, the issue shall not be deemed to be income producing. Common shares shall not be deemed to be income producing unless, during the last year preceding the date of the related balance sheet, there was at least one dividend paid upon such common shares.

[9] Indicate by an appropriate symbol each issue of restricted securities. State the following in a footnote: (a) as to each such issue: (1) Acquisition date, (2) carrying value per unit of investment at date of related balance sheet, *e.g.*, a percentage of current market value of unrestricted securities of the same issuer, etc., and (3) the cost of such securities; (b) as to each issue acquired during the year preceding the date of the related balance sheet, the carrying value per unit of investment of unrestricted securities of the same issuer at: (1) The day the purchase price was agreed to; and (2) the day on which an enforceable right to acquire such securities was obtained; and (c) the aggregate value of all restricted securities and the percentage which the aggregate value bears to net assets.

[10] Indicate by an appropriate symbol each issue of securities held in connection with open put or call option contracts or loans for short sales.

[11] State in a footnote the following amounts based on cost for Federal income tax purposes: (a) Aggregate gross unrealized appreciation for all securities in which there is an excess of value over tax cost, (b) the aggregate gross unrealized depreciation for all securities in which there is an excess of tax cost over value, (c) the net unrealized appreciation or depreciation, and (d) the aggregate cost of securities for Federal income tax purposes.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 5. The general authority citation for Part 239 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 77sss, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 6. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 7. Section 249.332 is added to read as follows:

§ 249.332 Form N–Q, quarterly schedule of portfolio holdings of registered management investment company.

This form shall be used by registered management investment companies, other than small business investment companies registered on Form N–5 (§§ 239.24 and 274.5 of this chapter), to file reports pursuant to § 270.30b1–5 of this chapter not later than 60 days after the close of the first and third quarters of each fiscal year.

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 8. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

■ 9. Section 270.30a–2 is amended by revising the section heading and paragraph (a) to read as follows:

§ 270.30a–2 Certification of Form N–CSR and Form N–Q.

(a) Each report filed on Form N–CSR (§§ 249.331 and 274.128 of this chapter) or Form N–Q (§§ 249.332 and 274.130 of this chapter) by a registered management investment company must include certifications in the form specified in Item 11(a)(2) of Form N–CSR or Item 3 of Form N–Q, as applicable, and such certifications must be filed as an exhibit to such report. Each principal executive and principal financial officer of the investment company, or persons performing similar functions, at the time of filing of the report must sign a certification.

* * * * *

■ 10. Section 270.30a–3 is amended by revising paragraphs (b) and (c) to read as follows:

§ 270.30a–3 Controls and procedures.

* * * * *

(b) Each such registered management investment company's management must evaluate, with the participation of the company's principal executive and principal financial officers, or persons performing similar functions, the effectiveness of the company's disclosure controls and procedures, within the 90-day period prior to the filing date of each report on Form N–CSR (§§ 249.331 and 274.128 of this chapter) and Form N–Q (§§ 249.332 and 274.130 of this chapter).

(c) For purposes of this section, the term disclosure controls and procedures means controls and other procedures of a registered management investment company that are designed to ensure that information required to be disclosed by the investment company on Form N–CSR (§§ 249.331 and 274.128 of this chapter) and Form N–Q (§§ 249.332 and 274.130 of this chapter) is recorded, processed, summarized, and reported within the time periods specified in the Commission's rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an investment company in the reports that it files or submits on Form N–CSR and Form N–Q is accumulated and communicated to the investment company's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

* * * * *

■ 11. Section 270.30b1–5 is added to read as follows:

§ 270.30b1–5 Quarterly report.

Every registered management investment company, other than a small business investment company registered on Form N–5 (§§ 239.24 and 274.5 of this chapter), shall file a quarterly report on Form N–Q (§§ 249.332 and 274.130 of this chapter) not more than 60 days after the close of the first and third quarters of each fiscal year. A registered management investment company that has filed a registration statement with the Commission registering its securities for the first time under the Securities Act of 1933 is relieved of this reporting obligation with respect to any reporting period or portion thereof prior to the date on which that registration statement becomes effective or is withdrawn.

■ 12. Section 270.30d–1 is revised to read as follows:

§ 270.30d–1 Filing of copies of reports to shareholders.

A registered management investment company, other than a small business investment company registered on Form N–5 (§§ 239.24 and 274.5 of this chapter), that is required to file annual and quarterly reports pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall satisfy its requirement to file such reports by the filing, in accordance with the rules and procedures specified therefor, of reports on Form N–CSR (§§ 249.331 and 274.128 of this chapter) and Form N–Q (§§ 249.332 and 274.130 of this chapter). A registered unit investment trust or a small business investment company registered on Form N–5 that is required to file annual and quarterly reports pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 shall satisfy its requirement to file such reports by the filing, in accordance with the rules and procedures specified therefor, of reports on Form N–SAR (§§ 249.330 and 274.101 of this chapter).

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 13. The authority citation for part 274 is amended by adding the following citation in numerical order to read 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.

* * * * *

Section 274.130 is also issued under 15 U.S.C. 7202 and 7241.

■ 14. Form N–1A (referenced in §§ 239.15A and 274.11A) is amended by:
■ a. Removing Item 5 and redesignating Items 6 through 30 as Items 5 through 29;
■ b. In paragraph B.2(b) of the General Instructions, revising the phrase "(except Items 1, 2, 3, 5, and 9), B, and C (except Items 23(e) and (i)—(k))" to read "(except Items 1, 2, 3, and 8), B, and C (except Items 22(e) and (i)—(k))";
■ c. In paragraph C.3(a) of the General Instructions, revising the reference "Item 8" to read "Item 7";
■ d. In paragraph C.3(d)(i), introductory text, of the General Instructions and in newly redesignated Item 6, the introductory text of paragraph (f), revising the reference "Items 7(b)–(d) and 8(a)(2)" to read "Items 6(b)—(d) and 7(a)(2)";
■ e. In paragraph (b)(1) of Item 1, removing the phrase ", if required by Item 5";
■ f. In Instruction 6 to Item 1(b)(1) and paragraph (a)(2) of newly redesignated Item 7, revising the reference "Item 7(f)" to read "Item 6(f)";
■ g. In Instruction 6 to Item 1(b)(1), revising the reference "Item 7(f)(3)" to read "Item 6(f)(3)";
■ h. In Item 2(c)(2)(iii), revising the phrase "Instruction 5 to Item 5(b)" to read "Instruction 5 to Item 21(b)(7)";
■ i. In Instruction 1(a) to Item 2(c)(2), revising the reference "Item 9(a)" to read "Item 8(a)";
■ j. In Instruction 2(a) to Item 2(c)(2), revising the references "Item 21(a)", "Item 21(b)(1)", and "Items 21(b)(2) and (3)" to read "Item 20(a)", "Item 20(b)(1)", and "Items 20(b)(2) and (3)", respectively;
■ k. In Instruction 2(b) to Item 2(c)(2), revising the phrase "Instruction 6 to Item 5(b)" to read "Instruction 6 to Item 21(b)(7)";
■ l. In Instruction 2(d) to Item 2(c)(2), revising the references "Item 21(b)(2)" and "Item 21" to read "Item 20(b)(2)" and "Item 20", respectively;
■ m. In Instruction 4 to Item 2(c)(2), revising the phrase "Instruction 11 of

Item 5(b)" to read "Instruction 11 to Item 21(b)(7)";

■ n. In Instruction 2(a)(i) to Item 3, revising the reference "Item 8(a)" to read "Item 7(a)";

■ o. In Instruction 5 to Item 4(b)(1), revising the reference "Item 12(c)(1)" to read "Item 11(c)(1)";

■ p. In paragraph (e) of newly redesignated Item 11, revising the reference "Item 9" to read "Item 8";

■ q. Revising the reference "Item 13" to read "Item 12" in the following places:

■ i. Instruction 1 to newly redesignated Item 12;

■ ii. Paragraph (a)(2) of newly redesignated Item 12;

■ iii. Paragraph (b)(3) of newly redesignated Item 12;

■ iv. Paragraph (b)(6) of newly redesignated Item 12;

■ v. Instructions 6, 8, and 10 to newly redesignated Item 12(b)(7) each time it appears;

■ vi. Paragraph (b)(8) of newly redesignated Item 12 each time it appears;

■ vii. Instructions 2, 4, 6, 7, and 8 to newly redesignated Item 12(b)(8) each time it appears; and

■ viii. Paragraph (b)(9)(iii) of newly redesignated Item 12.

■ r. In Instruction to paragraph (a) of newly redesignated Item 17, revising the reference "Item 18(a)" to read "Item 17(a)";

■ s. In Instruction 4 to paragraph (c) of newly redesignated Item 17 and paragraph (k) of newly redesignated Item 22, revising the reference "Item 22" to read "Item 21";

■ t. In Instruction 1 to paragraph (c) of newly redesignated Item 19, revising the references "Item 8(b)(2)", "Item 15(d)", and "Item 30" to read "Item 7(b)(2)", "Item 14(d)", and "Item 29", respectively;

■ u. In paragraph (b) of newly redesignated Item 26, revising the reference "Item 20" to read "Item 19";

■ v. In Instruction 2 to paragraph (c) of newly redesignated Item 26, revising the reference "Item 20(c)" to read "Item 19(c)";

■ w. In Instruction 1 to newly redesignated Item 28, revising the reference "Item 15" to read "Item 14"; and

■ x. Revising Instruction 5 to Item 1(b)(1) and newly redesignated Item 21. The revisions read as follows:

Note: The text of Form N–1A does not and this amendment will not appear in the *Code of Federal Regulations.*

Form N–1A

* * * * *

Item 1. Front and Back Cover Pages

* * * * *

(b) * * *

(1) * * *

Instructions

* * * * *

5. A Money Market Fund may omit the sentence indicating that a reader will find in the Fund's annual report a discussion of the market conditions and investment strategies that significantly affect the Fund's performance during its last fiscal year.

* * * * * *

Item 21. Financial Statements

(a) *Registration Statement.* Include, in a separate section following the responses to the preceding Items, the financial statements and schedules required by Regulation S–X. The specimen price-make-up sheet required by Instruction 4 to Item 17(c) may be provided as a continuation of the balance sheet specified by Regulation S–X.

Instructions

1. The statements of any subsidiary that is not a majority-owned subsidiary required by Regulation S–X may be omitted from Part B and included in Part C.

2. In addition to the requirements of rule 3–18 of Regulation S–X [17 CFR 210.3–18], any Fund registered under the Investment Company Act that has not previously had an effective registration statement under the Securities Act must include in its initial registration statement under the Securities Act any additional financial statements and condensed financial information (which need not be audited) necessary to make the financial statements and condensed financial information included in the registration statement current as of a date within 90 days prior to the date of filing.

(b) *Annual Report.* Every annual report to shareholders required by rule 30e–1 must contain the following:

(1) *Financial Statements.* The audited financial statements required, and for the periods specified, by Regulation S–X.

Instructions

1. *Schedule VI "Summary schedule of investments in securities of unaffiliated issuers* [17 CFR 210.12–12C] may be included in the financial statements in lieu of *Schedule I—Investments in securities of unaffiliated issuers* [17 CFR 210.12–12] if: (a) The Fund states in the report that the Fund's complete schedule of investments in securities of unaffiliated issuers is available (i) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (ii) on the Fund's Web site, if applicable; and (iii) on the Commission's Web site at *http://www.sec.gov;* and (b) whenever the Fund (or financial intermediary through which shares of the Fund may be purchased or sold) receives a request for the Fund's schedule of investments in securities of unaffiliated issuers, the Fund (or financial intermediary) sends a copy of *Schedule I—Investments in securities of unaffiliated issuers* within 3 business days of receipt by first-class mail or other means designed to ensure equally prompt delivery.

2. In the case of a Money Market Fund, *Schedule I "Investments in securities of unaffiliated issuers* (17 CFR 210.12–12C) may be omitted from its financial statements, provided that: (a) The Fund states in the report that the Fund's complete schedule of investments in securities of unaffiliated issuers is available (i) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (ii) on the Fund's Web site, if applicable; and (iii) on the Commission's Web site at *http://www.sec.gov;* and (b) whenever the Fund (or financial intermediary through which shares of the Fund may be purchased or sold) receives a request for the Fund's schedule of investments in securities of unaffiliated issuers, the Fund (or financial intermediary) sends a copy of *Schedule I—Investments in securities of unaffiliated issuers* within 3 business days of receipt by first-class mail or other means designed to ensure equally prompt delivery.

(2) *Condensed Financial Information.* The condensed financial information required by Item 8(a) with at least the most recent fiscal year audited.

(3) *Remuneration Paid to Directors, Officers, and Others.* Unless shown elsewhere in the report as part of the financial statements required by paragraph (b)(1), the aggregate remuneration paid by the Fund during the period covered by the report to:

(i) All directors and all members of any advisory board for regular compensation;

(ii) Each director and each member of an advisory board for special compensation;

(iii) All officers; and

(iv) Each person of whom any officer or director of the Fund is an affiliated person.

(4) *Changes in and Disagreements with Accountants.* The information concerning changes in and disagreements with accountants and on accounting and financial disclosure

required by Item 304 of Regulation S–K [17 CFR 229.304].

(5) *Management Information.* The management information required by Item 12(a)(1).

(6) *Availability of Additional Information about Fund Directors.* A statement that the SAI includes additional information about Fund directors and is available, without charge, upon request, and a toll-free (or collect) telephone number for shareholders to call to request the SAI.

(7) *Management's Discussion of Fund Performance.* Disclose the following information unless the Fund is a Money Market Fund:

(i) Discuss the factors that materially affected the Fund's performance during the most recently completed fiscal year, including the relevant market conditions and the investment strategies and techniques used by the Fund's investment adviser.

(ii)(A) Provide a line graph comparing the initial and subsequent account values at the end of each of the most recently completed 10 fiscal years of the Fund (or for the life of the Fund, if shorter), but only for periods subsequent to the effective date of the Fund's registration statement. Assume a $10,000 initial investment at the beginning of the first fiscal year in an appropriate broad-based securities market index for the same period.

(B) In a table placed within or next to the graph, provide the Fund's average annual total returns for the 1-, 5-, and 10-year periods as of the end of the last day of the most recent fiscal year (or for the life of the Fund, if shorter), but only for periods subsequent to the effective date of the Fund's registration statement. Average annual total returns should be computed in accordance with Item 20(b)(1). Include a statement accompanying the graph and table to the effect that past performance does not predict future performance and that the graph and table do not reflect the deduction of taxes that a shareholder would pay on fund distributions or the redemption of fund shares.

Instructions

1. *Line Graph Computation.*

(a) Assume that the initial investment was made at the offering price last calculated on the business day before the first day of the first fiscal year.

(b) Base subsequent account values on the net asset value of the Fund last calculated on the last business day of the first and each subsequent fiscal year.

(c) Calculate the final account value by assuming the account was closed and redemption was at the price last calculated on the last business day of the most recent fiscal year.

(d) Base the line graph on the Fund's required minimum initial investment if that amount exceeds $10,000.

2. *Sales Load.* Reflect any sales load (or any other fees charged at the time of purchasing shares or opening an account) by beginning the line graph at the amount that actually would be invested (*i.e.*, assume that the maximum sales load, and other charges deducted from payments, is deducted from the initial $10,000 investment). For a Fund whose shares are subject to a contingent deferred sales load, assume the deduction of the maximum deferred sales load (or other charges) that would apply for a complete redemption that received the price last calculated on the last business day of the most recent fiscal year. For any other deferred sales load, assume that the deduction is in the amount(s) and at the time(s) that the sales load actually would have been deducted.

3. *Dividends and Distributions.* Assume reinvestment of all of the Fund's dividends and distributions on the reinvestment dates during the period, and reflect any sales load imposed upon reinvestment of dividends or distributions or both.

4. *Account Fees.* Reflect recurring fees that are charged to all accounts.

(a) For any account fees that vary with the size of the account, assume a $10,000 account size.

(b) Reflect, as appropriate, any recurring fees charged to shareholder accounts that are paid other than by redemption of the Fund's shares.

(c) Reflect an annual account fee that applies to more than one Fund by allocating the fee in the following manner: divide the total amount of account fees collected during the year by the Funds' total average net assets, multiply the resulting percentage by the average account value for each Fund and reduce the value of each hypothetical account at the end of each fiscal year during which the fee was charged.

5. *Appropriate Index.* For purposes of this Item, an "appropriate broad-based securities market index" is one that is administered by an organization that is not an affiliated person of the Fund, its investment adviser, or principal underwriter, unless the index is widely recognized and used. Adjust the index to reflect the reinvestment of dividends on securities in the index, but do not reflect the expenses of the Fund.

6. *Additional Indexes.* A Fund is encouraged to compare its performance not only to the required broad-based index, but also to other more narrowly based indexes that reflect the market sectors in which the Fund invests. A Fund also may compare its performance to an additional broad-based index, or to a non-securities index (*e.g.*, the Consumer Price Index), so long as the comparison is not misleading.

7. *Change in Index.* If the Fund uses an index that is different from the one used for the immediately preceding fiscal year, explain the reason(s) for the change and compare the Fund's annual change in the value of an investment in the hypothetical account with the new and former indexes.

8. *Other Periods.* The line graph may cover earlier fiscal years and may compare the ending values of interim periods (*e.g.*, monthly or quarterly ending values), so long as those periods are after the effective date of the Fund's registration statement.

9. *Scale.* The axis of the graph measuring dollar amounts may use either a linear or a logarithmic scale.

10. *New Funds.* A New Fund (as defined in Instruction 5 to Item 3) is not required to include the information specified by this Item in its prospectus (or annual report), unless Form N–1A (or the annual report) contains audited financial statements covering a period of at least 6 months.

11. *Change in Investment Adviser.* If the Fund has not had the same investment adviser for the previous 10 fiscal years, the Fund may begin the line graph on the date that the current adviser began to provide advisory services to the Fund so long as:

(a) Neither the current adviser nor any affiliate is or has been in "control" of the previous adviser under section 2(a)(9) [15 U.S.C. 80a–2(a)(9)];

(b) The current adviser employs no officer(s) of the previous adviser or employees of the previous adviser who were responsible for providing investment advisory or portfolio management services to the Fund; and

(c) The graph is accompanied by a statement explaining that previous periods during which the Fund was advised by another investment adviser are not shown.

(iii) Discuss the effect of any policy or practice of maintaining a specified level of distributions to shareholders on the Fund's investment strategies and per share net asset value during the last fiscal year. Also discuss the extent to which the Fund's distribution policy resulted in distributions of capital.

(c) *Semi-Annual Report.* Every semi-annual report to shareholders required by rule 30e–1 must contain the following (which need not be audited):

(1) *Financial Statements.* The financial statements required by

Regulation S–X for the period commencing either with:

(i) The beginning of the Fund's fiscal year (or date of organization, if newly organized); or

(ii) A date not later than the date after the close of the period included in the last report under rule 30e–1 and the most recent preceding fiscal year.

Instruction. Instructions 1 and 2 to Item 21(b)(1) also apply to this Item 21(c)(1).

(2) *Condensed Financial Information.* The condensed financial information required by Item 8(a), for the period of the report as specified by paragraph (c)(1), and the most recent preceding fiscal year.

(3) *Remuneration Paid to Directors, Officers, and Others.* Unless shown elsewhere in the report as part of the financial statements required by paragraph (c)(1), the aggregate remuneration paid by the Fund during the period covered by the report to the persons specified under paragraph (b)(3).

(4) *Changes in and Disagreements with Accountants.* The information concerning changes in and disagreements with accountants and on accounting and financial disclosure required by Item 304 of Regulation S–K [17 CFR 229.304].

(d) *Annual and Semi-Annual Reports.* Every annual and semi-annual report to shareholders required by rule 30e–1 must contain the following:

(1) *Expense Example.* The following information regarding expenses for the period:

Example

As a shareholder of the Fund, you incur two types of costs: (1) transaction costs, including sales charges (loads) on purchase payments, reinvested dividends, or other distributions; redemption fees; and exchange fees; and (2) ongoing costs, including management fees; distribution [and/or service] (12b–1) fees; and other Fund expenses. This Example is intended to help you understand your ongoing costs (in dollars) of investing in the Fund and to compare these costs with the ongoing costs of investing in other mutual funds.

The Example is based on an investment of $1,000 invested at the beginning of the period and held for the entire period [insert dates].

Actual Expenses

The first line of the table below provides information about actual account values and actual expenses. You may use the information in this line, together with the amount you invested, to estimate the expenses that you paid over the period. Simply divide your account value by $1,000 (for example, an $8,600 account value divided by $1,000 = 8.6), then multiply the result by the number in the first line under the heading entitled "Expenses Paid During Period" to estimate the expenses you paid on your account during this period. [If the Fund charges any account fees or other recurring fees that are not included in the expenses shown in the table, for example, because they are not charged to all investors, disclose the amounts of these fees, describe the accounts that are charged these fees, and explain how an investor would use this information to estimate the total ongoing expenses paid over the period and the impact of these fees on ending account value.]

Hypothetical Example for Comparison Purposes

The second line of the table below provides information about hypothetical account values and hypothetical expenses based on the Fund's actual expense ratio and an assumed rate of return of 5% per year before expenses, which is not the Fund's actual return. The hypothetical account values and expenses may not be used to estimate the actual ending account balance or expenses you paid for the period. You may use this information to compare the ongoing costs of investing in the Fund and other funds. To do so, compare this 5% hypothetical example with the 5% hypothetical examples that appear in the shareholder reports of the other funds. [If the Fund charges any account fees or other recurring fees that are not included in the expenses shown in the table, for example, because they are not charged to all investors, disclose the amounts of these fees, describe the accounts that are charged these fees, and explain how an investor would use this information in making the foregoing comparison.]

Please note that the expenses shown in the table are meant to highlight your ongoing costs only and do not reflect any transactional costs, such as sales charges (loads), redemption fees, or exchange fees. Therefore, the second line of the table is useful in comparing ongoing costs only, and will not help you determine the relative total costs of owning different funds. In addition, if these transactional costs were included, your costs would have been higher.

	Beginning account value [date]	Ending account value [date]	Expenses paid during period* [dates]
Actual	$1,000	.....	.....
Hypothetical (5% return before expenses)	1,000	.....	.....

* Expenses are equal to the Fund's annualized expense ratio of [%], multiplied by the average account value over the period, multiplied by [number of days in most recent fiscal half-year/365 [or 366]] (to reflect the one-half year period).

Instructions

1. *General.*

(a) Round all dollar figures to the nearest dollar.

(b) Include the narrative explanations in the order indicated. A Fund may modify the narrative explanations if the explanation contains comparable information to that shown, and is required to make any modifications necessary to reflect accurately the Fund's circumstances. A Fund may eliminate any parts of the narrative explanations that are inapplicable. For example, a Fund that does not charge loads need not include the statement that the Example does not reflect loads or that costs would be higher if loads were included.

(c) The Fund's expense ratio shown in the footnote to the table should be calculated in the manner required by Instruction 4(b) to Item 8(a) using the expenses for the Fund's most recent fiscal half-year (the Fund's second fiscal half-year in the case of an annual report). Express the expense ratio on an annualized basis.

(d)(i) If the Fund is a Feeder Fund, reflect the aggregate expenses of the Feeder Fund and the Master Fund. In a footnote to the Example, state that the Example reflects the expenses of both the Feeder and Master Funds.

(ii) If the report covers more than one Class of a Multiple Class Fund or more than one Feeder Fund that invests in the same Master Fund, provide a separate Example for each Class or Feeder Fund.

2. *Computation.*

(a)(i) In determining the Fund's "actual expenses" for purposes of this example, include all expenses that are deducted from the Fund's assets or charged to all shareholder accounts, including "Management Fees," "Distribution [and/or Service] (12b–1) Fees," and "Other Expenses" as those terms are defined in Instruction 3 to Item 3 of this form as modified by Instructions 2(a)(ii) and (c)(i) to this Item. Reflect recurring and non-

recurring fees charged to all investors other than any exchange fees, sales charges (loads), or fees charged upon redemption of the Fund's shares. The amount of expenses deducted from the Fund's assets are the amounts shown as expenses in the Fund's statement of operations (including increases resulting from complying with paragraph 2(g) of rule 6–07 of Regulation S–X [17 CFR 210.6–07]).

(ii) For purposes of this Item 21(d)(1), "Other Expenses" include extraordinary expenses as determined under generally accepted accounting principles (*see* Accounting Principles Board Opinion No. 30). If extraordinary expenses were incurred that materially affected the Fund's "Other Expenses," the Fund may disclose in a footnote to the Example what "actual expenses" would have been had the extraordinary expenses not been included.

(b) Assume reinvestment of all dividends and distributions.

(c)(i) Base the percentages of "actual expenses" on amounts incurred during the Fund's most recent fiscal half-year (the Fund's second fiscal half-year in the case of an annual report). "Actual expenses" should reflect actual expenses after expense reimbursement or fee waiver arrangements that reduced expenses during the most recent fiscal half-year.

(ii) If there have been any increases or decreases in Fund expenses that occurred during the Fund's most recent fiscal half-year (or that have occurred or are expected to occur during the current fiscal year) that would have materially affected the information in the Example had those changes been in place throughout the most recent fiscal half-year, restate in a footnote to the Example the expense information using the current fees as if they had been in effect throughout the entire most recent fiscal half-year. A change in Fund expenses does not include a decrease in expenses as a percentage of assets due to economies of scale or breakpoints in a fee arrangement resulting from an increase in the Fund's assets.

(d) Reflect any shareholder account fees collected by more than one Fund by allocating the total amount of the fees collected during the Fund's most recent fiscal half-year (the Fund's second fiscal half-year in the case of an annual report) for all such Funds to each Fund in proportion to the relative average net assets of the Fund. A Fund that charges account fees based on a minimum account requirement exceeding $1,000 may adjust its account fees based on the amount of the fee in relation to the Fund's minimum account requirement.

(2) *Graphical Representation of Holdings.* One or more tables, charts, or graphs depicting the portfolio holdings of the Fund by reasonably identifiable categories (*e.g.*, type of security, industry sector, geographic region, credit quality, or maturity) showing the percentage of net asset value or total investments attributable to each. The categories and the basis of presentation (*e.g.*, net asset value or total investments) should be selected, and the presentation should be formatted, in a manner reasonably designed to depict clearly the types of investments made by the Fund, given its investment objectives. Credit quality should be the ratings grade assigned by a nationally recognized statistical rating organization ("NRSRO"), as that term is used in paragraphs (c)(2)(vi)(E), (F), and (H) of Rule 15c3–1 under the Exchange Act (17 CFR 240.15c3–1(c)(2)(vi)(E), (F), and (H)). The fund should use ratings of only one NRSRO.

(3) *Statement Regarding Availability of Quarterly Portfolio Schedule.* A statement that: (i) The Fund files its complete schedule of portfolio holdings with the Commission for the first and third quarters of each fiscal year on Form N–Q; (ii) the Fund's Forms N–Q are available on the Commission's Web site at *http://www.sec.gov*; (iii) the Fund's Forms N–Q may be reviewed and copied at the Commission's Public Reference Room in Washington, DC, and that information on the operation of the Public Reference Room may be obtained by calling 1–800–SEC–0330; and (iv) if the Fund makes the information on Form N–Q available to shareholders on its Web site or upon request, a description of how the information may be obtained from the Fund.

(4) *Statement Regarding Availability of Proxy Voting Policies and Procedures.* A statement that a description of the policies and procedures that the Fund uses to determine how to vote proxies relating to portfolio securities is available (i) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (ii) on the Fund's Web site, if applicable; and (iii) on the Commission's Web site at *http://www.sec.gov*.

Instruction. When a Fund (or financial intermediary through which shares of the Fund may be purchased or sold) receives a request for a description of the policies and procedures that the Fund uses to determine how to vote proxies, the Fund (or financial intermediary) must send the information disclosed in response to Item 12(f) of this Form, within three business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

(5) *Statement Regarding Availability of Proxy Voting Record.* A statement that information regarding how the Fund voted proxies relating to portfolio securities during the most recent 12-month period ended June 30 is available (i) without charge, upon request, by calling a specified toll-free (or collect) telephone number; or on or through the Fund's Web site at a specified Internet address; or both; and (ii) on the Commission's Web site at *http://www.sec.gov*.

Instructions

1. If a Fund discloses that the Fund's proxy voting record is available by calling a toll-free (or collect) telephone number, and the Fund (or financial intermediary through which shares of the Fund may be purchased or sold) receives a request for this information, the Fund (or financial intermediary) must send the information disclosed in the Fund's most recently filed report on Form N–PX, within three business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

2. If a Fund discloses that the Fund's proxy voting record is available on or through its Web site, the Fund must make available free of charge the information disclosed in the Fund's most recently filed report on Form N–PX on or through its Web site as soon as reasonably practicable after filing the report with the Commission. The information disclosed in the Fund's most recently filed report on Form N–PX must remain available on or through the Fund's Web site for as long as the Fund remains subject to the requirements of Rule 30b1–4 (17 CFR 270.30b1–4) and discloses that the Fund's proxy voting record is available on or through its Web site.

* * * * *

■ 15. Form N–2 (referenced in §§ 239.14 and 274.11a–1) is amended by:

■ a. Revising the fourth paragraph and subparagraph 2 of General Instruction F;

■ b. Revising Instructions 4.a. and 5.a. to Item 23;

■ c. Removing Instructions 4.g., 4.h., 5.e., and 5.f. to Item 23;

■ d. Adding "and" at the end of Instruction 4.e. to Item 23;

■ e. Removing the semi-colon from the end of Instruction 4.f. to Item 23 and in its place adding a period;

■ f. Adding "and" at the end of Instruction 5.c. to Item 23;

■ g. Removing the semi-colon from the end of Instruction 5.d. to Item 23 and in its place adding a period;

■ h. Redesignating Instructions 6 and 7 to Item 23 as Instructions 8 and 9; and

■ i. Adding new Instructions 6 and 7 to Item 23.

The additions and revisions 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

* * * * *

General Instructions

* * * * *

F. Incorporation by Reference

* * * * *

A Registrant may incorporate by reference into the prospectus or the SAI in response to Item 4.1 or 23 of this form the information contained in Form N–CSR (17 CFR 249.331 and 274.128) or any report to shareholders meeting the requirements of section 30(e) of the 1940 Act (15 U.S.C. 80a–29(e)) and Rule 30e–1 (17 CFR 270.30e–1) thereunder (and a Registrant that has elected to be regulated as a business development company may so incorporate into Items 4.2, 8.6.c, or 23 of this form the information contained in its annual report under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (the "Exchange Act")), provided:

* * * * *

2. the Registrant states in the prospectus or the SAI, at the place where the information required by Items 4.1, 4.2, 8.6.c., or 23 of this form would normally appear, that the information is incorporated by reference from a report to shareholders or a report on Form N–CSR. (The Registrant also may describe briefly, in either the prospectus, the SAI, or Part C of the registration statement (in response to Item 24.1) those portions of the report to shareholders or report on Form N–CSR that are not incorporated by reference and are not a part of the registration statement.); and

* * * * *

Item 23. Financial Statements

* * * * *

Instructions

* * * * *

4. * * *

a. the audited financial statements required by Regulation S–X for the periods specified by Regulation S–X, modified to permit the omission of the statements and schedules that may be omitted from Part B of the registration statement by Instruction 2 above and as permitted by Instruction 7 below;

* * * * *

5. * * *

a. the financial statements required by Regulation S–X for the period commencing either with (1) the beginning of the company's fiscal year (or date of organization, if newly organized); or (2) a date not later than the date after the close of the period included in the last report conforming with the requirements of Rule 30e–1 and the most recent preceding fiscal year, modified to permit the omission of the statements and schedules that may be omitted from Part B of the registration statement by Instruction 2 above and as permitted by Instruction 7 below;

* * * * *

6. Every annual and semi-annual report to shareholders required by Section 30(e) of the 1940 Act and Rule 30e–1 thereunder shall contain the following information:

a. one or more tables, charts, or graphs depicting the portfolio holdings of the Registrant by reasonably identifiable categories (*e.g.*, type of security, industry sector, geographic region, credit quality, or maturity) showing the percentage of net asset value or total investments attributable to each. The categories and the basis of presentation (*e.g.*, net asset value or total investments) should be selected, and the presentation should be formatted, in a manner reasonably designed to depict clearly the types of investments made by the Registrant, given its investment objectives. Credit quality should be the ratings grade assigned by a nationally recognized statistical rating organization ("NRSRO"), as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of Rule 15c3–1 under the Exchange Act [17 CFR 240.15c3–1(c)(2)(vi)(E), (F) and (H)]. The Registrant should use ratings of only one NRSRO;

b. a statement that: (i) The Registrant files its complete schedule of portfolio holdings with the Commission for the first and third quarters of each fiscal year on Form N–Q; (ii) the Registrant's Forms N–Q are available on the Commission's Web site at *http://www.sec.gov;* (iii) the Registrant's Forms N–Q may be reviewed and copied at the Commission's Public Reference Room in Washington, DC, and that information on the operation of the Public Reference Room may be obtained by calling 1–800–SEC–0330; and (iv) if the Registrant makes the information on Form N–Q available to shareholders on its Web site or upon request, a description of how the information may be obtained from the Registrant.

c. a statement that a description of the policies and procedures that the Registrant uses to determine how to vote proxies relating to portfolio securities is available (1) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (2) on the Registrant's Web site, if applicable; and (3) on the Commission's Web site at *http://www.sec.gov;* and

d. a statement that information regarding how the Registrant voted proxies relating to portfolio securities during the most recent 12-month period ended June 30 is available (1) without charge, upon request, by calling a specified toll-free (or collect) telephone number; or on or through the Registrant's Web site at a specified Internet address; or both; and (2) on the Commission's Web site at *http://www.sec.gov.*

7. *Schedule VI—Summary schedule of investments in securities of unaffiliated issuers* (17 CFR 210.12–12C) may be included in the financial statements required under Instructions 4.a. and 5.a. of this Item in lieu of *Schedule I—Investments in securities of unaffiliated issuers* (17 CFR 210.12–12) if: (a) The Registrant states in the report that the Registrant's complete schedule of investments in securities of unaffiliated issuers is available (i) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (ii) on the Registrant's Web site, if applicable; and (iii) on the Commission's Web site at *http://www.sec.gov;* and (b) whenever the Registrant (or financial intermediary through which shares of the Registrant may be purchased or sold) receives a request for the Registrant's schedule of investments in securities of unaffiliated issuers, the Registrant (or financial intermediary) sends a copy of *Schedule I—Investments in securities of unaffiliated issuers* within 3 business days of receipt by first-class mail or other means designed to ensure equally prompt delivery.

* * * * *

■ 16. Form N–3 (referenced in §§ 239.17 and 274.11b) is amended by:

■ a. Revising the fourth paragraph and subparagraph 2 of General Instruction G;

■ b. Revising Instructions 4(i) and 5(i) to Item 27(a);

■ c. Removing Instructions 4(vii), 4(viii), 5(v), and 5(vi) to Item 27(a);

■ d. Adding "and" at the end of Instruction 4(v) to Item 27(a);

■ e. Removing the semi-colon from the end of Instruction 4(vi) to Item 27(a) and in its place adding a period;

■ f. Adding "and" at the end of Instruction 5(iii) to Item 27(a);
■ g. Removing the semi-colon from the end of Instruction 5(iv) to Item 27(a) and in its place adding a period;
■ h. Redesignating Instructions 6 and 7 to Item 27(a) as Instructions 8 and 9 to Item 27(a);
■ i. Adding new Instructions 6 and 7 to Item 27(a); and
■ j. Revising newly redesignated Instruction 9 to Item 27(a).

The additions and revisions read as follows.

Note: The text of Form N–3 does not and this amendment will not appear in the *Code of Federal Regulations.*

Form N–3

* * * * *

General Instructions

* * * * *

G. Incorporation by Reference

Subject to these rules, a Registrant may incorporate by reference into the prospectus or the Statement of Additional Information in response to Items 4(a) or 27 of Form N–3 the information in Form N–CSR (17 CFR 249.331 and 274.128) or any report to contractowners meeting the requirements of section 30(e) of the 1940 Act (15 U.S.C. 80a–29(e)) and Rule 30e–1 (17 CFR 270.30e–1) provided:

* * * * *

2. The Registrant states in the prospectus or the Statement of Additional Information, at the place where the information would normally appear, that the information is incorporated by reference from a report to securityholders or a report on Form N–CSR. The Registrant may also describe, in either the prospectus, the Statement of Additional Information, or Part C of the Registration Statement (in response to Item 28(a)), any parts of the report to securityholders or the report on Form N–CSR that are not incorporated by reference and are not a part of the Registration Statement; and

* * * * *

Item 27. Financial Statements

(a) * * *

Instructions

* * * * *

4. * * *

(i) the audited financial statements required by Regulation S–X for the periods specified by Regulation S–X, as modified by Instruction 2 above and as permitted by Instruction 7 below;

* * * * *

5. * * *

(i) the financial statements required by Regulation S–X for the period commencing either with (A) the beginning of the separate account's fiscal year (or date of organization, if newly organized); or (B) a date not later than the date after the close of the period included in the last report conforming with the requirements of Rule 30e–1 and the most recent preceding fiscal year, as modified by Instruction 2 above and as permitted by Instruction 7 below;

* * * * *

6. Every report required by section 30(e) of the 1940 Act and Rule 30e–1 under it (17 CFR 270.30e–1) shall contain the following information:

(i) One or more tables, charts, or graphs depicting the portfolio holdings of the Registrant by reasonably identifiable categories (*e.g.*, type of security, industry sector, geographic region, credit quality, or maturity) showing the percentage of net asset value or total investments attributable to each. If the Registrant has sub-accounts, provide the information separately for each sub-account. The categories and the basis of presentation (*e.g.*, net asset value or total investments) should be selected, and the presentation should be formatted, in a manner reasonably designed to depict clearly the types of investments made by the Registrant, given its investment objectives. Credit quality should be the ratings grade assigned by a nationally recognized statistical rating organization ("NRSRO"), as that term is used in paragraphs (c)(2)(vi)(E), (F), and (H) of § 240.15c3–1 of Rule 15c3–1 under the Exchange Act (17 CFR 240.15c3–1(c)(2)(vi)(E), (F), and (H)). The Registrant should use ratings of only one NRSRO;

(ii) a statement that: (A) the Registrant files its complete schedule of portfolio holdings with the Commission for the first and third quarters of each fiscal year on Form N–Q; (B) the Registrant's Forms N–Q are available on the Commission's Web site at *http://www.sec.gov;* (C) the Registrant's Forms N–Q may be reviewed and copied at the Commission's Public Reference Room in Washington, DC, and that information on the operation of the Public Reference Room may be obtained by calling 1–800–SEC–0330; and (D) if the Registrant makes the information on Form N–Q available to contractowners on its Web site or upon request, a description of how the information may be obtained from the Registrant;

(iii) a statement that a description of the policies and procedures that the Registrant uses to determine how to vote proxies relating to portfolio securities is available (A) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (B) on the Registrant's Web site, if applicable; and (C) on the Commission's Web site at *http://www.sec.gov;* and

(iv) a statement that information regarding how the Registrant voted proxies relating to portfolio securities during the most recent 12-month period ended June 30 is available (A) without charge, upon request, by calling a specified toll-free (or collect) telephone number; or on or through the Registrant's Web site at a specified Internet address; or both; and (B) on the Commission's Web site at *http://www.sec.gov.*

7. (i) *Schedule VI—Summary schedule of investments in securities of unaffiliated issuers* (17 CFR 210.12–12C) may be included in the financial statements required under Instructions 4.(i) and 5.(i) of this Item in lieu of *Schedule I—Investments in securities of unaffiliated issuers* (17 CFR 210.12–12) if: (A) the Registrant states in the report that the Registrant's complete schedule of investments in securities of unaffiliated issuers is available (*1*) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (*2*) on the Registrant's Web site, if applicable; and (*3*) on the Commission's Web site at *http://www.sec.gov;* and (B) whenever the Registrant (or financial intermediary through which shares of the Registrant may be purchased or sold) receives a request for the Registrant's schedule of investments in securities of unaffiliated issuers, the Registrant (or financial intermediary) sends a copy of *Schedule I—Investments in securities of unaffiliated issuers* within 3 business days of receipt by first-class mail or other means designed to ensure equally prompt delivery.

(ii) In the case of a Registrant or sub-account of a Registrant that holds itself out as a money market account or sub-account and meets the maturity, quality, and diversification requirements of rule 2a–7 (17 CFR 270.2a–7) under the 1940 Act, *Schedule I—Investments in securities of unaffiliated issuers* (17 CFR 210.12–12C) may be omitted from the financial statements required under Instructions 4.(i) and 5.(i) of this Item, provided that: (A) the Registrant states in the report that the Registrant's complete schedule of investments in securities of unaffiliated issuers is available (*1*) without charge, upon request, by calling a specified toll-free (or collect) telephone number; (*2*) on the Registrant's Web site, if applicable; and (*3*) on the Commission's Web site at

http://www.sec.gov; and (B) whenever the Registrant (or financial intermediary through which shares of the Registrant may be purchased or sold) receives a request for the Registrant's schedule of investments in securities of unaffiliated issuers, the Registrant (or financial intermediary) sends a copy of *Schedule I—Investments in securities of unaffiliated issuers* within 3 business days of receipt by first-class mail or other means designed to ensure equally prompt delivery.

* * * * *

9. See General Instruction G regarding incorporation by reference.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 17. Form N–CSR (referenced in §§ 249.331 and 274.128) is amended by:
■ a. Adding new Item 6;
■ b. Revising paragraph (b) of Item 10;
■ c. Adding an Instruction to paragraph (b) of Item 10;
■ d. Revising paragraph 4(d) of the Certification in Item 11(a)(2); and
■ e. Adding an Instruction to paragraph (a)(2) of Item 11.

The additions and revisions read as follows:

Note: The text of Form N–CSR does not and this amendment will not appear in the *Code of Federal Regulations.*

Form N–CSR

* * * * *

Item 6. Schedule of Investments

File *Schedule I—Investments in securities of unaffiliated issuers* as of the close of the reporting period as set forth in § 210.12–12 of Regulation S–X [17 CFR 210.12–12], unless the schedule is included as part of the report to shareholders filed under Item 1 of this Form.

Instruction

Schedule I—Investments in securities of unaffiliated issuers filed under this Item must be audited, except that in the case of a report on this Form N–CSR as of the end of a fiscal half-year *Schedule I—Investments in securities of unaffiliated issuers* need not be audited.

* * * * *

Item 10. Controls and Procedures

* * * * *

(b) Disclose any change in the registrant's internal control over financial reporting (as defined in Rule 30a–3(d) under the Act (17 CFR 270.30a–3(d)) that occurred during the second fiscal quarter of the period covered by this report that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting.

Instruction to paragraph (b).

Until the earlier of June 30, 2005, or the date that the registrant has filed its first report on Form N–Q (17 CFR 249.332; 17 CFR 274.130), the registrant must disclose, pursuant to paragraph (b) of this Item, any change in the registrant's internal control over financial reporting that occurred during the registrant's last fiscal half-year (the registrant's second fiscal half-year in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting.

Item 11. Exhibits

(a) * * *
(2) * * *

Certifications

I, [Identify the certifying individual], certify that:

* * * * *

4. * * *

(d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the second fiscal quarter of the period covered by this report that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

* * * * *

Instruction to paragraph (a)(2).

Until the earlier of June 30, 2005, or the date that the registrant has filed its first report on Form N–Q (17 CFR 249.332; 17 CFR 274.130), in paragraph 4(d) of the certification required by Item 11(a)(2), the registrant's certifying officers must certify that they have disclosed in the report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal half-year (the registrant's second fiscal half-year in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting.

* * * * *

■ 18. Section 274.130 and Form N–Q (referenced in § 249.332 and § 274.130) are added to read as follows:

§ 274.130 Form N–Q, quarterly schedule of portfolio holdings of registered management investment company.

This form shall be used by registered management investment companies, other than small business investment companies registered on Form N–5 (§§ 239.24 and 274.5 of this chapter), to file reports pursuant to § 270.30b1–5 of this chapter not later than 60 days after the close of the first and third quarters of each fiscal year.

Note: The text of Form N–Q will not appear in the *Code of Federal Regulations.*

OMB Approval

OMB Number: 3235–0578
Expires: February 28, 2006
Estimated average burden hours per response: 20.00

Securities and Exchange Commission, Washington, DC 20549

Form N–Q: Quarterly Schedule of Portfolio Holdings of Registered Management Investment Company

Investment Company Act file number _____

(Exact name of registrant as specified in charter)

(Address of principal executive offices)

(Zip code)

(Name and address of agent for service)
Registrant's telephone number, including area code: _____
Date of fiscal year end: _____
Date of reporting period: _____

Form N–Q is to be used by management investment companies, other than small business investment companies registered on Form N–5 (§§ 239.24 and 274.5 of this chapter), to file reports with the Commission, not later than 60 days after the close of the first and third fiscal quarters, pursuant to rule 30b1–5 under the Investment Company Act of 1940 (17 CFR 270.30b1–5). The Commission may use the information provided on Form N–Q in its regulatory, disclosure review, inspection, and policymaking roles.

A registrant is required to disclose the information specified by Form N–Q, and the Commission will make this information public. A registrant is not required to respond to the collection of information contained in Form N-Q unless the Form displays a currently valid Office of Management and Budget ("OMB") control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. The OMB has reviewed

this collection of information under the clearance requirements of 44 U.S.C. 3507.

General Instructions

A. Rule as to Use of Form N–Q

Form N–Q is a combined reporting form that is to be used for reports of registered management investment companies, other than small business investment companies registered on Form N–5 (§§ 239.24 and 274.5 of this chapter), under section 30(b) of the Investment Company Act of 1940 (the "Act") and section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), filed pursuant to Rule 30b1–5 under the Act (17 CFR 270.30b1–5). Registered management investment companies, other than small business investment companies registered on Form N–5, shall file their complete portfolio holdings on Form N–Q as of the close of the first and third quarters of each fiscal year. A report on this form shall be filed not later than 60 days after the close of the first and third quarters of each fiscal year.

B. Application of General Rules and Regulations

The General Rules and Regulations under the Act and the Exchange Act contain certain general requirements that are applicable to reporting on any form under those Acts. These general requirements should be carefully read and observed in the preparation and filing of reports on this form, except that any provision in the form or in these instructions shall be controlling.

C. Preparation of Report

1. This Form is not to be used as a blank form to be filled in, but only as a guide in preparing the report in accordance with Rules 8b–11 (17 CFR 270.8b–11) and 8b–12 (17 CFR 270.8b–12) under the Act and Rules 12b–11 (17 CFR 240.12b–11) and 12b–12 (17 CFR 240.12b–12) under the Exchange Act. The Commission does not furnish blank copies of this form to be filled in for filing.

2. These general instructions are not to be filed with the report.

3. Attention is directed to Rule 12b–20 under the Exchange Act (17 CFR 240.12b–20), which states: "In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading."

D. Incorporation by Reference

A registrant may incorporate by reference information required by the Form. All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: Rule 10(d) of Regulation S–K under the Securities Act of 1933 (17 CFR 229.10(d)) (general rules on incorporation by reference, which, among other things, prohibit, unless specifically required by this Form, incorporating by reference a document that includes incorporation by reference to another document, and limits incorporation to documents filed within the last 5 years, with certain exceptions); Rule 303 of Regulation S–T (17 CFR 232.303) (specific requirements for electronically filed documents); Rules 12b–23 and 12b–32 under the Exchange Act (17 CFR 240.12b–23 and 12b–32) (additional rules on incorporation by reference for reports filed pursuant to sections 13 and 15(d) of the Exchange Act); and Rules 0–4, 8b–23, and 8b–32 under the Act (17 CFR 270.0–4, 270.8b–23, and 270.8b–32) (additional rules on incorporation by reference for investment companies).

E. Definitions

Unless the context clearly indicates the contrary, terms used in this Form N–Q have meanings as defined in the Act and the rules and regulations thereunder. Unless otherwise indicated, all references in the form to statutory sections or to rules are sections of the Act and the rules and regulations thereunder.

F. Signature and Filing of Report

1. If the report is filed in paper pursuant to a hardship exemption from electronic filing (*see* Item 201 *et seq.* of Regulation S–T (17 CFR 232.201 *et seq.*)), eight complete copies of the report shall be filed with the Commission. At least one complete copy of the report shall be filed with each exchange on which any class of securities of the registrant is registered. At least one complete copy of the report filed with the Commission and one such copy filed with each exchange must be manually signed. Copies not manually signed must bear typed or printed signatures.

2. (a) The report must be signed by the registrant, and on behalf of the registrant by its principal executive and principal financial officers.

(b) The name of each person who signs the report shall be typed or printed beneath his or her signature. Any person who occupies more than one of the specified positions shall indicate each capacity in which he or she signs the report. Attention is directed to Rule 12b–11 under the Exchange Act (17 CFR 240.12b–11) and Rule 8b–11 under the Act (17 CFR 270.8b–11) concerning manual signatures and signatures pursuant to powers of attorney.

Item 1. Schedule of Investments

File the schedules as of the close of the reporting period as set forth in §§ 210.12–12—12–14 of Regulation S–X [17 CFR 210.12–12—12–14]. The schedules need not be audited.

Item 2. Controls and Procedures

(a) Disclose the conclusions of the registrant's principal executive and principal financial officers, or persons performing similar functions, regarding the effectiveness of the registrant's disclosure controls and procedures (as defined in Rule 30a–3(c) under the Act (17 CFR 270.30a–3(c))) as of a date within 90 days of the filing date of the report that includes the disclosure required by this paragraph, based on the evaluation of these controls and procedures required by Rule 30a–3(b) under the Act (17 CFR 270.30a–3(b)) and Rule 13a–15(b) or 15d–15(b) under the Exchange Act (17 CFR 240.13a–15(b) or 240.15d–15(b)).

(b) Disclose any change in the registrant's internal control over financial reporting (as defined in Rule 30a–3(d) under the Act (17 CFR 270.30a–3(d)) that occurred during the registrant's last fiscal quarter that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting.

Item 3. Exhibits

File as exhibits as part of this Form a separate certification for each principal executive officer and principal financial officer of the registrant as required by Rule 30a–2(a) under the Act (17 CFR 270.30a–2(a)), exactly as set forth below:

Certifications

I, [identify the certifying individual], certify that:

1. I have reviewed this report on Form N–Q of [identify registrant];

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the schedules of investments included in

this report fairly present in all material respects the investments of the registrant as of the end of the fiscal quarter for which the report is filed;

4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Rule 30a–3(c) under the Investment Company Act of 1940) and internal control over financial reporting (as defined in Rule 30a–3(d) under the Investment Company Act of 1940) for the registrant and have:

(a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

(b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

(c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of a date within 90 days prior to the filing date of this report, based on such evaluation; and

(d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer(s) and I have disclosed to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

(a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize, and report financial information; and

(b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: _____

_____

[Signature]

[Title]

Signatures

[See General Instruction F]

Pursuant to the requirements of the Securities Exchange Act of 1934 and the Investment Company Act of 1940, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Registrant) _____

By (Signature and Title)* _____

Date _____

Pursuant to the requirements of the Securities Exchange Act of 1934 and the Investment Company Act of 1940, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

By (Signature and Title)* _____

Date _____

By (Signature and Title)* _____

Date _____

* Print the name and title of each signing officer under his or her signature.

By the Commission.

Dated: February 27, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–4829 Filed 3–8–04; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Tuesday,
March 9, 2004

Part VII

Department of Education

34 CFR Part 106
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Proposed Rules

DEPARTMENT OF EDUCATION

34 CFR Part 106

RIN 1870–AA11

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations implementing Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination in federally assisted education programs. These proposed amendments would clarify and modify Title IX regulatory requirements pertaining to the provision of single-sex schools and classes [1] in elementary and secondary schools. The proposed amendments would expand flexibility for recipients that may be interested in providing single-sex schools or classes, and they would explain how single-sex schools or classes may be provided consistent with the requirements of Title IX.

DATES: We must receive your comments on or before April 23, 2004.

ADDRESSES: Address all comments about our proposed regulations to Kenneth L. Marcus, U.S. Department of Education, 400 Maryland Avenue, SW., room 5000, Mary E. Switzer Building, Washington, DC 20202–1100. If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: *www.regulations.gov.*

Or you may send your Internet comments to us at the following address: *singlesexcomments@ed.gov.*

For all comments submitted, you should specify the subject as "Single-Sex Proposed Regulations Comments."

FOR FURTHER INFORMATION CONTACT: Sandra G. Battle, U.S. Department of Education, 400 Maryland Avenue, SW., room 5036, Mary E. Switzer Building, Washington, DC 20202–1100. Telephone: (202) 205–5526.

If you use a telecommunications device for the deaf (TDD), you may call 1–877–521–2172. For additional copies of this document, you may call the Customer Service Team for the Office for Civil Rights (OCR) at (202) 205–5413 or 1–800–421–3481. This notice of proposed rulemaking will also be available at OCR's Web site on the Internet at: *www.ed.gov/ocr.*

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit comments regarding these proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations.

During and after the comment period, you may inspect all public comments about these proposed regulations in room 5036, 330 C Street, SW., Washington, DC 20202–6132, between the hours of 9:30 a.m. and 4 p.m., Eastern time, Monday through Friday except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.** (If you use a TDD, you may call 1–877–521–2172.)

Overview

Title IX prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance.[2] The statute and existing regulations contain specific provisions regarding single-sex classes, schools, and extracurricular activities.

After almost 30 years of progress under Title IX and our regulations, we have reexamined our regulatory provisions applicable to single-sex elementary and secondary education. For the reasons described in this preamble, we are proposing amendments to our regulations that would provide additional flexibility in permitting single-sex schools and classes at the elementary and secondary education levels consistent with the requirements of Title IX. The proposed regulations would provide the framework for determining under what circumstances single-sex schools and classes may be provided in elementary and secondary education and for ensuring that, when they are provided, they are provided in a manner that ensures nondiscrimination on the basis of sex consistent with recipients' Title IX obligations.

When Title IX was enacted in 1972 and when the current regulations were issued in 1975, discrimination against female students was widespread at all levels of education, including elementary and secondary education. Since then, the educational opportunities for young women and girls, and the commitment of educators to those opportunities, have increased.

Thus, at the time that the current regulations were issued, it was not unreasonable to base the regulations on a presumption that, if recipients were permitted to provide single-sex classes beyond the most limited of circumstances, discriminatory practices would likely continue.

Over the past 30 years, the situation has changed dramatically. While there are still more gains to be made, schools are now far more equitable in their treatment of female students. Those changes are due in no small measure to Title IX and our regulations. In the meantime, educational research has suggested that in certain circumstances, single-sex education provides educational benefits for some students.[3] Therefore, we have determined that

[1] The current regulations use the terms "class," "course," "course offering", and "extracurricular activity." For the sake of simplicity, we solely use the term "class" in this preamble.

[2] 20 U.S.C. 1681(a).

[3] *See, e.g.*, U.S. Department of Education, Office of Educational Research and Improvement, *Single-Sex Schooling: Perspectives From Practice and Research* (1993) (stating that "[t]he research synthesis produced for this conference and the summary of the conference proceedings suggest that single-sex education provides educational benefits for some students"). We recognize that there is presently a debate among researchers and educators regarding the effectiveness of single-sex education. Compare Cornelius Riordan, What Do We Know About the Effects of Single-Sex Schools in the Private Sector?: Implications for Public Schools, in Gender in Policy and Practice: Perspectives on Single-Sex and Coeducational Schooling, 10, 13–22, 24–28 (Amanda Datnow & Lea Hubbard eds., 2002) (stating that "[s]ingle-sex schools remain an effective form of school organization for disadvantaged students"); Herbert W. Marsh, Effects of Attending Single-Sex and Coeducational High Schools on Achievement, Attitudes, and Sex Differences, Journal of Educational Psychology, 1989, Vol. 81, No. 1, 70, 80 (finding in study of Catholic schools that when outcomes for seniors were controlled for background characteristics in their sophomore year "almost no school-type effects were statistically significant* * * [and] there was no tendency favoring students from single-sex or coed schools"). *See also* American Association of University Women, Separated by Sex: A Critical Look at Single-Sex Education for Girls 2 (1998) (stating "[t]here is no evidence that single-sex education in general 'works' or is 'better' than coeducation" but also stating that "[s]ingle-sex educational programs produce positive results for some students in some settings").

amendments permitting additional flexibility in providing single-sex educational options, while incorporating appropriate safeguards, are appropriate. When the current regulations were issued, it may have been appropriate to provide limited flexibility for single-sex educational opportunities, as discriminatory practices were still prevalent. However, given the current environment, we believe that additional flexibility is warranted, and that this flexibility will not compromise equal educational opportunities for male and female students. In fact, these amendments will help provide educational benefits to some students.

These proposed amendments reflect our analysis of the Title IX statute, its legislative history, and the current regulations, as well as relevant case law under Title IX.[4] The proposed amendments describe standards that, if adopted, would be used by the Office for Civil Rights of the U.S. Department of Education (Department) in making determinations about whether recipients' single-sex schools and classes are consistent with our Title IX regulations for the purposes of continued receipt of Federal financial assistance.[5] OCR would make these determinations in resolving any complaints related to these issues.[6] The proposed amendments do not require single-sex schools or classes but provide additional flexibility to offer them, and they require that recipients continue to ensure that their policies and practices do not result in discrimination on the basis of sex. Recipients that chose to operate single-sex schools or classes would be required to comply with our final regulations, but we are not proposing to require recipients to apply to OCR for approval of a proposed single-sex school or class. OCR will provide technical assistance to recipients, upon request, when the Department approves final regulations.

Pursuant to a provision of the No Child Left Behind Act of 2001,[7] on May 8, 2002, the Department published guidelines on the existing regulatory requirements in a document entitled "Guidelines on current Title IX requirements related to single-sex classes and schools" (Guidelines).[8] Simultaneously, we published a notice of intent to regulate (NOIR), indicating that the Secretary intends to propose amendments to our Title IX regulations in order to provide more flexibility to educators to establish single-sex schools and classes at the elementary and secondary levels and to provide additional public educational choices to parents.[9] The purpose of the NOIR was to begin the process of obtaining early input from the public on this issue prior to amending the regulations.

In response to this invitation we received approximately 170 comments. We are pleased with this response and the public interest expressed regarding this issue. We have found that the comments fulfilled the aim of the NOIR to focus public attention and comment on key issues. In summary, the comments reflected a spectrum of opinion, ranging from enthusiastic support for amending the regulations to permit recipients more flexibility in providing single-sex schools and classes to opposition against any additional flexibility. In preparing these proposed regulations, we considered comments on both the critical issues raised in the NOIR and on other issues raised by commenters.

Application

In summary, and unless otherwise noted, the proposed amendments for classes and schools would apply to elementary and secondary education and to both public or private[10] recipients. The proposed amendments exempt certain charter schools from certain proposed requirements related to single-sex schools. Furthermore, under the proposed amendments public and private recipients would be prohibited from operating single-sex elementary and secondary vocational institutions and from offering single-sex vocational education classes in coeducational elementary and secondary schools.

We discuss the substantive issues under the sections of the proposed amendments to which they pertain. We discuss our proposed non-substantive changes in the technical amendments section at the end of the preamble.

Current Requirements and Proposed Substantive Changes for Single-Sex Classes

Current Regulations (34 CFR 106.34) Generally Prohibit Single-Sex Classes

There are limited exceptions to the general prohibition on single-sex classes and activities in the current regulations in 34 CFR 106.34.[11] For coeducational

[4] Because the requirements of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution also protect the rights of public school students who may be subject to sex-based classifications, in developing the proposed amendments, we have also considered Supreme Court decisions involving constitutional challenges to single-sex education. The Supreme Court has issued no opinions regarding single-sex programs in elementary and secondary school education. Soon after the original Title IX regulations were adopted in 1975, the Court, by an evenly divided vote and without an opinion, let stand a decision of the Third Circuit Court of Appeals allowing, under the Equal Protection Clause, a school district that also operated coeducational high schools to have two comparable single-sex high schools. *Vorchheimer* v. *School District of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), affirmed by an equally divided Court, 430 U.S. 703 (1977) (per curiam). We also considered the Court's decisions in two more recent constitutional challenges in the context of single-sex postsecondary education, *United States* v. *Virginia* (*Virginia*), 518 U.S. 515 (1996), and *Mississippi University for Women* v. *Hogan* (*Hogan*), 458 U.S. 718 (1982).

[5] In addition, recipients that are public entities, such as public school districts, are subject to the sex discrimination prohibitions of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. Public elementary and secondary schools are also subject to the requirements of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. 1701–1721, which, among other things, contains prohibitions against the involuntary assignment of students to schools on the basis of sex. 20 U.S.C. 1703(c), 1705, and 1720(c). Public school and private school recipients may also be subject to State or local laws prohibiting single-sex classes or schools. Recipients may wish to consult legal counsel regarding how these additional legal authorities may affect any particular single-sex schools or classes they propose to offer.

[6] Similarly, OCR would make these determinations if OCR were to initiate a compliance review on these issues. *See* 34 CFR 100.7, made applicable to Title IX by 34 CFR 106.71.

[7] On January 8, 2002, the President signed into law the No Child Left Behind Act of 2001 ("No Child Left Behind" or "NCLB"), which reauthorized the Elementary and Secondary Education Act of 1965 (ESEA). Section 5131(c) of the ESEA required the Department to issue guidelines for local educational agencies (LEAs) regarding the applicable law on single-sex classes and schools within 120 days of the enactment of NCLB. Section 5131(a) of the ESEA describes permissible uses for Innovative Assistance Programs funds, and the guidelines were required because section 5131(a)(23) permits "programs to provide same-gender schools and classrooms (consistent with applicable law)."

[8] 67 FR 31102–03 (2002).

[9] 67 FR 31098–99 (2002).

[10] Private elementary and secondary schools are subject to the proposed requirements pertaining to classes if they receive a grant or subgrant of Federal funds from the Department. Private schools with students who participate in programs conducted by LEAs that are funded under Federal programs such as Title I of the Elementary and Secondary Education Act or the Individuals with Disabilities Education Act are not considered recipients of Federal funds unless they otherwise receive a grant or subgrant of Federal funds. Such private schools are not subject to these regulations, but the LEA must ensure that its programs, including services to private school students, are consistent with Title IX. Also, the proposed amendments pertaining to single-sex schools do not apply to recipients that operate private, nonvocational elementary or secondary schools.

[11] These exceptions allow (1) single-sex groupings within physical education classes that result from the application of objective standards of physical ability, 34 CFR 106.34(b); (2) separation of students by sex in physical education classes during participation in contact sports, 34 CFR 106.34(c); (3) separation of students by sex for portions of classes in elementary and secondary schools dealing exclusively with human sexuality, 34 CFR 106.34(e); or (4) choruses based on vocal range or quality, which may result in a single-sex or predominantly single-sex grouping, 34 CFR 106.34(f).

elementary and secondary schools, the existing regulations in 34 CFR 106.34 prohibit recipients from conducting single-sex classes or activities or requiring or refusing participation in classes or activities on the basis of sex.

Application of Proposed Single-Sex Class Amendments (Proposed 34 CFR 106.34(b))

Except for specified exceptions, the prohibitions against excluding any student from classes on the basis of sex as set out in the current regulations apply to all classes and activities, including extracurricular activities, and to all coeducational recipient institutions at all levels of education. Our proposed substantive changes would apply both to elementary and secondary public [12] and private [13] recipients. The proposed amendments also would specify that the recipient that operates the school is responsible for ensuring compliance with the proposed provisions for single-sex classes.

Proposed 34 CFR 106.34(b) would not apply to postsecondary education. Coeducational postsecondary schools would continue to be subject to the requirements of the general prohibition contained in the existing regulations, and they would not be permitted to offer single-sex classes pursuant to the provisions of these proposed amendments. The existing general prohibition is in 34 CFR 106.34(a) of the proposed regulations.

Since vocational education schools were the only type of elementary and secondary schools to which Congress specifically applied Title IX admissions requirements, we have limited the prohibition on single-sex classes to vocational education.

Recipients operating vocational schools would continue to be subject to the general prohibition against excluding students from classes on the basis of sex, and, thus, would not be permitted to offer single-sex classes pursuant to the proposed amendments.

Some school districts offer their vocational education curriculum in comprehensive coeducational schools, rather than in separate vocational schools. Even in these elementary and secondary schools that are not vocational schools, the proposed amendments do not change the applicability of the current general regulatory prohibition against single-sex vocational education classes. These schools would be able to apply the proposed substantive amendments to their nonvocational classes, but the proposed amendments would not apply to vocational classes.

Recipient's Important Governmental or Educational Objective (Proposed 34 CFR 106.34(b)(1)(i))

The proposed amendments would require that a single-sex class be based on a recipient's important governmental or educational objective,[14] which may be either—(1) to provide a diversity of educational options to students and parents, provided that the single-sex nature of the class is substantially related to achievement of that objective; or (2) to meet the particular, identified educational needs of its students, provided that the single-sex nature of the class is substantially related to meeting those needs.[15] In either case, the recipient's important governmental or educational objective in providing a single-sex class must be implemented evenhandedly. We have identified and incorporated into the proposed regulations these two important objectives—diversity of educational options and meeting the particular, identified needs of its students—either of which could be the basis for single-sex classes. Because there may be differences in the way achievement of these two important objectives work, we discuss them separately in paragraphs that follow. In our discussion of the proposed procedural requirement to conduct periodic evaluations of single-sex classes, we provide suggestions as to the types of information that a recipient might use to determine whether a single-sex class could be created or maintained consistent with these proposed amendments.

We invite specific comments on whether there may be additional important governmental or educational objectives that could also be the basis for single-sex classes that should be incorporated into our final regulations.

Diversity of Educational Options (Proposed 34 CFR 106.34(b)(1)(i)(A))

A recipient may have an important governmental interest to evenhandedly support diverse educational options. Thus, the proposed amendments would permit a recipient to offer single-sex classes based on its objective to provide a diversity of educational options from which individual students and their parents may choose.[16] For example, a recipient may determine that students and parents would prefer the option of single-sex classes because they believe they would provide a benefit not available in coeducational classes. A recipient may also determine that it would be appropriate to offer single-sex classes because it has reliable information that single-sex classes would meet its educational objective.

These proposed amendments, as further described in the following paragraphs, also require that a recipient that operates a nonvocational coeducational elementary or secondary school may not authorize or offer a nonvocational single-sex class unless it provides a substantially equal coeducational class [17] in the same subject pursuant to 34 CFR 106.34(b)(1)(ii).

A recipient may also provide a substantially equal single-sex class in the same subject for the other sex. Furthermore, as discussed in the following paragraphs under proposed 34 CFR 106.34(b)(1)(iii) and (2), to provide a diversity of options in an evenhanded manner, a substantially equal single-sex class may be required in some circumstances.

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[12] Proposed 34 CFR 106.34(b) applies to recipients that operate coeducational nonvocational public charter schools.

[13] *See* footnote 10.

[14] In two cases, under the 14th Amendment to the Constitution, in the public postsecondary education school context where there were allegations of denial of equal opportunity because of sex, the Supreme Court has required that the proponent of a sex-based classification demonstrate that the classification serves an important governmental objective and that the sex-based classification is substantially related to the achievement of that objective. *Virginia*, 518 U.S. at 532–533; *Hogan*, 458 U.S. at 724.

[15] Our proposed amendments for classes differ in this regard from those for schools due to differences in the Title IX statute. Classes in recipient elementary and secondary schools are covered by the statute and our existing regulations. As explained further in the following section on schools, admissions to a recipient's nonvocational elementary and secondary schools are not covered by the Title IX statute.

[16] This process includes a determination that the single-sex nature of the class is substantially related to meeting the objective identified.

[17] In *Virginia*, in response to a lower court ruling that an institution's policies restricting admission to males unlawfully discriminated against females, the State attempted to remedy the discrimination by establishing a separate program for females at a neighboring women's college. There was no substantially equal coeducational program. The Court found that the women's program was not substantially equal to the men's program. *Virginia*, 518 U.S. at 554. In *Hogan* the male plaintiff was denied admission on the basis of his sex, and the State did not offer either an all-male or a coeducational nursing program within a reasonable traveling distance from his residence. The only option available was a coeducational institution at a considerable distance. The Court stated: "A similarly situated female would not have been required to choose between forgoing credit and bearing that inconvenience." *Hogan*, 458 U.S. at 723, n.8. The U.S. Supreme Court has not addressed the issue of whether for constitutional purposes substantial equality would require a public entity to provide a substantially equal single-sex school or class for students of the excluded sex or whether providing those students the opportunity to attend a substantially equal coeducational school or class would be sufficient.

The recipient must provide a diversity of educational options in an evenhanded manner. However, a single-sex class for each sex, in the same subject, generally is not required. For example, if the rationale for a single-sex class is the school's desire to provide a diversity of options based on parental or student preference and the school uses surveys of parents and students to determine which options would be desirable, the survey must include parents and students of both sexes. If the results of the survey show a strong preference for a single-sex class in chemistry for girls, while for boys there is no expressed interest in any single-sex classes, the school in this example would not violate these proposed provisions by creating a single-sex chemistry class for girls without creating a single-sex class for boys. However, the school would be required to provide a substantially equal coeducational chemistry class.

As discussed in later paragraphs, consistent with the requirement that single-sex classes be provided in an evenhanded manner, OCR will examine situations in which recipients offer significantly more single-sex class opportunities to students of one sex than to students of the other sex to determine if they are the result of discrimination. A recipient that offers single-sex classes solely in the context of evenhandedly providing substantially equal single-sex classes, as well as coeducational classes, to both boys and girls is not likely to experience compliance problems with proposed 34 CFR 106.34.

Meeting Students' Particular, Identified Educational Needs (Proposed 34 CFR 106.34(b)(1)(i)(B))

The proposed amendments would also permit a recipient, under appropriate circumstances, to offer single-sex classes based on its objective to meet the particular, identified educational needs of its students. In order to carry out this objective a recipient may, using reliable information and sound educational judgment, determine that a single-sex class in a given subject is likely to provide some students educational benefits.[18] A recipient must treat male and female students in an evenhanded manner in the process of identifying particular educational needs, determining if a single-sex class would be substantially related to meeting those needs, and meeting the educational needs of both sexes.

The proposed amendments provide that a single-sex nonvocational class may be provided only if a substantially equal coeducational class is provided to the other sex in the same subject. (*See* 34 CFR 106.34(b)(1)(ii) of the proposed amendments.) A recipient may also choose to provide a substantially equal single-sex class for the other sex in the same subject. Furthermore, under proposed 34 CFR 106.34(b)(1)(iii), a recipient must provide a substantially equal single-sex class for the other sex if such a class is necessary to implement its objectives in an evenhanded manner.[19]

Under the proposed amendments, if the particular, identified educational needs of both sexes are the same, and a single-sex class is substantially related to meeting those needs for each sex, then students of both sexes must be provided substantially equal single-sex classes in the same subject if a single-sex class is provided for one sex. However, there may be legitimate differences in particular, identified educational needs between some male and female students, as well as legitimate differences in whether those needs may best be addressed in single-sex classes. Thus, depending on a recipient's evenhanded assessment of the particular, identified educational needs of male and female students, a recipient may provide a different single-sex class to girls, as compared to boys. Thus, the result might be differences in subject area or in numbers of single-sex classes offered to girls, as compared to boys.

For example, a school decides to identify and address the highest priority need of sixth grade male and female students who are working below grade level and to determine if single-sex classes may be substantially related to meeting the identified need. The school makes a supportable determination that the highest priority educational need of these girls is in science and that a single-sex science class would best address that need. If, as part of its evenhanded assessment process, the school also makes a supportable determination that a subject other than science is the highest priority need of the male students working below grade level, the proposed amendments would not require the school to offer a single-sex science class for these boys. The school would be required to offer a substantially equal coeducational science class. The school also would, however, be required to address the highest priority educational need of these boys, to consider whether a single-sex class would best address that need, and to address that need appropriately.

Finally, although different results for boys and girls, in some instances, may be permissible under the proposed amendments, a recipient must treat male and female students equally in identifying whether they have particular educational needs that may be met by providing single-sex classes and in responding to those needs.

As discussed in later paragraphs, OCR will examine situations in which a recipient provides significantly more single-sex class opportunities to students of one sex than to students of the other sex to determine if they are the result of discrimination. A recipient that offers single-sex classes solely in the context of evenhandedly providing substantially equal single-sex classes, as well as coeducational classes, to both boys and girls is not likely to experience compliance problems with proposed 34 CFR 106.34.

Substantially Equal Coeducational Class Required (Proposed 34 CFR 106.34(b)(1)(ii))

The proposed amendment to the regulations in 34 CFR 106.34(b)(1)(ii) would require that student participation in single-sex classes be on a voluntary basis. This provision clarifies for recipients that the general prohibition in the existing regulations against assigning students to single-sex classes continues to apply and is not substantively affected by these proposed amendments.[20] Unless a substantially equal coeducational class is provided, enrollment in a single-sex class is not voluntary. Thus, the proposed amendments require that if a recipient provides a single-sex class, it must also provide students with the opportunity to enroll in a coeducational class in the same subject that is substantially equal to the single-sex class. For example, if a high school provided a single-sex Advanced Placement Calculus class for boys, it would need to provide a coeducational Advanced Placement Calculus class for boys and girls.

In order to ensure that participation in any single-sex class is voluntary, a recipient should notify parents or guardians of their option to enroll their children in a single-sex class on a voluntary basis and receive authorization from parents or guardians

[18] *See* footnote 16.

[19] *See also* 34 CFR 106.34(b)(2).

[20] The current regulations, in 34 CFR 106.34(a), state, in part: "A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis." The proposed amendments include this provision in proposed 34 CFR 106.34(a) without substantive revisions.

to place their children in a single-sex class.

Implementing the Recipient's Objective in an Evenhanded Manner (Proposed 34 CFR 106.34(b)(1)(iii))

As mentioned previously, under proposed 34 CFR 106.34(b)(1)(iii), a recipient must implement its objective in an evenhanded manner. Evenhandedness requires the recipient to provide each sex an equal opportunity to benefit from the important governmental or educational objective it seeks to achieve by providing single-sex classes. As the examples in the section on educational needs illustrate, this provision generally does not require a single-sex class for each sex in the same subject. However, a recipient must provide a substantially equal single-sex class for the other sex if such a class is necessary to implement its objectives in an evenhanded manner. Even if a substantially equal single-sex class is not required for the other sex, the recipient may choose to provide such a class consistent with Title IX and the proposed amendments.

If a recipient provides significantly more single-sex opportunities to students of one sex than to students of the other sex, OCR will examine whether this is the result of discrimination, taking into account the reasonable period of time needed to plan and establish single-sex classes. A recipient that offers single-sex classes solely in the context of evenhandedly providing substantially equal single-sex classes, as well as coeducational classes, to both girls and boys is not likely to experience compliance problems with proposed 34 CFR 106.34(b)(1)(iii).

We invite specific comments on whether OCR needs more information on how to assess if a recipient is implementing its objective in an evenhanded manner.

Single-Sex Class for Excluded Sex (Proposed 34 CFR 106.34(b)(2))

Proposed 34 CFR 106.34(b)(2) clarifies that in some circumstances the requirements of proposed paragraph (b)(1) of this section may require a recipient to provide a substantially equal single-sex class for the excluded sex.

Factors for Determining Substantially Equal (Proposed 34 CFR 106.34(b)(3))

The proposed amendments in 34 CFR 106.34(b)(1) permit a recipient to provide a single-sex class as long as the recipient provides students who are excluded from that class on the basis of sex a substantially equal class. This requirement to have substantially equal classes does not mean that the classes would need to be identical; the proposed amendment requires that policies applicable to the classes and benefits provided in them be substantially equal. The proposed amendments in 34 CFR 106.34(b)(3) outline the types of factors that the Department will consider in comparing single-sex classes to each other and to coeducational classes in making the determination of whether they are "substantially equal." That is, we will use these factors to evaluate whatever combination of single-sex and coeducational classes a recipient is providing in a given subject to determine if they are substantially equal. The list of factors is not intended to be exhaustive and other relevant factors that affect the educational benefits provided in these classes will be considered on a case-by-case basis. The list includes the following factors:

- Admissions policies and criteria.[21]
- Educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology.[22]
- Qualifications of faculty and staff.
- Quality, accessibility, and availability of facilities and resources provided for the class.

Under the proposed standard, each factor evaluated does not need to be identical, but each must be substantially equal.

Procedural Safeguard: Periodic Evaluations (Proposed 34 CFR 106.34(b)(4))

Proposed 34 CFR 106.34(b)(4) would require that recipients periodically evaluate their single-sex classes to ensure nondiscrimination. Specifically, this proposed section would require that evaluations of all single-sex classes be conducted to ensure that single-sex classes are based upon genuine justifications and that they do not rely on overly broad generalizations about the different talents or capacities of male and female students. In addition, this proposed section would require that evaluations be conducted to ensure that any single-sex classes offered are substantially related to achievement of the objective for the classes as required by proposed 34 CFR 106.34(b)(1)(i).

The proposed amendments do not prescribe the type of information that a recipient must use in making decisions to provide single-sex classes or in conducting evaluations, but the following are types of information that may be useful and appropriate. For example, a recipient may identify particular educational needs using district or school-based data including standardized test scores; class grades; attendance; suspension and expulsion rates; incidence of pregnancy; [23] and low levels of participation among members of one sex in certain curriculum areas. Research or other reliable evidence may be the basis for determining that a single-sex class is substantially related to meeting the particular, identified needs. Research, developed by an agency, organization, social scientist, or by another school district, may assist a recipient in making that determination if it is reliable and applicable to the recipient's circumstances. Similarly, the recipient may conduct its own district or school-based research. In addition, a recipient may have other reliable evidence such as teacher, parental, or student feedback.

We invite specific comments as to how often a recipient should be required to conduct periodic evaluations pursuant to proposed 34 CFR 106.34(b)(4).

Current and Proposed Requirements for Single-Sex Schools

Current Regulations (Current 34 CFR 106.35)

The current regulations describe requirements related to admissions to elementary and secondary schools operated by LEAs.[24] Paragraph (a) of 34 CFR 106.35 of the current regulations specifies that recipients that are LEAs are prohibited from discriminating on the basis of sex in admissions to

[21] This factor covers prerequisites to admission such as prior course requirements or grade point average.

[22] The factors describe the types of educational benefits that the Department will compare in determining whether recipients are treating male and female students in a nondiscriminatory manner. The assessment is solely to determine whether equality of opportunity in access to curricular offerings is provided in compliance with Title IX and is not intended to require any particular curricular offerings by a school district. Thus, the provision is consistent with the Department of Education Organization Act (as well as similar provisions in the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001), which provides in relevant part: "No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system * * * except to the extent authorized by law." 20 U.S.C. 3403(b).

[23] Cf. 34 CFR 106.40, which is not affected by the proposed amendments.

[24] 34 CFR 106.35.

vocational education institutions.[25] Consistent with the Title IX statute as discussed later, we are proposing to amend this portion of the regulations to make clear that all public and private vocational institutions that receive Federal financial assistance are prohibited from discriminating on the basis of sex in admissions.

Paragraph (b) of the current 34 CFR 106.35 describes requirements applicable to recipients that are LEAs that operate single-sex public schools. The current regulations do not prohibit recipients from having single-sex admissions for these types of schools.[26] The Title IX statute, which only covers admissions to specified types of educational institutions, does not include elementary and secondary schools among the types of institutions with covered admissions (except with respect to those that are also institutions of vocational education, for which admissions are covered as discussed in previous paragraphs).[27] As a result, our current regulations do not prohibit single-sex admissions to public nonvocational elementary and secondary schools. The equal protection requirements of the 14th Amendment to the Constitution apply to admissions to public entities, such as school districts and State educational agencies (SEAs).[28]

The current regulations require that, in the event that an LEA provides a nonvocational elementary or secondary school or educational unit for students of one sex, then it must provide students of the other sex, under the "same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools."[29]

Proposed Amendments for Single-Sex Schools (Proposed 34 CFR 106.34(c) and 34 CFR 106.35)

We are proposing to amend the current compliance provisions applicable to admissions to elementary and secondary vocational schools in 34 CFR 106.35(a), which will be redesignated as 34 CFR 106.35, to remove the reference to LEAs. Recipients of Federal financial assistance, including private schools, may not offer single-sex institutions of vocational education.[30]

We are proposing to amend existing 34 CFR 106.35(b) to remove from that section the requirements pertaining to nonvocational schools operated by LEAs and to move those requirements, with substantive amendments, to proposed 34 CFR 106.34. Under the proposed amendments, subject to conditions and requirements described in the following paragraphs, a recipient that operates public nonvocational elementary or secondary schools may not operate a single-sex nonvocational elementary or secondary school unless it provides students of the other sex substantially equal opportunities in a single-sex school, single-sex educational unit,[31] or a coeducational school. The proposed amendments also provide for an exception to this requirement for certain charter schools. The requirements pertaining to single-sex elementary and secondary schools are in paragraph (c) of proposed 34 CFR 106.34.

While Title IX does not prohibit a district from assigning students to single-sex schools because admissions to nonvocational elementary and secondary schools are exempt from Title IX coverage, recipients are cautioned that assigning students to single-sex schools—rather than allowing students to voluntarily select between those schools and substantially equal coeducational schools—could violate the Constitution and the requirements of the Equal Educational Opportunities Act of 1974 (EEOA),[32] which prohibits the assignment of students to schools on the basis of sex.

Substantially Equal Educational Opportunities Required (Proposed 34 CFR 106.34(c))

The proposed amendments do not regulate admissions to public nonvocational elementary and secondary schools.[33] Thus, unlike our proposed amendments for single-sex classes, they do not propose to require a recipient to justify establishing a single-sex school. The proposed amendments permit a recipient to provide a single-sex public school as long as the recipient provides students who are excluded from that school on the basis of sex substantially equal opportunities in another school.

The proposed amendments substitute the phrase "substantially equal" for the term "comparable" used in the existing regulations for comparing the policies applicable to and benefits provided to students in a single-sex school and students excluded from the school on the basis of sex. The Supreme Court applied a "substantially equal" standard in the context of evaluating the constitutionality of single-sex postsecondary institutions,[34] and we have adopted this standard here. We intend to convey the concept that although the policies and benefits compared do not need to be identical, they do need to be substantially equal. As discussed in the next section, the proposed amendments would expand the list of factors to be considered in making a determination as to whether the benefits provided are substantially equal.

The proposed amendments specifically provide that the substantially equal opportunities may be provided in a single-sex school or in a coeducational school.[35] Thus, the proposed amendments would change our interpretation of 34 CFR 106.35(b) of the current regulations that the benefits provided to students excluded from a single-sex school must be provided in a single-sex setting.[36] Our prior interpretation was based upon the premise that Title IX required recipients to provide a single-sex school for each sex to ensure that students of both sexes were provided an equal opportunity to attend a single-sex school.

Upon further analysis, we have determined that, since Title IX is silent regarding its application to admissions to nonvocational elementary and secondary schools, creation of an unequal number of single-sex schools for girls and boys does not implicate Title IX. The basis for this interpretation is Congress's decision not to cover admissions to nonvocational elementary and secondary schools in Title IX.[37]

[25] This provision implements the Title IX statute, which provides specifically that admissions to certain types of educational entities, including institutions of vocational education, are covered by Title IX. 20 U.S.C. 1681(a)(1).

[26] *See* 34 CFR 106.15(d).

[27] 20 U.S.C. 1681(a)(1).

[28] *See* footnote 14 for information about the equal protection requirements that apply to admissions requirements for public entities.

[29] 34 CFR 106.35(b).

[30] Our interpretation is based on the Title IX statute, which covers admissions to vocational schools. 34 CFR 106.15(c) and (d).

[31] Both the current regulations and the proposed amendments use the phrase "education unit." For the purposes of these provisions we interpret the term "education unit" to mean a "school within a school," and we are specifically referring to a school that is housed within another school. For the sake of clarity and simplicity, we will generally use the term "school" instead of either "school within a school" or "education unit" in explaining the requirements of the proposed amendments.

[32] 20 U.S.C. 1703(c); see footnote 5 on consulting legal counsel.

[33] 20 U.S.C. 1681(a)(1).

[34] In evaluating educational benefits and opportunities provided to male and female students in single-sex postsecondary education institutions for 14th Amendment equal protection purposes, the Supreme Court has required a standard of "substantial equality." *Virginia*, 518 U.S. at 554.

[35] *See* footnote 15.

[36] 67 FR 31103 (2002).

[37] The legislative history of Title IX supports this interpretation. When admissions coverage under Title IX was being considered, Congress was aware that single-sex nonvocational elementary and

Continued

Because Title IX does not cover admissions to these types of educational institutions, we have determined that Title IX does not impose an obligation on these recipients to avoid sex-based disparities in providing the opportunity to attend a single-sex nonvocational elementary or secondary school.

The lack of coverage of admissions to public nonvocational elementary and secondary schools does not relieve recipients from all obligations to students of the excluded sex. Consistent with Title IX, students of both sexes must be provided nondiscriminatory access to substantially equal educational benefits. This means that students excluded from a single-sex school, on the basis of sex, must be provided substantially equal educational benefits in another school. However, based on our analysis of the Title IX statute, under the proposed amendments the other school may be coeducational or single-sex.

Factors for Determining Substantially Equal (Proposed 34 CFR 106.34(c)(3))

The current regulations provide a description of the types of factors that OCR would consider in determining whether two schools, a single-sex school and a school available to students excluded on the basis of sex from that school, are substantially equal. The proposed regulations, in 34 CFR 106.34(c)(3)(i), expand upon the current description of factors that OCR would consider in comparing schools for this purpose.[38] Furthermore, the list of factors is not intended to be exhaustive, but it is intended to provide recipients with a more specific set of criteria. Other relevant factors that affect the educational benefits provided in these schools will be considered on a case-by-case basis. The list includes the following factors:

- Admissions policies and criteria.[39]
- Educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology.[40]
- Quality and range of extra-curricular offerings.
- Qualifications of faculty and staff.
- Geographic accessibility.
- Quality, accessibility, and availability of facilities and resources.[41]

Each factor does not have to be identical in order for two schools to be substantially equal. As specified in proposed 34 CFR 106.34(c)(3)(ii), OCR will assess the aggregate of benefits provided by each school as a whole in making these determinations.

Exception for Certain Charter Schools (Proposed 34 CFR 106.34(c)(2))

Title IX does not apply to admissions to nonvocational elementary and secondary schools under 20 U.S.C. 1681(a)(1); therefore, these types of single-sex charter schools are not prohibited by Title IX. If a public, nonvocational single-sex charter school is part of a school district or LEA that includes other schools, the proposed amendments would hold the LEA that operates the schools responsible for ensuring that students in the LEA who are excluded on the basis of sex from the single-sex charter school are provided substantially equal opportunities and benefits consistent with proposed 34 CFR 106.34(c)(1) and (c)(3). An LEA will be considered to be "operating" a charter school that is part of the LEA. Accordingly, the LEA must ensure that it provides the sex excluded from a charter school substantially equal educational opportunities in a single-sex school or coeducational school.

The proposed amendments exempt nonvocational charter schools that are single-school LEAs from the requirements that apply to other recipients that operate public nonvocational elementary and secondary schools. A chartering authority that receives Federal funds, and that charters a nonvocational, single-sex public charter school that is its own LEA, may charter a single-sex charter school for one sex without ensuring that the other sex is provided substantially equal educational opportunities in a single-sex school or coeducational school. A chartering authority that receives Federal financial assistance, of course, must review and approve or reject proposed charter school applications on a non-discriminatory basis. Such a chartering authority is not required to provide substantially equal educational opportunities to the other sex if the chartering authority is merely reviewing and approving charter school applications and is not independently operating those schools itself. Moreover, the chartering authority may have no control over what types of programs are proposed as charter schools, including whether they are single-sex. Therefore, requiring a chartering authority to provide the other sex substantially equal educational opportunities in a single-sex school or coeducational school would require the chartering authority to find an additional group of community leaders, developers, or parents who would meet the required application criteria and would be willing to provide to the other sex substantially equal educational opportunities in another charter school. Similarly, a group of community leaders, developers, or parents who wish to establish a single-sex charter school that is its own LEA should not be required to establish two schools in order to meet Title IX requirements.

Given the Title IX exemption for admissions to nonvocational elementary and secondary schools and the functions some chartering authorities perform, we have determined that Title IX does not impose such an obligation on these chartering authorities and that such an obligation on chartering authorities would unduly burden and inhibit the creation of single-sex charter schools that are their own LEAs. Therefore, the proposed amendments exempt nonvocational charter schools that are single-school LEAs from the requirements that apply to other recipients that operate public nonvocational elementary and secondary schools. We note that the obligations of public chartering authorities, including LEAs and SEAs, may differ under the U.S. Constitution, since admissions policies are covered under the 14th Amendment.[42]

Current Requirements Related to Classes and Proposed Technical Changes

General Requirements and Other Modifications (Proposed 34 CFR 106.34(a) and 34 CFR 106.43)

With respect to classes and activities in physical education, the existing regulations in 34 CFR 106.34(a) provided transition periods for

secondary schools existed. Because information about these schools was not sufficient to support a decision regarding admissions coverage, at least one member of Congress urged the Department of Health, Education and Welfare (HEW) to conduct a study and indicated that Congress then could make an informed decision. 92nd Cong., 118 Cong. Rec. 5804, 5807, 5812–13 (1972). HEW did not conduct such a study. Moreover, although several substantive amendments to Title IX have been enacted since that time, Congress has not amended this provision of the statute.

[38] We have added additional factors consistent with the Court's opinions addressing single-sex education at postsecondary institutions. See Virginia, 518 U.S. at 547–54; Hogan, 458 U.S. at 723 n.8.

[39] This factor covers prerequisites to admission such as prior course requirements or grade point average.

[40] *See* footnote 22.

[41] The new factors in the proposed amendment are—the educational benefits provided; the quality and range of extra-curricular offerings; the qualifications of faculty and staff; geographic accessibility; and the availability of classroom facilities and resources.

[42] *See* footnote 5 on consulting legal counsel.

recipients to comply with the regulations. Recipients at the elementary school level had to comply within one year from the effective date of the regulations, and recipients at the secondary level and postsecondary level had to comply within three years. Because these timeframes for compliance expired many years ago, this provision is obsolete. Existing paragraph (a) of 34 CFR 106.34 will be removed when final regulations are issued, and the regulations will be renumbered.

Some of the existing provisions of 34 CFR 106.34 apply to postsecondary, as well as elementary and secondary, coeducational schools. Our proposed amendments would not affect the continued applicability of those existing provisions to postsecondary institutions. However, because we are proposing other amendments, the numbering of these existing exceptions would change, as discussed in the following paragraphs.

We are proposing to retain the general prohibition against separation on the basis of sex, which applies to coeducational schools at all levels of education, that is in the existing regulations prior to paragraph (a) of 34 CFR 106.34. Due to other modifications that we are proposing, the general prohibition would be renumbered and become paragraph (a) of 34 CFR 106.34. Because our proposed amendments provide an exception to allow for single-sex classes in nonvocational elementary and secondary schools that may apply to classes of any type, except for vocational education classes, we are also proposing to delete the introductory listing of specific types of classes to which the general prohibition applies.

Recipients are generally prohibited from separating students on the basis of sex within coeducational physical education classes or activities by 34 CFR 106.34(a). We are proposing to retain in 34 CFR 106.34(a)(1) the exception currently provided in 34 CFR 106.34(c) that permits separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact. Other physical education classes in elementary and secondary schools would be covered by proposed 34 CFR 106.34(b) regardless of whether the purpose or major activity involves bodily contact. These classes may be offered on a single-sex basis consistent with the requirements of our proposed amendments.

Similarly, the exception provided in the proposed amendments in 34 CFR 106.34(a)(2) is the same exception provided in the current regulations in 34 CFR 106.34(b). This provision permits grouping of students in physical education classes by ability as assessed by objective standards of individual performance developed and applied without regard to sex. This exception would also continue to apply to elementary and secondary education and postsecondary education.

The exception provided in the proposed amendment to the regulations in 34 CFR 106.34(a)(3) is similar, but not identical, to the exception provided in the current regulations in 34 CFR 106.34(e). The proposed amendment permits separation by sex in classes or portions of classes in elementary and secondary schools that deal "primarily" with human sexuality. The current regulations require that "portions of the classes" in elementary and secondary schools must deal "exclusively" with human sexuality in order to separate students by sex. The proposed amendment changes "exclusively" to "primarily" because we recognize that issues of human sexuality that may require privacy may be raised in situations that are not devoted exclusively to human sexuality, such as sexual assault or harassment counseling or defense classes. In addition, we recognize that recipients may choose to offer classes that focus on issues of human sexuality that may require privacy. This provision continues to apply only to elementary and secondary education, and it is based on issues of privacy.[43]

We are also proposing to retain in 34 CFR 106.34(a)(4) the exception currently provided in 34 CFR 106.34(f), which permits grouping students for chorus based on vocal range or quality even if it results in a single-sex or predominantly single-sex chorus. This exception continues to apply to elementary and secondary education and postsecondary education, and it is based on real differences between the sexes.

Paragraph (d) of existing 34 CFR 106.34 does not address access to classes, but rather addresses nondiscrimination in assessments of skills or progress in physical education classes. It applies to elementary, secondary, and postsecondary physical education classes, and it applies to both single-sex and coeducational physical education classes in coeducational schools. In order to avoid confusion about the application of this provision, we are proposing to move it, with no modifications, to Subpart D of our regulations, as a separate provision, proposed 34 CFR 106.43, entitled "Standards for measuring skill or progress in physical education classes."

[43] 92nd Cong., 118 Cong. Rec. 5803 (1972).

Executive Order 12250

Pursuant to Executive Order 12250, which provides for the Attorney General to review proposed regulations implementing Title IX, the Acting Assistant Attorney General for Civil Rights has reviewed this notice of proposed rulemaking and approved it for publication.

Executive Order 12866

This rule is considered by the Department to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget (OMB) for review.

1. Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs for those recipients that would choose to provide single-sex schools or classes.

We have also determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

The proposed regulations do not require recipients to provide single-sex schools or classes and thus do not require recipients to incur any additional costs. Rather, the benefit of the proposed regulations is the expanded flexibility to provide single-sex schools or classes, if such classes are desired. If recipients choose to continue to operate schools or classes under their current policies or practices and choose not to provide single-sex schools or classes, no added costs will be incurred. Those recipients that choose to provide single-sex schools or classes may incur the additional expense to administer them. The costs associated with

providing single-sex schools or classes under the proposed regulations will range from minimal to substantial, depending on what options recipients choose to provide.

2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interfere with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 106.35 Access to institutions of vocational education.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the **ADDRESSES** section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations do not require recipients to provide single-sex classes or schools, but rather expand flexibility for recipients that may be interested in doing so.

Paperwork Reduction Act of 1995

These proposed regulations do not contain any information collection requirements.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79 because it is not a program or activity of the Department that provides Federal financial assistance.

Assessment of Educational Impact

The Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations in 34 CFR 106.34 and 34 CFR 106.35 may have federalism implications, as defined in Executive Order 13132. We encourage State and local elected officials to review and provide comments on these proposed regulations.

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(Catalog of Federal Domestic Assistance Number does not apply.)

List of Subjects in 34 CFR Part 106

Education, Sex discrimination.

Dated: March 3, 2004.

Rod Paige,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

2. Section 106.34 is revised to read as follows:

§ 106.34 Access to classes and schools.

(a) Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex or require or refuse participation therein by any of its students on the basis of sex.

(1) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(b)(1) *Classes. General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes, if—

(i) Each single-sex class is based on the recipient's objective—

(A) To provide a diversity of educational options to parents and students, provided that the single-sex nature of the class is substantially related to meeting that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class is substantially related to meeting those needs;

(ii) In accordance with the requirements of paragraph (a) of this section, the recipient provides a substantially equal coeducational class in the same subject; and

(iii) The recipient implements its objective in an evenhanded manner.

(2) *Single-sex class for excluded sex.* A recipient that provides a single-sex class may be required, subject to the requirements of paragraph (b)(1) of this section, to provide a substantially equal single-sex class for the excluded sex.

(3) *Substantially equal.* Factors that the Department will consider in determining whether classes are substantially equal include the following: the policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; and the quality, accessibility, and availability of facilities and resources provided to the class.

(4) *Periodic evaluations.* The recipient must conduct periodic evaluations to ensure that single-sex classes are based upon genuine justifications and do not rely on overly broad generalizations about the different talents or capacities of male and female students and that any single-sex classes are substantially related to achievement of the objective for the classes.

(5) *Definition.* For purposes of this paragraph, the term "classes" includes all education activities provided for students by a school or in a school.

(c)(1) *Schools.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school shall not, on the basis of sex, exclude any person from admission to any school that it operates unless it provides the other sex substantially equal educational opportunities in a single-sex school, single-sex education unit, or coeducational school.

(2) *Exception.* A nonvocational public charter school that is not part of a local educational agency with other schools may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal.* (i) Factors that the Department will consider in determining whether schools or education units are substantially equal include the following: The policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology; the quality and range of extra-curricular offerings; the qualifications of faculty and staff; geographic accessibility; and the quality, accessibility, and availability of facilities and resources; and

(ii) This determination involves an assessment in the aggregate of the educational benefits provided by each school as a whole.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

3. Section 106.35 is revised to read as follows:

§ 106.35 Access to institutions of vocational education.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

4. Section 106.43 is added to subpart D to read as follows:

§ 106.43 Standards for measuring skill or progress in physical education classes.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[FR Doc. 04–5156 Filed 3–8–04; 8:45 am]

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